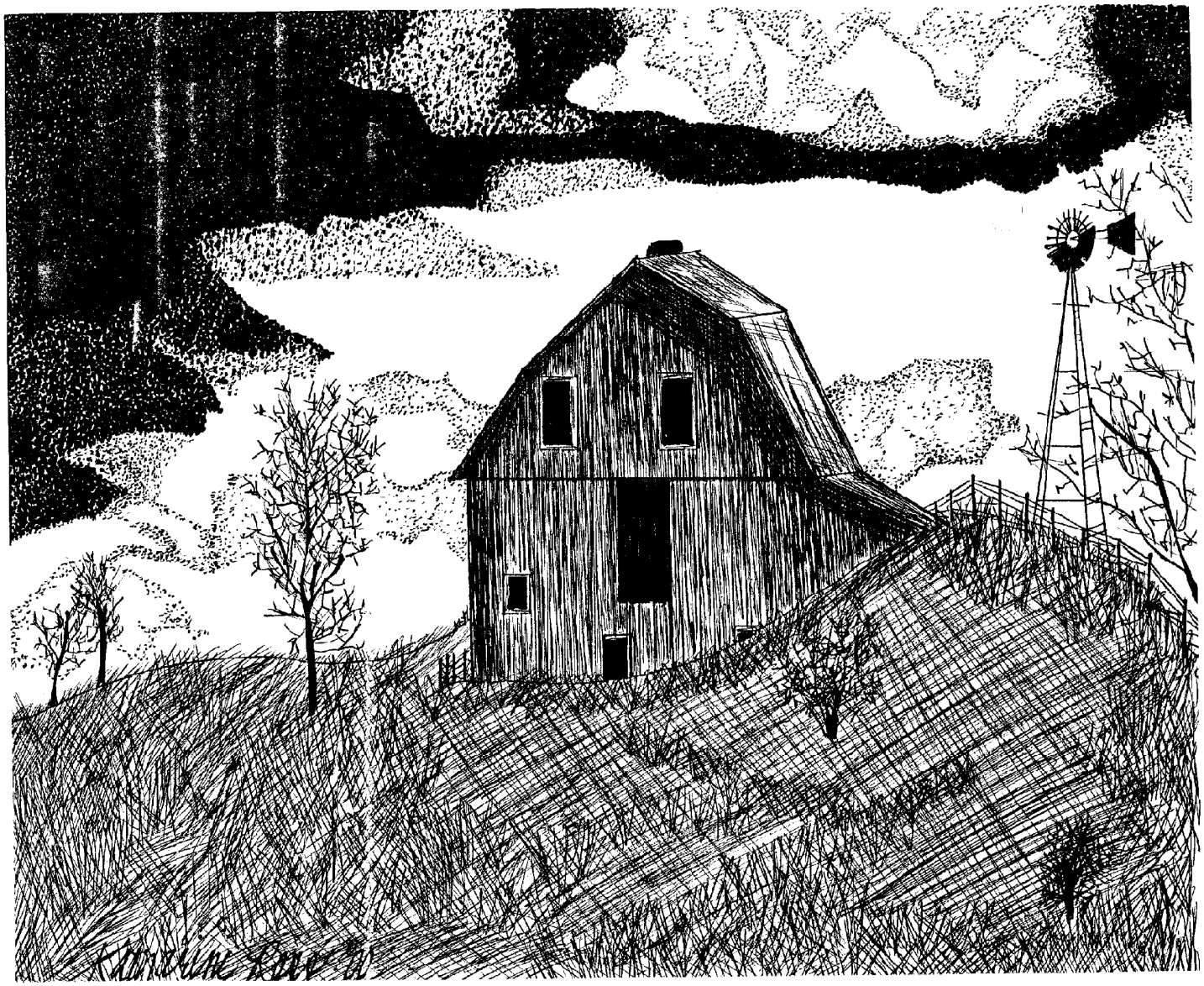
TEXAS REGISTER

Volume 26 Number 44 November 2, 2001 *Pages 8597-8916*



This month's front cover artwork:

Artist: *Katherine Ross*
12th Grade
Rockwall High School

School children's artwork has decorated the blank filler pages of the *Texas Register* since 1987. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

We will display artwork on the cover of each *Texas Register*. The artwork featured on the front cover is chosen at random.

The artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*. The artwork does not add additional pages to each issue and does not increase the cost of the *Texas Register*.

Texas Register, **(ISSN 0362-4781),** is published weekly, 52 times a year. Issues will be published by the Office of the Secretary of State, 1019 Brazos, Austin, Texas 78701. Subscription costs: printed, one year $150, six months $100. First Class mail subscriptions are available at a cost of $250 per year. Single copies of most issues for the current year are available at $10 per copy in printed format.

The ***Texas Register*** is published under the Government Code, Title 10, Chapter 2002. Periodicals Postage Paid at Austin, Texas and additional mailing offices.

POSTMASTER: Send address changes to the ***Texas Register,*** P.O. Box 13824, Austin, TX 78711-3824.

a section of the
Office of the Secretary of State
P.O. Box 13824
Austin, TX 78711-3824
(800) 22607199
(512) 463-5561
FAX (512) 463-5569
http://www.sos.state.tx.us

Director - Dan Procter

Customer Relations
Leti Benavides
LaKiza Fowler-Sibley

Texas Administrative Code
Dana Blanton
Roberta Knight

Texas Register
Carla Carter
Melissa Dix
Kris Hogan
Diana Muniz-Franklin

Circulation/Marketing
Jill S. Ledbetter

WITHDRAWN RULES

ADOPTED RULES

RULE REVIEW

TABLES AND GRAPHICS

IN ADDITION

Interagency Council on Early Childhood Intervention

Texas Lottery Commission

Texas Natural Resource Conservation Commission

Texas Parks and Wildlife Department

Public Utility Commission of Texas

Southwest Texas State University

Texas Department of Transportation

The University of Texas System

Open Meetings

A notice of a meeting filed with the Secretary of State by a state governmental body or the governing body of a water district or other district or political subdivision that extends into four or more counties is posted at the main office of the Secretary of State in the lobby of the James Earl Rudder Building, 1019 Brazos, Austin, Texas.

Notices are published in the electronic *Texas Register* and available on-line.
http://www.sos.state.tx.us/texreg

To request a copy of a meeting notice by telephone, please call 463-5561 if calling in Austin. For out-of-town callers our toll-free number is (800) 226-7199. Or fax your request to (512) 463-5569.

Information about the Texas open meetings law is available from the Office of the Attorney General. The web site is http://www.oag.state.tx.us. Or phone the Attorney General's Open Government hotline, (512) 478-OPEN (478-6736).

For on-line links to information about the Texas Legislature, county governments, city governments, and other government information not available here, please refer to this on-line site. http://www.state.tx.us/Government

•••

Meeting Accessibility. Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas. TTY: 7-1-1.

THE GOVERNOR

As required by Texas Civil Statutes, Article 6252-13a, §6, the ***Texas Register*** publishes executive orders issued by the Governor of Texas. Appointments and proclamations are also published. Appointments are published in chronological order. Additional information on documents submitted for publication by the Governor's Office can be obtained by calling (512) 463-1828.

Appointments

Appointments for October 24, 2001

Appointed to the Texas State University System Board of Regents for terms to expire February 1, 2007, Kent Morrison Adams of Beaumont (replacing Dan Hallmark of Beaumont whose term expired), Alan William Dreeben of San Antonio (replacing Massey Villarreal of Houston whose term expired), Pollyanna Allison Stephens of San Angelo (reappointed).

Appointed to the Texas Higher Education Coordinating Board for terms to expire August 31, 2007, Neal W. Adams of Euless (replacing Jodie Jiles of Houston whose term expired), Marc Cisneros of Kingsville (replacing Robert Fernandez of Fort Worth whose term expired), Jerry Farrington of Dallas (replacing Leonard Rauch of Houston whose term expired), Lorraine Perryman of Odessa (replacing Delores Carruth of Irving whose term expired), Curtis E. Ransom of Coppell (replacing William Atkinson of Bryan whose term expired), Windy MaryAnn Sitton of Lubbock (replacing Steve Late of Odessa whose term expired).

TRD-200106466

♦ ♦ ♦

OFFICE OF THE ATTORNEY GENERAL

Under provisions set out in the Texas Constitution, the Texas Government Code. Title 4, §402.042, and numerous statutes, the attorney general is authorized to write advisory opinions for state and local officials. These advisory opinions are requested by agencies or officials when they are confronted with unique or unusually difficult legal questions. The attorney general also determines, under authority of the Texas Open Records Act, whether information requested for release from governmental agencies may be held from public disclosure. Requests for opinions, opinions, and open records decisions are summarized for publication in the ***Texas Register***. The attorney general responds to many requests for opinions and open records decisions with letter opinions. A letter opinion has the same force and effect as a formal Attorney General Opinion, and represents the opinion of the attorney general unless and until it is modified or overruled by a subsequent letter opinion, a formal Attorney General Opinion, or a decision of a court of record. You may view copies of opinions at http://www.oag.state.tx.us. To request copies of opinions, please fax your request to (512) 462-0548 or call (512) 936-1730. To inquire about pending requests for opinions, phone (512) 463-2110.

Opinions

Opinion No. JC-0422.

The Honorable Edwin E. Powell, Jr. Coryell County Attorney, P.O. Box 796, Gatesville, Texas 76528, regarding release of "provisional autopsy report" maintained by a justice of the peace (RQ-0380-JC).

S U M M A R Y.

Although the Public Information Act, Texas Government Code chapter 552, does not apply to records of the judiciary, such records may be available to the public under other laws. A "provisional autopsy report" prepared in connection with an inquest by a justice of the peace is not available under the Public Information Act, but members of the public may inspect it pursuant to section 27.004 of the Government Code.

Opinion No. JC-0423.

The Honorable Tony Goolsby Chair, Committee on House Administration, Texas House of Representatives, P. O. Box 2910, Austin, Texas 78768-2910, regarding limitation on disclosure of driver's license information imposed by the Federal Driver's Privacy Protection Act (RQ-0381-JC).

S U M M A R Y.

House Bill 3016, which permits the use of magnetic stripe information on drivers' licenses and identification cards issued by the Texas Department of Public Safety for the purpose of compliance with the Alcoholic Beverage Code and rules promulgated by the Alcoholic Beverage Commission, does not violate or conflict with the Federal Driver's Privacy Protection Act, 18 U.S.C. § 2721.

Opinion No. JC-0424.

The Honorable David Sibley, Chair, Business and Commerce Committee, Texas State Senate, P.O. Box 12068, Austin, Texas 78711-2068, regarding whether a property owner's right of access under section 25.195 of the Tax Code to information prepared by a private appraisal firm and used by the appraisal district to establish the taxable appraised value of the owner's property is limited by section 25.01(c) of the Tax Code, and related questions (RQ-0385-JC).

S U M M A R Y.

Under section 25.195(a) of the Tax Code, a property owner has a right of access to information about his property prepared by a private appraisal firm and obtained by the appraisal district from the appraisal firm pursuant to section 25.01(c) of the Tax Code. In addition, section 25.195(c), a provision recently enacted by Senate Bill 1737, gives a property owner access to information in the possession of a private appraisal firm that may not be in the possession of the appraisal district.

Neither section 39.001 of the Utilities Code nor any other provision enacted by the Seventy- sixth Legislature in Senate Bill 7, legislation enacted in 1999 to deregulate the electric utility industry, affects a property owner's right of access to appraisal information under section 25.195 of the Tax Code.

Opinion No. JC-0425.

The Honorable Frank Madla Chair, Committee on Intergovernmental Relations, Texas State Senate, P. O. Box 12068, Austin, Texas 78711-2068, regarding whether real property for which an original application for a first permit has been filed remains subject to the orders, regulations, ordinances, rules, expiration dates, or other requirements that were effective at the time of that filing although the property has been conveyed to a different owner (RQ-0386-JC).

S U M M A R Y.

Under section 245.002 of the Local Government Code, property for which an original application for the first development permit has been filed remains subject to the orders, regulations, ordinances, rules, expiration dates, or other requirements that were effective at the time the application was filed for the duration of a project, regardless of any changes in ownership that may occur before the project is completed. See Tex. Loc. Gov't Code Ann. § 245.002(a), (b) (Vernon Supp. 2001). If a project changes, however, the project becomes subject to current development regulations. See id. § 245.001(3) (defining "project"). Whether a particular project has changed so as to lose the protections granted by chapter 245 is a question that must be resolved by the local regulatory agency with jurisdiction in the matter. See id. § 245.001(4) (defining "regulatory agency").

Opinion No. JC-0426.

Dr. Ann Stuart, Chancellor, Texas Woman's University, P.O. Box 425497, Denton, Texas 76204-5497, regarding whether a state university may contract with a bank that employs a member of the board of regents as an officer (RQ-0387-JC).

S U M M A R Y.

Under the common-law conflict of interest rule, an employee or officer of a bank has a pecuniary interest in the bank. When a regent of Texas Woman's University is an officer and employee of a bank, the university board of regents may not enter into a contract with that bank.

Section 51.923 of the Texas Education Code authorizes a university to enter into certain contracts with a corporation in which one or more members of the governing board has a pecuniary interest as a stockholder or a director, as long as no board member has a beneficial interest in more than five percent of the corporation's outstanding capital stock. This Education Code provision does not, however, modify the common-law conflict of interest rule if the regent is an employee or officer of a business entity. Accordingly, section 51.923 of the Education Code does not authorize the board of regents of Texas Woman's University to contract with a bank where a regent serves as an officer and employee.

Opinion No. JC-0427.

Ms. Pallie J. Wallace, Kleberg County Auditor, 700 East Kleberg Street, Kingsville, Texas 78363, regarding whether a monetary value transfers with sick-leave time as an employee contributes it to a sick-leave pool under chapter 157, subchapter E of the Local Government Code and then as another employee withdraws the time, and related questions (RQ-0394-JC).

S U M M A R Y.

With respect to a county sick-leave pool established under chapter 157, subchapter E of the Local Government Code, a monetary value transfers with the sick-leave time from a contributing employee to the pool and then to the withdrawing employee. See Tex. Loc. Gov't Code Ann. §§157.074(b), .075(b) (Vernon 1999). A county commissioners court is authorized to adopt rules governing how the transfer affects departmental budgets. A sick-leave pool may receive contributions of, and an employee may contribute to a sick-leave pool, unvested sick leave.

Opinion No. JC-0428.

The Honorable Michael A. McDougal, District Attorney, Ninth Judicial District, 301 North Thompson, Suite 106, Conroe, Texas 77301-2824, regarding whether a county bail bond board may authorize an alternate to serve on the board when the licensed bail bond surety representative is unable to attend its meetings (RQ-0403-JC).

S U M M A R Y.

A county bail bond board may not permit an alternate licensed bail bond surety to serve on the board when the licensed bail bond surety representative is unable to attend.

For further information, please contact the Opinion Committee at (512) 463-2110 or access their website at www.oag.state.texas.us .

TRD-200106441
Susan D. Gusky
Assistant Attorney General
Office of the Attorney General
Filed: October 23, 2001

♦ ♦ ♦

Request for Opinions

RQ-0443-JC

The Honorable Tom Ramsay Chair, County Affairs Committee, Texas House of Representatives, P.O. Box 2910, Austin, Texas 78768-2910

Re: Whether the Cherokee Indian Nation of Texas, Inc., may operate a charitable sweepstakes fund-raising program (Request No. 0443-JC)

Briefs requested by November 5, 2001

RQ-0444-JC

The Honorable J.E. "Buster" Brown, Chair, Natural Resources Committee, Texas State Senate, P.O. Box 12068, Austin, Texas 78768-2068

Re: Whether members of the Texas Council on Environmental Technology may be the recipients of grants awarded by the council (Request No. 0444-JC)

Briefs requested by November 17, 2001

RQ-0445-JC

The Honorable Tim Curry, Tarrant County Criminal District Attorney, 401 West Belknap, Justice Center, Fort Worth, Texas 76196-0201

Re: Scope of authority of a person who operates a bail bond business under the license of a deceased bail bond licensee, and related questions (Request No. 0445-JC)

Briefs requested by November l7, 2001

RQ-0446-JC

The Honorable Bill G. Carter, Chair, Urban Affairs Committee, Texas House of Representatives, P.O. Box 2910, Austin, Texas 78768-2910

Re: Whether a municipality can enforce its own sexually oriented business ordinance when the entity to be protected is outside the municipal boundary (Request No. 0446-JC)

Briefs requested by November 18, 2001

RQ-0447-JC

The Honorable Juan J. Hinojosa, Chair, Criminal Jurisprudence Committee, Texas House of Representatives, P.O. Box 2910, Austin, Texas 78768-2910

Re: Whether the term of a justice of the peace may be reduced from four to two years as a result of redistricting (Request No. 0447-JC)

Briefs requested by November 19, 2001

RQ-0448-JC

Mr. Charles Miller, Chair, Board of Regents, The University of Texas, 201 West 7th Street, Austin, Texas 78701-2981

Re: Whether the Board of Regents of The University of Texas System may hold a public meeting in Mexico pursuant to the Open Meetings Act (Request No. 0448-JC)

Briefs requested by November 17, 2001

RQ-0449-JC

Mr. Geoffrey S. Connor, Assistant Secretary of State, State of Texas, P.O. Box 12697, Capitol Station, Austin, Texas 78711

Re: Whether a "pre-effective-date financing statement" should be filed with the Secretary of State or with the county clerk (Request No. 0449-JC)

Briefs requested by November 18, 2001

RQ-0450-JC

The Honorable Rene Guerra, Hidalgo County District Attorney, P.O. Box 1356, Edinburg, Texas 78539

Re: Whether amendments to section 1704.152, Occupations Code, effective September 1, 2001, apply to an individual who filed her application for a bail bond license prior to the effective date of the amendments (Request No. 0450-JC)

Briefs requested by November 19, 2001

RQ-0451-JC

The Honorable Jose R. Rodriguez, El Paso County Attorney, Courthouse, 500 East San Antonio, Room 203, El Paso, Texas 79901

Re: Whether a subdivision of a county may meet in executive session to deliberate about individuals who are county employees but are not employees of the subdivision (Request No. 0451-JC)

Briefs requested by November 18, 2001

For further information, please contact the Opinion Committee at (512) 463-2110 or access their website at www.oag.state.texas.us .

TRD-200106460
Susan D. Gusky
Assistant Attorney General
Office of the Attorney General
Filed: October 24, 2001

♦ ♦ ♦

EMERGENCY RULES

An agency may adopt a new or amended section or repeal an existing section on an emergency basis if it determines that such action is necessary for the public health, safety, or welfare of this state. The section may become effective immediately upon filing with the ***Texas Register***, or on a stated date less than 20 days after filing and remaining in effect no more than 120 days. The emergency action is renewable once for no more than 60 additional days.

Symbology in amended emergency sections. New language added to an existing section is indicated by the text being underlined. [Brackets] and ~~strike-through~~ of text indicates deletion of existing material within a section.

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 20. COTTON PEST CONTROL
SUBCHAPTER C. STALK DESTRUCTION PROGRAM

4 TAC §20.22

The Department of Agriculture (the department) adopts on an emergency basis, an amendment to §20.22, concerning the authorized cotton destruction dates for Pest Management Zone 5. The department is acting on behalf of cotton farmers in Zone 5, which includes Chambers, Colorado, Fayette, Galveston, Gonzales, Harris, Jefferson, Lavaca, Liberty, Orange, Waller, and Washington Counties.

The current cotton destruction deadline for Zone 5 is October 20. The cotton destruction deadline will be extended through November 19 for Zone 5. The department believes that changing the cotton destruction dates is both necessary and appropriate. This extension is effective only for the 2001 crop year.

Adverse weather conditions have created a situation compelling an immediate extension of the cotton destruction dates for Zone 5. The unusually wet weather prior to the cotton destruction period has prevented many cotton producers from destroying cotton by the October 20 deadline in Zone 5. A failure to act to extend the cotton destruction deadline could create a significant economic loss to Texas cotton producers in Zone 5 and the state's economy.

The emergency amendment to §20.22(a) changes the date for cotton stalk destruction for Zone 5 extending the deadline through November 19.

The amendment is adopted on an emergency basis under the Texas Agriculture Code, §74.006, which provides the Texas Department of Agriculture with the authority to adopt rules as necessary for the effective enforcement and administration of Chapter 74, Subchapter A; §74.004, which provides the department with the authority to establish regulated areas, dates and appropriate methods of destruction of stalks, other parts, and products of host plants for cotton pests and provides the department with the authority to consider a request for a cotton destruction extension due to adverse weather conditions; and the Government Code, §2001.34, which provides for the adoption of administrative rules on an emergency basis, without notice and comment.

§20.22. Stalk Destruction Requirements.

(a) Deadlines and methods. All cotton plants in a pest management zone shall be destroyed, regardless of the method used, by the stalk destruction dates indicated for the zone. Destruction shall be accomplished by the methods described as follows:
Figure: 4 TAC §20.22 (a)

(b) - (c) (No change.)

This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106338
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective Date: October 19, 2001
Expiration Date: November 21, 2001
For further information, please call: (512) 463-7588

♦ ♦ ♦

PROPOSED RULES

Before an agency may permanently adopt a new or amended section or repeal an existing section, a proposal detailing the action must be published in the ***Texas Register*** at least 30 days before action is taken. The 30-day time period gives interested persons an opportunity to review and make oral or written comments on the section. Also, in the case of substantive action, a public hearing must be granted if requested by at least 25 persons, a governmental subdivision or agency, or an association having at least 25 members.

Symbology in proposed amendments. New language added to an existing section is indicated by the text being underlined. [Brackets] and ~~strike-through~~ of text indicates deletion of existing material within a section.

TITLE 1. ADMINISTRATION

PART 5. GENERAL SERVICES COMMISSION

CHAPTER 113. CENTRAL PURCHASING DIVISION

The General Services Commission proposes amendments to Title 1, T.A.C., Chapter 113, Subchapter A, §§113.2 - Definitions, 113.4 - the Centralized Master Bidders List, 113.6 - Bid Evaluation and Award, 113.8 - Preferences, and new §113.17 - Multiple Award Schedules, and amendments to §113.19 - Qualification of Information Systems Vendor; and to Subchapter F, §113.102 - Vendor Performance and Debarment. The amendments and new rule are made pursuant to S.B. 311 and H.B. 1027, 77th Leg. (2001).

Proposed amendments to Subchapter A, §113.2 provide definitions for "multiple award contract" and "schedule"; §113.4 amends language concerning the Centralized Master Bidders List to include the vendor registration requirements with the commission; §113.6 is amended to include statutory reference to Texas Government Code, §2155.074 (amended by S.B. 311, §14.16) relating to "best value criteria" ; §113.8 adds a preference for economically depressed and blighted areas pursuant to Texas Government Code, §2155.449 (added by S.B. 311, §14.03), and a preference for products produced in a formerly contaminated property for which the owner has a certificate of completion for voluntary cleanup pursuant to H.B. 1027 and the Health and Safety Code, §361.609; §113.19 updates reference to statutory citations; and Subchapter F, §113.102 clarifies language relating to reporting vendor performance. New rule Subchapter A, §113.17 creates the standards for a schedule of multiple award contracts pursuant to S. B. 311, §2.01.

Paul E. Schlimper, Director of Procurement, has determined that for the first five-year period these rules are in effect it is anticipated that there will be positive fiscal implications for state and local government who participate in using the multiple award schedule under the new rule §113.17. The schedule will make available to state and local government a list of contracts for goods or services that have previously been awarded by the federal government or any other governmental entity in any state. Although the positive fiscal implication to state and local government cannot presently be quantified, the use of multiple award contracts will reduce the administrative costs for bidding and evaluating the award of a contract.

There will be no other fiscal implications to state or local government for the first five-year period the rules are in effect as a result of the proposed amendments.

Paul E. Schlimper, further determines that for each year of the first five-year period the amendments and new rule are in effect, the public benefit anticipated will be rules consistent with the mandates enacted by S.B. 311 and H.B. 1027, 77th Leg. (2001) affecting Title 1, T.A.C., Chapter 113 - Central Purchasing Division. The amendments will clarify language to improve readability, update statutory citations and purchasing preferences. The new rule §113.17 will create standards for a schedule of multiple award contracts.

There will be no anticipated economic cost to persons who are required to comply with the amendments and new rule. There will be no cost to large, small or micro-businesses and/or persons.

Comments on the proposal may be submitted to Juliet King, General Counsel, General Services Commission, P.O. Box 13047, Austin, TX 78711-3047. Comments must be received no later than thirty days from the date of publication of the proposal to the *Texas Register.*

SUBCHAPTER A. PURCHASING

1 TAC §§113.2, 113.4, 113.6, 113.8, 113.17, 113.19

The amendments are proposed under the authority of the Government Code, §2152.003; Government Code, §2155.074 (amended by S.B. 311, §14.16); Government Code, §§2155.449 and 2155.503 (added by S.B. 311, §2.01 and §14.03, 77th Leg. (2001)), and Government Code, §2155.267 which provide the General Services Commission with the authority to promulgate rules necessary to implement the sections.

The following codes are affected by these rules: Government Code, §2152.003; Government Code, §2155.074 (amended by S.B. 311, §14.16); Government Code, §§2155.449 and 2155.503 (added by S.B. 311, §2.01 and §14.03, 77th Leg. (2001)), and Government Code, §2155.267.

§113.2. Definitions.

The following words and terms, when used in this title, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Adopted uniform standards and specifications--Specifications and standards developed by nationally recognized standards-making associations that are evaluated and adopted by the specifications and standards program.

(2) Advisory groups -- A group that advises and assists the standards and specification program in establishing specifications. The advisory group may include representatives from federal, state and local governments, user groups, manufacturers, vendors and distributors, bidders, associations, colleges, universities, testing laboratories and others with expertise and specialization in particular product area.

(3) Agency --A state agency as the term is defined under the Texas Government Code, Title 10, §2151.002.

(4) Agent of record--An employee or official designated by a qualified cooperative entity as the individual responsible to represent the qualified entity in all matters relating to the program.

(5) Approved products list-- The list is also referred to as the approved brands list or qualified products list. It is a specification developed by evaluation brands and models of various manufacturers and listing those determined to be acceptable to meet the minimum level of quality. Testing is completed in advance of procurement to determine which products comply with the specifications and standards requirements

(6) Award--The act of accepting a bid, thereby forming a contract between the state and a bidder.

(7) Bid--An offer to contract with the state, submitted in response to a bid invitation issued by the commission.

(8) Bid deposit--A deposit required of bidders to protect the state in the event a low bidder attempts to withdraw its bid or otherwise fails to enter into a contract with the state. Acceptable forms of bid deposits are limited to: cashier's check, certified check, or irrevocable letter of credit issued by a financial institution subject to the laws of Texas and entered on the United States Department of the Treasury's listing of approved sureties; a surety or blanket bond from a company chartered or authorized to do business in Texas.

(9) Bid sample--A sample required to be furnished as part of a bid, for evaluating the quality of the product offered.

(10) Bidder--An individual or entity that submits a bid. The term includes anyone acting on behalf of the individual or other entity that submits a bid, such as agents, employees, and representatives.

(11) Blanket bond--A surety bond which provides assurance of a bidder's performance on two or more contracts in lieu of separate bonds for each contract. The amount for a blanket bond shall be established by the commission based on the bidder's annual level of participation in the state purchasing program.

(12) Board--The governing body of a county or local school district.

(13) Brand name--A trade name or product name which identifies a product as having been made by a particular manufacturer.

(14) Centralized master bidders list (CMBL)--A list maintained by the commission containing the names and addresses of prospective bidders and qualified information systems vendors.

(15) Consumable procurement budget--That portion of an agency's budget as identified by the comptroller's expenditure codes attributable to consumable supplies, materials, and equipment.

(16) Cooperative purchasing program--A program to provide purchasing services to qualified cooperative entities, as defined herein.

(17) Debarment--An exclusion from contracting or subcontracting with state agencies on the basis of any cause set forth in §113.102 of this title (relating to Vendor Performance and Debarment), commensurate with the seriousness of the offense, performance failure, or inadequacy to perform.

(18) Director--The director of the commission's purchasing division.

(19) Distributor purchase--purchase of repair parts for a unit of major equipment that are needed immediately or as maintenance contracts for laboratory/medical equipment.

(20) Emergency purchase--A purchase of goods or services so badly needed that an agency will suffer financial or operational damage unless the items are secured immediately.

(21) Environmentally sensitive products--Products that protect or enhance the environment, or that damage the environment less than traditionally available products.

(22) Equivalent product--A product that is comparable in performance and quality to the specified product.

(23) Escalation clause--A clause in a bid providing for a price increase under certain specified circumstances.

(24) Formal bid--A written bid submitted in a sealed envelope in accordance with a prescribed format, or an electronic data interchange transmitted to the commission in accordance with procedures established by the commission.

(25) Group purchasing program--A purchasing program that offers discount prices to two or more state agencies or institutions of higher education, which is formed as a result of interagency or interlocal cooperation and follows all applicable statutory standards for purchases.

(26) Informal bid--An unsealed, competitive bid submitted by letter, telephone, telegram, or other means.

(27) Invitation for bids (or IFB) --A written request for submission of a bid; also referred to as a bid invitation.

(28) Late bid--A bid that is received at the place designated in the bid invitation after the time set for bid opening.

(29) Level of quality - The ranking of an item, article, or product in regard to its properties, performance, and purity.

(30) List of approved equipment--A list of items available under term contracts for purchase by school districts through the commission pursuant to the Texas Education Code, § 21.901.

(31) Local government--the meaning assigned by Section 271.101, Local Government Code.

(32) [~~(31)~~]Manufacturer's price list--A price list published in some form by the manufacturer and available to and recognized by the trade. The term does not include a price list prepared especially for a given bid.

(33) Multiple award contract--an award of a contract for an indefinite amount of one or more similar goods or services from a vendor.

(34) [~~(32)~~]Multiple award contract procedure--A purchasing procedure by which the commission establishes one or more levels of quality and performance and makes more than one award at each level.

(35) [~~(33)~~]Non-competitive purchase--A purchase of goods or services (also referred to as "spot purchase") that does not exceed the amount stated in §113.11 (c) (1) of this title (relating to Delegated Purchases).

(36) [~~(34)~~]Notice of award--A letter signed by the director or his designee which awards and creates a term contract.

(37) [~~(35)~~]Open market purchase--A purchase of goods, usually of a specified quantity, made by buying from any available source in response to an open market requisition.

(38) [~~(36)~~]Performance bond--A surety bond which provides assurance of a bidder's performance of a certain contract. The amount for the performance bond shall be based on the bidder's annual level of potential monetary volume in the state purchasing program. Acceptable forms of bonds are those described in the definition for "bid deposit".

(39) [~~(37)~~]Perishable goods--Goods that are subject to spoilage within a relatively short time and that may be purchased by agencies under delegated authority.

(40) [~~(38)~~]Post-consumer materials--Finished products, packages, or materials generated by a business entity or consumer that have served their intended end uses, and that have been recovered or otherwise diverted from the waste stream for the purpose of recycling.

(41) [~~(39)~~]Pre-consumer materials--Materials or by-products that have not reached a business entity or consumer for an intended end use, including industrial scrap material, and overstock or obsolete inventories from distributors, wholesalers, and other companies. The term does not include materials and by-products generated from, and commonly reused within, an original manufacturing process or separate operation within the same or a parent company.

(42) [~~(40)~~]Proprietary--Products or services manufactured or offered under exclusive rights of ownership, including rights under patent, copyright, or trade secret law. A product or service is proprietary if it has a distinctive feature or characteristic which is not shared or provided by competing or similar products or services.

(43) [~~(41)~~]Public bid opening--The opening of bids at the time and place advertised in the bid invitation, in the presence of anyone who wishes to attend. On request of any person in attendance, bids will be read aloud.

(44) [~~(42)~~]Purchase orders--

(A) Open market purchase order--A document issued by the commission to accept a bid, creating an open market purchase contract.

(B) Automated contract purchase order--A release order issued by the commission under an existing term contract, and pursuant to a requisition from a qualified ordering entity.

(C) Non-automated purchase order--A release order issued by an agency as a non-automated term contract, and pursuant to a requisition by the qualified ordering entity.

(45) [~~(43)~~] Purchasing functions--The development of specifications, receipt and processing of requisitions, review of specifications, advertising for bids, bid evaluation, award of contracts, and inspection of merchandise received. The term does not include invoice, audit, or contract administration functions.

(46) [~~(44)~~]Qualified information systems vendor catalogue proposal--A request for offers or quotations of prices from catalogue vendors (QISV).

(47) [~~(45)~~]Qualified cooperative entity--An entity that qualifies for participation in the cooperative purchasing program:

(A) A county, municipality, school district, special district, junior college district, or other legally constituted political subdivision of the state that is a local government.

(B) Mental health and mental retardation community centers in Government Code, §2155.202, that receive grants-in-aid under the provisions of Subchapter B, Chapter 534, Health and Safety Code.

(C) An assistance organization as defined in Government Code, §2175.001, that receive any state funds.

(D) A political subdivision, under Chapter 791, Government Code.

(48) [~~(46)~~]Qualified Ordering Entity--A state agency as the term is defined under the Texas Government Code, Title 10, §2151.002, or an entity that qualifies for participation in the cooperative purchasing program as defined in Local Government Code, Subchapter D, §271.081.

(49) [~~(47)~~]Recycled material content--The portion of a product made with recycled materials consisting of pre-consumer materials (waste), post-consumer materials (waste), or both.

(50) [~~(48)~~]Recycled materials--Materials, goods, or products that contain recyclable material, industrial waste, or hazardous waste that may be used in place of raw or virgin materials in manufacturing a new product.

(51) [~~(49)~~]Recycled product--A product that meets the requirements for recycled material content as prescribed by the rules established by the Texas Natural Resource Conservation Commission in consultation with the General Services Commission.

(52) [~~(50)~~]Remanufactured product--A product that has been repaired, rebuilt, or otherwise restored to meet or exceed the original equipment manufacturer's (OEM) performance specifications; provided, however, the warranty period for a remanufactured product may differ from the OEM warranty period.

(53) [~~(51)~~]Request for proposal--A written request for offers concerning goods or services the state intends to acquire by means of the competitive sealed proposal procedure.

(54) [~~(52)~~]Requisition--

(A) Open market purchase requisition--An initiating request from an agency describing needs and requesting the commission to purchase goods or services to satisfy those needs.

(B) Term contract purchase requisition--A request from a qualified ordering entity for delivery of goods under an existing term contract.

(55) [~~(53)~~]Responsible vendor--A vendor who has the capability to perform all contract requirements in full compliance with applicable state law, ethical standards, and applicable commission rules.

(56) [~~(54)~~]Resolution--Document of legal intent adopted by the governing body of a qualified cooperative entity that evidences

the qualified cooperative entity's participation in the cooperative purchasing program.

(57) Schedule--a list of multiple award contracts from which agencies may purchase goods and services.

(58) [~~(55)~~] Scheduled purchase--A purchase with a prescheduled bid opening date, allowing the commission to combine orders for goods.

(59) [~~(56)~~] Sealed bid--A formal written bid.

(60) [~~(57)~~]Solicitation--An invitation for bids or a request for proposals.

(61) [~~(58)~~]Specification--A concise statement of a set of requirements to be satisfied by a product, material or service, indicating whenever appropriate the procedures to determine whether the requirements are satisfied.

(62) [~~(59)~~]Standard specification--A description of what the purchaser requires and what a bidder or proposer must offer.

(63) [~~(60)~~]Successor-in-interest--Any business entity that has ownership similar to a business entity. For purposes of §113.102 of this title (relating to Vendor Performance and Debarment), it shall be presumed that a business entity that employs, or is associated with, any partner, member, officer, director, responsible managing officer, or responsible managing employee, of a business entity that was previously debarred is a successor-in-interest.

(64) [~~(61)~~]Tabulation of bids--The recording of bids and bidding data for purposes of bid evaluation and recordkeeping.

(65) [~~(62)~~]Term contract purchase--A purchase by a qualified ordering entity under a term contract, which established a source of supply for particular goods at a given price for a specified period of time.

(66) [~~(63)~~]Testing--an element of inspection involving the determination, by technical means, of the properties or elements of item (s) or component (s), including function operation.

(67) [~~(64)~~]Texas uniform standards and specification--Standards and specifications prepared and published by the standards and specifications program of the commission.

(68) [~~(65)~~] Total expenditures on products with recycled material content, remanufactured products, and environmentally sensitive products--The total direct acquisition costs (vendor selling price plus delivery costs) of all such products.

(69) [~~(66)~~] Unit price--The price of a selected unit of a good or service, e.g., price per ton, per labor hour, or per foot.

(70) [~~(67)~~] Using agency--An agency of government that requisitions goods or services through the commission.

(71) [~~(68)~~] Vendor--A supplier of goods or services to the state.

§113.4. Centralized Master Bidders List.

(a) The commission maintains the Centralized Master Bidders List (CMBL) of the names and addresses of vendors which have applied and been accepted for inclusion on the CMBL. The CMBL is maintained for the state's use in obtaining competitive bids for purchases and for registering vendors who wish to be designated as qualified information systems vendors. [~~No vendor will be placed on the CMBL to receive bid invitations for information purposes only.~~] Bid invitations and requests for proposals shall be [~~are~~] transmitted to vendors on the CMBL for the solicited commodity and/or service designated by the vendor at registration for open market, term contracts, competitive sealed proposal acquisitions and delegated purchases in excess of the non-competitive bid limit.

(b) To be considered for inclusion on the CMBL, a vendor must:

(1) register with the [~~complete the application form provided by the~~] commission which includes certification that the vendor has access to the class and item codes and is aware of the requirements and procedures regarding the provision of goods, services and other transactions with the state and its qualified ordering entities;

(2) remit an annual maintenance fee established by the director [~~remit a check or money order in the amount of $100, which is the biennial maintenance fee assessed~~] to cover the administrative [~~commission's~~] costs for maintaining the bidders list and transmission of bids or proposals. [~~This fee, less a reasonable handling fee approved by the director, will be refunded if the applicant is not accepted for inclusion on the CMBL.~~]

[~~(c) The commission will review and evaluate the CMBL application, and may reject an application that is not satisfactorily completed.~~]

(c) [~~(d)~~] A vendor may be administratively removed from the CMBL for one or more of the following reasons:

(1) failing to pay or unnecessarily delaying payment of damages assessed by the commission;

(2) failing to submit bids in response to bid invitations on either:

(A) four consecutive open market invitations concerning the affected class or item; or

(B) one or more contract or schedule invitations concerning the affected class;

(3) failing to remit the annual [~~biennial~~] CMBL maintenance fee; or

(4) any factor set forth in Government Code, Chapter 2155 [~~, §§2155.070 and 2155.077~~].

(d) [~~(e)~~] A vendor which has been removed from the CMBL shall not be reinstated until expiration of the period for which the vendor was removed and approval is granted by the director.

(e) [~~(f)~~] An error in addressing a bid invitation or request for proposal or a failure of the post office to deliver the solicitation will not be sufficient reason to require the commission to reject all other bids or proposals.

(f) [~~(g)~~] State agencies shall use the CMBL to select bidders for competitive bids or proposals and to the fullest extent possible for purchases exempt from the commission's purchasing authority. This requirement does not apply to the Texas Department of Transportation or to an institution of higher education as defined by §61.003, Education Code, but an institution of higher education should use the CMBL when possible.

§113.6. Bid Evaluation and Award.

(a) Bid evaluation.

(1) The commission may accept or reject any bid or any part of a bid or waive minor technicalities in a bid, if doing so would be in the state's best interest.

(2) A bid price may not be altered or amended after bids are opened except to correct mathematical errors in extension.

(3) No increase in price will be considered after a bid is opened. A bidder may reduce its price provided it is the lowest and best bidder and is otherwise entitled to the award.

(4) Bid prices are considered firm for acceptance for 30 days from the bid opening date for open market purchases and 60 days for term contracts, unless otherwise specified in the invitation for bids.

(5) A bid containing a self-evident error may be withdrawn by the bidder prior to an award.

(6) Bid prices which are subject to unlimited escalation will not be considered. A bidder may offer a predetermined limit of escalation in his bid and the bid will be evaluated on the basis of the full amount of the escalation.

(7) A bid containing a material failure to comply with the advertised specifications shall be rejected.

(8) All bids must be based on "F.O.B. destination" delivery terms unless otherwise specified.

(9) If requested in the invitation for bids, samples must be submitted or the bid will be rejected. The commission will require samples only when essential to the assessment of product quality during bid evaluation. Samples for non-winning bids shall be returned to a bidder whenever practicable, at the bidder's expense. Otherwise, samples will be disposed of in the same manner as surplus or salvage property.

(10) When brand names are specified, bids on alternate brands will be considered if they otherwise meet specification requirements.

(11) Cash discounts are acceptable but are not considered in making an award. All cash discounts offered will be taken if they are earned by the agency.

(12) No electrical item may be purchased unless the item meets applicable safety standards of the federal Occupational Safety and Health Administration (OSHA).

(b) Award.

(1) All awards shall be made to the bidder complying with the best value criteria used in the bid and conforming to the advertised product or service specifications. In determining which bidder is offering the best value, in addition to price, the commission may [~~shall~~] consider and evaluate the factors set out in Government Code, Title 10, Subtitle D, Subchapter A, §§2155.074, 2156.007, 2157.003, [~~§2156.007~~] and all other factors comprising the best value criteria as may be set forth in the bid or as may be applicable to a particular purchase.

(2) An open market purchase contract is awarded and created when the director of purchasing or his designee authorizes an open market purchase order. A term contract is awarded and created when the director of purchasing or his designee signs a notice of award.

(3) In case of tie bids which cannot be resolved by application of one or more preferences described in §113.8 of this title (relating to Preferences), an award shall be made by drawing lots.

§113.8. Preferences

(a) Claiming a preference. To claim a preference, a bidder shall mark the appropriate box on the face of the bid invitation. If the appropriate box is not marked, a preference will not be granted unless other documents included in the bid show a right to the preference.

(b) Preferences.

(1) Texas resident bidders.

(A) A Texas resident bidder shall be given preference over a nonresident bidder when the cost, and quality of the goods or services are equal.

(B) The commission may award a contract to a nonresident bidder only if its bid is lower than the lowest bid submitted by a responsible Texas resident bidder by the same amount that a Texas resident bidder would be required to underbid the nonresident bidder to obtain a comparable contract in the state where the nonresident's principal place of business is located. In evaluating a bid of a nonresident bidder, an amount will be added equal to the amount a Texas resident bidder would be required to underbid a nonresident bidder to obtain a comparable contract in the state where the nonresident bidder's principal place of business is located, otherwise known as reciprocal preference. After the amount is added, an award may be made to the nonresident bidder if it is determined to have the lowest price and best bid. The amount added is for evaluation purposes only; in no event shall an amount be awarded in excess of the amount actually bid.

(2) Texas and United States products.

(A) Supplies, materials, or equipment produced in Texas shall be given preference over comparable goods produced outside Texas when the cost and quality of the goods are equal. Supplies, materials, and equipment are considered to be produced in Texas if they are manufactured in Texas; "manufactured" does not include the work of packaging or repackaging.

(B) Agricultural products grown in Texas shall be given preference over comparable products grown outside Texas when the cost and quality of the goods are equal. Agricultural products are considered grown in Texas if they contain any amount grown in Texas. In case of tie bids between agricultural products claiming the preference, the bidder whose product contains the greatest percentage of the product grown in Texas will prevail. For purposes of this preference, agricultural products include, among other things, textiles and fiber products, processed and unprocessed foods, feed, lumber and forestry products, live animals, plants, flowers, and nursery stock.

(C) Supplies, materials, equipment, or agricultural products produced or grown in the United States shall be given preference over foreign products when the cost and quality are equal, if comparable goods of equal cost and quality produced or grown in Texas or offered by Texas bidders are not available.

(3) Products of persons with mental or physical disabilities. A preference shall be given to manufactured products of workshops, organizations, or corporations whose primary purpose is training and employing persons with mental or physical disabilities, if the products meet state specifications as to quantity, quality, and price. Competitive bids are not required for purchases of blind-made goods or services offered as a result of efforts by the Texas Council on Purchasing from People with Disabilities, if the goods or services meet state specifications as to quantity, quality, price, delivery, life cycle costs, and costs no more than the fair market price of similar items.

(4) Recycled, remanufactured or environmentally sensitive products. A preference shall be given to recycled, remanufactured or environmentally sensitive products if the products meet state specifications as to quantity and quality and defined best value factors.

(5) Energy efficient products. A preference shall be given to energy efficient products if they meet state requirements as to quantity and quality, and are equal to or less than the cost of other products offered. This preference shall be applied by evaluating the energy use of the products offered and considering the costs of such energy use over the expected life of the equipment. The methodology for evaluating energy use and costs shall be included in the bid invitation.

(6) Rubberized asphalt paving material. A preference shall be given to rubberized asphalt paving material made from scrap tires by a facility in this state if the cost, as determined by life-cycle cost benefit analysis, does not exceed the bid cost of alternative paving materials by more than 15%.

(7) Recycled motor oil and lubricants. A preference shall be given to motor oils and lubricants that contain at least 25% recycled oil if the quality is comparable and the cost is equal to or less than new oil and lubricants.

(8) Products and services from economically depressed or blighted areas as defined in Texas Government Code, Section 2306.004 or meets the definition of a historically underutilized business zone as defined by 15 U.S.C. Section 632 (p). Preference shall be given to products from economically depressed or blighted areas if they meet state requirements as to quantity and quality, and are equal to or less than the cost of other products offered.

(9) Products produced at a facility located on property for which the owner has received a certificate of completion under Section 361.609, Health and Safety Code, if the goods meet state specifications regarding quantity, quality, delivery, life cycle costs, and price.

§113.17. Multiple Award Schedule.

(a) Pursuant to Government Code, Section 2155.502, the Commission is directed to develop a schedule of multiple award contracts.

(b) All contracts on schedule shall meet the following standards: 1) Have been previously awarded using a competitive process by the federal government or any other governmental entity in any state; 2) Have agreed to the State of Texas General Terms and Conditions, including rules adopted by the commission; 3) Comply with all applicable State and federal procurement requirements; and 4) Any other applicable federal requirements.

(c) The Director of Procurement or successor is authorized to take actions necessary to implement this rule.

(d) Information on how to register for or use this schedule are to be listed on the Texas Building and Procurement Commission website.

§113.19. Qualification of Information Systems Vendors.

(a) Upon registration on the commission's Centralized Master Bidders List (CMBL), a vendor wishing to sell or lease automated information systems to governmental entities in accordance with this rule shall apply to the commission for designation as a qualified information systems vendor (QISV) by completing and submitting an application and catalogue.

(b) In this section a governmental entity is a state agency subject to the Information Resources Act (Texas Government Code, Title 10, Subtitle B, Chapter 2054) or a local government entity that participates in the Cooperative Purchasing Program under the Texas Local Government Code, Title 8, Subtitle C, Subchapter D.

(c) An application must include the following:

(1) a statement detailing the geographic area in Texas to which the vendor desires to market catalogue products and services;

(2) a statement acknowledging that any terms and conditions in the vendor's catalogue that conflict with the Constitution or laws of the State of Texas shall not be enforceable and, therefore, will not be binding;

(d) Upon receipt of a properly completed application, the director or the director's designee shall give consideration to the following standards and criteria when deciding to designate a vendor as a QISV:

(1) the criteria set forth in the Texas Government Code, §§2157.064 [~~§§2157.06~~] and 2157.065;

(2) the vendor's history of performance under Texas Government Code, §2155.077.

(e) An application that is incomplete or that contains inaccurate information will not be approved, and the vendor will be notified of corrections needed.

(f) Each vendor's catalogue shall:

(1) Conform to requirements set forth in Texas Government Code, §2157.066 and any other requirements established by the commission.

(2) be maintained on a website in accordance with subsection (l) of this section and include indexing and keywords consistent with the commission's web catalogue guidelines. The vendor's catalogue maintained on the website and in compliance with this rule shall be the official version of the catalogue.

(g) A vendor designated as a QISV shall be notified of the designation by the commission. Once designated as a QISV, the vendor shall maintain a catalogue listing all products and services available for purchase and shall make the same available to qualified ordering entities upon request at no cost.

(h) The director shall promulgate guidelines for the revision process of a vendor's catalogue.

(i) Failure of a vendor to remain active on the CMBL, or failure to conform to any other commission rules may result in suspension or removal of QISV status. A vendor that has been suspended or removed may not market or sell products or services from its QISV catalogue to the state until the cause of the suspension or removal has been resolved.

(j) The vendor shall retain all records related to any business transaction under the catalogue purchase procedure for automated information systems for five years from the date of the purchase order. The records shall be provided upon request to the commission or the actual purchaser.

(k) Preference shall be given to QISV's who sell or lease products in Texas in accordance with provisions of the Texas Government Code, §2155.4441.

(l) The QISV vendor is encouraged to:

(1) use, produce, or provide products that contain recycled or remanufactured content, are environmentally sensitive, or possess energy saving features;

(2) identify recycled or remanufactured products and if possible, include the percentage of the total product that is recycled or remanufactured and/or the percentage of the total post-consumer recycled material content in its product literature or other representations; and

(3) use recycled/recyclable paper if printing a catalogue.

(m) The State of Texas is committed to assisting historically underutilized businesses (HUBs) to receive a portion of the total value of all contracts that an agency will award. If the vendor qualifies as a HUB, but is not certified by the State of Texas as such, the vendor should contact the commission to obtain a HUB certification application. Upon the request of a governmental entity, the vendor will be

required to detail the amount of expenditures that have been made to material suppliers and subcontractors that are Texas certified HUBs. A vendor that has demonstrated past HUB participation is still expected to provide documentation using the reporting forms provided by a governmental entity to show its good faith effort in meeting or exceeding the state's procurement utilization goals identified in GSC's HUB Rules (1 TAC §111.14).

(n) Once the process for utilizing URL's has been established and is operational, the GSC will create deadlines whereby all QISV's must provide and maintain their URL.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106309
Juliet U. King
Acting General Counsel
General Services Commission
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 463-3960

♦ ♦ ♦

SUBCHAPTER F. VENDOR PERFORMANCE AND DEBARMENT PROGRAM

1 TAC §113.102

The amendments are proposed under the authority of the Government Code, §2152.003 and Government Code, §2155.077 which provide the General Services Commission with the authority to promulgate rules necessary to implement the sections.

The following codes are affected by these rules: Government Code, §2152.003 and Government Code, §2155.077.

§113.102. Vendor Performance and Debarment.

(a) The commission may debar a vendor for a period that is commensurate with the seriousness of the vendor's action and the damage to the state's interest and may remove a vendor's name from the commission's Centralized Master Bidders List for the same period. If complaints resume after the vendor is reinstated on the bidders list, the Director of Central Procurement Services will re-evaluate the vendor's current performance and make a determination of the vendor's standing at that time.

(b) The Director of Central Procurement Services shall adopt a measurement system to evaluate a vendor's past performance as an indicator of a vendor's ability to perform under a state contract for purchases or other acquisitions under Government Code, Chapters 2155-2158:

(1) As a minimum, the number and severity of a vendor's performance problems in relation with volume of goods or services provided, the effectiveness of corrective actions taken by the vendor, and the age and relevance of past performance information at the time it is used shall be considered;

(2) Firms lacking relevant past performance history shall receive a neutral evaluation for past performance in state contracting except as provided for in subsection (d) of this section.

(c) The Director of Central Procurement Services shall establish standard policies and procedures for vendor performance criteria used in the evaluation of delegated and non-delegated purchases. In the evaluation process for delegated purchases, agencies must accurately document the vendor performance criteria used in determining the successful bidder or offeror.

(d) When in the best interest of the State, a business entity or a successor-in-interest may be debarred for any of the following:

(1) A history of unsatisfactory performance of a contract, or a history of failure to perform contracted services.

(2) Stating an unwillingness to honor a binding bid.

(3) Knowingly and intentionally supplying false information in order to appear responsive to a solicitation, to obtain a contract, or to qualify for a bid preference.

(4) Knowingly and intentionally conferring or offering to confer any gift, gratuity, favor, or advantage, present or future, upon any employee of a state agency who exercises any official responsibility for an acquisition.

(5) Conviction of any felony charge of fraud, bribery, collusion, conspiracy, federal or state antitrust laws, or other criminal offense in connection with the bidding upon, award of, or performance of any contract for goods and services with any state agency.

(6) Violation of state ethic laws.

(7) Failure to comply with terms and conditions of existing contracts.

(8) Notice of debarment activities from other governmental entities.

(9) Any cause indicating that the individual or firm is not a responsible vendor.

(e) A proposed debarment may include all known successors-in-interest of a business entity. Each proposed decision to debar a vendor and/or successors-in-interest shall be made on a case-by-case basis after consideration of relevant facts and circumstances. A proposal to debar a vendor shall be delivered in writing to the vendor, stating the reason therefore. Vendor shall be given 10 working days to respond. Debarment does not relieve the vendor of responsibility for existing contractual obligations with the state. The commission shall establish procedures to ensure due process to vendors in the debarment process.

(1) Vendors subject to a proposed debarment may submit a written appeal to the Director of Central Procurement Services within 10 days following notification of the proposed debarred status.

(2) No person who has a direct interest in the outcome of the appeal may communicate directly or indirectly upon the merits of debarment with any commission employees without notice and approval of the Director of Central Procurement Services.

(f) The commission and state agencies shall ensure that debarred vendors do not participate in state contracting. Any exclusion from state contracting due to debarment shall extend to all state contracting and subcontracting within the supervision of state agencies.

(g) State agencies shall report poor or exceptional vendor [~~a vendor's~~] performance on any purchases of $25,000 or more from contracts established [~~administered~~] by the commission and other purchases made through an agency's delegated authority in accordance with the policy guidance contained in the Commission's Procurement Manual.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106310
Juliet U. King
Acting General Counsel
General Services Commission
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 463-3960

♦ ♦ ♦

PART 12. COMMISSION ON STATE EMERGENCY COMMUNICATIONS

CHAPTER 251. REGIONAL PLANS-STANDARDS

1 TAC §251.6

The Commission on State Emergency Communications (CSEC) proposes an amendment to §251.6, concerning guidelines for submission requests from councils of governments on strategic plans, amendments and allocation of equalization surcharge funds.

Current Rule 251.6 prescribes the methods and procedures for a regional planning commission (RPC) to use to amend its 9-1-1 strategic plan. One type of amendment is a notification amendment, which does not require Commission action because it does not increase the method of finance. This amendment serves as a process for the RPCs to notify the CSEC staff of changes to the strategic plans that would require a shift in funds from one category to another. In reviewing that process, and based on recent internal audit findings, the CSEC is proposing to eliminate the notification amendment reporting requirement from 15 working days to a schedule to be set by the CSEC staff of no more than twice a year.

Additional proposed revisions would also bring the rule in alignment with Sunset recommendations and legislative mandates enacted during the 76th and 77th Legislative sessions on CSEC's funding authority and revenue allocation.

Paul Mallett, executive director, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Mallett also has determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing the section will be an improved system for funds authority and allocation for 9-1-1 systems statewide. No historical data is available, however, there appears to be no direct impact on small or large businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. There is no anticipated local employment impact as a result of enforcing the section.

Comments on the amendment may be submitted in writing within 30 days after publication of the proposal in the *Texas Register* to Paul Mallett, Executive Director, Commission on State Emergency Communications, 333 Guadalupe Street, Suite 2-212, Austin, Texas 78701-3942.

The amendment is proposed pursuant to the Texas Health and Safety Code, Chapter 771, §§771.051, 771.055, 771.056, 771.057, 771.071, 771.0711, 771.072, 771.075, 771.078, and 771.079 which authorize the Commission to adopt policies and procedures prescribing the distribution and use of 9-1-1 funds for providing 9-1-1 service.

No other statute, code, or article is affected by this amendment.

§251.6. Guidelines for Strategic Plans, Amendments, and Revenue[~~Equalization Surcharge~~]Allocation.

(a) Policy and Procedures. As authorized by the Texas Health and Safety Code, Chapter 771, the Advisory Commission on State Emergency Communications (Commission) may impose 9-1-1 emergency service fees and equalization surcharges to support the planning, development, and provision of 9-1-1 service throughout the State of Texas. In accordance with §771.055, such service implementation shall be consistent with regional plans developed by regional planning commissions. These regional plans must meet standards established by the Commission and "...include a description of how money allocated to the region under this chapter is to be allocated in the region." Section 771.057 addresses amendments to regional plans and indicates that such amendments may be adopted in accordance with procedure established by the Commission.

(b) Strategic Plan Levels. Regional strategic plans developed in accordance with Chapter 771, along with the commensurate allocation of the above described funds, shall reflect implementation consistent with the following three major strategic plan levels (in order of priority) through state fiscal year 2001.

(1) Level I: 9-1-1 service generally associated with Automatic Number Identification (ANI), to include the following components and associated costs:

(A) ANI (equipment and network);

(B) Public Safety Answering Point (PSAP) Room Preparation;

(C) Language Line;

(D) PSAP Supplies;

(E) Telecommunications Device for the Deaf (TDD);

(F) Maintenance/Repair (ANI/TDD); and

(G) Capital Recovery (ANI/TDD).

(2) Level II: 9-1-1 service generally associated with ANI, Selective Routing (SR), Automatic Location Identification (ALI) and any other network and/or database system enhancement, to include the following components and associated costs:

(A) ANI/ALI/SR (equipment and network);

(B) PSAP Room Preparation;

(C) Addressing;

(D) Addressing Maintenance;

(E) PSAP Training;

(F) Maintenance/Repair (CPE);

(G) Capital Recovery (telephone equipment); and

(H) Capital Recovery (addressing).

(3) Level III: Other 9-1-1 equipment, services and enhancements to same, to include, but not limited to the following components and associated costs:

(A) Additional Trunk Diversity;

(B) Other Redundancy;

(C) Wireless Access;

(D) Training Positions;

(E) Emergency Power;

(F) Recorders;

(G) Pagers;

(H) Detectors/Diverters;

(I) External Ringers;

(J) Mapped ALI;

(K) Maintenance/Repair (ancillary equipment);

(L) Capital Recovery (ancillary equipment); and

(M) Other.

(c) New Strategic Plan Levels. Regional strategic plans developed in accordance with Chapter 771, along with the commensurate allocation of the above described funds, shall reflect implementation consistent with the following three major strategic plan levels (in order of priority) beginning state fiscal year 2002.

(1) Level I: The equipment, network and database equipment and/or services that provide the essential elements of 9-1-1 service, including the maintenance and replacement of equipment.

(A) [~~Wireline~~]Network;

(B) Wireless Phase I;

(C) Database;

(D) Equipment;

(E) Language Line;

(F) Equipment maintenance.[~~; and~~]

[~~(G) Equipment Capital Recovery.~~]

(2) Level II: The activities, equipment, and/or services that directly support and[~~the~~] enhance [~~enhanced~~] 9-1-1 call delivery and data maintenance for the level of service provided to the region.

(A) Addressing Maintenance;

(B) Graphic MSAG;

(C) MIS;

(D) Mapped ALI;

(E) PSAP Room Prep;

(F) PSAP Training/Public Education; and

(G) Wireless Phase II.

(3) Level III: The activities, equipment, and/or services that provide auxiliary enhancements to the delivery of 9-1-1 calls and the level of service provided to the region.

(A) Network Diversity;

(B) Training Positions;

(C) Emergency Power;

(D) Recorders;

(E) Pagers;

(F) Ancillary Maintenance & Repair;and

[~~(G) Ancillary Capital Recovery; and~~]

(G) [~~(H)~~] Other.

(d) Strategic Plans. Regional strategic plans developed in compliance with Chapter 771 shall include a strategic plan that projects regional 9-1-1 service costs, [~~and service fee and other non-equalization surcharge revenues~~]at least two years into the future; and program goals and strategies at least five years into the future. [~~Within the context of §771.056(d), the Commission shall consider any revenue insufficiencies to represent need for equalization surcharge funding support.~~]

(1) The Commission shall[~~may~~] establish the format of strategic plans for the sake of identifying overall statewide requirements in its implementation.

(2) Strategic plans shall be reviewed and amended, as appropriate, on a biennial basis.

(3) Each biennial review and update of strategic plans shall reflect a reconciliation of all actual implementation costs by component incurred for the year involved against projected strategic plan costs and revenues.

(4) Strategic plans shall be consistent with the three major implementation priority levels identified above, in subsection (b)(1), (2) and (3), of this section and all applicable Commission policies and rules.

(5) A regional planning commission shall submit financial and performance reports at least quarterly on a schedule to be established by the Commission. The financial report shall identify actual implementation costs by county, strategic plan priority level and component. The performance report shall be submitted along with each financial report requesting 9-1-1 funds and shall reflect the progress of implementing the region's strategic plan, including the status of equipment, services and program deliverables, in a format to be determined by the Commission.

(e) Amendments to Regional Strategic Plans.

(1) A regional planning commission may make changes to its approved regional strategic plan to accommodate unanticipated requirements and/or to prevent disruption of its implementation schedule, contingent upon compliance with all Commission policies and procedures.

(A) The changes do not require additional service fees or equalization surcharge funds; and

(B) The changes are consistent with all Commission policies and procedures.

(2) Changes made to the regional plan must be reported in writing to the Commission no more than twice a year on a schedule to be established by the Commission[~~within 15 working days of making the change~~]. The documentation required for changes will be an amended budget, narrative, related worksheets and a letter indicating executive approval of the amendment.

(3) Emergency situations requiring amendments to regional plans that require additional funding may be presented to the Commission for review and consideration contingent upon the availability of such funds within level priorities as established by the Commission.

(f) Allocation of Revenue [~~Equalization Surcharge Funds~~].

(1) Service Fee allocation - Consistent with §771.056 (d), and §771.078 the Commission shall allocate, by contract, service fee revenue to regional planning commissions contingent on the availability of appropriated funds.

(2) Equalization Surcharge Funds -

(A) Within the context of Section 771.056(d), the Commission shall consider any revenue insufficiencies to represent need for equalization surcharge funding support.

(B) [~~(1)~~] Consistent with this rule, the Commission shall allocate, by agreement, equalization surcharge funds and service fees to regional planning commissions [~~and emergency communication districts~~] based upon statewide strategic plan [~~and district needs~~]contingent on the availability of appropriated funds[~~coupled with the projected availability of such funds~~] over a two year period.

(C) The Commission may allocate equalization surcharge to an emergency communication district based on district requests and availability of appropriated funds.

(D) [~~(2)~~] Equalization surcharge funds shall be allocated first to eligible recipients requiring such funds for administrative budgetary purposes, followed by Level I, II, and III activities in that order.

(E) [~~(3)~~] If sufficient equalization surcharge funds are not available to fund all regional planning commission strategic plan and district requests, funds shall be allocated to provide a consistent level of 9-1-1 service throughout the State of Texas in accordance with the priority levels described. Such allocation methods may include, but are not limited to, one or more of the following:

(i) [~~(A)~~] In reverse order of priority, reducing the number of priority level components supported with equalization surcharge funds;

(ii) [~~(B)~~] Requesting that regional strategic plans be adjusted to allow for more implementation time as appropriate; and/or

(iii) [~~(C)~~] In order of priority, proportionally allocating available funds among requesting agencies.

(F) [~~(4)~~] The Commission may elect to hold a balance of equalization surcharge funds in reserve for emergencies and other contingencies.

(g) Funding Parameters. The Commission will look favorably on plan amendments for tandem and/or database service arrangements and ancillary equipment that will improve the effectiveness and reliability of 9-1-1 call delivery systems. This will include the following when the equipment is for 9-1-1 call delivery: surge protection devices, uninterrupted power source (UPS), power backup, voice recorders, paging systems for 9-1-1 call delivery, security devices, and other back-up communication services.

(1) Paging Systems. Funding for the paging systems may be approved when such systems are the most effective means of 9-1-1 call delivery and they do not replace other paging or radio alerting systems. Funding for paging will be limited to systems, where alternative systems or the systems now in use cause significant delay in 9-1-1 call delivery and where existing radio systems can be modified to accommodate paging. Funding for pagers (receivers) will be limited to three, providing pagers to only necessary core responders within an organization (e.g., in a 15-member volunteer emergency medical group, only the on-call ambulance driver and one or two attendants would be furnished pagers).

(2) Voice Recording Equipment. Voice loggers may be approved when the primary use of the equipment is in support of the 9-1-1 call-taking and call-delivery function. Extra capacity on such systems may be used for other public safety functions (such as dispatch); however, 9-1-1 funding will not be authorized for systems whose capacity clearly exceed actual or anticipated 9-1-1 requirements. Shared funding of larger systems to accommodate both a 9-1-1 PSAP and a PSAP operating agency's other needs will be considered on a case-by-case basis. Other considerations include:

(A) The Commission will normally fund voice recording capability in a PSAP to record the conversation on each answering position used to answer emergency calls on a regular basis. (This means one recording channel per 9-1-1 answering position instead of one channel per incoming line.)

(B) The Commission will also fund recording capability to record the transfer of an emergency call from the PSAP first answering the call to the agency that is responsible for providing the required emergency services. This recording capability will be limited to the minimum amount required to record the transfer of the caller and relaying of information to the service provider.

(C) The Commission will fund the purchase of voice recorders as justified, to record 9-1-1 call delivery. Call volumes requiring recording in excess of 90 minutes per day will normally be required to justify larger systems.

(D) The funding of recording devices to transfer information from another recorder will be approved only upon specific justification of need.

(E) Funding for search capability for recorders will be limited to the ability to locate an event by date and time.

(F) The Commission will not normally fund the purchase of both voice logging recorders and instant playback recorders in the same location.

(G) When the operator of a 9-1-1 PSAP and the providers of emergency services desire to use the same recording equipment funded by Regional Strategic Plan, the following guidelines will apply to determine the amount to be funded by the Commission:

(i) When the minimum size of recorder that can be purchased to serve the PSAP provides more channels than are needed by the PSAP to record the delivery of 9-1-1 calls, the other agency may use the extra channels and all funding will be provided by the Commission.

(ii) When the PSAP requires a given size of recording equipment, and the other agency requires additional channels, the Commission will fund the size of recording equipment needed to record only the delivery of 9-1-1 calls, and the other agency will fund all additional equipment.

(iii) When the recording requirements of the other agency requires additional features or capabilities than would be required by the PSAP alone, the Commission will fund the equivalent amount of the system needed to serve the 9-1-1 functions of the PSAP alone. For instance, if the PSAP could use a recording system to record the delivery of 9-1-1 calls, but another agency needs to record a radio channel that requires the capacity of a larger recorder, the Commission will fund the equivalent cost of the smaller system.

(H) To assist the Commission in reviewing and approving requests for funding for voice recording devices for 9-1-1 call delivery, requests for funding should include a worksheet, provided by the Commission, for each PSAP location.

(I) In reviewing requests for recording systems, the Commission will award funding, when justified, for the actual costs of basic recording systems not to exceed $10,000 on 4-channel or equivalent systems, and not to exceed $20,000 on up to 10-channel or equivalent recording systems. Requests for any other recording systems will require separate approval by the Commission.

(J) The Commission will consider funding of recording capabilities greater than those suggested by the guidelines when sufficient justification is provided as part of a Regional Strategic Plan.

(h) Emergency Power Equipment. Each PSAP location should be evaluated by the RPC to determine if an emergency power system is required to insure the ability to answer 9-1-1 calls in the event that the standard power supply is interrupted. A PSAP that receives a relatively small number of emergency calls per day may be able to provide acceptable service without the availability of ANI or ALI for short periods of time. If the same PSAP is located in a location that is subject to prolonged power outages, it may need emergency power sources. Other considerations include:

(1) Where conditions exist that indicate a need for emergency power systems to support 9-1-1 call delivery, UPS should be considered as the emergency power system. Emergency generators (power backup) should be approved only in locations with a documented history of or potential for extended interruptions of commercial power supplies. Generally, 9-1-1 funding will not be used to provide both a generator and UPS. At least 75% of the capacity of any UPS system or generator funded should directly support an existing (or planned) 9-1-1 system.

(2) Each request for UPS must include a worksheet showing the calculations used to determine the system size and batteries required. This worksheet must identify all equipment to be powered and the operating voltage and current drain of each piece of equipment. The request for UPS must identify the load capacity of the system requested and the length of time the batteries will operate the PSAP 9-1-1 equipment. The request should also indicate whether the 9-1-1 equipment has any built-in UPS capability.

(3) The length of time that a UPS battery will be required to provide emergency power is a major factor in determining the cost of the UPS system. Each request for UPS must provide information justifying the size of the batteries requested. Information concerning the history of power failures at the PSAP location and the average time to restore power should be obtained from the local power company.

(4) If the history of power failures, or the expected restoration time, is more than can be economically justified for UPS batteries, an emergency generator can be considered. Any request for an emergency generator, in addition to a UPS, shall include a comparison of the cost of a UPS with sufficient batteries to the cost of the combination of the UPS and an emergency generator.

(5) There may be circumstances that justify the installation of an emergency generator (backup power), in addition to an UPS, as the primary system for a PSAP location. In these cases, the request for the emergency generator must include an explanation and comparison of the relevant costs.

(6) When the operator of a 9-1-1 PSAP and the providers of emergency services desire to share the emergency power system funded by the Commission, the following guidelines will apply to determine the amount to be funded by the Commission:

(A) When the minimum size of emergency power system that can be purchased to serve the PSAP provides more capacity than is needed by the PSAP, the other agency may use the extra capacity and all funding will be provided by the Commission.

(B) When the PSAP requires a given size of emergency power system, and the other agency requires additional capacity, the Commission will fund the size of emergency power equipment needed to supply the PSAP alone and the other agency will fund all additional capacity.

(7) Funding may be approved for surge protection devices when they are used for protection of 9-1-1 specific electronic equipment. Documented justification must be provided.

(i) Definitions. The following words and terms when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) 9-1-1 Call Delivery - Delivery of a 9-1-1 call to the agency responsible for providing the emergency service required.

(2) 9-1-1 Funds - Funds assessed and disbursed in accordance with the Texas Health and Safety Code, Chapter 771.

(3) Emergency Communications District - A public agency or group of public agencies acting jointly that provided 9-1-1 service before September 1, 1987, or that had voted or contracted before that date to provide that service; or a district created under Health and Safety Code, Chapter 772, Subchapter B, C, or D.

(4) Paging Systems - A radio system capable of transmitting tone, digital, and/or voice signals to small receiving devices designed to be carried by an individual.

(5) Power Backup - Power provided by a generator in the event regular utility services are interrupted.

(6) Recorders - Devices that capture and retain sound, including, but not limited to the following:

(A) Voice Loggers - A device that records sound on a permanent source for later review.

(B) Instant Recall Recorder - A device that records and temporarily stores calls for immediate review.

(7) Regional Strategic Plan - Each regional planning commission shall develop and plan for the establishment and operation of 9-1-1 service throughout the region that the regional planning commission serves. The service must meet the standards established by the Commission.

(8) Regional Planning Commission (RPC) - A commission established under Local Government Code, Chapter 391, also referred to as a regional council of governments (COG), or simply, a regional council.

(9) Security Devices - Devices whose use is specific to the protection of 9-1-1 systems from intentional damage.

(10) Strategic Plan - As part of a regional strategic plan, a document identifying 9-1-1 equipment and related activity, by strategic plan component, required to support planned levels of 9-1-1 service within a defined area of the state. The strategic plan shall cover a two year financial planning period and a five year plan outlining regional goals and strategies, and specifically projects 9-1-1 implementation costs and revenues associated with the above including equalization surcharge requirements.

(A) Strategic Plan Component - Within a 9-1-1 implementation priority level, a category of 9-1-1 activity and/or equipment generally associated with 9-1-1 implementation cost.

(B) Strategic Plan Level - A Commission established statewide implementation priority generally associated with a level of 9-1-1 service - e.g., Automatic Number Identification, ANI.

(11) Surge Protection Devices - Devices designed to protect sensitive electronic equipment by preventing excessive electrical power from reaching and damaging such equipment.

(12) Uninterrupted Power Source (UPS) - Equipment that is designed to provide a constant power source for electronic systems. Capable of operating independently, for a designated period of time, should public or emergency electrical power sources fail.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 22, 2001.

TRD-200106395
Paul Mallett
Executive Director
Commission on State Emergency Communications
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 305-6933

♦ ♦ ♦

CHAPTER 255. FINANCE

1 TAC §255.1

The Commission on State Emergency Communications (CSEC) proposes an amendment to §255.1, concerning the statewide 9-1-1 Equalization Surcharge to be assessed to each customer receiving intrastate long-distance service except those specifically exempted by law.

The section is amended to reflect consistency with the 77th Texas Legislature's passage of HB 2914 which provides statutory authority to bill only one Equalization Surcharge. Rule 255.1 is being amended to increase the surcharge rate, combining both the 9-1-1 and Poison surcharges, the net effect of the two changes would not be an increase or decrease in the rates currently applied. Section 771.072 states that equalization surcharges will be imposed on customers for intrastate long-distance service. This revenue will be allocated to the 9-1-1 Program and the Poison Program. CSEC staff agrees there appears to be authority to bill a single "Equalization Surcharge," and not two separate surcharges.

Mr. Paul Mallett, executive director, has determined that for the first five-year period the rule is in effect there will be no effect on state or local government as a result of enforcing the repeal of the rule.

Mr. Mallett also has determined that for each year of the first five years the section is in effect, there will be no adverse effect anticipated on public benefit as a result of enforcing this section. Equalization surcharge for both the 9-1-1 and Poison programs will continue to be collected at the same rate. While no historical data is available, there appears to be no direct impact on small or large businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. There is no anticipated local employment impact as a result of enforcing the section.

Comments on the amendment must be submitted in writing within 30 days after publication of the proposal in the *Texas Register* to Paul Mallett, Executive Director, Commission on State Emergency Communications, 333 Guadalupe Street, Suite 2-212, Austin, Texas 78701-3942.

The amendment is proposed pursuant to the Health and Safety Code, Chapter 771, §§771.072, 771.073, 771.074, 771.075, and 771.078.

No other statute, code, or article is affected by this amendment.

§255.1. Statewide 9-1-1 Equalization Surcharge.

An equalization surcharge is established in the amount of 6/10 of 1% (0.60%) [~~3/10 of 1.0% (0.30%)~~], the amount to be rounded up to the next whole one cent ($0.01) in the case of fractions. This surcharge will be assessed to each customer receiving intrastate long-distance service, except those exempted by the Health and Safety Code, §771.074 [~~§771.001, or commission rule~~]. The surcharge shall be applied to the total amount for intrastate long-distance service charged by the customer's long-distance service provider, but such amount shall not include taxes charged by local, state, and federal authorities, nor shall local, state, or federal taxes be applied to this surcharge unless otherwise required by law.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 22, 2001.

TRD-200106396
Paul Mallett
Executive Director
Commission on State Emergency Communications
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 305-6933

♦ ♦ ♦

1 TAC §255.6

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Commission on State Emergency Communications or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Commission on State Emergency Communications (CSEC) proposes the repeal of §255.6, concerning the 9-1-1 service fee and surcharge exemption, which prohibits a service provider from billing or collecting the fee from any agency or branch of the Federal Government.

The section is being repealed to reflect consistency with the 77th Texas Legislature's passage of HB 2914 which states that the 9-1-1 service fee and surcharge authorized by Health and Safety Code, Chapter 771, Chapter 772, or a home-rule municipality may not be imposed on or collected from the state or the federal government.

Paul Mallett, executive director, has determined that for the first five-year period the rule is in effect there will be no effect on state or local government as a result of enforcing this exemption. The CSEC had exempted the federal government from the billing and collection of the fees since December 1990 through rulemaking.

Mr. Mallett also has determined that for each year of the first five years the section is in effect, there will be no adverse effect anticipated on public benefit as a result of enforcing the repeal of this section. While no historical data is available, there appears

to be no direct impact on small or large businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. There is no anticipated local employment impact as a result of enforcing the section.

Comments on the repeal must be submitted in writing within 30 days after publication of the proposal in the *Texas Register* to Paul Mallett, Executive Director, Commission on State Emergency Communications, 333 Guadalupe Street, Suite 2-212, Austin, Texas 78701-3942.

The repeal is proposed pursuant to the Health and Safety Code, Chapter 771, §771.074.

The other statute affected by the proposed repeal is Health and Safety Code, Chapter 772.

§255.6. 9-1-1 Service Fee and Surcharge Exemption.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 22, 2001.

TRD-200106397
Paul Mallett
Executive Director
Commission on State Emergency Communications
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 305-6933

♦ ♦ ♦

1 TAC §255.9

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Commission on State Emergency Communications or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Commission on State Emergency Communications (CSEC) proposes the repeal of §255.9, concerning the statewide Poison Control Surcharge to be assessed to each customer receiving intrastate long-distance service.

The section is being repealed to reflect consistency with the 77th Texas Legislature's passage of HB 2914 which provides statutory authority to bill only one Equalization Surcharge. Current CSEC Rule 255.1 is being amended to increase the surcharge rate, combining both the 9-1-1 and Poison surcharges, the net effect of the two changes would not be an increase or decrease in the rates currently applied.

Mr. Paul Mallett, executive director, has determined that for the first five-year period the rule is in effect there will be no effect on state or local government as a result of enforcing the repeal of the rule.

Mr. Mallett also has determined that for each year of the first five years the section is in effect, there will be no adverse effect anticipated on public benefit as a result of enforcing the repeal of this section. While no historical data is available, there appears to be no direct impact on small or large businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. There is no anticipated local employment impact as a result of enforcing the section.

Comments on the repeal must be submitted in writing within 30 days after publication of the proposal in the *Texas Register* to Paul Mallett, Executive Director, Commission on State Emergency Communications, 333 Guadalupe Street, Suite 2-212, Austin, Texas 78701-3942.

The repeal is proposed pursuant to the Health and Safety Code, Chapter 771, §§771.072, 771.073, 777.074, 771.075, and 771.078.

No other statute, code, or article is affected by the repeal.

§255.9. Statewide Poison Control Surcharge.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 22, 2001.

TRD-200106398
Paul Mallett
Executive Director
Commission on State Emergency Communications
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 305-6933

♦ ♦ ♦

TITLE 7. BANKING AND SECURITIES

PART 1. FINANCE COMMISSION OF TEXAS

CHAPTER 1. CONSUMER CREDIT COMMISSIONER

SUBCHAPTER J. AUTHORIZED LENDER'S DUTIES AND AUTHORITY

7 TAC §1.840, §1.841

The Finance Commission of Texas proposes new 7 TAC §§1.840-1.841, concerning plain language contracts and non-standard contract filing procedures.

The purpose of the new rules is to implement the provisions of Texas Finance Code §341.502 as mandated by the 77th Legislative Session in Senate Bill 317. Section 341.502 requires contracts for consumer loans under Chapter 342, motor vehicle installments sales contracts under Chapter 348, and home equity transactions regulated by the Office of Consumer Credit Commissioner to be written in plain language. The section requires the Finance Commission to adopt rules governing the form of contracts including model provisions for contracts in plain language. A drafting workgroup has been formed to develop plain language contracts for the various transactions. The final draft contract provisions will be proposed as rules when the draft provisions are complete. The statute requires creditors who choose not to use the model contracts to file their non-standard contracts for a plain language review. It is the view of the Finance Commission and the Office Consumer Credit Commissioner that the statute contemplates that model contract provisions would be promulgated before creditors begin submitting non-standard contracts for a plain language review. Towards that end, the rule

proposes to establish a schedule for the submission of non-standard contracts that reflects deadlines that would follow the estimated dates for promulgating model contract provisions.

Leslie L. Pettijohn, Consumer Credit Commissioner has determined that for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of administering the rules.

Commissioner Pettijohn also has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of the new rules will be enhanced compliance with the credit laws and consistency in credit contracts. No economic cost will result to persons affected by these rules. There is no adverse impact to small business. No difference will exist between the cost of compliance for small businesses and the cost of compliance for the largest businesses affected by this section.

Comments on the proposed rules may be submitted in writing to Leslie L. Pettijohn, Consumer Credit Commissioner, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705- 4207.

The new rules proposed under the Texas Finance Code §11.304 and §341.502, which authorizes the Finance Commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code §14.108 grants the Consumer Credit Commissioner and the Finance Commission the authority to interpret the provisions of Title 4, Subtitle B, in which Chapter 341 is located.

These rules affect Chapter 342 and 348, Texas Finance Code.

§1.840. Plain Language Contracts.

(a) Purpose and scope. The sections contained in this subchapter are intended to implement the provisions of Tex. Fin. Code §341.502. These sections establish the plain language procedures for filing non-standard contracts.

(b) Applicability. These sections apply to all consumer credit contracts that are governed by the following provisions:

(1) a loan under Chapter 342;

(2) a retail installment contract under Chapter 348; or

(3) a home equity loan regulated by the Office of Consumer Credit Commissioner (e.g., an equity loan subject to Subchapter G of Chapter 342 of the Texas Finance Code).

§1.841. Non-standard Contract Filing Procedures.

(a) Non-standard contracts. Contracts that do not use model contract provisions must be submitted to the Office of Consumer Credit Commissioner for review.

(b) Certification of readability. Contract filings subject to this subchapter must be accompanied by a certification signed by an officer of the creditor or the entity submitting the form on behalf of the creditor. The certification must state that the contract is written in plain language (i.e., that the contract can be easily understood by the average consumer). The certification must also state that the contract is printed in an easily readable font and type size.

(c) Filing requirements. Contract filings must be identified as to the transaction type. Contract filings must be submitted on paper that is suitable for permanent record storage and imaging. Handwritten forms or handwritten corrections will not be accepted.

(d) Contact Person. One person shall be designated as the contact person for each filing submitted. Each submission should provide the name, address, phone number, and fax number, if available, of the contact person for that filing. If the contracts are submitted by anyone other than the company itself, the contracts must be accompanied by a dated letter which contains a description of the anticipated users of the contracts and designates the legal counsel or other designated contact person for that filing.

(e) Filing deadlines. Submission of non-standard contracts is not required until the model contract provisions have been adopted by rule.

(1) For subchapter F loans under 342, non-standard contracts are not required to be filed before April 1, 2002.

(2) For subchapter E loans under 342, non-standard contracts are not required to be filed until August 1, 2002.

(3) For subchapter G loans under Chapter 342 or home equity loans, non-standard contracts are not required to be filed before January 1, 2003.

(4) For retail installment transactions under Chapter 348, non-standard contracts are not required to be filed before April 1, 2003.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106335
Leslie L. Pettijohn
Commissioner
Finance Commission of Texas
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 936-7640

♦ ♦ ♦

CHAPTER 4. CURRENCY EXCHANGE

7 TAC §§4.3 - 4.6, 4.10

The Texas Finance Commission (the commission) proposes to amend §4.3, concerning reporting and recordkeeping requirements that apply to currency businesses; §4.4, concerning changes in location of a currency business; §4.5, concerning acquisition or control of a currency business licensee; §4.6, concerning exemptions to licensing as a currency business; and §4.10, concerning mobile currency businesses. The amendments are in accordance with Finance Code, Chapter 153, which makes currency transportation a regulated currency business subject to these sections.

The amendments to §4.3 make reporting and recordkeeping requirements for currency businesses applicable to persons engaged in currency transportation transactions. The amendments also add a new requirement in subsection (e)(2)(G) for currency exchange, transportation, and transmission businesses to obtain receipts for all transactions conducted with other financial institutions and to retain those receipts for five years. The amendments delete subsection (i), which allows a currency business to maintain records under 31 CFR, Part 103 in lieu of compliance with §4.3. The amendments also delete the requirements in subsections (e)(1)(A) and (e)(2)(A) that receipts required under these subsections must be sequentially numbered. The remaining amendments to §4.3 are proposed to improve clarity and are nonsubstantive.

The amendments to §§4.4, 4.5, 4.6, and 4.10 add currency transportation as a currency business to which these sections apply.

Stephanie Newberg, Deputy Commissioner, Texas Department of Banking, has determined that, for each year of the first five years that these sections are in effect, there will be no fiscal implication for state or local government as a result of enforcing or administering these sections as amended.

Ms. Newberg also has determined that, for each of the first five years the sections as amended are in effect, the public benefit anticipated as a result of the adoption of the sections will be guidance for persons engaged in currency transportation transactions and clarification of requirements for all currency business licensees. No economic cost will be incurred by a person required to comply with the sections, and there will be no deleterious effect on small businesses.

Comments on the proposed amendments may be submitted to Robin Robinson, Assistant General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705-4294, or by email to robin.robinson@ banking.state.tx.us.

The amendments are proposed under the rulemaking authority provided in Finance Code, §153.002, which authorizes the commission to adopt rules necessary to enforce and administer Finance Code, Chapter 153.

Finance Code, Chapter 153, is affected by the proposed amendments.

§4.3. Reporting and Recordkeeping.

(a) For purposes of this section, a "currency business" refers to a person that engages in or has engaged in currency exchange, transportation, or [~~currency~~] transmission transactions, whether the person is licensed under the Finance Code, Chapter 153, or is exempt from licensing under the Finance Code, §153.117(a)(2).

(b)-(c) (No change.)

(d) Each currency business shall, in a form prescribed by the banking commissioner (the commissioner), file quarterly written reports with the department. Except to the extent waived by the commissioner in the report form for a particular quarter, each report must include:

(1) (No change.)

(2) currency business [~~exchange and/or currency transmission~~] activity [~~reports for the currency business~~] including:

(A)-(C) (No change.)

(D) the total dollars of [~~outbound~~] currency transportation and/or transmission activities by country [~~of destination~~]; and

(E) the total dollars of transportation and/or transmission activities transacted on behalf of other companies under agent agreements with the currency business;

(3)-(11) (No change.)

(e) In addition to the records required to be maintained under subsections (b), (c), and (d) of this section, currency businesses shall keep the following records:

(1) Currency Exchange [~~exchange~~].

(A) No currency business may engage in a currency exchange transaction in an amount in excess of $1,000, unless the currency business issues [~~sequentially numbered receipts or~~] receipts bearing a unique identification or transaction number for each of those transactions. The receipts must include the date of the transaction, the amount and type of currency received and given in exchange, the rate of exchange, and the applicable commission for the transaction. The currency business also shall maintain a record of each such transaction that includes the transaction [~~identifying receipt~~] number, or other unique identifier, as well as the following information:

(i) the name, [~~and~~] address, and date of birth of the individual conducting the transaction [~~customer~~];

(ii) the social security number of the individual [~~customer~~], or if the individual [~~customer~~] is an alien and does not have a social security number, then the passport number, alien identification card number, or other official document of the individual [~~customer~~] evidencing foreign nationality or residence [~~(e.g., a provincial driver's license with indication of home address)~~];

(iii) the name and address of the person or business on whose behalf the transaction is conducted if the individual [~~customer~~] is conducting the transaction on behalf of another person or business, together with the appropriate identification for such other person or business (e.g., passport number, taxpayer identification number, alien registration number) [~~specified in clause (ii) of this subparagraph~~];

(iv) (No change.)

(v) the [~~initials of the~~] employee or representative of the currency business executing [~~effecting~~] the transaction; and

(vi) the specific identifying information (number, type, and issuer) of a document [~~the date of birth of the customer~~]

[~~(B) In addition, in connection with all transactions in an amount in excess of $1,000, the currency business shall verify the customer's name by examination of a document~~] that contains the name and a photograph of the individual [~~customer~~] and is customarily acceptable within the banking community as a means of identification when cashing checks for nondepositors [~~and shall record the specific identifying information on the receipt or in the log entry related to the transaction (e.g., state of issuance and number of driver's license)~~].

(B) [~~(C)~~] Multiple [~~Contemporaneous~~] currency exchange transactions during one business day of the same or different types of currency made by or on behalf of the same person or business totaling in excess of $1,000 must be treated as one transaction. [~~Multiple transactions initiated by or on behalf of the same person during one or more business days totaling in excess of $1,000 must be treated as one transaction if made by such person for the purpose of evading the reporting requirements under this section and an individual employee, director, officer, or partner of the currency business knew or should have known that the transactions occurred~~].

(2) Currency Transmission and Transportation.

(A) No currency business authorized to engage in currency transmission or transportation may enter into a currency transmission or transportation transaction of $3,000 or more in amount unless the currency business issues [~~sequentially numbered receipts or~~] receipts or written confirmation bearing a unique identification or transaction number for each of those transactions. The receipt or written confirmation must bear the date and time of day of the transaction, the amount of the transmission in United States dollars, the rate of exchange (if applicable), and the applicable fee or commission for the transaction. [~~The receipt also must indicate whether the transaction initiated or terminated the currency transmission.~~] The currency business also must maintain a record of each such transaction that includes the transaction [~~identifying receipt~~] number or other unique identifier as well as the following information:

(i) the name, address, date of birth, and telephone number of the individual conducting the transaction [~~customer~~], whether sender or recipient, or if the individual has no telephone, a notation in the record of that fact;

(ii) the social security number of the individual [~~customer~~], or if the individual [~~customer~~] is an alien and does not have a social security number, then the passport number, alien identification card number, or other official document of the customer evidencing foreign nationality or residence [~~(e.g., a provincial driver's license with indication of home address)~~];

(iii) [~~the date of birth of the customer;~~]

[~~(iv)~~] the name and address of the person or business on whose behalf the transaction is conducted, if the individual [~~customer~~] is conducting the transaction on behalf of another person or business, together with the appropriate identification for such other person or business (e.g., passport number, taxpayer identification number, alien registration number) [~~specified in clause (ii) of this subparagraph~~];

(iv) [~~(v)~~] the location of the office where the transaction was conducted;

(v) [~~(vi)~~] if the customer is the sender, the designated recipient's name, address, or bank account number, as applicable, and telephone number, or if the inquiry of the currency business reveals that the recipient has no telephone, a notation in the record of that fact [~~if the customer is the sender~~];

(vi) [~~(vii)~~] if the customer is the recipient, the sender's name, address, and telephone number, to the extent such information is available to the currency business after reasonable inquiry, with a notation in the record of the type of information that is not available [~~if the customer is the recipient and that information is available to the currency business~~];

~~[(viii)~~ ~~all instructions or messages relating to the transmission;]~~

(vii) [~~(ix)~~] the method of payment (e.g., cash, check, credit card, etc.); and

(viii) [~~(x)~~] the [~~initials of the~~] employee or representative of the currency business executing [~~effecting~~] the transaction, and

(ix) the specific identifying information

[~~(B) In addition, in connection with all transactions of $3,000 or more in amount, the currency business shall verify the customer's identity by examination~~] of a document[~~, preferably one~~] that contains the name[~~, address,~~] and photograph of the individual [~~customer~~] and is customarily acceptable within the banking community as a means of identification when cashing checks for nondepositors[~~, and shall record the specific identifying information on the receipt or in the log entry related to the transaction (e.g., state of issuance and number of driver's license)~~].

(B) [~~(C)~~] Multiple [~~Contemporaneous~~] currency transmission or transportation transactions during one business day initiated by or on behalf of the same person or business or received by or on behalf of the same person or business totaling $3,000 or more must be treated as one transaction. [~~Multiple transactions initiated by or on behalf of the same person or received by or on behalf of the same person during one or more business days totaling $3,000 or more must be treated as one transaction if made by such person for the purpose of evading the reporting requirements under this section and an individual employee, director, officer, or partner of the currency business knew or should have known that the transactions occurred~~].

(3) A currency business shall maintain a log or logs of its activities under the Finance Code, Chapter 153, [~~for each calendar month~~] containing the following information for each transaction:

(A)-(B) (No change.)

(C) the amount and type of currency received and given in exchange, or the amount of the transmission or transportation, as applicable;

(D) (No change.)

(E) the amount of service charges or fees assessed in connection with the transaction; [~~and~~]

(F) the number of the receipt issued in connection with the transaction, if any; and

(G) if transportation, whether currency or monetary instrument.

(4) In addition to the receipt requirements of paragraphs (1)(A) and (2)(A) of this subsection, a currency business must obtain a receipt for all transactions conducted with other financial institutions, regardless of where the transaction is conducted. The receipts must be retained by the currency business for a minimum of five years containing the following information for each transaction:

(A) the transaction date;

(B) the transaction amount in dollars and the equivalent amount in any foreign currency;

(C) the applicable exchange rate;

(D) the name and address of the other financial institution; and

(E) the initials of the license holder's representative executing the transaction.

(f)-(h) (No change.)

[~~(i) In lieu of compliance with this section, the commissioner may authorize a currency business to maintain records of currency transmission and currency exchange transactions in accordance with 31 CFR, Part 103. Such authorization must be pursuant to the commissioner's written approval based on review of current audited financial statements of the currency business. To support authorization under this subsection, the audited financial statements must have been issued by a certified public accountant acceptable to the commissioner within the 18-month period prior to its submission to the department and must have an unqualified opinion. If at an examination or other review of the records of a currency business by the department a violation of 31 CFR, Part 103, or the Finance Code, Chapter 153, is cited, the authorization of the currency business pursuant to this subsection is subject to immediate revocation by order of the commissioner.~~]

(i) [~~(j)~~] A currency business does not violate this section if it cannot produce records on transactions conducted prior to the effective date of this section which were not previously required by statute or rule.

§4.4. Change of Location.

Each licensee shall give the banking commissioner 30 days' prior, written notification of any change in any location from which it conducts any of its currency exchange, transportation, or transmission activities, including the identity of the new location, the name of the lessor or owner of the new location, and the estimated date of the change.

§4.5. Acquisition of Control of Corporate License.

(a) (No change.)

(b) The application shall be on a form prescribed by the banking commissioner and shall be made under oath. The application shall, except to the extent expressly waived by the banking commissioner, contain the following information:

(1) the identity, personal history, business background and experience relating to the currency exchange, transportation, or transmission business, and a description of any material, pending legal or administrative proceedings to which the applicant is a party;

(2)-(3) (No change.)

(c)-(f) (No change.)

§4.6. Exemptions.

(a)-(c) (No change.)

(d) Check sellers. Check sellers licensed under Finance Code, Chapter 152, which engage in currency exchange, transportation, or [~~currency~~] transmission transactions, must comply with the net worth requirements under Finance Code, §152.203(a)(1), or Finance Code, §153.102(d)(5), whichever is greater. Check sellers licensed under Finance Code, Chapter 152, which engage in currency exchange, transportation, or [~~currency~~] transmission transactions, must also post a bond or deposit in lieu of bond in accordance with Finance Code, §152.206, or Finance Code, §153.109, §153.110, and §4.7 of this chapter (relating to bond requirements and deposits in lieu of bond), whichever is greater.

§4.10. Mobile Currency Business.

(a) Definitions. The following words and terms, when used in this section, have the following meanings unless the text clearly indicates otherwise.

(1) Mobile currency business--The business of currency exchange as defined in the Finance Code, §153.001(4), currency transportation as defined in Finance Code §153.001(7), and/or currency transmission as defined in the Finance Code, §153.001(6), conducted from a mobile unit at one or more locations.

(2) (No change.)

(b) Use of a mobile unit. A licensee under the Finance Code, Chapter 153, may not conduct a mobile currency business without first obtaining an additional license to serve each location at which the mobile unit will stop to conduct mobile currency business, and must have at least one previously existing office address at which it actively conducts licensed currency exchange, transportation, and/or [~~currency~~] transmission before applying for a license under this section. The filing fee for an additional location set forth in §4.11 of this title (relating to Fees) applies to a license application under this section; except that the application fee for each additional location in excess of the first location for mobile currency business is waived.

(c)-(h) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106311

Everette D. Jobe
Certifying Official
Finance Commission of Texas
Proposed date of adoption: December 14, 2001
For further information, please call: (512) 475-1300

♦ ♦ ♦

7 TAC §4.21

The Finance Commission of Texas (the commission) proposes new §4.21 concerning the filing of consumer complaints with the Texas Department of Banking (department).

Section 4.21 will implement the requirements of Finance Code, §11.307, pertaining to the filing of consumer complaints with the department.

Proposed §4.21 will specify the manner in which currency exchange, transmission, and transportation licensees provide consumers with information on how to file complaints with the department. The proposed section will also require that the information on how to file complaints be included with each privacy notice a currency exchange, transmission, and transportation licensee is required by law to provide to consumers.

Stephanie Newberg, Deputy Commissioner, Texas Department of Banking, has determined that, for each year of the first five years that the section is in effect, there will be no fiscal implication for state or local government as a result of enforcing or administering the section as adopted.

Ms. Newberg also has determined that, for each of the first five years the section as adopted is in effect, the public benefit anticipated as a result of the adoption of this section will be the provision of information to the consumers of currency exchange, transmission, and transportation licensees on how to file complaints with the department. Costs to comply with this section will be less than $100.00, and there will be no deleterious effect on small businesses.

Comments on proposed §4.21 may be submitted to Steven L. Martin, Deputy General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4294, or by e-mail to: steve.martin@banking. state.tx.us.

Section 4.21 is proposed under the authority of Finance Code, §11.307, which requires the commission to adopt rules specifying the manner in which currency exchange, transmission, and transportation licensees provide consumers with information on how to file complaints with the department.

Finance Code, §11.307 is being implemented by the proposed new section.

§4.21. How Do I Provide Information to Consumers on How to File a Complaint?

(a) Definitions

(1) "Consumer" means an individual who obtains or has obtained a product or service from you that is to be used primarily for personal, family, or household purposes.

(2) "Privacy notice" means any notice which you give regarding a consumer's right to privacy as required by a specific state or federal law.

(3) "Required notice" means a notice in a form set forth or provided for in subsection (b) (1) of this section.

(4) "You" means a currency exchange, transmission, and transportation licensee that is licensed by the Texas Department of Banking under the Finance Code.

(b) How do I provide notice of how to file complaints?

(1) You must use the following notice in order to let your consumers know how to file complaints: The (your name) is licensed under the laws of the State of Texas and by state law is subject to regulatory oversight by the Texas Department of Banking. Any consumer wishing to file a complaint against the (your name) should contact the Texas Department of Banking through one of the means indicated below: In Person or U.S. Mail: 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4294 Telephone No.: 877/276-5554 Fax No.: 512/475-1288 E-mail: consumer.complaints@banking.state.tx.us Website: www.banking.state.tx.us

(2) You must provide the required notice in the language in which a transaction is conducted.

(3) You must include the required notice with each privacy notice that you send out.

(4) Regardless of whether you are required by any state or federal law to give privacy notices, you must take appropriate steps to let your consumers know how to file complaints by giving them the required notice in compliance with paragraph (1) of this subsection.

(5) You must use the following measures to give the required notice:

(A) In each area where you conduct business on a face-to-face basis, you must conspicuously post the required notice. A notice is deemed to be conspicuously posted if a consumer with 20/20 vision can read it from the place where he or she would typically conduct business or if it is included on a bulletin board, in plain view, on which all required notices to the general public (such as equal housing posters, licenses, Community Reinvestment Act notices, etc.) are posted.

(B) For consumers who are not given privacy notices, you must give the required notice when the consumer first obtains a product or service from you.

(C) Those portions of your website that offer consumer goods and services must contain access to the required notice.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106312
Everette D. Jobe
Certifying Official
Finance Commission of Texas
Proposed date of adoption: December 14, 2001
For further information, please call: (512) 475-1300

♦ ♦ ♦

PART 2. TEXAS DEPARTMENT OF BANKING

CHAPTER 11. MISCELLANEOUS

SUBCHAPTER A. GENERAL

7 TAC §11.37

The Finance Commission of Texas (the commission) proposes new §11.37 concerning the filing of consumer complaints with the Texas Department of Banking (department).

Section 11.37 will implement the requirements of Finance Code, §11.307, pertaining to the filing of consumer complaints with the department.

Proposed §11.37 will specify the manner in which banks, foreign banks, bank holding companies, and trust companies provide consumers with information on how to file complaints with the department. The proposed section will also require that the information on how to file complaints be included with each privacy notice a bank, foreign bank, bank holding company, or trust company is required by law to provide to consumers.

Gayle Griffin, Deputy Commissioner, Texas Department of Banking, has determined that, for each year of the first five years that the section is in effect, there will be no fiscal implication for state or local government as a result of enforcing or administering the section as adopted.

Mr. Griffin also has determined that, for each of the first five years the section as adopted is in effect, the public benefit anticipated as a result of the adoption of this section will be the provision of information to the consumers of banks, foreign banks, bank holding companies, and trust companies on how to file complaints with the department. Costs to comply with this section will be less than $100.00, and there will be no deleterious effect on small businesses.

Comments on proposed §11.37 may be submitted to Steven L. Martin, Deputy General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4294, or by e-mail to: steve.martin@banking.state.tx.us.

Section 11.37 is proposed under the authority of Finance Code, §11.307, which requires the commission to adopt rules specifying the manner in which banks, foreign banks, bank holding companies, and trust companies provide consumers with information on how to file complaints with the department.

Finance Code, §11.307 is being implemented by this proposed new section.

§11.37. How Do I Provide Information to Consumers on How to File a Complaint?

(a) Definitions

(1) "Consumer" means an individual who obtains or has obtained a product or service from you that is to be used primarily for personal, family, or household purposes.

(2) "Privacy notice" means any notice which you give regarding a consumer's right to privacy as required by a specific state or federal law.

(3) "Required notice" means a notice in a form set forth or provided for in subsection (b)(1) of this section.

(4) "You" means a bank, foreign bank, bank holding company, or trust company that is chartered, licensed, or registered by the Texas Department of Banking under the Finance Code.

(b) How do I provide notice of how to file complaints?

(1) You must use the following notice in order to let your consumers know how to file complaints: The (your name) is (chartered, licensed, or registered) under the laws of the State of Texas and by state law is subject to regulatory oversight by the Texas Department

of Banking. Any consumer wishing to file a complaint against the (your name) should contact the Texas Department of Banking through one of the means indicated below: In Person or U.S. Mail: 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4294; Telephone No.: 877/276-5554; Fax No.: 512/475-1313; E-mail: consumer.complaints@banking.state.tx.us; Website: www.banking.state.tx.us.

(2) You must provide the required notice in the language in which a transaction is conducted.

(3) You must include the required notice with each privacy notice that you send out.

(4) Regardless of whether you are required by any state or federal law to give privacy notices, you must take appropriate steps to let your consumers know how to file complaints by giving them the required notice in compliance with paragraph (1) of this subsection.

(5) You must use the following measures to give the required notice:

(A) In each area where you conduct business on a face-to-face basis, you must conspicuously post the required notice. A notice is deemed to be conspicuously posted if a consumer with 20/20 vision can read it from the place where he or she would typically conduct business or if it is included on a bulletin board, in plain view, on which all required notices to the general public (such as equal housing posters, licenses, Community Reinvestment Act notices, etc.) are posted.

(B) For consumers who are not given privacy notices, you must give the required notice when the consumer first obtains a product or service from you.

(C) Those portions of your website that offer consumer goods and services must contain access to the required notice.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106313
Everette D. Jobe
Certifying Official
Texas Department of Banking
Proposed date of adoption: December 14, 2001
For further information, please call: (512) 475-1300

♦ ♦ ♦

CHAPTER 25. PREPAID FUNERAL CONTRACTS

SUBCHAPTER A. CONTRACT FORMS

7 TAC §§25.1 - 25.6

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Banking or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Finance Commission of Texas (the commission) proposes the repeal of §§25.1 - 25.6, concerning contract forms for sale of prepaid funeral benefits. The sections proposed for repeal will be replaced with new §§25.1 - 25.6, proposed for comment in this issue of the *Texas Register*. The proposed repeal will not be adopted until and unless the new proposed sections are adopted.

Amendments in law made by the 77th Texas Legislature, effective September 1, 2001, require that existing §§25.1 - 25.6 be rewritten. Revisions are sufficiently extensive to require repeal and replacement by new sections.

Everette D. Jobe, General Counsel, Texas Department of Banking, has determined that for the first five-year period the repeals are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeals.

Mr. Jobe also has determined that for each year of the first five years the repeals are in effect the public benefit anticipated as a result of enforcing the repeals is elimination of obsolete provisions and the clarification of highly complex statutory standards to aid the industry in compliance. No net economic cost will result to persons required to comply with the repeals. No difference will exist between the cost of compliance for small businesses and the cost of compliance for the largest businesses affected by these repeals.

Comments on the proposed repeals may be submitted in writing to Christine Delmas, Assistant General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4294. Comments may also be submitted by e-mail to Christine.Delmas@banking.state.tx.us.

The repeals are proposed under Finance Code, §154.051, which authorizes the commission to adopt reasonable rules concerning enforcement and administration of Finance Code, Chapter 154.

Finance Code, Chapter 154, is affected by the proposed repeals.

§25.1. Definitions.

§25.2. All Prepaid Funeral Contracts.

§25.3. Insurance-Funded Contracts.

§25.4. Trust Funded Contracts.

§25.5. Filings and Review.

§25.6. Distribution of Contract Copies.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106314
Everette D. Jobe
Certifying Official
Texas Department of Banking
Proposed date of adoption: December 14, 2001
For further information, please call: (512) 475-1300

♦ ♦ ♦

7 TAC §25.1 - 25.6

The Finance Commission of Texas (the commission) proposes new §§25.1 - 25.6, concerning contract forms. Existing §§25.1 - 25.6 in this title are proposed to be repealed in this issue of the *Texas Register*, although the repeal will not be adopted until and unless the new proposed sections are adopted.

The commission is proposing these sections to guide a prepaid funeral benefits contract seller in complying with law. Finance

Code, §154.151(a) requires the Texas Department of Banking (department) to approve a sales contract form for prepaid funeral benefits before a licensed seller uses the form. Amendments enacted by the Texas Legislature to Finance Code, Chapter 154, effective September 1, 2001, significantly alter the legal requirements applicable to a prepaid funeral benefits contract, requiring licensees to revise their contract forms. As amended, Finance Code, §§11.307, 154.151, and 154.156, obligate the commission and the department to provide new standard disclosures, model contract forms, and "plain language" contract standards. Construed narrowly, the new requirements directly affect only current §§25.2 - 25.4 but indirectly affect §§25.1, 25.5, and 25.6 to a sufficient degree that extensive revisions are appropriate.

Proposed §25.1 defines terms commonly used in prepaid funeral benefits contracting and terms that will simplify understanding of legal requirements. Most definitions should be easily understood and applied. The definition of "you" in §25.1(9), a prepaid funeral benefits seller that is currently licensed under Finance Code, Chapter 154, is designed to identify the primary user of §§25.2 - 25.6 in order to make the rules simpler and more direct and understandable. The proposed sections apply only to licensed sellers.

Under Finance Code, §154.151(a), the department must approve a sales contract form for prepaid funeral benefits before a seller uses the form. Finance Code, §154.151(d), provides that a prepaid funeral benefits contract, whether in English or Spanish, must be written in plain language designed to be easily understood by the average consumer. Further, the contract must be printed in an easily readable font and type size. The department is charged with providing model contracts that comply with these directives and must enforce the provisions as applied to contract forms submitted by industry for approval. A form waiver of right of cancellation must also be approved by the department, see Finance Code, §154.156(a).

The department recently published model prepaid funeral benefits contracts for both insurance-funded and trust-funded arrangements and a waiver of cancellation rights, as required by Finance Code, §154.151(d) and §154.156(a). These forms were developed with the assistance of the regulated industry and are still being improved. A few provisions in the models directly reflect certain required, standard disclosures and these provisions are incorporated into the proposed sections as appropriate and discussed further in this preamble. (The models use the term "you" to describe the purchaser of a prepaid funeral benefits contract, not the seller as the proposed sections do, because the focus of the models is the contractual relationship between a seller and a purchaser.)

Proposed §25.2 explains how a seller may use the model forms developed by the department, and generally describes the requirements applicable to non-model forms. The model contracts and waiver are still in development and the latest versions are available from the department's web site, in English. The department anticipates the models will be final and available in both English and Spanish versions before adoption of the proposal.

Proposed §25.3 imposes requirements for the content and certain formatting aspects of a non-model form submitted for department approval. Subsection (a) collects all requirements in summary form that are more explicitly described in subsequent subsections of §25.3 and in proposed §25.4 and §25.5. In preparing the proposal, the department tried to satisfy state law requirements while permitting the variations that may be necessary to comply with other state or federal law. Comment is specifically requested whether any requirement in the proposal is inconsistent with a requirement of other state or federal law.

Finance Code, §154.151(e), requires the commission to adopt rules establishing "a standard disclosure that must be included in each contract to inform purchasers of the goods and services that will be provided or excluded under the contract and the circumstances under which the contract may be modified after death of the beneficiary." As a specific application of these requirements, the model contract forms contain the required disclosures. Non-model contracts are required to contain the funeral goods and services disclosure by proposed §25.3(b) and the modifications after death disclosure by proposed §25.3(g).

Finance Code, §11.307(a), requires the commission to adopt rules, applicable to each entity regulated by the department, requiring the entity to provide consumers with information on how to file complaints with the department. The commission has separately proposed new §25.41 in this issue of the *Texas Register* to apply this requirement to a prepaid funeral benefits seller. As a specific application of this requirement, the model contract forms contain the required disclosure. Proposed §25.3(j) requires the same disclosure to appear in non-model forms.

Proposed §25.4 articulates the plain language principles, including font and type size, that are incorporated into the model forms and will apply to non-model contract and waiver forms submitted for department approval. This plain language requirement is imposed by Finance Code, §154.151(d). The proposal currently contemplates applying plain language principles to a submitted form in English and then requiring a certified Spanish translation as evidence that the Spanish version contract is in plain language, see proposed §25.5(b)(2). Comment is requested regarding how the department may more effectively determine that a Spanish language contract is in "plain language designed to be easily understood by the average consumer."

The department researched plain language writing and determined that plain language principles sound deceptively simple but can dramatically improve readability and understandability if followed. Plain language writing does not mean deleting complex information to make the document easier to understand. A plain language document uses words economically and at a level the audience can understand. Its sentence structure is tight. Its tone is welcoming and direct. Its design is visually appealing. The department located numerous resources from which to derive the requirements of proposed §25.4, including the information and links available at http://www.plainlanguagenetwork.org/ and http://www.plainlanguage.gov.

A proposed non-model contract or waiver should substantially comply with each of the plain language writing principles stated in proposed §25.4(b) and avoid the plain language impediments identified in proposed §25.4(c). The principles stated in proposed §25.4(b) and (c) seek to avoid the most common writing problems that hinder a reader's understanding, including overly long sentences, overuse of passive voice and weak verbs, and unnecessary use of technical jargon and artificially defined terms.

The proposed rule incorporates several plain language formatting concepts in proposed §25.4(d) - (f). Subsection (d) addresses typeface (font) selection and describes both serif and sans serif typefaces and the relative advantages of these categories of typeface. The basic text of a proposed non-model

document must be set in a serif typeface. Titles, headings, subheadings, captions, and illustrative or explanatory tables or sidebars may be set in a sans serif typeface for emphasis.

The department has specified the minimum type size (measured in points (pt)) in proposed §25.4(e)(1) as equivalent to a Times typeface in 10pt, and will permit smaller sizes for certain provisions. Most resources reviewed by the department suggest 10pt as the minimum size and urge consideration of 12pt or larger if the document is designed for an elderly audience. In specifying what is generally considered a smaller than desirable type size for certain sections of the document, the department sought a compromise between easy legibility and other advisable requirements, such as keeping related disclosures grouped together or satisfying a requirement to keep specified text on a single page. However, the department encourages sellers to consider submitting form documents that use a larger and more legible type size.

The proposal also addresses linespacing, or "leading", which refers to the amount of space between lines of text. The department specified minimum leading in proposed §25.4(e)(2) as about 120% of type size, provided this standard results in at least two points of additional leading between lines of type.

Document design and formatting can enhance or hinder readability. Proposed §25.4(f) states a preference for left justified, ragged right text and encourages use of descriptive headings and subheadings and tabular presentations.

The department will apply several automated readability tests contained in Microsoft Word and Corel WordPerfect software to documents submitted for approval. The person submitting a proposed document for approval will be expected to apply the same tests before submission and explain how the results are consistent with the requirements of proposed §25.4. Mechanical readability formulas are flawed because they cannot analyze substantive content. The department will therefore not rely solely on the readability statistics generated by these tests but will instead use them to supplement the department's evaluation of more subjective factors. However, in the absence of a suitable explanation that is consistent with plain language principles, a document that fails one of the four common tests listed in proposed §25.4(g)(1) will ordinarily not be approved.

Proposed §25.5 clearly states the filing requirements and procedures applicable to department approval of a non-model document. A fee is imposed of $250 plus $60 per hour spent by department employees in excess of one hour in evaluating the proposed document submitted for approval. A seller will have the option of seeking judicial review of a department decision by following the specified procedures. Under proposed §25.5(f), effective March 1, 2002, a seller will be unable to use a form contract that was approved prior to September 1, 2001. Such forms are currently permissible if coupled with the model addendum developed by and available from the department. The department is permitting use of the addendum as an interim step while requirements for new contract forms are developed.

Finally, proposed §25.6 rephrases and reorganizes existing §25.6 in a manner consistent with this proposal without adding new substantive content.

Stephanie Newberg, Deputy Commissioner, Texas Department of Banking, has determined that, for each year of the first five years that the sections are in effect, there will be no fiscal implication for state or local government as a result of enforcing or administering the sections as adopted.

Ms. Newberg also has determined that, for each of the first five years the sections as adopted are in effect, the public benefit anticipated as a result of the adoption of the sections will be enhanced guidance to industry regarding legal requirements for prepaid funeral benefits contracts and a predictable application process for approval of contract forms. Consumers will also benefit by the use of more uniform contracts throughout the industry. Consumers should be able to gain greater understanding and awareness of the effect of specific prepaid funeral contract provisions and will be better informed regarding how to contact the department for questions and complaints.

Additional economic costs will be incurred by a person required to comply with this proposal. Because a seller fully complies with the proposal by using the department's model forms, the additional costs imposed by the proposal are limited to costs associated with copying a contract that is longer than formerly required and costs attributable to loss of obsolete forms inventory. Additional copy costs are estimated to be approximately $0.30 - 0.40 per contract. A seller that chooses to develop customized contract forms and pursue department approval will incur a minimum filing fee of $250 plus costs associated with form development and representation before the department. There will be no adverse effect on small businesses as compared to the effect on large businesses, assuming small businesses elect to use the model contracts developed and furnished by the department.

Comments regarding proposed §§25.1 - 25.6 may be submitted to Christine Delmas, Assistant General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4294, or by e-mail to christine.delmas@banking.state.tx.us.

Sections 25.1 - 25.6 are proposed under Finance Code, §154.051(b), which authorizes the commission to adopt reasonable rules regarding matters relating to the enforcement and administration of Chapter 154, including rules concerning the filing of contracts. Additional authority and applicable requirements are provided by Finance Code, §§11.307(a) and (b), 154.151(d) and (e), and 154.156(a).

Finance Code, Chapter 154, is affected by proposed new §§25.1 - 25.6.

§25.1. Definitions.

Words and terms used in this subchapter that are defined in Finance Code, Chapter 154, have the same meanings as defined in the Finance Code. The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Contract beneficiary--The person for whom a prepaid funeral benefits contract is purchased.

(2) Model contract--A generic prepaid funeral benefits contract form developed and published by the department for your use.

(3) Model waiver--A generic form developed and published by the department for your use, by which a purchaser may waive the right to cancel a prepaid funeral benefits contract as permitted by Finance Code, §154.156(a).

(4) Non-model contract--A prepaid funeral benefits contract form that differs from the model contract with respect to the requirements and standards of §25.3 of this title (relating to What Requirements Apply to a Non-Model Contract) and §25.4 of this title (relating to What Are the Plain Language Requirements for a Non-Model Contract or Waiver). A model contract does not become a non-model contract because you add your name, trademark, or other information

about you, or information about a third party funeral home or provider if you are relying on another to perform portions of the contract.

(5) Non-model waiver--A form of waiver that has the same purpose as but differs from the model waiver with respect to the requirements and standards of §25.2(c) of this title (relating to Am I Required to Use the Model Contract and Model Waiver) and §25.4 of this title. For example, a model waiver does not become a non-model waiver because you add your name, trademark, or other information about you, or information about a third party funeral home or provider if you are relying on another to perform portions of the contract.

(6) Prepaid funeral benefits contract--A contract or agreement for prepaid funeral benefits, whether funded by trust deposits or insurance policies.

(7) Purchaser--The person who is contracting to buy prepaid funeral benefits, who may also be the contract beneficiary. If permitted by the context, the term includes the purchaser's authorized agent.

(8) Responsible person--The person charged with the disposition of the contract beneficiary's remains by Health and Safety Code, §711.002(a).

(9) You--A prepaid funeral benefits seller licensed under Finance Code, Chapter 154.

§25.2. Am I Required to Use the Model Contract and Model Waiver?

(a) Use of model contract and waiver. You may use the appropriate model contract or the model waiver described in this subsection but you are not required to do so if you obtain approval to use a non-model contract or waiver.

(1) The department has adopted separate model contracts for sale of trust-funded and insurance-funded prepaid funeral benefits and a model waiver, in English and in Spanish, for your use. Each model contact or waiver meets all statutory requirements and you may download them from the department's web site or request them by mail. The department's web site address is http://www.banking.state.tx.us.

(2) You may use a current model contract or model waiver after the department receives a copy of your form document and verifies that it has been customized by inserting your name and permit number. Your submitted form document may also contain other information about you or a third party funeral home or provider as long as you do not otherwise alter the model document.

(b) Non-model contracts. Before you use a non-model contract, it must:

(1) satisfy the substantive content requirements of §25.3 of this title (relating to What Requirements Apply to a Non-Model Contract or Waiver), as the department determines;

(2) qualify under the plain language principles stated in §25.4 of this title (relating to What Are the Plain Language Requirements for a Non-Model Contract or Waiver), as the department determines; and

(3) be approved by the department as provided in §25.5 of this title (relating to How Do I Obtain Approval of a Non-Model Contract or Waiver).

(c) Non-model waivers. You may use a non-model waiver, but it must contain identical provisions to the model waiver and use substantially the same language as the model waiver. You must submit a non-model waiver to the department for approval in the manner required by §25.5 of this title. The model waiver in English appears as:
Figure: 7 TAC §25.2(c)

§25.3. What Requirements Apply to a Non-Model Contract or Waiver?

(a) Requirements. The department must approve a non-model contract before you can use it. Your proposed non-model contract must:

(1) inform the purchaser of the funeral goods and services that will be provided or excluded under the contract, as a standard disclosure described by subsection (b) of this section;

(2) define terms used in the contract as described by subsection (c) of this section;

(3) state and explain your obligations and the obligations of the purchaser, a third party funeral home or provider if you are relying on another to perform portions of the contract, and the insurance company if the contract is insurance-funded, as described by subsection (d) of this section;

(4) disclose and explain the purchaser's cancellation rights under the contract and each funding insurance policy, if any, as described by subsection (e) of this section;

(5) state events of default for all parties and explain the consequences of default as described by subsection (f) of this section;

(6) state and explain the circumstances under which the responsible person may modify or change the contract at the death of the contract beneficiary, as described by subsection (g) of this section;

(7) disclose and explain all payment terms and related provisions as described by subsection (h) of this section;

(8) contain a section for required signatures and related notices as described by subsection (i) of this section;

(9) contain an explanation of how a purchaser can make inquiries or file complaints with specified regulatory agencies, as a standard disclosure described by subsection (j) of this section;

(10) comply with subsection (k) of this section;

(11) comply with §25.4 of this title (relating to What Are the Plain Language Requirements for a Non-Model Contract or Waiver); and

(12) be approved by the department as provided by §25.5 of this title (relating to How Do I Obtain Approval of a Non-Model Contract or Waiver).

(b) Statement of funeral goods and services selected. The first section of a proposed prepaid funeral benefits contract must inform the purchaser of the funeral goods and services that you will provide or exclude under the contract, as required by Finance Code, §154.151(e). This section must appear entirely on page one of the contract exactly as set out in the model contract and in the figure below including substantially the same formatting and spacing, except:
Figure: 7 TAC §25.3(b)

(1) you may move specific goods and services between general description categories;

(2) you may move specific goods and services between the category of goods and services to be provided and the category of goods and services not included in the contract;

(3) you may change the description of specific goods or services if the alteration does not change the intent of the description in the standard disclosure;

(4) you may add other, specific funeral goods and services to the list of included funeral goods and services;

(5) you may delete the item designated "cash advance items" under included funeral goods and services as if you do not sell cash advance items as prepaid funeral benefits and you list all cash advance items under funeral goods and services not normally included; and

(6) you may delete check boxes and related text for sealing features in casket and outer burial container descriptions, for example, "seal", "non-seal", "protective", and "non-protective", if these features are not included in the funeral home's price list.

(c) Definitions. Your proposed prepaid funeral benefits contract must list, define, and use the terms "contract beneficiary", "responsible person", "funeral home", "purchaser", and "seller" substantially as defined in each model contract. You may substitute the term "provider" for "funeral home" if appropriate. If your proposed contract is to be funded by insurance, you must also list, define, and use the terms "insurance company", "insurance policy", and "premiums" in the contract substantially as defined in the department's insurance-funded model contract. You may list, define and use additional terms if they are consistent with the requirements of §25.4 of this title.

(d) General provisions. Your proposed prepaid funeral benefits contract must recognize and explain your obligations and those of the purchaser, the third party funeral home or provider if you are relying on another to perform portions of the contract, and the insurance company if the contract is insurance-funded, with respect to:

(1) your obligation (and the third party funeral home or provider's obligation, if you are relying on another to perform portions of the contract) to furnish the funeral goods and services selected in the contract for a cost not to exceed the total contract price at the death of the contract beneficiary, if the purchaser has fully complied with the contract and each funding insurance policy, if any;

(2) the purchaser's inability to change selected funeral goods and services during the life of the contract;

(3) the extent to and conditions under which the purchaser may change:

(A) the funeral home or provider specified in the contract without losing the cost guarantee feature;

(B) the contract beneficiary; and

(C) other provisions or requirements of the contract;

(4) the extent to which:

(A) the purchaser will have any tax liability for earnings attributable to the contract or a funding insurance policy, if any, and whether and the manner in which you or the insurer, if applicable, will withhold funds to pay any tax liability;

(B) you offer any warranties or guarantees or assert any specific disclaimers of warranty;

(C) the contract is binding on a person who assumes the rights or obligations of a party to the contract; and

(D) you will refund to the purchaser any available funds in excess of the contract price at the time the funeral is performed or keep the excess funds (or a third party funeral home or provider keeps the excess funds);

(5) each party's general contractual duties under the contract;

(6) the manner in which a party must notify other parties of a change of address; and

(7) other contractual provisions of a general nature.

(e) Cancellation or assignment. Your proposed prepaid funeral benefits contract must recognize and explain:

(1) the requirement for and 15-day delay that applies to a separate, written waiver of cancellation rights if the purchaser chooses to irrevocably waive the right to cancel the contract;

(2) the manner in and conditions under which the purchaser may cancel the contract and each funding insurance policy, if any, including:

(A) the procedural requirements applicable to a cancellation, including the requirement of requesting cancellation in writing on department-approved forms and paying a refund not later than the 30th day after receipt of the purchaser's written cancellation notice;

(B) the amount of the refund or other payment that you will owe the purchaser if the contract or a funding insurance policy, if any, is canceled and the conditions or circumstances that may alter the refund amount;

(3) the refund or other benefits you will owe the purchaser if the contract is canceled at your request;

(4) the prohibition on partial cancellation of the contract, loans against the contract, and loans against or withdrawal of proceeds accrued under a funding insurance policy, if any;

(5) only with respect to a trust-funded contract, whether or not performance of the contract is guaranteed by the prepaid funeral guaranty fund created by §25.17 of this title (relating to Guaranty Fund);

(6) only with respect to an insurance-funded contract:

(A) the purchaser's right to assign the purchaser's interest in a funding insurance policy by signing a separate document; and

(B) that canceling the contract does not automatically cancel the insurance policy but canceling the insurance policy does cancel the contract; and

(7) the extent to which other provisions of the contract or governing law materially impact contract cancellation rights and insurance policy cancellation rights, if applicable.

(f) Default. Your proposed prepaid funeral benefits contract must explain events and consequences of default under the contract and under each funding insurance policy, if any, including:

(1) the consequences of incomplete or late payments;

(2) the effect on the contract and on a funding insurance policy, if any, and on payments due if the contract beneficiary dies before the purchaser's payment obligations on the contract or insurance policy have been completed;

(3) the conditions under which you may owe a full or partial refund to the purchaser as a consequence of your inability (or a third party funeral home or provider's inability, if you are relying on another to perform portions of the contract) to furnish the selected funeral goods and services; and

(4) other provisions of the contract or governing law that materially impact the purchaser in the event of default by any party to the contract or a funding insurance policy, if any.

(g) Changes to a contract at the death of contract beneficiary. Your proposed prepaid funeral benefits contract must disclose the circumstances under which the contract may be modified by the responsible person at the death of the contract beneficiary, as required by Finance Code, §154.151(e). The disclosure must appear exactly as set

out in the model contract and in the figure below without modification, except you may use a larger type size if feasible.
Figure: 7 TAC §25.3(g)

(h) Payment terms. Your proposed prepaid funeral benefits contract must clearly state and explain payment terms and related provisions, including:

(1) how and when you will deposit a payment or apply it to a funding insurance policy, if any;

(2) with respect to a trust-funded contract, whether and the extent to which you will retain a portion of the purchaser's payments for reimbursement of your operating and selling expenses;

(3) the finance charges you will impose, if applicable, provided that the description required by this paragraph must also comply with Finance Code, Chapter 345, and other state and federal law governing such charges;

(4) with respect to an insurance-funded contract:

(A) the consequence if insurance coverage is denied and the manner in which written notice of the reason for denial will be sent to the purchaser; and

(B) notice that insurance premiums paid on the underlying insurance policy or policies may exceed the total contract price; and

(5) other contract provisions that materially relate to payment terms under a contract or a funding insurance policy.

(i) Required signatures and notices. Your proposed prepaid funeral benefits contract must contain a section for required signatures and related notices that appears in its entirety on the last page of the contract. This section must include:

(1) a list of all items that must be received or offered before the contract can be signed;

(2) if required by state or federal law, cooling-off period language that includes spaces to note when and where the contract was signed;

(3) notice that the purchaser will receive a copy of the contract and may request a copy of the insurance policy, if applicable;

(4) spaces for:

(A) the purchaser's printed name, mailing address, social security number, if required, and signature line;

(B) the funeral home or provider's printed name and mailing address, and spaces for the printed name and signature of the authorized officer or agent signing on behalf of the funeral home or provider;

(C) your printed name and mailing address, and spaces for the printed name and signature of the authorized officer or agent signing on your behalf; and

(D) the printed name, mailing address, and date of birth of the sole individual designated as contract beneficiary; and

(5) other provisions, party identifications, or certifications legally required for valid execution of the contract.

(j) Inquiries and complaints notice. Your proposed prepaid funeral benefits contract must disclose how a purchaser, potential purchaser or consumer can make consumer inquiries and complaints to the department as required by Finance Code, §11.307(a), and §25.41 of this title (relating to How Do I Provide Information to Consumers on How to File a Consumer Complaint), and to certain other state regulatory agencies with appropriate jurisdiction. This disclosure must appear exactly as set out in the relevant model contract, including the state seal and the names and contact information for each regulatory agency, without modification, and will vary in context depending on whether the proposed contract is trust-funded or insurance- funded. The model disclosures for both trust-funded and insurance-funded contracts appear in the figure below. This disclosure must appear at the end of the last page of the contract.
Figure: 7 TAC §25.3(j)

(k) A proposed prepaid funeral benefits contract must also contain:

(1) page numbers;

(2) a document title that includes the term "Prepaid Funeral Benefits Contract";

(3) a distinguishing form number or name;

(4) your permit number;

(5) a space for the contract number; and

(6) all consumer disclosures required by other state or federal law for the type of transaction the contract represents.

§25.4. What Are the Plain Language Requirements for a Non-Model Contract or Waiver?

(a) Overview. If you elect to not use a model contract or waiver, you must prepare a non-model prepaid funeral benefits contract or a waiver of cancellation rights, whether in English or Spanish, in plain language designed to be easily understood by the average consumer. Your proposed non-model document must also be printed in an easily readable font and type size. The department is charged with enforcing these requirements by Finance Code, §154.151(d).

(b) Plain language principles for English documents. The department will consider the extent to which you have incorporated plain language principles into the organization, language, and design of a non-model document that you submit for approval. At a minimum, your proposed non-model document should substantially comply with each of the plain language writing principles identified in this subsection.

(1) You must present information in clear, concise sections, paragraphs, and sentences. Whenever possible, you should use the active voice with strong verbs in short, explanatory sentences and bullet lists. Passive voice is not banned but should be used sparingly.

(2) You should use everyday words whenever possible and avoid the use of legal and highly technical business terminology. In those instances where no plain language alternative is apparent, you should explain what the term means when the term is first used. Use of a defined term may improve readability in such instances.

(3) You should group related information together whenever possible to help identify and eliminate repetitious information.

(4) You should use first-person plural (we, us, our/ours) and second-person singular (you, your/yours) pronouns.

(5) You should make complex information more understandable by using an example scenario or a "question and answer" format.

(c) Attributes to avoid. The department will consider the extent to which you avoid the detrimental attributes identified in this subsection. In preparing your proposed non-model document, you should not:

(1) include a term in definitions unless the meaning of the term is unclear from the context and cannot be easily explained in context, or rely on artificially defined terms as the primary means of explaining information;

(2) use superfluous words (words that can be replaced with fewer words that mean the same thing) that detract from understanding;

(3) rely on legalistic or overly complex presentations;

(4) copy complex information directly from legal documents, statutes, or rules without a clear and concise explanation of the material;

(5) unnecessarily repeat information in different sections of the non-model document; or

(6) use multiple negatives.

(d) Typeface (font). Typefaces come in two varieties: serif and sans serif. All serif typefaces have small lines at the beginning or ending strokes of each letter. Sans serif typefaces lack those small connective lines.

(1) The text of your proposed non-model document must be set in a serif typeface. Popular serif typefaces include Times, Scala, Caslon, Century Schoolbook, and Garamond.

(2) A sans serif typeface may be used for titles, headings, subheadings, captions, and illustrative or explanatory tables or sidebars to distinguish between different levels of information or provide emphasis. Popular sans serif typefaces include Scala Sans, Franklin Gothic, Frutiger, Helvetica, Ariel, and Univers.

(e) Type size and line spacing. You must select a type size for your proposed non-model document that is clearly legible. Minimum type size and line spacing are specified in this subsection. If other state or federal law requires a different type size for a specific disclosure or contractual provision, you should set the specific disclosure or contractual provision in the type size specified by other law.

(1) Typeface size is referred to in points (pt). Because different typefaces in the same point size are not of equal size, type size is not strictly defined in this subsection but is expressed as a minimum size in the Times typeface for visual comparative purposes. Use of a larger size typeface is encouraged. Generally, the type size must be at least as large as 10pt in the Times typeface, except the type size must be at least as large as 8-1/2pt in the Times typeface for:

(A) the statement of funeral goods and services selected, as described in §25.3(b) of this title (relating to What Requirements Apply to a Non-Model Contract);

(B) the required signatures and notices, as described in §25.3(i) of this title; and

(C) the consumer inquiries and complaints disclosure, described in §25.3(j) of this title.

(2) You must use line spacing that is at least 120% of the type size. For example, a 10pt type should be set with 12pt leading (two points of additional leading between the lines).

(3) The department may approve a smaller type size or denser line spacing than specified in this subsection in limited circumstances, such as keeping related disclosures grouped together or satisfying a requirement to keep specified text on a single page. However, you must offset smaller type size or denser line spacing by use of other readability enhancements such as a more readable typeface or greater use of white space through wider margins or divisions between sections of the document.

(f) Formatting and design. The department will consider the extent to which your non-model document uses the plain language formatting and design concepts described in this subsection.

(1) You must align the text flush on the left, with a loose, or ragged, right edge. Although discouraged, you may seek approval of a document with full justification (text aligned flush on both left and right sides), but your proposed document must at a minimum use a larger type size than specified in subsection (e) of this section. You should also add other readability enhancements, such as a more readable typeface or greater use of white space, including wider margins and additional leading between lines.

(2) The recommended page size of a proposed non-model contract is 8-1/2 inches by 14 inches and 8-1/2 inches by 11 inches for a proposed non-model waiver.

(3) You must use descriptive headings and subheadings that match the headings in the department's model contract.

(4) You may use tabular presentations or bullet lists to simplify disclosure of complex material. You may also use pictures, logos, charts, graphs, or other design elements so long as the design is not misleading and the required information is clear.

(5) If you act as both seller and funeral home or provider, you may eliminate duplicate information created by separate references to the seller and to the funeral home or provider. For example, you may define and use the term "seller/provider" or "seller/funeral home" to indicate your multiple roles.

(g) Readability statistics. The department will consider the readability statistics generated by your non-model document in the tests described in this subsection.

(1) The department's evaluation of your proposed non-model document will include results of automated readability tests applied to the complete document, without omission of titles or other attributes of the document. These tests are commonly available in word processing software, including Microsoft Word and Corel WordPerfect. Because mechanical readability formulas do not evaluate the substantive content of a document, the department will exercise judgment when considering the readability statistics generated by these tests. However, absent explanatory circumstances or additional justification persuasive to the commissioner, your proposed non-model document will ordinarily not be approved if:

(A) over 20% of the sentences are passive in structure;

(B) the average sentence length exceeds 19 words;

(C) the Flesch reading ease score is less that 49.0; and

(D) the Flesch-Kincaid grade level score is higher than 10.5.

(2) As part of your application for department approval, you must disclose the readability statistics you generated in evaluating the final draft of your proposed document and explain the circumstances and justifications for any scores outside the parameters expressed in this subsection.

§25.5. How Do I Obtain Approval of a Non-Model Contract or Waiver?

(a) Authority. Finance Code, §154.151(a), requires the department to approve a prepaid funeral benefits contract form before you use the form. Finance Code, §154.156(a), requires the department to approve a waiver of cancellation rights form in the same manner. You may use the department's model contracts or model waiver as provided in §25.2(a) of this title (relating to Am I Required to Use the Model Contract and Model Waiver).

(b) Submission of proposed non-model document. You must submit a written request for the department's approval of your proposed non-model document as far in advance of the date you intend to use it as possible. At the same time, you must also submit:

(1) both a printed copy of your proposed non-model document and an electronic version of the document, prepared using Microsoft Word or Corel WordPerfect software;

(2) if any proposed sales transaction utilizing your submitted non-model document could be conducted predominately in Spanish, a copy of the Spanish version of the document and a certification from a translation service acceptable to the commissioner that the Spanish version is a true and correct translation of the submitted English version;

(3) unless you notify the department that it already has a copy on file:

(A) a copy of all related contracts and agreements that are part of your prepaid funeral arrangement, such as a separate finance charge agreement; and

(B) if you intend to fund your proposed contract by insurance, a copy of the insurance policy form you intend to use and written evidence from the Texas Department of Insurance that the insurance policy has been approved; and

(4) the filing fee required by subsection (d) of this section.

(c) Review process. This subsection describes the procedure the department will follow in considering whether to approve your proposed non-model document.

(1) As soon as reasonably possible after the department receives your request for approval of a non-model document and all other required submissions, the department will either approve or deny approval of your proposed non-model document in writing. If approval is denied, the department will state the basis for the denial.

(2) If the department denies approval of your non-model document, you may submit a new proposed non-model document that you have modified to address the reasons for denial, and the department will consider the request for approval to remain open pending the additional submission. At your option, you may submit a written request for hearing before the commissioner to seek approval of the non-model document that the department sought to disapprove.

(3) If you request a hearing, the department will coordinate with you and set a hearing date as soon as reasonably possible. At the hearing, the department bears the burden of proof that:

(A) your submitted non-model contract fails to meet the standards of §25.3 of this title (relating to What Requirements Apply to a Non-Model Contract or Waiver) or §25.4 of this title (relating to What Are the Plain Language Requirements for a Non- Model Contract or Waiver); or

(B) your submitted non-model waiver fails to meet the standards of §25.2(c) or §25.4 of this title.

(4) After your hearing ends, the commissioner will issue an order approving or denying approval of your proposed non-model document. You may appeal the order as provided in Government Code, Chapter 2001.

(d) Fees. The filing fee for a request to approve a non-model document is $250, due at the time the request is submitted. If the department's review of a non-model document takes longer than one hour, you must pay an additional fee of $60 per additional hour, due on or before the 10th day after you receive a written statement of charges due from the department. Your failure to pay fees when due constitutes grounds for denial of approval for the submitted non-model document.

(e) Application of other state and federal law. If you submit a non-model document for approval, you must certify that the submitted non-model document complies with all applicable state and federal law, including Finance Code, Chapter 154, and this chapter. In approving a non-model document, the department does not determine that it complies with laws and regulations administered by another state or federal regulatory agency with appropriate jurisdiction.

(f) Withdrawn approval. The department may withdraw its approval of a model or previously approved non-model document for future use if governing law is changed or clarified by statute, rule, or judicial opinion. After February 28, 2002, you may not use a document approved by the department before September 1, 2001, unless the form complies with current law and is again submitted for approval as required by this section.

§25.6. How and When are Contract Copies Distributed Between the Parties?

(a) At the conclusion of a discussion about funeral arrangements, if someone purchases prepaid funeral goods or services, whether trust-funded or insurance-funded, you must give the purchaser a copy of the contract and all related agreements. You must also give the purchaser a copy of the completed insurance policy application if the contract is to be funded by insurance.

(b) With respect to an insurance-funded prepaid funeral benefits contract, on or before the 30th day after you execute the contract, you must give a copy of:

(1) the face page of the fully executed insurance policy to the purchaser and a copy of the entire insurance policy if the purchaser requests it; and

(2) the fully executed prepaid funeral benefits contract to the insurance company issuing the funding insurance policy.

(c) On or before the 30th day after the contract is executed by all parties, you must give a copy of the executed contract to any third-party provider or administrator that has responsibility for any portion of the contract.

(d) If a purchaser signs a waiver of cancellation rights, you must give the purchaser a copy of the executed waiver.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106315
Everette D. Jobe
Certifying Official
Texas Department of Banking
Proposed date of adoption: December 14, 2001
For further information, please call: (512) 475-1301

♦ ♦ ♦

SUBCHAPTER B. REGULATION OF LICENSES

7 TAC §25.41

The Finance Commission of Texas (the commission) proposes new §25.41 concerning the filing of consumer complaints with the Texas Department of Banking (department).

Section 25.41 will implement the requirements of Finance Code, §11.307, pertaining to the filing of consumer complaints with the department.

Proposed §25.41 will specify the manner in which prepaid funeral benefits contract sellers provide consumers with information on how to file complaints with the department. The proposed section will also require that the information on how to file complaints be included with each privacy notice a prepaid funeral benefits contract seller is required by law to provide to consumers.

Stephanie Newberg, Deputy Commissioner, Texas Department of Banking, has determined that, for each year of the first five years that the section is in effect, there will be no fiscal implication for state or local government as a result of enforcing or administering the section as adopted.

Ms. Newberg also has determined that, for each of the first five years the section as adopted is in effect, the public benefit anticipated as a result of the adoption of this section will be the provision of information to the consumers of prepaid funeral benefits contract sellers on how to file complaints with the department. Costs to comply with this section will be less than $100.00, and there will be no deleterious effect on small businesses.

Comments on proposed §25.41 may be submitted to Steven L. Martin, Deputy General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4294, or by e-mail to: steve.martin@banking.state.tx.us.

Section 25.41 is proposed under the authority of Finance Code, §11.307, which requires the commission to adopt rules specifying the manner in which prepaid funeral benefits contract sellers provide consumers with information on how to file complaints with the department.

Finance Code, §11.307 is being implemented by this proposed new section.

§25.41. How Do I Provide Information to Consumers on How to File a Complaint?

(a) Definitions

(1) "Consumer" means an individual who obtains or has obtained a product or service from you that is to be used primarily for personal, family, or household purposes.

(2) "Privacy notice" means any notice which you give regarding a consumer's right to privacy as required by a specific state or federal law.

(3) "Required notice" means a notice in a form set forth or provided for in subsection (b)(1) of this section.

(4) "You" means a prepaid funeral benefits contract seller that is licensed or permitted by the Texas Department of Banking under the Finance Code.

(b) How do I provide notice of how to file complaints?

(1) You must use the following notice in order to let your consumers know how to file complaints: The (your name) is licensed or permitted under the laws of the State of Texas and by state law is subject to regulatory oversight by the Texas Department of Banking. Any consumer wishing to file a complaint against the (your name) should contact the Texas Department of Banking through one of the means indicated below: In Person or U.S. Mail: 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4294; Telephone No.: 877/276-5554; Fax No.: 512/475-1288; E-mail: consumer.complaints@banking.state.tx.us; Website: www.banking.state.tx.us.

(2) You must provide the required notice in the language in which a transaction is conducted.

(3) You must include the required notice with each privacy notice that you send out.

(4) Regardless of whether you are required by any state or federal law to give privacy notices, you must take appropriate steps to let your consumers know how to file complaints by giving them the required notice in compliance with paragraph (1) of this subsection.

(5) You must use the following measures to give the required notice:

(A) In each area where you conduct business on a face-to-face basis, you must conspicuously post the required notice. A notice is deemed to be conspicuously posted if a consumer with 20/20 vision can read it from the place where he or she would typically conduct business or if it is included on a bulletin board, in plain view, on which all required notices to the general public (such as equal housing posters, licenses, Community Reinvestment Act notices, etc.) are posted.

(B) For consumers who are not given privacy notices, you must give the required notice when the consumer first obtains a product or service from you.

(C) Those portions of your website that offer consumer goods and services must contain access to the required notice.

(D) You must also include in all contract forms the notice required by §25.3(j) of this title (relating to What Requirements Apply to a Non-Model Contract or Waiver).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106316
Everette D. Jobe
Certifying Official
Texas Department of Banking
Proposed date of adoption: December 14, 2001
For further information, please call: (512) 475-1300

♦ ♦ ♦

CHAPTER 26. PERPETUAL CARE CEMETERIES

7 TAC §26.11

The Finance Commission of Texas (the commission) proposes new §26.11 concerning the filing of consumer complaints with the Texas Department of Banking (department).

Section 26.11 will implement the requirements of Finance Code, §11.307, pertaining to the filing of consumer complaints with the department.

Proposed §26.11 will specify the manner in which perpetual care cemeteries provide consumers with information on how to file

complaints with the department. The proposed section will also require that the information on how to file complaints be included with each privacy notice a perpetual care cemetery is required by law to provide to consumers.

Stephanie Newberg, Deputy Commissioner, Texas Department of Banking, has determined that, for each year of the first five years that the section is in effect, there will be no fiscal implication for state or local government as a result of enforcing or administering the section as adopted.

Ms. Newberg also has determined that, for each of the first five years the section as adopted is in effect, the public benefit anticipated as a result of the adoption of this section will be the provision of information to the consumers of perpetual care cemeteries on how to file complaints with the department. Costs to comply with this section will be less than $100.00, and there will be no deleterious effect on small businesses.

Comments on proposed §26.11 may be submitted to Steven L. Martin, Deputy General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4294, or by e-mail to: steve.martin@banking.state.tx.us.

Section 26.11 is proposed under the authority of Finance Code, §11.307, which requires the commission to adopt rules specifying the manner in which perpetual care cemeteries provide consumers with information on how to file complaints with the department.

Finance Code, §11.307 is being implemented by this proposed new section.

§26.11. How Do I Provide Information to Consumers on How to File a Complaint?

(a) Definitions

(1) "Consumer" means an individual who obtains or has obtained a product or service from you that is to be used primarily for personal, family, or household purposes.

(2) "Privacy notice" means any notice which you give regarding a consumer's right to privacy as required by a specific state or federal law.

(3) "Required notice" means a notice in a form set forth or provided for in subsection (b)(1) of this section.

(4) "You" means a perpetual care cemetery that is certificated by the Texas Department of Banking under the Finance Code.

(b) How do I provide notice of how to file complaints?

(1) You must use the following notice in order to let your consumers know how to file complaints: The (your name) is certificated under the laws of the State of Texas and by state law is subject to regulatory oversight by the Texas Department of Banking. Any consumer wishing to file a complaint against the (your name) should contact the Texas Department of Banking through one of the means indicated below: In Person or U.S. Mail: 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4294; Telephone No.: 877/276-5554; Fax No.: 512/475-1288; E-mail: consumer.complaints@banking.state.tx.us; Website: www.banking.state.tx.us.

(2) You must provide the required notice in the language in which a transaction is conducted.

(3) You must include the required notice with each privacy notice that you send out.

(4) Regardless of whether you are required by any state or federal law to give privacy notices, you must take appropriate steps to let your consumers know how to file complaints by giving them the required notice in compliance with paragraph (1) of this subsection.

(5) You must use the following measures to give the required notice:

(A) In each area where you conduct business on a face-to-face basis, you must conspicuously post the required notice. A notice is deemed to be conspicuously posted if a consumer with 20/20 vision can read it from the place where he or she would typically conduct business or if it is included on a bulletin board, in plain view, on which all required notices to the general public (such as equal housing posters, licenses, Community Reinvestment Act notices, etc.) are posted.

(B) For consumers who are not given privacy notices, you must give the required notice when the consumer first obtains a product or service from you.

(C) Those portions of your website that offer consumer goods and services must contain access to the required notice.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106317
Everette D. Jobe
Certifying Official
Texas Department of Banking
Proposed date of adoption: December 14, 2001
For further information, please call: (512) 475-1300

♦ ♦ ♦

CHAPTER 29. SALE OF CHECKS ACT

7 TAC §29.21

The Finance Commission of Texas (the commission) proposes new §29.21, concerning the filing of consumer complaints with the Texas Department of Banking (department).

Section 29.21 will implement the requirements of Finance Code, §11.307, pertaining to the filing of consumer complaints with the department.

Proposed §29.21 will specify the manner in which sale of checks licensees provide consumers with information on how to file complaints with the department. The proposed section will also require that the information on how to file complaints be included with each privacy notice a sale of checks licensee is required by law to provide to consumers.

Stephanie Newberg, Deputy Commissioner, Texas Department of Banking, has determined that, for each year of the first five years that the section is in effect, there will be no fiscal implication for state or local government as a result of enforcing or administering the section as adopted.

Ms. Newberg also has determined that, for each of the first five years the section as adopted is in effect, the public benefit anticipated as a result of the adoption of this section will be the provision of information to the consumers of sale of checks licensees on how to file complaints with the department. Costs to comply with this section will be less than $100.00, and there will be no deleterious effect on small businesses.

Comments on proposed §29.21 may be submitted to Steven L. Martin, Deputy General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4294, or by e-mail to: steve.martin@banking.state.tx.us.

Section 29.21 is proposed under the authority of Finance Code, §11.307, which requires the commission to adopt rules specifying the manner in which sale of checks licensees provide consumers with information on how to file complaints with the department.

Finance Code, §11.307 is being implemented by this proposed new section.

§29.21. How Do I Provide Information to Consumers on How to File a Complaint?

(a) Definitions

(1) "Consumer" means an individual who obtains or has obtained a product or service from you that is to be used primarily for personal, family, or household purposes.

(2) "Privacy notice" means any notice which you give regarding a consumer's right to privacy as required by a specific state or federal law.

(3) "Required notice" means a notice in a form set forth or provided for in subsection (b)(1) of this section.

(4) "You" means a sale of checks licensee that is licensed by the Texas Department of Banking under the Finance Code.

(b) How do I provide notice of how to file complaints?

(1) You must use the following notice in order to let your consumers know how to file complaints: The (your name) is licensed under the laws of the State of Texas and by state law is subject to regulatory oversight by the Texas Department of Banking. Any consumer wishing to file a complaint against the (your name) should contact the Texas Department of Banking through one of the means indicated below: In Person or U.S. Mail: 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4294; Telephone No.: 877/276-5554; Fax No.: 512/475-1288; E-mail: consumer.complaints@banking.state.tx.us; Website: www.banking.state.tx.us.

(2) You must provide the required notice in the language in which a transaction is conducted.

(3) You must include the required notice with each privacy notice that you send out.

(4) Regardless of whether you are required by any state or federal law to give privacy notices, you must take appropriate steps to let your consumers know how to file complaints by giving them the required notice in compliance with paragraph (1) of this subsection.

(5) You must use the following measures to give the required notice:

(A) In each area where you conduct business on a face-to-face basis, you must conspicuously post the required notice. A notice is deemed to be conspicuously posted if a consumer with 20/20 vision can read it from the place where he or she would typically conduct business or if it is included on a bulletin board, in plain view, on which all required notices to the general public (such as equal housing posters, licenses, Community Reinvestment Act notices, etc.) are posted.

(B) For consumers who are not given privacy notices, you must give the required notice when the consumer first obtains a product or service from you.

(C) Those portions of your website that offer consumer goods and services must contain access to the required notice.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106318
Everette D. Jobe
Certifying Official
Texas Department of Banking
Proposed date of adoption: December 14, 2001
For further information, please call: (512) 475-1300

♦ ♦ ♦

CHAPTER 31. PRIVATE CHILD SUPPORT ENFORCEMENT AGENCIES

The Finance Commission of Texas (the "commission") proposes new Chapter 31, §§31.1, 31.11 - 31.19, 31.31 - 31.39, 31.51 - 31.56, 31.71 - 31.76, 31.91 - 31.96, 31.111 - 31.115, concerning the licensing and regulation of private child support enforcement agencies ("agencies").

The proposed chapter will implement the requirements of Finance Code, Chapter 396, pertaining to the department licensing and regulating the agencies.

The proposed chapter specifies the requirements for persons to receive certifications to engage in business as agencies. The proposed chapter sets forth: requirements for relocating, the process for relocating, closing, or ceasing business; the process for certifying agencies licensed in other states; prohibited practices; procedures for filing a complaint; the department's enforcement authority; and the appeal process for denied, suspended, or revoked certification.

Stephanie Newberg, Deputy Commissioner, Texas Department of Banking, has determined that for each year of the first five years that the proposed chapter is in effect, there will be no fiscal implication for local government, but a fiscal implication of $5,000 for state government as a result of enforcing or administering the proposed chapter as adopted.

Ms. Newberg also has determined that, for each of the first five years the section as adopted is in effect, the public benefit anticipated as a result of the adoption of the proposed chapter will be a clearer understanding of the agencies products by consumers and fewer incidents of questionable or abusive collection practices by agencies. Persons required to comply with this section will incur a $500 annual cost of regulation, $500 triennial registration fee for each location, $750 to $1,500 for a surety bond, and the expense of drafting and printing new contracts. There may be some additional expense to the agencies in notifying obligors and obligees of the Department's regulatory authority. There will be no deleterious effect on small businesses.

Comments on proposed Chapter 31 may be submitted to Shannon Phillips, Assistant General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4294, or by e-mail to: sphillips@banking.state.tx.us.

SUBCHAPTER A. GENERAL PROVISIONS

7 TAC §31.1

The new sections are proposed under the authority of Finance Code, §396.051(b), which requires the commission to adopt rules as necessary for the administration of the chapter.

Finance Code, Chapter 396, is affected by the proposed new sections.

§31.1. Definitions.

The following words and terms, when used in this chapter shall have the following meanings, unless the context clearly indicates otherwise.

(1) Additional registered office--A registered office of an agency that is not the principal business office.

(2) Agency--A private child support enforcement agency, including a foreign private child support agency, that is or is desiring to register under Chapter 396.

(3) Certificate of registration--The form specified by the department certifying that an agency has fulfilled the registration requirements of Chapter 396 and this chapter for the registered location indicated thereon. A certificate of registration is sometimes referred to as a "certificate."

(4) Chapter 396--Finance Code Chapter 396, as amended.

(5) Child support enforcement--An action, conduct, or practice in enforcing, or in soliciting for enforcement, a child support obligation, including the collection of an amount owed under a child support obligation.

(6) Child support obligation--An obligation for the payment of financial support for a child under an order or writ issued by a court or other tribunal.

(7) Client--An obligee who has contracted with the child support enforcement agency for the enforcement of a child support obligation.

(8) Controlling interest--Ownership interest in a private child support enforcement agency of 25 percent or more.

(9) Department--The Texas Department of Banking.

(10) Foreign agency--A private child support enforcement agency that engages in business in this state solely by use of telephone, mail, the Internet, facsimile transmission, or any other means of interstate communication.

(11) Hearings officer--An employee of the department designated by the banking commissioner to take certain actions on behalf of the banking commissioner.

(12) Material change--A change to information provided that could affect or be taken into consideration by the department or banking commissioner in acting or making a decision on issuing, revoking, or suspending an agency's certificate of registration.

(13) Obligee--The person identified in an order for child support issued by a court or other tribunal as the payee to whom an obligor's amounts of ordered child support are due.

(14) Obligor--The person identified in an order for child support issued by a court or other tribunal as the individual required to make payments to an obligee under the terms of a support order for a child.

(15) Person--An individual, partnership, joint stock or other association, trust, or corporation. The term does not include the United States, this state, or any other governmental entity.

(16) Principal business office--The registered office designated in the agency's application for registration as its principal business office. This location must be in Texas if the agency has a location in Texas.

(17) Principal owner--The person who has the largest ownership interest in the agency. If two or more persons have the largest ownership interest in the agency, this term includes each person.

(18) Private child support enforcement agency--An individual or nongovernmental entity that engages in the enforcement of child support ordered by a court or other tribunal for a fee or other consideration. The term does not include:

(A) an attorney enforcing a child support obligation on behalf of, and in the name of, a client, unless the attorney has an employee who is not an attorney and who on behalf of the attorney:

(i) regularly solicits for child support enforcement; or

(ii) regularly contacts child support obligees or obligors for the purpose of child support enforcement;

(B) a state agency designated to serve as the state's Title IV-D agency in accordance with Part D, Title IV, Social Security Act (42 U.S.C. *Section 651 et seq.*), as amended; or

(C) a contractor awarded a contract to engage in child support enforcement on behalf of a governmental agency, including a contractor awarded a contract:

(i) under Chapter 236, Family Code; or

(ii) by a political subdivision of this or another state that is authorized by law to enforce a child support obligation.

(19) Registered office--A physical location of an agency where:

(A) its records are maintained;

(B) child support payments are received or processed;

(C) it conducts activities in collecting child support obligations;

(D) appointments are conducted with obligees; or

(E) contracts are executed by obligees.

(20) Sign--

(A) to sign; or

(B) to execute or otherwise adopt a symbol, or encrypt or similarly process a record in whole or in part, with the present intent of the authenticating person to identify the person and adopt or accept a record.

(21) You or Your--A duly authorized representative of an agency.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106319

Everette D. Jobe
Certifying Official
Texas Department of Banking
Proposed date of adoption: December 14, 2001
For further information, please call: (512) 475-1300

♦ ♦ ♦

SUBCHAPTER B. HOW DO I REGISTER MY AGENCY TO ENGAGE IN THE BUSINESS OF CHILD SUPPORT ENFORCEMENT?

7 TAC §§31.11 - 31.19

The new sections are proposed under the authority of Finance Code, §396.051(b), which requires the commission to adopt rules as necessary for the administration of the chapter.

Finance Code, Chapter 396, is affected by the proposed new sections.

§31.11. What must I do to legally engage in the business of child support enforcement in Texas?

(a) First, you must submit an application to the department for a certificate of registration that includes the following information:

(1) with respect to your agency and its principal owner, the name, title, physical street address, mailing address, business telephone number, fax number, web site address, and e-mail address of:

(A) the principal owner;

(B) each person with a controlling interest;

(C) each officer and director;

(D) the principal business office; and

(E) each additional registered office;

(2) the name, address, states in which operated, and current license status of any agency ever operated in any state by:

(A) your agency;

(B) your agency's principal owner;

(C) an officer or director of your agency or your agency's principal owner, or

(D) a person owning a controlling interest in your agency or principal owner;

(3) a notarized statement by your agency's principal owner or chief executive officer stating that the application and accompanying information is accurate and truthful in all respects; and

(4) such other information as the banking commissioner may require you to submit.

(b) Second, you must submit the following documents with your application:

(1) a copy of your agency's assumed name certificate if it is doing business or intends to do business in this state under a different name; financial disclosures that comply with this chapter;

(2) a list containing information on each pending lawsuit (civil or criminal) involving your agency, including:

(A) the parties;

(B) a synopsis of the facts alleged by each party;

(C) the nature of the action;

(D) the court in which it is pending; and

(E) the amount in controversy;

(3) a list, containing the information required in paragraph (2) of this subsection, on each pending lawsuit involving an owner of a controlling interest in your agency that:

(A) is related to child support enforcement; or

(B) may affect your agency.

(4) a list for the previous ten years of each judgment awarded against your agency or any owner of a controlling interest in the agency and a statement as to whether an appeal is pending;

(5) a surety bond in the amount of $50,000 that meets the requirements of §31.12;

(6) a certificate of account status from the Texas Comptroller of Public Accounts or a certificate of good standing from the Texas Secretary of State, if you are a Texas business corporation or a foreign business corporation;

(7) a paper and electronic (Word or WordPerfect) copy of the form contract your agency will use for an obligee to engage its services to enforce a child support obligation and the scores you calculated under §31.14(c); and

(8) such other information as the banking commissioner may require you to submit.

(c) Third, you must submit a certified financial statement with your application containing the following:

(1) information that demonstrates the financial solvency of your agency;

(2) for your agency's most recent fiscal year:

(A) a balance sheet;

(B) an income statement; and

(C) a statement of change in equity and cash flow;

(3) if the end of your agency's most recent fiscal year was more than 120 days prior to submission of your application, an interim version of each document required under paragraph (2) of this subsection covering the period from the end of the most recent fiscal year to a date less than 120 days prior to submission;

(4) a written certification by your agency's chief financial officer or accountant that:

(A) it is a true and correct statement of the agency's financial position; and

(B) that the agency is able to meet its financial obligations as they become due; and

(5) any information the banking commissioner requests you to submit to demonstrate your agency's financial solvency, including an audited financial statement.

(d) Fourth, you must submit the following fees with your application:

(1) a nonrefundable filing fee of $500 for each location you want to register; and

(2) a $500 fee to cover the annual cost of regulation.

§31.12. What are the requirements of my agency's surety bond?

(a) Your agency is required to maintain a surety bond in the amount of $50,000. The surety bond must be:

(1) approved by the department;

(2) issued by a surety company authorized to do business in this state;

(3) in favor of the department for the benefit of a person damaged by a violation of Chapter 396; and

(4) conditioned on your agency's compliance with Chapter 396 and this chapter and the faithful performance of the obligations under its agreements with its clients.

(b) Your agency's surety bond must be filed with and held by the department.

§31.13. May my agency make a deposit of money instead of a surety bond?

(a) Your agency may request in writing that instead of furnishing a surety bond the banking commissioner authorize it to deposit money with a federally insured depository in this state. You designate the depository. The banking commissioner must approve it. You must deposit an aggregate amount, including cash and certificates of deposit that equals $50,000. The banking commissioner must approve or deny your agency's request within 30 days of receipt.

(b) Your agency's deposit must be held in trust for the benefit of a person damaged by a violation of Chapter 396. The deposit secures the same obligations as the surety bond. Your agency is entitled to receive all interest and dividends on the deposit.

(c) If a claim is paid from your agency's money deposit, then within 15 days of the payment of the claim your agency must either:

(1) make a deposit pursuant to subsection (a) of this section in the amount of the money paid; or

(2) furnish the required surety bond.

§31.14. What are the requirements for the contract for services with my agency's clients?

(a) What elements must be in my agency's contract with obligees for engaging my agency's child support enforcement services? The contract requirements for your agency, or a foreign agency authorized to engage in business under Subchapter F of this chapter, are:

(1) dated;

(2) signed by both parties;

(3) written in clear language; and

(4) approved by the department.

(b) Will the department provide a model contract? The department will prepare and provide a clear language contract that your agency, or a foreign agency authorized to engage in business under Subchapter F of this chapter may use.

(c) How will I know if my agency's contract is in "clear language?"

(1) The department will apply automated readability tests contained in Microsoft Word or Corel WordPerfect software. Because mechanical readability formulas do not take into account the content of the document being evaluated, the department will not rely solely on these readability statistics. Unless you present a good reason, in writing, for failing to meet these standards, it is likely that your contract will not be approved if:

(A) over 20% of its sentences are passive in structure;

(B) the average sentence length exceeds 18 words;

(C) the Flesch Reading ease score is less that 49.0; and

(D) the Flesch-Kincaid grade level score is higher than 10.5.

(2) The department will compare your proposed contract to recognized techniques of plain language, including, but not limited to:

(A) organizing the material to emphasize the main ideas first, then progress down to the details;

(B) writing sections in a question and answer format;

(C) writing in a clear and coherent manner;

(D) using personal pronouns to write directly to the reader;

(E) writing to one reader;

(F) using the active voice primarily;

(G) using words with common and everyday meanings wherever practical;

(H) using paper that does not measure more than 8-1/2 inches by 11 inches if at all possible;

(I) printing in not less than 10-point type with line spacing at least 120% of the point size;

(J) dividing and captioning the contract in meaningful sequence such that each section contains an underlined, bold-faced, or otherwise conspicuous title or caption at the beginning of the section that indicates the nature or subject matter included or covered by the section of the contract;

(K) using an average sentence length of less than 15 words; and

(L) using informative tables, especially "if, then" tables, with respect to your fees and the length of the term of the contract.

(3) If your agency submits a contract that does not meet the requirements under paragraph (1) of this subsection, in the discretion of the banking commissioner, the contract may be approved if your contract otherwise uses the techniques of plain language and you submit a statement specifying:

(A) the reasonable efforts your agency made to draft the contract in clear language;

(B) the plain language techniques that were used in the drafting; and

(C) the reasons why the required readability level was not achieved.

(d) Are there any other contractual requirements for clients who engage the services of my agency on or after January 1, 2002? A written contract for the enforcement of child support executed on or after January 1, 2002 by your agency, or a foreign agency authorized to engage in business under Subchapter F of this chapter, must contain following provision in substantially similar language in a font at least as large as the other provisions of the contract, but no smaller than 10-point with line spacing at least 120% of the point size: Direct your inquiries to the Texas Department of Banking. Complaints must be in writing. Texas Department of Banking, 2601 North Lamar, Austin, Texas 78705, 877-276-5554 (toll free), www.banking.state.tx.us.

(e) Are there any other contractual requirements for clients who engaged the services of my agency prior to January 1, 2002? If prior to January 1, 2002, a client engaged the child support enforcement services of your agency, or a foreign agency authorized to engage in

business under Subchapter F of this chapter, without a written contract and the agency is continuing to perform services for the client, then on or before the effective date of Chapter 396, the agency must execute a contract with the client, complying with the provisions of this section.

§31.15. What if I am registering or renewing a certificate of registration for more than one agency location?

You may submit a single application to register or renew more than one location.

§31.16. How will I know if I have submitted all required information and the department has accepted my application?

The banking commissioner will send you a written notice, on or before the 15th day after initial submission of your application, telling you that:

(1) all filing fees have been paid and the application is complete and accepted for filing; or

(2) the application is deficient and specific additional information is required.

§31.17. How is my agency's application evaluated?

The banking commissioner or his appointed designee will investigate and evaluate facts related to your application including, but not limited to:

(1) completeness of the application and accompanying documentation;

(2) payment of required fees;

(3) financial solvency;

(4) compliance with the bonding requirements;

(5) prior history of conducting business, including all complaints;

(6) license revocations, suspensions or denials in any state;

(7) readability and plain language techniques used in your agency's contract; and

(8) such other information as the banking commissioner may require.

§31.18. When is an application or notice submitted by my agency abandoned?

(a) If you provide all required information on or before the 61st day after your agency submits an application or notice, the banking commissioner will accept it. Prior to the end of the initial 60-day period, you may request an automatic 30-day extension of time to submit required information. An additional extension may be requested in writing if your request is received prior to the expiration of the automatic extension. The additional extension will be granted only if the banking commissioner in the exercise of discretion finds that you have good and sufficient cause for the extension. The banking commissioner will mail notice of the decision to you within ten days of receipt of the request by the department.

(b) If you do not timely pay a fee or timely furnish information required by applicable law, rule, or request for additional information, then the banking commissioner may determine that your application or notice is abandoned. The banking commissioner will notify you in writing that it is abandoned.

(c) Any filing fees you paid related to an abandoned application or notice are nonrefundable. Any filing fee you did not pay related to an abandoned application or notice remain due and payable from you to the department. If paid, the fee for cost of regulation will be refunded to you.

(d) If your application or notice is considered abandoned, you may file it again without prejudice. A new filing fee will be required.

§31.19. When and how will my agency's certificate of registration be issued and mailed?

(a) On or before the 60th day after the date your application is accepted for filing the banking commissioner will either:

(1) approve your application by issuing a certificate of registration for each location approved; or

(2) refer your application to the administrative law judge for notice and hearing under Chapter 9 of this title.

(b) If your application is approved, the department will issue a certificate of registration for each location in your application.

(c) The banking commissioner will mail each certificate of registration for your agency to your agency's principal business office mailing address within 15 days of approval.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106320
Everette D. Jobe
Certifying Official
Texas Department of Banking
Proposed date of adoption: December 14, 2001
For further information, please call: (512) 475-1300

♦ ♦ ♦

SUBCHAPTER C. WHAT ARE MY AGENCY'S RESPONSIBILITIES AFTER REGISTRATION?

7 TAC §§31.31 - 31.39

The new sections are proposed under the authority of Finance Code, §396.051(b), which requires the commission to adopt rules as necessary for the administration of the chapter.

Finance Code, Chapter 396, is affected by the proposed new sections.

§31.31. Is my agency required to display its certificate of registration?

(a) Your agency, or a foreign agency authorized to engage in business under Subchapter F of this chapter, must have a certificate of registration posted in the lobby of each registered office at a point accessible to the public.

(b) If your agency, or a foreign agency authorized to engage in business under Subchapter F of this chapter, offers obligees the opportunity to contract for the agency's child support enforcement services electronically on its web site, the homepage of the web site must contain either:

(1) a link, in no less than 8 point font, to the page of the department's website which links to agency certificates of registration; or

(2) the certificate of registration graphic link provided by the department.

§31.32. Is there an annual fee requirement?

The $500 fee for cost of regulation must be paid annually to the department on or before the anniversary date of your certificate of registration.

§31.33. When does my agency's certificate of registration expire?

(a) The certificate of registration issued to your agency for establishment or renewal of its principal business office expires on the third anniversary date of its issuance.

(b) All additional certificates of registration issued to your agency will bear the same expiration date as the current certificate issued for your agency's principal business office.

§31.34. If my agency's certificate of registration expires soon, what must I do to renew it?

At least 60 days prior to the expiration of the certificate, you must file your application to renew the certificate of registration pursuant to the instructions in §31.11.

§31.35. Under what circumstances will the department issue a temporary certificate of registration to my agency?

(a) If your agency shows good cause for issuance of a temporary certificate, the banking commissioner, in exercise of discretion, may issue it. Good cause for issuance includes:

(1) Your agency's certificate will likely expire before a decision will be made on a timely submitted application for renewal of a certificate of registration.

(2) Final resolution of a complaint against your agency, that could result in suspension or revocation of its certificate, is not made before the expiration date of its certificate.

(b) Your agency's temporary certificate of registration will contain on its face an expiration date not more than 60 days after the date of issuance. Your agency's temporary certificate of registration expires immediately upon approval or denial of an application for certificate or renewal of a certificate. Your agency's temporary certificate may be revoked at any time by written notice from the banking commissioner. A temporary certificate of registration may be issued to your agency for each registered office.

§31.36. Where may my agency engage in the business of child support enforcement?

Your agency may only engage in the business of child support enforcement at a physical location for which the department has issued a certificate of registration. It is a violation of Chapter 396 and this chapter to engage in the business of child support enforcement at a physical location:

(1) that has not been issued a certificate by the department; or

(2) with an expired, suspended or revoked certificate.

§31.37. What practices is my agency prohibited from employing in enforcing a child support obligation?

(a) In enforcing a child support obligation, your agency may not use threats, coercion, or attempts to coerce that employ any of the following practices:

(1) using or threatening to use violence or other criminal means to cause harm to an obligor or property of the obligor;

(2) accusing falsely or threatening to accuse falsely an obligor of a violation of state or federal child support laws;

(3) taking or threatening to take an enforcement action against an obligor that is not authorized by law; or

(4) intentionally representing to a person that your agency is a governmental agency authorized to enforce a child support obligation.

(b) Your agency is not prevented from:

(1) informing an obligor that the obligor may be subject to penalties prescribed by law for failure to pay a child support obligation; or

(2) taking, or threatening to take, an action authorized by law for the enforcement of a child support obligation by your agency.

(c) In enforcing a child support obligation, your agency or an employee of your agency may not:

(1) identify your agency by any name other than one by which it is registered with the department;

(2) falsely represent the nature of the child support enforcement activities in which your agency is authorized by law to engage; or

(3) falsely represent that an oral or written communication is the communication of an attorney.

§31.38. What if my agency's information changes?

Your agency must notify the department of any material change in the information provided to the department not later than the 60th day after the date on which the information changes.

§31.39. What are the record keeping requirements for my agency?

(a) What records must my agency keep? Your agency must maintain records of all child support collections made on behalf of, and disbursed to, a client who is an obligee, including:

(1) the name of any obligor who made child support payments collected by your agency;

(2) the total amount of support collected by your agency for each client, including:

(A) the date on which the amount was collected;

(B) the date on which each amount due the client by the obligor was paid to the client; and

(C) the whereabouts and amounts of any child support payments collected but not yet distributed to the client;

(3) a copy of the order establishing the child support obligation under which a collection was made by the agency;

(4) any other pertinent information relating to the child support obligation, including any case, cause, or docket number of the court having jurisdiction over the matter;

(5) the original, signed contract for the agency's child support collection services and the correspondence pertaining to the contract;

(6) a list of complaints received from any source, including the following information on each complaint:

(A) the date received;

(B) the method used to make the complaint (e.g. telephone, fax, letter);

(C) the nature of the complaint;

(D) the name of the person making the complaint;

(E) the date and manner of the resolution of the complaint.

(b) How often must the records be updated? You must update the records required under this section at least monthly.

(c) How long must the records be kept? You must maintain the records required under this section for a period of four years from the

date of the last support payment collected by your agency on behalf of a client. You must fulfill this requirement even if your agency ceases to engage in the business of child support enforcement.

(d) May the records be maintained electronically? The required records may be maintained either chronologically or alphabetically in hard-copy form or on microfiche or in an electronic database from which they may be reasonably retrieved in hard-copy form.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106321
Everette D. Jobe
Certifying Official
Texas Department of Banking
Proposed date of adoption: December 14, 2001
For further information, please call: (512) 475-1300

♦ ♦ ♦

SUBCHAPTER D. WHAT ARE THE DEPARTMENT REQUIREMENTS FOR ADDING AN OFFICE, CLOSING AN OFFICE, RELOCATING AN OFFICE, TRANSFERRING CONTROL OF MY AGENCY, CEASING TO DO BUSINESS, OR CHANGING MY E-MAIL OR WEB SITE ADDRESSES?

7 TAC §§31.51 - 31.56

The new sections are proposed under the authority of Finance Code, §396.051(b), which requires the commission to adopt rules as necessary for the administration of the chapter.

Finance Code, Chapter 396, is affected by the proposed new sections.

§31.51. What if I want to establish an additional registered office?

(a) To establish an additional registered office and be issued a certificate for the office, you must submit a notice that includes the following information:

(1) the name, physical street address, mailing address, telephone number, fax number, web site, and e-mail address of:

(A) your agency; and

(B) the additional office your agency is establishing.

(2) whether your agency's principal business office will be located at the additional registered office to be established; and

(3) such other information as the banking commissioner may require you to submit.

(b) Along with your notice submitted under subsection (a) of this section, you must pay to the department a nonrefundable filing fee of:

(1) $500 if the application was submitted more than two years before the expiration date of the certificate of registration for the agency's principal business office; or

(2) $250 if the application was submitted two years or less before the expiration date of the certificate of registration for the agency's principal business office.

§31.52. What are the requirements for transferring a controlling interest in my agency?

(a) Except as provided in subsection (b) of this section, you may transfer a controlling interest in your agency, without issuance of new certificates of registration, 30 days or more after providing the department with the following information:

(1) the name, physical street address, mailing address, telephone number, fax number, web site, and e-mail address of:

(A) your agency;

(B) each person to whom you are transferring a controlling interest in your agency;

(C) each person owning a controlling interest in the person to whom you are transferring a controlling interest in your agency;

(2) the effective date of the transfer of a controlling interest;

(3) a statement signed by the principal owner of the agency and all transferees that the transfer of controlling interest will not cause the certificate of registration to expire under subsection (b) of this section; and

(4) such other information as the banking commissioner may require you to submit.

(b) All of your agency's certificates of registration will expire and you must surrender them immediately if:

(1) you transfer a controlling interest:

(A) in your agency; or

(B) in a person who owns a controlling interest in your agency; and

(2) the person or persons to whom you transfer the controlling interest:

(A) owned a controlling interest in an agency at the time it's registration was denied, suspended, or revoked, in any state; or

(B) were officers or directors in an agency at the time its registration was denied, suspended, or revoked in any state.

(c) If more than one person fitting the description under subsection (b)(2) of this section obtains an interest in your agency or in a person who owns a controlling interest in your agency, you must aggregate their interests to determine whether they have obtained a controlling interest described in subsection (b)(1) of this section.

(d) If your agency's certificates of registration expire under subsection (b) of this section, an application for registration under §31.11 may be submitted.

§31.53. What are the requirements for relocating my agency's principal business office or an additional registered office?

(a) What are the requirements for relocating my agency's principal business office to the location of an existing additional registered office? Your agency may relocate its principal business office to the location of an existing additional registered office, without issuance of new certificate, 15 days, after:

(1) paying a filing fee of:

(A) $500 if the application was submitted more than 2 years before the expiration date of the certificate of registration for the agency's principal business office; or

(B) $250 if the application was submitted 2 years or less before the expiration date of the certificate of registration for the agency's principal business office;

(2) completing the requirements of this chapter for closing a registered office, if the former principal business office will not remain open as an additional registered office;

(3) filing a written notice with the department disclosing:

(A) the new address of your principal business office;

(B) that the new principal business office location is an existing additional registered office; and

(C) whether your agency's former principal business office will remain open as an additional registered office; and

(4) submitting such other information as the banking commissioner may require you to submit.

(b) What are the requirements for establishing a new registered office and relocating my agency's principal business office to it? To establish a new registered office, be issued a certificate for the office, and relocate your agency's principal business office to it, your agency must:

(1) complete the requirements for establishing an additional registered office under §31.51; and

(2) if the agency is closing its former principal business office location, complete the requirements under §31.54.

(c) What are the requirements for relocating an additional registered office? To be issued a certificate for an additional registered office that you propose to relocate, your agency must:

(1) complete the requirements for establishing an additional registered office under §31.51; and

(2) complete the requirements under §31.54 for the former location of the relocated additional registered office.

§31.54. What are the requirements for closing a registered office?

(a) For each registered office you propose to close, you must file a written notice with the banking commissioner, at least 30 days prior to the date you propose to close the registered office, disclosing:

(1) your agency's name,

(2) physical street address, mailing address, telephone number, fax number, web site, and e-mail address of:

(A) the registered office that is closing;

(B) your agency's principal business office;

(C) the registered office where your agency is transferring the records and operations of the registered office that is closing;

(3) the effective date of the closing;

(4) a copy of a letter notifying all of your agency's client currently served by that registered office that the office is closing and evidence that you distributed it to those clients at least 45 days prior to closing the registered office; and

(5) such other information as the banking commissioner may require you to submit.

(b) Within 30 days of the submission of a completed notice under subsection (a) of this section, the department will notify you in writing that:

(1) your notice was complete; and

(2) that you must surrender the certificate of registration for the closed registered office within 15 days of receiving the notification.

§31.55. What are the department's requirements for changing my agency's web site URL or e-mail address?

You must notify the department within 15 days of changing your agency's web site URL or e-mail address. If you change your agency's web site URL address, then, if possible, the former web site URL address must link to the new address for 60 days.

§31.56. What are the requirements for my agency to cease engaging in the business of child support enforcement?

(a) Thirty days before your agency will cease engaging in the business of child support enforcement, you must submit to the department a notice containing:

(1) the name, physical street address, mailing address, telephone number, fax number, web site, and e-mail address:

(A) of your agency;

(B) of all registered offices of your agency;

(C) of all officers, directors, and owners of your agency;

(D) where the department can reach the following persons after your agency ceases engaging in the business of child support enforcement:

(i) your agency's chief executive officer;

(ii) your agency's principal owner;

(iii) your agency's officers and directors; and

(iv) anyone owning a controlling interest in your agency or in the principal owner of your agency.

(2) a notarized statement by the chief executive officer or principal owner of your agency that all child support payments received on behalf of its clients have been properly distributed to the clients;

(3) a copy of a written notice that your agency is ceasing to engage in the business of child support enforcement and evidence that your agency distributed it to all its clients at least 45 days prior to the proposed date of closing;

(4) the physical street address, mailing address, telephone number, fax number, and Internet or other electronic mail address of the location where your agency will hold agency records for the period of time required under Chapter 396; and

(5) such other information as the banking commissioner may require you to submit.

(b) The written notice your agency is required to send each client under subsection (a) of this section must include:

(1) the date the agency intends to cease engaging in the business of child support enforcement;

(2) a form for the client to change his or her address with the registry through which child support payments are paid;

(3) an accounting of all child support payments collected on behalf of the client, the amounts remitted to the client, the amount of fees retained by the agency, and the amount of outstanding child support the agency is currently under contract to collect;

(4) the consumer hotline telephone number, address, and web site address of the department; and

(5) such other information as the banking commissioner may require you to submit.

(c) Within 15 days after the date your agency closes, it must surrender all certificates and submit a statement to the department, sworn to by the chief executive officer of your agency as being truthful and correct, disclosing:

(1) that your agency has distributed all client funds; and

(2) a list of all outstanding complaints from your clients or obligors or that your agency has no such outstanding complaints.

(d) This section does not affect a contract between your agency and a client, and your agency may not rely on this section to escape any continuing contractual obligations.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106322
Everette D. Jobe
Certifying Official
Texas Department of Banking
Proposed date of adoption: December 14, 2001
For further information, please call: (512) 475-1300

♦ ♦ ♦

SUBCHAPTER E. HOW DOES THE DEPARTMENT EXERCISE ITS ENFORCEMENT AUTHORITY?

7 TAC §§31.71 - 31.76

The new sections are proposed under the authority of Finance Code, §396.051(b), which requires the commission to adopt rules as necessary for the administration of the chapter.

Finance Code, Chapter 396, is affected by the proposed new sections.

§31.71. How will obligors and clients be notified of the department's licensing and enforcement authority?

(a) How will clients engaging the services of my agency prior to January 1, 2002 be notified of the department's licensing and enforcement authority? If prior to January 1, 2002, a client executed a written contract with a your agency, or a foreign agency authorized to engage in business under Subchapter F of this chapter, to enforce child support and the agency is continuing to perform services for the client on or after January 1, 2002, then on or before February 1, 2002 the agency must send the client a letter containing, in substantially similar language, the provision contained in §31.14(d). Type the provision in font at least as large as the font used for the text of the letter, but no smaller than 10-point with line spacing at least 120% of the point size.

(b) How will obligors of clients engaging the services of my agency be notified of the department's licensing and enforcement authority? If your agency, or a foreign agency authorized to engage in business under Subchapter F of this chapter, has contracted with a client to enforce a child support obligation against an obligor, it must include with its initial written communication with the obligor or within 15 days of its initial oral communication with the obligor, whichever is earlier, a letter containing, in substantially similar language, the provision contained in §31.14(d). If your agency made its initial communication with an obligor prior to January 1, 2002, it must include the provision in its next written communication with the obligor or in a letter within 15 days of its next oral communication with the obligor, whichever is earlier. Type the provision in font at least as large as the font used for the text of the letter, but no smaller than 10-point with line spacing at least 120% of the point size;

§31.72. What claims may be made against my agency's surety bond or money deposit?

(a) A person may make a claim against your agency's surety bond or money deposit in lieu of a surety bond for actual financial losses if:

(1) a court of competent jurisdiction liquidated the financial losses and entered an award, under Finance Code, §396.351, against your agency in favor of the person making the claim against the bond or money deposit, and either:

(A) the time for appeal of the award has passed; or

(B) all appeals have been exhausted and award has been upheld in whole or in part; or

(2) after a hearing and issuance of a proposal for decision by the administrative law judge:

(A) the banking commissioner signed a final order adopting, or modifying and adopting the proposal for decision;

(B) the final order found that the person making the claim against your agency's bond or money deposit suffered actual financial losses due to your agency's violation of Chapter 396; and

(C) either:

(i) the time for appeal of the banking commissioner's order has passed; or

(ii) all appeals of the banking commissioner's have been exhausted and the banking commissioner's order has been upheld in whole or in part.

(b) If there is an appeal of an order or award described in subsection (a) of this section, the person making a claim against your agency's surety bond or money deposit may only claim the amount of actual financial losses upheld upon final appeal.

§31.73. How does the department conduct the administrative investigation of complaint filed against my agency?

(a) How is a complaint filed against my agency? A person may file a complaint against your agency for violation of Chapter 396 or this chapter in writing mailed, faxed, or e-mailed to the department at 2601 North Lamar Blvd., Austin, Texas 78705, (512) 475-1313, or consumer.complaints@banking.state.tx.us.

(b) Is there a form for filing a complaint against my agency? The department will prepare and provide a form to anyone requesting it. Request the form by calling the toll free consumer hotline at 877-276-5554.

(c) How does the department investigate a complaint filed against my agency? Within 30 days of receiving a complaint under Finance Code, §396.304, the department will initiate an investigation into the merits of the complaint.

(d) Who conducts the investigation? The banking commissioner may appoint a hearings officer to conduct the investigation.

(e) Is my agency required to submit records relating to the complaint? Your agency must submit records requested by the banking commissioner, or a hearings officer appointed under this section, within ten business days of receiving a written request for the records.

(f) Can we mediate a complaint against my agency? The banking commissioner, or a hearings officer appointed under this section, may arrange for the services of a qualified mediator and attempt to:

(1) resolve the complaint and any differences between the parties; and

(2) reach a settlement without the requirement of further investigation.

(g) What if the evidence does not support a complaint filed against my agency?

(1) The banking commissioner after an initial investigation may dismiss the complaint against your agency; or

(2) The banking commissioner may delegate to a hearings officer appointed to investigate a complaint against your agency the authority to dismiss the complaint, after notice to each affected party and an opportunity for hearing.

(h) Will the banking commissioner allow my agency to take corrective action to resolve the complaint? It is within the banking commissioner's discretion to permit your agency to take appropriate action to correct a failure to comply and not revoke, suspend, or deny the registration of the agency.

(i) What if a complaint arises from a bona fide error by my agency? If your agency's failure to comply with Chapter 396 or this chapter was the result of bona fide error that occurred despite the use of reasonable procedures to avoid the error, the failure is not a violation of Chapter 396 or this chapter.

§31.74. How can the department deny my agency's application or revoke or suspend its registration?

(a) How can my agency's registration be revoked? After notice and hearing, under Chapter 9 of this title, the banking commissioner may revoke the registration of your agency if it has:

(1) failed to comply with this chapter or Chapter 396;

(2) failed to pay a fee or other charge imposed by the department; and

(3) failed to maintain and produce at the request of the department records attesting to the financial solvency of your agency or other business records concerning client accounts.

(b) How can my agency's registration be suspended or its renewal of registration be denied? After notice and hearing, under Chapter 9 of this title, the banking commissioner may suspend the registration or deny the renewal of registration of your agency if it has failed:

(1) to comply with this chapter or Chapter 396;

(2) to pay a fee or other charge imposed by the department; or

(3) to maintain and produce at the request of the department records attesting to its financial solvency or other business records concerning client accounts.

(c) How can an application for certificate of registration submitted by my agency be denied? After notice and hearing, under Chapter 9 of this title, the banking commissioner may deny the registration of your agency if it has:

(1) failed to comply with this chapter or Chapter 396; or

(2) failed to pay a fee or other charge imposed by the department.

§31.75. How is the hearing process conducted?

(a) When will a hearing be held on a complaint filed against my agency, on an application filed by my agency under this chapter, or on my agency's registration? The matter must be referred to the administrative law judge for notice and hearing under Chapter 9 of this title if at the completion of the investigation of the matter, the banking commissioner, his designee or a hearings officer appointed under this section, determines that sufficient evidentiary basis exists:

(1) supporting the complaint filed against your agency;

(2) to deny your agency's application filed under this chapter; or

(3) to revoke or suspend your agency's registration.

(b) How is a hearing on a complaint against my agency, on an application filed by my agency, or on my agency's registration conducted?

(1) If the matter is referred to the administrative law judge, appropriate order(s) must be entered and the hearing conducted within 30 days after the date the hearing was granted, or as soon thereafter as is reasonably possible, under Chapter 9 of this title and the Administrative Procedure Act (*Texas Government Code, Chapter 2001*).

(2) Issues will be limited to those on which testimony is absolutely necessary.

(3) The administrative law judge may require testimony be submitted in written form and prefiled.

(4) No evidence will be received on matters that are not in dispute.

(5) No issues or evidence will be considered that are not relevant to the standards set forth in this chapter or that are not supported by the notice, response, or reply. Chapter 9 of this title governs a proposal for decision, exceptions and replies to such proposal for decision, the final decision of the banking commissioner, and motions for rehearing.

§31.76. Is it possible to appeal a decision of the department on a complaint filed against my agency?

If you, or another person who is a party to the complaint, is harmed by a decision of the department on a complaint against your agency, then you or that person may appeal the decision to a district court in Travis County.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106323
Everette D. Jobe
Certifying Official
Texas Department of Banking
Proposed date of adoption: December 14, 2001
For further information, please call: (512) 475-1300

♦ ♦ ♦

SUBCHAPTER F. FOREIGN AGENCIES REGISTERED IN OTHER STATES

7 TAC §§31.91 - 31.96

The new sections are proposed under the authority of Finance Code, §396.051(b), which requires the commission to adopt rules as necessary for the administration of the chapter.

Finance Code, Chapter 396, is affected by the proposed new sections.

§31.91. Are registration requirements waived if my foreign agency is registered in another state?

The department may waive any prerequisite to obtaining a registration for your foreign agency:

(1) after reviewing your foreign agency's credentials and determining that it holds a valid registration or other authorization from another state whose requirements are substantially equivalent to those imposed under Chapter 396; or

(2) after determining that your foreign agency has a valid registration or other authorization from another state with which this state has a reciprocity agreement.

§31.92. How can my foreign agency obtain a registration exemption and an authorization to engage in business in this state?

(a) If your foreign agency meets the requirements of §31.91, you may submit an application with:

(1) the following information:

(A) with respect to your agency and its principal owner, the name, title, physical street address, mailing address, telephone number, fax number, and Internet or other electronic mail address of:

(i) the principal owner;

(ii) each person with a controlling interest;

(iii) each officer and director;

(iv) the principal business office; and

(v) each additional registered office;

(B) the name, address, states in which operated, and current license status of any agency ever operated in any state by:

(i) your agency;

(ii) your agency's principal owner;

(iii) an officer or director of your agency or your agency's principal owner; or

(iv) a person owning a controlling interest in your agency or principal owner;

(C) a copy of the form contract your foreign agency will use for an obligee to engage its services to enforce a child support obligation; and

(D) a notarized statement by your chief executive officer stating that the application and all accompanying documents are accurate and truthful in all respects; and

(2) a surety bond or deposit of money that meets the requirements of this chapter unless you provide proof to the satisfaction of the department that your foreign agency maintains in the state in which that it has its principal office an adequate bond or similar instrument for purposes similar to the purposes required for the filing of a surety bond in this state;

(3) a copy of the license or other authorization issued by the state in which that agency is authorized to operate;

(4) a paper and electronic (Word or WordPerfect) copy of the form contract your agency will use for an obligee to engage its services to enforce a child support obligation and the scores you calculated under §31.14(c);

(5) a single administrative fee of $500 to cover the cost of the department in processing and acting on the application; and

(6) such other information as the banking commissioner may request that you submit.

(b) Your application is subject to abandonment as provided under §31.18.

§31.93. When will the department issue a certificate for my foreign agency to operate under another state's authorization?

The banking commissioner or an appointed designee will investigate and evaluate facts related to your foreign agency's application. The department will issue and mail a certificate for your foreign agency to operate under another state' authorization in this state within 15 days of:

(1) determining that your foreign agency meets all the requirements of §31.91;

(2) determining that your foreign agency has submitted everything required by §31.92; and

(3) verifying that the registration or other authorization issued to your foreign agency by another state is active and in good standing.

§31.94. When must my foreign agency notify the department of updated information or changes?

If your foreign agency holds an authorization under this subchapter, then prior to the 30th day after the date on which the change occurs, your foreign agency that is issued a certificate to operate in this state under this section must notify the department of any change in:

(1) the information provided in or with an application submitted under §31.92; or

(2) the status of the agency's authorization in the other state.

§31.95. How can the department withdraw its approval of my foreign agency to operate under another state's authorization?

(a) If your foreign agency violates the provisions of this chapter or Chapter 396, its authorization under this chapter may be revoked or suspended. The authorization may be revoked or suspended in the same manner as revocation or suspension of a registered agency's certificate of registration under this chapter.

(b) If another state has revoked or withdrawn your foreign agency's authority to operate as an agency in that state, then:

(1) you may not legally engage in business in this state as an agency under this subchapter; and

(2) your agency must apply for a certificate of registration under this chapter and Chapter 396.

§31.96. Is a foreign agency subject to each section of this chapter?

If your foreign agency holds a certificate issued under this subchapter, then it is subject to:

(1) every section of this subchapter;

(2) every section of this chapter referred to in this subchapter; and

(3) every section of this chapter that states that your foreign agency is subject to its provisions.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106324
Everette D. Jobe
Certifying Official
Texas Department of Banking
Proposed date of adoption: December 14, 2001
For further information, please call: (512) 475-1300

♦ ♦ ♦

SUBCHAPTER G. CIVIL REMEDIES

7 TAC §§31.111 - 31.115

The new sections are proposed under the authority of Finance Code, §396.051(b), which requires the commission to adopt rules as necessary for the administration of the chapter.

Finance Code, Chapter 396, is affected by the proposed new sections.

§31.111. May a person bring a civil action against my agency under Chapter 396?

In addition to any other remedy provided by Chapter 396, a person may bring an action for:

(1) injunctive relief to enjoin or restrain a violation of Chapter 396; and

(2) actual damages incurred as a result of a violation of Chapter 396.

§31.112. Can a person recover court costs or attorney's fees in an action against my agency under Chapter 396?

A person who prevails in an action brought under Finance Code, §396.351, is entitled to recover court costs and reasonable attorney's fees.

§31.113. What if an action is brought against my agency under Chapter 396 in bad faith or to harass?

If a court finds that an action under Finance Code, §396.251, was brought in bad faith or for purposes of harassment, the court will award the defendant attorney's fees reasonably related to the work performed and costs.

§31.114. How would a person serve process on my foreign agency?

(a) Whether your agency located in another state has registered in Texas or is engaging in the business of child support enforcement in this state in violation of Chapter 396, it is considered to have submitted to the jurisdiction of the courts of this state with respect to an action brought under Chapter 396.

(b) If your foreign agency is engaging in business in this state in violation of this chapter it is considered to have appointed the department as the agency's agent for service of process in any action, suit, or proceeding arising from a violation of Chapter 396.

§31.115. What remedies are available under other laws for violation of Chapter 396?

(a) A violation of Chapter 396 is a deceptive trade practice under Subchapter E, Chapter 17, Business & Commerce Code, and is actionable under that subchapter.

(b) Chapter 396 does not affect or alter a remedy at law or in equity available to an obligor, obligee, governmental entity, or other legal entity.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106325
Everette D. Jobe
Certifying Official
Texas Department of Banking
Proposed date of adoption: December 14, 2001
For further information, please call: (512) 475-1300

♦ ♦ ♦

PART 4. TEXAS SAVINGS AND LOAN DEPARTMENT

CHAPTER 64. BOOKS, RECORDS, ACCOUNTING PRACTICES, FINANCIAL STATEMENTS, RESERVES, NET WORTH, EXAMINATIONS, CONSUMER COMPLAINTS

7 TAC §64.10

The Finance Commission of Texas (the "Finance Commission") proposes new 7 TAC §64.10, concerning the filing of consumer complaints with the Texas Savings and Loan Department (the "department").

The new §64.10 will implement the requirements of *Finance Code*, §11.307, pertaining to the filing of consumer complaints with the department, as enacted by the 77th Legislative through House Bill 1763.

Proposed §64.10 will specify the manner in which a savings and loan association provides consumers with information on how to file complaints with the department. The proposed section will also require that the information on how to file complaints be included with each privacy notice a savings and loan association is required by law to provide to consumers.

James L. Pledger, Commissioner, Texas Savings and Loan Department, has determined that, for each year of the first five years that the section is in effect, there will be no fiscal implication for state or local government as a result of enforcing or administering the section as adopted.

Commissioner Pledger also has determined that, for each of the first five years the section as adopted is in effect, the public benefit anticipated as a result of the adoption of this section will be the provision of information to the consumers of savings and loan associations on how to file complaints with the department. There will be minimal costs incurred by a person required to comply with this section and there will be no deleterious effect on small businesses.

Comments on proposed §64.10 may be submitted in writing to James L. Pledger, Commissioner, Texas Savings and Loan Department, 2601 North Lamar Boulevard, Suite 201, Austin, Texas, 78705-4294, or e-mailed to: TSLD@tsld.state.tx.us.

The new section is proposed under the authority of *Finance Code*, §11.307, which requires the Finance Commission to adopt rules specifying the manner in which savings and loan associations provide consumers with information on how to file complaints with the department.

The proposed new section implements *Finance Code*, §11.307.

§64.10. Consumer Complaint Procedures.

(a) Definitions

(1) "Privacy notice" means any notice which a savings and loan association gives regarding a consumer's right to privacy, regardless of whether it is required by a specific state or federal law or given voluntarily.

(2) "Required notice" means a notice in a form set forth or provided for in subsection (b) (1) of this section.

(b) Notice of how to file complaints

(1) In order to let its consumers know how to file complaints, savings and loan associations must use the following notice: The (name of savings and loan association) is chartered under the laws of the State of Texas and by state law is subject to regulatory oversight by the Texas Savings and Loan Department. Any consumer wishing to file a complaint against the (name of savings and loan association) should contact the Texas Savings and Loan Department through one of the means indicated: In Person or by U.S. Mail: 2601 North Lamar Boulevard, Suite 201, Austin, Texas 78705-4294, Telephone No.: (877) 276-5550, Fax No.: (512) 475-1360, E-mail: TSLD@tsld.state.tx.us

(2) A required notice must be included in each privacy notice that a savings and loan association sends out.

(3) Regardless of whether a savings and loan association is required by any state or federal law to give privacy notices, each savings and loan association must take appropriate steps to let its consumers know how to file complaints by giving them the required notice in compliance with paragraph (1) of this subsection.

(4) The following measures are deemed to be appropriate steps to give the required notice:

(A) In each area where a savings and loan association conducts business on a face-to-face basis, the required notice, in the form specified in paragraph (1) of this subsection, must be conspicuously posted. A notice is deemed to be conspicuously posted if a customer with 20/20 vision can read it from the place where he or she would typically conduct business or if it is included on a bulletin board, in plain view, on which all required notices to the general public (such as equal housing posters, licenses, Community Reinvestment Act notices, etc.) are posted.

(B) For customers who are not given privacy notices, the savings and loan association must give the required notice when the customer relationship is established.

(C) If a savings and loan association maintains a web site, the required notice must be included in a screen which the consumer must view whenever the site is accessed.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 22, 2001.

TRD-200106349

Timothy K. Irvine
General Counsel
Texas Savings and Loan Department
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 475-1350

♦ ♦ ♦

CHAPTER 79. MISCELLANEOUS
SUBCHAPTER H. CONSUMER COMPLAINT PROCEDURES

7 TAC §79.122

The Finance Commission of Texas (the "Finance Commission") proposes new 7 TAC §79.122 concerning the filing of consumer complaints with the Texas Savings and Loan Department (the "department").

The new §79.122 will implement the requirements of *Finance Code*, §11.307, pertaining to the filing of consumer complaints with the department, as enacted by the 77th Legislative through House Bill 1763.

Proposed §79.122 will specify the manner in which state savings banks provide consumers with information on how to file complaints with the department. The proposed section will also require that the information on how to file complaints be included with each privacy notice a state savings bank is required by law to provide to consumers.

James L. Pledger, Commissioner, Texas Savings and Loan Department, has determined that, for each year of the first five years that the section is in effect, there will be no fiscal implication for state or local government as a result of enforcing or administering the section as adopted.

Commissioner Pledger also has determined that, for each of the first five years the section as adopted is in effect, the public benefit anticipated as a result of the adoption of this section will be the provision of information to the consumers of state savings banks on how to file complaints with the department. There will be minimal costs incurred by a person required to comply with this section and there will be no deleterious effect on small businesses.

Comments on proposed §79.122 may be submitted in writing to James L. Pledger, Commissioner, Texas Savings and Loan Department, 2601 North Lamar Boulevard, Suite 201, Austin, Texas, 78705-4294, or e-mailed to: TSLD@tsld.state.tx.us.

Section 79.122 is proposed under the authority of *Finance Code*, §11.307, which requires the Finance Commission to adopt rules specifying the manner in which state savings banks provide consumers with information on how to file complaints with the department.

The proposed new section implements *Finance Code*, §11.307.

§79.122. Consumer Complaint Procedures.

(a) Definitions

(1) "Privacy notice" means any notice which a state savings bank gives regarding a consumer's right to privacy, regardless of whether it is required by a specific state or federal law or given voluntarily.

(2) "Required notice" means a notice in a form set forth or provided for in subsection (b)(1) of this section.

(b) Notice of how to file complaints

(1) n order to let its consumers know how to file complaints, state savings banks must use the following notice: The (name of state savings bank) is chartered under the laws of the State of Texas and by state law is subject to regulatory oversight by the Texas Savings and Loan Department. Any consumer wishing to file a complaint against the (name of state savings bank) should contact the Texas Savings and Loan Department through one of the means indicated below: In Person or by U.S. Mail: 2601 North Lamar Boulevard, Suite 201, Austin, Texas 78705-4294, Telephone No.: (877) 276-5550, Fax No.: (512) 475-1360, E-mail: TSLD@tsld.state.tx.us

(2) A required notice must be included in each privacy notice that a state savings bank sends out.

(3) Regardless of whether a state savings bank is required by any state or federal law to give privacy notices, each state savings bank must take appropriate steps to let its consumers know how to file complaints by giving them the required notice in compliance with paragraph (1) of this subsection.

(4) The following measures are deemed to be appropriate steps to give the required notice:

(A) In each area where a state savings bank conducts business on a face-to-face basis, the required notice, in the form specified in paragraph (1) of this subsection, must be conspicuously posted. A notice is deemed to be conspicuously posted if a customer with 20/20 vision can read it from the place where he or she would typically conduct business or if it is included on a bulletin board, in plain view, on which all required notices to the general public (such as equal housing posters, licenses, Community Reinvestment Act notices, etc.) are posted.

(B) For customers who are not given privacy notices, the state savings bank must give the required notice when the customer relationship is established.

(C) If a state savings bank maintains a web site, the required notice must be included in a screen which the consumer must view whenever the site is accessed.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 22, 2001.

TRD-200106351
Timothy K. Irvine
General Counsel
Texas Savings and Loan Department
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 475-1350

♦ ♦ ♦

CHAPTER 80. MORTGAGE BROKER AND LOAN OFFICER LICENSING

SUBCHAPTER K. ANNUAL REPORTS

7 TAC §80.23

The Finance Commission proposes to amend the regulations implementing the Mortgage Broker License Act, *Finance Code*, Chapter 156, (the "Act") through the adoption of a new 7 TAC §80.23, to require that mortgage brokers licensed under the Act provide annual reports about their activity subject to the Act as well as the activity of each of the loan officers under their sponsorship.

The Act became effective September 1, 1999. It requires that mortgage brokers and the loan officers who work for them meet certain requirements, that they obtain licenses, that they adhere to certain standards of conduct, and that they provide required disclosures to mortgage loan applicants. The Act charges the Commissioner with oversight of the Act and directs that the Commissioner promulgate regulations (the "regulations") to implement the Act.

HB 1636, 77th Legislature, placed authority to promulgate regulations under the Act with the Finance Commission, effective September 1, 2001. HB 1636 also created a new §156.213 of the Act requiring annual reports by mortgage brokers. This amendment became effective September 1, 2001. This proposed new section implements §156.213 of the Act requiring annual reports by mortgage brokers.

The Act establishes an Advisory Committee to advise the Savings and Loan Commissioner and the Commission on the promulgation of forms and regulations and the implementation of the Act. The Advisory Committee met on October 9, 2001, and reviewed this proposed new section of the regulations.

James L. Pledger, Savings and Loan Commissioner, has determined that for the first five year period the new section, as proposed, will be in effect, there will be no fiscal implications for state and local government as a result of enforcing or administering the section.

Mr. Pledger estimates that for the first five years the proposed new section is in effect, the public will benefit from obtaining of annual reports from mortgage brokers. No difference will exist between the cost of compliance for small business and the cost of compliance for the largest business affected by the new section.

Comments on the proposed new section may be submitted in writing to James L. Pledger, Commissioner, Texas Savings and Loan Department, 2601 North Lamar, Suite 201, Austin, Texas 78705-4294, or e-mailed to TSLD@tsld.state.tx.us.

The new section is proposed under §156.102 of the Finance Code, which authorizes the Commission to adopt rules necessary to ensure compliance with the intent of the Act.

Finance Code , Chapter 156, Subchapter A, §156.213, is affected by the proposed new section.

§80.23. Annual Reports.

The Commissioner shall, not more frequently than once during each fiscal year, require each licensed mortgage broker to file an annual report. The Commissioner shall specify the information that each mortgage broker shall provide regarding the mortgage brokerage activity of the licensee and each licensed loan officer under his or her sponsorship. The Commissioner shall prepare and make public a report summarizing the annual reports provided by the licensees but shall treat each individual report and the information contained therein as confidential because of the proprietary and confidential information regarding the business activity of the licensees set forth therein.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 22, 2001.

TRD-200106350
Timothy K. Irvine
General Counsel
Texas Savings and Loan Department
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 475-1350

♦ ♦ ♦

PART 5. OFFICE OF CONSUMER CREDIT COMMISSIONER

CHAPTER 85. RULES OF OPERATION FOR PAWNSHOPS

SUBCHAPTER B. PAWNSHOP LICENSE

7 TAC §85.211

The Finance Commission of Texas proposes amendments to 7 TAC §85.211, concerning pawnshop assessments.

The purpose of the amendments are to harmonize the administrative pawnshop operational rules with the amendment made by the 77th Legislature to the Texas Pawnshop Act in Senate Bill 317. In the legislation, an authorization to employ a volume based assessment methodology for fee collection was placed in the pawnshop statute. The agency has used an activity based costing formula that charges annually for license renewals and for examinations which occur on average every 12 to 16 months. The formula contemplated in the rule would replace the two fees with a single fee containing a fixed portion necessary to recoup the administrative costs associated with regulating an active pawnshop licensee and a variable portion based upon the licensee's volume level. The agency through its experience has determined a direct relationship between a pawnshop's volume and its level of compliance risk. All operating pawnshops possess at minimum levels a fairly equivalent level of compliance risk. The formula contemplated in the rule provides the agency with the required revenue level to recoup the cost of agency direct and indirect cost associated with the administration of the Texas Pawnshop Act. The rule includes a minimum assessment level ($400) for active licensees that directly corresponds to the cost of supervision and a maximum assessment level ($1,000) that includes the estimated maximum supervision cost. The agency anticipates using the previous activity based cost methodology until pawnshop renewals occur in June 2002. During the renewal process June 2002 the agency anticipates using the new assessment funding formula.

Leslie L. Pettijohn, Consumer Credit Commissioner has determined that for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of administering the rules.

Commissioner Pettijohn also has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of the new rules will be a systematic predictable revenue collection methodology. The average projected assessment per operating pawnshop is $455. The current regulatory cost per pawnshop is an annual license fee of $125 and a direct examination cost (every 12-16 months) that averages $449. The agency sampled the data of several pawnshop licensees and compared existing operational costs to the formula contemplated by the proposal. Some pawnshop licensees will experience an increased annualized cost and some licensees will experience a decreased annualized cost. The number of operating pawnshops paying the minimum assessment would be approximately 67%, while the number of operating pawnshops paying the maximum assessment would be approximately 1.5%. The agency does not believe that there is an adverse economic effect on small business as compared to large business in complying with the proposed rule. The minimum assessment level was derived to be as low as feasibly possible while recovering the associated level of cost with regulating those businesses. The assessment methodology employs a variable factor by loan volume which results in proportional treatment between large businesses and small businesses.

Comments on the proposed amendments may be submitted in writing to Leslie L. Pettijohn, Consumer Credit Commissioner, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207.

The amendments are proposed under the Texas Finance Code § 371.006, which authorizes the Finance Commission to adopt rules to enforce the Texas Pawnshop Act.

These rules affect Chapter 371, Texas Finance Code.

§85.211. Fees.

(a)-(d) (No change.)

(e) Annual Renewal and Examination Assessment. [~~Fee. A $125~~]

(1) An annual renewal fee is required for each licensed pawnshop of:[~~by June 30 each year to keep a license from expiring~~]

(A) A license fee of $125; and

(B) A volume fee of $0.50 per each $1,000 loaned as calculated from the most recent annual examination report as described in §85.502 of this title (relating to annual examination report).

(2) The minimum annual assessment for each active license shall be no less than $400.

(3) The maximum annual assessment for each active license shall be no more than $1,000.

(4) The minimum annual assessment for each inactive license shall be no less than $125.

(5) A pawnshop license shall expire on June 30 unless the assessment has been paid.

(6) Upon approval of a new pawnshop license pursuant to 7 TAC §85.206, the first year's operational assessment fee shall be $400.

(f)-(j) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106340

Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 936-7640

♦ ♦ ♦

TITLE 22. EXAMINING BOARDS

PART 3. TEXAS BOARD OF CHIROPRACTIC EXAMINERS

CHAPTER 73. LICENSES AND RENEWALS

22 TAC §73.2

The Texas Board of Chiropractic Examiners proposes to amend chapter 73, relating to renewal of a chiropractic license . S.B. 171, as enacted by the 77th Legislature, and effective September 1, 2001, allows a person whose chiropractic license has been expired for more than one year but not more than three years to renew without reexamination and compliance with the requirements and procedures for an original license if the board determines that good cause exists for the nonrenewal. The board, by rule, is required to establish criteria to use in making this determination. The proposal amends §73.2(d) by adding new paragraphs (6) and (7), which set out the requirements for renewal in this situation and the criteria that the board will use in considering applications. Good cause is defined basically as extenuating circumstances beyond the control of the applicant. Example are provided. A licensee who practices with an expired license is not eligible.

Dr. Sergio François, D.C., Chair, Rules Committee, has determined that for the first five-year period the section as amended is in effect, there will be no significant fiscal implications for state government, and none for local government, as a result of enforcing or administering the section as amended. The board will collect some additional revenue from the payment of the statutory late fees by applicants, but that amount is not anticipated to be significant in that it is anticipated that no more that two or three applications will be filed each year.

Dr. François has determined that for each year of the first five years, the section as amended is in effect, the public benefit anticipated as a result of enforcing and administering the section, will be to allow qualified chiropractors to renew their licenses without re-examination if they can demonstrate good cause for not renewing prior to their applications. There will be no effect on small or micro businesses, or anticipated economic cost to persons who are required to comply with the section as proposed, except for the payment of the statutory late fees set out in S.B. 171.

Written comments may be submitted, no later than 30 days from the date of this publication, to Jessica Harwell, Rules Committee, Texas Board of Chiropractic Examiners, 333 Guadalupe, Tower III, Suite 825, Austin, TX 78701.

The amendment is proposed under the Occupations Code §201.152, which the board interprets as authorizing it to adopt rules necessary for the performance of its duties; and §201.354(g), which the board interprets as requiring it to adopt criteria, by rule, for determining whether or not certain licensees who has failed to renew their chiropractic licenses timely, may renew without examination.

The following are the statutes, articles, or codes affected by the amendments:

Section 73.2 -- Occupations Code, §§201.152, 201.354(g).

§73.2. Renewal of License.

(a) Annual renewal. Each year, on or before the first day of a licensee's birth month, a licensee shall renew his or her license. A licensee may also apply for inactive status in accordance with §73.4 of this title (relating to Inactive Status). In order to renew a license, a licensee must submit to the board the license renewal form provided by the board, the renewal fee for an active license as provided in §75.7 of this title (relating to Fees and Charges for Public Information), any late fees, if applicable as provided in subsection (d) of this section, and verification of continuing education attendance as required by §73.3 of this title (relating to Continuing Education). An annual renewal certificate shall not be issued until all information and fees required by this section and §75.7 are provided to the board.

(b) Locum Tenens Information. A licensee who substitutes for another licensee (locum tenens) and temporarily practices at the facility of the absent licensee shall provide the board with a list of each facility that he or she has served as a locum tenens during the previous 12 months. The list shall include the name, address, and facility registration of each facility. A locum tenens licensee shall have proof of licensure, such as a copy of the license or the board-issued wallet size license, with them while practicing and shall show it upon request.

(c) Licensees in default of student loan or repayment agreement.

(1) The board shall not renew a license of a licensee who is in default of a loan guaranteed by the Texas Guaranteed Student Loan Corporation or a repayment agreement with the corporation except as provided in paragraphs (2) and (3) of this subsection.

(2) For a licensee in default of a loan, the board shall renew the license if:

(A) the renewal is the first renewal following notice to the board that the licensee is in default; or

(B) the licensee presents to the board a certificate issued by the corporation certifying that:

(i) the licensee has entered into a repayment agreement on the defaulted loan; or

(ii) the licensee is not in default on a loan guaranteed by the corporation.

(3) For a licensee who is in default of a repayment agreement, the board shall renew the license if the licensee presents to the board a certificate issued by the corporation certifying that:

(A) The licensee has entered into another repayment agreement on the defaulted loan; or

(B) the licensee is not in default on a loan guaranteed by the corporation or on a repayment agreement.

(4) This subsection does not prohibit the board from issuing an initial license to a person who is in default of a loan or repayment agreement but is otherwise qualified for licensure. However, the board shall not renew the license of such a licensee, if at the time of renewal, the licensee is in default of a loan or repayment agreement except as provided in paragraphs (2)(B) or (3) of this subsection.

(5) The board shall notify a licensee of the nonrenewal of a license under this subsection and of the opportunity for a hearing under paragraph (7) of this subsection prior to or at the time the annual renewal application is sent.

(6) A license which is not renewed under this subsection is considered expired. The licensee cannot practice chiropractic until such time that he or she complies with this subsection. Subsection (d) of this section applies to licenses expired under this subsection.

(7) Upon written request for a hearing by a licensee, the board shall set the matter for hearing before the State Office of Administrative Hearings in accordance with §75.9(d) of this title (relating to Complaint Procedures). A licensee shall file a request for a hearing with the board within 30 days from the date of receipt of the notice required by paragraph (5) of this subsection.

(d) Expired License.

(1) If an active or inactive license is not renewed on or before the first day of the licensee's birth month of each year, it expires [~~becomes expired~~].

(2) If a person's license has expired for 90 days or less, the person may renew the license by paying to the board the required renewal fee, as provided in §75.7 of this title (relating to Fees), and a late fee of $62.

(3) If a person's license has expired for longer than 90 days, but less than one year, the person may renew the license by paying to the board the required renewal fee, as provided in §75.7 of this title and a late fee of $125.

(4) Except as provided by paragraphs (5) and (6) of this subsection, if [~~If~~] a person's license has expired for one year or longer, the person may not renew the license but may obtain a new license by submitting to reexamination and complying with the current requirements and procedures for obtaining an initial license.

(5) At the board's discretion, a person whose license has expired for one year or longer may renew without complying with paragraph (4) of this subsection if the person moved to another state and is currently licensed and has been in practice in the other state for two years preceding application for renewal. The person must also pay the board the required renewal fee, as provided in §75.7 of this title and a late fee of $125.

(6) At the board's discretion, a person whose license has expired for one year but not more than three years may renew without complying with paragraph (4) of this subsection if the board determines that the person has shown good cause for the failure to renew the license and pays to the board:

(A) the required renewal fee for each year in which the licensee was expired; and

(B) an additional fee in an amount equal to the sum of:

(i) the jurisprudence examination fee, multiplied by the number of years the license was expired, prorated for fractional years; and

(ii) two times the jurisprudence examination fee.

(7) Good cause for the purposes of paragraph (6) of this subsection means extenuating circumstances beyond the control of the applicant which prevented the person from complying timely with subsection (a) of this section, such as extended personal illness or injury, extended illness of the immediate family, or military duty outside the United States where communication for an extended period is impossible. Good cause is not shown if the applicant was practicing chiropractic during the period of time that the applicant's license was expired. With the renewal application, an applicant must submit a notarized sworn affidavit and supporting documents that demonstrate good cause, in the opinion of the board.

(8) [~~(6)~~] The annual renewal application will be deemed to be the written notice of the impending license expiration forwarded to the person at the person's last known address according to the records of the board.

(e) Practicing with an expired license. Practicing chiropractic with an expired license constitutes practicing chiropractic without a license. A licensee whose license expires shall not practice chiropractic until the license is renewed or a new license is obtained as provided by subsection (d) of this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 22, 2001.

TRD-200106400
Gary K. Cain, Ed.D.
Executive Director
Texas Board of Chiropractic Examiners
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 305-6709

♦ ♦ ♦

PART 9. TEXAS STATE BOARD OF MEDICAL EXAMINERS

CHAPTER 163. LICENSURE

22 TAC §163.13

The Texas State Board of Medical Examiners proposes new §163.13, concerning Expedited Licensure Process.

Michele Shackelford, General Counsel, Texas State Board of Medical Examiners, has determined that for the first five-year period the section is in effect there will be no fiscal implications to state or local government as a result of enforcing the rule as proposed.

Ms. Shackelford also has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing the section will be regulations regarding expedited licensure process. There will be no effect on small businesses. There will be no effect to individuals required to comply with the section as proposed.

Comments on the proposal may be submitted to Pat Wood, P.O. Box 2018, MC-901, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The new section is proposed under the authority of the Occupations Code Annotated, §153.001, which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; and enforce this subtitle.

The Occupations Code, §152.1025 is affected by the new section.

§163.13. Expedited Licensure Process.

(a) Applications for licensure shall be expedited by the board's licensure division provided the applicant submits an affidavit stating that:

(1) the applicant intends to practice in a rural community as determined by the Center for Rural Health Initiatives; or

(2) the applicant intends to:

(A) accept employment with an entity located in a medically underserved area or health professional shortage area designated by the United States Department of Health and Human Services and affiliated with or participating in a public university-sponsored graduate medical education program or a graduate medical education program accredited by Accreditation Council on Graduate Medical Education or the American Osteopathic Association;

(B) serve on the faculty of a public-university sponsored graduate medical program or a graduate medical education program accredited by the Accreditation Council on Graduate Medical Education or the American Osteopathic Association; and

(C) engage in the practice of medicine and teach in a specialty field of medicine in which it is necessary to obtain or maintain the accreditation of a graduate medical education program by the Accreditation Council for Graduate Medical Education or the American Osteopathic Association.

(b) The board shall notify the Texas Department of Health when the board is in receipt of an application from a foreign applicant eligible for expedited processing under subsection (a)(2) of this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 22, 2001.

TRD-200106374
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 305-7016

♦ ♦ ♦

CHAPTER 166. PHYSICIAN REGISTRATION

22 TAC §§166.1 - 166.6

The Texas State Board of Medical Examiners proposes amendments to §§166.1-166.6, concerning physician registration. The proposal makes changes regarding general cleanup. This proposal also amends CME temporary license, SB 1300 (which allows a 30-day grace period to practice with an expired permit) and voluntary charity care provided to indigent populations.

Elsewhere in this issue of the *Texas Register*, the Texas State Board of Medical Examiners contemporaneously proposes the rule review of Chapter 166, concerning Physician Registration.

Michele Shackelford, General Counsel, Texas State Board of Medical Examiners, has determined that for the first five-year period the sections are in effect there will be a minimal effect to state or local government as a result of enforcing the amendments as proposed.

Ms. Shackelford also has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be updated regulations, CME temporary licenses, grace period to practice with an expired license and voluntary charity care. There is a possible effect on those physicians who would no longer be exempt from the annual registration fee - $330 per year.

Comments on the proposal may be submitted to Pat Wood, P.O. Box 2018, MC-901, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The amendments are proposed under the authority of the Occupations Code Annotated, §153.001, which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; and enforce this subtitle.

The Occupations Code, §§156.001-156.008; 156.056 are affected by the amendments.

§166.1. Physician Registration.

(a) Each physician licensed to practice medicine in Texas shall register annually and pay a fee. A physician may obtain an annual registration permit ("permit") [~~renew an unexpired license~~] by submitting the required form and by paying the required annual registration [~~renewal~~] fee to the board on or before the expiration date of the permit [~~license~~]. The fee shall accompany a written application which sets forth the licensee's name, mailing address, the place or places where the licensee is engaged in the practice of medicine, and other necessary information prescribed by the board.

(b) The board shall stagger annual registration of physicians proportionally on a periodic basis.

(c) The board shall provide written notice to each practitioner at the practitioner's last known mailing address according to the records of the board at least 30 days prior to the expiration date of the annual registration permit [~~a license~~] and shall provide for a 30-day grace period for payment of the annual registration fee from the date of the expiration of the permit [~~license~~].

(d) Within 30 [~~60~~] days of a physician's change of mailing or practice address from the addresses on file with the board [~~Board~~], a physician shall notify the board in writing [~~the Board Licensure Division~~] of such change.

§166.2. Continuing Medical Education.

(a) As a prerequisite to the annual registration of a physician's permit [~~license~~], 24 hours of continuing medical education (CME) are required to be completed in the following categories:

(1) At least one-half of the hours are to be from formal courses that are:

(A) designated for AMA/PRA Category 1 credit by a CME sponsor accredited by the Accreditation Council for Continuing Medical Education or a state medical society recognized by the Committee for Review and Recognition of the Accreditation Council for Continuing Medical Education;

(B) approved for prescribed credit by the American Academy of Family Physicians;

(C) designated for AOA Category 1-A credit required for osteopathic physicians by an accredited CME sponsor approved by the American Osteopathic Association; or

(D) approved by the Texas Medical Association based on standards established by the AMA for its Physician's Recognition Award.

(2) At[~~Beginning with annual registrations in 1999, at~~] least one of the formal hours of CME which are required by paragraph(1) of this subsection must involve the study of medical ethics and/or professional responsibility. Whether a particular hour of CME involves the study of medical ethics and/or professional responsibility shall be determined by the organizations which are enumerated in paragraphs(1) of this subsection as part of their course planning.

(3) The remaining hours may be composed of informal self-study, attendance at hospital lectures or grand rounds not approved for formal CME, or case conferences and shall be recorded in a manner that can be easily transmitted to the board upon request.

(b) A physician must report on the annual registration permit application [~~form~~] if she or he has completed the required continuing medical education during the previous year. A licensee may carry forward CME credit hours earned prior to an annual registration report which are in excess of the 24-hour annual requirement and such excess hours may be applied to the following years' requirements. A maximum of 48 total excess credit hours may be carried forward and shall be reported according to the categories set out in subsection (a) of this section. Excess CME credit hours of any type may not be carried forward or applied to an annual report of CME more than two years beyond the date of the annual registration following the period during which the hours were earned.

(c) A licensee shall be presumed to have complied with this section if in the preceding 36 months the licensee becomes board certified or recertified in a medical specialty and the medical specialty program meets the standards of the American Board of Medical Specialties, the American Medical Association, the Bureau of Osteopathic Specialists [~~Advisory Board for Osteopathic Specialists and Boards of Certification~~], or the American Osteopathic Association. This provision exempts the physician from all CME requirements, including the requirement for one hour involving the study of medical ethics and/or professional responsibility, as outlined in subsection (a)(2) of this section, and this exemption is valid for one annual registration [~~renewal~~] period only.

(d) A physician may request in writing an exemption for the following reasons:

(1) catastrophic illness;

(2) military service of longer than one year's duration outside the state;

(3) medical practice and residence longer than one year's duration outside the United States; or

(4) good cause shown submitted in writing by [~~on written application of~~] the licensee that gives satisfactory evidence to the board that the licensee is unable to comply with the requirement for continuing medical education.

(e) Exemptions are subject to the approval of the executive director or [~~/~~]medical director and must be requested in writing at least 30 days prior to the expiration date of the permit [~~license~~].

(f) A temporary exemption under subsection (d) of this section may not exceed one year but may be requested [~~renewed~~] annually, subject to the approval of the board.

(g) Subsection (a) of this section does not apply to a licensee who is retired and has been exempted from paying the annual registration fee under §166.3 of this title (relating to Retired Physician Exception).

(h) This section does not prevent the board from taking board [~~disciplinary~~] action with respect to a licensee or an applicant for a license by requiring additional hours of continuing medical education or of specific course subjects.

(i) The board may require written verification of both formal and informal credits from any licensee within 30 days of request. Failure to provide such verification may result in disciplinary action by the board.

(j) Physicians in residency/fellowship training or who have completed such training within six months prior to the annual registration expiration date, [~~their renewal application~~] will satisfy the requirements of subsections (a)(1) and (2) of this section by their residency or fellowship program.

(k) Unless exempted under the terms of this section, a [~~physician~~] licensee's apparent failure to obtain and timely report the 24 hours of CME as required and provided for in this section shall result in the denial [~~nonrenewal~~] of the annual registration permit [~~license~~] until such time as the physician obtains and reports the required CME hours; however, the executive director of the board may issue to such a physician a temporary CME license numbered so as to correspond to the nonrenewed license. Such a temporary CME license shall be issued upon receipt of a written request and fee for the license made prior to the expiration of the 30 day grace period for annual registration at the direction of the executive director for a period of no longer than 60 [~~90~~] days. A temporary CME license issued pursuant to this subsection may be issued to allow the board to verify the accuracy of information related to the physician's CME hours and to allow the physician who has not obtained or timely reported the required number of hours an opportunity to correct any deficiency so as not to require termination of ongoing patient care.

(l) The fee for issuance of a temporary CME license pursuant to the provisions of this section shall be in the amount specified for temporary licenses under §175.1 of this title (relating to Fees) [~~; however, the fee need not be paid prior to the issuance of the temporary license, but shall be paid prior to the renewal of a permanent license~~].

(m) CME hours which are obtained to comply with the CME requirements for the preceding year as a prerequisite for obtaining an annual registration permit [~~licensure renewal~~], shall first be credited to meet the CME requirements for the previous year. Once the previous year's CME requirement is satisfied, any additional hours obtained shall be credited to meet the CME requirements for the current year.

(n) An intentionally false report or [~~intentionally false~~] statement to the board by a licensee regarding CME hours reportedly obtained shall be a basis for disciplinary action by the board pursuant to the Medical Practice Act (the "Act"), Tex. Occ. Code Ann. §§164.051-.053. A licensee who is disciplined by the board for such a violation may be subject to the full range of actions authorized by the Act including suspension or revocation of the physician's medical license, but in no event shall such action be less than an administrative penalty of $500 and a public reprimand.

(o) Administrative penalties for failure to timely obtain and report required CME hours may be determined by the Disciplinary Process Review Committee of the board as provided for in §187.40 [~~§187.39~~] of this title (relating to Administrative Penalties).

(p) Failure to obtain and timely report the CME hours on an annual registration permit application[~~for renewal of a license~~] shall subject the licensee to a monetary penalty for late registration in the amount set forth in §175.2 of this title (relating to Penalties). Any temporary CME licensure fee and any administrative penalty imposed for failure to obtain and timely report the 24 hours of CME required for [~~renewal of~~] an annual registration permit application [~~a license~~]

shall be in addition to the applicable penalties for late registration [~~or renewal~~] as set forth in §175.2 of this title (relating to Penalties).

§166.3. Retired Physician Exception.

The annual registration fee shall apply to all physicians licensed by the board, whether or not they are practicing within the borders of this state, except retired physicians.

(1) To become exempt from the annual registration fee due to retirement:

(A) the physician's current license must be active and in good standing; and

(B) the physician must request in writing on a form prescribed by the board for his or her license to be placed on official retired status.

(2) The following restrictions shall apply to physicians whose licenses are on official retired status: [~~.~~]

(A) the [~~The~~] physician must not engage in clinical activities or practice medicine in any state; [~~.~~]

(B) the [~~The~~] physician may [~~must~~] not prescribe or administer drugs to anyone, nor may the physician possess a Drug Enforcement Administration or Texas controlled substances registration; and [~~.~~]

(C) the [~~The~~] physician's license may not be endorsed to any other state.

(3) A physician whose license has been placed on official retired status must obtain the approval of the board before returning to active status by submitting a written request to the attention of the Permits Department of the board which indicates the following:

(A) the physician's Texas medical license number;

(B) current mailing address;

(C) proposed practice location;

(D) intended type of medical practice;

(E) length of retired status;

(F) any other medical licenses held;

(G) any condition which adversely affects the physician's ability to practice medicine with reasonable skill and safety;

(H) any current specialty board certifications; and[~~,~~]

(I) any formal or informal continuing medical education obtained during the period of retired status.

(4) The request of a physician seeking a return to active status whose license has been placed on official retired status for two years or longer shall be submitted to the Licensure Committee of the board for consideration and a recommendation to the full board for approval or denial of the request. After consideration of the request and the recommendation of the Licensure Committee, the board shall grant or deny the request subject to such conditions which the board determines are necessary to adequately protect the public including but not limited to passage of the Special Purpose Examination (SPEX), passage of the Medical Jurisprudence Examination, and/or passage of a specialty board certification examination.

(5) The request of a physician seeking a return to active status whose license has been placed on official retired status for less than two years may be approved by the executive director of the board or submitted by the executive director to the Licensure Committee for consideration and a recommendation to the full board for approval or denial of the request. In those instances in which the executive director submits the request to the Licensure Committee of the board, the Licensure Committee shall make a recommendation to the full board for approval or denial. After consideration of the request and the recommendation of the Licensure Committee, the board shall grant or deny the request subject to such conditions which the board determines are necessary to adequately protect the public including but not limited to passage of the Special Purpose Examination (SPEX), passage of the Medical Jurisprudence Examination, and/or passage of a specialty board certification examination.

(6) In evaluating a request to return to active status, the Licensure Committee or the full board may require a personal appearance by the requesting physician at the offices of the board, and [~~the full board~~] may also require a physical or mental examination by one or more physicians or other health care providers approved in advance in writing by the executive director, the secretary-treasurer, the Licensure [~~executive~~] committee, or other designee(s) determined by majority vote of the board.

§166.4. [~~Renewal of~~] Expired Annual Registration Permits [~~License~~].

(a) If a physician's annual registration permit [~~license~~] has expired, the physician may register for a new permit [~~renew the license~~] without monetary penalty during the first 30 days following expiration.

[~~(b)~~] If a physician's permit [~~license~~] has been expired for longer than 30 days, but less than 91 [~~days~~], the physician may obtain a new permit [~~renew the license~~] by submitting to the board a completed permit application, the annual registration fee, and a $50 penalty fee [~~annual registration form and paying to the board the required renewal fee and a fee that is one-half of the annual registration fee as established by the board under the Medical Practice Act, Tex. Occ. Code Ann. §156.005(a)~~].

(b) [~~(c)~~] If a physician's annual registration permit [~~license~~] has been expired for longer than 90 days but less than one year, the physician may obtain a new permit [~~renew the license~~] by submitting a completed permit application, the annual registration fee, and a $100 penalty fee [~~annual registration form and paying to the board all unpaid renewal fees and a fee that is equal to the annual registration fee as established by the board under the Medical Practice Act, Tex. Occ. Code Ann. §156.005(b)~~].

(c) [~~(d)~~] If a physician's annual registration permit [~~license~~] has been expired for one year or longer, the physician's license [~~it~~] is considered to have been canceled, unless an investigation is pending, and the physician may not obtain a new permit [~~renew the license~~].

(d) Practicing medicine after the expiration of the 30-day grace period under subsection (a) of this section without obtaining a new annual registration permit for the current year has the same effect as, and is subject to all the penalties of, practicing medicine without a license.

§166.5. Relicensure [~~Obtaining a New Medical License~~] Following Cancellation for Nonpayment of Annual Registration Fee.

To be relicensed following cancellation for nonpayment, [~~obtain a new license~~], a physician must submit to reexamination and qualify under §163.10 [~~§163.12~~] of this title (relating to Relicensure).

§166.6. Exemption From Annual Registration Fee for Retired Physician Providing Voluntary Charity Care.

(a) A retired physician licensed by the board whose only practice is the provision of voluntary charity care to indigent populations shall be exempt from the annual registration fee. To qualify for and obtain such an exemption, a physician must truthfully certify under oath, on a form approved by the board, and received by the board at least 30 days prior to the expiration date of the permit [~~license~~], that the following information is correct:

(1) the physician's practice of medicine does not include the provision of medical services for either direct or indirect compensation which has monetary value of any kind;

(2) the physician's practice of medicine is limited to voluntary charity care for which the physician receives no direct or indirect compensation of any kind for medical services rendered;

(3) the physician's practice of medicine does not include the provision of medical services to members of the physician's family; and

(4) the physician's practice of medicine does not include the self-prescribing of controlled substances or dangerous drugs.

(b) A physician who qualifies for and obtains an exemption from the annual registration fee authorized under this section shall obtain and report continuing medical education as required under the [~~Medical Practice~~] Act, [~~Tex. Occ. Code Ann.~~] §§156.051-.055 and §166.2 of this title (relating to Continuing Medical Education).

(c) A physician who qualifies for and obtains an exemption from the annual registration fee authorized under this section shall file an application for registration with the board on an annual basis as required under the [~~Medical Practice~~] Act, [~~Tex. Occ. Code Ann.~~] §§156.001-.009.

(d) A retired physician who has obtained an exemption from the annual registration fee as provided for under this section, may be subject to disciplinary action under the [~~Medical Practice~~] Act, [~~Tex. Occ. Code Ann.~~] §§164.051-.053, based on unprofessional or dishonorable conduct likely to deceive, defraud, or injure the public if the physician engages in the compensated practice of medicine, the provision of medical services to members of the physician's family, or the self-prescribing of controlled substances or dangerous drugs.

(e) A physician who attempts to obtain an exemption from the annual registration fee under this section by submitting false or misleading statements to the board shall be subject to disciplinary action pursuant to the [~~Medical Practice~~] Act, [~~Tex. Occ. Code Ann~~]. §164.052(a)(1), in addition to any civil or criminal actions provided for by state or federal law.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 22, 2001.

TRD-200106375
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 305-7016

♦ ♦ ♦

CHAPTER 173. PHYSICIAN PROFILES

22 TAC §173.1

The Texas State Board of Medical Examiners proposes an amendment to §173.1, concerning Physician Profiles. This amendment deletes several items from the profile requirements.

Michele Shackelford, General Counsel, Texas State Board of Medical Examiners, has determined that for the first five-year period the section is in effect there will be no fiscal implications to state or local government as a result of enforcing the rule as proposed.

Ms. Shackelford also has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing the section will be updated regulations. There will be no effect on small businesses. There will be no effect to individuals required to comply with the section as proposed.

Comments on the proposal may be submitted to Pat Wood, P.O. Box 2018, MC-901, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The amendment is proposed under the authority of the Occupations Code Annotated, §153.001, which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; and enforce this subtitle.

The Occupations Code, §154.006 is affected by the amendment.

§173.1. Profile Contents.

(a) The Texas State Board of Medical Examiners (the "board") shall develop and make available to the public a comprehensive profile of each licensed physician electronically via the Internet or in paper format upon request.

(b) The profile of each licensed physician shall contain the following information listed in paragraphs (1)-(28) of this subsection:

(1) full name;

(2) place of birth if the physician requests that it be included in the physician's profile;

(3) gender;

(4) ethnic origin if the physician requests that it be included in the physician's profile;

(5) name of each medical school attended and the dates of:

(A) graduation; or

(B) Fifth Pathway designation and completion of the Fifth Pathway Program;

(6) a description of all graduate medical education in the United States or Canada, including:

(A) beginning and ending dates;

(B) program name;

(C) city and state of program;

(D) type of training (internship, residency or fellowship); and[,]

(E) specialty of program;

(7) any specialty certification held by the physician and issued by a board that is a member of the American Board of Medical Specialties or the Bureau of Osteopathic Specialists;

(8) primary and secondary specialties practiced, as designated by the physician;

(9) the number of years the physician has actively practiced medicine in:

(A) the United States or Canada; and

(B) Texas;

(10) the original date of issuance of the physician's Texas medical license;

(11) the expiration date of the physician's annual registration permit;

(12) the physician's current registration, disciplinary and licensure statuses and dates of such statuses;

~~[(13) the physician's Continuing Medical Education status;]~~

~~[(14) the expiration date of the physician's permit to conduct outpatient anesthesia services, if applicable;]~~

~~[(15) the method of licensure of the physician's original Texas medical license, and, if by reciprocal endorsement, the state and/or province of reciprocal endorsement;]~~

(13) [~~(16)~~] the name and city of each hospital in Texas in which the physician has privileges;

(14) [~~(17)~~] the physician's primary practice location (street address, city, state and zip code);

~~[(18) the physician's mailing address (street address or post office box, city, state and zip code);]~~

(15) [~~(19)~~] the type of language translating services, including translating services for a person with impairment of hearing, that the physician provides at the physician's primary practice location;

(16) [~~(20)~~] whether the physician participates in the Medicaid program;

(17) [~~(21)~~] whether the physician's patient service areas are accessible to disabled persons, as defined by federal law;

(18) [~~(22)~~] a description of any conviction for an offense constituting a felony, a Class A or Class B misdemeanor, or a Class C misdemeanor involving moral turpitude during the ten-year period preceding the date of the profile;

(19) [~~(23)~~] a description of any charges reported to the board during the ten-year period preceding the date of the profile to which the physician has pleaded no contest, for which the physician is the subject of deferred adjudication or pretrial diversion, or in which sufficient facts of guilt were found and the matter was continued by a court of competent jurisdiction;

(20) [~~(24)~~] a description of any disciplinary action against the physician by the board during the ten-year period preceding the date of the profile;

(21) [~~(25)~~] a description of any disciplinary action against the physician by a medical licensing board of another state during the ten-year period preceding the date of the profile;

(22) [~~(26)~~]a description of the final resolution taken by the board on medical malpractice claims or complaints required to be opened by the board under §5.05(f) of the Medical Practice Act (the "Act"), Tex. Occ. Code Ann. §164.201;

(23) [~~(27)~~] a description of any formal complaint issued by the Board's staff against the physician and initiated and filed with the State Office of Administrative Hearings under §164.005 of the [~~Medical Practice~~] Act [~~,Texas Occupations Code, Annotated, §164.005,~~] and the status of the complaint; and[~~,~~]

(24) [~~(28)~~] a description of a maximum of five awards, honors, publications or academic appointments submitted by the physician, each no longer than 120 characters.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 22, 2001.

TRD-200106376
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 305-7016

♦ ♦ ♦

CHAPTER 175. FEES, PENALTIES AND APPLICATIONS

The Texas State Board of Medical Examiners proposes amendments to §§175.1-175.3 and the repeal and replacement of §175.4, and the repeal of §175.5, concerning Fees, Penalties and Applications.

Elsewhere in this issue of the *Texas Register*, the Texas State Board of Medical Examiners contemporaneously proposes the rule review of Chapter 175, concerning Fees, Penalties and Applications.

Michele Shackelford, General Counsel, Texas State Board of Medical Examiners, has determined that for the first five-year period the sections are in effect there will be fiscal implications to state or local government as a result of enforcing the rules as proposed. There will be an increase in revenue to the state:

Repeat Jurisprudence examination - $20 x 200 = $4,000

CME temporary license - $5 x 100 = $500

Reissuance of license following revocation - $450 x 10 = $4,500

Evaluation or re-evaluation of postgraduate training program - $100 x 20 = $2,000

Estimated total increased revenue to state - $11,000

Ms. Shackelford also has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing the sections will be updated regulations. There will be an effect to individuals required to comply with the sections as proposed:

Repeat Jurisprudence examination - $20

CME temporary license - $5

Reissuance of license following revocation - $450

Evaluation or re-evaluation of postgraduate training program - $100

The change in fees relating to Institutional Permits and Postgraduate Training Permits will offset one another.

Comments on the proposal may be submitted to Pat Wood, P.O. Box 2018, MC-901, Austin, Texas 78768-2018. A public hearing will be held at a later date.

22 TAC §§175.1 - 175.3

The amendments are proposed under the authority of the Occupations Code Annotated, §153.001, which provides the Texas

State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; and enforce this subtitle.

The Occupations Code, §153.051 is affected by the amendments.

§175.1. Fees.

The board shall charge the following fees.

(1) Physicians:

(A) processing an application for [~~complete or partial~~] licensure examination (includes a $200 surcharge and one [~~USMLE Step 3 or COMLEX Level 3 and~~] jurisprudence examination sitting [~~fee~~]) -- $800;

(B) [~~processing an application for licensure by endorsement (includes one jurisprudence examination fee) -- $800;~~]

[~~(C)~~]] Jurisprudence examination fees (required and payable each time applicant is scheduled for a repeat of examination)[~~:~~] -- $50;

~~*(i)* USMLE Step 3 -- $500;~~

~~*(ii)* COMLEX Level 3 -- $500;~~

~~*(iii)* Jurisprudence -- $30;~~

(C) [~~(D)~~] processing an application for a special purpose license for practice of medicine across state lines (includes a $200 surcharge and one jurisprudence examination sitting [~~fee~~]) -- $800;

(D) [~~(E)~~] temporary license:

(i) regular -- $50;

(ii) distinguished professor -- $50;

(iii) state health agency -- $50;

~~*(iv)* section 3.0305 -- $50;~~

(iv) [~~(v)~~] rural/underserved areas -- $50;

(v) [~~(vi)~~] continuing medical education -- $ 55 [~~50~~];

(E) [~~(F)~~] annual registration permit (includes a $200 surcharge) [~~renewal~~] -- $330; [~~.~~]

(F) duplicate wall certificate -- $45;

(G) processing an application for reissuance of license following revocation (includes a $200 surcharge and one jurisprudence examination sitting) -- $800;

(H) office-based anesthesia site registration -- $300.

(2) Physicians in Training:

(A) institutional permit (began training program prior to 6-1-2000) -- $45 [~~50~~];

(B) [~~renewal of institutional permit (began training program prior to 6-1-2000) -- $35;~~]

[~~(C)~~] [~~basic~~] postgraduate resident permit -- $60 [~~75~~];

~~[(D) advanced postgraduate resident permit -- $75;]~~

(C) [~~(E)~~] temporary postgraduate resident permit -- $50;

~~[(F) renewal of basic postgraduate resident permit -- $50;]~~

~~[(G) renewal of advanced postgraduate resident permit -- $50;]~~

(D) [~~(H)~~] faculty temporary permit -- $110;

(E) [~~(I)~~] visiting professor permit -- $110;

(F) [~~(J)~~] evaluation or re-evaluation of postgraduate training program --$250 [~~150~~].

(3) Physician Assistants:

(A) processing application for licensure as a physician assistant -- $200;

(B) temporary license -- $50;

(C) annual renewal -- $150.

(4) Acupuncturists/Acudetox Specialists:

(A) processing an application for licensure [~~license~~] as an acupuncturist -- $300;

(B) temporary license for an acupuncturist -- $50;

(C) annual renewal for an acupuncturist -- $250;

(D) acupuncturist distinguished professor -- $50;

(E) processing an application for acudetox specialist -- $50;

(F) annual renewal for acudetox specialist -- $25;

(G) review of continuing acupuncture education courses -- $50;

(H) review of continuing acudetox acupuncture education courses -- $50.

(5) Non-Certified Radiologic Technicians:

(A) processing an application -- $50;

(B) annual renewal -- $50.

(6) Certification as a Non-Profit Health Organization:

(A) processing an application for new or initial certification -- $2,500;

(B) processing an application for biennial recertification -- $1,000;

(C) fee for [~~processing~~] a late application for biennial recertification -- $1,000 [~~$2,000~~].

~~[(7) Miscellaneous Fees:]~~

~~[(A) duplicate license -- $45;]~~

~~[(B) endorsement -- $40;]~~

~~[(C) reinstatement after cancellation for cause -- $350;]~~

~~[(D) office-based anesthesia site registration -- $300.]~~

§175.2. Penalties.

The board shall charge the following late fee penalties:

(1) Physicians:

(A) [~~renewal of~~] physician's annual registration permit [~~license~~] expired for 31-90 days -- $50;

(B) [~~renewal of~~] physician's annual registration permit [~~license~~] expired for longer than 90 days but less than one year -- $100.

(2) Physician Assistants:

(A) renewal of physician assistant's license expired for 90 days or less -- $50;

(B) renewal of physician assistant's license expired for longer than 90 days but less than one year -- $100.

(3) Acupuncturists/Acudetox Specialists:

(A) renewal of acupuncturist's license expired for 90 days or less -- $125;

(B) renewal of acupuncturist's license expired for longer than 90 days but less than one year -- $250;

(C) renewal of acudetox specialist certification expired for less than one year -- $25.

(4) Non-Certified Radiologic Technicians. Renewal of non-certified radiologic technician's registration expired for 1-90 days -- $25.

§175.3. Payment of Fees or Penalties.

All licensure fees or penalties must be submitted in the form of a money order , personal check, or cashier's check payable on or through a United States bank. Fees and penalties cannot be refunded. If a single payment is made for more than one individual permit, it must be made for the same class of permit and a detailed listing, on a form prescribed by the board, must be included with each payment.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 22, 2001.

TRD-200106377
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 305-7016

♦ ♦ ♦

22 TAC §175.4

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas State Board of Medical Examiners or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under the authority of the Occupations Code Annotated, §153.001, which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; and enforce this subtitle.

The Occupations Code, §153.051 is affected by the repeal.

§175.4. Partial Refund.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 22, 2001.

TRD-200106378
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 305-7016

♦ ♦ ♦

22 TAC §175.4

The new section is proposed under the authority of the Occupations Code Annotated, §153.001, which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; and enforce this subtitle.

The Occupations Code, §153.051 is affected by the new section.

§175.4. Applications.

(a) All information required on applications used by this board will conform to the Medical Practice Act and rules promulgated by this board. The board hereby adopts by reference the following forms:

(1) Physicians:

(A) application for licensure;

(B) application for a special purpose license for practice of medicine across state lines;

(C) application for annual registration of physician's permit; .

(D) application for a duplicate wall certificate;

(E) application for reissuance of license following revocation;

(F) physician designation of prescriptive delegation;

(G) application for office-based anesthesia registration.

(2) Physicians in Training:

(A) application for institutional permit (physician began program prior to 5-31-2000);

(B) application for basic postgraduate resident permit;

(C) application for advanced postgraduate resident permit;

(D) application for renewal of basic postgraduate resident permit;

(E) application for renewal of advanced postgraduate resident permit;

(F) application for faculty temporary permit;

(G) application for visiting professor permit;

(H) application for National Health Service Corps Permit.

(3) Physician Assistants:

(A) licensure application;

(B) application for temporary license;

(C) notice of intent to supervise a physician assistant;

(D) notice of intent to practice as a physician assistant;

(E) application for annual renewal of license.

(4) Acupuncturists/Acudetox Specialists:

(A) licensure application for acupuncturist;

(B) application for acupuncture distinguished professor temporary license;

(C) application for annual renewal of acupuncturist license;

(D) application for acudetox specialist certification;

(E) application for annual renewal of acudetox specialist certification;

(F) application for approval of continuing acupuncture education courses;

(G) application for approval of continuing acudetox acupuncture education courses.

(5) Non-Certified Radiologic Technicians:

(A) application for initial non-certified radiologic technician permit;

(B) application for annual renewal of non-certified radiologic technician permit; .

(C) application for supervision of a non-certified radiologic technician.

(6) Certification as a Non-Profit Health Organization:

(A) application for initial certification;

(B) application for biennial recertification.

(b) These forms may be examined and copies may be obtained at the offices of the Texas State Board of Medical Examiners, 333 Guadalupe, Tower 3, Suite 610, Austin, Texas.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 22, 2001.

TRD-200106379
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 305-7016

♦ ♦ ♦

22 TAC §175.5

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas State Board of Medical Examiners or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under the authority of the Occupations Code Annotated, §153.001, which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; and enforce this subtitle.

The Occupations Code, §153.051 is affected by the repeal.

§175.5. Applications.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 22, 2001.

TRD-200106380
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 305-7016

♦ ♦ ♦

CHAPTER 183. ACUPUNCTURE

22 TAC §§183.2 - 183.6, 183.12 - 183.14, 183.16 - 183.21

The Texas State Board of Medical Examiners proposes amendments to §§183.2-183.6, 183.12-183.14 and 183.16-183.21, concerning Acupuncture. The proposed changes are pursuant to SB 643 concerning the definition of acupuncture and acupuncturist and the authority of an acupuncturist to treat alcoholism and chronic pain without referral. The proposed amendments will also update Occupation Code cites.

Michele Shackelford, General Counsel, Texas State Board of Medical Examiners, has determined that for the first five-year period the sections are in effect there will be no effect to state or local government as a result of enforcing the amendments as proposed.

Ms. Shackelford also has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be compliance with SB 643. There will be no effect on small businesses. There will be no effect to individuals required to comply with the sections as proposed.

Comments on the proposal may be submitted to Pat Wood, P.O. Box 2018, MC-901, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The amendments are proposed under the authority of the Occupations Code Annotated, §153.001, which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; and enforce this subtitle.

The Occupations Code, §205.001, §205.302 are affected by the amendments.

§183.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the content clearly indicates otherwise.

(1) Ability to communicate in the English language -- An applicant who has met the requirements set out in §183.4(a)(7) of this title (relating to Licensure).

(2) Acceptable approved acupuncture school -- Effective January 1, 1996, with the exception of the provisions outlined in §183.4(h) of this title (relating to Exceptions),

(A) a school of acupuncture located in the United States or Canada which, at the time of the applicant's graduation, was a candidate for accreditation by the Accreditation Commission for Acupuncture and Oriental Medicine (ACAOM), offered no more than a certificate upon graduation, and had a curriculum of 1,800 hours with at least 450 hours of herbal studies which at a minimum included the following:

(i) basic herbology including recognition, nomenclature, functions, temperature, taste, contraindications, and therapeutic combinations of herbs;

(ii) herbal formulas including traditional herbal formulas and their modification/variations based on traditional methods of herbal therapy;

(iii) patent herbs including the names of the more common patent herbal medications and their uses; and

(iv) clinical training emphasizing herbal uses; or

(B) a school of acupuncture located in the United States or Canada which, at the time of the applicant's graduation, was accredited by ACAOM, offered a masters degree upon graduation, and had a curriculum of 1,800 hours with at least 450 hours of herbal studies which at a minimum included the following:

(i) basic herbology including recognition, nomenclature, functions, temperature, taste, contraindications, and therapeutic combinations of herbs;

(ii) herbal formulas including traditional herbal formulas and their modifications or variations based on traditional methods of herbal therapy;

(iii) patent herbs including the names of the more common patent herbal medications and their uses; and

(iv) clinical training emphasizing herbal uses; or

(C) a school of acupuncture located outside the United States or Canada that is determined by the board to be substantially equivalent to a school defined in subparagraph (B) of this paragraph through an evaluation by a board-approved credential evaluation service; and

(D) the requirements of this section shall be in addition to the requirements of the Medical Practice Act, §6.07, subsection (c), and shall be construed and applied so as to be consistent with the Act.

(3) Acceptable unapproved acupuncture school -- A school or college located outside the United States or Canada that was not approved by the board at the time the degree was conferred but whose curriculum meets the requirements for an unapproved medical school as determined by a committee of experts selected by the Texas State Board of Acupuncture Examiners, subject to approval by the Texas State Board of Medical Examiners.

(4) Acupuncture --

(A) The insertion of an acupuncture needle and the application of moxibustion of specific areas of the human body as a primary mode of therapy to treat and mitigate a human condition, including the evaluation and assessment of the condition; and

(B) the administration or thermal and electrical treatments or the recommendations of dietary guidelines, energy flow exercise, or dietary or herbal supplements in conjunction with the treatment described by subparagraph (A) of this paragraph.

(5) Acupuncture board -- The Texas State Board of Acupuncture Examiners.

(6) Acupuncturist -- A licensee of the Texas State Board of Acupuncture Examiners who directly or indirectly charges a fee for the performance of acupuncture services.

(7) APA -- The Administrative Procedure Act, Government Code, §2001.001 et seq.

(8) Applicant or petitioner -- A party seeking a license or rule from the board.

(9) Application -- An application is all documents and information necessary to complete an applicant's request for licensure including the following:

(A) forms furnished by the board, completed by the applicant:

(i) all forms and addenda requiring a written response must be printed in ink or typed;

(ii) photographs must meet United States Government passport standards;

(B) a fingerprint card, furnished by the acupuncture board, completed by the applicant, that must be readable by the Texas Department of Public Safety;

(C) all documents required under §183.4(c) of this title (relating to Licensure Documentation); and

(D) the required fee, payable by check through a United States bank.

(10) Assistant Presiding Officer -- A member of the acupuncture board elected by the acupuncture board to fulfill the duties of the presiding officer in the event the presiding officer is incapacitated or absent, or the presiding officer's duly qualified successor under Robert's Rules of Order Newly Revised or board rules.

(11) Board -- The Texas State Board of Acupuncture Examiners.

(12) Board member -- One of the members of the acupuncture board, appointed and qualified pursuant to §§205.051-.053 [~~§6.04~~] of the Act.

(13) Chiropractor -- A licensee of the Texas State Board of Chiropractic Examiners.

(14) Contested case -- A proceeding, including but not restricted to, licensing, in which the legal rights, duties, or privileges of a party are to be determined by the board after an opportunity for adjudicative hearing.

(15) Documents -- Applications, petitions, complaints, motions, protests, replies, exceptions, answers, notices, or other written instruments filed with the medical board or acupuncture board in a licensure proceeding or by a party in a contested case.

(16) Eligible for legal practice and/or licensure in country of graduation -- An applicant who has completed all requirements for legal practice of acupuncture and/or licensure in the country in which the school is located except for any citizenship requirements.

(17) Executive Director -- The executive director of the Texas State Board of Medical Examiners.

(18) Full force -- Applicants for licensure who possess a license in another jurisdiction must have it in full force and not restricted for cause, canceled for cause, suspended for cause or revoked. An acupuncturist with a license in full force may include an acupuncturist who does not have a current, active, valid annual permit in another

jurisdiction because that jurisdiction requires the acupuncturist to practice in the jurisdiction before the annual permit is current.

(19) Full NCCAOM examination -- The National Certification Commission for Acupuncture and Oriental Medicine examination, consisting of the Comprehensive Written Exam (CWE), the Clean Needle Technique Portion (CNTP), and the Practical Examination of Point Location Skills (PEPLS), and, effective January 1, 1998, the Chinese Herbology Exam.

(20) Good professional character -- An applicant for licensure must not be in violation of or have committed any act described in the Act, §205.351 [~~§6.11~~].

(21) Hearings Examiner, Examiner, Administrative Law Judge, or ALJ -- An administrative law judge, duly employed by the State Office of Administrative Hearings.

(22) License -- Includes the whole or part of any board permit, certificate, approval, registration, or similar form of permission required by law; specifically, a license and a registration.

(23) Licensing -- Includes the medical board's and acupuncture board's process respecting the granting, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license.

(24) Medical board -- The Texas State Board of Medical Examiners.

(25) Misdemeanors involving moral turpitude -- Any misdemeanor of which fraud, dishonesty, or deceit is an essential element; [~~, any criminal violation of the Medical Practice Act,~~] burglary;[~~,~~] robbery;[~~,~~] sexual offense;[~~,~~] theft;[~~,~~] child molesting;[~~, and~~] substance diversion or substance abuse;[~~, or~~] an offense involving baseness, vileness, or depravity in the private social duties one owes to others or to society in general;[~~,~~] or an offense committed with knowing disregard for justice or honesty.

(26) Party -- Each person named or admitted as a party whether an applicant, protestant, petitioner, complainant, respondent or intervenor, and the board.

(27) Person -- Any individual, partnership, corporation, association, governmental subdivision, or public or private organization of any character.

(28) Physician -- A licensee of the Texas State Board of Medical Examiners.

(29) Pleading -- Written documents filed by parties concerning their respective claims.

(30) Presiding officer -- The member of the acupuncture board appointed by the governor to preside over acupuncture board proceedings or the presiding officer's duly qualified successor in accordance with Robert's Rules of Order Newly Revised or board rules, a hearings examiner, administrative law judge, or other person presiding over the board.

(31) Register -- The Texas Register.

(32) Rule -- Any agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the procedures or practice requirements of this board. The term includes the amendment or repeal of a prior section but does not include statements concerning only the internal management or organization of any agency and not affecting private rights or procedures. This definition includes substantive regulations.

(33) Secretary -- The secretary-treasurer of the Texas State Board of Acupuncture Examiners.

(34) Substantially equivalent to a Texas acupuncture school -- A school or college of acupuncture located outside the United States or Canada must be an institution of higher learning designed to select and educate acupuncture students; provide students with the opportunity to acquire a sound basic acupuncture education through training; to develop programs of acupuncture education to produce practitioners, teachers, and researchers; and to afford opportunity for postgraduate and continuing medical education. The school must provide resources, including faculty and facilities, sufficient to support a curriculum offered in an intellectual and practical environment that enables the program to meet these standards. The faculty of the school shall actively contribute to the development and transmission of new knowledge. The school of acupuncture shall contribute to the advancement of knowledge and to the intellectual growth of its students and faculty through scholarly activity, including research. The school of acupuncture shall include, but not be limited to, the following characteristics:

(A) the facilities for didactic and clinical training (i.e., laboratories, hospitals, library, etc.) shall be adequate to ensure opportunity for proper education.

(B) the admissions standards shall be substantially equivalent to a Texas school of acupuncture.

(C) the basic curriculum shall include courses substantially equivalent to those delineated in the Accreditation Commission for Acupuncture and Oriental Medicine (ACAOM) core curriculum at the time of applicant's graduation.

(D) the curriculum shall be of at least 1800 hours in duration.

(35) The Act -- Tex. Occ. Code Ann., Chapter 205. [~~The Medical Practice Act, Article 4495b and its amendments~~].

§183.3. Meetings.

(a) The acupuncture board shall meet at least four times a year to carry out the mandates of the Act.

(b) Special meetings may be called by the presiding officer of the acupuncture board, by resolution of the acupuncture board, or upon written request to the presiding officer of the acupuncture board signed by at least three members of the board.

(c) Acupuncture board and committee meetings shall, to the extent possible, be conducted pursuant to the provisions of Robert's Rules of Order Newly Revised unless, by rule, the acupuncture board adopts a different procedure.

(d) All elections and any other issues requiring a vote of the acupuncture board shall be decided by a simple majority of the members present. A quorum for transaction of any business by the acupuncture board shall be one more than half the acupuncture board's membership at the time of the meeting. If more than two candidates contest an election or if no candidate receives a majority of the votes cast on the first ballot, a second ballot shall be conducted between the two candidates receiving the highest number of votes.

(e) The acupuncture board, at a regular meeting or special meeting, may elect from its membership an assistant presiding officer and a secretary-treasurer to serve a term of one year or for a term of a set duration established by majority vote of the acupuncture board.

(f) The acupuncture board, at a regular meeting or special meeting, upon majority vote of the members present may remove the assistant presiding officer or secretary-treasurer from office.

(g) The following are standing and permanent committees of the acupuncture board. Each committee, with the exception of the Executive Committee, shall consist of at least one board member who is

a licensed physician, one board member who is a licensed acupuncturist, and one public board member. In the event that a committee does not have a representative of one or more of these groups, the presiding officer [~~Presiding Officer~~] shall appoint additional members as necessary to maintain this composition. The Executive Committee shall include the presiding officer [~~Presiding Officer~~], the assistant presiding officer [~~Assistant Presiding Officer~~], and the secretary-treasurer [~~Secretary-Treasurer~~], plus additional members so that the committee consists of a minimum of two board members who are licensed acupuncturists, one board member who is a licensed physician, and one public board member. The responsibilities and authority of these committees shall include those duties and powers as set forth below and such other responsibilities and authority which the acupuncture board may from time to time delegate to these committees.

(1) Licensure Committee:

(A) draft and review proposed rules regarding licensure, and make recommendations to the acupuncture board regarding changes or implementation of such rules;

(B) draft and review proposed application forms for licensure, and make recommendations to the acupuncture board regarding changes or implementation of such rules;

(C) oversee the application process for licensure;

(D) receive and review applications for licensure in the event the eligibility for licensure of an applicant is in question;

(E) present the results of reviews of applications for licensure and make recommendations to the acupuncture board regarding licensure of applicants whose eligibility is in question;

(F) oversee and make recommendations to the acupuncture board regarding any aspect of the examination process including the approval of an appropriate licensure examination and the administration of such an examination;

(G) draft and review proposed rules regarding any aspect of the examination;

(H) make recommendations to the acupuncture board regarding matters brought to the attention of the Licensure Committee.

(2) Discipline and Ethics Committee:

(A) draft and review proposed rules regarding the discipline of acupuncturists and enforcement of Subchapter H [~~F~~] of the Act;

(B) oversee the disciplinary process and give guidance to the acupuncture board and staff regarding methods to improve the disciplinary process and more effectively enforce Subchapter F of the Act;

(C) monitor the effectiveness, appropriateness, and timeliness of the disciplinary process;

(D) make recommendations regarding resolution and disposition of specific cases and approve, adopt, modify, or reject recommendations from staff or representatives of the acupuncture board regarding actions to be taken on pending cases. Approve dismissals of complaints and closure of investigations;

(E) draft and review proposed ethics guidelines and rules for the practice of acupuncture, and make recommendations to the acupuncture board regarding the adoption of such ethics guidelines and rules;

(F) make recommendations to the acupuncture board and staff regarding policies, priorities, budget, and any other matters related to the disciplinary process and enforcement of Subchapter F of the Act; and

(G) make recommendations to the acupuncture board regarding matters brought to the attention of the Discipline and Ethics Committee.

(3) Education Committee:

(A) draft and propose rules regarding educational requirements for licensure in Texas and make recommendations to the acupuncture board regarding changes or implementation of such rules;

(B) draft and propose rules regarding training required for licensure in Texas and make recommendations to the acupuncture board regarding changes or implementation of such rules;

(C) draft and propose rules regarding tutorial program requirements for licensure in Texas and make recommendations to the acupuncture board regarding changes or implementation of such rules;

(D) draft and propose rules regarding continuing education requirements for renewal of a Texas license and make recommendations to the acupuncture board regarding changes or implementation of such rules;

(E) draft and propose rules regarding educational requirements for degrees granted upon graduation in Texas and make recommendations to the acupuncture board regarding changes or implementation of such rules;

(F) consult with the Texas Higher Education Coordinating Board regarding educational requirements for schools of acupuncture, oversight responsibilities of each entity, degrees which may be offered by schools of acupuncture;

(G) maintain communication with acupuncture schools;

(H) plan and make visits to acupuncture schools at specified intervals, with the goal of promoting opportunities to meet with the students so they may become aware of the board and its functions;

(I) develop information regarding foreign acupuncture schools in the areas of curriculum, faculty, facilities, academic resources, and performance of graduates;

(J) draft and propose rules which would set the requirements for degree programs in acupuncture;

(K) be available for assistance with problems relating to acupuncture school issues which may arise within the purview of the board;

(L) offer assistance to the Licensure Committees in determining eligibility of graduates of foreign acupuncture schools for licensure;

(M) study and make recommendations regarding documentation and verification of records from foreign acupuncture schools;

(N) make recommendations to the acupuncture board regarding matters brought to the attention of the Education Committee;

(4) Executive Committee:

(A) review agendum for board meetings;

(B) ensure records are maintained of all committee actions;

(C) review requests from the public to appear before the board and to speak regarding issues relating to acupuncture;

(D) review inquiries regarding policy or administrative procedures;

(E) delegate tasks to other committees;

(F) take action on matters of urgency that may arise between board meetings;

(G) assist the medical board in the organization, preparation, and delivery of information and testimony to the Legislature and committees of the Legislature;

(H) formulate and make recommendations to the board concerning future board goals and objectives and the establishment of priorities and methods for their accomplishment;

(I) study and make recommendations to the board regarding the role and responsibility of the board offices and committees;

(J) study and make recommendations to the board regarding ways to improve the efficiency and effectiveness of the administration of the board pursuant to the Occupations Code, §205.102(b);

(K) make recommendations to the board regarding matters brought to the attention of the executive committee.

(h) Meetings of the acupuncture board and of its committees are open to the public unless such meetings are conducted in executive session pursuant to the Open Meetings Act and the Act. In order that board meetings may be conducted safely, efficiently, and with decorum, members of the public shall refrain at all times from smoking or using tobacco products, eating, or reading newspapers and magazines. Members of the public may not engage in disruptive activity that interferes with board proceedings, including, but not limited to, excessive movement within the meeting room, noise or loud talking, and resting of feet on tables and chairs. The public shall remain within those areas of the board's offices designated as open to the public. Members of the public shall not address or question board members during meetings unless recognized by the board's presiding officer pursuant to a published agenda item.

(i) Journalists have the same right of access as other members of the public to acupuncture board meetings conducted in open session, and are also subject to the rules of conduct described in subsection (h) of this section. Observers of any board meeting may make audio or visual recordings of such proceedings conducted in open session subject to the following limitations: the acupuncture board's presiding officer may request periodically that camera operators extinguish their artificial lights to allow excessive heat to dissipate; camera operators may not assemble or disassemble their equipment while the board is in session and conducting business; persons seeking to position microphones for recording board proceedings may not disrupt the meeting or disturb participants; journalists may conduct interviews in the reception area of the board's offices or, at the discretion of the acupuncture board's presiding officer, in the meeting room after recess or adjournment; no interview may be conducted in the hallways of the board's offices; and the acupuncture board's presiding officer may exclude from a meeting any person who, after being duly warned, persists in conduct described in this subsection and subsection (h) of this section.

(j) The assistant presiding officer of the acupuncture board shall assume the duties of the presiding officer in the event of the presiding officer's absence or incapacity.

(k) In the absence or incapacity of both the presiding officer and the assistant presiding officer, the secretary-treasurer shall assume the duties of the presiding officer.

(l) In the event of the absence or incapacity of the presiding officer, the assistant presiding officer, and secretary-treasurer, the members of the acupuncture board may elect another member to act as the presiding officer of a board meeting or may elect an interim acting presiding officer for the duration of the absences or incapacity or until another presiding officer is appointed by the governor.

(m) Upon the death, resignation, or permanent incapacity of the assistant presiding officer or the secretary-treasurer, the acupuncture board shall elect from its membership an officer to fill the vacant position. Such an election shall be conducted as soon as practicable at a regular or special meeting of the acupuncture board.

§183.4. Licensure.

(a) Qualifications. An applicant must present satisfactory proof to the acupuncture board that the applicant:

(1) is at least 21 years of age;

(2) is of good professional character as defined in §183.2 of this title (relating to Definitions);

(3) has successfully completed 60 semester hours of general academic college level courses, other than in acupuncture school, that are not remedial and would be acceptable at the time they were completed for credit on an academic degree at a two or four year institution of higher education within the United States accredited by an agency recognized by the Higher Education Coordinating Board or its equivalent in other states as a regional accrediting body. Coursework completed as a part of a degree program in acupuncture or Oriental medicine may be accepted by the acupuncture board if, in the opinion of the acupuncture board, such coursework is substantially equivalent to the required hours of general academic college level coursework;

(4) is a graduate of a reputable acupuncture school that was a candidate for accreditation or had accreditation through the Accreditation Commission for Acupuncture and Oriental Medicine (ACAOM) at the time of applicant's graduation, or received and completed training which, in the opinion of the acupuncture board, was substantially equivalent to training provided by such a school;

(5) has taken and passed, within three attempts, the full National Certification Commission for Acupuncture and Oriental Medicine (NCCAOM) examination;

(6) has taken and passed the CCAOM (Council of Colleges of Acupuncture and Oriental Medicine) Clean Needle Technique (CNT) course and practical examination; and

(7) is able to communicate in English as demonstrated by one of the following:

(A) passage of the NCCAOM examination taken in English; or

(B) passage of the TOEFL (Test of English as a Foreign Language) with a score of 550 or higher on the paper based test or with a score of 213 or higher on the computer based test; or

(C) passage of the TSE (Test of Spoken English) with a score of 45 or higher; or

(D) passage of the TOEIC (Test of English for International Communication) with a score of 500 or higher; or

(E) at the discretion of the acupuncture board, passage of any other similar, validated exam testing English competency given by a testing service with results reported directly to the acupuncture board or with results otherwise subject to verification by direct contact between the testing service and the acupuncture board; or

(F) an interview conducted in English with the acupuncture board, a committee of the acupuncture board, or the executive director of the acupuncture board. Only one interview shall be granted to each requesting applicant unless that applicant can satisfactorily demonstrate that a second personal interview is the only remaining opportunity for the applicant to meet the required ability to communicate in the English language. Should the applicant fail to adequately demonstrate the ability to communicate in the English language at the second interview, the applicant is ineligible for future interviews to determine English proficiency.

(b) Procedural rules for licensure applicants. The following provisions shall apply to all licensure applicants.

(1) Applicants for licensure:

(A) whose documentation indicates any name other than the name under which the applicant has applied must furnish proof of the name change;

(B) whose application for licensure which has been filed with the board office and which is in excess of two years old from the date of receipt shall be considered inactive. Any fee previously submitted with that application shall be forfeited. Any further application procedure for licensure will require submission of a new application and inclusion of the current licensure fee.

(C) will be allowed to sit for the NCCAOM examination only three times;

(D) who in any way falsify the application may be required to appear before the acupuncture board. It will be at the discretion of the acupuncture board whether or not the applicant will be issued a Texas acupuncture license;

(E) on whom adverse information is received by the acupuncture board may be required to appear before the acupuncture board. It will be at the discretion of the acupuncture board whether or not the applicant will be issued a Texas license;

(F) shall be required to comply with the acupuncture board's rules and regulations which are in effect at the time the completed application form and fee are filed with the board;

(G) may be required to sit for additional oral, written, or practical examinations or demonstrations that, in the opinion of the acupuncture board, are necessary to determine competency of the applicant;

(H) must have the application for licensure completed and legible in every detail 60 days prior to the acupuncture board meeting in which they are to be considered for licensure unless otherwise determined by the acupuncture board based on good cause.

(2) Applicants for licensure who wish to request reasonable accommodation due to a disability must submit the request at the time of filing the application.

(3) Applicants who have been licensed in any other state, province, or country shall complete a notarized oath or other verified sworn statement in regard to the following:

(A) whether the license, certificate, or authority has been the subject of proceedings against the applicant for the restriction for cause, cancellation for cause, suspension for cause, or revocation of the license, certificate, or authority to practice in the state, province, or country, and if so, the status of such proceedings and any resulting action; and,

(B) whether an investigation in regard to the applicant is pending in any jurisdiction or a prosecution is pending against the applicant in any state, federal, national, local, or provincial court for any offense that under the laws of the state of Texas is a felony, and if so, the status of such prosecution or investigation.

(4) An applicant for a license to practice acupuncture may not be required to appear before the acupuncture board or any of its committees unless the application raises questions about the applicant's:

(A) physical or mental impairment;

(B) criminal conviction; or

(C) revocation of a professional license.

(c) Licensure documentation.

(1) Original documents/interview. An applicant must appear for a personal interview at the board offices and present original documents to a representative of the board for inspection. Original documents may include, but are not limited to, those listed in paragraph (2) of this subsection.

(2) Required documentation. Documentation required of all applicants for licensure shall include the following:

(A) Birth certificate/proof of age. Each applicant for licensure must provide a copy of either a birth certificate and translation, if necessary, to prove that the applicant is at least 21 years of age. In instances where a birth certificate is not available, the applicant must provide copies of a passport or other suitable alternate documentation.

(B) Name change. Any applicant who submits documentation showing a name other than the name under which the applicant has applied must present copies of marriage licenses, divorce decrees, or court orders stating the name change. In cases where the applicant's name has been changed by naturalization the applicant must submit the original naturalization certificate by hand delivery or by certified mail to the board office for inspection.

(C) Examination scores. Each applicant for licensure must have a certified transcript of grades submitted directly from the appropriate testing service to the acupuncture board for all examinations used in Texas for purposes of licensure in Texas.

(D) Dean's certification. Each applicant for licensure must have a certificate of graduation submitted directly from the school of acupuncture on a form provided by the acupuncture board. The applicant shall attach to the form a recent photograph, meeting United States Government passport standards, before submitting it to the school of acupuncture. The school shall have the Dean or the designated appointee sign the form attesting to the information on the form and placing the school seal over the photograph.

(E) Diploma or certificate. All applicants for licensure must submit a copy of their diploma or certificate of graduation.

(F) Evaluations. All applicants must provide, on a form furnished by the acupuncture board, evaluations of their professional affiliations for the past ten years or since graduation from acupuncture school, whichever is the shorter period.

(G) Preacupuncture school transcript. Each applicant must have the appropriate school or schools submit a copy of the record of their undergraduate education directly to the acupuncture board. Transcripts must show courses taken and grades obtained. If determined that the documentation submitted by the applicant is not sufficient to show proof of the completion of 60 semester hours of college courses other than in acupuncture school, which courses would be acceptable, at the time of completion, to The University of Texas at Austin for credit on a bachelor of arts degree or a bachelor of science

degree, the applicant may be requested to contact the Office of Admissions at The University of Texas at Austin for course work verification or otherwise submit such documentation to the acupuncture board for a determination as to the adequacy of such education.

(H) School of acupuncture transcript. Each applicant must have his or her acupuncture school submit a transcript of courses taken and grades obtained directly to the acupuncture board.

(I) Fingerprint card. Each applicant must complete a fingerprint card for the Texas Department of Public Safety and return it to the acupuncture board as part of the application.

(J) Other verification. For good cause shown, with the approval of the acupuncture board, verification of any information required by this subsection may be made by a means not otherwise provided for in this subsection.

(3) Additional documentation. Applicants may be required to submit other documentation, including, but not limited to the following:

(A) Translations. An accurate certified translation of any document that is in a language other than the English language along with the original document or a certified copy of the original document which has been.

(B) Arrest Records. If an applicant has ever been arrested, a copy of the arrest and arrest disposition from the arresting authority and submitted by that authority directly to the acupuncture board.

(C) Malpractice. If an applicant has ever been named in a malpractice claim filed with any liability carrier or if an applicant has ever been named in a malpractice suit, the applicant shall submit the following:

(i) a completed liability carrier form furnished by the acupuncture board regarding each claim filed against the applicant's insurance;

(ii) for each claim that becomes a malpractice suit, a letter from the attorney representing the applicant directly to this board explaining the allegation, dates of the allegation, and current status of the suit. If the suit has been closed, the attorney must state the disposition of the suit, and if any money was paid, the amount of the settlement, unless release of such information is prohibited by law or an order of a court with competent jurisdiction. If such letter is not available, the applicant will be required to furnish a notarized affidavit explaining why this letter cannot be provided; and

(iii) a statement, composed by the applicant, explaining the circumstances pertaining to patient care in defense of the allegations.

(D) Inpatient treatment for alcohol/substance abuse or mental illness. Each applicant that has been admitted to an inpatient facility within the last ten years for the treatment of alcohol/substance abuse or mental illness must submit the following:

(i) an applicant's statement explaining the circumstances of the hospitalization;

(ii) an admitting summary and discharge summary, submitted directly from the inpatient facility;

(iii) a statement from the applicant's treating physician/psychotherapist as to diagnosis, prognosis, medications prescribed, and follow-up treatment recommended; and

(iv) a copy of any contracts or agreements signed with any licensing authority.

(E) Outpatient treatment for alcohol/substance abuse or mental illness. Each applicant that has been treated on an outpatient basis within the last ten years for alcohol/substance abuse or mental illness must submit the following:

(i) an applicant's statement explaining the circumstances of the outpatient treatment;

(ii) a statement from the applicant's treating physician/psychotherapist as to diagnosis, prognosis, medications prescribed, and follow-up treatment recommended; and

(iii) a copy of any contracts or agreements signed with any licensing authority.

(F) Additional documentation. Additional documentation as is deemed necessary to facilitate the investigation of any application for licensure.

(G) DD214. A copy of the DD214 indicating separation from any branch of the United States military.

(H) Other verification. For good cause shown, with the approval of the acupuncture board, verification of any information required by this subsection may be made by a means not otherwise provided for in this subsection.

(I) False documentation. Falsification of any affidavit or submission of false information to obtain a license may subject an acupuncturist to denial of a license or to discipline pursuant to the Act, §205.351 [~~§6.11~~].

(4) Substitute documents/proof. The acupuncture board may, at its discretion, allow substitute documents where proof of exhaustive efforts on the applicant's part to secure the required documents is presented. These exceptions are reviewed by the acupuncture board, a board committee, or the board's executive director on an individual case-by-case basis.

(d) Temporary license.

(1) Issuance. The Texas State Board of Acupuncture Examiners may, through the executive director of the Texas State Board of Medical Examiners, issue a temporary license to a licensure applicant who appears to meet all the qualifications for an acupuncture license under the Act, but is waiting for the next scheduled meeting of the Texas State Board of Acupuncture Examiners for review and for the license to be issued.

(2) Duration/renewal. A temporary license shall be valid for 100 days from the date issued and may be extended only for another 30 days after the date the initial temporary license expires. Issuance of a temporary license may be subject to restrictions at the discretion of the executive director and shall not be deemed dispositive in regard to the decision by the Texas State Board of Acupuncture Examiners to grant or deny an application for a permanent license.

(e) Distinguished professor temporary license.

(1) Issuance. The acupuncture board may issue a distinguished professor temporary license to an acupuncturist who:

(A) holds a substantially equivalent license, certificate, or authority to practice acupuncture in another state, province, or country; and

(B) agrees to and limits any acupuncture practice in this state to acupuncture practice for demonstration or teaching purposes for acupuncture students and/or instructors, and in direct affiliation with an

acupuncture school that is a candidate for accreditation or has accreditation through the Accreditation Commission for Acupuncture and Oriental Medicine (ACAOM) at which the students are trained and/or the instructors teach; and

(C) agrees to and limits practice to demonstrations or instruction under the direct supervision of a licensed Texas acupuncturist who holds an unrestricted license to practice acupuncture in this state; and

(D) pays any required fees for issuance or renewal of the distinguished professor temporary license.

(2) Duration/renewal. Any such distinguished professor temporary license shall have a duration of no longer than 60 days and may be renewed no more than three consecutive times for a total of an additional 180 days.

(3) Termination. A distinguished professor temporary license shall automatically expire at the end of 60 days from issuance or 60 days from date of renewal unless otherwise renewed. A distinguished professor temporary license or renewal may be denied, terminated, cancelled, suspended, or revoked for any violation of acupuncture board rules or the Act, Subchapter H [~~F~~].

(f) Relicensure.

(1) If an acupuncturist's license has been expired for one year, it is considered to have been canceled, and the acupuncturist may not renew the license. The acupuncturist may obtain a new license by submitting to reexamination and complying with the requirements and procedures for obtaining an original license. The examination required by this section is the full NCCAOM examination.

(2) A person may qualify for renewal of his or her original license without reexamination if that person:

(A) held a license previously in this state;

(B) moved to another state, province, or country;

(C) legally practiced in the other state, province, or country for not more than two years since the expiration of his or her Texas license; and

(D) files an application for relicensure under subsections (a)-(c) of this section.

(g) Approved schools. A ACAOM approved acupuncture school may use the word college as a means of representation to the public as long as it maintains ACAOM accreditation. An approved school may not represent itself as a university.

(h) Exceptions. Before January 1, 2004, the acupuncture board may not adopt a rule under §205.101 of the Act [~~the Medical Practice Act, §6.07(d), Article 4495b, Texas Civil Statutes~~], that requires a school of acupuncture operating in Texas on or before September 1, 1993, be accredited by, or a candidate for accreditation by, the Accreditation Commission for Acupuncture and Oriental Medicine.

§183.5. Annual Renewal of License.

(a) Acupuncturists licensed under the Act shall register annually and pay a fee. An acupuncturist may renew an unexpired license by submitting the required form and by paying the required renewal fee to the acupuncture board on or before November 30 of each year. The fee shall accompany a written application which legibly sets forth the licensee's name, mailing address, the place or places where the licensee is engaged in the practice of acupuncture, and other necessary information prescribed by the acupuncture board.

(b) Falsification of an affidavit or submission or false information to obtain renewal of a license shall subject an acupuncturist to denial of a license renewal or to discipline pursuant to §205.351 [~~§6.11~~] of the Act.

(c) If the renewal fee and completed application form are not received on or before November 30 of each year, penalty fees will be imposed as outlined in §175.2 of this title (relating to Fees, Penalties, and Applications).

§183.6. Denial of License; Discipline of Licensee.

(a) An applicant for a license under the Act shall be subject to denial of the application pursuant to provisions of §205.351 [~~§6.11~~] of the Act.

(b) An acupuncturist who holds a license issued under authority of the Act shall be subject to discipline, including revocation of license, pursuant to [~~the provisions of~~] §205.351 [~~§6.11~~] of the Act.

(c) The imposition of disciplinary action by the acupuncture board pursuant to §205.351 [~~§6.11~~] of the Act shall be in accordance with the Act, the procedures set forth in §183.8 of this title (relating to Procedure - General), the Administrative Procedure Act, and the rules of the State Office of Administrative Hearings.

(d) Disciplinary guidelines [~~Guidelines~~].

(1) Purpose. This subsection will:

(A) provide guidance and a framework of analysis for administrative law judges in the making of recommendations in contested licensure and disciplinary matters;

(B) promote consistency in the exercise of sound discretion by board members in the imposition of sanctions in disciplinary matters; and,

(C) provide guidance for board members for the resolution of potentially contested matters.

(2) Limitations. This subsection shall be construed and applied so as to preserve board member discretion in the imposition of sanctions and remedial measures pursuant to §205.351 of the Act. [~~the Medical Practice Act (the "Act"), §6.11 (relating to Denial of License; Discipline of License Holder)~~]. This subsection shall be further construed and applied so as to be consistent with the Act, and shall be limited to the extent as otherwise proscribed by statute and board rule.

(3) Aggravation. The following subparagraphs (A)-(O) of this paragraph may be considered as aggravating factors so as to merit more severe or more restrictive action by the board.

(A) patient harm and the severity of patient harm;

(B) economic harm to any individual or entity and the severity of such harm;

(C) environmental harm and severity of such harm;

(D) increased potential for harm to the public;

(E) attempted concealment of misconduct;

(F) premeditated misconduct;

(G) intentional misconduct;

(H) motive;

(I) prior misconduct of a similar or related nature;

(J) disciplinary history;

(K) prior written warnings or written admonishments from any government agency or official regarding statutes or regulations pertaining to the misconduct;

(L) violation of a board order;

(M) failure to implement remedial measures to correct or mitigate harm from the misconduct;

(N) lack of rehabilitative potential or likelihood for future misconduct of a similar nature; and,

(O) relevant circumstances increasing the seriousness of the misconduct.

(4) Extenuation and Mitigation. The following subparagraphs (A)-(O) of this paragraph may be considered as extenuating and mitigating factors so as to merit less severe or less restrictive action by the board.

(A) absence of patient harm;

(B) absence of economic harm to any individual or entity;

(C) absence of environmental harm;

(D) absence of potential harm to the public;

(E) self-reported and voluntary admissions of misconduct;

(F) absence of premeditation to commit misconduct;

(G) absence of intent to commit misconduct;

(H) motive;

(I) absence of prior misconduct of a similar or related nature;

(J) absence of a disciplinary history;

(K) implementation of remedial measures to correct or mitigate harm from the misconduct;

(L) rehabilitative potential;

(M) prior community service and present value to the community;

(N) relevant circumstances reducing the seriousness of the misconduct; and,

(O) relevant circumstances lessening responsibility for the misconduct.

(e) Scope of Practice.

(1) An acupuncturist may perform [~~Except as provided by paragraph (2) of this subsection, a license to practice acupuncture shall be denied or, after notice and hearing, revoked if the holder of a license has performed~~] acupuncture on a person who has been [~~was not~~] evaluated by a physician or dentist, as appropriate, for the condition being treated within twelve months before the date acupuncture was performed.

(2) The holder of a license may perform acupuncture on a person who was referred by a doctor licensed to practice chiropractic by the Texas Board of Chiropractic Examiners if the licensee commences the treatment within 30 days of the date of the referral. The licensee shall refer the person to a physician after performing acupuncture 30 times or for 120 days, whichever occurs first, if no substantial improvement occurs in the person's condition for which the referral was made.

(3) Notwithstanding paragraphs (1) and (2) of this subsection, an acupuncturist holding a current and valid license may without an evaluation or a referral from a physician, dentist, or chiropractor perform acupuncture on a person for smoking addiction, weight loss, alcoholism, chronic pain, or [~~, as established by the medical board with advice from the acupuncture board by rule,~~] substance abuse.

(4) A licensed acupuncturist must recommend an evaluation by a licensed Texas physician or dentist, if after performing acupuncture 20 times or for two months, whichever occurs first, there is no substantial improvement of the patient's chronic pain.

(5) A licensed acupuncturist shall recommend an evaluation by a licensed Texas physician or dentist, as appropriate, if after performing acupuncture 20 times or for two months, whichever occurs first, there is no substantial improvement of the patient's alcoholism or substance abuse.

§183.12. Patient Records.

(a) Acupuncturists licensed under the Act [~~act~~] shall keep and maintain adequate records of all patient visits or consultations which shall, at a minimum, include:

(1) the patient's name and address;

(2) vital signs;

(3) the chief complaint of the patient;

(4) a patient history;

(5) a treatment plan for each patient visit or consultation;

(6) a notation of any herbal medications, including amounts and forms, and other modalities used in the course of treatment with corresponding dates for such treatment;

(7) a system of billing record

(8) a written record regarding whether or not a patient was evaluated by a physician or dentist, as appropriate, for the condition being treated within 12 months before the date acupuncture was performed as required by §183.6(e) of this title (relating to Denial of License; Discipline of Licensee);

(9) a written record regarding whether or not a patient was referred to a physician after the acupuncturist performed acupuncture 30 times or for 120 days, whichever occurs first, as required by §183.6(e) of this title (relating to Denial of License; Discipline of Licensee) in regard to treatment of patients upon referral by a doctor licensed to practice chiropractic by the Texas Board of Chiropractic Examiners;

(10) in the case of referrals to the acupuncturist of a patient by a doctor licensed to practice chiropractic by the Texas Board of Chiropractic Examiners, the acupuncturist shall record the date of the referral and the most recent date of chiropractic treatment prior to acupuncture treatment; and,

(11) reasonable documentation that the evaluation required by §183.6(e) of this title (relating to Denial of License; Discipline of Licensee) was performed or, in the event that the licensee is unable to determine that the evaluation took place, a written statement signed by the patient stating that the patient has been evaluated by a physician within the required time frame on a copy of the following form:
Figure: 22 TAC §183.12(a)(11)

(b) Pursuant to §205.302 [~~subsection 6.11(g)~~] of the Act, an acupuncturist shall not be required to keep and maintain the documentation set forth in subsection (a)(11) of this section when performing acupuncture on a patient only for smoking addiction or weight loss.

(c) Acupuncturists licensed under the Act shall keep copies of patient treatment records indefinitely and billing records for a period of five years from the time of the last treatment rendered to the patient by the acupuncturist.

(d) Consent for the release of confidential information must be in writing and signed by the patient, or a parent or legal guardian if the patient is a minor, or a legal guardian if the patient has been adjudicated incompetent to manage his or her personal affairs, or an attorney ad litem appointed for the patient, as authorized by the Texas Mental Health Code Subtitle C, Title 7, Health and Safety Code [~~(Texas Civil Statutes, Article 5547-1 et seq.)~~]; the Persons with Mental Retardation Act, Subtitle D, Title 7, Health and Safety Code; [~~Mentally Retarded Persons Act of 1977 (Texas Civil Statutes, Article 5547-300); Section 9, Chapter 411, Acts of the 53rd Legislature, Regular Session, 1953 (Texas Civil Statutes, Article 5561c)~~]; Chapter 452, Health and Safety Code, (relating to Treatment of Chemically Dependent Persons); [~~Section 2, Chapter 543, Acts of the 61st Legislature, Regular Session, 1969 (Texas Civil Statutes, Article 5561c-1);~~] Chapter 5, Texas Probate Code; and Chapter 11, Family Code; or a personal representative if the patient is deceased, provided that the written consent specifies the following:

(1) the information or records to be covered by the release;

(2) the reason or purposes for the release; and

(3) the person to whom the information is to be released.

(e) The patient, or other person authorized to consent, has the right to withdraw his or her consent to the release of any information. Withdrawal of consent does not affect any information disclosed prior to the written notice of the withdrawal.

(f) Any person who receives information made confidential by this act may disclose the information to others only to the extent consistent with the authorized purposes for which consent to release the information was obtained.

(g) An acupuncturist shall furnish legible copies of patient records requested, or a summary or narrative of the records in English, pursuant to a written consent for release of the information as provided by subsection (d) of this section, except if the acupuncturist determines that access to the information would be harmful to the physical, mental, or emotional health of the patient. [~~, and~~]The [~~the~~] acupuncturist may delete confidential information about another person who has not consented to the release. The information shall be furnished by the acupuncturist within 30 days after the date of receipt of the request. Reasonable fees for furnishing the information shall be paid by the patient or someone on his or her behalf. If the acupuncturist denies the request, in whole or in part, the acupuncturist shall furnish the patient a written statement, signed and dated, stating the reason for denial. A copy of the statement denying the request shall be placed in the patient's records. In this subsection, "patient records" means any records pertaining to the history, diagnosis, treatment, or prognosis of the patient.

§183.13. Complaint Procedure Notification.

(a) Methods of Notification. Pursuant to the Act, §205.152 [~~§2.09(s)(2)~~], for the purpose of directing complaints to the acupuncture board, the acupuncture board and its licensees shall provide notification to the public of the name, mailing address, and telephone number of the acupuncture board by one or more of the following methods:

(1) displaying in a prominent location at their place or places of business, signs in English and Spanish of no less than 8 1/2 inches by 11 inches in size with the board-approved notification statement printed in black on a white background in type no smaller than standard 24-point Times Roman print; [~~or~~]

(2) placing the board-approved notification statement printed in English and Spanish in black type no smaller than standard 10-point, 12-pitch typewriter print on each bill for services; or

(3) placing the board-approved notification statement printed in English and Spanish in black type no smaller than standard 10-point, 12-pitch typewriter print on each registration form, application, or written contract for services.

(b) Approved English Notification Statement. The following notification statement in English is approved by the acupuncture board for purposes of these rules and the Act, §205.152 [~~§2.09(s)(2)~~], and is a sample of the type print reference in subsection (a) of this section. Figure: 22 TAC§183.13(b) (No change).

(c) Approved Spanish Notification Statement. The following notification statement in Spanish is approved by the acupuncture board for purposes of these rules and the Act, §205.152 [~~§2.09(s)(2)~~], and is a sample of the type print reference in subsection (a) of this section. Figure: 22 TAC §183.13(c)

§183.14. Medical Board Review and Approval.

(a) Pursuant to §205.202 [~~§6.10~~] of the Act, after consulting the acupuncture board, the medical board shall issue a license to practice acupuncture in this state to a person who meets the requirements of the Act and the rules adopted pursuant to the Act.

(b) The issuance, renewal, surrender, or cancellation of a license to practice acupuncture in this state shall be subject to final approval by the medical board after consultation with the acupuncture board.

(c) The acupuncture board recommendations of the revocation, suspension, restriction, probation, cancellation, or surrender of a license to practice acupuncture, as well as all recommended disciplinary actions, dismissals of allegations of violations of the Act, and agreed dispositions, shall be subject to medical board review and final approval by the medical board.

(d) Medical board approval of acupuncture board actions under this section shall be memorialized in the minutes of the medical board, the minutes of a committee of the medical board, or in a writing signed by the medical board's presiding officer, secretary-treasurer, or authorized committee chairman after consideration of the recommendations of the acupuncture board.

§183.16. Acudetox Specialist.

(a) For purposes of this chapter, an "acudetox specialist" shall be defined as a person who is certified to practice auricular acupuncture for the limited purpose of treating alcoholism, substance abuse, and chemical dependency.

(b) Any person who does not possess a Texas acupuncture license or is not otherwise authorized to practice acupuncture under [~~the Medical Practice Act,~~] Tex. Occ. Code Ann. Title 3, Subtitle C, Chapter 205 [~~(Act), Texas Civil Statutes, Article 4495b~~], may practice as an acudetox specialist for the sole purpose of the treatment of alcoholism, substance abuse, or chemical dependency upon obtaining certification as an acudetox specialist only under the following conditions listed in paragraphs (1)-(4) of this subsection:

(1) after issuance of certification by the Medical Board, payment of any required fee and receipt of written confirmation of certification from the Medical Board;

(2) after successful completion of a training program in acupuncture for the treatment of alcoholism, substance abuse, or chemical dependency, which has been approved by the Medical Board. Such program in auricular acupuncture shall be 70 hours in length, and shall

include a clean needle technique course or equivalent universal infection control precaution procedures course approved by the Medical Board;

(3) if the individual holds an unrestricted and current license, registration, or certification issued by the appropriate Texas regulatory agency authorizing practice as a social worker, a licensed professional counselor, a licensed psychologist, a licensed chemical dependency counselor, a licensed vocational nurse, or a licensed registered nurse; provided, however, that such practice of acudetox is not prohibited by the regulatory agency authorizing such practice as a social worker, professional counselor, psychologist, chemical dependency counselor, licensed vocational nurse, or registered nurse; and,

(4) if the individual works under protocol and has access to a licensed Texas physician or a licensed Texas acupuncturist readily available by telephonic means or other methods of communication.

(c) For purposes of this chapter, auricular acupuncture shall be defined as acupuncture treatment limited to the insertion of needles into five acupuncture points in the ear. These points being the liver, kidney, lung, sympathetic and shen men.

(d) Certification as an acudetox specialist shall be subject to suspension, revocation, or cancellation on any grounds substantially similar to those set forth in the Act, §205.351 [~~§6.11~~] or for practicing acupuncture in violation of this chapter.

(e) Practitioners certified as acudetox specialists shall keep records of patient care which at a minimum shall include the dates of treatment, the purpose for the treatment, the name of the patient, the points used, and the name, signature, and title of the certificate-holder.

(f) The fee for certification as an acudetox specialist for the treatment of alcoholism, substance abuse, or chemical dependency shall be set in such an amount as to cover the reasonable cost of administering and enforcing this chapter without recourse to any other funds generated by the Medical or the Acupuncture Board. Such fee shall be $50 for the initial application for certification and $25 per renewal.

(g) Certificate-holders under this chapter shall keep a current mailing and practice address on file with the Medical Board and shall notify the Medical Board in writing of any address change within ten days of the change of address.

(h) Individuals practicing as an acudetox specialist under the provisions of this chapter shall ensure that any patient receiving such treatment is notified in writing of the qualifications of the individual providing the acudetox treatment and the process for filing complaints with the Medical Board, and shall ensure that a copy of the notification is retained in the patient's record.

(i) Applications for certification as an acudetox specialist shall be submitted in writing on a form approved by the Medical Board which contains the information set forth in subsection (b) of this section and any supporting documentation necessary to confirm such information.

(j) Each individual who is certified as an acudetox specialist may annually renew certification by completing and submitting to the Medical Board an approved renewal form together with the following as listed in paragraphs (1)-(3) of this subsection:

(1) documentation that the certification or license as required by subsection (b)(3) of this section is still valid;

(2) proof of any Continuing Auricular Acupuncture Education (CAAE) obtained as provided for in §183.21 of this title (relating to Continuing Auricular Acupuncture Education for Acudetox Specialists); and,

(3) payment of a certification renewal fee in the amount of $25.

(k) Each individual who obtains certification as an acudetox specialist under this section may only use the titles "Certified Acudetox Specialist" or "C.A.S." to denote his or her specialized training.

§183.17. Use of Professional Titles.

(a) A licensee shall use the title "Licensed Acupuncturist," "Lic. Ac.," or "L. Ac.," alongside his/her name on any advertising or other materials visible to the public which pertain to the licensee's practice of acupuncture. Only persons licensed as an acupuncturist may use these titles.

(b) If a licensee uses any additional title or designation, it shall be the responsibility of the licensee to comply with the provisions of the Healing Art Identification Act, Tex. Occ. Code Ann., Chapter 104 [~~Texas Civil Statutes, Article 4590e~~].

§183.18. Texas Acupuncture Schools.

(a) A licensed Texas acupuncturist operating an acupuncture school in Texas which has not yet been accredited by the Accreditation Commission for Acupuncture and Oriental Medicine (ACAOM) or reached candidate status for accreditation by ACAOM, a licensed Texas acupuncturist with any ownership interest in such a school, or a licensed Texas acupuncturist who teaches in or operates such a school, shall ensure that students of the school and applicants to the school are made aware of the provisions of the Medical Practice Act governing acupuncture practice, the rules and regulations adopted by the Texas State Board of Acupuncture Examiners, and the educational requirements for obtaining a Texas acupuncture license to include the rules and regulations establishing the criteria for an approved acupuncture school for purposes of licensure as an acupuncturist by the Texas State Board of Acupuncture Examiners as set forth in subsection (b) of this section.

(b) Compliance with the provisions of subsection (a) of this section shall be accomplished by providing students and applicants with a copy of Subchapter H [~~F~~] of the [~~Medical Practice~~] Act, a copy of Chapter 183 (Acupuncture) contained in the Rules of the Texas State Board of Medical Examiners, and the following typed statement:
Figure: 22 TAC §183.18(b)

(c) A licensed Texas acupuncturist who operates, teaches at, or owns, in whole or in part, a Texas acupuncture school which is not accredited by ACAOM or is not a candidate for ACAOM accreditation shall not state directly or indirectly, explicitly or by implication, orally or in writing, either personally or through an agent of the acupuncturist or the school, that the school is endorsed, accredited, registered with, affiliated with, or otherwise approved by the Texas State Board of Acupuncture Examiners for any purpose.

(d) Failure to comply with the requirements or abide by the prohibitions of this section shall be grounds for disciplinary action against a licensed Texas acupuncturist who operates, teaches at, or owns, in whole or in part, a Texas acupuncture school which is not accredited by ACAOM or is not a candidate for ACAOM accreditation. Such disciplinary action shall be based on the violation of a rule of the Texas State Board of Acupuncture Examiners as provided for in the [~~Medical Practice~~] Act, §205.351(a)(6) [~~§6.11(a)(5)~~].

(e) For purposes of licensure and regulation of acupuncturists practicing in Texas, ACAOM approved acupuncture schools in Texas meeting the criteria set forth in §183.2 of this title (relating to Definitions) may issue masters of science in oriental medicine degrees in a manner consistent with the laws of the State of Texas. The Texas State

Board of Acupuncture Examiners shall recognize any such lawfully issued degrees. For purposes of licensure and regulation of acupuncturists practicing in Texas, acupuncture schools in Texas which are ACAOM candidates for masters level programs in acupuncture and oriental medicine and who have issued diplomas or degrees during the period of candidacy, may upgrade such degrees to masters degrees upon obtaining full ACAOM accreditation. The Texas State Board of Acupuncture Examiners shall recognize any such lawfully upgraded degrees.

§183.19. Acupuncture Advertising.

(a) License number on print advertising. Except as provided for in subsection (b) of this section, all written advertising communicated by any means or medium which is authorized, procured, promulgated, or used by any acupuncturist shall reflect the current Texas acupuncture license number of the acupuncturist who authorized, procured, promulgated, or used the advertisement and/or is the subject of the advertising. In the event that more than one acupuncturist authorizes, procures, promulgates, uses, and/or is the subject of the advertising, each such acupuncturist shall ensure that any such print medium reflects the current Texas acupuncture license number of the acupuncturist.

(b) Exceptions. The following forms of advertising shall be exempt from the provisions of subsection (a) of this section:

(1) business cards;

(2) office, clinic, or facility signs at the office, clinic, or facility location;

(3) single line telephone listings; and,

(4) billboard advertising.

(c) Misleading or deceptive advertising. Acupuncturists shall not authorize or use false, misleading, or deceptive advertising, and, in addition, shall not engage in any of the following:

(1) hold themselves out as a physician or surgeon or any combination or derivative of those terms unless also licensed by the medical board as a physician or surgeon as defined under the Medical Practice Act, Tex. Occ. Code Ann. §151.002(a)(13) [~~§1.03~~] (relating to Definitions);

(2) use the terms "board certified" unless the advertising also discloses the complete name of the board which conferred the referenced certification; or,

(3) use the terms "board certified" or any similar words or phrases calculated to convey the same meaning if the advertised board certification has expired and has not been renewed at the time the advertising in question was published, broadcast, or otherwise promulgated.

§183.20. Continuing Acupuncture Education.

(a) Purpose. This section is promulgated to promote the health, safety, and welfare of the people of Texas through the establishment of minimum requirements for continuing acupuncture education (CAE) for licensed Texas acupuncturists so as to further enhance their professional skills and knowledge.

(b) Minimum Continuing Acupuncture Education. As a prerequisite to the annual registration of the license of an acupuncturist, the acupuncturist shall complete 17 hours of continuing acupuncture education (CAE) each year in the following categories:

(1) The required hours shall be from courses that are designated or otherwise approved for credit by the Texas State Board of Acupuncture Examiners at the time the course was taken based on a review and recommendation of the Education Committee of the Board.

(2) At least five of the required hours from courses shall be herbology.

(3) At least two hours of the required hours from courses shall be ethics.

(c) Reporting Continuing Acupuncture Education. An acupuncturist must report on the licensee's annual registration form the number of hours and type of continuing acupuncture education completed during the previous year.

(d) Grounds for Exemption from Continuing Acupuncture Education. An acupuncturist may request in writing and may be exempt from the annual minimum continuing acupuncture education requirements for one or more of the following reasons:

(1) catastrophic illness;

(2) military service of longer than one year in duration;

(3) acupuncture practice and residence of longer than one year in duration outside the United States; and/or

(4) good cause shown on written application of the licensee which gives satisfactory evidence to the board that the licensee is unable to comply with the requirements of continuing acupuncture education.

(e) Exemption Requests. Exemption requests shall be subject to the approval of the executive director of the board, and shall be submitted in writing at least 30 days prior to the expiration of the license.

(f) Exemption Duration and Renewal. An exemption granted under subsections (d) and (e) of this section may not exceed one year, but may be renewed annually upon written request submitted at least 30 days prior to the expiration of the current exemption.

(g) Verification of Credits. The board may require written verification of both formal and informal continuing acupuncture education hours from any licensee and the licensee shall provide the requested verification within 30 calendar days of the date of the request. Failure to timely provide the requested verification may result in disciplinary action by the Board.

(h) Nonrenewal for Insufficient Continuing Acupuncture Education. Unless exempted under the terms of this section, the apparent failure of an acupuncturist to obtain and timely report the 17 hours of continuing education hours as required and provided for in this section shall result in nonrenewal of the license until such time as the acupuncturist obtains and reports the required hours; however, the executive director of the board may issue to such an acupuncturist a temporary license numbered so as to correspond to the nonrenewed license. Such a temporary license issued pursuant to this subsection may be issued to allow the board to verify the accuracy of information related to the continuing acupuncture education hours of the acupuncturist and to allow the acupuncturist who has not obtained or timely reported the required number of hours an opportunity to correct any deficiency so as not to require termination of ongoing patient care.

(i) Fee for Issuance of Temporary License. The fee for issuance of a temporary license pursuant to the provisions of this section shall be in the amount specified under §175.1 of this title (relating to Fees, Penalties, and Applications); however, the fee need not be paid prior to the issuance of the temporary license, but shall be paid prior to the renewal of a permanent license.

(j) Application of Additional Hours. Continuing acupuncture education hours which are obtained to comply with the requirements for the preceding year as a prerequisite for licensure renewal, shall first be credited to meet the requirements for that previous year. Once the requirements of the previous year are satisfied, any additional hours

obtained shall be credited to meet the continuing acupuncture education requirements of the current year.

(k) False Reports/Statements. An intentionally false report or statement to the board by a licensee regarding continuing acupuncture education hours reportedly obtained shall be a basis for disciplinary action by the board pursuant to the Act, §§205.351(a)(2) and (6).

(l) Monetary Penalty. Failure to obtain and timely report the continuing acupuncture education hours for renewal of a license shall subject the licensee to a monetary penalty for late registration in the amount set forth in §175.2 of this title (relating to Fees, Penalties, and Applications).

(m) Disciplinary Action, Conditional Licensure, and Construction. This section shall be construed to allow the board to impose requirements for completion of additional continuing acupuncture education hours for purposes of disciplinary action and conditional licensure.

(n) Approval of Continuing Acupuncture Education. Continuing Acupuncture Education (CAE) credit hours shall be approved by the Texas State Board of Acupuncture Examiners based on the recommendation of the Education Committee of the Board in regard to courses, programs, and activities submitted by licensees to satisfy the CAE requirements of this section. Approval shall be based on a showing by the education provider that:

(1) the content of the course, program, or activity is related to the practice of acupuncture or oriental medicine, and is not a course on practice enhancement, business, or office administration;

(2) the method of instruction is adequate to teach the content of the course, program, or activity;

(3) the credentials of the instructor(s) indicate competency and sufficient training, education, and experience to teach the specific course, program, or activity;

(4) the education provider maintains an accurate attendance/participation record on individuals completing the course, program, or activity;

(5) each credit hour for the course, program, or activity is equal to no less than 50 minutes of actual instruction or training;

(6) the course, program, or activity is provided by a knowledgeable health care provider or reputable school, state, or professional organization;

(7) the course description provides adequate information so that each participant understands the basis for the program and the goals and objectives to be met; and,

(8) the education provider obtain written evaluations at the end of each program, collate the evaluations in a statistical summary, and make the summary available to the board upon request.

(o) Continuing Acupuncture Education Approval Requests. All requests for approval of courses, programs, or activities for purposes of satisfying Continuing Acupuncture Education (CAE) credit requirements shall be submitted in writing to the Education Committee of the Board on a form approved by the Board, along with any required fee, and accompanied by information, documents, and materials accurately describing the course, program, or activity, and necessary for verifying compliance with the requirements set forth in subsection (n) of this section. At the discretion of the Board or the Education Committee, supplemental information, documents, and materials may be requested as needed to obtain an adequate description of the course, program, or activity and to verify compliance with the requirements set forth in subsection (n) of this section. At the discretion of the Board or the Education Committee, inspection of original supporting documents may be required for a determination on an approval request. The Acupuncture Board shall have the authority to conduct random and periodic checks of courses, programs, or activities to ensure that criteria for education approval as set forth in subsection (n) of this section have been met and continue to be met by the education provider. Upon requesting approval of a course, program, or activity, the education provider shall agree to such checks by the Acupuncture Board or its designees, and shall further agree to provide supplemental information, documents, and material describing the course, program, or activity which, in the discretion of the Acupuncture Board, may be needed for approval or continued approval of the course, program, or activity. Failure of an education provider to provide the necessary information, documents, and materials to show compliance with the standards set forth in subsection (n) of this section shall be grounds for denial of CAE approval or recision of prior approval in regard to the course, program, or activity.

(p) Reconsideration of Denials of Approval Requests. Determinations to deny approval of a CAE course, program, or activity may be reconsidered by the Education Committee or the Board based on additional information concerning the course, program, or activity, or upon a showing of good cause for reconsideration. A decision to reconsider a denial determination shall be a discretionary decision based on consideration of the additional information or the good cause showing. Requests for reconsideration shall be made in writing by the education provider, and may be made orally or in writing by Board staff or a committee of the Board.

(q) Reconsideration of Approvals. Determinations to approve a CAE course, program, or activity may be reconsidered by the Education Committee or the Board based on additional information concerning the course, program, or activity, or upon a showing of good cause. A decision to reconsider an approval determination shall be a discretionary decision based on consideration of the additional information or the good cause showing. Requests for reconsideration may be made in writing by a member of the public or may be made orally or in writing by Board staff or a committee of the Board.

~~[(h) Approval of Continuing Acupuncture Education. Continuing Acupuncture Education (CAE) credit hours shall be approved by the Texas State Board of Acupuncture Examiners based on the recommendation of the Education Committee of the Board in regard to courses, programs, and activities submitted by licensees to satisfy the CAE requirements of this section. Approval shall be based on a showing by the education provider that:]~~

~~[(1) the content of the course, program, or activity is related to the practice of acupuncture or oriental medicine, and is not a course on practice enhancement, business, or office administration;]~~

~~[(2) the method of instruction is adequate to teach the content of the course, program, or activity;]~~

~~[(3) the credentials of the instructor(s) indicate competency and sufficient training, education, and experience to teach the specific course, program, or activity;]~~

~~[(4) the education provider maintains an accurate attendance/participation record on individuals completing the course, program, or activity;]~~

~~[(5) each credit hour for the course, program, or activity is equal to no less than 50 minutes of actual instruction or training;]~~

~~[(6) the course, program, or activity is provided by a knowledgeable health care provider or reputable school, state, or professional organization;]~~

[(7) the course description provides adequate information so that each participant understands the basis for the program and the goals and objectives to be met; and,]

[(8) the education provider obtain written evaluations at the end of each program, collate the evaluations in a statistical summary, and make the summary available to the board upon request.]

[(i) Continuing Acupuncture Education Approval Requests. All requests for approval of courses, programs, or activities for purposes of satisfying Continuing Acupuncture Education (CAE) credit requirements shall be submitted in writing to the Education Committee of the Board on a form approved by the Board, along with any required fee, and accompanied by information, documents, and materials accurately describing the course, program, or activity, and necessary for verifying compliance with the requirements set forth in subsection (h) of this section. At the discretion of the Board or the Education Committee, supplemental information, documents, and materials may be requested as needed to obtain an adequate description of the course, program, or activity and to verify compliance with the requirements set forth in subsection (h) of this section. At the discretion of the Board or the Education Committee, inspection of original supporting documents may be required for a determination on an approval request. The Acupuncture Board shall have the authority to conduct random and periodic checks of courses, programs, or activities to ensure that criteria for education approval as set forth in subsection (h) of this section have been met and continue to be met by the education provider. Upon requesting approval of a course, program, or activity, the education provider shall agree to such checks by the Acupuncture Board or its designees, and shall further agree to provide supplemental information, documents, and material describing the course, program, or activity which, in the discretion of the Acupuncture Board, may be needed for approval or continued approval of the course, program, or activity. Failure of an education provider to provide the necessary information, documents, and materials to show compliance with the standards set forth in subsection (h) of this section shall be grounds for denial of CAE approval or recision of prior approval in regard to the course, program, or activity.]

[(j) Reconsideration of Denials of Approval Requests. Determinations to deny approval of a CAE course, program, or activity may be reconsidered by the Education Committee or the Board based on additional information concerning the course, program, or activity, or upon a showing of good cause for reconsideration. A decision to reconsider a denial determination shall be a discretionary decision based on consideration of the additional information or the good cause showing. Requests for reconsideration shall be made in writing by the education provider, and may be made orally or in writing by Board staff or a committee of the Board.]

[(k) Reconsideration of Approvals. Determinations to approve a CAE course, program, or activity may be reconsidered by the Education Committee or the Board based on additional information concerning the course, program, or activity, or upon a showing of good cause. A decision to reconsider an approval determination shall be a discretionary decision based on consideration of the additional information or the good cause showing. Requests for reconsideration may be made in writing by a member of the public or may be made orally or in writing by Board staff or a committee of the Board.]

[(l) Nonrenewal for Insufficient Continuing Acupuncture Education. Unless exempted under the terms of this section, the apparent failure of an acupuncturist to obtain and timely report the 17 hours of continuing education hours as required and provided for in this section shall result in nonrenewal of the license until such time as the acupuncturist obtains and reports the required hours; however, the executive director of the board may issue to such an acupuncturist a temporary license numbered so as to correspond to the nonrenewed license. Such a temporary license issued pursuant to this subsection may be issued to allow the board to verify the accuracy of information related to the continuing acupuncture education hours of the acupuncturist and to allow the acupuncturist who has not obtained or timely reported the required number of hours an opportunity to correct any deficiency so as not to require termination of ongoing patient care.]

[(m) Fee for Issuance of Temporary License. The fee for issuance of a temporary license pursuant to the provisions of this section shall be in the amount specified under §175.1 of this title (relating to Fees, Penalties, and Applications); however, the fee need not be paid prior to the issuance of the temporary license, but shall be paid prior to the renewal of a permanent license.]

[(n) Application of Additional Hours. Continuing acupuncture education hours which are obtained to comply with the requirements for the preceding year as a prerequisite for licensure renewal, shall first be credited to meet the requirements for that previous year. Once the requirements of the previous year are satisfied, any additional hours obtained shall be credited to meet the continuing acupuncture education requirements of the current year.]

[(o) False Reports/Statements. An intentionally false report or intentionally false statement to the board by a licensee regarding continuing acupuncture education hours reportedly obtained shall be a basis for disciplinary action by the board pursuant to the Act, §6.11(a)(2), §6.11(a)(4), and §6.11(a)(5).]

[(p) Monetary Penalty. Failure to obtain and timely report the continuing acupuncture education hours for renewal of a license shall subject the licensee to a monetary penalty for late registration in the amount set forth in §175.2 of this title (relating to Fees, Penalties, and Applications).]

[(q) Disciplinary Action, Conditional Licensure, and Construction. This section shall be construed to allow the board to impose requirements for completion of additional continuing acupuncture education hours for purposes of disciplinary action and conditional licensure.]

§183.21. Continuing Auricular Acupuncture Education for Acudetox Specialists.

(a) Purpose. This section is promulgated to promote the health, safety, and welfare of the people of Texas through the establishment of minimum requirements for continuing auricular acupuncture education (CAAE) for certified acudetox specialists so as to further enhance their professional skills and knowledge.

(b) Minimum continuing auricular acupuncture education. As a prerequisite to the re-certification of an acudetox specialist, the acudetox specialist shall provide documentation to the Medical Board that the individual has successfully met the continuing education requirements established by the board which includes the following listed in paragraphs (1)-(2) of this subsection:

(1) At least six hours of CAAE each year shall be in the practice of auricular acupuncture;

(2) The required hours shall be from courses that are designated or otherwise approved for credit by the Medical Board at the time the course was taken.

(c) Reporting continuing auricular acupuncture education. An acudetox specialist must report on the certificate-holder's re-certification form the number of hours and type of continuing auricular acupuncture education completed during the previous year.

(d) Grounds for exemption from continuing auricular acupuncture education. An acudetox specialist may request in writing

and may be exempt from the annual minimum continuing auricular acupuncture education requirements for one or more of the following reasons listed in paragraphs (1)-(2) of this subsection:

(1) catastrophic illness; and/or

(2) military service of longer than one year in duration;

(e) Exemption requests. Exemption requests shall be subject to the approval of the executive director of the Medical Board, and shall be submitted in writing at least 30 days prior to the expiration of the certificate.

(f) Exemption duration and renewal. An exemption granted under subsections (d) and (e) of this section may not exceed one year, but may be renewed annually upon written request submitted at least 30 days prior to the expiration of the current exemption.

(g) Verification of credits. The board may require written verification of continuing auricular acupuncture education hours from any certified acudetox specialist and the certificate-holder shall provide the requested verification within 30 calendar days of the date of the request. Failure to timely provide the requested verification may result in disciplinary action by the board.

(h) Approval of continuing auricular acupuncture education. Continuing Auricular Acupuncture Education (CAAE) credit hours shall be approved by the Medical Board and shall include education by a ACAOM accredited school or other nationally recognized institution, organization, or training program approved by the Medical Board. Approval of courses shall be by January 1, 1999. The first reporting of CAE shall be required for certification renewal in 2000. Approval shall be based on a showing by the education provider that:

(1) the content of the course, program, or activity is related to the practice of acudetox, and is not a course on practice enhancement, business, or office administration;

(2) the method of instruction is adequate to teach the content of the course, program, or activity;

(3) the credentials of the instructor(s) indicate competency and sufficient training, education, and experience to teach the specific course, program, or activity;

(4) the education provider maintains an accurate attendance/participation record on individuals completing the course, program, or activity; and,

(5) each credit hour for the course, program, or activity is equal to no less than 50 minutes of actual instruction or training.

(i) False Reports/Statements. An intentionally false [~~or misleading~~] report or statement to the board by a certificate-holder regarding continuing auricular acupuncture education hours reportedly obtained shall be a basis for disciplinary action by the board pursuant to the [~~Medical Practice Act~~] [{]Act[~~}~~], §205.351(a)(2) and (6) [~~section 6.11(a)(2), (4), and (5)~~].

(j) Monetary penalty. Failure to obtain and timely report the continuing auricular acupuncture education hours for renewal of a certificate shall subject the certificate-holder to a monetary penalty for late registration in the amount set forth in §175.2 of this title (relating to Fees, Penalties, and Applications).

(k) Disciplinary action, conditional licensure, and construction. This section shall be construed to allow the board to impose requirements for completion of additional continuing auricular acupuncture education hours for purposes of disciplinary action and conditional licensure.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 22, 2001.

TRD-200106381
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 305-7016

♦ ♦ ♦

CHAPTER 185. PHYSICIAN ASSISTANTS

22 TAC §§185.2, 185.7, 185.17, 185.19, 185.21, 185.29, 185.30

The Texas State Board of Medical Examiners proposes amendments to §§185.2, 185.7, 185.17, 185.19, 185.21, and new §185.29, §185.30 concerning Physician Assistants. The proposed changes to Chapter 185 relate to employment guidelines pursuant to SB 1166 and proposed changes concerning temporary licenses, automatic suspension and temporary suspensions pursuant to HB 3421.

Michele Shackelford, General Counsel, Texas State Board of Medical Examiners, has determined that for the first five-year period the sections are in effect there will be a minimal impact to agency budget relating to travel for the Disciplinary Panel members to attend meetings.

Ms. Shackelford also has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be compliance with SB 1166 and HB 3421. There will be no effect on small businesses. There will be no effect to individuals required to comply with the sections as proposed.

Comments on the proposal may be submitted to Pat Wood, P.O. Box 2018, MC-901, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The amendments and new section are proposed under the authority of the Occupations Code Annotated, §153.001, which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; and enforce this subtitle.

The Occupations Code, §§204.155, 204.202, 204.204, 204.205, 204.310, 204.311 are affected by the amendments and new section.

§185.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Act -- The Physician Assistant Licensing Act, Texas Occupations Code Annotated, Title 3, Subtitle C, Chapter 204 as amended.

(2) [~~(1)~~] Alternate physician -- A physician providing appropriate supervision on a temporary basis not to exceed fourteen consecutive days.

(3) APA -- The Administrative Procedure Act, Texas Government Code, Chapter 2001 as amended.

(4) [~~(2)~~] Board -- The Texas State Board of Physician Assistant Examiners.

(5) [~~(3)~~] Medical Board -- The Texas State Board of Medical Examiners.

(6) [~~(4)~~] Physician assistant -- A person licensed as a physician assistant by the Texas State Board of Physician Assistant Examiners.

(7) [~~(5)~~] State -- Any state, territory, or insular possession of the United States and the District of Columbia.

(8) [~~(6)~~] Submit -- The term used to indicate that a completed item has been actually received and date-stamped by the board [~~Board~~] along with all required documentation and fees, if any.

(9) [~~(7)~~] Supervising physician -- A physician licensed by the medical board either as a doctor of medicine or doctor of osteopathic medicine who assumes [~~is assuming~~] responsibility and legal liability for the services rendered by the physician assistant, and who has received approval from the medical board to supervise a specific physician assistant.

(10) [~~(8)~~] Supervision -- Overseeing the activities of, and accepting responsibility for, the medical services rendered by a physician assistant. Supervision does not require the constant physical presence of the supervising physician but includes a situation where a supervising physician and the person being supervised are, or can easily be, in contact with one another by radio, telephone, or another telecommunication device.

§185.7. Temporary License.

(a) The board may issue a temporary license to an applicant who:

(1) meets all the qualifications for a license under the Physician Assistant Licensing Act but is waiting for the next scheduled meeting of the board for the license to be issued; or

(2) seeks to temporarily substitute for a licensed physician assistant during the licensee's absence, if the applicant:

(A) is licensed or registered in good standing in another state, territory, or the District of Columbia;

(B) submits an application on a form prescribed by the board; and

(C) pays the appropriate fee prescribed by the board.

(3) has graduated from an educational program for physician assistants or surgeon assistants accredited by the Commission on Accreditation of Allied Health Education Programs or by the committee's predecessor or successor entities no later than six months previous to the application for temporary licensure and is waiting for examination results from the National Commission on Certification of Physician Assistants.

(b) A temporary license may be [~~is~~] valid for not more than one year [~~100 days~~] from the date issued [~~and may be extended for not more than an additional 30 days after the expiration date of the initial temporary license~~].

§185.17. Employment Guidelines.

(a) Except as otherwise provided in this section, a physician may supervise up to five physician assistants, or their full-time equivalents [~~of five physician assistants~~].

(b) A [~~The~~] physician assistant may not independently bill patients for the [~~their~~] services provided by the physician assistant except where provided by law.

(c) Except at a site serving medically underserved populations, a physician assistant shall not practice at a site where that physician assistant's supervising physician is not present at least 20 percent of the site's listed business hours unless the supervising physician has obtained a waiver under §193.6(i) of this title (relating to Waivers). [~~be maintained in an office practice setting separate from that of his or her supervising physician.~~]

(d) A physician who provides medical services in preventive medicine, disease management, health and wellness education, or similar services in an accredited academic/teaching institution listed in paragraphs (1)-(10) of this subsection, or its affiliates, may be denoted as the supervising physician for more than five physician assistants in that institution or its affiliates, provided the supervising physician determines that the physician assistants are properly trained to deliver the services, that the services are of such a nature that they may be safely and competently delivered by the supervised physician assistants, and the proper paperwork has been filed with the Texas State Board of Medical Examiners. The supervision of physician assistants must comply with all institutional rules and there must be accurate and timely internal institutional records, which are available upon request within 24 hours to the Texas State Board of Medical Examiners, which list the name and license number of the physician who is specifically assigned to actively supervise each physician assistant at one of the following institutions:

(1) University of Texas Medical Branch at Galveston;

(2) University of Texas Southwestern Medical Center at Dallas;

(3) University of Texas Health Science Center at Houston;

(4) University of Texas Health Science Center at San Antonio;

(5) University of Texas Health Center at Tyler;

(6) University of Texas M.D. Anderson Cancer Center;

(7) Texas A&M University College of Medicine;

(8) Texas Tech University School of Medicine;

(9) Baylor College of Medicine; or

(10) University of North Texas Health Science Center at Fort Worth.

(e) The provisions of subsections (a) and (d) of this section relating to the number of physician assistants authorized to be supervised shall not be interpreted to change or modify rules or statutes relating to the number of physician assistants to whom prescriptive authority may be delegated.

§185.19. Discipline of Physician Assistants.

(a) The board, upon finding a physician assistant has committed any of the acts set forth in §185.18 of this title (relating to Grounds for Denial of Licensure and for Disciplinary Action), shall enter an order imposing one or more of the following:

(1) deny the person's application for a license or other authorization to practice as a physician assistant;

(2) administer a public reprimand;

(3) order revocation, suspension, limitations, or restrictions of a physician assistant's license, or other authorization to practice as a physician assistant, including limiting the practice of the person to,

or excluding from the practice, one or more specified activities of the practice as a physician assistant or stipulating periodic board review;

(4) require a physician assistant to submit to care, counseling, or treatment by a health care practitioner designated by the board;

(5) stay enforcement of its order and place the physician assistant on probation with the board retaining the right to vacate the probationary stay and enforce the original order for noncompliance with the terms of probation or impose any other remedial measures or sanctions authorized by this section;

[~~(6) restore or reissue, at its discretion, a license or remove any disciplinary or corrective measure that the board may have imposed;~~]

(6) [~~(7)~~] order the physician assistant to perform public service;

(7) [~~(8)~~] require the physician assistant to complete additional training; or

(8) [~~(9)~~] assess an administrative penalty against the physician assistant.

(b) Notwithstanding subsection (a) of this section, the board shall suspend the license of a physician assistant serving a prison term in a state or federal penitentiary during the term of the incarceration, regardless of the offense.

(c) [~~(b)~~] Disciplinary Guidelines.

(1) Purpose. This subsection will:

(A) provide guidance and a framework of analysis for administrative law judges in the making of recommendations in contested licensure and disciplinary matters;

(B) promote consistency in the exercise of sound discretion by board members in the imposition of sanctions in disciplinary matters; and[~~,~~]

(C) provide guidance for board members for the resolution of potentially contested matters.

(2) Limitations. This subsection shall be construed and applied so as to preserve board member discretion in the imposition of sanctions and remedial measures pursuant to the [~~Physician Assistant Licensing~~] Act, §204.301 [~~sections 18 (related to Disciplinary Proceedings) and 19~~] (related to [~~Additional~~] Disciplinary Authority of the Board). This subsection shall be further construed and applied so as to be consistent with the [~~Physician Assistant Licensing~~] Act, and shall be limited to the extent as otherwise proscribed by statute and board rule.

(3) Aggravation. The following may be considered as aggravating factors so as to merit more severe or more restrictive action by the board: [~~.~~]

(A) patient harm and the severity of patient harm;

(B) economic harm to any individual or entity and the severity of such harm;

(C) environmental harm and the severity of such harm;

(D) increased potential for harm to the public;

(E) attempted concealment of misconduct;

(F) premeditated misconduct;

(G) intentional misconduct;

(H) motive;

(I) prior misconduct of a similar or related nature;

(J) disciplinary history;

(K) prior written warnings or written admonishments from any governmental agency or official regarding statutes or regulations pertaining to the misconduct;

(L) violation of a board order;

(M) failure to implement remedial measures to correct or mitigate harm from the misconduct;

(N) lack of rehabilitative potential or likelihood for future misconduct of a similar nature; and[~~,~~]

(O) relevant circumstances increasing the seriousness of the misconduct.

(4) Extenuation and Mitigation. The following may be considered as extenuating and mitigating factors so as to merit less severe or less restrictive action by the board:[~~.~~]

(A) absence of patient harm;

(B) absence of economic harm;

(C) absence of environmental harm;

(D) absence of potential harm to the public;

(E) self-reported and voluntary admissions of misconduct;

(F) absence of premeditation to commit misconduct;

(G) absence of intent to commit misconduct;

(H) motive;

(I) absence of prior misconduct of a similar or related nature;

(J) absence of a disciplinary history;

(K) implementation of remedial measures to correct or mitigate harm from the misconduct;

(L) rehabilitative potential;

(M) prior community service and present value to the community;

(N) relevant circumstances reducing the seriousness of the misconduct; and[~~,~~]

(O) relevant circumstances lessening responsibility for the misconduct.

§185.21. Complaint Procedure Notification.

(a) Methods of Notification. Pursuant to the Medical Practice Act, §154.051, [~~§2.09(s)(2),~~] for the purpose of directing complaints to the Texas State Board of Medical Examiners, the board and its licensees shall provide notification to the public of the name, mailing address, and telephone number for filing complaints by one or more of the following methods:

(1) displaying in a prominent location at their place or places of business, signs in English and Spanish of no less than 8 and 1/2 inches by 11 inches in size with the board-approved notification statement printed alone and in its entirety in black on a white background in type no smaller than standard 24-point Times Roman print with no alterations, deletions, or additions to the language of the board-approved statement; or

(2) placing the board-approved notification statement printed in English and Spanish in black type no smaller than standard

10-point, 12-pitch typewriter print on each bill for services with no alterations, deletions, or additions to the language of the board-approved statement; or

(3) placing the board-approved notification statement printed in English and Spanish in black type no smaller than standard 10-point, 12-pitch typewriter print on each registration form, application, or written contract for services with no alterations, deletions, or additions to the language of the board-approved statement.

(b) Approved English Notification Statement. The following notification statement in English is approved by the board for purposes of these rules and the Medical Practice Act, §154.051, [~~§2.09(s)(2)~~] and is a sample of the type print referenced in subsection (a) of this section.
Figure: 22 TAC §185.21(b) (No change.)

(c) Approved Spanish Notification Statement. The following notification statement in Spanish is approved by the board for purposes of these rules and the Medical Practice Act, §154.051, [~~§2.09(s)(2),~~] and is a sample of the type print referenced in subsection (a) of this section.
Figure: 22 TAC §185.21(c)

§185.29. Temporary Suspensions.

(a) In accordance with §§204.310-.311 of the Act, the presiding officer of the board, with board approval shall appoint a three-member disciplinary panel consisting of board members to determine whether a person's license to practice as a physician assistant in this state should be temporarily suspended.

(b) If a disciplinary panel determines from the evidence or information presented to the panel that a person licensed to practice as a physician assistant in this state would, by the person's continuation in practice, constitute a continuing threat to the public welfare, the disciplinary panel shall temporarily suspend the license of that person.

(c) The license may be suspended under this section without notice or hearing on the complaint if:

(1) institution of proceedings for a hearing before the board is initiated simultaneously with the temporary suspension; and

(2) a hearing is held under the APA and this Act as soon as possible.

(d) Notwithstanding the Public Information Act, Tex. Gov't Code Ann. Chapter 552 et. seq., the disciplinary panel may hold a meeting by telephone conference call if immediate action is required and the convening at one location of the disciplinary panel is inconvenient for any member of the disciplinary panel.

(e) In the event of the recusal of a disciplinary panel member or the inability of a panel member to attend a temporary suspension proceeding, an alternate disciplinary panel member may serve on the panel if previously appointed by the presiding officer of the board and approved by the board.

(f) To the extent practicable, in the discretion of the chair or acting chair of the disciplinary panel, the sequence of events will be as follows:

(1) Call to Order

(2) Roll Call

(3) Calling of the Case

(4) Recusal Statement

(5) Introductions/Appearances on the Record

(6) Presentation by Board Staff

(A) Synopsis of Allegations/Opening Statement

(B) Introduction of Evidence and Information

(7) Presentation of Respondent

(A) Opening Statement

(B) Introduction of Evidence and Information

(8) Rebuttal by Board Staff/Surrebuttal by Respondent

(9) Closing Arguments

(A) Argument by Board Staff

(B) Argument by Respondent

(C) Final Argument by Board Staff

(10) Deliberations

(11) Announcement of Decision

(12) Adjournment

(g) Witnesses may provide sworn statements in writing or verbally or choose to provide statements which are not sworn; however, whether a statement is sworn may be a factor to be considered by the disciplinary panel in evaluating the weight to be given to the statement. Questioning of witnesses by the parties or panel members shall be at the discretion of the chair or acting chair of the disciplinary panel with due consideration being given to the need to obtain accurate information and prevent the harassment or undue embarrassment of witnesses.

(h) Presentations by the parties may be based on evidence or information and shall not be excluded on objection of a party unless determined by the chair or acting chair that the evidence or information is clearly irrelevant or unduly inflammatory in nature; however, objections by a party may be noted for the record.

(i) The Disciplinary Panel of the board may be convened at the direction of or with the approval of any committee chair, any member of the Executive Committee, or any Informal Settlement Conference/Show Compliance Proceeding panel conveyed either verbally or in writing to the Executive Director, Director of Enforcement or General Counsel of the board.

§185.30. Recusals.

(a) Before or during any meeting or portion of a meeting of the board or board committee, a board member may choose to be recused from participating or voting in any contested or uncontested matter for any reason and shall not be required to state the basis for recusal, but may choose to state the basis in general terms if such a statement will not prejudice the rights of any party to a fair proceeding before the board or committee of the board. In the event a board member discloses a basis for recusal which could potentially prejudice the rights of any party to a fair proceeding, the presiding officer of the board or committee may cure any such prejudice by an instruction to board or committee members to not consider the statement during the course of the proceeding or during deliberations or discussions related to the proceeding.

(b) A board member should exercise sound discretion in choosing to be recused from participation and voting in any contested matter in which the board member is predisposed either for or against a party based on matters which are not part of the administrative record, and should choose to be recused from any matter in which the board member cannot set aside the predisposition whether the predisposition be for or against a party to the contested matter.

(c) Any party may move for the disqualification or recusal of a board member stating with particularity why the board member should

not sit. The motion shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall be verified by affidavit. The board member sought to be recused shall issue a decision as to whether he or she agrees that the recusal is appropriate or required before the board is scheduled to act on the matter for which the recusal is sought, or within 15 days after filing of the motion, whichever occurs first.

(d) In any instance in which a ground for recusal is raised by any party to a proceeding, any member of the board, or any member of a board committee, the board member who may have a basis for recusal may generally explain the potential basis for recusal and obtain the oral or written consent of the parties to the proceeding to participate and vote in the pending matter.

(e) Upon exercising the right to be recused and announcement of the recusal in open session, any board member so recused shall be allowed to remain in the room during any portion of the related proceeding, but shall not participate in any discussions, questioning, deliberations, or vote pertaining to the proceeding.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 22, 2001.

TRD-200106382
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 305-7016

♦ ♦ ♦

CHAPTER 187. PROCEDURE

The Texas State Board of Medical Examiners proposes the repeal of §§187.1-187.16, 187.17-187.24, 187.25-187.30, 187.31-187.41 and new §§187.1-187.9, 187.10-187.21, 187.22-187.34, 187.35-187.42 and §§187.43-187.44, concerning Procedure and Procedural Rules. The chapter is repealed and replaced to update procedures for formal and informal board proceedings. The new chapter will be titled Procedural Rules.

Michele Shackelford, General Counsel, Texas State Board of Medical Examiners, has determined that for the first five-year period the sections are in effect there will be a minimal effect to state or local government as a result of enforcing the repeal and replacement. The exact fiscal impact cannot be determined at this time, but it is expected to be minimal.

Ms. Shackelford also has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be updated regulations. There will be no effect on small businesses. There will be no effect to individuals required to comply with the sections as proposed.

Comments on the proposal may be submitted to Pat Wood, P.O. Box 2018, MC-901, Austin, Texas 78768-2018. A public hearing will be held at a later date.

SUBCHAPTER A. GENERAL PROVISIONS

22 TAC §§187.1 - 187.16

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas State Board of Medical Examiners or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the authority of the Occupations Code Annotated, §153.001, which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; and enforce this subtitle.

The Occupations Code, §§164.001-164.011; 164.051-164.061; 164.101-164.103; 164.151-164.154; 164.201-164.204; 165.001-165.008; 165.051; 165.101-165.103; 165.151-165.160. are affected by the repeals.

§187.1. Definitions.
§187.2. Applicability.
§187.3. Construction.
§187.4. Computation of Time.
§187.5. Agreement to be in Writing.
§187.6. Expiration of Licenses.
§187.7. Pleadings.
§187.8. Notice of Adjudicative Hearing Proceedings.
§187.9. Conduct and Decorum.
§187.10. Classification of Parties.
§187.11. Parties in Interest.
§187.12. Service in Nonrulemaking Proceedings.
§187.13. Appearances Personally or by Representative.
§187.14. Filing Fees.
§187.15. Forms.
§187.16. Ex Parte Consultations.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 22, 2001.

TRD-200106383
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 305-7016

♦ ♦ ♦

SUBCHAPTER B. PREHEARING

22 TAC §§187.17 - 187.24

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas State Board of Medical Examiners or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the authority of the Occupations Code Annotated, §153.001, which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; and enforce this subtitle.

The Occupations Code, §§164.001-164.011; 164.051-164.061; 164.101-164.103; 164.151-164.154; 164.201-164.204; 165.001-165.008; 165.051; 165.101-165.103; 165.151-165.160. are affected by the repeals.

§187.17. Discovery.
§187.18. Subpoenas.
§187.19. Show Compliance Proceeding.
§187.20. Prehearing Conferences.
§187.21. Motions.
§187.22. Consolidated Hearings.
§187.23. Place and Nature of Hearings.
§187.24. Informal Disposition.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 22, 2001.

TRD-200106384
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 305-7016

♦ ♦ ♦

SUBCHAPTER C. HEARING

22 TAC §§187.25 - 187.30

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas State Board of Medical Examiners or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the authority of the Occupations Code Annotated, §153.001, which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; and enforce this subtitle.

The Occupations Code, §§164.001-164.011; 164.051-164.061; 164.101-164.103; 164.151-164.154; 164.201-164.204; 165.001-165.008; 165.051; 165.101-165.103; 165.151-165.160. are affected by the repeals.

§187.25. Presiding Officer.
§187.26. Hearing Examiners.
§187.27. Order of Proceeding.
§187.28. Reporters and Transcripts.
§187.29. Dismissal Without Hearing.
§187.30. Evidence.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 22, 2001.

TRD-200106385
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 305-7016

♦ ♦ ♦

SUBCHAPTER D. POSTHEARING

22 TAC §§187.31 - 187.41

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas State Board of Medical Examiners or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the authority of the Occupations Code Annotated, §153.001, which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; and enforce this subtitle.

The Occupations Code, §§164.001-164.011; 164.051-164.061; 164.101-164.103; 164.151-164.154; 164.201-164.204; 165.001-165.008; 165.051; 165.101-165.103; 165.151-165.160. are affected by the repeals.

§187.31. Proposals for Decision.
§187.32. Exceptions and Replies.
§187.33. Oral Argument.
§187.34. Final Decisions and Orders.
§187.35. Motions for Rehearing.
§187.36. The Record.
§187.37. Costs of Appeal.
§187.38. Modification/Termination of Agreed Orders and Disciplinary Orders.
§187.39. Administrative Penalties.
§187.40. Temporary Suspensions.
§187.41. Recusals.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 22, 2001.

TRD-200106386
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 305-7016

♦ ♦ ♦

CHAPTER 187. PROCEDURAL RULES

SUBCHAPTER A. GENERAL PROVISIONS AND DEFINITIONS

22 TAC §§187.1 - 187.9

The new sections are proposed under the authority of the Occupations Code Annotated, §153.001, which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; and enforce this subtitle.

The Occupations Code, §§164.001-164.011; 164.051-164.061; 164.101-164.103; 164.151-164.154; 164.201-164.204; 165.001-165.008; 165.051; 165.101-165.103; 165.151-165.160. are affected by the new sections.

§187.1. Purpose and Scope.

(a) Purpose. The purpose of this chapter is to provide a system of procedures for practice before the Texas State Board of Medical Examiners that will promote just and efficient disposition of proceedings and public participation in the decision-making process. The provisions of this chapter shall be given a fair and impartial construction to obtain these objectives.

(b) Scope.

(1) This chapter shall govern the initiation, conduct, and determination of proceedings required or permitted by law, including proceedings referred to SOAH.

(2) This chapter shall not be construed so as to enlarge, diminish, modify, or otherwise alter the jurisdiction, powers or authority of the board, board staff, or the substantive rights of any person.

(3) This chapter shall control the practice and procedure of all board proceedings to include SOAH proceedings unless preempted by SOAH rules or the APA.

§187.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Act--The Medical Practice Act, Texas Occupations Code Annotated, Title 3, Subtitle B as amended.

(2) Address of record--The mailing address of each licensee or applicant as provided to the agency pursuant to the Act.

(3) Administrative law judge (ALJ)--An individual appointed to preside over administrative hearings pursuant to the APA.

(4) Agency--The divisions, departments, and employees of the Texas State Board of Medical Examiners, the Texas State Board of Physician Assistant Examiners, and the Texas State Board of Acupuncture Examiners.

(5) APA--The Administrative Procedure Act, Texas Government Code, Chapter 2001 as amended.

(6) Applicant--A person seeking a license from the board.

(7) Attorney of record--A person licensed to practice law in Texas who has provided staff with written notice of representation.

(8) Authorized representative--An attorney of record or any other person who has been designated in writing by a party to represent the party at a board proceeding.

(9) Board--The Texas State Board of Medical Examiners.

(10) Board member--One of the members of the board appointed pursuant to the Act.

(11) Board proceeding--Any proceeding before the board or at which the board is a party to an action, including a hearing before SOAH.

(12) Board representative--a board member or district review committee member who sits on a panel at an informal proceeding.

(13) Complaint--Pleading filed at SOAH by the board alleging a violation of the Act.

(14) Contested case--A proceeding, including but not restricted to licensing, in which the legal rights, duties, or privileges of a party are to be determined by the board after an opportunity for an administrative hearing to be held at SOAH.

(15) Conviction--An adjudication of guilt or an order of deferred adjudication entered against a person by a court of competent jurisdiction for an offense under the laws of this state, another state, or the United States, whether or not the imposition of the sentence is subsequently probated and the person is discharged from community supervision. The term does not include an adjudication of guilt or an order of deferred adjudication that has been subsequently expunged by a court of competent jurisdiction.

(16) Default judgment--The issuance of a proposal for decision or board order in which the factual allegations against a party are deemed admitted as true upon the party's failure to appear at a properly noticed SOAH hearing or ISC.

(17) Documents--Applications, petitions, complaints, motions, protests, replies, exceptions, answers, notices, or other written instruments filed with the board in a board proceeding.

(18) Executive director--The executive director of the agency, the authorized designee of the executive director, or the secretary of the board if and whenever the executive director and authorized designee are unavailable.

(19) Formal board proceeding--any proceeding requiring action by the board, including a temporary suspension hearing.

(20) Group practice--Any business entity, including a partnership, professional association, or corporation, organized under Texas law and established for the purpose of practicing medicine in which two or more physicians licensed in Texas are members of the practice.

(21) Informal board proceeding--Any proceeding involving matters before the board prior to the filing of a pleading at SOAH, to include, but not limited to show compliance proceedings, eligibility determinations, and informal resolution conferences.

(22) Informal show compliance proceeding--a board proceeding that provides a licensee the opportunity to demonstrate compliance with all requirements of the Act and board rules either in writing as set out in §187.17 of this title (relating to Informal Show Compliance Proceeding Based on Written Information) or through a personal appearance with one or more representatives of the board as set out in §187.18 of this title (relating to Informal Sow Compliance Proceeding and Settlement Conference Based on Personal Appearance ("ISC")) and an opportunity to enter into an informal settlement.

(23) ISC--Informal Show Compliance Proceeding and Settlement Conference Based on Personal Appearance.

(24) License--Includes the whole or part of any board permit, certificate, approval, registration or similar form of permission authorized by law.

(25) Licensee--Any person to whom the agency has issued a license, permit, certificate, approval, registration or similar form of permission authorized by law.

(26) Licensing--The agency process relating to the granting, denial, renewal, revocation, cancellation, suspension, limitation, reinstatement or reissuance of a license.

(27) Misdemeanors involving moral turpitude--Any misdemeanor of which fraud, dishonesty, or deceit is an essential element or as otherwise defined by §168.1(d) of this title (relating to Crimes Directly Related to the Practice of Medicine).

(28) National Practitioner Data Bank (NPDB) reportable action--In accordance with the Health Care Quality Improvement Act, 42 U.S.C. §11132, a public board action subject to reporting to the NPDB, includes a revocation, suspension, restriction or limitation of a physician's license or public reprimand. An administrative penalty or a requirement that a physician obtain additional education or training

are not considered reportable actions for the purpose of reporting to the NPDB, however, all disciplinary actions are public as set out in the Act.

(29) Party--The board and each person named or admitted as a party in a SOAH hearing or contested case before the board.

(30) Person--Any individual, partnership, corporation, association, governmental subdivision, or public or private organization.

(31) Petition--Pleading filed at SOAH by the board alleging the reasons for the denial of a license.

(32) Pleading--A written document submitted by the board, which requests procedural or substantive relief, makes claims, alleges facts, makes legal arguments, or otherwise addresses matters involved in a board proceeding.

(33) Presiding officer--The president of the board or the duly qualified successor of the president or other person presiding over a board proceeding.

(34) Probationer--A licensee who is under a board order.

(35) Probationer show compliance proceeding--A board proceeding that provides a probationer the opportunity to demonstrate compliance with the Act, board rules, and board order prior to the board finding that a probationer is in noncompliance with the probationer's order.

(36) Register--The Texas Register.

(37) Respondent--in a contested case, the licensee or applicant who either formally contests or defaults on an action rendered in a board proceeding.

(38) Rule--Any agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the procedures or practice requirements of this board. The term includes the amendment or repeal of a prior section but does not include statements concerning only the internal management or organization of any agency and not affecting private rights or procedures. This definition includes substantive regulations.

(39) Secretary--The secretary-treasurer of the board.

(40) SOAH--The State Office of Administrative Hearings.

(41) SOAH hearing--A public adjudication proceeding at SOAH.

(42) SOAH rules--1 Texas Administrative Code §155.1 et. seq.

(43) Texas Public Information Act--Texas Government Code, Chapter 552.

(44) Witness--Any person offering testimony or evidence at a board proceeding who is not board staff, the respondent, or an authorized representative of the respondent.

§187.3. Computation of Time.

(a) Counting days. Unless otherwise required by statute, in computing time periods prescribed by this chapter or by a SOAH order, the period shall begin to run on the day after the act, event or default in question. The day of the act, event or default on which the designated period time begins to run is not included. The period shall conclude on the last day of the designated period, unless that day is a day the agency is not open for business, in which case the designated period runs until the end of the next day on which the agency is open for business. When these rules specify a deadline or a set number of days for filing documents or taking other actions, the computation of time shall be calendar days rather than business days, unless otherwise provided in this chapter or pursuant to a SOAH or board order. However, if the period to act is five days or less, the intervening Saturdays, Sundays and legal holidays are not counted.

(b) Dispute. Disputes regarding computation of time for periods not specified by this chapter or by a board or SOAH order will be resolved by reference to applicable law and upon consideration of agency policy documented in accordance with the Act and board rules.

(c) Extensions. Unless otherwise provided by statute, the time for filing any document may be extended by agreement of the parties, order of the executive director or the ALJ if SOAH has acquired jurisdiction, upon written request filed prior to the expiration of the applicable time period. This written request must show good cause for an extension of time and state that the need is not caused by the neglect, indifference or lack of diligence of the movant.

§187.4. Agreement to be in Writing.

No stipulation or agreement between the parties, with regard to any matter involved in any board proceeding shall be enforced unless it shall have been reduced to writing and signed by the parties or their authorized representatives, or unless it shall have been dictated into the record by them during the course of a SOAH hearing or a deposition, or incorporated in an order bearing their written approval. This section does not limit a party's ability to waive, modify or stipulate any right or privilege afforded by these sections, unless precluded by law.

§187.5. Expiration of Permits.

(a) Timely applications. If a licensee submits a timely and sufficient application for new annual registration permit, the existing permit does not expire until the application has been finally determined by the agency. If the application is denied or the terms of the new permit are limited, the existing permit does not expire until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

(b) Late applications. A licensee must submit an application for an annual registration permit in a timely manner. A licensee shall be provided written notice at the licensee's address of record at least 30 days prior to the expiration date of the permit. Failure to submit an application for the permit by the appropriate deadline shall render the license invalid. If a permit is expired for more than one year, the license shall be considered canceled and may not be renewed. The board shall formally cancel the license at the next scheduled meeting of the board.

(c) Temporary suspensions. Nothing in this rule may be construed to violate or contradict the temporary suspension provisions of §164.059 of the Act.

§187.6. Appearances Personally or by Representative.

(a) An individual may appear on his or her own behalf or by an authorized representative. This right may be waived.

(b) Any person appearing as the authorized representative of an individual must produce a written statement executed by the individual they are representing which grants the representative the authority to appear on behalf of the individual. The original or a notarized copy of the authorization must be provided to the board at least three days prior to the appearance of the authorized representative in a proceeding or SOAH hearing unless waived by the board.

(c) A corporation, partnership, or association may appear and be represented by any authorized representative.

§187.7. Conduct and Decorum.

Each person, witness, or other representative shall behave in a dignified, courteous, and respectful manner with the board, the executive director, board staff, and all other parties at board proceedings. Disorderly or disruptive conduct will not be tolerated. Attorneys and other

representatives shall observe and practice the standards of ethical behavior prescribed for attorneys by the State Bar of Texas.

§187.8. Subpoenas.

(a) Authority. Pursuant to the Act, §153.007, the board has the authority to issue subpoenas to compel the attendance of witnesses and to issue subpoenas duces tecum to compel the production of books, records, or documents on the board's own motion.

(b) Request. Subsequent to the filing of a formal complaint, any party may request in writing that the executive director, as defined in §187.2 of this title (relating to Definitions), issue a subpoena or subpoena duces tecum in accordance with §2001.089 of the APA and §153.007 of the Act, upon a showing of good cause.

(1) The party requesting the subpoena shall be responsible for the payment of any expense incurred in serving the subpoena, as well as reasonable and necessary expenses incurred by the witness who appears in response to the subpoena.

(2) If the subpoena is for the attendance of a witness, the written request shall contain the name, address, and title, if any, of the witness and the date and location at which the attendance of the witness is sought.

(3) If the subpoena is for the production of books, records, writings, or other tangible items, the written request shall contain a description of the item sought; the name, address, and title, if any, of the person or entity who has custody or control over the items and the date; and the location at which the items are sought to be produced.

(4) The party requesting a subpoena duces tecum shall describe and recite with great clarity, specificity, and particularity the books, records, documents to be produced.

(c) Service and expenses.

(1) A subpoena issued at the request of the board's staff may be served either by a board investigator or by certified mail in accordance with the Act §153.007. The board shall pay reasonable charges for photocopies produced in response to a subpoena requested by the board's staff, but such charges may not exceed those billed by the board for producing copies of its own records.

(2) A subpoena issued at the request of any party other than the board shall be addressed to a sheriff or constable for service in accordance with the APA §2001.089.

(d) Fees and travel. A witness called at the request of the board shall be paid a compensation fee as set by agency policy and reimbursed for travel in like manner as board employees. An expert witness called at the request of the board shall be paid a compensation fee as set by agency policy and reimbursed for travel in like manner as board members.

(e) Additional reasons for granting a subpoena. Notwithstanding any other provisions of this section, the executive director, as defined in §187.2 of this title (relating to Definitions), may issue a subpoena if, in the opinion of the executive director, such a subpoena is necessary to preserve evidence and testimony to investigate any potential violation or lack of compliance with the Act, the rules and regulations or orders of the board.

§187.9. Board Actions.

(a) Pursuant to the Act, §164.001, and in accordance with Chapter 190 of this title (relating to Disciplinary Guidelines), the board, upon finding that an applicant or licensee has committed a prohibited act under the Act or board rules, shall enter an order imposing one or more of the following actions:

(1) deny the person's license application or other authorization to practice medicine;

(2) administer a public reprimand;

(3) revoke, suspend, limit or restrict a person's license or other authorization to practice medicine;

(4) require the person to submit to care, counseling or treatment by a health care practitioner designated by the board;

(5) require the person to participate in an evaluation, educational or counseling program;

(6) require the person to practice under the direction of a physician for a specified period of time;

(7) require the person to perform public service;

(8) require the person to participate in continuing education programs;

(9) require the person to be monitored for a specific period of time with or without restrictions on the person's practice of medicine; or

(10) assess an administrative penalty against the person.

(b) The board may stay enforcement of any order and place the person on probation. The board shall retain the right to vacate the probationary stay and enforce the original order for noncompliance with the terms of the probation or to impose any other disciplinary action as provided in subsection (a) of this section in addition to or instead of enforcing the original order.

(c) A private nondisciplinary rehabilitation order may impose one or more of the above board actions or such other actions as agreed to by the board and person subject to the order.

(d) The time period of an order shall be extended for any period of time in which a person subject to an order subsequently resides or practices outside the State of Texas, is in official retired status with the board, or for any period during which the person's license is subsequently cancelled for nonpayment of licensure fees.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 22, 2001.

TRD-200106387
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 305-7016

♦ ♦ ♦

SUBCHAPTER B. INFORMAL BOARD PROCEEDINGS

22 TAC §§187.10 - 187.21

The new sections are proposed under the authority of the Occupations Code Annotated, §153.001, which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties;

regulate the practice of medicine in this state; and enforce this subtitle.

The Occupations Code, §§164.001-164.011; 164.051-164.061; 164.101-164.103; 164.151-164.154; 164.201-164.204; 165.001-165.008; 165.051; 165.101-165.103; 165.151-165.160. are affected by the new sections.

§187.10. Purpose.

The purpose of informal board proceedings is to provide notice to an applicant or licensee of the basis of denial of licensure or of alleged violations, an opportunity for an applicant or licensee to show compliance, and an opportunity for informal disposition of the matter.

§187.11. Transfer to Litigation.

Upon an initial determination by board staff that an applicant is ineligible for licensure or that a licensee has allegedly violated the Act, board rules, or order of the board, the matter and the ongoing investigation shall either be retained by the licensure division or be referred to the agency's litigation section for the scheduling of an informal proceeding.

§187.12. Notice.

The applicant or licensee shall be given notice of the opportunity to attend and participate at an informal board proceeding by hand delivery, regular mail, certified mail - return receipt requested, overnight or express mail, or registered mail to the address of record. The notice shall include the basis for denial or the alleged violations and a description of the process for informal board proceedings. Within the written notice, the licensee shall be adequately informed that failure to respond to the allegations either in writing or by personal appearance may result in default judgment.

§187.13. Informal Board Proceedings Relating to Licensure Eligibility.

(a) Request for Review. If an applicant is determined to be ineligible for a license by the executive director pursuant to §§155.001-155.152 of the Act and Chapter 163 of this title (relating to Licensure), the applicant may request review of that determination by the Licensure Committee. The applicant must request the review not later than the 20th day after the date the applicant receives notice of the determination.

(b) Determination by Licensure Committee.

(1) Upon review of an application for licensure, the Licensure Committee may determine that the applicant is ineligible for licensure or is eligible for licensure with or without restrictions.

(2) If the Licensure Committee determines that the applicant should be granted a license with restrictions based on the applicant's commission of a prohibited act under the Act or board rules, the Committee, as the board's representatives, shall propose an agreed order as set out in §187.19 of this title (relating to Resolution by Agreed Order). Following the acceptance and execution by the application of the settlement agreement, the agreement shall be submitted to the board for approval as provided under §187.20 of this title (relating to Board Action).

(3) If the Licensure Committee determines that an applicant is ineligible for a license, the Committee shall submit its determination along with the reasons for the determination to the full board for consideration.

(c) Notice. An applicant determined to be ineligible for licensure by the board shall be notified of the board's determination and given the option of appealing the board's decision to SOAH. An applicant has 20 days from the date the applicant receives notice of the board's determination to make the request. If an applicant requests a SOAH hearing, the matter shall be referred to board staff. If the applicant does not timely request a SOAH hearing, the board's decision shall become administratively final.

§187.14. Informal Resolution of Disciplinary Issues Against a Licensee.

Pursuant to §§164.003 -.004 of the Act and §§2001.054-.056 of the APA, the following rules shall apply to informal resolution:

(1) Any matter within the board's jurisdiction may be resolved informally by agreed order, administrative penalty, dismissal, or default.

(2) Prior to the imposition of any disciplinary action against a licensee, the licensee shall be given the opportunity to show compliance with all the requirements of the law for the retention of an unrestricted license before one or more board representatives.

(3) If a determination is made by the board representatives that there has been no violation, the board representatives may recommend that the complaint or allegations be dismissed.

(4) If a determination is made by the board representatives that a licensee has violated the Act, board rules, or board order, the board representatives may make recommendations for resolution of the issues to be reduced to writing and processed in accordance with §187.19 of this title (relating to Resolution by Agreed Order).

(5) An opportunity for the licensee to show compliance shall not be required prior to a temporary suspension under §164.059 of the Act, or in accordance with the terms of an agreement between the board and a licensee.

(6) Any modification made by the board to any agreed order must be approved by the licensee.

§187.15. Investigation and Collection of Information.

Failure of a licensee to comply within the prescribed time with all requests to produce records, documents, or other information requested by board staff in connection with an informal board proceeding shall constitute unprofessional and dishonorable conduct.

§187.16. Informal Show Compliance Proceedings.

(a) Prior to the institution of any disciplinary action against a licensee, the licensee shall be provided with notice of the allegations and the facts that the board staff reasonably believes could be proven by competent evidence at a hearing, and may be asked to respond in writing to questions from the board staff concerning the matter.

(b) The licensee shall respond within 30 days after the notice is mailed. The licensee's response may include any additional information the licensee wants the board representatives to consider.

(c) All information provided by the board staff and the licensee shall be provided to the board representatives for review prior to the board representatives making a determination of whether the licensee has violated the Act, board rules, or board order.

(d) Upon receiving the notice of allegations, the licensee must submit written notification to the board within 14 days of the mailing, indicating whether the licensee has chosen to waive an opportunity to show compliance, have a determination of compliance be made based upon the written information submitted to the board representatives as set out in §187.17 of this title (relating to Informal Show Compliance Proceeding Based on Written Information), or attend an ISC as set out in §187.18 of this title (relating to Informal Show Compliance Proceeding and Settlement Conference Based on Personal Appearance ("ISC")). The board shall assume that if a licensee fails to provide any written response that the licensee has elected to personally appear at an ISC.

(e) Notwithstanding any other provision of this section, the board representatives may request that a licensee personally appear at an ISC.

(f) Notwithstanding any other provision of this section, board staff may schedule an ISC provided the licensee is given at least ten days notice.

§187.17. Informal Show Compliance Proceeding Based on Written Information.

(a) A licensee may request in writing that a determination of show compliance be made based on the written information provided by the licensee and board staff for review by the board representatives.

(b) One or more board representatives shall review the written information and deliberate in person or by telephone in order to make recommendations for the disposition of the complaint and/or allegations.

(c) Board staff and counsel of the board shall be available for assistance to the board representatives.

(d) If a determination is made by the board representatives that there has been no violation, the board representatives may recommend that the complaint or allegations be dismissed.

(e) If a determination is made by the board representatives that the licensee has violated the Act, board rules, or board order, the board representatives may propose resolution of the issues to the licensee that shall be reduced to writing and processed in accordance with §187.19 of this title (relating to Resolution by Agreed Order).

§187.18. Informal Show Compliance Proceeding and Settlement Conference Based on Personal Appearance ("ISC").

(a) If there is no written request for an informal show compliance proceeding based on written information, the licensee shall be scheduled to appear for an ISC with one or more board representatives.

(b) Notice of the ISC shall be extended to the licensee and the complainant(s) in writing, by hand delivery, regular mail, certified mail - return receipt requested, overnight or express mail, courier service, or registered mail, to the address of record of the licensee or the licensee's authorized representative to be received at least ten days prior to the date of the ISC. The notice shall include the time, date, and location of the ISC; the rules governing the proceeding; the deadline for submitting any additional material for presentation to the board representatives; and a brief written statement of the nature of the allegations to be addressed at the ISC.

(c) Requests to reschedule the ISC may be granted only if the licensee is able to show that extraordinary circumstances exist such as illness, death or natural disaster, which suggest the need to reschedule the ISC. The licensee must submit a written request within five days of receipt of the notice that includes the reasons for the requested continuance. Counsel to the board shall make the determination as to whether to grant a request to reschedule.

(d) Prior to the ISC, the board representatives shall be provided with the information sent to the licensee by the board staff and all information timely received in response from the licensee. If no information has been received from the licensee that shall be reported to the board representatives.

(e) The ISC shall allow:

(1) the board staff to present a synopsis of the allegations and the facts that the board staff reasonably believes could be proven by competent evidence at a hearing;

(2) the licensee to reply to the board staff's presentation and present facts the licensee reasonably believes could be proven by competent evidence at a hearing;

(3) presentation of evidence by the board staff and the licensee which may include medical and office records, x-rays, pictures, film recordings of all kinds, audio and video recordings, diagrams, charts, drawings, and any other illustrative or explanatory materials which in the discretion of the board representatives are relevant to the proceeding;

(4) representation of the licensee by an authorized representative;

(5) presentation of oral or written statements by the licensee or authorized representative;

(6) presentation of oral or written statements or testimony by witnesses;

(7) questioning of the witnesses;

(8) questioning of the licensee;

(9) rebuttal by board staff; and

(10) upon request by board representatives, the board staff may propose appropriate disciplinary action and the licensee or authorized representative may respond.

(f) The board representatives may exclude from the ISC all persons except witnesses during their testimony or presentation of statements, the licensee, the licensee's authorized representative, board representatives, and board staff.

(g) All evidence that a licensee wishes the board representatives to consider at the ISC must be submitted to the board at least seven days before the ISC. The board representatives may refuse to consider any evidence not submitted in a timely manner. If the board representatives allow the licensee to submit late evidence, the representatives may reschedule and/or assess an administrative penalty for the late submission.

(h) During the ISC, the board's legal counsel shall be present to advise the board representatives or the board's employees.

(i) At the ISC, the board representatives shall attempt to resolve disputed matters and the representatives may call upon the board staff at any time for assistance in conducting the ISC.

(j) The board representatives shall prohibit or limit access to the board's investigative file by the licensee, the licensee's authorized representative, the complainant(s), witnesses, and the public consistent with Act, §164.006.

(k) Although the participants may make notes, mechanical or electronic recordings shall not be made of the ISC, settlement discussions, or mediation efforts.

(l) The ISC shall be informal and shall not follow the procedures established under this title for formal board proceedings.

(m) At the conclusion of the presentations, the board representatives shall deliberate in order to make recommendations for the disposition of the complaint or allegations. During the deliberations by the board representatives, the board representatives shall exclude, except with agreement of the licensee, the board staff who presented the allegations and facts related to the complaint against the licensee, the licensee, the licensee's authorized representative, the complainant(s), witnesses, and the general public. Counsel of the board shall be available for assistance during deliberations.

(n) The board representatives may make recommendations to dismiss the complaint or allegations.

(o) Upon a determination by the board representatives that the licensee has violated the Act, board rules, or board order, the board representatives may propose resolution of the issues to the licensee to be reduced to writing and processed in accordance with §187.19 of this title (relating to Resolution by Agreed Order).

§187.19. Resolution by Agreed Order.

(a) If the board representatives determine that the licensee has violated the Act, board rules, or board order, the board representatives may recommend board action and terms and conditions for informal resolution.

(b) The recommendation of the board representatives shall be reduced to writing in an agreed order prepared by board staff and presented to the licensee and the authorized representative.

(c) The licensee may accept the proposed settlement within the time period prescribed. If the licensee rejects or fails to timely accept the proposed agreement, board staff may proceed with the filing of a complaint at SOAH.

(d) Additional negotiations may be held between board staff and the licensee or the authorized representative. In consultation with the board representatives, as available, the recommendations of the board representatives may be subsequently modified based on new information, a change of circumstances, or to expedite a resolution in the interest of protecting the public.

(e) At the discretion of board staff and the chief of litigation, a licensee may be invited to participate in an informal resolution conference for the purpose of allowing further negotiation. One or both of the board representatives from the informal show compliance proceeding, or a board member if no such board representative is available, may participate in the conference either in person or by telephone.

(f) The board representative(s) shall be consulted and must concur with any subsequent substantive modifications before any recommendations are sent to the full board for approval.

(g) The recommendations may be adopted, modified, or rejected by board.

(h) Board staff may communicate directly with the board representative(s) after the ISC for the purpose of discussing settlement of the case.

§187.20. Board Action.

(a) Following the acceptance and execution by the licensee or applicant of the settlement agreement, the agreement shall be submitted to the board for approval.

(b) The following relate to the consideration of an agreed disposition by the board:

(1) Upon an affirmative majority vote of members present, the board shall enter an order approving the proposed settlement agreement. The order shall bear the signature of the president of the board or of the officer presiding at such meeting and shall be referenced in the minutes of the board.

(2) If the board does not approve a proposed settlement agreement, the licensee or applicant shall be so informed and the matter shall be referred to board staff for appropriate action that may include dismissal, closure, further negotiation, further investigation, an additional informal resolution conference or a SOAH hearing. The board must specify their rationale for the rejection of the proposed settlement agreement that shall be referenced in the minutes of the board.

(c) To promote the expeditious resolution of any complaint or matter relating to the Act or of any contested case, with the approval of the executive director or a member of the Executive Committee or the Disciplinary Process Review Committee, board staff may present a proposed settlement agreement for licensees to the board for consideration and acceptance without conducting an informal show compliance proceeding.

§187.21. Board and District Review Committee Members Participation.

(a) One or more members of the board or the district review committee shall conduct an ISC as the board's representatives. When a board member and district review committee member conduct an informal show compliance proceeding, the board member shall serve as chair of the proceeding. In the event that the representatives consist of two board members or two district review committee members, the representative who has seniority on the board or committee shall serve as the chair of the proceeding. In the event a public member of the board or of the district review committee serves as the only board representative in such a proceeding, a board consultant or the board's executive director, if the executive director is a physician, may, with the approval of the licensee, serve as a medical advisor to the representative.

(b) To the extent possible, board members and district review committee members are required to serve as representatives at show compliance proceedings an equal number of times during a calendar year.

(c) In the event a board member or district review committee member has a complaint regarding the frequency or infrequency of service as a representative at informal show compliance proceedings, the complaint may be routed in writing to the director of enforcement for the board who shall then bring the complaint to the attention of the president of the board for resolution.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 22, 2001.

TRD-200106388
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 305-7016

♦ ♦ ♦

SUBCHAPTER C. FORMAL PROCEEDINGS AT SOAH

22 TAC §§187.22 - 187.34

The new sections are proposed under the authority of the Occupations Code Annotated, §153.001, which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; and enforce this subtitle.

The Occupations Code, §§164.001-164.011; 164.051-164.061; 164.101-164.103; 164.151-164.154; 164.201-164.204; 165.001-165.008; 165.051; 165.101-165.103; 165.151-165.160. are affected by the new sections.

§187.22. Purpose.

The purpose of this subchapter is to provide procedure for public adjudicative hearings at SOAH.

§187.23. General Provisions.

(a) SOAH hearings of contested cases shall be conducted in accordance with the APA by an ALJ assigned by SOAH. Jurisdiction over the case is acquired by SOAH when board staff files a Request to Docket Case form accompanied by legible copies of all pertinent documents, including but not limited to the complaint, petition or other document describing the board action giving rise to the contested case.

(b) The ALJ has the authority under SOAH rules, Chapter 155, to issue orders, to regulate the conduct of the proceeding, rule on motions, establish deadlines, clarify the scope of the proceeding, schedule and conduct prehearing and posthearing conferences for any purpose related to any matter in the case, set out additional requirements for participation in the case, and take any other steps conducive to a fair and efficient process in the contested case, including referral of the case to a mediated settlement conference or other appropriate alternative dispute resolution procedure as provided by Chapter 2008 of the Government Code.

(c) Any person may file a motion to be admitted as a party upon showing of a justiciable interest.

(d) All documents are to be filed at SOAH only after it acquires jurisdiction. Copies of all documents filed at SOAH shall be contemporaneously sent to board staff.

(e) Because of the often voluminous nature of the records properly received into evidence by the ALJ, the party introducing such documentary evidence should paginate each exhibit and/or flag pertinent pages in each exhibit in order to expedite the hearing and the decision-making process.

(f) Board staff may file an interlocutory or interim appeal to the board of an ALJ's ruling excluding evidence offered by board staff, or of any procedural ruling that staff believes is substantially prejudicial to the board. The board's determination on these matters shall be controlling.

(g) Board staff may certify to the board any question concerning the following:

(1) procedural or evidentiary issues;

(2) the imposition of any sanction;

(3) evidentiary or procedural ruling by an ALJ that would be substantially prejudicial to the board;

(4) policy issues including, but not limited to:

(A) the board's interpretation of its rules and applicable statutes;

(B) which rules or statutes are applicable to a proceeding; and

(C) whether board policy should be established or clarified as to a substantive or procedural issue of significance of the proceeding;

(5) any other matter which is committed to the discretion or judgment of the board.

(h) Final argument by the parties, whether written or oral, shall proceed by allowing the party with the burden of proof to open and conclude. In disciplinary matters, board staff will make argument, the respondent/licensee will be permitted to make a reply argument, and board staff will be permitted to make rebuttal argument in that order. In licensure matters, the respondent/applicant shall make argument, the board staff shall be permitted to make reply argument, and the respondent/applicant shall be permitted rebuttal argument, in that order.

(i) Within the time line set out in SOAH rules, after the conclusion of the hearing, the ALJ shall prepare and serve on the parties a proposal for decision that includes the ALJ's findings of fact and conclusions of law.

(j) After receiving the ALJ's findings of fact and conclusions of law, the board shall rule on the merits of the charges and enter an order.

§187.24. Pleadings.

(a) In disciplinary matters, actions by the board as petitioner against a licensee, the board's pleadings shall be styled "Complaint." Except in cases of temporary suspension, a complaint shall be filed only after notice of the facts or conduct alleged to warrant the intended action has been sent to the licensee's address of record and the licensee has an opportunity to show compliance with the law for the retention of a license as provided in §2001.054 of the APA, and §164.004(a) of the Act.

(b) In nondisciplinary matters, actions by the board as petitioner to enforce and regulate matters regarding licensure eligibility, the board's pleadings shall be styled "Petition of the Board of Medical Examiners".

§187.25. Notice of Formal Adjudicative Proceedings.

(a) Notice. Before revoking or suspending any license, denying an application for a license, or reprimanding any licensee, the board will afford all parties an opportunity for an adjudicative hearing after reasonable notice of not less than ten days, except as otherwise provided by board rule or the Act.

(b) Content.

(1) In accordance with §2001.052 of the APA, notice of adjudicative hearing shall include:

(A) a statement of time, place, and nature of the hearing;

(B) a statement of the legal authority and jurisdiction under which the hearing is to be held;

(C) a reference to the particular sections of the statutes and rules involved;

(D) a short and plain statement of the matters asserted; and

(E) notice that failure to appear may result in a default judgment as specified in §187.27 of this title (relating to Default Judgments).

(2) A copy of the original pleading filed with the board may be substituted for subsection (b)(1), subparagraphs (B)-(E) of this section if it contains all required information.

(c) Service. The notice of adjudicative hearing shall be served as specified in §187.26 of this title (relating to Service in SOAH Proceedings).

(d) Temporary suspensions. Notice is not required for temporary suspension hearings as specified in §187.41 of this title (relating to Temporary Suspensions), provided institution of proceedings for a hearing before the board is initiated simultaneously with the temporary suspension and a hearing is held as soon as can be accomplished under the APA and the Act.

§187.26. Service in SOAH Proceedings.

(a) Personal service. Service of process shall be made by hand delivery or by mailing notice of hearing by regular, registered or certified mail, or courier service to the person entitled to notice at the address of record by such an individual or otherwise in accordance with the APA and its subsequent amendments. A certificate of service indicating service in the manner provided for in this subsection shall be prima facie evidence of such service.

(b) Service by regular mail. Service by mail shall be complete upon deposit of the paper, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service.

(c) Service by publication. If service of notice as prescribed by subsection (a) of this section is impossible or cannot be accomplished, then notice may be made through publication of a notice of hearing once a week for two successive weeks in a newspaper published in the county of the last known place of practice of the person entitled to notice if the county is known. If the person is not currently practicing in Texas as evidenced by information in the agency files, or if the last county of practice is unknown, publication shall be in a newspaper in Travis County. When publication of notice is used, the date of hearing may not be less than ten days after the date of the last required publication of notice. Proof of publication may be accomplished by affidavit of a representative or record custodian of the publisher indicating the required publication or by introduction and admission into evidence of copies of the required notices published for purposes of service.

(d) Service of documents in SOAH cases. Service of documents in contested cases pending before SOAH shall be governed by the rules of SOAH.

§187.27. Default Judgments.

(a) When a contested case has been filed at SOAH by board staff and a complaint or petition has been served on the respondent, the respondent shall file a written answer or other responsive pleading within 20 days of the date on which the complaint or petition has been served.

(b) The complaint or petition shall include the following language in at least 10-point bold type: "If you do not file a written answer to this notice with the State Office of Administrative Hearings within 20 days of the date notice of service was mailed, a default judgment may be entered against you, which may include the denial of licensure or any or all of the requested sanctions including the revocation of your license. If you file a written answer, but then fail to attend the hearing, a default judgment may be entered against you, which may include the denial of licensure or any or all of the requested sanctions including the revocation of your license. A copy of any response you file with the State Office of Administrative Hearings shall also be provided to the hearings coordinator of the Texas State Board of Medical Examiners."

(c) In the event the respondent fails to file a responsive pleading in the required time period, board staff shall be entitled to a default judgment. A hearing on any motion for default judgment shall be set as soon as practicable.

(d) In the event that the respondent files an answer or makes an appearance more than 20 days after service of notice of hearing and a default judgment has not previously been granted, board staff shall be granted a continuance, if requested, in order to prepare for a contested case.

(e) If a default judgment has been granted, the respondent may file a motion to vacate the default judgment rendered by the ALJ if filed within ten days of service of notice of the default judgment.

(1) The motion to vacate the default judgment shall be granted if movant proves by a preponderance of the evidence that the failure to attend the hearing was not intentional or the result of conscious indifference, but due to accident or mistake.

(2) If the motion to vacate the default judgment is granted, it shall be the responsibility of the parties to either settle the matter informally or to request a rehearing on the merits. Whenever possible, the rehearing of the case shall occur with the ALJ that heard the default matter.

§187.28. Discovery.

Parties to SOAH proceedings shall have reasonable opportunity and methods of discovery as described in the APA, §164.005 of the Act, board rules, SOAH's rules and where specifically provided, the Texas Rules of Civil Procedure. Matters subject to discovery are limited to those that are relevant and material to, or reasonably calculated to lead to the discovery of, issues within the board's authority as set out in the Act.

(1) Preliminary Discovery. Not later than 20 days after receiving a written request from an opposing party, the responding party shall provide to the requesting party the following:

(A) a preliminary list of the names and last known addresses and phone numbers of potential witnesses which the responding party reasonably anticipates may testify in its case-in-chief;

(B) a list or copy of all documents, records, photographs, moving pictures, films, videotapes, audio recordings, and other such material in the possession of the responding party which the responding party intends to offer in its case-in-chief, and a reasonable opportunity to inspect and copy such items;

(C) a list identifying all tangible items in the possession of the responding party which the responding party intends to offer in its case-in-chief, and a reasonable opportunity to inspect such items;

(D) a list of the names and last known addresses and phone numbers of any experts the responding party anticipates calling to testify in its case-in-chief; and

(E) upon written request, a list identifying all of the following documents and tangible items pertaining to the responding party's experts, or copies of such documents and tangible items, shall be provided to the requesting party before the initial deposition of such an expert, or no later than five days prior to the hearing on the case if no deposition of the expert has been taken. The following must be identified:

(i) documents and tangible items which have been provided to any expert who is expected to testify in the case;

(ii) documents and tangible items which have been made or prepared by any expert used for consultation if such documents and tangible items form the basis, either in whole or in part, of the opinion of an expert who is expected to testify in the case; and

(iii) a report from each expert who is anticipated to testify in the case which generally synopsizes the expected testimony of the expert.

(2) Additional Discovery.

(A) Request for Admissions and Genuineness of Documents as permitted by the rules of SOAH. "Genuineness" means that the documents are truly what they purport to be and are not false, fictitious, forged, spurious or counterfeit.

(B) Interrogatories as permitted by the rules of SOAH.

(C) Requests for Disclosure as provided for in the Texas Rules of Civil Procedure, except the time period allowed for answering the Requests for Disclosure shall be 20 days rather than 30 days.

(D) Requests for Production as permitted by the rules of SOAH.

(E) Deposition on Written Questions as provided for in the Texas Rules of Civil Procedure.

(F) Other forms of discovery as provided for in the APA and by the rules of SOAH.

(3) Inspection and Copying. Documents and tangible items that are identified in a discovery response but not provided, shall be made available for inspection and copying at a reasonable time and place upon the written request of an opposing party.

(4) Depositions.

(A) The taking and use of depositions shall be governed by APA or by an agreement between the parties either on the record or in a writing signed by the parties or their representatives. Except by an agreement between the parties either on the record or in a writing signed by the parties or their representatives, depositions shall be conducted and completed no later than 19 days prior to the scheduled hearing date. Failure of a properly noticed witness who is a party to the case to attend a deposition for the purpose of taking the testimony of that party witness, or the failure of such a witness to attend such a deposition as agreed to by the parties on the record or in a writing signed by the parties or their representatives, may result in the imposition of the sanctions and remedies set forth in paragraph (6) of this section.

(B) In the event that, as provided for in the APA, an original deposition transcript is not returned by a deponent or a deponent's counsel, or is not filed by a deponent, a deponent's counsel, or other individual, officer, or entity in possession of or last known to be in possession of the original transcript, a party to the contested case pending before SOAH shall be entitled to have a certified true copy of the deposition transcript filed under seal at the agency where the case is pending by the officer or a court reporter who transcribed the deposition testimony or their designee. Such a copy shall be presumed to be authentic unless an objecting party is able to rebut such a presumption by a preponderance of competent evidence.

(5) Admissibility of privileged or confidential communications. Pursuant to Chapters 159 and 160 of the Act, testimony, information, and material for which there may be a claim of privilege or confidential communication, shall be admissible at a SOAH hearing, provided the board shall protect all identifying information of any patient. No waiver of confidentiality shall be required for admission of peer review documents or records in proceedings before SOAH.

(6) Remedies and Sanctions. A failure to comply with a discovery request to the extent required by board rule, the Act, or as agreed to between the parties in a discovery agreement, the presiding ALJ should, after notice and hearing, make such orders in regard to the failure as are just, and issue one or more of the following:

(A) an order granting a continuance;

(B) an order limiting or restricting the admissibility and use of evidence, to include exclusion of evidence or testimony;

(C) an order for payment by a party of the actual travel, lodging, discovery expenses; hearing and court reporter costs; but not attorney fees, incurred by an opposing party as a result of the failure to comply with the discovery requirements under board rule;

(D) an order imposing a scheduling order providing for discovery deadlines necessary to remedy the failure to comply with discovery requirements under board rules;

(E) an order for remedies and sanctions agreed to by the parties in writing or on the record;

(F) an order disallowing further discovery of any kind or of a particular kind by the offending party;

(G) an order holding that designated facts be considered admitted for purposes of the proceeding;

(H) an order refusing to allow the offending party to support or oppose a designated claim or defense or prohibiting the party from introducing designated matters into evidence;

(I) an order disallowing in whole or in part requests for relief by the offending party and excluding evidence in support of those request; or

(J) an order striking pleadings or testimony, or both, in whole or in part.

(7) Good Cause. Showing of good cause for failure to comply with a discovery request to the extent required by law, board rule, or as agreed to between the parties in a discovery agreement, may justify the imposition of less severe remedies or sanctions which might otherwise be imposed. Good cause shall include but is not limited to the following:

(A) lack of knowledge of the existence of the information or material;

(B) lack of access to or control of the information or material; and

(C) act of nature.

(8) Calculation of Deadlines and Time Limits. Discovery requests promulgated less than seven days prior to the scheduled hearing date shall not require a response unless agreed to by the parties on the record or in a writing signed by the parties or their representatives; however, other discovery requests promulgated at a time prior to the scheduled hearing date which by their timing allow less than the applicable deadline period for a response, shall not require a response until submitted for approval by motion of the requesting party to the ALJ and approved in whole or in part by order of the ALJ. Any such approval shall provide for one or more of the following:

(A) modified response deadlines;

(B) a continuance of the hearing date charged to the party requesting discovery; or

(C) such reasonable requirements which are necessary to minimize any anticipated burden or inconvenience to the responding party as a result of the lateness of the discovery request.

(9) Discovery Agreements. Discovery requirements governing SOAH proceedings may be modified by agreement of the parties either on the record or in a writing signed by the parties or their representatives without approval of an ALJ.

(10) Ordered Modification of Discovery. Modification of discovery requirements under board rules may be ordered by an ALJ pursuant only to a motion by a party, and upon a showing of good cause, in order to deviate from the discovery requirements and time limitations of the board's rules and SOAH rules.

(11) Official Notice. No later than three days prior to the date of the hearing, the parties shall exchange lists specifying all matters which each party will seek to have officially noticed at the hearing.

(12) Final Witness List.

(A) Expert witnesses. A party must designate all expert witnesses within 20 days of receipt of written request, unless otherwise determined by the ALJ upon motion by movant for good cause, and in no event less than 30 days prior to the date of hearing.

(B) Fact witnesses. No later than 20 days prior to the date of the hearing, the parties shall exchange final lists identifying the names and last known addresses and phone numbers of all other witnesses other than expert witnesses each party intends to call to testify in its case-in-chief.

(13) Waiver of Privilege/Confidentiality. The provision of any information or material in response to a discovery request which may be the subject of a privilege or confidentiality requirement under the Act or other applicable law, including but not limited to the physician/patient privilege, mental health provider privilege, and the physician peer review process, shall not constitute a waiver of any such privilege or confidentiality requirement with respect to other such information or material not provided.

(14) Supplementation. Upon receiving new information or material, or upon otherwise determining that an inaccuracy exists in a previous discovery response, each party shall supplement such responses as soon as practicable.

§187.29. Mediated Settlement Conferences

(a) In an effort to expeditiously resolve outstanding complaints, mediation of complaints or petitions may be held through SOAH in compliance with §155.37 of SOAH rules. For any such proceeding:

(1) SOAH will provide a minimum of 30 days notice of any mediated settlement conference (MSC). In no event shall the MSC be held later than 30 days before the scheduled hearing unless agreed to by the parties.

(2) To the extent possible any MSC should be held soon after the complaint or petition is filed and before extensive discovery is initiated. If a party opposes a MSC, SOAH shall consider whether the request for the MSC was timely made.

(3) Any ordered MSC will not stay discovery unless agreed to by the parties.

(4) Board members and District Review Committee (DRC) members are not parties to actions pending before SOAH, and accordingly will not be ordered or expected to attend MSCs before SOAH. Board members and DRC members who attended the informal show compliance proceeding or Licensure Committee hearing will be invited by board staff to attend the MSC. If the board and DRC members who attended the informal show compliance proceeding, or the Licensure Committee members are unable to attend the MSC, then other members of the board and DRC may be invited to attend the MSC. In appropriate cases, board staff will make every effort to have a physician-member present.

(5) All proposed mediated agreed orders are not considered final until they are approved by the board.

(6) All mediated agreed orders shall be in writing and shall contain findings of facts, conclusions of law and board actions consistent with §187.9 of this title (relating to Board Actions).

(b) The costs of mediation shall be born equally by the parties, unless proof through affidavit and other reliable records such as tax returns show that a party is incapable of paying part of the costs of mediation.

§187.30. Reporter and Transcripts.

(a) Recording by a court reporter. Each contested hearing may be recorded. Any recording of contested case proceedings shall be conducted in accordance with §§2001.059-.060 of the APA and §155.43 of SOAH rules.

(b) Costs. A stenographic reporter may sell copies of a transcript. If the respondent in the proceedings requests the original record of the testimony and evidence of a disciplinary hearing, the costs for the original record shall be borne by the respondent. When no party requests a transcript, but the ALJ requests a court reporter to prepare a transcript, SOAH shall bear the cost of any transcript requested by the ALJ unless the agency agrees to pay the cost or assess the cost as allowed. Any subsequent copies of the record shall be borne by any person requesting same.

(c) Corrections. Suggested corrections to the transcript of the record may be offered within 10 days after the transcript is filed in the proceeding, unless the ALJ shall permit suggested corrections to be offered thereafter. Suggested corrections shall be served in writing upon each party of record, the official reporter, and the ALJ. If suggested corrections are not objected to, the ALJ will direct the corrections to be made and the manner of making them. In case the parties disagree on suggested corrections, they may be heard by the ALJ which shall then determine the manner in which the record shall be changed, if at all.

§187.31. Evidence

(a) Rules. The rules of evidence as applied in nonjury civil cases in the district courts of this state shall be followed, except that evidence inadmissible under those rules may be admitted if it meets the standards set out in the APA §2001.081, as discussed in this section. In all cases, irrelevant, immaterial, or unduly repetitious evidence shall be excluded. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. The ALJ shall give effect to the rules of privilege recognized by law. Opportunity must be afforded all parties to respond and present evidence and argument of all issues involved.

(b) Objections. Objections to evidentiary offers shall be made and shall be noted in the record. Formal exceptions to rulings of the ALJ during a hearing shall be unnecessary. It shall be sufficient that the party at the time any ruling is made or sought shall have made known to the ALJ the action which he or she desires.

(c) Offer of proof. If evidence is excluded from the record by an exclusionary ruling of the ALJ the evidence may be included in the record by an offer of proof by the sponsoring party by dictating into the record or submitting in writing the substance of the evidence. An offer of proof shall be sufficient to preserve the evidence for review.

(d) Physician's office records. When subpoenaed by the board, unless stipulated by the parties, the office records of each patient shall have stapled thereto an affidavit in the form approved and furnished by the board which contains the requisite elements to comply with the Texas Rules of Evidence, 902 (10)(b), relating to form of affidavits.

(e) Peer review proceedings.

(1) Findings by a "medical peer review committee", "professional review body" or any "health care entity" as those terms are defined in the Act are admissible in accordance with §2001.081 of the APA.

(2) In accordance with the exceptions to the confidentiality of peer review proceedings cited in §§160.008-.009 of the Act, parties and witnesses can be required to produce documents and testify regarding medical peer review proceedings otherwise privileged pursuant to §160.007 of the Act.

(f) Deferred adjudications. In accordance with §2001.081 of the APA and consistent with §§164.053(a)(1) and 164.053(b) of the

Act, deferred adjudications are admissible as evidence that the respondent violated the law with which the respondent was charged and pled to, which gave rise to the deferred adjudication.

(g) Documents. Subject to these requirements, if a hearing will be expedited and the interests of the parties will not be substantially prejudiced, any part of the evidence may be received in written form.

(1) Copies. Documentary evidence may be received in the form of copies or excerpts if the original is not readily available. On request, parties shall be given an opportunity to compare the copy with the original. When numerous documents are offered, the ALJ may limit those admitted to a number which are typical and representative and may, in his or her discretion, require the abstracting of the relevant data from the documents and the presentation of the abstracts in the form of an exhibit; provided, however, that before making such requirement the ALJ shall require that all parties of record or their representatives be given the right to examine the documents from which such abstracts were made.

(2) Prepared testimony. In all contested proceedings, prepared testimony of a witness upon direct examination, either in narrative or question and answer form, may be incorporated in the record as if read or received as an exhibit, upon the witness's being sworn and identifying the same. Such witness shall be subject to cross-examination and the prepared testimony shall be subject to a motion to strike in whole or in part. A party may not be required over objection to submit written testimony. The board relies upon physicians who receive minimal compensation to act as consultants to the board and provide testimony as needed at SOAH hearings. Requiring the board's consultants to spend additional time to reduce their testimony to writing would dissuade and deter physicians from continuing to volunteer to act as board consultants and experts. Accordingly, it is not in the interest of the board and would be substantially prejudicial to the board to require testimony to be reduced to writing.

§187.32. Motions.

Any motion filed during the pendency of a formal administrative hearing shall be filed with SOAH and in accordance with its rules.

§187.33. Proposals for Decision.

(a) Elements. In addition to any other requirement of the Act or the APA, the ALJ shall serve on the parties a proposal for decision that shall contain:

(1) a summary of the evidence adduced by each party;

(2) a statement of the ALJ's reasons for the proposed decision;

(3) findings of fact based on the evidence and on matters officially noticed;

(4) conclusions of law necessary to the proposed decision;

(5) a listing and explanation of all mitigating and aggravating circumstances necessary to a complete understanding of the case by the board; and

(6) a finding whether the board is authorized by the Act to take disciplinary action against the respondent.

(b) Service. When a proposal for decision is prepared, a copy of the proposal shall be served forthwith by the ALJ on each party, his or her attorney of record or representative, and the board. Service of the proposal for decision shall be in accordance with §187.26 of this title (relating to Service in SOAH Proceedings).

(c) Statutory statement. If findings of fact are stated in statutory language, each finding must be accompanied by a concise and explicit statement of the facts supporting the finding.

(d) Proposed findings. If the board's staff submits proposed findings of fact, the ALJ shall rule on each proposed finding, including a statement as to why any proposed finding was not included in the proposal for decision.

§187.34. Exceptions and Replies.

(a) Entitlement. Any party of record who is aggrieved by the ALJ's proposal for decision shall have the opportunity to file exceptions to the proposal for decision within 20 days from the date of service of the proposal for decision. Replies to the exceptions may be filed by other parties within ten days of the filing of the exceptions. Exceptions and replies shall be filed with the ALJ. Any extensions of time shall be as provided by §187.3 of this title (relating to Computation of Time).

(b) Form. The form of exceptions and replies are to be done in accordance with SOAH rules.

(c) Content. Each exception or reply to a finding of fact shall be concisely stated and summarize the evidence in support thereof. Arguments shall be logical and citations to authorities shall be complete.

(d) Briefs. Briefs shall be filed only when requested or permitted by the board, the board's presiding officer, or the ALJ.

(e) Service. Exceptions and replies shall be served upon every party of record by the filing party pursuant to §187.26 of this title (relating to Service in SOAH Proceedings).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 22, 2001.

TRD-200106389
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 305-7016

♦ ♦ ♦

SUBCHAPTER D. FORMAL BOARD PROCEEDINGS

22 TAC §§187.35 - 187.42

The new sections are proposed under the authority of the Occupations Code Annotated, §153.001, which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; and enforce this subtitle.

The Occupations Code, §§164.001-164.011; 164.051-164.061; 164.101-164.103; 164.151-164.154; 164.201-164.204; 165.001-165.008; 165.051; 165.101-165.103; 165.151-165.160. are affected by the new sections.

§187.35. Presentation of Proposal for Decision.

(a) Notice of oral argument. All parties and the ALJ who has issued a proposal for decision shall be given notice of the opportunity to attend and provide oral argument concerning a proposal for decision before the board. Notice shall be sent by hand delivery, regular mail, certified mail - return receipt requested, courier service, or registered service to the ALJ's office and the parties' addresses of record.

(b) Arguments before the Board. The order of the proceeding shall be as follows:

(1) the ALJ shall present and explain the proposal for decision;

(2) the party adversely affected shall briefly state the party's reasons for being so affected supported by the evidence of record;

(3) the other party or parties shall be given the opportunity to respond;

(4) the party with the burden of proof shall have the right to close;

(5) board members may question any party as to any matter relevant to the proposal for decision and evidence presented at the hearing;

(6) at the end of all arguments by the parties, the board may deliberate in closed session and shall take action on a final decision in open session.

(c) Limitation. A party shall not inquire into the mental processes used by the board in arriving at its decision, nor be disruptive of the orderly procedure of the board's routines.

§187.36. Interlocutory Appeals and Certification of Questions.

(a) Interlocutory appeals and certification of questions. Interlocutory appeals to the board and certification of questions filed pursuant to §187.23 of this title (relating to General Provisions of Formal Proceedings at SOAH) shall be filed with the hearings coordinator of the board and served on the respondent or authorized representative and the ALJ. The respondent or authorized representative and the ALJ shall be given ten days from the date of filing by board staff to file a written response with the hearings coordinator. The board, at its discretion, may invite the staff member who filed the appeal or certified question, the ALJ, the respondent and authorized representative to appear at a meeting to make oral argument on the appeal or certified question.

(b) Abatement of proceeding. The ALJ shall abate the proceeding while a certified question or interlocutory appeal is pending.

(c) Board action. The board shall issue a written decision on the certified question or interlocutory appeal at the board meeting at which the certified question or interlocutory appeal is heard. A board decision on a certified question or interlocutory appeal is not subject to motion for rehearing.

(d) Judicial review. Nothing in this section shall be interpreted to affect a licensee's right to seek judicial review of any disciplinary action taken by the board against the licensee as provided by §164.009 of the Act.

§187.37. Final Decisions and Orders.

(a) Board action. On written request, a copy of the final decision or order shall be delivered or mailed to any party and to the attorney of record.

(b) Recorded. All final decisions and orders of the board shall be in writing and shall be signed by the president, vice-president, or secretary and reported in the minutes of the meeting. A final order shall include findings of fact and conclusions of law, separately stated.

(c) Imminent peril. If the board finds that imminent peril to the public's health, safety, or welfare requires immediate effect of a final decision or order in a contested case, it shall recite the finding in the decision or order as well as the fact that the decision or order is final and effective on the date rendered, in which event the decision or order is final and appealable on the date rendered and no motion for rehearing is required as a prerequisite for appeal.

(d) Changes to Recommendation. In that the board has been created by the legislature to protect the public interest as an independent agency of the executive branch of the government of the State of Texas so as to remain as the primary means of licensing, regulating and disciplining physicians and surgeons, to protect the public interest and ensure that sound medical principles govern the decisions of the board, it shall hereafter be the policy of the board to change a finding of fact or conclusion of law or to vacate or modify any proposed order of an ALJ when the proposed order is:

(1) erroneous;

(2) against the weight of the evidence;

(3) based on unsound medical principles;

(4) based on an insufficient review of the evidence;

(5) not sufficient to protect the public interest; or

(6) not sufficient to adequately allow rehabilitation of the physician.

(e) Changes to proposed order. If the board modifies, amends, or changes the ALJ's recommended order, an order shall be prepared reflecting the board's changes, the board's justification(s) for the changes, and recorded in the minutes of the meeting.

(f) Administrative finality. A final order or board decision is administratively final:

(1) upon a finding of imminent peril to the public's health, safety or welfare, as outlined in subsection (c) of this section;

(2) when absent the filing of a timely motion for rehearing upon the expiration of 20 days from the date the final order or board decision is entered; or

(3) when a timely motion for rehearing is filed and the motion for rehearing is denied by board order or operation of law as outlined in §187.38 of this title (relating to Motions for Rehearing).

§187.38. Motions for Rehearing.

(a) Filing times. A motion for rehearing must be filed with the board within 20 days after a party has been notified, either in person or by mail, of the final decision or order of the board.

(b) Board action. Board action on the motion must be taken within 45 days after the date of rendition of the final decision or order. If board action is not taken within the 45-day period, the motion for rehearing is overruled by operation of law 45 days after the date of rendition of the final decision or order. The board may rule on a motion for rehearing at a meeting or by mail, telephone, telegraph, or another suitable means of communication. The board may by written order extend the period of time for filing the motions and replies and taking board action, except that an extension may not extend the period for board action beyond 90 days after the date of rendition of the final decision or order. In the event of an extension, the motion for rehearing is overruled by operation of law on the date fixed by the order, or in the absence of a fixed date, 90 days after the date of the final decision or order. The parties may by agreement with the approval of the board provide for a modification of the times provided in this section.

§187.39. Costs of Administrative Hearings.

(a) Default Judgments. In cases brought before SOAH, in the event that the respondent is adjudged to be in violation of the Act by default, the board has the authority to assess, in addition to penalty imposed, costs of the administrative hearing.

(b) Trial on the Merits. In cases brought before SOAH, in the event that the respondent is adjudged to be in violation of the Act after a trial on the merits, the board has the authority to assess in addition to the penalty imposed, the actual costs of the administrative hearing. Such costs include, but are not limited to, investigative costs, witness fees, deposition expenses, travel expenses of witnesses, costs of adjudication before SOAH and any other costs that are necessary for the preparation of the board's case including the costs of any transcriptions of testimony.

(c) Appeal. The costs of transcribing the testimony and preparing the record for an appeal by judicial review shall be paid by the respondent.

§187.40. Administrative Penalties.

(a) Pursuant to §165.001 of the Act, the board may impose an administrative penalty against a person licensed or regulated under the Act upon finding that the person has violated the Act or a rule or order adopted under the Act. The imposition of such a penalty shall be consistent with the requirements of the Act and APA.

(b) Prior to the imposition of an administrative penalty by board order, a person must be given notice and opportunity to respond and present evidence and argument on each issue that is the basis for the proposed administrative penalty at an informal show compliance proceeding.

(c) An administrative penalty shall not exceed more than $5,000 for each separate violation; however, each day that a violation continues or occurs is a separate violation for purposes of imposing a penalty.

(d) The amount of the penalty shall be based on the factors set forth under the Act, §165.003(b) and Chapter 190 of this title (relating to Disciplinary Guidelines).

(e) Consistent with the Act, §165.004, if the board order finds that a violation has occurred and imposes an administrative penalty on a person licensed or regulated under the Act, the board shall give notice to the person of the board's order which shall include a statement of the right of the person to seek judicial review.

(f) Pursuant to §165.005 of the Act, if the board determines by order, that a violation has occurred and imposes an administrative penalty, the respondent shall:

(1) pay the penalty;

(2) pay the penalty and file a petition for judicial review;

(3) without paying the penalty, petition for judicial review; or

(4) stay or request a stay of the enforcement of the penalty, as described in §165.005(b) of the Act.

(g) If a person does not pay the amount of a penalty and the enforcement of the penalty is not stayed, the executive director of the board may refer the matter to the attorney general for collection of the amount of the penalty.

(h) An administrative penalty may be imposed under this section for the following:

(1) failure to release medical records as required by §159.006 of the Act or board rule shall be grounds for imposition of an administrative penalty of no less than $100 and no more than $5,000 for each separate violation;

(2) overcharging or overtreating as prohibited by §164.053(a)(7) of the Act shall be grounds for imposition of an administrative penalty of no less than $100 or twice the known amount of the overcharge or cost of overtreatment, whichever is greater, and no more than $5,000 for each separate violation;

(3) engaging in the corporate practice of medicine as prohibited by §164.052(a)(17) of the Act shall be grounds for imposition of an administrative penalty of no less than $100 and no more than $5,000 for each separate violation;

(4) failure to timely comply with a board subpoena issued by the board pursuant to §153.009 of the Act and board rules shall be grounds for imposition of an administrative penalty of no less than $100 and no more than $5,000 for each separate violation;

(5) failure to timely obtain and report Continuing Medical Education (CME) required by board rule shall be grounds for imposition of an administrative penalty of no less than $500 and no more than $5,000 for each separate violation;

(6) failure to timely comply with the terms, conditions, or requirements of a board order shall be grounds for imposition of an administrative penalty of no less than $100 and no more than $5,000 for each separate violation;

(7) failure to timely report a change of address to the board as required by §166.1(d) of this title (relating to Physician Registration) shall be grounds for imposition of an administrative penalty of no less than $100 and no more than $5,000 for each separate violation;

(8) failure to timely respond to a patient's communication shall be grounds for imposition of an administrative penalty of no less than $100 and no more than $5,000 for each separate violation;

(9) failure to timely comply with the complaint procedure notification requirements as set forth in Chapter 188 of this title (relating to Complaint Procedure Notification) shall be grounds for imposition of an administrative penalty of no less than $100 and no more than $5,000 for each separate violation;

(10) failure to provide show compliance proceeding information in the prescribed time shall be grounds for imposition of an administrative penalty of no less than $100 and no more than $5,000 for each separate violation; and

(11) for any other violation other than quality of care that the board deems appropriate shall be grounds for imposition of an administrative penalty of no less than $100 and no more than $5,000 for each separate violation.

(i) In the case of untimely compliance with a board order, the board staff shall not be authorized to impose an administrative penalty without first allowing for an informal show compliance proceeding if the person licensed or regulated under the Act has not first been brought into compliance with the terms, conditions, and requirements of the order other than the time factors involved.

(j) Any order proposed under this section shall be subject to final approval by the board.

(k) Failure to pay an administrative penalty imposed through an order shall be grounds for disciplinary action by the board pursuant to the Act, §164.052(a)(5), regarding unprofessional or dishonorable conduct likely to deceive or defraud the public or injure the public, and shall also be grounds for the executive director to refer the matter to the attorney general for collection of the amount of the penalty.

(l) A person who becomes financially unable to pay an administrative penalty after entry of an order imposing such a penalty, upon a showing of good cause by a writing executed by the person under oath, at the discretion of the Disciplinary Process Review Committee of the board, may be granted an extension of time or deferral of no more than one year from the date the administrative penalty is due. Upon the

conclusion of any such extension of time or deferral, if payment has not been made in the manner and in the amount required, action authorized by the terms of the order or subsection (k) of this section and the Act, §165.006, may be pursued.

§187.41. Temporary Suspensions.

(a) In accordance with the Act, §164.059, the president of the board, with the approval of the board shall appoint a three-member disciplinary panel consisting of members of the board, one of which must be a physician, for the purpose of determining whether a person's license to practice medicine in this state should be temporarily suspended under this section.

(b) If the disciplinary panel determines from the evidence or information presented to it that a person licensed to practice medicine in this state by the person's continuation in practice would constitute a continuing threat to the public welfare, the disciplinary panel shall temporarily suspend the license of that person.

(c) The license may be suspended under this section without notice or hearing on the complaint, provided institution of proceedings for a hearing before the board is initiated simultaneously with the temporary suspension and provided that a hearing is held as soon as can be accomplished under the APA and the Act.

(d) Notwithstanding the Public Information Act, Tex. Gov't Code Ann. Chapter 552 et. seq., the disciplinary panel may hold a meeting by telephone conference call if immediate action is required and the convening at one location of the disciplinary panel is inconvenient for any member of the disciplinary panel.

(e) In the event of the recusal of a disciplinary panel member or the inability of a panel member to attend a temporary suspension proceeding, an alternate disciplinary panel member may serve on the panel if previously appointed by the president, acting president, or presiding officer of the board, and approved by the board.

(f) To the extent practicable, in the discretion of the chair or acting chair of the disciplinary panel, the sequence of events will be as follows:

(1) Call to Order

(2) Roll Call

(3) Calling of the Case

(4) Recusal Statement

(5) Introductions/Appearances on the Record

(6) Presentation by Board Staff

(A) Synopsis of Allegations/Opening Statement

(B) Introduction of Evidence and Information

(7) Presentation of Respondent

(A) Opening Statement

(B) Introduction of Evidence and Information

(8) Rebuttal by Board Staff/Surrebuttal by Respondent

(9) Closing Arguments

(A) Argument by Board Staff

(B) Argument by Respondent

(C) Final Argument by Board Staff

(10) Deliberations

(11) Announcement of Decision

(12) Adjournment

(g) Witnesses may provide sworn statements in writing or verbally or choose to provide statements which are not sworn; however, whether a statement is sworn may be a factor to be considered by the disciplinary panel in evaluating the weight to be given to the statement. Questioning of witnesses by the parties or panel members shall be at the discretion of the chair or acting chair of the disciplinary panel with due consideration being given to the need to obtain accurate information and prevent the harassment or undue embarrassment of witnesses.

(h) Presentations by the parties may be based on evidence or information and shall not be excluded on objection of a party unless determined by the chair or acting chair that the evidence or information is clearly irrelevant or unduly inflammatory in nature; however, objections by a party may be noted for the record.

(i) The disciplinary panel of the board may be convened at the direction of or with the approval of any committee chair, any member of the Executive Committee, or any informal show compliance proceeding panel conveyed either verbally or in writing to the executive director, director of enforcement, or general counsel of the board.

§187.42. Recusals.

(a) Before or during any meeting or portion of a meeting of the board or board committee, a board member may choose to be recused from participating or voting in any contested or uncontested matter for any reason and shall not be required to state the basis for recusal, but may choose to state the basis in general terms if such a statement will not prejudice the rights of any party to a fair proceeding before the board or committee of the board. In the event a board member discloses a basis for recusal which could potentially prejudice the rights of any party to a fair proceeding, the presiding officer of the board or committee may cure any such prejudice by an instruction to board or committee members to not consider the statement during the course of the proceeding or during deliberations or discussions related to the proceeding.

(b) A board member should exercise sound discretion in choosing to be recused from participation and voting in any contested matter in which the board member is predisposed either for or against a party based on matters which are not part of the administrative record, and should choose to be recused from any matter in which the board member cannot set aside the predisposition whether the predisposition be for or against a party to the contested matter.

(c) Any party may move for the disqualification or recusal of a board member stating with particularity why the board member should not sit. The motion shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall be verified by affidavit. The board member sought to be recused shall issue a decision as to whether he or she agrees that the recusal is appropriate or required before the board is scheduled to act on the matter for which the recusal is sought, or within 15 days after filing of the motion, whichever occurs first.

(d) In any instance in which a ground for recusal is raised by any party to a proceeding, any member of the board, or any member of a board committee, the board member who may have a basis for recusal may generally explain the potential basis for recusal and obtain the oral or written consent of the parties to the proceeding to participate and vote in the pending matter.

(e) Upon exercising the right to be recused and announcement of the recusal in open session, any board member so recused shall be allowed to remain in the room during any portion of the related proceeding, but shall not participate in any discussions, questioning, deliberations, or vote pertaining to the proceeding.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 22, 2001.

TRD-200106390
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 305-7016

♦ ♦ ♦

SUBCHAPTER E. PROCEEDINGS RELATING TO PROBATIONERS

22 TAC §187.43, §187.44

The new sections are proposed under the authority of the Occupations Code Annotated, §153.001, which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; and enforce this subtitle.

The Occupations Code, §§164.001-164.011; 164.051-164.061; 164.101-164.103; 164.151-164.154; 164.201-164.204; 165.001-165.008; 165.051; 165.101-165.103; 165.151-165.160. are affected by the new sections.

§187.43. Proceedings for the Modification/Termination of Agreed Orders and Disciplinary Orders.

(a) Unless the board order specifies that the order shall or will be modified or terminated upon the fulfillment of certain conditions or the occurrence of certain events, the decision to modify or terminate a board order shall be a matter for the exercise of sound discretion by the board.

(b) Modification or termination requests shall not be contested matters, but instead shall be matters to be ruled upon through the exercise of sound discretion by the board.

(c) If a board order sets out certain conditions or events for granting modification or termination of an order, the licensee shall have the burden of establishing that such conditions or events have taken place or been met.

(d) If by the terms of the order no specific conditions or events trigger the requirement that the petition be granted, the licensee has the burden of proof of demonstrating that one or more of the following factors should be considered for purposes of analyzing the merits of the petition and exercising sound discretion:

(1) whether there has been a significant change in circumstances which indicates that it is in the best interest of the public and the licensee to modify or terminate the order;

(2) whether there has been an unanticipated, unique or undue hardship on the licensee as a result of the board order which goes beyond the natural adverse ramifications of the disciplinary action (i.e. impossibility of requirement, geographical problems). Economic hardships such as the denial of insurance coverage or an adverse action taken by a medical specialty board are not considered unanticipated, unique or undue hardships;

(3) whether the licensee has engaged in special activities which are particularly commendable or so meritorious as to make modification or termination appropriate; and

(4) whether the licensee has fulfilled the requirements of the licensee's order in a timely manner and cooperated with the board and board staff during the period of probation or restriction.

(e) Probationers must be in compliance with the terms and conditions of their orders in order for the board to consider modification or termination of an order unless the modification or termination relates to the factors outlined in subsection (d)(2) of this section.

(f) Unless the terms of the board order specify otherwise, petitions for modification or termination shall be in writing and filed with the director of compliance for the board 20 days prior to a hearing on the matter.

(g) Modification or termination requests may be made only once a year since the prior request for modification or termination unless a board order otherwise specifies, or upon an assertion in writing under oath by a petitioner indicating that a circumstance exists as described in subsection (d)(2) of this section. Upon receipt of the petition, the director of compliance shall determine whether such a request is valid and meets the requirements of subsection (d)(2) of this section. A finding by the director of compliance does not equate to such a finding by representatives of the board.

(h) For purposes of administrative convenience, modification or termination requests may be heard by the full board or by representatives of the board. If such a request is heard by representatives of the board, the representatives shall consist of at least one board member or one district review committee member. In the event such a request is heard by board representatives, the representatives of the board shall not be authorized to bind the board, but shall only make recommendations to the board regarding an appropriate disposition. The recommendation of such representatives shall be submitted to the full board for adoption or rejection in the form of an order drafted by board staff.

§187.44. Probationer Show Compliance Proceedings.

Pursuant to §§164.003-.004 of the Act and §§2001.054-.056 of the APA, the following rules shall apply to probationer show compliance proceedings.

(1) If a licensee is placed under an order, the licensee shall be monitored by the board to ensure compliance. In the event that a licensee fails to comply with the licensee's order, such noncompliance will be addressed at a probationer show compliance proceeding.

(2) All licensees under any order must maintain their licenses in good standing, including meeting all fee and continuing medical education requirements. Failure to keep a license in good standing shall be evidence of noncompliance with a board order and considered a violation of the Act and board rules.

(3) Unless otherwise stated, the policies and procedures as described for ISCs in §187.18 of this title (relating to Informal Show Compliance Proceeding and Settlement Conference on Personal Appearance ("ISC")) shall apply to probationer show compliance proceedings.

(4) At a probationer show compliance proceeding, the board representatives may consider facts relevant to the alleged noncompliance, and the board representatives may recommend that the licensee's existing order be modified or extended.

(5) The licensee may have the probationer show compliance proceeding recorded and reduced to writing at the licensee's expense after providing written notice to the director of enforcement for the board at least five days in advance of the proceeding. Recording

and transcribing equipment shall be provided by the licensee. Efforts to mediate the disputed matters or discussions concerning possible settlement options shall not be recorded.

(6) To the extent possible, board members and district review committee members are required to serve as representatives at probationer show compliance proceedings an equal number of times during a calendar year. In the event a board member or district review committee member has a complaint regarding the frequency or infrequency of service as a representative required for any member, the complaint may be routed in writing to the director of enforcement for the board who shall then bring the complaint to the attention of the president of the board for a resolution.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 22, 2001.

TRD-200106391
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 305-7016

♦ ♦ ♦

CHAPTER 188. COMPLAINT PROCEDURE NOTIFICATION

22 TAC §188.1

The Texas State Board of Medical Examiners proposes an amendment to §188.1, concerning Complaint Procedure Notification. The amendment is necessary to make updates pursuant to the Texas Occupations Code cites. The amendment also corrects Spanish translation.

Michele Shackelford, General Counsel, Texas State Board of Medical Examiners, has determined that for the first five-year period the section is in effect there will be no effect to state or local government as a result of enforcing the section.

Ms. Shackelford also has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing the section will be updated cites and regulations. There will be no effect on small businesses. There will be no effect to individuals required to comply with the section as proposed.

Comments on the proposal may be submitted to Pat Wood, P.O. Box 2018, MC-901, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The amendment is proposed under the authority of the Occupations Code Annotated, §153.001, which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; and enforce this subtitle.

The Occupations Code, §§154.051 is affected by the repeal and new sections.

§188.1. Complaint Procedure Notification.

(a) Methods of Notification. Pursuant to the Medical Practice Act (the Act), §154.051, [~~Article 4495b, §2.09(s)(2),~~] for the purpose of directing complaints to the board, the board and its licensees shall provide notification to the public of the name, mailing address, and telephone number of the board by one or more of the following methods:

(1) displaying in a prominent location at their place of business, signs in English and Spanish of no less than 8 1/2 inches by 11 inches in size with the board-approved notification statement printed alone and in its entirety in black on white background in type no smaller than standard 24-point Times Roman print with no alterations, deletions, or additions to the language of the board-approved statement; or

(2) placing the board-approved notification statement printed in English and Spanish in black type no smaller than standard 10-point 12-pitch typewriter print on each bill for services with no alterations, deletions, or additions to the language of the board-approved statement; or

(3) placing the board-approved notification statement printed in English and Spanish in black type no smaller than standard 10-point, 12-pitch typewriter print on each registration form, application, or written contract for services with no alterations, deletions, or additions to the language of the board-approved statement.

(b) Approved English Notification Statement. The following notification statement in English is approved by the board for purposes of these rules and the Act, §154.051: [~~§2.09(s)(2):~~]
Figure: 22 TAC §188.1(b) (No change.)

(c) Approved Spanish Notification Statement. The following notification statement in Spanish is approved by the board for purposes of these rules and the Act, §154.051: [~~§2.09(s)(2):~~]
Figure: 22 TAC §188.1(c)

(d) Following are samples of the type print references in subsection (a) of this section.
Figure: 22 TAC §188.1(d)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 22, 2001.

TRD-200106392
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 305-7016

♦ ♦ ♦

CHAPTER 193. STANDING DELEGATION ORDERS

22 TAC §193.6

The Texas State Board of Medical Examiners proposes an amendment to §193.6, concerning Standing Delegation Orders. The amendment is necessary pursuant to SB 1166, relating to delegation of prescriptive authority at alternate practice sites and procedures for waiver from site and supervision requirements.

Michele Shackelford, General Counsel, Texas State Board of Medical Examiners, has determined that for the first five-year

period the section is in effect there will be no effect to state or local government as a result of enforcing the section.

Ms. Shackelford also has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing the section will be compliance with SB 1166. There will be no effect on small businesses. There will be no effect to individuals required to comply with the section as proposed.

Comments on the proposal may be submitted to Pat Wood, P.O. Box 2018, MC-901, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The amendment is proposed under the authority of the Occupations Code Annotated, §153.001, which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; and enforce this subtitle.

The Occupations Code, §§157.053, 157.0541 and 157.0542 are affected by the amendment.

§193.6. Delegation of the Carrying Out or Signing of Prescription Drug Orders to Physician Assistants and Advanced Practice Nurses.

(a) Purpose. The purpose of this section is to provide guidelines for implementation of the Medical Practice Act ("the Act"), Texas Occupations Code Annotated, §§157.051-157.060, which provide for the use by physicians of standing delegation orders, standing medical orders, physician's orders [order], or other orders or protocols in delegating authority to physician assistants or advanced practice nurses at a site [sites] serving medically underserved populations, at a physician's primary practice or alternate practice site, or at a facility-based practice site. [described in subsection (j) of this section. In accord with Texas Occupations Code Annotated, §§157.051-157.060,] This[this] section establishes minimum standards for supervision by physicians of physician assistants and advanced practice nurses for provision of services at such sites. This section also provides for the signing of a prescription by an advanced practice nurse or a physician assistant after the person has been designated by the delegating physician as a person delegated to sign a prescription and for the use of prescriptions pre-signed by the delegating [supervising] physician which may be carried out by a physician assistant or advanced practice nurse according to protocols. Such protocols may authorize diagnosis of the patient's condition and treatment, including prescription of dangerous drugs. Proper use of protocols allows integration of clinical data gathered by the physician assistant or advanced practice nurse. Neither the [Medical Practice] Act, [Texas Occupations Code Annotated,] §§157.051-157.060, nor these rules authorize the exercise of independent medical judgment by physician assistants or advanced practice nurses, and the supervising physician remains responsible to the board and to his or her patients for acts performed under the physician's delegated authority. Advanced practice nurses and physician assistants remain professionally responsible for acts performed under the scope and authority of their own licenses.

[(b) Physician supervision at site serving medically underserved populations. Physician supervision of a physician assistant or advanced practice nurse at a site serving a medically underserved population will be adequate if a delegating physician:]

[(1) receives a daily status report to be conveyed in person, by telephone, or by radio from the advanced practice nurse or physician assistant on any complications or problems encountered that are not covered by a protocol;]

[(2) visits the clinic in person at least once every ten business days during regular business hours during which the advanced practice nurse or physician assistant is on site providing care, to observe and to provide medical direction and consultation to include, but not be limited to:]

[(A) reviewing with the physician assistant or advanced practice nurse case histories of patients with problems or complications encountered;]

[(B) personally diagnosing or treating patients requiring physician follow-up;]

[(C) verifying that patient care is provided by the clinic in accordance with a written quality assurance plan on file at the clinic, which includes a random review and countersignature of at least 10% of the patient charts by the supervising physician;]

[(3) is available by telephone or direct telecommunication for consultation, assistance with medical emergencies, or patient referrals.]

[(4) is responsible for the formulation or approval of such physician's orders, standing medical orders, standing delegation orders, or other orders or protocols and periodically reviews such orders and the services provided patients under such orders.]

[(c) Documentation of supervision. If the physician assistant or advanced practice nurse is located at a site other than the site where the physician spends the majority of the physician's time, physician supervision shall be documented through a log kept at the clinic where the physician assistant or advanced practice nurse is located. The log will include the names or identification numbers of patients discussed during the daily status reports, the times when the physician is on site, and a summary of what the physician did while on site. Said summary shall include a description of the quality assurance activities conducted and the names of any patients seen or whose case histories were reviewed with the physician assistant or advanced practice nurse. The supervising physician shall sign each log at the conclusion of each site visit. A log is not required if the physician assistant or advanced practice nurse is permanently located with the physician at a site where the physician spends the majority of the physician's time.]

[(d) Alternate physicians. If a delegating physician will be unavailable to supervise the physician assistant or advanced practice nurse as required by this section, arrangements shall be made for another physician to provide that supervision. The physician providing that supervision shall affirm in writing that he or she is familiar with the protocols or standing delegation orders in use at the clinic and is accountable for adequately supervising care provided pursuant to those protocols or standing delegation orders by fulfilling the requirements for registration as an alternate supervising physician as detailed in rules of the Texas State Board of Physician Assistant Examiners, 22 Texas Administrative Code, Chapter 185 of this title (relating to Physician Assistants).]

[(e) Supervision of clinics. A physician may not supervise more than three clinics without approval of the board. A physician may not supervise any number of clinics with combined regular business hours exceeding 150 concurrent hours per week without approval of the board.]

[(f) Exceptions to patient chart review. Exceptions to the percentage of patient chart reviews required by subsection (b)(2)(C) of this section and the provisions of subsection (e) of this section relating to the number of clinics or clinic hours supervised may be made by the board upon special request by a delegating physician. Such a request shall state the special circumstances and needs prompting the exception, the names and locations of the clinics and/or hours to be supervised, and a plan of supervision. In granting an exception, the board shall state the

~~percentage of charts that must be reviewed and/or the number of clinics or the combined clinic hours that can be supervised.~~]

(b) [~~(g)~~] Delegation of prescriptive authority at site serving underserved populations.

(1) Acts that may be delegated. A physician may delegate to a physician assistant or an advanced practice nurse the act or acts of administering, providing, or carrying out or signing a prescription drug order as authorized by the physician through physician's orders, standing medical orders, standing delegation orders, or other orders or protocols as defined by the board for treating patients at a site serving a medically underserved population. [~~The prescription forms itself shall comply with applicable rules adopted by the Texas State Board of Pharmacy. Prescriptions issued pursuant to this section may only be written for dangerous drugs. No prescriptions for controlled substances may be authorized or issued. An appropriate signature on one of the two signature lines on the prescription shall convey instructions to a pharmacist regarding the pharmacist's authority to dispense a generically equivalent drug, if available. If the physician assistant or advanced practice nurse authorizes generic substitution, the protocol shall provide direction to the physician assistant or advanced practice nurse as to whether and under what circumstances product selection will be permitted by a pharmacist. A delegating physician is responsible for devising and enforcing a system to account for and monitor the issuance of prescriptions under his supervision.~~]

(2) Physician supervision at site serving medically underserved populations. Physician supervision of a physician assistant or an advanced practice nurse at a site serving a medically underserved population will be adequate if a delegating physician:

(A) receives a daily status report to be conveyed in person, by telephone, or by radio from the advanced practice nurse or physician assistant on any complications or problems encountered that are not covered by a protocol;

(B) visits the clinic in person at least once every ten business days during regular business hours during which the advanced practice nurse or physician assistant is on site providing care, in order to observe and provide medical direction and consultation to include, but not be limited to:

(i) reviewing with the physician assistant or advanced practice nurse the case histories of patients with problems or complications encountered;

(ii) personally diagnosing or treating patients requiring physician follow-up; and

(iii) verifying that patient care is provided by the clinic in accordance with a written quality assurance plan on file at the clinic, which includes a random review and countersignature of at least 10% of the patient charts by the supervising physician;

(C) is available by telephone or direct telecommunication for consultation, assistance with medical emergencies, or patient referrals; and

(D) is responsible for the formulation or approval of such physician's orders, standing medical orders, standing delegation orders, or other orders or protocols and periodically reviews such orders and the services provided to patients under such orders.

(3) Supervision of clinics. A physician may not supervise more than three clinics serving medically underserved populations without approval of the board. A physician may not supervise any number of clinics with combined regular business hours exceeding 150 concurrent hours per week without approval of the board.

[~~(h) Violations. Violation of this section by the supervising physician may result in a refusal to approve supervision or cancellation of the physician's authority to supervise a physician assistant or advanced practice nurse under this section. Violation of this section may also subject the physician to disciplinary action as provided by the Medical Practice Act, Texas Occupations Code Annotated, §164.001, for violation of Texas Occupations Code Annotated, §164.051. If an advanced practice nurse violates this section or the Medical Practice Act, Texas Occupations Code Annotated, §§157.051-157.060, the board shall promptly notify the Texas Board of Nurse Examiners of the alleged violation. If a physician assistant violates this section or the Medical Practice Act, Texas Occupations Code Annotated, §§157.051-157.060, the board shall promptly notify the Texas State Board of Physician Assistant Examiners.~~]

(c) [~~(i)~~] Delegation of prescriptive authority at primary practice site.

(1) "Primary practice site" means:

(A) the practice location where the physician spends the majority of the physician's time;

(B) a licensed hospital, long-term care facility, or adult care center where both the physician and the physician assistant or advanced practice nurse are authorized to practice;

(C) a clinic operated by or for the benefit of a public school district for the purpose of providing care to the students of that district and the siblings of those students, if consent to treatment at that clinic is obtained in a manner that complies with the Family Code, Chapter 32;

(D) an established patient's residence; or

(E) where the physician is physically present with the physician assistant or advanced practice nurse.

(2) Acts that may be delegated. At a physician's primary practice site [~~or a location as described by subsection (j) of this section,~~] a physician licensed by the board may delegate to a physician assistant or an advanced practice nurse acting under adequate physician supervision the act or acts of administering, providing, carrying out or signing a prescription drug order as authorized through physician's orders, standing medical orders, standing delegation orders, or other orders or protocols as defined by the board. Providing and carrying out or signing a prescription drug order under this subdivision is limited to dangerous drugs and shall comply with other applicable laws.

(3) Physician supervision. Physician supervision of the carrying out and signing of prescription drug orders shall conform to what a reasonable, prudent physician would find consistent with sound medical judgment but may vary with the education and experience of the advanced practice nurse or physician assistant. A physician shall provide continuous supervision, but the constant physical presence of the physician is not required.

(4) [~~(1)~~] Additional limitations. A physician's authority to delegate the carrying out or signing of a prescription drug order [~~at his primary practice site~~] under this subsection [~~section~~] is limited to:

(A) three physician assistants or advanced practice nurses or their full-time equivalents practicing at the physician's primary or alternate practice site; and

(B) the patients with whom the physician has established or will establish a physician-patient relationship, but this shall not be construed as requiring the physician to see the patient within a specific period of time.

[(2) "Primary practice site" means:]

[(A) the practice location where the physician spends the majority of the physician's time;]

[(B) a licensed hospital, a licensed long-term care facility, and a licensed adult care center where both the physician and the physician assistant or advanced practice nurse are authorized to practice, a clinic operated by or for the benefit of a public school district for the purpose of providing care to the students of that district and the siblings of those students, if consent to treatment at that clinic is obtained in a manner that complies with the Family Code, Chapter 32, or an established patient's residence; or]

[(C) where the physician is physically present with the physician assistant or advanced practice nurse.]

(d) Delegation of prescriptive authority at a physician's alternate practice site.

(1) "Alternate practice site" means a site:

(A) where services similar to the services provided at the delegating physician's primary practice site are provided; and

(B) located within 60 miles of the delegating physician's primary practice site.

(2) Acts that may be delegated. At a physician's alternate practice site, a physician licensed by the board may delegate to a physician assistant or an advanced practice nurse acting under adequate physician supervision the act or acts of administering, providing, carrying out or signing a prescription drug order as authorized through physician's orders, standing medical orders, standing delegation orders, or other orders or protocols as defined by the board. Providing, carrying out or signing a prescription drug order under this subsection is limited to dangerous drugs and shall comply with other applicable laws.

(3) Physician supervision is adequate for the purposes of this subsection if the delegating physician:

(A) is on-site with the advance practice nurse or physician assistant at least 20 percent of the time;

(B) reviews at least 10 percent of the medical charts at the site; and

(C) is available through direct telecommunication for consultation, patient referral, or assistance with a medical emergency.

(4) A supervising physician may not delegate to a combined number of more than three physician assistants or advanced practice nurses or their full-time equivalents at the physician's primary and alternate practice sites.

(e) [(j)] Delegation of prescriptive authority at a facility-based practice site.

(1) Acts that may be delegated. A physician licensed by the board shall be authorized to delegate, to one or more physician assistants or advanced practice nurses acting under adequate physician supervision whose practice is facility-based at a licensed hospital or licensed long-term care facility, the carrying out or signing of prescription drug orders if the physician is the medical director or chief of medical staff of the facility in which the physician assistant or advanced practice nurse practices, the chair of the facility's credentialing committee, a department chair of a facility department in which the physician assistant or advanced practice nurse practices, or a physician who consents to the request of the medical director or chief of medical staff to delegate the carrying out or signing of prescription drug orders at the facility in which the physician assistant or advanced practice nurse practices.

(2) Limitations on authority to delegate. A physician's authority to delegate under this subsection is limited as follows [in paragraphs (1)-(5) of this subsection:]

(A) [(1)] the delegation is pursuant to a physician's order, standing medical order, standing delegation order, or other order or protocol developed in accordance with policies approved by the facility's medical staff or a committee thereof as provided in facility bylaws;

(B) [(2)] the delegation occurs in the facility in which the physician is the medical director, the chief of medical staff, the chair of the credentialing committee, or a department chair;

(C) [(3)] the delegation does not permit the carrying out or signing of prescription drug orders for the care or treatment of the patients of any other physician without the prior consent of that physician;

(D) [(4)] delegation in a long-term care facility must be by the medical director and the medical director is limited to delegating the carrying out and signing of prescription drug orders to no more than three advanced practice nurses or physician assistants or their full-time equivalents; and

(E) [(5)] under this section, a physician may not delegate at more than one licensed hospital or more than two long-term care facilities unless approved by the board.

(3) Physician supervision. Physician supervision of the carrying out and signing of a prescription drug order shall conform to what a reasonable, prudent physician would find consistent with sound medical judgment but may vary with the education and experience of the advanced practice nurse or physician assistant. A physician shall provide continuous supervision, but the constant physical presence of the physician is not required.

(f) Documentation of supervision. If the physician assistant or advanced practice nurse is located at a site other than the site where the physician spends the majority of the physician's time, physician supervision shall be documented through a log kept at the clinic where the physician assistant or advanced practice nurse is located. The log will include the names or identification numbers of patients discussed during the daily status reports, the times when the physician is on site, and a summary of what the physician did while on site. Said summary shall include a description of the quality assurance activities conducted and the names of any patients seen or whose case histories were reviewed with the physician assistant or advanced practice nurse. The supervising physician shall sign each log at the conclusion of each site visit. A log is not required if the physician assistant or advanced practice nurse is permanently located with the physician at a site where the physician spends the majority of the physician's time.

(g) Alternate physicians. If a delegating physician will be unavailable to supervise the physician assistant or advanced practice nurse as required by this section, arrangements shall be made for another physician to provide that supervision. The physician providing that supervision shall affirm in writing that he or she is familiar with the protocols or standing delegation orders in use at the site and is accountable for adequately supervising care provided pursuant to those protocols or standing delegation orders by fulfilling the requirements for registration as an alternate supervising physician as detailed in Chapter 185 of this title (relating to Physician Assistants).

(h) Prescription forms. Prescription forms shall comply with applicable rules adopted by the Texas State Board of Pharmacy. Prescriptions issued pursuant to this section may only be written for dangerous drugs. No prescriptions for controlled substances may be authorized or issued. An appropriate signature on the prescription shall convey instructions to a pharmacist regarding the pharmacist's authority

to dispense a generically equivalent drug, if available. If the physician assistant or advanced practice nurse authorizes generic substitution, the protocol shall provide direction to the physician assistant or advanced practice nurse as to whether and under what circumstances product selection will be permitted by a pharmacist. A delegating physician is responsible for devising and enforcing a system to account for and monitor the issuance of prescriptions under the physician's supervision.

(i) Waivers.

(1) The board may waive or modify any of the site or supervision requirements for a physician to delegate the carrying out or signing of prescription drug orders to an advanced practice nurse or physician assistant at facilities serving medically underserved areas, at physician primary and alternate practice sites, and at facility-based practice sites.

(2) The board may grant a waiver under paragraph (1) of this subsection if the board determines that:

(A) the practice site where the physician is seeking to delegate prescriptive authority is unable to meet the requirements of the Chapter 157 of the Act or this section, or compliance would cause an undue burden without a corresponding benefit to patient care;

(B) safeguards exist for patient care and for fostering a collaborative practice between the physician and the advanced practice nurses and physician assistants; and

(C) the frequency and duration of time the physician is on-site when the advanced practice nurse or physician assistant is present is sufficient for collaboration to occur, taking into consideration the other ways the physician collaborates with the advanced practice nurse or physician assistant, including at other sites.

(3) The board may not waive the limitation on the number of primary or alternate practice sites at which a physician may delegate the carrying out or signing of prescription drug orders or the number of advanced practice nurses or physician assistants to whom a physician may delegate the carrying out or signing of prescription drug orders.

(4) Procedure.

(A) A physician may apply for a waiver by completing a waiver form provided by the board and submitting it to the licensure division of the board. Applications must be submitted at least 20 days prior to the next scheduled meeting of the advisory committee in order for the committee to consider the application at that meeting.

(B) In accordance with this section and §157.0542 of the Act, the board shall appoint an advisory committee to meet as needed to review and make recommendations on applications for waivers. The board must receive recommendations from the advisory committee at least 20 days prior to the board meeting at which they shall be considered.

(C) An advisory committee recommendation of the approval of a waiver, with or without modifications, requires a vote of at least:

(i) three advanced practice nurse committee members;

(ii) three physician assistant committee members; and

(iii) three physician committee members.

(D) The Standing Orders Committee of the board shall review recommendations from the advisory committee and may recommend to the full board that a waiver be granted, denied or modified.

(E) The board may grant a waiver only if the advisory committee recommends that the waiver be granted, unless the board determines good cause exists to grant a waiver the committee does not recommend.

(F) The advisory committee may recommend that the board approve a waiver with modifications.

(G) If the board denies a waiver, a written explanation for the denial shall be given to the physician along with any recommended modifications that would make the waiver application acceptable.

(H) The board may revoke, suspended or modify a waiver previously granted after providing the physician notice and opportunity for a hearing as provided for by the Administrative Procedure Act and Chapter 187 of this title (relating to Procedure).

(j) Violations. Violation of this section by the supervising physician may result in a refusal to approve supervision or the cancellation of the physician's authority to supervise a physician assistant or advanced practice nurse under this section. Violation of this section may also subject the physician to disciplinary action as provided by the Act, §164.001, for violation of §164.051. If an advanced practice nurse violates this section or the Act, §§157.051-157.060, the board shall promptly notify the Texas Board of Nurse Examiners of the alleged violation. If a physician assistant violates this section or the Act, §§157.051-157.060, the board shall promptly notify the Texas State Board of Physician Assistant Examiners.

(k) Delegation to certified registered nurse anesthetists.

(1) In a licensed hospital or ambulatory surgical center a physician may delegate to a certified registered nurse anesthetist the ordering of drugs and devices necessary for a certified registered nurse anesthetist to administer an anesthetic or an anesthesia-related service ordered by the physician. The physician's order for anesthesia or anesthesia-related services does not have to be drug-specific, dose-specific, or administration-technique-specific. Pursuant to the order and in accordance with facility policies or medical staff bylaws, the nurse anesthetist may select, obtain, and administer those drugs and apply the appropriate medical devices necessary to accomplish the order and maintain the patient within a sound physiological status.

(2) This paragraph shall be liberally construed to permit the full use of safe and effective medication orders to utilize the skills and services of certified registered nurse anesthetists.

(l) Delegation related to obstetrical services.

(1) A physician may delegate to a physician assistant offering obstetrical services and certified by the board as specializing in obstetrics or an advanced practice nurse recognized by the Texas State Board of Nurse Examiners as a nurse midwife the act or acts of administering or providing controlled substances to the nurse midwife's or physician assistant's clients during intra-partum and immediate post-partum care. The physician shall not delegate the use or issuance of a triplicate prescription form under the triplicate prescription program, the Health and Safety Code, §481.075.

(2) The delegation of authority to administer or provide controlled substances under this paragraph must be under a physician's order, medical order, standing delegation order, or protocol which shall require adequate and documented availability for access to medical care.

(3) The physician's orders, medical orders, standing delegation orders, or protocols shall provide for reporting or monitoring of client's progress including complications of pregnancy and delivery and the administration and provision of controlled substances by the

nurse midwife or physician assistant to the clients of the nurse midwife or physician assistant.

(4) The authority of a physician to delegate under this paragraph is limited to:

(A) three nurse midwives or physician assistants or their full-time equivalents; and

(B) the designated facility at which the nurse midwife or physician assistant provides care.

(5) The administering or providing of controlled substances under this paragraph shall comply with other applicable laws.

(6) In this paragraph, "provide" means to supply one or more unit doses of a controlled substance for the immediate needs of a patient not to exceed 48 hours.

(7) The controlled substance shall be supplied in a suitable container that has been labeled in compliance with the applicable drug laws and shall include the patient's name and address; the drug to be provided; the name, address, and telephone number of the physician; the name, address, and telephone number of the nurse midwife or physician assistant; and the date.

(8) This paragraph does not permit the physician or nurse midwife or physician assistant to operate a retail pharmacy as defined under the Texas Pharmacy Act (Article 4542a-1, Vernon's Texas Civil Statutes).

(9) This paragraph shall be construed to provide a physician the authority to delegate the act or acts of administering or providing controlled substances to a nurse midwife or physician assistant but not as requiring physician delegation of further acts to a nurse midwife or as requiring physician delegation of the administration of medications to registered nurses or physician assistants other than as provided in this paragraph.

(m) Liability. A physician shall not be liable for the act or acts of a physician assistant or advanced practice nurse solely on the basis of having signed an order, a standing medical order, a standing delegation order, or other order or protocols authorizing a physician assistant or advanced practice nurse to perform the act or acts of administering, providing, carrying out, or signing a prescription drug order unless the physician has reason to believe the physician assistant or advanced practice nurse lacked the competency to perform the act or acts.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 22, 2001.

TRD-200106393
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 305-7016

♦ ♦ ♦

PART 23. TEXAS REAL ESTATE COMMISSION

CHAPTER 535. PROVISIONS OF THE REAL ESTATE LICENSE ACT
SUBCHAPTER G. MANDATORY CONTINUING EDUCATION

22 TAC §535.72

The Texas Real Estate Commission (TREC) proposes an amendment to §535.72, concerning presentation of mandatory continuing education (MCE) courses, advertising and records.

By law, many Texas real estate licensees are required to complete MCE courses to renew an active real estate license. MCE providers are approved by TREC and must offer their courses in accordance with TREC rules. Section 535.72 provides guidelines for the providers' reporting of course completion by a student in a correspondence course or a course offered by alternative delivery systems such as by a computer. The section now requires a provider to report the course completion with a written report, MCE Form 9-4. Providers have suggested that course completion could be reported electronically, facilitating the student's credit being entered in TREC's records. The proposed amendment would permit the content of the MCE Form 9-4 to be filed electronically with TREC. The provider would be responsible for ensuring that the person reported as receiving course credit is the person who completed the course and that the reporting process does not compromise the security of TREC's records. Adoption of the amendment would enable course completion to be reported more quickly and thus eliminate delays in renewing or obtaining a license when continuing education is required.

Mark A. Moseley, General Counsel, has determined that for the first five-year period the section is in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the section. There is no anticipated impact on small businesses, micro businesses or local or state employment as a result of implementing the section.

Mr. Moseley also has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing the section will be a streamlined process for reporting completion of MCE courses to TREC. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Comments on the proposal may be submitted to Mark A. Moseley, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

The amendment is proposed under Texas Civil Statutes, Article 6573a, §5(h), which authorize the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties.

The statute which is affected by this proposal is Texas Civil Statutes, Article 6573a.

§535.72. Mandatory Continuing Education: Presentation of Courses, Advertising and Records.

(a) - (c) (No change.)

(d) In a course offered by correspondence or alternative delivery method, the provider shall award the student credit for the course upon completion of the course examination and all other requirements for credit and shall report the awarding of credit to the commission . Course credit must be reported either by the provider filing a completed MCE Form 9-4, signed by the student, or submitting the information contained in MCE Form 9-4 by electronic means acceptable

to the commission. If the provider chooses to use an electronic reporting process, the process must ensure that only students who complete the course are reported to the commission as receiving course credit and that the process does not compromise the security of commission records. [~~Providers of MCE correspondence or alternative delivery method courses shall furnish each student with an Alternative Instructional Methods Reporting Form, MCE Form 9-4, at the time of the final examination. Upon successful completion of the examination the student shall sign MCE Form 9-4. To report successful course completion the provider shall file the completed MCE Form 9-4 with the commission.~~]

(e) - (o) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 16, 2001.

TRD-200106223
Mark A. Moseley
General Counsel
Texas Real Estate Commission
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 465-3900

♦ ♦ ♦

SUBCHAPTER R. REAL ESTATE INSPECTORS

22 TAC §535.208

The Texas Real Estate Commission (TREC) proposes an amendment to §535.208, concerning applications for a real estate inspector or professional inspector license.

The amendment to §535.208 would eliminate the requirement that a person applying for an inspector license online furnish TREC with a hard copy of the application within 60 days to complete the application. Rather, the person would be required to furnish TREC with a photograph and signature prior to receiving a license, and the photograph and signature could be furnished before the application is filed. The amendment would streamline the electronic application process presently being developed by TREC, while obtaining appropriate identification of the applicant.

Mark A. Moseley, General Counsel, has determined that for the first five-year period the section as proposed is in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the section. There is no anticipated impact on small businesses, micro businesses or local or state employment as a result of implementing the section.

Mr. Moseley also has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing the section will be the elimination of possible delays in the licensing process for real estate inspectors. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Comments on the proposal may be submitted to Mark A. Moseley, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

The amendment is proposed under Texas Civil Statutes, Article 6573a, §5(h), which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties.

The statute which is affected by this proposal is Texas Civil Statutes, Article 6573a.

§535.208. Application for a License.

(a) (No change.)

(b) If the commission develops a system whereby a person may electronically file an application for a license, a person who has previously satisfied applicable education requirements and obtained an evaluation from the commission also may apply for a license by accessing the commission's Internet web site, entering the required information on the application form and paying the appropriate fee in accordance with the instructions provided at the site by the commission. The person must provide the commission with the person's photograph and signature prior to issuance of a license certificate. The person may provide the photograph and signature prior to the submission of an electronic application. [~~Within 60 days after paying the fee, the applicant must complete the application process by submitting to the commission a printed copy of the application signed by the applicant and any sponsoring inspector and including a photograph of the applicant. If the applicant does not complete the application process as required by this subsection, the commission shall terminate the application.~~]

(c) - (f) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 16, 2001.

TRD-200106222
Mark A. Moseley
General Counsel
Texas Real Estate Commission
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 465-3900

♦ ♦ ♦

TITLE 25. HEALTH SERVICES

PART 1. TEXAS DEPARTMENT OF HEALTH

CHAPTER 313. ATHLETIC TRAINERS

SUBCHAPTER A. GENERAL GUIDELINES AND REQUIREMENTS

25 TAC §§313.9, 313.10, 313.12

The Advisory Board of Athletic Trainers (board) proposes amendments to §§313.9, 313.10 and 313.12 concerning the licensure and regulation of athletic trainers. Specifically, the amendments are necessary to accurately reflect that examination dates are set and announced by the board, to correct citations, to allow the board to issue a temporary license to persons who were licensed and allowed the license to expire, and to establish independent study courses and training as acceptable forms of continuing education.

Kathy Craft, Program Director, Advisory Board of Athletic Trainers, has determined that for the first five-year period the sections are in effect, there will be minor fiscal implications to state or local government as a result of enforcing or administering the sections as proposed. The effect on state government will mean increased revenue estimated at $1000 per year for each of the five years. It is estimated that the costs to the department to administer the amendments will not exceed the estimated revenue increases.

Ms. Craft has also determined that for each of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing the sections will be a clearer understanding of the process for establishing examination dates and greater assurance that licensed athletic trainers are in compliance with all requirements for providing athletic training services and the annual license renewal. There will be no anticipated costs to micro-businesses or small businesses to comply with the sections as proposed because the requirements apply only to licensed individuals. The anticipated economic costs to persons who are required to comply with the sections as proposed will be a $200 fee for persons who choose to obtain a temporary license. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Heather Muehr, Program Administrator, Advisory Board of Athletic Trainers, Texas Department of Health, 1100 West 49th Street, Austin, Texas, 78756, (512) 834-6615, heather.muehr@tdh.state.tx.us. Comments will be accepted for 30 days following the date of publication of this proposal in the *Texas Register*.

The amendments are proposed under the Occupations Code, Chapter 451, §451.103, which authorizes the board to adopt rules necessary for the performance of its duties.

The amendments affect the Occupations Code, Chapter 451.

§313.9. Examination for Licensure.

(a) The board shall offer examinations at least two times a year at times and places established [~~by the Administrative Services Committee~~] and announced by the board.

(b) (No change.)

(c) An applicant may file an application for examination if the applicant:

(1) - (3) (No change.)

(4) has completed at least 600 clock hours of the required 720 clock hours and the apprenticeship program is in progress if the applicant qualifies under the Act, §451.153(2) or §451.153(3) [~~§421.153(3)~~].

(d) - (k) (No change.)

§313.10. Temporary License.

(a) - (b) (No change.)

[~~(c) A temporary license shall not be renewed, but a second temporary license may be issued upon approval by the Administrative Services Committee on grounds of documented hardship.~~]

(c) [~~(d)~~] An applicant who failed an examination administered by the board shall not be eligible for a temporary license. If a temporary license has previously been issued, it shall be voided and the applicant shall not be eligible for another temporary license.

(d) A person who has been licensed as an athletic trainer and allowed the license to expire, may be eligible for a temporary license upon submission and approval of a new application for licensure. The expiration of a temporary license issued under this subsection will be in accordance with subsection (b) of this section.

§313.12. Continuing Education Requirements.

(a) - (b) (No change.)

(c) Continuing education credit undertaken by a licensee for renewal shall be acceptable if the experience falls in one or more of the following categories:

(1) - (4) (No change.)

(5) publishing a book or an article in a peer review journal relating to athletic training or sports medicine not to exceed five clock-hours each continuing education period; [~~or~~]

(6) serving as a skills examiner at the state licensure examination not to exceed one clock-hour of continuing education credit for each examination date for a maximum of six clock- hours of credit each continuing education period; or

(7) successful completion of a self-study program in athletic training or sports medicine, not to exceed eight clock-hours each continuing education period.

(d) Continuing education experience shall be credited as follows.

(1) - (5) (No change.)

(6) Successful completion of courses described in subsection (c)(7) of this section is evidenced by a certificate of completion presented by the publisher, or sponsoring organization of the self-study program.

(7) [~~(6)~~] Approval by [~~of~~] the continuing education committee must be obtained for each continuing education program as [~~experience~~] described in subsection (c) of this section, unless continuing education credit is granted by a national, regional or state health care professional association.

(e) - (i) (No change.)

(j) The continuing education committee may not grant continuing education credit to any licensee for:

(1) - (2) (No change.)

(3) any continuing education activity completed before or after the period of time described in subsections (b) or (h) of this section; or

[~~(4) self-study continuing education programs or activities; or~~]

(4) [~~(5)~~] performance of duties that are routine job duties or requirements.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 16, 2001.

TRD-200106248
Natalie Steadman
Chair, Advisory Board of Athletic Trainers
Texas Department of Health
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 458-7236

♦ ♦ ♦

TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 19. AGENTS' LICENSING
SUBCHAPTER T. SPECIALTY INSURANCE LICENSE

28 TAC §§19.1902, 19.1905, 19.1909

The Texas Department of Insurance proposes amending §19.1902, §19.1905 and §19.1909 concerning specialty insurance licenses. The proposed amendments allow a specialty license holder to register all locations, except franchises, where its associated consumer transactions occur and specialty insurance products are sold and require the specialty license holder to train those persons selling insurance under its license. The proposed amendments will apply equally to all specialty insurance licenses including the telecommunications specialty license added by amendments to Article 21.09 in Senate Bill 466, 77th Legislature.

These proposed amendments are necessary to maintain effective regulation of the specialty insurance license through responsible license holders and to provide the public with insurance products through trained persons without disruption of the public's access to or the availability of the associated consumer transactions. Many industries covered by the specialty license do not have a franchise business model. Vendors in these industries often utilize a business relationship in which their associated consumer transaction and insurance sales are conducted through other businesses, but controlled by the vendor through the use of forms, specific requirements and procedures.

The current subchapter restricts the use of a specialty license to only those locations owned and operated by the specialty license holder. Each vendor and other business are required to obtain and maintain a separate specialty license. This requirement has raised the concern that these other businesses may discontinue relationships with the vendors and effectively diminish the public's access to and the availability of the associated consumer transactions. The department believes that the legislative intent of Article 21.09 was to provide effective regulation of specialty insurance license holders, but not to otherwise influence business relationships of the industries selling associated consumer transactions or to diminish the public's access to or availability of these consumer products.

The proposed amendments redefine the terms franchisee and franchisor and enable a specialty license holder to register nonfranchise locations at which its associated consumer transactions occur and insurance is sold. For the purposes of this subchapter, this proposal also broadens the definition of employee beyond a direct contractual relationship and requires a specialty license holder to be responsible for the related training and actions of persons who are selling insurance products under its specialty license.

The proposed amendments to §19.1902, the definitions section revise the definitions of franchisee and franchisor to prevent the specialty license holder's business relationships from being classified as a franchise solely because of its type of business activity. The proposed amendments add a definition of registered location to standardize this term throughout the subchapter; remove contractual references from the definition of employee; and add a definition of supervision to support the definition of employee. The proposal also deletes the term franchise location and defines the term location as a place of business.

The proposed amendment to §19.1905(a) removes the requirement that insurance sales may only be conducted at locations owned and operated by the specialty license holder. The proposed amendments to §19.1905(b) and (f) require applicants and specialty license holders to register locations at which both the associated consumer transaction and the sale of insurance occur under the specialty license. The proposed amendments to §19.1905(d) and (e) clarify the licensing relationships of franchisees and franchisors under this subchapter.

The proposed amendment to §19.1909(a) reflects that the term employee is not limited to the scope of the individual's employment.

Finally, the proposal deletes the word business where the term business location is used in the subchapter.

Matt Ray, deputy commissioner, licensing division, has determined that for each year of the first five years the proposed amendments will be in effect, there will be no fiscal impact to state and local governments as a result of the enforcement or administration of the proposed rule. There will be no measurable effect on local employment or the local economy as a result of the proposal.

Mr. Ray has determined that for each year of the first five years the proposed amendments are in effect, the anticipated public benefit is that the convenience and availability of certain insurance products will be increased without compromising the level of consumer protection afforded to the citizens of Texas. In addition, the proposed sections will enhance regulation of the insurance industry in Texas and improve the effectiveness of regulation of specialty agents.

It is anticipated that no new costs will be created by the proposed amendments. The economic cost to comply with the proposed amendments results from the legislative enactment of Article 21.09 and its amendment and not as a result of adoption, enforcement or administration of the proposed amendments. There is no difference in the costs of compliance between a large and small business as a result of the proposed sections. In addition, the cost of labor per hour is not affected by the proposed sections and thus there is no disproportionate economic impact on small or micro businesses. It is neither legal nor feasible to waive the provisions of the proposed subchapter for small or micro businesses since the requirements of Article 21.09 apply to all applicants for a specialty license.

To be considered, written comments on the proposal must be submitted no later than 5 p.m. on December 3, 2001 to Lynda H. Nesenholtz, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P. O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comments must be simultaneously submitted to Matt Ray, Deputy Commissioner, Licensing Division, Mail Code 107-1A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any requests for a public hearing should be submitted separately to the Office of the Chief Clerk.

The amendments are proposed under Insurance Code Article 21.09 and §36.001. Article 21.09 §6 provides the Commissioner may adopt rules necessary to implement the specialty license. Section 36.001 provides that the Commissioner of Insurance

may adopt rules to execute the duties and functions of the Texas Department of Insurance only as authorized by statute.

The following statute is affected by the proposal: Insurance Code Article 21.09.

§19.1902. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings unless the context clearly indicates otherwise.

(1)-(8) (No change.)

(9) Employee--A person that:

(A) is trained to act individually on behalf of the specialty license holder;

(B) is acting on behalf of and under the supervision of the license holder; and

(C) is not compensated based primarily on the amount of insurance sold. [~~in the service of a specialty license holder under any contract of hire where the specialty license holder has the power or right to direct and control the person in the material details of how the work is to be performed~~]

(10) Franchisee--A person that is granted a franchise by a franchisor [~~or a person who is an agent or licensee of a travel agency, vehicle rental company or a self-service storage facility without regard to whether a franchise is granted to such person~~].

(11) [~~Franchise~~] Location--A place of business [~~independently owned and operated by a franchisee~~].

(12) Franchisor--A person that grants a franchise to a franchisee [~~or a travel agency, vehicle rental company or self-service storage facility that authorizes an agent or licensee to conduct business under the company's name~~].

(13)-(16) (No change.)

(17) Registered Location--A location that has been identified by an applicant or specialty license holder to the department as a place at which the applicant's or specialty license holder's associated consumer transactions occur and insurance sales will be conducted under the specialty license and for which all applicable registration fees have been paid.

(18) Supervision--Supplying trained employees with forms, specific requirements and procedures necessary for the sale of insurance under the specialty license.

§19.1905. Place of Business.

(a) An applicant may obtain a single specialty license which authorizes the applicant to conduct insurance business under Article 21.09 at registered locations [~~owned and operated only by the applicant~~].

(b) An applicant for a specialty license under Article 21.09 shall only [~~is required to~~] register with the department locations [~~each location~~] where applicant's associated consumer transactions occur and insurance sales will be conducted under the specialty license. All existing [~~business~~] locations [~~owned or operated by the license applicant~~] where applicant's associated consumer transactions occur and insurance sales will be conducted must be included with the applicant's original license application form. An applicant may submit a separate registration form as required under §19.902(c) of this title (relating to One Agent, One License) for each [~~business~~] location or a single notarized list containing the physical address of each location.

(c) The registration of an additional [~~business~~] location shall be treated as an expansion of the specialty license holder's authority, and a fee equal to the license fee shall be paid for each additional location as provided by §19.902 of this title.

(d) An applicant or specialty license holder that is also a franchisor may not register a [~~business~~] location of [~~which is independently owned or operated by~~] a franchisee.

(e) An applicant or specialty license holder that is a franchisee may [~~obtain a single specialty license which authorizes the franchisee person to conduct insurance business under Article 21.09 at locations owned and operated only by the franchisee. The independent owner of each franchisee franchise location must submit an application separate from any application submitted by the franchisor. A franchisee may~~] not register a [~~business~~] location of [~~which is owned or operated by~~] the franchisor or [~~by~~] another franchisee. The independent owner of each franchisee must submit an application for specialty license and location registration separate from any application and location registration submitted by the franchisor

(f) A specialty license holder who transfers [~~business~~] locations, opens an additional [~~business~~] location or acquires a [~~business~~] location already in operation is required to register each new location where specialty license holder's associated consumer transactions occur and insurance sales will be conducted which was not registered [~~owned or operated~~] by the license holder at the time the original license application was filed with the department. The requirements set out in §19.902(c) of this title shall govern a registration under this subsection.

(g) No applicant for or holder of a specialty license shall be required to file multiple registrations for a previously registered [~~business~~] location as a result of seeking more than one specialty license authority.

(h) A specialty license holder may not solicit insurance from a [~~business~~] location which the license holder has not registered with the department under this section.

§19.1909. Employee Training.

(a) Each employee of a specialty license holder who performs any act of an insurance agent [~~within the scope of the individual's employment~~] shall complete a training program which satisfies the requirements of Article 21.09 §1(d).

(b)-(d) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 22, 2001.

TRD-200106353
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 463-6327

♦ ♦ ♦

PART 2. TEXAS WORKERS' COMPENSATION COMMISSION

CHAPTER 133. GENERAL MEDICAL PROVISIONS

The Texas Workers' Compensation Commission (the commission) proposes new §§133.305, 133.307 and 133.308 (concerning Medical Dispute Resolution--Definitions, Medical Dispute Resolution of a Medical Fee Dispute, and Medical Dispute Resolution by Independent Review Organization) and the simultaneous repeal of existing §133.305 (concerning Medical Dispute Resolution). The new rules and repeal are proposed to comply with statutory revisions regarding medical dispute resolution in the workers' compensation system. The commission's medical advisor has been involved in the development of these proposed new rules.

House Bill 2600 (HB-2600), adopted during the 2001 Texas Legislative Session, amended §413.031 of the Texas Labor Code concerning medical dispute resolution. With respect to medical dispute resolution, HB-2600 addresses the following:

* the items for which medical dispute resolution is available;

* an injured employee's right to request review of a medical service for which preauthorization is sought by the health care provider and denied by the insurance carrier;

* disputes over the amount of payment due for services determined to be medically necessary and appropriate for treatment of a compensable injury;

* review of the medical necessity of a health care service requiring preauthorization under §413.014 of the Texas Labor Code;

* review of the medical necessity of a health care service provided under Chapter 408 or Chapter 413 of the Texas Labor Code;

* the dispute resolution process for a dispute in which the injured employee has paid for health care and been denied reimbursement by the carrier;

* billing for commission or independent review organization (IRO) review; and

* the appeal of a commission decision or an IRO decision.

The issues for which medical dispute resolution is available include disputes as to fees and disputes regarding medical necessity of health care. Some of the medical necessity reviews are prospective (prior to providing the health care), and some are retrospective (after the health care has been provided). The manner in which the reviews are to be conducted is established by the statute. Fee disputes will continue to be resolved by the commission, as they are currently. Prospective and retrospective medical necessity reviews shall be conducted by an IRO under Article 21.58C, Insurance Code, in the same manner as reviews of utilization review decisions by health maintenance organizations. The statute also establishes the party that pays for commission review or the independent review, depending on the circumstances of the review and the decision reached by the commission or the IRO.

Existing §133.305 addresses medical dispute resolution pursuant to the statute in effect prior to the effective date of HB-2600. Because of the substantial statutory revisions, the commission is proposing repeal of existing §133.305, and adoption of a new §133.305. In addition, because the manner of review differs dependent on the type of dispute, the commission has separated the medical dispute resolution provisions into three rules.

Proposed §133.305 gives an overview of the medical dispute resolution processes, by defining the types of disputes and stating the requirement to file two separate dispute requests if the health care in dispute has issues as to fees and issues as to medical necessity.

Proposed §133.307 addresses medical dispute resolution for medical fee disputes. Proposed subsection (a) of this rule states that the rule applies to a request for resolution of a medical fee dispute for which the initial dispute resolution request was filed on or after January 1, 2002. This is in keeping with the HB-2600 provisions regarding the effectiveness of the statutory changes to Texas Labor Code §413.031. Dispute resolution requests filed prior to that date will be resolved in accordance with the rules in effect at the time the request was filed. Medical necessity is not an issue in a medical fee dispute.

Proposed subsection (b) states who may be a party to the various types of fee disputes.

Proposed subsections (c) - (e) set out the required content of a request and the time frames in which the various types of fee dispute requests must be filed. A request must be complete and timely filed to be accepted for filing by the commission.

The current rule restricts medical dispute resolution to 1 year after the date of service. However, by law, health care providers have nearly 1 year to bill for medical care in the workers' compensation system. This has meant that although providers can bill 11 months following the date of service, the 45-day timeframe that carriers have to process the bill (not to mention the requirement to request reconsideration on a denied/reduced bill) meant that the provider would not be able to access medical dispute resolution. In addition, the current rule does not provide for an extension of the 1 year limit if the carrier fails to timely process the bill. This meant that it was the provider who was punished for noncompliance by the carrier (because the carrier could delay processing until after the 1 year limit to request dispute resolution).

The proposed rules address these problems by tying the deadline to the carrier's action. The clock doesn't start until the carrier issues its final response to the request for reconsideration. In addition, the rule allows the provider to get into medical dispute resolution if the carrier fails to respond to the request for reconsideration. This helps ensure that noncompliance by the carrier doesn't further affect the provider. However, disputes need to be timely resolved and part of timely resolution of a dispute requires the dispute to be pursued with due diligence. Therefore, the time limits are not 1 year after the final denial but rather are 60 days which should be sufficient to identify and pursue a legitimate dispute while ensuring that the commission is not receiving disputes that are nine months old by the time they are received.

Proposed subsection (f) addresses a dispute in which an injured employee who has paid for health care is requesting reimbursement which the carrier has denied to the employee.

Proposed subsection (g) addresses where to file a request, how many copies must be filed, and how the commission will forward the request to the parties.

Proposed subsections (h) - (k) set out the required content, filing deadlines, and filing requirements for responses to requests for medical fee dispute resolution.

Proposed subsections (l) and (m) address requests from the commission for additional information, and commission dismissal of a request.

Proposed subsections (n) and (o) address the decision issued by the commission, commission assessment of fees in accordance with Texas Labor Code §413.020, and the requirement that the commission post the decision on the commission website after confidential information has been redacted from the decision.

Requirements for filing an appeal to the State Office of Administrative Hearings (SOAH) are addressed in proposed subsections (p) and (q).

Proposed new §133.308 applies to the independent review of prospective or retrospective medical necessity disputes for which the initial dispute resolution request was filed on or after January 1, 2002. This is in keeping with the HB-2600 provisions regarding the effectiveness of the statutory changes to Texas Labor Code §413.031. Dispute resolution requests filed prior to January 1, 2002 shall be resolved in accordance with the rules in effect at the time the request was filed.

HB-2600 requires that a review of the medical necessity of a health care service requiring preauthorization under Texas Labor Code §413.014 or commission rules be conducted by an IRO under Article 21.58C, Insurance Code, in the same manner as reviews of utilization review decisions by health maintenance organizations. HB-2600 also requires that a retrospective review of the medical necessity of a health care service provided under Texas Labor Code Chapter 408 or Chapter 413 be conducted by an IRO under Article 21.58C, Insurance Code, in the same manner as reviews of utilization review decisions by health maintenance organizations. These requirements are stated in proposed subsection (a).

Proposed subsection (b) states that an IRO performing independent review of health care provided in the workers' compensation system must be certified by the Texas Department of Insurance (TDI) pursuant to Article 21.58C of the Insurance Code. The IRO also must comply with the TDI rules regarding certification of IROs. In addition, subsection (b) states which other TDI rules apply to independent reviews in the workers' compensation system, and what modifications or exceptions to those rules apply to workers' compensation cases. In general, the modifications and exceptions are due to substantive differences in the Insurance Code and the Labor Code, and to terminology differences in the statutes and rules.

The remainder of the layout of proposed new §133.308 is similar to that of proposed new §133.307. Proposed subsection (c) states who may be a party to the various types of medical necessity disputes.

Proposed subsections (d) - (h) set out the required contents of a request, the time frames in which the various types of medical necessity dispute requests must be filed, and the requirements for filing with the carrier and the commission. A request must be complete and must be timely filed with the carrier to be accepted for filing by the commission. Parts of the request form must be filled in by the person requesting independent review, and part must be filled in by the carrier. As with IRO reviews under TDI rules, the request must be filed with the carrier, who completes the required information and files the request with the commission. In addition, however, when the requestor files a copy of the request with the carrier, the requestor must also file a copy with the commission. This will enable the commission to monitor the timeliness of carrier filings with the commission.

Proposed subsections (i) and (j) address commission assignment of an IRO and notification of that assignment to the parties by the commission and the IRO.

Proposed subsections (k) and (l) address confidentiality requirements and requests from the IRO for additional information. Proposed subsection (m) addresses the statutory provision that allows an IRO performing a review of medical necessity to request that the commission order an examination by a designated doctor under Texas Labor Code Chapter 408.

Proposed subsections (n) and (o) state the time deadlines for an IRO to issue a decision, and the requirements for an IRO to notify the parties and the commission of the IRO decision.

Proposed subsection (p) states the requirement that the commission post the IRO decision on the commission's Internet website after confidential information has been redacted from the decision.

Proposed subsection (q) addresses which party pays for the independent review; in accordance with the statute, this varies, dependent on whether the review is prospective or retrospective, and who prevails in the IRO decision.

Proposed subsection (r) reiterates the statutory provision that it is a defense for the carrier if the carrier timely complies with the IRO decision with respect to the medical necessity or appropriateness of health care for an injured employee. If an unresolved fee dispute issue exists at the time the IRO issues a decision of medical necessity, this subsection also clarifies that the carrier is not required to pay for the health care until the commission has resolved the medical fee dispute.

If an unresolved fee dispute issue exists at the time the commission receives an IRO decision finding medical necessity, proposed subsection (s) states that the commission shall proceed to resolve the medical fee dispute in accord with commission rules, after receipt of the IRO decision.

Proposed subsections (t) - (v) address appeals from an IRO decision. In accordance with HB-2600, an IRO decision in a prospective or a retrospective medical necessity dispute, with one exception, may be appealed by filing a written request for a SOAH hearing. The appeal must be filed with the commission; the commission then files the request for hearing with SOAH. The parties to the dispute must represent themselves before SOAH, and the IRO is not required to participate in the SOAH hearing. HB-2600 requires the commission to also post SOAH decisions on the commission's Internet website after confidential information has been redacted. Prospective necessity disputes regarding spinal surgery may appeal an IRO decision by requesting a Contested Case Hearing (CCH). This CCH and further appeals will be conducted in accordance with Chapters 140, 142, and 143 of the commission rules.

By statute, a party who has exhausted the party's administrative remedies and who is aggrieved by a final decision of SOAH may seek judicial review of the decision, which shall be conducted in the manner provided for judicial review of contested cases under Subchapter G, Chapter 2001 of the Government Code.

Tom Hardy, Director of the Medical Review Division, has determined that for the first five-year period the proposed repeal and new rules are in effect the fiscal implications for state or local governments as a result of enforcing or administering the rule are as follows.

The commission is currently handling all types of medical dispute requests, so there should be no additional cost to the state as a result of enforcing or administering the rules as proposed. The commission is currently receiving, reviewing, forwarding, monitoring, evaluating, and issuing decisions on requests for medical

dispute resolution, as well as receiving requests for appeals to SOAH. The incorporation of the IRO review process, the need to screen and assign an IRO, and to notify the IRO and the parties should not substantially increase the cost to the commission. The need to order additional designated doctor examinations also should not substantially increase costs to the commission, as that process is already in place at the commission. The commission is also already involved in assessing costs to the parties for some types of disputes. The requirement to redact and post decisions on the commission website should not cause substantial additional cost, as the commission has had experience in posting other redacted decisions on its website. There will be no reduction or increase in revenue to the commission as a result of enforcing or administering these proposed new rules.

No local government will be involved in enforcing or administering the rules as proposed. Local government and state government as covered regulated entities will be impacted in the same manner as described later in this preamble for persons required to comply with the repeal and new rules as proposed.

Mr. Hardy has also determined that for each year of the first five years the proposed repeal and new rules are in effect the public benefits anticipated as a result of enforcing the rule will be an improved system for prospective and concurrent review of health care and payment for health care, that should provide positive benefits to all participants in the system: injured employees, employers, carriers, and health care providers.

The intent of the proposed repeal and new rules is to comply with statutory mandates in the Texas Labor Code as amended by HB-2600. The proposed new rules should benefit all participants in the system by clarifying and implementing the statutorily mandated processes for review of medical fees and medical necessity issues.

The proposed new rules contain language to clarify the steps required by requestors and respondents with respect to medical dispute resolution, and should improve the quality of requests and decisions.

Posting the decisions on the commission website and monitoring IRO decisions should promote consistency and familiarity with decisions, which may eventually result in fewer disputes as to fees and medical necessity. This should also benefit all participants in the system. It should additionally help the commission monitor health care providers filing disputes, carriers denying health care or payment for health care, and IRO's issuing decisions. The rules address a requestor's ability to timely request resolution to disputes over the denials of health care or payment for health care, which should work toward improving access to and payment for reasonable and necessary care and thus, reduction in costs to the system.

The injured employee and health care providers should also benefit from independent review by medically trained and experienced personnel. This may ultimately reduce the number of disputes, saving time for and expense to health care providers and employers, and facilitating the delivery of health care to injured employees, as and when needed. It should also benefit employers by ensuring that their injured employees receive appropriate and medically necessary treatment in a timely manner for their compensable injury in anticipation of a timely return-to-work. The proposed rules should also assist in the prevention of unnecessary costly treatment. Savings that may result should be reflected in the cost for employers to provide workers' compensation coverage to employees.

There will be some anticipated economic costs to persons who are required to comply with the new rules as proposed. No economic costs are anticipated for injured employees to comply with the requirements of the proposed new rules, as the employee will not be charged for the costs of any review. The process should help the employee to receive reasonably necessary health care and to receive fair and reasonable reimbursement for reasonably necessary health care paid for by the employee.

Health care providers and carriers may experience increased economic costs as a result of the proposed new rules. The financial impact may result from an increase in the number of requests for independent review by IRO's and payment of the IRO review fee. Whether the provider or the carrier pays the review fee varies, dependent on whether the review is prospective or retrospective, and who prevails in the IRO decision. However, providers and carriers should already be familiar with the IRO process and use of the process itself should not increase costs other than paying for the review fee. However, system participants may become more familiar with IRO decisions on similar issues (because decisions will be posted on the commission's Internet website) and make more discriminate choices for disputes that are filed.

There will be no adverse economic impact on small businesses or on micro-businesses as a result of the proposed new rules. If a business is small enough that payment of the review fee would adversely impact the business, it is likely that the business is not doing enough dispute resolution for the fee to impact the business. There will be only a proportionate difference in the cost of compliance for small businesses and micro-businesses as compared to the largest businesses, including state and local government entities. The same basic processes and procedures apply, regardless of the size or volume of the business. The business size cost difference will be in direct proportion to the volume of business that falls under the purview of these proposed rules.

Comments on the proposals must be received by 5:00 p.m., December 3, 2001. You may comment via the Internet by accessing the commission's website at *www.twcc.state.tx.us* and then clicking on "Proposed Rules." This medium for commenting will help you organize your comments by rule chapter. You may also comment by e-mailing your comments to *RuleComments@twcc.state.tx.us* or by mailing or delivering your comments to Nell Cheslock at the Office of the General Counsel, Mailstop #4-D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH-35, Austin, Texas 78704-7491.

Commenters are requested to clearly identify by number the specific rule and paragraph commented upon. The commission may not be able to respond to comments that cannot be linked to a particular proposed rule. Along with your comment, it is suggested that you include the reasoning for the comment in order for commission staff to fully evaluate your recommendations.

Based upon various considerations, including comments received and the staff's or commissioners' review of those comments, or based upon the commissioners' action at the public meeting, the rules as adopted may be revised from the rules as proposed in whole or in part. Persons in support of the rules as proposed, in whole or in part, may wish to comment to that effect.

A public hearing on these proposals will be held on November 14, 2001, at the Austin central office of the commission (Southfield

Building, 4000 South IH-35, Austin, Texas). Those persons interested in attending the public hearing should contact the Commission's Office of Executive Communication at (512) 804-4430 to confirm the date, time, and location of the public hearing for this proposal. The public hearing schedule will also be available on the commission's website at *www.twcc.state.tx.us*.

SUBCHAPTER D. DISPUTE AND AUDIT OF BILLS BY INSURANCE CARRIERS

28 TAC §133.305

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Workers' Compensation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under following statutes: Texas Labor Code §402.061, which gives the Commission the authority to adopt rules as necessary to implement and enforce the Act; Texas Labor Code §401.024, which provides the Commission authority to require use of facsimile or other electronic means to transmit information in the system; Texas Labor Code §402.042, which authorizes the executive director to enter orders as authorized by the statute as well as to prescribe the form, manner and procedure for transmission of information to the Commission; Texas Labor Code §406.010, which authorizes the Commission to adopt rules regarding claims service; Texas Labor Code §408.027, which provides for insurance carrier payment of health care providers; Texas Labor Code §409.009, which allows a person to become a sub-claimant to a workers' compensation claim; Texas Labor Code §413.007, which directs the Medical Review Division to maintain a statewide database of medical billing information; Texas Labor Code §413.015, which directs insurance carrier payments to and audits of health care providers; Texas Labor Code §413.031, which directs medical dispute resolution; Texas Labor Code §413.042, which prohibits private claims; and Texas Civil Practice and Remedies Code, Chapter 146, which directs that health care providers submit bills no later than the 11th month in which the service was provided.

No other statutes, codes or sections are affected by this repeal.

§133.305. Medical Dispute Resolution.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106300
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 804-4287

♦ ♦ ♦

CHAPTER 133. GENERAL RULES FOR REQUIRED REPORTS
SUBCHAPTER D. DISPUTE AND AUDIT OF BILLS BY INSURANCE COMPANY

28 TAC §§133.305, 133.307, 133.308

The new rules are proposed under following statutes: Texas Labor Code §402.061, which gives the Commission the authority to adopt rules as necessary to implement and enforce the Act; Texas Labor Code §401.024, which provides the Commission authority to require use of facsimile or other electronic means to transmit information in the system; Texas Labor Code §402.042, which authorizes the executive director to enter orders as authorized by the statute as well as to prescribe the form, manner and procedure for transmission of information to the Commission; Texas Labor Code §406.010, which authorizes the Commission to adopt rules regarding claims service; Texas Labor Code §408.027, which provides for insurance carrier payment of health care providers; Texas Labor Code §409.009, which allows a person to become a sub-claimant to a workers' compensation claim; Texas Labor Code §413.007, which directs the Medical Review Division to maintain a statewide database of medical billing information; Texas Labor Code §413.015, which directs insurance carrier payments to and audits of health care providers; Texas Labor Code §413.031, which directs medical dispute resolution; Texas Labor Code §413.042, which prohibits private claims; and Texas Civil Practice and Remedies Code, Chapter 146, which directs that health care providers submit bills no later than the 11th month in which the service was provided.

The new rules are proposed under following statutes: Texas Labor Code §402.061, which gives the Commission the authority to adopt rules as necessary to implement and enforce the Act; Texas Labor Code §401.024, which provides the Commission authority to require use of facsimile or other electronic means to transmit information in the system; Texas Labor Code §402.042, which authorizes the executive director to enter orders as authorized by the statute as well as to prescribe the form, manner and procedure for transmission of information to the Commission; Texas Labor Code §406.010, which authorizes the Commission to adopt rules regarding claims service; Texas Labor Code §408.027, which provides for insurance carrier payment of health care providers; Texas Labor Code §409.009, which allows a person to become a sub-claimant to a workers' compensation claim; Texas Labor Code §413.007, which directs the Medical Review Division to maintain a statewide database of medical billing information; Texas Labor Code §413.015, which directs insurance carrier payments to and audits of health care providers; Texas Labor Code §413.031, which directs medical dispute resolution; Texas Labor Code §413.042, which prohibits private claims; and Texas Civil Practice and Remedies Code, Chapter 146, which directs that health care providers submit bills no later than the 11th month in which the service was provided.

§133.305. Medical Dispute Resolution--Definitions.

(a) Definitions. The following words and terms, when used in this subchapter shall have the following meanings, unless the context clearly indicates otherwise.

(1) Medical Dispute Resolution--A request for resolution of one or more of the following disputes after reconsideration has been requested as required by commission rules and denied by the carrier:

(A) a medical fee dispute; or

(B) a medical necessity dispute, which may be:

(i) a prospective necessity dispute; or

(ii) a retrospective necessity dispute.

(2) Medical Fee Disputes--Medical Fee Disputes involve a dispute over the amount of payment for health care rendered to an

injured employee and determined to be reasonably necessary and appropriate for treatment of that employee's compensable injury. The dispute is for reasons other than the medical necessity of the care (e.g. based upon the requirements of commission rules or fee guidelines). The dispute is resolved by the commission pursuant to commission rules, including §133.307 of this title (relating to Medical Dispute Resolution Regarding a Medical Fee Dispute). The following types of disputes can be Medical Fee Disputes:

(A) a health care provider dispute of a carrier reduction or denial of a medical bill;

(B) an employee dispute of a carrier reduction or denial of a request for reimbursement of health care charges paid by the employee (employee reimbursement dispute);

(C) a carrier dispute of a health care provider reduction or denial of the carrier request for refund of payment for health care previously paid by the carrier (refund request dispute); and

(D) a health care provider dispute of a commission refund order issued pursuant to a commission audit or review (refund order dispute).

(3) Prospective Necessity Disputes--Prospective Necessity Disputes involve a review of the medical necessity of health care requiring preauthorization or concurrent review. The dispute is reviewed by an independent review organization pursuant to commission rules, including §133.308 of this title (relating to Medical Dispute Resolution Regarding Medical Necessity Disputes and Preauthorization Disputes). The following types of disputes may be Prospective Necessity Disputes:

(A) a provider or injured employee dispute of a carrier denial of preauthorization (a denial of the medical necessity of health care listed in §134.600 of this title (relating to Procedure for Requesting Pre-Authorization of Specific Treatments and Services), made prior to the provision of the health care); or

(B) a provider dispute of a carrier denial of health care pursuant to concurrent review (extension of health care beyond previously approved health care, for health care listed in §134.600 of this title).

(4) Retrospective Necessity Disputes--Retrospective Necessity Disputes involve a review of the medical necessity of health care provided. The dispute is reviewed by an independent review organization pursuant to commission rules, including §133.308 of this title. The following types of disputes may be Retrospective Necessity Disputes:

(A) a health care provider dispute of a carrier denial of a medical bill based on lack of medical necessity;

(B) an employee dispute of a carrier denial of a request for reimbursement of health care charges paid by the employee (employee reimbursement dispute), based on lack of medical necessity; or

(C) a carrier dispute of a health care provider denial of the carrier request for refund of payment for health care previously paid by the carrier (refund request dispute).

(D) a health care provider dispute of a commission refund order issued pursuant to a commission audit or review based upon lack of medical necessity (refund order dispute).

(5) Requestor--the party that timely files a complete request for medical dispute resolution with the division and/or the carrier; the party seeking relief in medical dispute resolution.

(6) Respondent--the party that files a response to the issue(s) raised by the requestor in a medical dispute resolution; the party against whom relief is sought.

(b) If there is a medical fee dispute with respect to the health care for which there is a medical necessity dispute, the requestor shall file a request for medical fee dispute resolution pursuant to §133.307 of this title and a request for medical necessity dispute resolution pursuant to §133.308 of this title. The medical necessity dispute will be resolved prior to deciding the medical fee dispute.

§133.307. Medical Dispute Resolution of a Medical Fee Dispute.

(a) Applicability. This rule applies as follows:

(1) This rule applies to a request for medical fee dispute resolution for which the initial dispute resolution request was filed on or after January 1, 2002. Dispute resolution requests filed prior to January 1, 2002 shall be resolved in accordance with the rules in effect at the time the request was filed. In resolving disputes over the amount of payment due for health care determined to be medically necessary and appropriate for treatment of a compensable injury, the role of the commission is to adjudicate the payment, given the relevant statutory provisions and commission rules. Medical necessity is not an issue in a medical fee dispute.

(2) If there is a medical fee dispute with respect to the health care for which there is a medical necessity dispute, the requestor shall file a request for medical fee dispute resolution pursuant to this section and a request for medical necessity dispute resolution pursuant to §133.308 of this title (relating to Medical Dispute Resolution By Independent Review Organization).

(b) Parties. The following persons may be requestors and respondents in medical fee disputes:

(1) the health care provider (provider) and the insurance carrier (carrier) in a dispute of a medical bill;

(2) the injured employee (employee) and the carrier in a dispute involving an employee's request for reimbursement of medical expenses;

(3) the carrier and the provider in a dispute involving a carrier's refund request;

(4) the provider and the commission in a dispute involving a commission refund order issued pursuant to an audit or review.

(c) Requests. A request for medical dispute resolution of a medical fee dispute must be complete and must be timely filed with the commission Medical Review Division (division).

(d) Timeliness. Requests for medical fee dispute resolution shall be filed timely with the division. A person or entity who fails to timely file a request for medical fee dispute resolution waives the right to medical dispute resolution. The commission shall deem a request to be filed on the date the division receives a complete request and timeliness shall be determined as follows:

(1) A request for medical fee dispute resolution on a carrier denial or reduction, for reasons other than lack of medical necessity, of a medical bill or an employee reimbursement request shall be considered timely if it is filed with the division:

(A) no earlier than the 28th day after the date the requestor had filed the request for reconsideration with the carrier; and

(B) no later than 60 days after the date the carrier took final action on the request for reconsideration.

(2) A request for medical fee dispute resolution on a provider denial or reduction of a carrier request for refund of payment

for health care shall be considered timely if it is filed with the division no later than 60 days after the date the provider took final action on the refund request.

(3) A request for medical fee dispute resolution on a commission refund order issued pursuant to a commission audit or review shall be considered timely if a request for a hearing is filed with the commission Chief Clerk of Proceedings, Hearing Division, not later than 20 days after the date of receipt of the refund order.

(e) Complete Request (General). All provider and carrier requests for medical fee dispute resolution shall be made in the form, format, and manner prescribed by the commission. (Requests of medical dispute resolution on medical fee disputes involving an employee's request for reimbursement of medical expenses are governed by subsection (f) of this section).

(1) Each request shall be legible, shall include only a single copy of each document, and shall include:

(A) documentation of the request for and response to reconsideration (when a provider is requesting dispute resolution on a carrier reduction or denial of a medical bill) or, if the carrier failed to respond to the request for reconsideration, convincing evidence of the carrier's receipt of that request;

(B) an identical copy of all medical bill(s) relevant to the fee dispute, as submitted for reconsideration in accordance with §133.304 of this title (relating to Medical Bill Payments and Denials);

(C) a copy of each explanation of benefits (EOB) or response to the refund request relevant to the fee dispute or, if no EOB was received, convincing evidence of a provider request for an EOB from the carrier,

(D) a copy of medical records, clinical notes, diagnostic test results, treatment plans, and other documents relevant to the fee dispute;

(E) a statement of the disputed issue(s) that shall include:

(i) a description of the health care for which payment is in dispute,

(ii) the requestor's reasoning for why the disputed fees should be paid or refunded,

(iii) how the Texas Labor Code and commission rules, including treatment guidelines and fee guidelines, impact the disputed fee issues, and

(iv) how the submitted documentation supports the requestor position for each disputed fee issue;

(F) if the dispute involves health care for which the commission has not established a maximum allowable reimbursement, documentation that discusses, demonstrates, and justifies that the payment amount being sought is a fair and reasonable rate of reimbursement in accordance with §133.1 of this title (relating to Definitions);

(G) a table listing the disputed health care in the form, format, and manner prescribed by the commission; and

(H) if the carrier has raised a dispute pertaining to liability for the claim, compensability, or extent of injury, in accordance with §124.2 of this title (relating to Carrier Reporting and Notification Requirements), the requestor shall file with the request, proof that a Benefit Review Conference (BRC) has been requested under Chapter 141 of this title (relating to Benefit Review Conference) by either the employee or the licensed health care provider as a subclaimant. The commission shall adjudicate the medical dispute issues and enter a decision on those issues conditional upon final adjudication of the issues of liability for the claim, compensability, or extent of injury.

(2) Prior to submission, any documentation that contains confidential information regarding a person other than the injured employee for that claim or a party in the dispute, must be redacted by the party submitting the documentation, to protect the confidential information and the privacy of the individual.

(3) If the request for medical fee dispute resolution does not contain all the components required by the commission-prescribed form and by this subsection, the requestor may amend and resubmit the request to include all the required components as long as the amended request is filed within the time frames required by subsection (d) of this section.

(f) Employee Reimbursement Dispute. An employee who has paid for health care may request medical dispute resolution of a denied reimbursement. The employee may only pursue reimbursement up to the amount the employee paid the provider. Reimbursement shall be fair and reasonable in accordance with commission rules, and shall not exceed the Maximum Allowable Reimbursement (MAR) as established in the appropriate fee guideline, or in the absence of a fee guideline, the amount determined to be fair and reasonable for the health care. Health care requiring preauthorization or concurrent review pursuant to §134.600 of this title (relating to Treatments and Services Requiring Preauthorization) must have received the preauthorization or concurrent review approval. The employee request shall be made in the form, format, and manner prescribed by the commission. The request must be legible, must contain only a single copy of each document, and must include:

(1) an explanation of the disputed fee issue(s);

(2) proof of employee payment for the health care for which the employee is requesting reimbursement;

(3) a copy of any explanations of benefits relevant to the dispute, or, if no EOB was received, convincing evidence of carrier receipt of employee request for reimbursement; and

(4) a copy of medical records, clinical notes, diagnostic test results, treatment plans, and other documents relevant to the dispute, that are in the employee's possession.

(g) Filing. The requestor shall file two copies of the complete request with the division.

(1) If the respondent is a carrier, the division shall forward a copy of the request to the carrier. The commission shall deem the carrier to have received the request on the acknowledgment date as defined in §133.1 of this title. If the division forwards the request to the carrier via its Austin representative, the representative shall sign for the request.

(2) If the respondent is a provider, the commission shall forward a copy of the request to the provider by regular U.S. mail service. The commission shall deem the provider to have received the request on the acknowledgment date as defined in §133.1 of this title.

(h) Response. The respondent shall file the response to a request for medical dispute resolution of a medical fee dispute, with the division.

(i) Timeliness of Response. A respondent who fails to timely file a request for medical dispute resolution waives the right to respond. The commission shall deem a response to be filed on the date the division receives a response. If the respondent does not respond timely, the commission shall issue a decision based on the request. The response

will be considered timely if received by the commission within 14 days after the date the respondent received the copy of the request.

(j) Complete Response. All responses to requests for medical fee dispute resolution shall be made on the form and in the manner prescribed by the commission.

(1) Each response shall be legible, include only a single copy of each document, and, unless previously provided in the request, shall include:

(A) documentation of carrier response to reconsideration in accordance with commission rules;

(B) a copy of all medical bill(s) relevant to the dispute, as originally submitted to the carrier for reimbursement;

(C) a copy of all medical audit summaries and/or explanations of benefits relevant to the fee dispute, or a statement certifying that the carrier did not receive the provider disputed billing relevant to the dispute;

(D) a copy of medical records, clinical notes, diagnostic test results, treatment plans, and other documents relevant to the dispute;

(E) a statement of the disputed fee issue(s), which includes:

(i) a description of the health care in dispute;

(ii) a statement of the reasons that the disputed medical fees should not be paid,

(iii) a discussion of how the Texas Labor Code and commission rules, including fee guidelines, impact the disputed fee issues, and

(iv) a discussion regarding how the submitted documentation supports the respondent position for each disputed fee issue; and

(F) if the dispute involves health care for which the commission has not established a maximum allowable reimbursement, documentation that discusses, demonstrates, and justifies that the amount the respondent paid is a fair and reasonable rate of reimbursement in accordance with §133.1 of this title.

(2) The response shall address only those issues raised by the requestor and may not include any reason that was not previously given for the adverse decision by the utilization review agent.

(k) Filing of Response. The respondent shall file a copy of the response with the division and with the other party to the dispute.

(l) Additional Information. The commission may request additional information from either party to review the medical fee issues in dispute. The additional information shall be received by the division within 14 days of receipt of the request for additional information.

(m) Dismissal. The commission may dismiss a complete request for medical fee dispute resolution if:

(1) the requestor informs the commission, or the commission otherwise determines, that the dispute no longer exists;

(2) the individual or entity requesting medical fee dispute resolution is not a proper party to the dispute per subsection (b) of this section;

(3) the commission determines that the medical bills in the dispute have not been properly submitted to the carrier;

(4) the fee disputes for the date(s) of health care in dispute have been previously adjudicated by the commission; or

(5) the commission determines that good cause exists to dismiss the request.

(n) Decision. The commission shall send the commission decision to the parties to the dispute and post the decision on the commission Internet website after confidential information has been redacted.

(o) Fee. The commission may assess a fee in accordance with Texas Labor Code §413.020 of this title. (relating to Commission Charges).

(p) Appeal. A party to a medical fee dispute may appeal the commission decision by filing a written request for a State Office of Administrative Hearings (SOAH) hearing with the Chief Clerk of Proceedings, Division of Hearings in accordance with §148.3 of this title (relating to Requesting a Hearing).

(1) the appeal must be filed no later than 20 days from the date the party received the commission decision. The date of receipt of the decision shall be the acknowledgment date as defined in §133.1 of this title. The carrier representative shall sign for the decision.

(2) A party who has exhausted the party's administrative remedies under this subtitle and who is aggrieved by a final decision of the SOAH may seek judicial review of the decision. Judicial review under this subsection shall be conducted in the manner provided for judicial review of contested cases under Subchapter G, Chapter 2001, Government Code.

(3) The commission shall post the SOAH decision on the commission Internet website after confidential information has been redacted.

(q) Notice of Appeal. The party appealing the commission decision shall deliver a copy of its written request for a SOAH hearing to all other parties involved in the dispute.

§133.308. Medical Dispute Resolution By Independent Review Organization.

(a) Applicability. This rule is to be applied as follows.

(1) This rule applies to the independent review of prospective or retrospective medical necessity disputes (a review of health care requiring preauthorization or concurrent review, or of health care provided) for which the initial dispute resolution request was filed on or after January 1, 2002. Dispute resolution requests filed prior to January 1, 2002 shall be resolved in accordance with the rules in effect at the time the request was filed. All independent review organizations (IRO's) performing reviews of health care under the Texas Workers' Compensation Act (the Act), regardless of where the independent review activities are based, shall comply with this rule.

(2) If there is a medical fee dispute with respect to the health care for which there is a medical necessity dispute, the requestor shall file a request for medical fee dispute resolution pursuant to §133.307 of this title (relating to Medical Dispute Resolution of a Medical Fee Dispute) and a request for medical necessity dispute resolution pursuant to this section.

(b) TDI Rules. Each IRO performing independent review of health care provided in the workers' compensation system shall be certified by TDI pursuant to article 21.58C, and must comply with TDI rules regarding General Provisions and Certification of IROs, Title 28, Part 1, Chapter 12, Subchapters A and B. In addition, TDI rules in Title 28, Part 1, Chapter 12, Subchapters C through F apply, with these modifications to TDI rules for workers' compensation cases:

(1) where the agency name "Texas Department of Insurance" or "TDI" is used in those TDI rules, it shall mean the Texas Workers' Compensation Commission.

(2) where the word "patient" is used in those TDI rules, it shall mean the injured employee.

(3) where any of the terms "health insurance carrier", "health maintenance organization", or "managed care entity" are used in those TDI rules, it shall mean the carrier or its agent.

(4) the commission rule governs who is notified of the IRO decision.

(5) a provider who has been removed from the commission Approved Doctor List is not eligible to direct or conduct independent reviews of workers' compensation cases.

(6) the provisions regarding a "life-threatening condition" are not applicable because in the workers' compensation system, emergency health care does not require prospective approval.

(7) written screening criteria and review procedures shall also be available to the commission for review and inspection and copying to carry out its duties under the Texas Labor Code and Insurance Code articles 21.58A and 21.58C.

(8) the commission rule governs liability for payment of the independent review fee and copy expenses.

(9) in addition to confidentiality requirements in those rules, an IRO shall preserve the confidentiality of claim file information that is confidential pursuant to the Texas Labor Code.

(10) conflicts of interest will not be screened by TDI; the commission shall screen for conflicts of interest to the extent reasonably possible. (Notification of each IRO decision must include a certification by the IRO that the reviewing provider has certified that no known conflicts of interest exist between that provider and any of the treating providers or any of the providers who reviewed the case for determination prior to referral to the IRO.)

(c) Parties. The following persons are allowed to be requestors and respondents in medical necessity dispute resolution:

(1) in a retrospective necessity dispute--the provider who was denied payment for health care rendered, the employee denied reimbursement for health care for which the employee paid, and the carrier.

(2) in a prospective preauthorization dispute--persons or entities as established in §134.600 of this title (relating to Procedure for Requesting Pre-Authorization of Specific Treatments and Services).

(3) in a prospective concurrent review dispute--the provider and the carrier.

(d) Requests. A request for independent review of a medical necessity dispute must be complete and must be timely filed by the requestor, with the carrier and the division. An employee may file a request for independent review of a preauthorization prospective necessity dispute with the division.

(e) Timeliness. A person or entity who fails to timely file with the carrier a request for medical necessity dispute resolution waives the right to independent review or medical dispute resolution. The commission shall deem a request to be filed on the date the division receives a complete request and timeliness shall be determined as follows:

(1) A request for retrospective necessity dispute resolution shall be considered timely if it is filed with the carrier and the division:

(A) no earlier than the 28th day after the date the requestor had filed the request for reconsideration with the carrier; and

(B) no later than 60 days after the date the carrier took final action on the request for reconsideration.

(2) A request for prospective necessity dispute resolution shall be considered timely if it is filed with the carrier and the division no later than the 45th day after the date the carrier denied approval of the party's request for reconsideration of denial of health care that requires preauthorization or concurrent review.

(f) Complete Request (General). A request for independent review must be filed in the form, format, and manner prescribed by the commission. Each request shall be legible, shall include only a single copy of each document, and shall include:

(1) a designation that the request is for review by Independent Review Organization;

(2) written notices of adverse determinations (both initial and reconsideration) of prospective or retrospective necessity disputes, if in the possession of the requestor;

(3) documentation of the request for and response to reconsideration, or, if the respondent failed to respond to a request for reconsideration, convincing evidence of carrier receipt of that request;

(4) for medical necessity disputes:

(A) for retrospective necessity disputes, a table of disputed health care denied for lack of medical necessity, which includes complete details of the dispute issues (denial codes T, U or V); or

(B) for prospective necessity disputes, a detailed description of the health care requiring preauthorization and/or concurrent review and approval in accordance with §134.600 of this title;

(5) a list of any and all providers that have examined or provided health care to the employee during the course of the workers' compensation claim; and

(6) a list of all providers that participated in the review or determination of the carrier, if known by the requestor.

(g) Carrier Notification to the Commission. The carrier shall complete the remaining sections of the request form and shall provide any missing information required on the form, which shall include:

(1) the respondent information;

(2) a list of any additional providers that have examined, provided, or rendered health care to the employee at any time during the course of the worker's compensation claim;

(3) notices of adverse determinations of prospective or retrospective medical necessity, not provided by the requestor;

(4) a list of all providers that participated in the review or determination of the carrier, if known by the requestor; and

(5) if the carrier has raised a dispute pertaining to liability for the claim, compensability, or extent of injury, in accordance with §124.2 of this title (relating to Carrier Reporting and Notification Requirements), the requestor shall file with the request, proof that a Benefit Review Conference (BRC) has been requested under Chapter 141 of this title (relating to Benefit Review Conference) by either the employee or the licensed health care provider as a subclaimant. The commission shall adjudicate the medical dispute issues and enter a decision on those issues conditional upon final adjudication of the issues of liability for the claim, compensability, or extent of injury.

(h) Filing. The carrier shall file the request with the division by facsimile or other electronic means within three working days of receipt of the request for review by the IRO.

(i) TWCC Notification of Parties The commission shall review the request for IRO review, assign an IRO, and notify the parties and the IRO of the assignment. The commission will assign disputes on a rotating basis to the IROs certified by TDI, in accord with Insurance Code article 21.58C and TDI rules.

(j) IRO Notification of Parties. The IRO shall also notify the parties of the assignment and require that documentation be sent directly to the assigned IRO and received not later than the seventh day after the party's receipt of the IRO notice. The documentation shall include:

(1) any medical records of the injured employee relevant to the review;

(2) any documents used by the utilization review agent or carrier in making the decision, to be reviewed by the IRO; and

(3) any supporting documentation submitted to the utilization review agent or carrier.

(k) Confidentiality. No IRO or provider shall require the written consent of the injured employee as a prerequisite to obtaining medical records relevant to the review. The IRO shall preserve confidentiality of individual medical records as required by law.

(l) Additional Information. The IRO may request additional relevant information from either party or from other providers whose records are relevant to the dispute, to review the medical issues in a dispute. The party shall deliver the requested information to the IRO as directed. The additional information must be received by the IRO within 14 days of receipt of the request for additional information.

(m) Designated Doctor Exam. In performing a review of medical necessity, an IRO may request that the commission order an examination by a designated doctor and order the employee to attend the examination. The IRO request to the commission must be made no later than 3 days after the IRO receives notification of assignment of the IRO. The treating doctor and carrier shall forward a copy of all medical records, diagnostic reports, films, and other medical documents to the designated doctor appointed by the commission, to arrive no later than three days prior to the scheduled examination. Neither party may communicate with the designated doctor regarding issues not related to the medical dispute. The designated doctor shall complete a report and file it with the IRO, on the form and in the manner prescribed by the commission, no later than seven working days after completing the examination. The designated doctor report shall address all issues the commission instructed the doctor to address.

(n) Time Frame for IRO Decision. The IRO will review and render a decision on retrospective medical necessity disputes by the 20th day after the IRO receipt of the dispute. The IRO will review and render a decision on prospective necessity disputes by the 8th day after the IRO receipt of the dispute. If a designated doctor examination has been requested by the IRO, the above time frames begin from the date of the IRO receipt of the designated doctor report.

(o) IRO Notification of Decision. An IRO shall notify and provide a copy of the decision to the parties and the commission of a decision made in an independent review.

(1) the notification must include a certification by the IRO that the reviewing provider has certified that no known conflicts of interest exist between that provider and any of the treating providers or any of the providers who reviewed the case for determination prior to referral to the IRO.

(2) the notification in a retrospective necessity dispute must be *mailed or otherwise transmitted* not later than the 20th day after the IRO receipt of the dispute. The notification in a prospective necessity dispute must be *delivered* not later than the 8th day after the IRO receipt of the dispute.

(3) the notification to the commission shall also include certification of the date and means by which the decision was sent to the parties.

(4) an IRO decision is deemed to be a commission decision and order.

(5) If an IRO decision finds that medical necessity exists for care that the carrier denied, and the carrier utilized the opinion of a peer review or other case review to issue its denial, the review and its rational shall not be used on subsequent denials in that claim as the IRO has already found it unconvincing.

(p) Commission Posting. The commission shall post the IRO decision on the commission Internet website after confidential information has been redacted.

(q) IRO Billing. The IRO shall bill for the independent review.

(1) In a retrospective necessity dispute other than an employee reimbursement dispute, and in a concurrent review prospective necessity case, the IRO shall bill the non-prevailing party:

(A) if the IRO decision as to the main issue in dispute is a finding of medical necessity, the requestor is the prevailing party.

(B) if the IRO decision does not find medical necessity with respect to the main issue in dispute, the respondent is the prevailing party.

(C) if the IRO decision does not clearly determine the prevailing party, the IRO shall request the commission to advise the IRO of the allowable fees for the health care in dispute, and the party who prevailed as to the majority of the fees for the disputed health care is the prevailing party.

(2) In an employee reimbursement dispute and in a preauthorization prospective necessity dispute, the IRO shall bill the carrier.

(3) The IRO shall bill copy expenses to the party billed for the independent review; provided, however, that no copy costs shall be paid to the requestor.

(4) The injured employee shall not be required to pay any portion of the cost of a review.

(5) Designated doctor examinations ordered by the commission at the request of an IRO shall be paid by the carrier in accordance with the appropriate fee guideline.

(6) Receipt of an IRO bill to pay for independent review is deemed to be receipt of a commission order to pay the fee.

(7) IRO fees will be paid in the same amounts as those set by TDI rules for tier one and tier two fees. In addition to the specialty classifications established as tier two fees in TDI rules, independent review by a doctor of chiropractic shall be paid the tier two fee.

(8) If the fee has not been received by the IRO within 30 days of the IRO bill, the IRO shall notify the commission and the commission shall issue an order to pay the IRO fee.

(9) Failure to pay or refund the IRO fee may result in enforcement action as allowable by statute and rules and/or restriction of future requests for independent review.

(10) The party required to pay the IRO fee is liable for that fee upon receipt of the bill from the IRO, regardless of whether an appeal of the IRO decision has been or will be filed.

(11) if the IRO decision is subsequently reversed at a CCH or by a SOAH decision, the commission shall order a refund of the IRO fee to the party who prevailed by CCH or SOAH decision.

(12) the requestor may be liable for the IRO fee if the request is withdrawn or the review is terminated prior to completion.

(r) Defense. It is a defense for the carrier if the carrier timely complies with the IRO decision with respect to the medical necessity or appropriateness of health care for an injured employee. If a previously timely filed request for fee dispute resolution exists at the time the IRO issues a decision of medical necessity, the carrier is not required to pay for the disputed health care until the commission has resolved the medical fee dispute. If there is no previously pending request for medical fee resolution, the carrier shall immediately comply with the IRO decision.

(s) Unresolved Fee Disputes. If an unresolved fee dispute issue exists at the time the commission receives the IRO decision in a dispute, the commission shall then proceed to resolve the medical fee dispute in accord with commission rules.

(t) Appeal. Except with respect to a prospective necessity dispute regarding spinal surgery, a party to a prospective or retrospective necessity dispute may appeal the IRO decision by filing a written request for a SOAH hearing with the commission Chief Clerk of Proceedings, Division of Hearings in accordance with §148.3 of this title (relating to Requesting a Hearing).

(1) The appeal must be filed no later than 20 days from the date the party received the IRO decision.

(2) The party appealing the IRO decision shall deliver a copy of its written request for a hearing to all other parties involved in the dispute.

(3) The commission shall file the request for hearing with SOAH.

(4) The hearing shall be conducted by the State Office of Administrative Hearings within 90 days of receipt of a request for a hearing in the manner provided for a contested case under Chapter 2001, Government Code (the administrative procedure law).

(5) The parties to the dispute must represent themselves before SOAH, and the IRO is not required to participate in the SOAH hearing.

(6) A party who has exhausted the party's administrative remedies under this subtitle and who is aggrieved by a final decision of the State Office of Administrative Hearings may seek judicial review of the decision. Judicial review under this subsection shall be conducted in the manner provided for judicial review of contested cases under Subchapter G, Chapter 2001, Government Code.

(7) The commission shall post the SOAH decision on the commission website after confidential information has been redacted.

(u) Spinal Surgery Appeal. A party to a prospective necessity dispute regarding spinal surgery may appeal the IRO decision by requesting a Contested Case Hearing ("CCH").

(1) the written appeal must be filed with the commission Chief Clerk of Proceedings, Division of Hearings, within 10 days after receipt of the IRO decision and must be filed in compliance with §142.5(c) of this title (relating to Sequence of Proceedings to Resolve Benefit Disputes).

(2) the CCH will be scheduled and held within 20 days of commission receipt of the request for a CCH.

(3) the hearing and further appeals shall be conducted in accordance with Chapters 140, 142, and 143 of this title (relating to Dispute Resolution/General Provisions, Benefit Contested Case Hearing, and Review by the Appeals Panel).

(4) the party appealing the IRO decision shall deliver a copy of its written request for a hearing to all other parties involved in the dispute; the IRO is not required to participate in the CCH or any appeal.

(v) In all appeals from reviews of prospective or retrospective necessity disputes, the IRO decision has presumptive weight.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106295
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 804-4287

♦ ♦ ♦

CHAPTER 134. BENEFITS--GUIDELINES FOR MEDICAL SERVICES, CHARGES, AND PAYMENTS
SUBCHAPTER K. TREATMENT GUIDELINES

The Texas Workers' Compensation Commission (the commission) proposes new §134.1004, concerning the Treatment Guideline and the simultaneous repeal of current §134.1000, concerning the Mental Health Treatment Guideline; §134.1001, concerning the Spine Treatment Guideline; §134.1002 concerning the Upper Extremities Treatment Guideline; and §134.1003, concerning the Lower Extremities Treatment Guideline.

New §134.1004 is proposed to comply with statutory mandates in the Texas Labor Code. House Bill 2600 (HB-2600), adopted during the 77th Texas Legislative Session, 2001 amended Section 413.011 of the Texas Labor Code to add, "The commission by rule may adopt treatment guidelines, including return to work guidelines. If adopted, treatment guidelines must be nationally recognized, scientifically valid, and outcome-based and designed to reduce excessive or inappropriate medical care while safeguarding necessary medical care." The amended statute also provides that the commission may establish medical policies or treatment guidelines relating to necessary treatments for injuries. Any medical policies or guidelines adopted by the commission must be: designed to ensure the quality of medical care and to achieve effective medical cost control; designed to enhance a timely and appropriate return to work; and consistent with §§413.013, 413.020, 413.052, and 413.053 of the Texas Labor Code.

The repeal of the existing treatment guidelines (§§134.1000-134.1003) is necessitated by HB-2600, which abolishes the current treatment guidelines on January 1, 2002.

The commission determined that treatment guidelines are needed to ensure appropriate treatment and management of work related injuries and illnesses; to establish elements against which aspects of care can be compared; to monitor health care provider utilization and carrier denials of health care; and to identify treatments and services that are reasonable and medically necessary for treatment of a compensable injury

The Commission staff researched and gathered the names of treatment guideline products available which might be used for the purposes defined in the Workers' Compensation Act. In reviewing each treatment guideline product identified, the staff considered: the experience of the company, industry usage of the treatment guideline; the knowledge base of the developers; the development process; quality assurance, ease of use and understandability, specificity, and cost. Because of the commission decision to adopt both treatment guidelines and work release guidelines, the ability to coordinate a treatment guideline with work release criteria in a consistent manner was also considered.

The *Clinical Guidelines Tool* (CGT), an Internet-based claim management tool, published by International Rehabilitation Associates, Inc. d/b/a Intracorp. was selected for use as the commission's treatment and work release guidelines based upon the recommendation of staff, including the commission's interim medical advisor, and three system participant physicians. The CGT was chosen for the following reasons: it ensures the quality of medical care; achieves effective medical cost control by reducing excessive and inappropriate medical care; enhances timely and appropriate return to work; is nationally recognized; is scientifically valid; is outcome-based; and is consistent with Texas Labor Code §§413.013 (relating to Programs), and 413.018 (relating to Review of Medical Care if Guidelines Exceeded). In addition, Intracorp's CGT was the only treatment guideline reviewed which included integrated treatment and work release components. This combination assists all parties with regard to the appropriate treatment and management of work related injuries and illnesses; establishes elements against which aspects of care can be compared; assists in monitoring health care provider utilization and carrier denials of health care; identifies treatments and services that are reasonable and medically necessary for treatment of a compensable injury; and includes diagnosis-specific disability duration information.

Proposed new §134.1004 will provide a tool for the commission to monitor patterns of practice and the appropriateness of treatment and utilization review.

Proposed §134.1004 establishes the universal use of a single, standard, designated treatment and work release guideline for the commission. Subsection (a) adopts by reference as its treatment guideline, the *Clinical Guidelines Tool* (CGT) published by International Rehabilitation Associates, Inc. d/b/a Intracorp.

Because this is an Internet-based product which is regularly updated, adoption by reference enables the commission to maintain consistency with current industry standards widely used in the industry.

Tom Hardy, Director of the Medical Review Division, has determined the following with respect to fiscal impact for the first five-year period the proposed new rule is in effect.

With regard to enforcement and administration of the rule by state or local governments, the commission anticipates experiencing minimal fiscal implications. The commission will be required to pay an annual license fee for the use of Intracorp's CGT. System participants are not required to purchase the CGT. Clarification as to which nationally recognized, scientifically; valid, and outcome-based treatment guideline is to be used by the commission should facilitate the implementation of some of the framework mandated by HB-2600. The volume of requests to the commission for Medical Dispute Resolution regarding medical necessity of treatments and services should decrease with the adoption of a single, standard, and universally applied treatment guideline.

Local government will not be involved in enforcing or administering this rule. Local government and state government as covered regulated entities, will be impacted in the same manner as persons required to comply with the rule as proposed.

Tom Hardy has determined that for each year of the first five years the rule as proposed is in effect, the public benefits anticipated as a result of enforcing the rule will be an improved system of monitoring health care to injured employees of Texas because of the use of a single, standard treatment and work release guideline as proposed.

The intent of new proposed §134.1004 and the simultaneous repeal of existing §§134.1000-134.1003 is to comply with statutory mandates in the Texas Labor Code as amended by HB-2600, adopted during the 77th Texas Legislative Session, 2001. The commission has met requirements to achieve the joint statutory purposes of the timely delivery of appropriate medical care and cost containment by adopting guideline(s) (treatment and work release guidelines) that are nationally recognized, scientifically valid, outcome-based, and designed to reduce excessive or inappropriate medical care while safeguarding the delivery of necessary medical care. This should benefit the workers' compensation system and injured employees.

Additionally, the intent of the proposed rule (guideline) is to implement the framework for adoption of additional rules, which will use the guideline for effecting cost containment while ensuring employee access to quality health care. Further, the intent is to prevent the injured employee from being subjected to unnecessary medical care by assuring the appropriate utilization of services and treatments as identified in the commission approved work release and treatment guidelines. These are both benefits to the injured employee. Any savings that result from elimination of unnecessary medical services or treatments has a positive financial impact for employers who pay insurance premiums.

The benefit of the proposed new rule to employers is the assurance that their injured employees are receiving appropriate and medically necessary treatment in a timely manner for their compensable injury in anticipation of a timely return to work. Also, the proposed rule will assist in the prevention of unnecessary, costly medical treatment. The cost savings effected by a single standard guideline is expected to reduce the medical costs per claim and an overall savings to the system.

No economic costs are anticipated for injured employees to comply with the requirements of the proposed rule. There will be no additional economic costs for health care providers or carriers because use of the treatment guideline is not required by the rule. To the extent that system participants choose to purchase the guideline, the adoption of one guideline for both treatment and work release will help hold the cost down.

There will be no adverse economic impact on small businesses or on micro-businesses as a result of the proposed rule. There will be only a proportionate difference in the cost of compliance for small businesses and micro-businesses as compared to the largest businesses affected by the rule, including state and local government entities. The same basic processes and procedures apply, regardless of the size or volume of the business. The business size cost difference will be in direct proportion to the volume of business that falls under the purview of these proposed rules.

Comments on the proposal must be received by 5:00 p.m., December 3, 2001. You may comment via the Internet by accessing the commission's website at *http://www.twcc.state.tx.us* and then clicking on "Proposed Rules." This medium for commenting will help you organize your comments. You may also email your comments to *RuleComments@twcc.state.tx.us* or mail or deliver your comments to Nell Cheslock, Legal Services, Mailstop #4-D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH-35, Austin, Texas 78704-7491.

Commenters who wish to access the *Clinical Guidelines Tool* (CGT) published by International Rehabilitation Associates, Inc. d/b/a Intracorp may do so for a two-week trial period free of charge by accessing Intracorp's website at *www.intracorp.com* and selecting "B2B" (Business to Business) Tools and then selecting "claims toolbox." For a trial logon, scroll to the bottom of the page and follow the instructions to register for the claims toolbox. For additional information on accessing the claims toolbox contact the commission's Medical Review division at 512/804-4851.

Commenters are requested to clearly identify by number the specific subsection and paragraph commented upon. The commission may not be able to respond to comments, which cannot be linked to a particular proposed subsection. Along with your comment, it is suggested that you include the reasoning for the comment in order for commission staff to fully evaluate your recommendations. Unspecified comments submitted will not be addressed.

Based upon various considerations, including comments received and the staff's or commissioners' review of those comments, or based upon the commissioners' action at the public meeting, the rule as adopted may be revised from the rule as proposed in whole or in part. Persons in support of the rule as proposed, in whole or in part, may wish to comment to that effect with reference to specifics in the proposed rule amendments.

A public hearing on this proposal will be held on November 14, 2001, at the Austin central office of the commission (Southfield Building, 4000 South IH-35, Austin, Texas). Those persons interested in attending the public hearing should contact the commission's Office of Executive Communication at (512) 804-4430 to confirm the date, time, and location of the public hearing for this proposal. The public hearing schedule will also be available on the commission's website at *www.twcc.state.tx.us*.

28 TAC §§134.1000 - 134.1003

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Workers' Compensation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under: the Texas Labor Code §401.011 which contains definitions used in the Texas Workers' Compensation Act; the Texas Labor Code §401.024, which provides the Commission the authority to require use of facsimile or other electronic means to transmit information in the system; the Texas Labor Code §402.042, which authorizes the Executive Director to enter orders as authorized by the statute as well as to prescribe the form and manner and procedure for transmission of information to the Commission; the Texas Labor Code §402.061, which authorizes the commission to adopt rules necessary to administer the Act; the Texas Labor Code §408.021(a) that states an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed; the Texas Labor Code §408.023 (as created by HB-2600) and provides for the list of approved doctors and duties of the treating doctor; the Texas Labor Code §408.0231 (as created by HB-2600) that provides for the maintenance of the list of approved doctors and stipulates the provisions of sanctions and privileges relating to health care; the Texas Labor Code §406.010 that authorizes the commission to adopt rules regarding claims service; the Texas Labor Code §409.022, which requires a notice of refusal to specify the insurance carrier's grounds for disputing a claim and requires the reason to be reasonable; the Texas Labor Code §413.002, that requires the commission to monitor health care providers and carriers to ensure compliance with commission rules relating to health care including medical policies and fee guidelines; the Texas Labor Code §413.011 that requires the commission by rule to establish medical policies relating to necessary treatments for injuries and designed to ensure the quality of medical care and to achieve effective medical cost control and to enhance a timely and appropriate return to work; the Texas Labor Code §413.012, which requires the Commission to review and revise medical policies and fee guidelines at least every two years to reflect current medical treatment and fees that are reasonable and necessary; the Texas Labor Code §413.0511 (as created by HB-2600) as it provides for the role of a Medical Advisor at the commission; the Texas Labor Code §413.0512 (as created by HB-2600) which describes the functions of a medical quality review panel; the Texas Labor Code §414.007, that allows the review of referrals from the Medical Review Division by the Division of Compliance and Practices; the Texas Labor Code §415.002 which establishes an administrative violation for an insurance carrier to: unreasonably dispute the reasonableness and necessity of health care, to violate a Commission rule or to fail to comply with the Act; the Texas Labor Code §415.003 that establishes an administrative violation for a health care provider to: administer improper, unreasonable, or medically unnecessary treatment or services, to violate a commission rule, or to fail to comply with the act; and the Texas Labor Code §415.0035 that establishes administrative violations for health care providers and carriers, including a carrier denying preauthorization in a manner that is not in accordance with commission rules.

No other statutes, articles or codes are affected by the repeal

§134.1000. Mental Health Treatment Guideline.

§134.1001. Spine Treatment Guideline.

§134.1002. Upper Extremities Treatment Guideline.

§134.1003. Lower Extremities Treatment Guideline.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106337
Kaylene Ray
General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 804-4287

♦ ♦ ♦

28 TAC §134.1004

The new rule is proposed under: the Texas Labor Code §401.011 which contains definitions used in the Texas Workers' Compensation Act; the Texas Labor Code §401.024, which provides the Commission the authority to require use of facsimile or other electronic means to transmit information in the system; the Texas Labor Code §402.042, which authorizes the Executive Director to enter orders as authorized by the statute as well as to prescribe the form and manner and procedure for transmission of information to the Commission; the Texas Labor Code §402.061, which authorizes the commission to adopt rules necessary to administer the Act; the Texas Labor Code §408.021(a) that states an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed; the Texas Labor Code §408.023 (as created by HB-2600) and provides for the list of approved doctors and duties of the treating doctor; the Texas Labor Code §408.0231 (as created by HB-2600) that provides for the maintenance of the list of approved doctors and stipulates the provisions of sanctions and privileges relating to health care; the Texas Labor Code §406.010 that authorizes the commission to adopt rules regarding claims service; the Texas Labor Code §409.022, which requires a notice of refusal to specify the insurance carrier's grounds for disputing a claim and requires the reason to be reasonable; the Texas Labor Code §413.002, that requires the commission to monitor health care providers and carriers to ensure compliance with commission rules relating to health care including medical policies and fee guidelines; the Texas Labor Code §413.011 that requires the commission by rule to establish medical policies relating to necessary treatments for injuries and designed to ensure the quality of medical care and to achieve effective medical cost control and to enhance a timely and appropriate return to work; the Texas Labor Code §413.012, which requires the Commission to review and revise medical policies and fee guidelines at least every two years to reflect current medical treatment and fees that are reasonable and necessary; the Texas Labor Code §413.0511 (as created by HB-2600) as it provides for the role of a Medical Advisor at the commission; the Texas Labor Code §413.0512 (as created by HB-2600) which describes the functions of a medical quality review panel; the Texas Labor Code §414.007, that allows the review of referrals from the Medical Review Division by the Division of Compliance and Practices; the Texas Labor Code §415.002 which establishes an administrative violation for an insurance carrier to: unreasonably dispute the reasonableness and necessity of health care, to violate a Commission rule or to fail to comply with the Act; the Texas Labor Code §415.003 that establishes an administrative violation for a health care provider to: administer improper, unreasonable, or medically unnecessary treatment or services, to violate a commission rule, or to fail to comply with the act; and the Texas Labor Code §415.0035 that establishes administrative violations for health care providers and carriers, including a carrier denying preauthorization in a manner that is not in accordance with commission rules.

No other statutes, articles or codes are affected by the new rule.

§134.1004. Treatment Guideline.

(a) The Texas Workers' Compensation Commission (the commission) adopts herein, by reference as its Treatment Guideline, the Internet-based *Clinical Guidelines Tool* (CGT), published by International Rehabilitation Associates, Inc. d/b/a Intracorp.

(b) Medical necessity considerations prevail over any application of treatment guidelines or other commission medical policies.

(c) Information on how to purchase a license to use the CGT is available by accessing the commission's website: *www.twcc.state.tx.us*.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106336
Kaylene Ray
General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 804-4287

♦ ♦ ♦

SUBCHAPTER L. WORK RELEASE

28 TAC §134.1100

The Texas Workers' Compensation Commission (the commission) proposes new §134.1100 concerning the Work Release Guideline.

The new rule is proposed to comply with the statutory mandates contained in §413.018 and §413.011 of the Texas Workers' Compensation Act (the Act), (relating to Review of Medical Care if Guidelines Exceeded, and Guidelines and Medical Policies).

House Bill 2513 (HB-2513) enacted by the 76th Legislative Session, 1999, required the incorporation of return to work concepts and guidelines in Texas workers' compensation rules. HB-2513 amended §413.018(a) of the Act, requiring the periodic review of medical care provided in claims in which guidelines for expected or average return to work time frames are exceeded. There are currently no adopted commission rules or guidelines to serve as the framework for use in determining expected or average return to work time frames, nor are parameters established for determining if a treatment regimen has exceeded the time frames.

Prior to the 77th Legislative Session, studies conducted by the Research and Oversight Council on Texas Workers' Compensation (ROC), as well as by the Workers' Compensation Research Institute (WCRI) in Cambridge, Massachusetts, concluded that the rate of injured employee's return to work in Texas was less successful than in comparable states. The studies further revealed that fewer Texas injured employees returned to employment after being injured, and in general they stayed off work longer and earned less after returning to work. These findings,

when combined with findings of other studies relating to the affect of length of separation from employment on an employee's long term earning potential, raised concerns about whether the Texas workers' compensation system is adequately fulfilling one of its purposes: returning injured employees to work.

House Bill 2600 (HB-2600), enacted by the 77th Legislative Session, 2001, amended §413.011 of the Act by adding that the commission by rule may adopt treatment guidelines, including return to work guidelines. This new legislation requires, in part, that any commission adopted guideline (work release and/or treatment guidelines) must be nationally recognized, scientifically valid, outcome-based, and designed to reduce excessive or inappropriate medical care while safeguarding the delivery of necessary medical care and to enhance a timely and appropriate return to work. The statute further states that any medical policies or guidelines adopted by the commission must be: designed to ensure the quality of medical care and to achieve effective medical cost control; designed to enhance a timely and appropriate return to work; and consistent with §§413.013, 413.020, 413.052, and 413.053. Commission staff and various system participants reviewed numerous industry work release guidelines that met the required stipulations as outlined in Article 6 of HB-2600.

The Commission staff researched and gathered the names of treatment guideline products available which might be used for the purposes defined in the Workers' Compensation Act. In reviewing each treatment guideline product identified, the staff considered: the experience of the company, industry usage of the treatment guideline; the knowledge base of the developers; the development process; quality assurance, ease of use and understandability, specificity, and cost. Because of the commission decision to adopt both treatment guidelines and work release guidelines, the ability to coordinate a treatment guideline with work release criteria in a consistent manner was also considered.

The *Clinical Guidelines Tool* (CGT), an Internet-based claim management tool, published by International Rehabilitation Associates, Inc. d/b/a Intracorp. was selected for use as the commission's treatment and work release guidelines based upon the recommendation of staff, including the commission's interim medical advisor, and three system participant physicians. The CGT was chosen for the following reasons: it ensures the quality of medical care; achieves effective medical cost control by reducing excessive and inappropriate medical care; enhances timely and appropriate return to work; is nationally recognized; is scientifically valid; is outcome-based; and is consistent with Texas Labor Code §413.013 (relating to Programs), and §413.018 (relating to Review of Medical Care if Guidelines Exceeded). In addition, Intracorp's CGT was the only treatment guideline reviewed which included integrated treatment and work release components. This combination assists all parties with regard to the appropriate treatment and management of work related injuries and illnesses; establishes elements against which aspects of care can be compared; assists in monitoring health care provider utilization and carrier denial of health care; identifies treatments and services that are reasonable and medical necessary for treatment of a compensable injury; and includes diagnosis-specific disability duration information.

The use of a single work release guideline is a major change for the system. It will be a valuable tool which will as a means to benchmark overall performance. It will assist in monitoring health care provider utilization and carrier denial of health care. It will also be valuable for monitoring and guiding individual claims. The intent of these rules is to allow the guideline to function as a trigger for claims in which the employee may not have been timely or appropriately released to return to work, to establish this communication and to provide for the review of medical care required by Texas Labor Code §413.018.

The proposed rule is intended to provide the commission with another source of information regarding doctors whose medical practices may be outside the norms as relates to work release. This information will be used by the commission for determining whether to conduct an audit of health care patterns and practices and when addressing quality of care, utilization review, and similar concerns.

Return to work is a primary purpose of the workers' compensation system. The Joint Select Committee on Workers' Compensation identified encouraging "the speedy return to employment which is safe, meaningful, and commensurate with the abilities of the accident victim" as one of the goals that the 1989 reform should accomplish.

Proposed new §134.1100 establishes a work release guideline (also referred to as a return to work guideline) for the commission to use in reinforcing good communication among all parties, one of the most important determinants in facilitating return to work. Intracorp's CGT, proposed herein to be adopted by reference as the commission's work release guideline (and treatment guideline as in proposed new §134.1004) should facilitate the communication and monitoring processes. Further, proposing for adoption a guideline by reference is intended as the starting point for proposing additional rules that describe the processes for applying this guideline.

Proposed §134.1100 establishes the universal use of a single, standard, designated work release guideline for the commission and workers' compensation system participants. Subsection (a) adopts by reference as its work release guideline, Intracorp's *Clinical Guidelines Tool* (CGT).

Adoption by reference enables the commission to maintain consistency with current industry standards. This document proposed to be adopted by reference, is widely used in the industry. Adopting CGT by reference will also allow the commission to explain this rule and other related rules on the commission's website.

Tom Hardy, Director of the Medical Review Division, has determined the following with respect to fiscal impact for the first five-year period the proposed rule is in effect.

With regard to enforcement and administration of the rule by state or local governments, the commission anticipates experiencing minimal fiscal implications. The commission will be required to pay an annual license fee for the use of Intracorp's CGT. System participants are not required to purchase the CGT. Selection of a nationally recognized, scientifically valid, and outcome-based return to work guideline to be used by the commission and system participants should facilitate the implementation of some of the framework mandated by HB-2600. There will be no enforcement or administration by local governments.

Local government and state government as covered regulated entities, will be impacted in the same manner as persons required to comply with the rule as proposed.

Tom Hardy has determined that for each year of the first five years the rule as proposed is in effect, the public benefits anticipated as a result of enforcing the rule will be an improved

system of monitoring health care to injured employees of Texas because of the use of a single, standard work release and treatment guideline as proposed.

The intent of proposed new §134.1100 is to comply with statutory mandates in the Texas Labor Code as amended by HB-2600, adopted during the 77th Texas Legislative Session, 2001. The commission has included requirements to achieve the joint statutory purposes of the timely delivery of appropriate medical care and cost containment by adopting guideline(s) (work release and treatment guidelines) that are nationally recognized, scientifically valid, outcome-based, and designed to reduce excessive or inappropriate medical care while safeguarding the delivery of necessary medical care. This should benefit the workers' compensation system and injured employees.

Additionally the intent of the proposed rule (guideline) is to implement the framework for adoption of additional rules, which will use the guideline for effecting cost containment while ensuring employee access to quality health care.

The benefits of the proposed new rule to employees and employers are the assurance that injured employees are receiving appropriate and medically necessary treatment in a timely manner for their compensable injury in anticipation of a timely and appropriate return to work. Also, the proposed rule will assist in the prevention of unnecessary, costly medical treatment. The cost savings effected by a single standard guideline is expected to reduce the medical costs per claim and an overall savings to the system. Savings that may result from a more efficient return to work process should ultimately be reflected in the cost to provide workers' compensation coverage to employees.

No economic costs are anticipated for system participants to comply with the requirements of the proposed new rule. Purchase of a license to use the CGT is not required of system participants so there will be no additional economic costs for heath care providers and carriers. To the extent that system participants choose to purchase the guideline, the adoption of one guideline for both treatment and work release will help hold the cost down.

The system participants benefit from the proposed new §134.1100 in that the adoption by reference of the CGT, by rule establishes the framework for meeting the requirements of HB-2513 of the 76th Legislative Session, requiring in §413.018 the periodic review of medical care provided in claims in which guidelines for expected or average return to work time frames are exceeded.

There will be no adverse economic impact on small businesses or on micro-businesses as a result of the proposed rule. There will be only a proportionate difference in the cost of compliance for small businesses and micro-businesses as compared to the largest businesses affected by the rule, including state and local government entities. The same basic processes and procedures apply, regardless of the size or volume of the business. The business size cost difference will be in direct proportion to the volume of business that falls under the purview of these proposed rules.

Comments on the proposal must be received by 5:00 p.m., December 3, 2001. You may comment via the Internet by accessing the commission's website at *http://www.twcc.state.tx.us* and then clicking on "Proposed Rules." This medium for commenting will help you organize your comments. You may also email your comments to *RuleComments@twcc.state.tx.us* or mail or deliver your comments to Nell Cheslock, Legal Services, Mailstop #4-D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH-35, Austin, Texas 78704-7491.

Commenters who wish to access the *Clinical Guidelines Tool* (CGT) published by International Rehabilitation Associates, Inc. d/b/a Intracorp may do so for a two-week trial period free of charge by accessing Intracorp's website at *www.intracorp.com* and selecting "B2B" (Business to Business) Tools and then selecting "claims toolbox." For a trial logon, scroll to the bottom of the page and follow the instructions to register for the claims toolbox. For additional information on accessing the claims toolbox contact the commission's Medical Review division at 512/804-4851.

Commenters are requested to clearly identify by number the specific subsection and paragraph commented upon. The commission may not be able to respond to comments that cannot be linked to a particular proposed subsection. Along with your comment, it is suggested that you include the reasoning for the comment in order for commission staff to fully evaluate your recommendations. Unspecified comments submitted will not be addressed.

Based upon various considerations, including comments received and the staff's or commissioners' review of those comments, or based upon the commissioners' action at the public meeting, the rule as adopted may be revised from the rule as proposed in whole or in part. Persons in support of the rule as proposed, in whole or in part, may wish to comment to that effect in the proposed rule.

A public hearing on this proposal will be held on November 14, 2001, at the Austin central office of the commission (Southfield Building, 4000 South IH-35, Austin, Texas). Those persons interested in attending the public hearing should contact the commission's Office of Executive Communication at (512) 804-4430 to confirm the date, time, and location of the public hearing for this proposal. The public hearing schedule will also be available on the commission's website at *http://www.twcc.state.tx.us*.

The amendment is proposed under: the Texas Labor Code §401.011, which contains definitions used in the Texas Workers' Compensation Act; the Texas Labor Code §401.024, which provides the Commission the authority to require use of facsimile or other electronic means to transmit information in the system; the Texas Labor Code §402.042, which authorizes the Executive Director to enter orders as authorized by the statute as well as to prescribe the form and manner and procedure for transmission of information to the Commission; the Texas Labor Code §402.061, which authorizes the commission to adopt rules necessary to administer the Act; the Texas Labor Code §408.021(a) that states an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed; the Texas Labor Code §408.023 (as created by HB-2600) which provides for the list of approved doctors and duties of the treating doctor; the Texas Labor Code §408.0231 (as created by HB-2600) that provides for the maintenance of the list of approved doctors and stipulates the provisions of sanctions and privileges relating to health care; the Texas Labor Code §406.010 that authorizes the commission to adopt rules regarding claims service; the Texas Labor Code §409.022, which requires a notice of refusal to specify the insurance carrier's grounds for disputing a claim and requires the reason to be reasonable; the Texas Labor Code §413.002, that requires the commission to monitor health care providers and carriers to ensure compliance with commission rules relating to health care including medical policies and fee

guidelines; the Texas Labor Code §413.011 that requires the commission by rule to establish medical policies relating to necessary treatments for injuries and designed to ensure the quality of medical care and to achieve effective medical cost control and to enhance a timely and appropriate return to work; the Texas Labor Code §413.012, which requires the Commission to review and revise medical policies and fee guidelines at least every two years to reflect current medical treatment and fees that are reasonable and necessary; the Texas Labor Code §413.018, which provides for periodic review of medical care provided in claims in which expected return to work timeframes are exceeded; the Texas Labor Code §413.0511 (as created by HB-2600) as it provides for the role of a Medical Advisor at the commission; the Texas Labor Code §413.0512 (as created by HB-2600) which describes the functions of a medical quality review panel; the Texas Labor Code §414.007, that allows the review of referrals from the Medical Review Division by the Division of Compliance and Practices; the Texas Labor Code §415.002 which establishes an administrative violation for an insurance carrier to: unreasonably dispute the reasonableness and necessity of health care, to violate a Commission rule or to fail to comply with the Act; the Texas Labor Code §415.003 that establishes an administrative violation for a health care provider to: administer improper, unreasonable, or medically unnecessary treatment or services, to violate a commission rule, or to fail to comply with the act; and the Texas Labor Code §415.0035 that establishes administrative violations for health care providers and carriers, including a carrier denying preauthorization in a manner that is not in accordance with commission rules.

The proposed rule affects the following statutes: the Texas Labor Code §401.011, which contains definitions used in the Texas Workers' Compensation Act; the Texas Labor Code §401.024, which provides the Commission the authority to require use of facsimile or other electronic means to transmit information in the system; the Texas Labor Code §402.042, which authorizes the Executive Director to enter orders as authorized by the statute as well as to prescribe the form and manner and procedure for transmission of information to the Commission; the Texas Labor Code §402.061, which authorizes the commission to adopt rules necessary to administer the Act; the Texas Labor Code §408.021(a) that states an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed; the Texas Labor Code §408.023 (as created by HB-2600) which provides for the list of approved doctors and duties of the treating doctor; the Texas Labor Code §408.0231 (as created by HB-2600) that provides for the maintenance of the list of approved doctors and stipulates the provisions of sanctions and privileges relating to health care; the Texas Labor Code §406.010 that authorizes the commission to adopt rules regarding claims service; the Texas Labor Code §409.022, which requires a notice of refusal to specify the insurance carrier's grounds for disputing a claim and requires the reason to be reasonable; the Texas Labor Code §413.002, that requires the commission to monitor health care providers and carriers to ensure compliance with commission rules relating to health care including medical policies and fee guidelines; the Texas Labor Code §413.011 that requires the commission by rule to establish medical policies relating to necessary treatments for injuries and designed to ensure the quality of medical care and to achieve effective medical cost control and to enhance a timely and appropriate return to work; the Texas Labor Code §413.012, which requires the Commission to review and revise medical policies and fee guidelines at least every two years to reflect current medical treatment and fees that are reasonable and necessary; the Texas Labor Code §413.018, which provides for periodic review of medical care provided in claims in which expected return to work timeframes are exceeded; the Texas Labor Code §413.0511 (as created by HB-2600) as it provides for the role of a Medical Advisor at the commission; the Texas Labor Code §413.0512 (as created by HB-2600) which describes the functions of a medical quality review panel; the Texas Labor Code §414.007, that allows the review of referrals from the Medical Review Division by the Division of Compliance and Practices; the Texas Labor Code §415.002 which establishes an administrative violation for an insurance carrier to: unreasonably dispute the reasonableness and necessity of health care, to violate a Commission rule or to fail to comply with the Act; the Texas Labor Code §415.003 that establishes an administrative violation for a health care provider to: administer improper, unreasonable, or medically unnecessary treatment or services, to violate a commission rule, or to fail to comply with the act; and the Texas Labor Code §415.0035 that establishes administrative violations for health care providers and carriers, including a carrier denying preauthorization in a manner that is not in accordance with commission rules.

§134.1100. Work Release Guideline.

(a) The Texas Workers' Compensation Commission (the commission) adopts herein, by reference as its Work Release Guideline, the Internet-based *Clinical Guidelines Tool* (CGT), published by International Rehabilitation Associates, Inc. d/b/a Intracorp.

(b) Information on how to purchase a license to use the CGT is available by accessing the commission's website: *www.twcc.state.tx.us.*

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106292
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 804-4287

♦ ♦ ♦

28 TAC §§134.1101 - 134.1103

The Texas Workers' Compensation Commission (the commission) proposes new §134.1101, concerning General Work Release And Return To Work Definitions, §134.1102, concerning Work Release Monitoring Definitions, and §134.1103 Work Release and Coordinated Case Management.

The new rules are proposed to comply with the statutory mandates contained in §413.018 of the Texas Workers' Compensation Act (the Act), (relating to Review of Medical Care if Guidelines Exceeded).

House Bill 2513 (HB-2513) enacted by the 76th Legislative Session, 1999, required the incorporation of return to work concepts in Texas Workers' Compensation Commission rules. HB-2513 amended §413.018(a) of the Act, requiring the periodic review of medical care provided in claims in which guidelines for

expected or average return to work time frames are exceeded (these claims are referred to in the proposal as Work Release Outlier Claims). Concurrent with the proposal of these rules, the commission is proposing the adoption of a Work Release Guideline as §134.1100 (relating to Work Release Guideline). Proposed new §134.1100 would adopt the *Clinical Guidelines Tool* (CGT), an Internet-based claim management tool, published by International Rehabilitation Associates, Inc. d/b/a Intracorp. for use as the commission's work release guideline. All references to a commission Work Release Guideline in §§134.1101 to 134.1103 are a reference to this guideline.

HB-2513 also required the commission to implement a program to encourage employers and treating doctors to discuss the availability of modified duty to encourage the safe and more timely return to work of injured employees. The Commission adopted §129.5 of this title (relating to Work Status Reports) to provide information to employers about an injured employee's activity restrictions and also to allow employers to provide treating doctors with functional job descriptions of positions that the employer can offer the employee while the employee is unable to perform his or her normal job functions. In addition, HB-2513 required the commission to provide employers information regarding effective return to work programs. To that end, the commission has used outreach efforts such as its employer seminars to provide information to employers about return to work.

Prior to the 77th Legislative Session, studies conducted by the Research and Oversight Council on Texas Workers' Compensation (ROC), as well as by the Workers' Compensation Research Institute (WCRI) in Cambridge, Massachusetts, concluded that the rate of injured employee's return to work in Texas was less successful than in comparable states. The studies further revealed that fewer Texas injured employees returned to employment after being injured, and in general, they stayed off work longer and earned less after returning to work. These findings, when combined with findings of other studies relating to the affect of length of separation from employment on an employee's long term earning potential, raised concerns about whether the Texas workers' compensation system is adequately fulfilling one of its purposes: returning injured employees to work.

These proposed rules are intended to fulfill several purposes. First, they set up two groups of definitions that will help system participants better understand return to work/work release issues. One group is common definitions applicable to return to work/work release in general and the other group focuses on work release monitoring. As noted, return to work is a primary purpose of the workers' compensation system. The Joint Select Committee on Workers' Compensation identified encouraging "the speedy return to employment which is safe, meaningful, and commensurate with the abilities of the accident victim" as one of the goals that the 1989 reform should accomplish. Currently, however, "return to work" and "work release" seem to be misunderstood concepts in the system.

Another intent of the new rules is to ensure that there is adequate communication and coordination between system participants for claims that are in danger of becoming Work Release Outlier Claims. The use of a single work release guideline is a major change for the system. It will be a valuable tool that will as a means to benchmark overall performance. It will assist in monitoring health care provider utilization and carrier denial of health care. It will also be valuable for monitoring and guiding individual claims. The intent of these rules is to allow the guideline to function as a trigger for claims in which the employee may not have been timely or appropriately released to return to work, to establish this communication and to provide for the review of medical care required by Texas Labor Code §413.018.

Finally, the rules are intended to provide the commission with another source of information regarding doctors whose medical practices may be outside the norms as relates to work release. This information will be used by the commission for determining whether to conduct an audit of health care patterns and practices and when addressing quality of care, utilization review, and similar concerns.

It should be noted that these rules focus primarily on "work release" (that is, whether the doctor has released the employee to return to work in a timely manner and whether the release is consistent with the Work Release Guideline). These rules do not address whether the employee actually has returned to work. Though this is important as well, the first step is to ensure that employees are being evaluated and released by the doctor as and when medically appropriate. Once such a release has been given, there are obvious economic incentives to provide an available position that is within the employee's activity restrictions.

The commission's medical advisor was involved in the development of these proposed rules.

Proposed §134.1101. General Work Release and Return to Work Definitions.

This rule contains definitions common to work release and return to work issues.

The intent of these basic definitions is to help ensure that system participants use one set of terms when discussing return to work and work release. There has been some confusion in the past regarding these concepts, particularly "Alternate Duty Job" and "Modified Duty Job." It is also important to make it clear that these two types of work positions can be temporary or permanent and at the same or different wages than the preinjury wage.

A definition of "Work Release Status" is proposed to differentiate between the various stages of work release. Most injuries should not result in the employee being placed in the "Full Restriction" status for an extensive period of time. For injuries that result in disability (as defined in Texas Labor Code §401.011), the most common status should be "Restricted Release." After an initial period of possible Full Restriction, most injuries should allow the employee to perform some work functions (whether the employer has positions that meet those restrictions is a separate matter). There appears to be confusion between the concepts of a work release and an actual return to work. These definitions help to clear up that confusion by making it clear that an employee on Restricted Release is capable of returning to work if a position is available that meets the Activity Restrictions. It also makes it clear that a person on Restricted Release can return to their normal job if the job functions are within the employee's Activity Restrictions and abilities.

Proposed §134.1102. Work Release Monitoring Work Definitions.

Although it may be unusual to have two rules that provide for definitions, in this case, it was believed that placing the more general definitions in one rule (proposed §134.1101) and the more specific ones in a separate rule (proposed §134.1102) would group similar concepts together and make them easier to follow.

Proposed §134.1102 contains five definitions. The two most important definitions are "At Risk Claim" and "Work Release Outlier

Claim." These two definitions are used as triggers in proposed §134.1103.

An "At Risk Claim" is one that is "at risk" of becoming an outlier claim. A claim becomes an "At Risk Claim" if there is not a Restricted Release or Full Release to return to work by the "At Risk Claim Date" (described later). One purpose of identifying a claim as being at risk is to increase carrier monitoring and communication with the treating doctor to try to prevent the claim from becoming a "Work Release Outlier Claim."

A "Work Release Outlier Claim" is one that is beyond the point at which the guideline indicates that the employee should have been released to return to work. A claim becomes a "Work Release Outlier Claim" if there is not a Full Release to return to work by the "Work Release Outlier Date" (described later).

To understand these concepts and to understand how to determine the "At Risk Claim Date" and "Work Release Outlier Date," it is necessary to understand the guideline that the Commission has proposed for adoption, which is the *Clinical Guidelines Tool* (CGT), an Internet-based claim management tool, published by International Rehabilitation Associates, Inc. d/b/a Intracorp.

The CGT is organized by injury/illness and contains return to work information for each. This return to work information is presented in "Return to Work Goal Tables" that present information on when a claimant might be expected to be able to return to work in various capacities. The information is presented using three standard job classifications. The three classifications are "sedentary/light," "medium," and "heavy/very heavy" (which correspond to the classifications described in the United States Department of Labor's *Dictionary of Occupational Titles*).

In some cases, the Work Release Guideline provides more than one Return to Work Goal Table for a given injury. The differences between the tables have to do with differences in the condition (i.e. seriousness/symptoms) and the type of treatment being provided. For example, an injury might have two tables: one for treatment with surgery and one for treatment with more conservative care. Therefore, the appropriate table to use will be the one that best describes the employee's injury and the type of treatment being used. Though this may seem more complicated than having a single table per type of injury, it actually results in a guideline that is more sensitive to the specifics of an injured employee's condition and thus should be more valuable as a monitoring and management tool. In those instances where an employee has multiple injuries (each with its own corresponding table) the table that shows the longest off-work duration is the appropriate table to use because it is the one for the condition that should have the most significant effect on the employee's ability to return to work. Once the appropriate table is selected, it is possible to identify the two key dates because the guideline lays out the expected number of days that an employee would be off of work from the onset of treatment.

The "At Risk Date" is calculated by using the number of days listed under the "red flag" column on the "Sedentary/Light" row. Adding this number of days to the date that treatment began provides the "At Risk Date."

The "Work Release Outlier Date" is calculated by using the number of days listed under the "red flag" column on the "Medium" row. Adding this number of days to the date that treatment began provides the "Work Release Outlier Date."

The reason the "red flag" numbers are used is that they include consideration for conditions that might adversely affect the amount of time the employee is off of work. It should be noted that there is no intent in these rules to create a default presumption that the employee no longer has disability under the Act even if the guideline indicates that it is reasonable to expect the employee to return to work by a given date.

Thus, the At Risk Date is the latest date that one would expect a person with a given condition to be ready to return to work in a "light work" capacity (according to the guideline). Similarly, the Work Release Outlier Date is the latest date that one would expect a person with a given condition to be ready to return to work in a "medium" capacity (according to the guideline).

The reason that the "medium" category is used to identify Work Release Outliers rather than the "light" category is that the commission at this time is interested in identifying claims that are the most excessive outliers. Further, the Commission believes that a significant percentage of jobs fit into the medium category or a less strenuous classification. Therefore, in many cases, the employee's normal job is within these classifications.

Under proposed §134.1103 a carrier can require monthly treatment plans to be preauthorized while a claim is in outlier status. These are claims that usually are significantly beyond the point at which the employee should have been released to return to work in some capacity. In these cases, it is important to bring all resources to bear to determine what is preventing the employee from being given an appropriate release and to ensure that appropriate return to work is a primary focus of care.

It is important to note that the fact that a claim is a Work Release Outlier in and of itself is not necessarily a reflection on a doctor. Therefore the commission felt that it was important to note this in the rule by explaining that a Work Release Outlier could be the result of any number of causes. However, routinely having claims that are Work Release Outliers Claims may raise questions regarding the quality or quantity of care being provided.

Proposed §134.1103. Work Release and Coordinated Case Management.

This proposed rule implements the requirements of Texas Labor Code §413.018 by providing for the review of medical care in claims where the commission's Work Release Guideline is exceeded. Specifically, the rule provides for monitoring of work release and coordination of care in claims that are Work Release Outlier Claims. Proposed subsection (a) of the rule lays out this intent.

Proposed subsection (b) outlines the general responsibilities of carriers, health care providers, and the Commission regarding work release.

Carriers should encourage timely and appropriate return to work and a number of methods to do this are suggested. None of these methods are required to be used by the carrier and, with the exception of requiring Coordinated Case Management (as described below), carriers are able to use the listed methods under current rules. The purpose of listing existing methods together in one rule is to centralize concepts and help carriers to identify methods that may be effective in ensuring timely return to work.

The proposed rule requires carriers to notify the commission when they identify a provider whose claims are routinely Work Release Outlier Claims. Although the commission intends to also identify these providers using system data, there are delays in obtaining the data. By requiring carriers to notify the commission of the identity of these providers and provide a list of Work

Release Outlier Claims, the commission will be able to review quality of care, utilization or similar issues more quickly than it might be able to otherwise.

Similarly, the section on the health care provider's general responsibilities relating to work release is largely a compendium of existing responsibilities. This subsection includes some general and some specific requirements. The general requirements include items such as providing appropriate medical care to enhance the ability of the employee to return to or retain employment and regularly evaluating the employee's work status. The subsection also notes that work releases are independent of whether an employer has offered an alternate or modified duty job. The intent of this rule and §129.5 of this title (relating to Work Status Report) is that the provider evaluate the employee's condition regardless of what employment the employer may or may not offer. The health care provider provides an appropriate evaluation of the employee's condition regardless of whether the employer can or will accommodate the employee's Activity Restrictions.

Proposed subsection (c) addresses Coordinated Case Management. Coordinated Case Management involves the treating doctor taking a more active role in the management of a claim by coordinating care with other providers on a claim and submitting monthly treatment plans to the carrier for approval in the manner of preauthorization and concurrent review requirements (plans can be for other than monthly periods if agreed upon by the treating doctor and the carrier). While a claim is a Work Release Outlier Claim, the carrier may require Coordinated Case Management on the claim by following the process laid out in the subsection. However, the carrier may also offer (but not require) it at other times during a claim.

While there are legitimate reasons why a claim might be a Work Release Outlier Claim, it is still appropriate to have increased case management on claims that are Work Release Outlier Claims. The treatment plan requirements are intended to bring this additional focus and coordination to outlier claims and to ensure that work release is being considered as part of the course of treatment. Treatment plans require a narrative that explains why the employee's medical condition has prevented the employee from being released to return to work in accordance with the guideline.

Requiring Coordinated Case Management is purely optional on the part of the carrier. If a claim is a Work Release Outlier Claim, the carrier has the option of requiring it. The decision can be made on a case-by-case basis and the carrier can waive the requirement once initiated. However, if the carrier intends to require Coordinated Case Management, the carrier must provide sufficient advance notice to the treating doctor. This allows the treating doctor to evaluate the claim and determine whether it may become a Work Release Outlier Claim and whether the employee should have been previously released or should currently be released to return to work.

If a dispute arises over whether a claim is a Work Release Outlier Claim, the presumption is that it is an outlier claim until the commission finds or the carrier agrees otherwise. Such dispute resolution is not intended to evaluate whether it is medically appropriate for a claim to be a Work Release Outlier Claim but whether the appropriate table was applied correctly.

One of the reasons there might be disagreement as to whether a claim is an outlier claim relates to there being a dispute over what the extent of the injury or diagnosis is. Since the guideline is driven by diagnosis, such a dispute could result in the doctor and the carrier looking at different "red flag" dates in the guideline. Thus the commission would have to review the extent of injury issue and once resolved, these findings would determine the applicable section of the guideline to use.

Stephen W. Quick has determined the following with respect to fiscal impact for the first five-year period the proposed rules are in effect.

With regard to enforcement and administration of the rules by state or local governments, the rules do not put enforcement and administration requirements on governments other than the commission itself (and only minimal requirements on the commission). The commission anticipates experiencing minimal fiscal implications because the commission will be monitoring outcomes such as return to work on a per doctor basis as mandated by HB-2600 and this rule should help the Commission obtain information. To the extent that these rules help control costs by improving return to work, governments as employers should experience savings. However, many governments are also self-insured employers and thus may experience minor costs associated with monitoring claims for work release and outlier status (though this monitoring is not required by these rules and thus these costs would largely be self-selected). However, these costs should be outweighed by improved return to work by employees.

Local government and state government as covered regulated entities, will be impacted in the same manner as persons required to comply with the rule as proposed.

Stephen W. Quick has determined that for each year of the first five years the rules as proposed are in effect, the public benefits anticipated as a result of enforcing the rules will be improved return to work performance in the Texas workers' compensation system and increased ability to monitor, coordinate with, and, if necessary, take action against providers whose claims are routinely Work Release Outlier Claims.

As noted, a timely return to work is important in minimizing the impact of the injury on the employee's current and long-term earning potential. To the extent that this is achieved, employees will benefit.

Although the focus of these rules primarily on work release and return to work, these rules can also effect cost containment while ensuring employee access to quality health care. Through use of treatment plans, employees may be prevented from being subjected to unnecessary medical care by assuring appropriate utilization of services and treatments. Any savings that result from elimination of unnecessary services or treatments should have a positive financial impact for employers who pay insurance premiums.

Another benefit of the proposed new rules to employees and employers is the assurance that injured employees are receiving appropriate and medically necessary treatment in a timely manner for their compensable injury in anticipation of a timely and appropriate return to work. The proposed rules will also assist in the prevention of unnecessary and potentially costly treatment. Further, a timely and appropriate work release helps the employer by minimizing the disruption to his work place and the need to find other methods to handle the work of the employee while he is off work.

Providers will benefit from knowing what standards their claims will be judged by and by having reminders about the status of their claims.

There will be some anticipated economic costs to persons who are required to comply with the new rules as proposed. No economic costs are anticipated for injured employees who have no requirements under the proposed new rules.

Insurance carriers and self-insured employers may experience minor costs associated with monitoring claims for work release and outlier status. However, the rules do not require carriers to use the return to work tools provided. Thus these costs would largely be self-selected. Further, carriers should already be monitoring their claims in some fashion in order to ensure timely and appropriate payment of income benefits and it should be relatively simple to put a reminder in the claim file as to when a claim is scheduled to become an "At Risk Claim" and/or a "Work Release Outlier Claims."

Health care providers who have claims that are Work Release Outlier Claims in which the carriers exercise their option to mandate Coordinated Case Management may experience additional administrative costs. Coordinated Case Management (as a form of preauthorization) does require additional work on the part of the health care provider. However, HB-2513 does require the Commission to provide for the review of medical care in claims in which guidelines for return to work are exceeded and these rules provide that. Further, since the requirement won't be imposed on all claims (as only outliers are eligible) nor will it be imposed on all eligible claims (as carriers have the discretion to impose it on a per claim basis), most providers should not be impacted financially.

Savings that may result from more efficient return to work monitoring and a reduction in unnecessary treatment should be reflected in the cost to provide workers' compensation coverage to employees and thus benefit employers and employees.

There will be no adverse economic impact on small businesses or on micro-businesses as a result of the proposed rules. There will be only a proportionate difference in the cost of compliance for small businesses and micro-businesses as compared to the largest businesses affected by the rule, including state and local government entities. The same basic processes and procedures apply, regardless of the size or volume of the business. The business size cost difference will be in direct proportion to the volume of business that falls under the purview of these proposed rules.

Comments on the proposal must be received by 5:00 p.m., December 3, 2001. You may comment via the Internet by accessing the commission's website at *http://www.twcc.state.tx.us* and then clicking on "Proposed Rules." This medium for commenting will help you organize your comments. You may also email your comments to *RuleComments@twcc.state.tx.us* or mail or deliver your comments to Nell Cheslock, Legal Services, Mailstop #4-D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH-35, Austin, Texas 78704-7491.

Commenters who wish to access the *Clinical Guidelines Tool* (CGT) published by International Rehabilitation Associates, Inc. d/b/a Intracorp may do so for a two-week trial period free of charge by accessing Intracorp's website at *www.intracorp.com* and selecting "B2B" (Business to Business) Tools and then selecting "claims toolbox." For a trial logon, scroll to the bottom of the page and follow the instructions to register for the claims toolbox. For additional information on accessing the claims toolbox contact the commission's Medical Review Division at 512/804-4851.

Commenters are requested to clearly identify by number the specific subsection and paragraph commented upon. The commission may not be able to respond to comments that cannot be linked to a particular proposed subsection. Along with your comment, it is suggested that you include the reasoning for the comment in order for commission staff to fully evaluate your recommendations. Unspecified comments submitted will not be addressed.

Based upon various considerations, including comments received and the staff's or commissioners' review of those comments, or based upon the commissioners' action at the public meeting, the rules as adopted may be revised from the rules as proposed in whole or in part. Persons in support of the rules as proposed, in whole or in part, may wish to comment to that effect.

A public hearing on this proposal will be held on November 14, 2001, at the Austin central office of the commission (Southfield Building, 4000 South IH-35, Austin, Texas). Those persons interested in attending the public hearing should contact the commission's Office of Executive Communication at (512) 804-4430 to confirm the date, time, and location of the public hearing for this proposal. The public hearing schedule will also be available on the commission's website at *http://www.twcc.state.tx.us*.

The amendment is proposed under: the Texas Labor Code 401.011, which contains definitions used in the Texas Workers' Compensation Act; the Texas Labor Code §401.024, which provides the Commission the authority to require use of facsimile or other electronic means to transmit information in the system; the Texas Labor Code §402.042, which authorizes the Executive Director to enter orders as authorized by the statute as well as to prescribe the form and manner and procedure for transmission of information to the Commission; the Texas Labor Code §402.061, which authorizes the commission to adopt rules necessary to administer the Act; the Texas Labor Code §408.021(a) that states an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed; the Texas Labor Code §408.023 (as created by HB-2600) and provides for the list of approved doctors and duties of the treating doctor; the Texas Labor Code §408.0231 (as created by HB-2600) that provides for the maintenance of the list of approved doctors and stipulates the provisions of sanctions and privileges relating to health care; the Texas Labor Code §406.010 that authorizes the commission to adopt rules regarding claims service; the Texas Labor Code §409.022, which requires a notice of refusal to specify the insurance carrier's grounds for disputing a claim and requires the reason to be reasonable; the Texas Labor Code §413.002, that requires the commission to monitor health care providers and carriers to ensure compliance with commission rules relating to health care including medical policies and fee guidelines; the Texas Labor Code §413.011 that requires the commission by rule to establish medical policies relating to necessary treatments for injuries and designed to ensure the quality of medical care and to achieve effective medical cost control and to enhance a timely and appropriate return to work; the Texas Labor Code §413.012, which requires the Commission to review and revise medical policies and fee guidelines at least every two years to reflect current medical treatment and fees that are reasonable and necessary; the Texas Labor Code §413.018 which requires the commission to provide for the review of medical care in claims in which guidelines for return to work are exceeded; the Texas Labor Code §413.0511 (as created by HB-2600) as it provides for the role of a Medical

Advisor at the commission; the Texas Labor Code §413.0512 (as created by HB-2600) which describes the functions of a medical quality review panel; the Texas Labor Code §414.007, that allows the review of referrals from the Medical Review Division by the Division of Compliance and Practices; and the Texas Labor Code §415.0035 that establishes that a provider or carrier commits an administrative violation by violating the Statute, rules, or a Commission decision or order and provides for penalties.

The proposed rule affects the following statutes: the Texas Labor Code §401.011, which contains definitions used in the Texas Workers' Compensation Act; the Texas Labor Code §401.024, which provides the Commission the authority to require use of facsimile or other electronic means to transmit information in the system; the Texas Labor Code §402.042, which authorizes the Executive Director to enter orders as authorized by the statute as well as to prescribe the form and manner and procedure for transmission of information to the Commission; the Texas Labor Code §402.061, which authorizes the commission to adopt rules necessary to administer the Act; the Texas Labor Code §408.021(a) that states an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed; the Texas Labor Code §408.023 (as created by HB-2600) and provides for the list of approved doctors and duties of the treating doctor; the Texas Labor Code §408.0231 (as created by HB-2600) that provides for the maintenance of the list of approved doctors and stipulates the provisions of sanctions and privileges relating to health care; the Texas Labor Code §406.010 that authorizes the commission to adopt rules regarding claims service; the Texas Labor Code §409.022, which requires a notice of refusal to specify the insurance carrier's grounds for disputing a claim and requires the reason to be reasonable; the Texas Labor Code §413.002, that requires the commission to monitor health care providers and carriers to ensure compliance with commission rules relating to health care including medical policies and fee guidelines; the Texas Labor Code §413.011 that requires the commission by rule to establish medical policies relating to necessary treatments for injuries and designed to ensure the quality of medical care and to achieve effective medical cost control and to enhance a timely and appropriate return to work; the Texas Labor Code §413.012, which requires the Commission to review and revise medical policies and fee guidelines at least every two years to reflect current medical treatment and fees that are reasonable and necessary; the Texas Labor Code §413.018 which requires the commission to provide for the review of medical care in claims in which guidelines for return to work are exceeded; the Texas Labor Code §413.0511 (as created by HB-2600) as it provides for the role of a Medical Advisor at the commission; the Texas Labor Code §413.0512 (as created by HB-2600) which describes the functions of a medical quality review panel; the Texas Labor Code §414.007, that allows the review of referrals from the Medical Review Division by the Division of Compliance and Practices; and the Texas Labor Code §415.0035 that establishes that a provider or carrier commits an administrative violation by violating the Statute, rules, or a Commission decision or order and provides for penalties.

§134.1101. General Work Release and Return to Work Definitions.

Definitions -- The following words and terms, when used in this title have the following meanings, unless the context clearly indicates otherwise:

(1) Activity Restrictions -- limitations on the employee's current ability to work caused by the compensable injury. These limitations can include, but are not limited to, restrictions on posture, motion, strength, time, etc.

(2) Alternate Duty Job -- a job different than the injured employee's (employee) job at the time of the injury but which matches the employee's current ability to work and Activity Restrictions. An alternate work job may be temporary or permanent and may be at the same or different wages than the employee earned prior to the injury.

(3) Modified Duty Job -- the employee's prior job that has been modified to match the employee's current ability to work and Activity Restrictions. A modified duty job may be temporary or permanent and may be at the same or different wages than the employee earned prior to the injury.

(4) Work Release Guideline (synonymous with "Return to Work Guideline" or "Lost Time Guideline") -- The Commission's Work Release Guideline adopted by the Commission in §134.1100 of this title (relating to Work Release Guideline).

(5) Work Release Status -- refers to whether an injured employee's compensable injury allows or prevents the employee from returning to work (and in what capacity). There are three levels of Work Release Status:

(A) Full Release -- indicates that the employee has no current Activity Restrictions relating to ability to work caused by the compensable workers' compensation injury. (Note - this is not necessarily equivalent to maximum medical improvement).

(B) Full Restriction -- indicates that the employee's workers' compensation injury prevents the employee from working in any capacity (Note - this should not be a long term status for most injuries).

(C) Restricted Release -- indicates that the employee has Activity Restrictions relating to ability to work caused by the compensable workers' compensation injury.

(i) If an employee is on a Restricted Release but the demands of his normal job do not exceed the Activity Restrictions, the employee can return to the normal job.

(ii) If the demands of the employee's normal job are beyond his Activity Restrictions, the employee can work in either an Alternate Duty Job or a Modified Duty Job that meets the Activity Restrictions if the employer offers the employee the opportunity.

§134.1102. Work Release Monitoring Definitions.

Definitions -- The following words and terms, when used in this title have the following meanings, unless the context clearly indicates otherwise:

(1) At Risk Claim -- a workers' compensation claim which is "at risk" of becoming a Work Release Outlier Claim. A claim shall be considered to be an "At Risk Claim" if the employee has not been given a Restricted Release or a Full Release to return to work by the At Risk Date.

(2) At Risk Date -- the At Risk Date is the date that is computed from the Work Release Guideline by adding the number of days listed in the "red flag" column on the "sedentary/light" physical work row on the appropriate Return to Work Goal Table (located in the commission's Work Release Guideline) to the date the employee began treatment. If the appropriate table does not include a specific number of days, the At Risk Date shall be 3 months following the date treatment began. Note - if the appropriate table is based upon surgical intervention or hospitalization, the appropriate number of days shall be added

to the end date of surgery/hospitalization rather than the very beginning of treatment.

(3) Return to Work Goal Tables -- Tables included on the "Disability" pages of the Work Release Guideline that provide goals for an employee to return to work based upon the employee's injury/illness type/extent and, sometimes, the general course of treatment(s) being used.

(A) The appropriate Return to Work Goal Table shall be used to identify the "At Risk Date" and the "Work Release Outlier Date."

(B) The appropriate table is the one that best describes the employee's injury/illness type/extent and, if applicable, treatment type.

(C) If the employee's workers' compensation injury includes several conditions/treatments (so that multiple tables are applicable), the table that provides the longest return to work goals shall be considered the appropriate table.

(4) Work Release Outlier Claim -- a workers' compensation claim in which the employee has not timely been given a Full Release to return to work.

(A) A claim shall be considered to be a "Work Release Outlier Claim" if the employee has not been given a Full Release to return to work by the Work Release Outlier Date.

(B) A claim can become a Work Release Outlier Claim as a result of one or more factors including but not limited to:

(i) complications with the employee's condition;

(ii) the employee's failure to respond to treatment;

(iii) an exaggeration of symptoms by the employee; and/or

(iv) the doctor's failure to fulfill his or her duty to timely release the employee to work.

(5) Work Release Outlier Date -- the Work Release Outlier Date is the date that is computed by adding the number of days listed in the "red flag" column on the "medium" physical work row on the appropriate Return to Work Goal Table to the date the employee began treatment. If the appropriate table does not include a specific number of days, the Work Release Outlier Date shall be 6 months following the date treatment began. Note - if the appropriate table is based upon surgical intervention or hospitalization, the appropriate number of days shall be added to the end date of surgery/hospitalization rather than the very beginning of treatment.

§134.1103. Work Release and Coordinated Case Management.

(a) This section implements the requirements of Texas Labor Code §413.018 which requires the Commission to provide for the periodic review of medical care (synonymous with "medical treatment" and "health care") provided in claims in which guidelines for expected or average return to work time frames are exceeded (Work Release Outlier Claims). The purpose of the review of medical care in Work Release Outlier Claims is to ensure that parties in the Texas workers' compensation system work together to provide the injured employee (employee) with reasonable and necessary medical care that will enable the employee to return to work at the earliest medically appropriate time.

(b) The Insurance Carrier's (carrier) and Health Care Provider's General Responsibilities relating to Work Release are described in this subsection.

(1) The carrier's responsibilities are as follows.

(A) The insurance carrier (carrier) should attempt to promote employee ability to work, timely and appropriate work releases, and employee return to work.

(B) Among the methods carriers are encouraged to use to promote timely and appropriate work releases and return to work are:

(i) facilitating communication between employers and treating doctors regarding modified or alternate duty jobs that the employer may have available for an employee;

(ii) tracking of work release status by using the Work Release Guideline and a claims management system to identify At Risk Claims and Work Release Outlier Claims;

(iii) contacting health care providers to inform them of the dates that claims would be considered at risk or outliers (so that the providers have that information early in the claim and can consider those expectations in their medical care);

(iv) communicating with health care providers regarding the medical care being provided to the employee and how it relates to enhancing the employee's ability to return to and/or retain employment;

(v) discussing an employee's work status with the treating doctor when the carrier believes that an employee's work status or activity restrictions are inappropriate based upon the employee's medical condition (possibly requesting a required medical examination/functional capacity examination when the carrier and treating doctor are unable to come to consensus); and

(vi) requiring treating doctors to take a more active role in Work Release Outlier claims by requiring Coordinated Case Management in accordance with subsection (c) of this section to occur in the form of monthly treatment plans to be preauthorized or concurrently reviewed by the carrier.

(C) When a carrier identifies a health care provider whose workers' compensation patients are routinely Work Release Outlier Claims, the carrier shall, in the form and manner prescribed by the Commission, provide the Commission with the identity of the provider and provide a list of related claims that were or are Work Release Outlier Claims.

(2) Health Care Provider responsibilities are as follows.

(A) The health care provider shall provide the employee all health care reasonably required by the nature of the injury as and when needed which:

(i) cures or relieves the effects naturally resulting from the compensable injury;

(ii) promotes recovery; and

(iii) enhances the ability of the employee to return to or retain employment.

(B) The health care provider shall also regularly evaluate the employee's work status and, at the earliest medically appropriate times:

(i) release the employee to return to work with Activity Restrictions (Restricted Release); and/or

(ii) release the employee to return to work without Activity Restrictions (Full Release). Note - it is possible that an injury was severe enough that the Activity Restrictions become permanent.

(C) Although nearly all health care providers in a claim should be involved in work release and employee return to work, it is

the treating doctor who is primarily responsible for ensuring timely and appropriate work release.

(D) A health care provider's responsibilities regarding evaluating an employee's Work Release Status and applicable Activity Restrictions are independent of whether the employer has an Alternate Duty Job or is willing to offer a Modified Duty Job which is consistent with the Activity Restrictions and abilities.

(c) This subsection relates to Work Release Outliers and Coordinated Case Management.

(1) When a claim becomes a Work Release Outlier Claim a carrier may require Coordinated Case Management (and otherwise may not do so).

(A) Coordinated Case Management involves the treating doctor actively coordinating with the other health care providers in the claim to identify an effective plan of treatment which must be reviewed by the carrier as a request for preauthorization and/or concurrent review.

(B) While under the requirements of Coordinated Case Management, all medical care (other than that provided in response to a medical emergency) must be pre-approved in the form of monthly treatment plans (unless another period is agreed upon between the carrier and the treating doctor). Treatment plans can include a proposed schedule of treatment that extends beyond one month.

(C) The carrier's authority to require Coordinated Case Management ends upon the claim no longer being a Work Release Outlier Claim (i.e., once the employee is given a Full Release to return to work).

(D) The carrier can release the treating doctor from the requirements of Coordinated Case Management by providing a written release to the treating doctor.

(2) To initiate Coordinated Case Management the carrier shall notify the treating doctor of the carrier's intent to require Coordinated Case Management in writing by verifiable means of delivery.

(A) The notification may be made no earlier than the At Risk Date.

(B) The notification shall:

(i) identify the identity of the employee whose claim is at risk of becoming a Work Release Outlier;

(ii) specify the Work Release Outlier Date;

(iii) explain that if the employee's claim reaches outlier status, all non-emergency medical care on the claim will require preauthorization and/or concurrent review in the form of monthly treatment plans (to be requested by the treating doctor); and

(iv) ask the doctor to evaluate the employee's condition in accordance with §129.5 of this title (relating to Work Status Reports) to evaluate the employee's current work release status (including applicable Activity Restrictions).

(C) Coordinated Case Management will become mandatory upon the later of the 10th working day following receipt of the notification to the treating doctor or the date the claim becomes a Work Release Outlier Claim.

(i) If the employee changes treating doctors prior to the date that Coordinated Case Management becomes mandatory, the carrier shall provide the written notification to the new treating doctor by verifiable means. Coordinated Case Management shall then become mandatory upon the later of: the 5th working day following provision of the notification to the new treating doctor or the date the claim becomes a Work Release Outlier.

(ii) If the employee changes treating doctors after the date that Coordinated Case Management becomes mandatory, the Commission shall inform the new treating doctor of the claim's status in this regard with the approval to change doctors.

(D) The carrier shall notify the Commission that a claim is under Coordinated Case Management within 7 days of the date that it becomes mandatory.

(3) If a dispute arises over whether a claim is a Work Release Outlier Claim (and thus, whether the carrier is entitled to require Coordinated Case Management), it shall be presumed that the claim is a Work Release Outlier Claim until there is a finding by the Commission or agreement to the contrary. A claim would most likely be found to not be a Work Release Outlier Claim if the carrier did not choose the appropriate table (and thus failed to identify the correct Work Release Outlier Date) or if there was a dispute regarding extent of injury (which could likewise relate to the appropriate table to be used to identify the Work Release Outlier Date).

(4) Treatment plans required by Coordinated Case Management shall be requested and responded to as a request for preauthorization and/or concurrent review under §134.600 of this title (relating to Preauthorization, Concurrent Review, and Precertification of Health Care). Requests should begin within 7 days of the employee's claim reaching outlier status and subsequent requests should be made at least 7 days prior to the expiration of a current plan to minimize the risk of disrupting treatment.

(5) Upon being informed that the carrier intends to require Coordinated Case Management, the treating doctor shall:

(A) inform all health care providers involved in a Work Release Outlier Claim of the mandatory treatment plan requirements; and

(B) coordinate all medical care with the carrier by requesting preauthorization and/or concurrent review for monthly treatment plans.

(6) Treatment plans under this section shall include:

(A) clinical information relating to the primary diagnosis and secondary diagnoses (if not related to primary diagnosis);

(B) current patient status and a narrative which specifically explains why the employee's medical condition has prevented the employee from being released to return to work in accordance with the Work Release Guideline;

(C) type of intervention/treatment, frequency of treatment, and expected duration of treatment;

(D) expected clinical response to treatment and specification of re-evaluation timeframe; and

(E) a description of how the plan will return the employee to work or improve the capacity of the employee to perform work, and an estimated date these improvements and/or return will be achieved.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106291
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 804-4287

♦ ♦ ♦

TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 356. GROUNDWATER MANAGEMENT

SUBCHAPTER A. GROUNDWATER MANAGEMENT PLAN CERTIFICATION

31 TAC §§356.1 - 356.6, 356.10

The Texas Water Development Board (board) proposes amendments to 31 TAC §§356.1 through 356.6 and new §356.10 concerning Groundwater Management Plan Certification. These amendments and the new section are proposed in response to Senate Bill 2, 77th Texas Legislature, Regular Session, 2001 and pursuant to the four-year rule review requirement of Texas Government Code §2001.039.

First, the board proposes to rename the chapter to Groundwater Management due to the fact that the board's responsibilities have been expanded by Senate Bill 2. The current title of Groundwater Management Plan Certification is too narrow and misleading given the board's new duties. The board further proposes to restructure the chapter into subchapter A, Groundwater Management Plan Certification, which will be composed of §§356.1-356.10, and subchapter B, Designation of Groundwater Management Areas, which will be composed of new sections not yet developed.

The board proposes changes to §356.1 to correct for the creation of the new subchapters. Section 356.1 currently states that it governs all of chapter 356 but, after the expansion of the chapter, it will only govern subchapter A. This revision will provide accuracy and avoid confusion.

The proposed amendments to §356.2 are intended to add and correct definitions of terms used in the subchapter. The board proposes a new term, "best available data," at §356.2(4), pursuant to Texas Water Code §36.1071. Section 36.1071(b) was amended by Senate Bill 2 to require groundwater conservation districts to develop management plans using the best available data. Texas Water Code §36.1071(h) was added by Senate Bill 2 to require the groundwater conservation districts to use the board's groundwater availability modeling information in conjunction with any available site-specific information provided by the district and acceptable to the executive administrator. The information described in §36.1071(h), in addition to any site-specific information maintained by the board, is the best information that will be available to groundwater conservation districts and will provide clear guidance to the groundwater conservation districts about what data should be utilized in developing management plans.

The board proposes to remove the definition for "management objectives," at §356.2(10), and move it to §356.5(a)(2) (relating to Required Content of Management Plan). This proposed change does not have a material impact on the rules and is merely done for clarification. Using the definition in the section where management objectives are required will make it easier to understand what is required. This change is based on comments received from groundwater conservation districts that have gone through the management plan certification process.

The board proposes to remove the definition of "performance standards," at §356.2(14), and move it to §356.5(a)(3) (relating to Required Content of Management Plan). This proposed change does not have a material impact on the rules and is merely done for clarification. Using the definition in the section where performance standards are required will make it easier to understand what is required. This change is based on comments received from groundwater conservation districts that have gone through the management plan certification process.

The board proposes to amend the definition of "projected water supply," at §356.2(14), to clarify that usable groundwater must be of an acceptable quality. Further, the board proposes to require the groundwater conservation districts to determine the usable amount of groundwater based on the best available data, as required by Senate Bill 2. This will provide consistency and predictability to the determinations. Lastly, the board proposes to amend the definition as it pertains to surface water to be the quantity based on full implementation of any applicable, approved regional water plan. Now that the first round of regional water planning is complete and all regional water plans have been approved, this provides the groundwater conservation districts with an accurate determination of surface water availability that can be used for their planning efforts. Not only will this make it easier for groundwater conservation districts to plan for the impact of surface water use in their districts, it will provide consistency between the management plan and regional water plans as they pertain to surface water.

The board proposes to remove the definition of "regional water plan," at §356.2(18), because the term "approved regional water plan" is already defined. This definition is duplicative and may cause confusion. For clarification, this second definition is proposed for removal. There will be no material impact from this proposed change.

The board proposes to remove the definition of "useable amount of groundwater," at §356.2(20), because the pertinent terms have been included in the definition of the term "projected water supply." This definition is duplicative and may cause confusion. For clarification, this definition is proposed for removal. There will be no material impact from this proposed change.

The proposed amendments to §356.3 are intended to remove expired language that no longer is necessary to the section. The deadline of September 1, 1998 for filing management plans with the board has past and is no longer applicable. There will be no material impact from this proposed change.

The proposed amendments to §356.4 are intended to comply with §36.1071(b), which was amended by Senate Bill 2. Section 36.1071(b) now requires groundwater conservation districts to forward their management plans to the appropriate regional water planning group for consideration in their planning process. The requirement for the management plan to be consistent with the approved regional water plan has been removed. Therefore, it is necessary to revise §356.4 to reflect these changes.

The board's proposed amendments remove the requirement for consistency with the approved regional water plans and instead require the groundwater conservation districts to forward their management plans for consideration.

The proposed amendments to §356.5 are intended to add clarity and comply with Senate Bill 2. The proposed change to §356.5(a) is intended to comply with Texas Water Code §36.1071(b), as amended by Senate Bill 2. This provision requires the groundwater conservation districts to develop their management plans using the best available data. The proposed amendment to §356.5(a) requires the districts to use the best available data when developing their management plans. The proposed revisions to §356.5(a)(1) are intended to comply with Texas Water Code §36.1071(a)(6) and (7), which were added by Senate Bill 2. These statutory provisions add requirements that groundwater conservation district management plans address drought conditions and conservation. These requirements are added at §356.5(a)(1)(F) and (G). The proposed revisions to §356.5(a)(2) are intended to clarify the paragraph. The proposed revisions add the definition of "management objectives" that has been proposed for removal from §356.2 (relating to Definitions of Terms). This proposed change is based on comments received from groundwater conservation districts that have gone through the management plan certification process. Further, the board proposes to add to §356.5(a)(2) that the desired future accomplishments and outcomes of the district must be the result of actions that can be taken by district staff or assigns. This is necessary because the board has received management plans that had objectives that depended on parties outside of the groundwater conservation district's control. Because management objectives should be achievable by the district, it is appropriate to add this limitation to the rule provision. The proposed amendments to §356.5(a)(3) move the definition of "performance standards" from the definitions of §356.2 to the substantive rule for clarification. It also splits the current §356.5(a)(2) into separate paragraphs to avoid confusion between management objectives and performance standards. There is no material impact from this proposed change. The proposed amendments to §356.5(a)(5) are intended for clarification. The language in §356.5(a)(5)(C) is proposed to mirror the language of Texas Water Code §36.1071(e)(3)(C). This will avoid confusion that has been caused by the language differences between these two provisions and will provide consistency for groundwater conservation districts. There is no material impact to the rules from this proposed change.

The proposed amendments to §356.6(a)(5) are intended to comply with §36.1071(b), Texas Water Code. As stated above, this statute has been amended to remove the requirement that groundwater conservation district management plans be consistent with approved regional water plans. Section 356.6(a)(5) currently contains the requirement that the plans be consistent. The board proposes to remove this language to be consistent with the revised law. However, Texas Water Code §36.1071(e)(4) continues to require that groundwater conservation district management plans address water supply needs in a manner not in conflict with the approved regional water plan. The board, therefore, proposes to continue to require, in §356.6(a)(5), that groundwater conservation districts identify any potential conflict between their management plans and approved regional water plans at the time the management plan is submitted to the board for certification.

The board proposes new §356.10 to comply with Texas Water Code §36.1072(g). This statutory provision was added by Senate Bill 2 to require the board to resolve conflicts that exist between a groundwater conservation district's management plan and the state water plan. Pursuant to this law, the board proposes §356.10 to provide a mechanism for groundwater conservation districts to petition the board to resolve a potential conflict between the district's certified management plan and the state water plan. The petition must be in writing and must state the specific nature of the conflict, the specific sections and provisions of the management plan and the state water plan that are in conflict, and the proposed resolution to the conflict. This information will assist the board in isolating the conflict and working more efficiently to resolve it. Within 30 days of receiving the petition, the executive administrator will determine if a conflict exists and, if so, coordinate a resolution between the affected parties. Coordination may include requiring the affected parties to respond in writing to the petition, meeting with the affected parties for informal mediation, or arranging formal mediation. If the affected parties cannot resolve the conflict within 150 days from receipt of the groundwater conservation district's petition, then the executive administrator will bring the issue to the board at a public meeting for the board to adopt a resolution to the conflict. The board may require the groundwater conservation district to amend its management plan to resolve the conflict. If the groundwater conservation district is required to amend its management plan, then the board's certification of the plan will be suspended until the groundwater conservation district made the revision, following a public hearing. Either the groundwater conservation district or the regional water planning group may request that the board include in the state water plan a discussion of the conflict and its resolution.

Ms. Melanie Callahan, Director of Fiscal Services, has determined that for the first five-year period these changes are in effect there will be no additional fiscal implications on state and local government as a result of enforcing or administering the rules.

Ms. Callahan has also determined that for the first five years the changes as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be to assure groundwater conservation district management plans that developed using the best available data and that are subject to review to resolve conflicts. Ms. Callahan has determined there will be no increased economic cost to small businesses or individuals required to comply with the sections as proposed because the provisions apply only to regional water planning groups and political subdivisions involved in the regional water planning process.

Comments on the proposed amendments and new section will be accepted for 30 days following publication and may be submitted to Phyllis Thomas, Director, Research & Planning Fund Grants Management, (512) 463-3154, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711-3231, by email at Phyllis.Thomas@twdb.state.tx.us, or by fax at (512) 463-9893.

The amendments and new section are proposed under the authority of Texas Water Code §6.101.

The statutory provisions affected by the proposed amendments and new sections are Texas Water Code, Chapter 36, §36.1071 and §36.1072

§356.1. Scope of <u>Subchapter</u>[~~Chapter~~].

This subchapter governs [~~chapter shall govern~~] the board's procedures for reviewing and certifying management plans as administratively complete.

§356.2. Definitions of Terms.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Words defined in Texas Water Code, Chapter 36 that are[~~and~~] not defined here shall have the meanings provided in Chapter 36.

(1) - (3) (No change)

(4) Best available data--Most recent groundwater availability modeling information or other site specific information as available and provided by the executive administrator and any available site- specific information provided by the groundwater conservation district that is acceptable to the executive administrator.

(5) [~~(4)~~] Board--Texas Water Development Board.

(6) [~~(5)~~] Conjunctive surface water management issues--Issues relating to the active use of both surface water and groundwater to achieve increased water supply or enhanced water quality.

(7) [~~(6)~~] District--Any district or authority created under Texas Constitution, Article III, §52 or Article XVI, §59 that has the authority to regulate the spacing of water wells, the production from water wells, or both.

(8) [~~(7)~~] Estimates--Calculations using best available data and methodologies specified in the management plan such that the quantifications will be reasonable for use by the district and can be tracked over time.

(9) [~~(8)~~] Executive administrator--The executive administrator of the board.

(10) [~~(9)~~] Management goals--The qualitative and quantitative ends toward which a district directs its efforts.

[~~(10) Management objectives--Specific, quantifiable, and time-based statements of desired future accomplishments or outcomes, each linked to a management goal, which set the individual priority for district strategies.~~]

(11) - (12) (No change)

[~~(13) Performance standards--Indicators or measures, each of which is linked to a management objective, used to evaluate effectiveness and efficiency of district activities by quantifying the results of actions and the impact of the results of activities. Evaluation of the effectiveness of district activities measures the accomplishments of the district. Evaluation of the efficiency of district activities measures how well resources are used to produce an output, such as the amount of resources devoted per unit of accomplishment.~~]

(13) [~~(14)~~] Projected water demand--The quantity of water needed per annum for beneficial use during the period covered by the management plan. The demands shall be projected for the types of use that are included in the state water plan. Each type of use may be subdivided into sub-types by the district.

(14) [~~(15)~~] Projected water supply--The usable amount of groundwater of acceptable quality that is available per annum as determined by the district using the best available data [~~under the district's management plan~~] and the quantity of surface water available per annum during the period covered by the management plan based on full implementation of any applicable, approved regional water plan.

(15) [~~(16)~~] Recharge--The addition of water from precipitation or runoff by seepage or infiltration to an aquifer from the land surface, streams, or lakes directly into a formation or indirectly by way of leakage from another formation.

[~~(17) Regional water plan -- Regional water plan developed by a regional water planning group in each regional water planning area as provided by Texas Water Code, §16.053.~~]

(16) [~~(18)~~] Surface water management entities--Political subdivisions as defined by Texas Water Code, Chapter 15, and identified from Texas Natural Resource Conservation Commission records which are granted authority to store, take, divert, or supply surface water either directly or by contract under Texas Water Code, Chapter 11, for use within the boundaries of a district.

[~~(19) Usable amount of groundwater--The quantity of groundwater of acceptable quality that is contained within the portion of an aquifer covered by a district's management plan and which is economically and legally retrievable for beneficial use.~~]

§356.3. Required Management Plan.

As required by Texas Water Code, §36.1071 and §36.1072, a district shall submit to the executive administrator a management plan that meets the requirements of §356.5 of this title (relating to Required Content of Management Plan). The management plan shall be submitted [~~by existing districts not later than September 1, 1998. For districts created after or which require a confirmation election after September 1, 1997, the management plan shall be submitted~~] not later than two years after the creation of the district or, if the district requires confirmation, not later than two years after the election confirming the district. The district may review the plan annually, and shall readopt the plan with or without revisions at least once every five years.

§356.4. Sharing [~~Consistency~~] with Regional Water Planning Groups [~~Plans~~].

For management [~~Management~~] plans certified [~~developed~~] after January 5, 2002, the district shall forward the plan to the chair of each regional water planning group with territory within the boundaries of the district for consideration in their planning process. [~~the board approval of a regional water plan, or amendments to management plans developed after the approval of a regional water plan must be consistent with the approved regional water plan for each region in which any part of the district is located. If approval of a regional water plan makes the management plan inconsistent, the district shall revise its management plan within the five-year rotation specified in.§356.3 of this title (relating to Required Management Plan).~~]

§356.5. Required Content of Management Plan.

(a) The executive administrator shall certify a management plan as administratively complete if it uses a planning period of at least ten years, was developed using the best available data, and contains the following:

(1) management goals, as applicable:

(A) - (C) (No change)

(D) addressing conjunctive surface water management issues; [~~and~~]

(E) (No change)

(F) addressing drought conditions, and

(G) addressing conservation;

(2) [~~performance standards and~~] management objectives that the district will use to achieve the management goals in paragraph (1) of this subsection. Management objectives are specific, quantifiable, and time-based statements of desired future accomplishments or outcomes, each linked to a management goal, which set the individual

priority for district strategies. Each desired future accomplishment or outcome must be the result of actions that can be taken by district staff or assigns;

(3) performance standards for each management objective. Performance standards are indicators or measures used to evaluate the effectiveness and efficiency of district activities by quantifying the results of actions. Evaluation of the effectiveness of district activities measures the accomplishments of the district. Evaluation of the efficiency of district activities measures how well resources are used to produce an output, such as the amount of resources devoted per unit of accomplishment;

(4) [~~(3)~~] actions, procedures, performance, and avoidance, necessary to effectuate the management plan, including specifications and proposed rules, all specified in as much detail as possible; and

(5) [~~(4)~~] estimates of:

(A) - (B) (No change)

(C) the annual amount of recharge, if any, to the groundwater resources within the district and how[~~annual amount of additional~~] natural or artificial recharge may be increased[~~that could result from implementation of feasible methods for increasing the natural or artificial recharge~~]; and

(D) (No change)

(6) [~~(5)~~] details of how the district will manage groundwater supplies in the district, including a methodology by which a district will track its progress on an annual basis in achieving its management goals.

(b) - (d) (No change)

§356.6. Plan Submittal.

(a) A district requesting review and certification of the administrative completeness of its management plan shall submit to the executive administrator the following:

(1) - (4) (No change)

(5) identification of any potential[~~evidence of consistency with and any~~] conflict between the proposed management plan and an approved regional water plan for each region in which any part of the district is located, if such regional water management plan has been approved by the board. To meet the requirements of this paragraph, the district shall send, by certified mail, return receipt requested, to the chair of each regional water planning group formed under Texas Water Code, §16.053(c) for each region in which any part of the district is located, a letter asking the regional water planning group to review the management plan and [~~for consistency with the regional water plan, and asking the regional water planning group to~~] specify any areas of conflict between the management plan and the regional water plan. The district shall provide to the board a copy of any comments on the management plan provided by the regional water planning group. The executive administrator, with input from the regional water planning groups, will determine if there are any conflicts between the management plan and the regional water plans.

(b) (No change)

§356.10. Possible Conflicts with State Water Plan.

(a) A person with a legally defined interest in groundwater in a district or the regional water planning group may file a written petition with the board stating that a conflict requiring resolution may exist between the district's certified groundwater conservation district management plan developed under Texas Water Code, §36.1071, and the state water plan developed under Texas Water Code, §16.051. A copy of the petition shall be provided to the district. The petition must state:

(1) the specific nature of the conflict;

(2) the specific sections and provisions of the certified management plan and the state water plan that are in conflict, and

(3) the proposed resolution to the conflict.

(b) Within 30 days of receiving the petition, if the executive administrator determines that a conflict does exist, the executive administrator will facilitate coordination between the affected parties. Coordination may include any of the following processes:

(1) requiring the affected parties to respond to the petition in writing;

(2) meeting with representatives from the affected parties to informally mediate the conflict; and/or

(3) coordinating a formal mediation session between representatives of the affected parties.

(c) The executive administrator will inform the parties how long they have to attempt to resolve the conflict. If the parties do not reach resolution in that time period, the executive administrator will recommend a resolution to the conflict to the board. Before presenting the issue to the board, the executive administrator will provide the affected parties 30 days notice. The board shall adopt a resolution to the conflict at a public meeting. If the board finds that a conflict exists, the board shall adopt a resolution to the conflict at a public meeting. Resolution may include requiring a revision to the groundwater conservation district's certified management plan or consolidating the resolution with an action being taken by the board pursuant to §357.15 of this title (relating to Interaction with Groundwater Conservation District Management Plans)

(d) If the board requires a revision to the groundwater conservation district's certified management plan, the board shall suspend the certification of the plan and provide information to the groundwater conservation district on what revisions are required and why. The groundwater conservation district shall prepare any revisions to its plan required by the board and hold, after notice, at least one public hearing at a central location within the district. The groundwater conservation district shall consider all public and board comments, prepare, revise, and adopt its plan, and submit the revised plan to the board for certification pursuant to this subchapter.

(e) At the request of either the groundwater conservation district or the affected regional water planning group, the board shall include in the state water plan a discussion of the conflict and its resolution.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 18, 2001.

TRD-200106288
Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: December 12, 2001
For further information, please call: (512) 463-7981

♦ ♦ ♦

CHAPTER 357. REGIONAL WATER PLANNING GUIDELINES

31 TAC §§357.2, 357.7, 357.8, 357.11, 357.14, 357.15

The Texas Water Development Board (board) proposes amendments to 31 TAC §§357.2, 357.7, 357.8, 357.11, and 357.14 and new §357.15, concerning Regional Water Planning Guidelines. These amendments and new sections are proposed in response to Senate Bill 2, 77th Legislature, Regular Session, 2001 and pursuant to the four-year rule review requirement of Texas Government Code §2001.039.

The proposed amendments to §357.2(4) and (5) are intended to remove definitions of terms that are no longer used in the chapter. The board determined in the first round of regional water planning that there is no need to separate water needs into long-term and near-term needs. Therefore, it proposes to remove these terms. This will not have a material impact on the regional planning process.

The board proposes to amend §357.2(7) for clarification to the term "regional water plan." The board proposes to amend the definition to state that a regional water plan is the plan adopted or amended by a regional water planning group pursuant to Texas Water Code §16.053 and this chapter. This removes the term "approved" from the definition, which is appropriate because the regional water planning group does not approve the plan. This proposed amendment will not have a material impact on the rules.

The proposed amendments to §357.7(a)(1) serve two purposes. First, the board proposes adding subparagraph labels to elements of a regional water planning area description in order to improve readability of the paragraph and properly organize it. This proposed change has no impact on the rule. The board also proposes to add information on water pipelines and other facilities as a required element of the regional water planning area, at §357.7(a)(1)(M). This is intended to comply with Texas Water Code §16.053(e)(3)(D). Senate Bill 2 amended §16.053(e)(3)(D) to require the regional water plans to identify information on water pipelines and other facilities that can be used for water conveyance, including, but not limited to, currently used and abandoned oil, gas, and water pipelines. The proposed amendments to §357.7(a)(1)(M) add this information as a required part of the regional water plans. Because this information describes certain water transportation abilities within the region, adding the requirement to §357.7(a)(1) is appropriate and contributes to a more thorough description of the region that is directly relevant to planning decisions.

The board proposes to amend §357.7(a)(5) for clarification. The subsection currently requires regional water plans to include plans to be used during a drought of record. The term "plan" in this subsection creates confusion with the term "regional water plan." Therefore, the board proposes to change the word "plan" to "water management strategies," which is more accurate and appropriate. Due to this proposed change and also consistent with elimination of the long-term planning for scenarios that is proposed in §357.7(a)(9), the reference to water management strategies in the subsection is not necessary and is proposed for deletion. This proposed change does not materially impact the rules or the regional water planning process.

The board proposes to amend §357.7(a)(7)(A) to assure compliance with Texas Water Code §11.085. Section 11.085 requires applicants for interbasin transfer permits to develop and implement a water conservation plan that will result in the highest practicable level of water conservation and efficiency achievable within the jurisdiction of the applicant. In the first round of regional water planning, several regional water plans had water management strategies that recommended that water user groups and wholesale water providers obtain water from new interbasin transfers. It is appropriate that these recommendations are analyzed based on these requirements for water conservation so that the planning process more closely considers the realities of permitting. This analysis will provide a more executable water plan.

The board proposes amendments to §357.7(a)(8)(A) to comply with Texas Water Code §16.053(h)(7)(C) which requires the regional water plans to be consistent with long-term protection of the state's water resources, agricultural resources, and natural resources as embodied in the guidance principles found in Chapter 358 of this title (relating to State Water Planning Guidelines). Section 357.7(a)(8)(A) currently requires the regional water planning groups to evaluate all water management strategies determined to be potentially feasible by reporting on the quantity, reliability, and cost of water delivered or treated and environmental factors for the water. The proposed amendments would also require such analysis based on impacts on agricultural resources. Combined with the existing language in §357.7(a)(7) regarding water conservation, the language regarding water resource, agricultural and natural resource, and socioeconomic impacts in §357.7(a)(8)(B), (C), and (G), and the proposed language in §357.7(a)(9) and (13), these proposed amendments will require the regional water planning groups to develop regional water plans to be consistent with long-term protection of the state's water resources, agricultural resources, and natural resources.

The proposed new §357.7(a)(8)(H) are intended to comply with Texas Water Code §16.053(e)(3)(D). This statutory provision requires the regional water planning groups to identify information on water pipelines and other facilities that can be used for water conveyance, including, but not limited to, currently used and abandoned oil, gas, and water pipelines. The proposed amendments to §357.7(a)(1)(M) add this information as a required part of the description of the regional water planning area. The proposed amendment to §357.7(a)(8)(H) will require the regional water planning groups to consider how the pipelines and facilities they have identified pursuant to §357.7(a)(1)(M) can be used for water conveyance. These changes will comply with Texas Water Code §16.053(e)(3)(D) and will ensure that the regional water plans consider utilizing all available resources within the region.

Proposed amendments to §357.7(a)(9) are intended to accomplish two purposes. First, the proposed changes are intended to comply with Texas Water Code §16.053(h)(7)(C) which requires the regional water plans to be consistent with long-term protection of the state's water resources, agricultural resources, and natural resources as embodied in the guidance principles found in Chapter 358 of this title (relating to State Water Planning Guidelines). The proposed amendments to §357.7(a)(9) require the regional water planning groups to select cost effective water management strategies that are environmentally sensitive and that provide long-term protection of agricultural resources unless the regional water planning group demonstrates that the adoption of such a strategy is not appropriate. These proposed changes will ensure compliance with Texas Water Code §16.053(h)(7)(C). Second, the proposed changes are intended to remove the terms "near-term" and "long-term" from the water needs analysis. As stated previously, the board determined in the first round of regional water planning that dividing water needs into near- and long-term was unnecessary.

The proposed change to remove these terms will not materially affect the rules or the planning process.

The proposed amendment to add §357.7(a)(12) is intended to comply with Texas Water Code §16.053(e)(8). Section 16.053(e)(8) was added by Senate Bill 2 to require the regional water plans to describe the impact of proposed water projects on water quality. The proposed amendments to §357.7(a)(12) add this requirement as a necessary component of regional water plans. The proposed amendments will require the regional water planning groups to provide a qualitative description of the major impacts of recommended water management strategies on key parameters of water quality. The parameters will be selected by the regional water planning groups because they are in the best position to determine the factors that are important to water quality for the water sources in their regions. The comparison to current conditions provides a picture of the actual impacts of planned strategies against existing quality, which will show the actual change that would occur. This analysis augments existing requirements to develop water management strategies that protect the environment and will incorporate a water quality component.

The proposed amendment to add §357.7(a)(13) are intended to comply with Texas Water Code §16.053(h)(7)(C) which requires the regional water plans to be consistent with long-term protection of the state's water resources, agricultural resources, and natural resources as embodied in the guidance principles found in Chapter 358 of this title (relating to State Water Planning Guidelines). The guidance principles are also elements of §357.5 of this title (relating to Guidelines for Development of Regional Water Plans) and §357.7. The amendments to §357.7(a)(13) require the regional water planning groups to describe how they have made their plans consistent with the guidance principles, as required by §357.14 of this title (relating to Approval of Regional Water Plans by the Board), which sets out the rule provisions that the regional water planning groups must comply with to meet the requirements Texas Water Code §16.053(h)(7)(C). By having this description in the regional water plans, the board will be able to more clearly ascertain compliance with Texas Water Code §16.053(h)(7)(C) and will provide the public with a clear description of the water resources, agricultural resources, and natural resources protections in each regional water plan.

The proposed new §357.7(a)(14) is intended to comply with Texas Water Code §16.053(q), which was added by Senate Bill 2. This statutory provision requires the regional water planning groups to examine the financing needed to implement the water management strategies and projects identified in their most recent approved regional water plans. Proposed §357.7(a)(14) requires this information to be a chapter of the regional water plan. This will enable the regional water planning groups to comply with Texas Water Code §16.053(q) and will provide political subdivisions and the public with plans that have considered the financing implications of the recommended water management strategies. The consideration of how local governmental entities will pay for water infrastructure projects identified in the regional water plans will mean the plans have a greater chance of successful implementation.

The proposed amendment to add new §357.7(c) and (d) are intended to comply with Texas Water Code §16.053(h)(7)(B), which was amended by Senate Bill 2 to require the regional water plans to include water conservation practices and drought management measures that incorporate, at a minimum, the provisions of Texas Water Code §11.1271 and §11.1272. These statutory provisions require applicants for new and amended water rights to submit a water conservation plan and for wholesale and retail public water suppliers and irrigation districts to develop drought contingency plans consistent with applicable regional water plans. The proposed amendments to §357.7(a)(7)(A) and (B) require the regional water planning groups to include a model water conservation plan and a model drought contingency plan in their regional water plans. These models will serve as examples for other persons and entities that must comply with Texas Water Code §11.1271 and §12.1272.

The proposed amendment to add §357.8(c) is intended to comply with Texas Water Code §16.053(e)(7), which was added by Senate Bill 2. This addition to the Texas Water Code requires regional water planning groups to assess the impact of their plans on unique river and stream segments identified in their plans or designated by the legislature as having a unique ecological value pursuant to §16.051(f). The addition of subsection (c) to §357.8 complies with Texas Water Code §16.053(e)(7) by requiring the regional water planning groups to assess the impact of their plans on the flows important to the river or stream segment, as determined by the regional water planning group. It is appropriate for the regional water planning groups to determine which flows are important to the river or stream segment because they are in the best position to obtain that information. The analysis is based on the conditions described in the regional water plans and assumes full implementation of all recommended water management strategies.

The proposed amendments to §357.11(f) are merely to rearrange the subsection, which is proposed to be divided into two subsections. Section 357.11(f) contains only language that was in the existing subsection. There is no material impact from this proposed change.

The proposed addition of §357.11(g) takes the remaining language from subsection 357.11(f) and inserts additional language to comply with Texas Water Code §16.054(d). Senate Bill 2 amended §16.054(d) to provide a mechanism for political subdivisions to request regional water planning groups consider specific changes to their regional water plans based on changed conditions or new information. If the regional water planning group agrees that a change is necessary, it shall then amend its regional water plan. If the regional water planning group disagrees that a change is needed and does not amend its regional water plan as requested, the political subdivision may request that the board review the issue and consider changing the board-approved regional water plan. The board proposes amendments to §357.11(f) in order to comply with this statutory requirement. The proposed resolution process will require the political subdivision to submit a written petition to the board to review the issue. The board will then coordinate a resolution between the regional water planning group and the political subdivision, if necessary. If no resolution is reached, the board may alter the approved regional water plan and the state water plan as necessary.

Changes are proposed to §357.14(2)(B) to comply with Texas Water Code §16.053(h)(7)(B). This statute was amended by Senate Bill 2 to require regional water plans to include water conservation practices and drought management measures incorporating, at a minimum, the provisions of Texas Water Code §11.1271 and §11.1272. The requirements of these statutory provisions have been proposed for addition to §357.7(c) and (d)

(relating to Regional Water Plan Development). The addition of §357.14(2)(B) will require these practices and measures of §357.7(c) and (d) be incorporated into the regional water plans in order for the board to approve them.

The board proposes adding §357.14(2)(C) to comply with Texas Water Code §16.053(h)(7)(C). This statutory provision was amended by Senate Bill 2. It requires the regional water plans to be consistent with long-term protection of the state's water resource, agricultural resources, and natural resources as embodied in the guidance principles adopted by the board in Chapter 358 of this title relating the State Water Plan. The board proposes adding §357.14(2)(C) to require that the regional water plans be consistent with the principles in Chapter 358 of this title in order for the board to approve them, as now required by the Texas Water Code. The section states the standard by which the board will judge the consistency of the regional water plans with long-term protection of the water resources, agricultural resources, and natural resources. If the regional water planning group has complied with other parts of the board rules in compiling the plan, it will comply with this consistency requirement since those provisions are designed to assure the analysis and decisions needed for long-term resource protection.

The board proposes new §357.15 to comply with Texas Water Code §16.053(p). This subsection of §16.053 was added by Senate Bill 2. Section 16.053(p) requires the board to have a process for handling potential conflicts between groundwater conservation district management plans and regional water plans. Pursuant to this law, the board proposes §357.15 to provide a mechanism for groundwater conservation districts to petition the board to assist with a potential conflict between the district's certified management plan and a board-approved regional water plan. The petition must be in writing and must state the specific nature of the conflict, the specific sections and provisions of the management plan and regional water plan that are in conflict, and the proposed resolution to the conflict. This information will assist the board in isolating the conflict and working more efficiently to resolve it. Within 30 days of receiving the petition, the executive administrator will determine if a conflict exists and, if so, coordinate a resolution. Coordination may include requiring the regional water planning group to respond in writing to the petition, meeting with the regional water planning group and groundwater conservation district for informal mediation, or arranging formal mediation. If the groundwater conservation district and the regional water planning group cannot resolve the conflict within 150 days from receipt of the groundwater conservation district's petition, then the executive administrator will bring the issue to the board at a public meeting for the board to adopt a resolution to the conflict. The board may require the groundwater conservation district, the regional water planning group, or both to amend their plans to resolve the conflict. If the groundwater conservation district is required to amend their management plan, then the board's certification of the plan will be suspended until the groundwater conservation district has revised its management plan, following a public hearing. If the regional water planning group is required to amend its regional water plan, the board's approval of the plan will be suspended until the regional water planning group complies with the amendment process set out in Chapter 357. Either the groundwater conservation district or the regional water planning group may request that the board include in the state water plan a discussion of the conflict and its resolution.

Ms. Melanie Callahan, Director of Fiscal Services, has determined that for the first five-year period these changes are in effect there will be fiscal implications as a result of enforcement and administration of the sections. The estimated effect on state government from the provisions of Senate Bill 2 addressed in these rule provisions is between $67,800 and $88,800 for each year of the first five years the bill and rules are in effect, based on providing grants to the regional water planning groups for the development of regional water plans, the costs of providing technical assistance by board staff, and other board administrative costs of supporting the regional planning efforts. These additional costs will be paid for with the existing resources allocated to the board for the second round of regional water planning.

Specifically, the board estimates that there are fiscal implications to the state from the changes required by proposed §357.7(a)(7)(A). Currently, the regional water plans recommend interbasin transfers for approximately 217 water user groups. Based on costs from the first round of regional water planning and the costs associated with the current effort to perform an infrastructure survey, the board estimates that the proposed requirement to perform a water conservation analysis, pursuant to Texas Water Code §11.085(l), will cost an additional $400 per water user group. This amounts to approximately $86,800 total for the next five years, or $17,360 per year.

The board also estimates that changes required by Senate Bill 2 to §357.7(a)(14) have a fiscal impact to the state through increased costs for preparing regional water plans. Proposed §357.7(a)(14) requires regional water planning groups to consider the financing needed to implement the water management strategies and projects identified in their regional water plans. To comply with this provision, the regional water planning groups will have to survey the political subdivisions for information on how they propose to pay for water infrastructure projects identified in the plans. The board estimates there are 670 political subdivisions in the state and the cost of each survey is approximately $160. Since regional water planning is a five-year cycle, this means the five-year cost will be approximately $107,200, or approximately $21,440 per year for the first five years these provisions are in effect as proposed.

Changes required by Senate Bill 2 to §357.7(a)(8)(H) and §357.7(c) and (d) also have fiscal impact to the state. The proposed amendments to §357.7(a)(8)(H) are estimated to cost between $13,000 and $34,000 per year for the next five years. This proposed change requires the regional water planning groups to consider water pipelines and other facilities that can be used for water conveyance when evaluating feasible water management strategies. The result of this consideration will be in the form of whether or not existing pipelines and water conveyance facilities can be used as part of a water management strategy. In the first round of regional water planning, the cost of evaluating water management strategies generally ranged from approximately $5,000 to $27,500. There are 51 major water conveyance projects identified and recommended in the current approved regional water plans. These recommendations could potentially be reassessed under the proposed changes to consider the availability of existing water pipelines and conveyance facilities. It is estimated, based on the work needed to reassess these 51 strategies, that it will cost between $65,000 and $170,000 for the five year period after these changes are implemented.

The proposed amendments to §357.7(c) and (d), as required by Senate Bill 2, require the regional water planning groups to

include water conservation practices and drought management measures that incorporate, at a minimum, the provisions of Texas Water Code §11.1271 and §11.1272. This proposed change in the rules is estimated to increase the cost to the state for regional water planning by $5,000 per region for a total additional cost of $80,000 for the entire state over the five year period after these changes are implemented. There is, therefore, an estimated cost of $16,000 per year as a result of these changes for the first five years they are in effect.

Ms. Callahan has determined that for the first five years the changes as proposed are in effect, there will be no cost to local government but there will be a benefit in the form of regional water plans that are more comprehensive, include more detail about water conservation and drought management, and subject to review by the board to resolve potential conflicts with local governmental entities.

Ms. Callahan has also determined that for the first five years the changes as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be to assure regional water plans that are more comprehensive, include more detail about water conservation and drought management, and subject to review to resolve conflicts. This will provide the public with regional water plans that contain greater detail. Ms. Callahan has determined there will be no increased economic cost to small businesses or individuals required to comply with the sections as proposed because the provisions apply only to regional water planning groups and political subdivisions involved in the regional water planning process.

Comments on the proposed amendments and new section will be accepted for 30 days following publication and may be submitted to Phyllis Thomas, Director, Research & Planning Fund Grants Management, (512) 463-3154, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711-3231, by email at Phyllis.Thomas@twdb.state.tx.us, or by fax at (512) 463-9893.

The amendments and new section are proposed under the authority of Texas Water Code §6.101.

The statutory provisions affected by the proposed amendments and new sections are Texas Water Code, Chapter 16, §16.053 and §16.054.

§357.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Words defined in the applicable provisions of the Texas Water Code, Chapter 16, and not defined here shall have the meanings provided in Chapter 16.

(1) -(3) (No change)

~~[(4) Long term water needs-Those needs which must be met by implementation of water management strategies within the next 30 to 50 years based on federal census years (2040, 2050, etc).]~~

~~[(5) Near term water needs-Those needs which must be met by implementation of water management strategies within the next 30 years based on federal census years (2000, 2010, 2020, 2030, etc).]~~

(4) [~~(6)~~] Political subdivision--City, county, district or authority created under the Texas Constitution, Article III, §52, or Article XVI, §59, any other political subdivision of the state, any interstate compact commission to which the state is a party, and any nonprofit water supply corporation created and operating under Acts of the 43rd Legislature, 1933, 1st Called Session, Chapter 76, (Vernon's Texas Civil Statutes, Article 1434a).

(5) [~~(7)~~] Regional water plan--The plan adopted or amended by [~~Plan or amendment to an adopted or approved regional water plan developed by~~]a regional water planning group [~~for a regional water planning area~~]pursuant to the Texas Water Code, §16.053 and this chapter.

(6) [~~(8)~~] Retail public utility--Any person, corporation, public utility, water supply or sewer service corporation, municipality, political subdivision or agency operation, maintaining, or controlling in this state facilities for providing potable water service or sewer service, or both, for compensation.

(7) [~~(9)~~] State water plan--The most recent state water plan adopted by the board under the Texas Water Code, Chapter 16.

(8) [~~(10)~~] Wholesale water provider--Any person or entity, including river authorities and irrigation districts, that has contracts to sell more than 1000 acre-feet of water wholesale in any one year during the five years immediately preceding the adoption of the last regional water plan. The regional water planning groups shall include as wholesale water providers other persons and entities that enter or that the regional water planning group expects or recommends to enter contracts to sell more than 1000 acre-feet of water wholesale during the planning period.

§357.7. Regional Water Plan Development.

(a) Regional water plan development shall include the following:

(1) description of the regional water planning area including:

(A) wholesale water providers,

(B) current water use,

(C) identified water quality problems,

(D) sources of groundwater and surface water including major springs,

(E) major demand centers,

(F) agricultural and natural resources,

(G) social and economic aspects of the regional water planning area including information on current population and primary economic activities including businesses dependent on natural water resources,

(H) initial assessment of current preparations for drought within the regional water planning area,

(I) summary of existing regional water plans,

(J) summary of recommendations in state water plan,

(K) summary of local water plans, [~~and~~]

(L) any identified threats to the agricultural and natural resources of the regional water planning area due to water quantity problems or water quality problems related to water supply, and

(M) information on water pipelines and other facilities that the regional water planning group determines are or could be used for water conveyance, including, but not limited to currently used and abandoned oil, gas, and water pipelines. This information will be developed from data provided by the board from its pipeline and facility reports received pursuant to §358.6 of this title (relating to Pipeline and Facility Reports), data available from the Railroad Commission

of Texas, and any other data gathered by the regional water planning groups;

(2) - (4) (No change)

(5) using the water supply needs identified in paragraph (4) of this subsection, water management strategies[~~plans~~] to be used during the drought of record to provide sufficient water supply to meet the needs identified in paragraph (4) of this subsection [~~and in accordance with water management strategies and scenarios described in paragraph (9) of this subsection~~] as follows:

(A) - (C) (No change)

(6) (No change)

(7) evaluation of all water management strategies the regional water planning group determines to be potentially feasible, including:

(A) water conservation practices. The executive administrator shall provide technical assistance to the regional water planning groups on water conservation practices. The regional water planning group must consider water conservation practices for each need identified in paragraph (4) of this subsection. If the regional water planning group does not adopt a water conservation strategy for a need, it must document the reason. For each water user group or wholesale water provider that is to obtain water from a new unpermitted interbasin transfer, the regional water planning group shall include a conservation water management strategy, pursuant to Texas Water Code §11.085(1), that will result in the highest practicable level of water conservation and efficiency achievable unless the transfer will meet one of the exceptions in Texas Water Code §11.085(v). The regional water planning group shall determine and report the projected water use in gallons per capita per day based on its determination of the highest level of water conservation and efficiency achievable. The regional water planning group shall develop conservation water management strategies based on this determination. In preparing the evaluation, the regional water planning group shall seek the input of the water user groups and wholesale water providers as to what is the highest practicable level of water conservation and efficiency achievable, in their opinion, and take that input into consideration. The strategy evaluation shall include a quantitative description of the quantity, cost, and reliability of the water estimated to be conserved under the highest practicable level of water conservation and efficiency achievable;

(B) - (G) (No change)

(8) evaluations of allwater management strategies the regional water planning group determines to be potentially feasible by including:

(A) a quantitative reporting of:

(i) - (ii) (No change)

(iii) impacts on agricultural resources including analysis of third-party impacts of moving water from rural and agricultural areas;

(B) - (E) (No change)

(F) consideration of the provisions in Texas Water Code, §11.085(k)(1) for interbasin transfers of surface water. At a minimum, this consideration shall include a summation of water needs in the basin of origin and in the receiving basin, based on needs presented in the applicable approved regional water plan; [~~and~~]

(G) consideration of third party social and economic impacts resulting from voluntary redistributions of water; and

(H) consideration of water pipelines and other facilities that can be used for water conveyance as described in subsection (a)(1)(M) of this section;

(9) [~~plans to meet needs, which shall include:~~]

(~~A~~) specific recommendations of water management strategies to meet the [~~near term~~]needs in sufficient detail to allow state agencies to make financial or regulatory decisions to determine the consistency of the proposed action before the state agency with an approved regional water plan. Strategies shall be selected so that cost effective water management strategies which are environmentally sensitive and which provide long-term protection of agricultural resources are adopted unless the regional water planning group demonstrates that adoption of such strategies is not appropriate; [~~and~~]

[~~(B) specific recommendations of water management strategies or long-term scenarios that meet the long term needs. A long-term scenario is a combination of various water management strategies;~~]

(10) regulatory, administrative, or legislative recommendations that the regional water planning group believes are needed and desirable to: facilitate the orderly development, management, and conservation of water resources and preparation for and response to drought conditions in order that sufficient water will be available at a reasonable cost to ensure public health, safety, and welfare; further economic development; and protect the agricultural and natural resources of the state and regional water planning area. The regional water planning group may develop information as to the potential impact once proposed changes in law are enacted; [~~and~~]

(11) a chapter consolidating the water conservation and drought management recommendations of the regional water plan;[~~.~~]

(12) a description of the major impacts of recommended water management strategies on key parameters of water quality:

(A) based on key parameters of water quality identified by the regional water planning group as important to the use of the water resource; and

(B) comparing conditions with the recommended water management strategies to current conditions using best available data;

(13) a chapter describing how the regional water plan is consistent with long-term protection of the state's water resources, agricultural resources, and natural resources as required in §357.14(2)(C) of this title (relating to Approval of Regional Water Plans by the Board); and

(14) a chapter describing the financing needed to implement the water management strategies recommended. The description shall include how local governments, regional authorities, and other political subdivisions in the regional water planning area propose to pay for water management strategies identified in the regional water plan.

(b) (No change)

(c) The regional water planning group shall include in its regional water plan a model water conservation plan pursuant to Texas Water Code §11.1271 .

(d) The regional water planning group shall include in its regional water plan a model drought contingency plan pursuant to Texas Water Code §11.1272 .

(e) [~~(c)~~] The executive administrator shall provide technical assistance within available resources to the regional water planning

groups requesting such assistance in performing regional water planning activities and if requested, may facilitate resolution of conflicts within regional water planning areas.

§357.8. Ecologically Unique River and Stream Segments.

(a) - (b) (No change)

(c) For every river and stream segment that has been designated as a unique river or stream segment by the legislature or recommended as a unique river or stream segment in the regional water plan, the regional water planning group shall assess the impact of the regional water plan on these segments. The assessment shall be a quantitative analysis of the impact of the plan on the flows important to the river or stream segment, as determined by the regional water planning group, comparing current conditions to conditions with implementation of all recommended water management strategies. The assessment shall also describe the impact of the plan on the unique features cited in the region's nomination of that segment.

§357.11. Adoption of Regional Water Plans by Regional Water Planning Groups.

(a) - (e) (No change)

(f) A regional water planning group may amend an adopted regional water plan at any meeting, after giving notice according to §357.12 of this title and providing the public, the board, and other governmental entities 30 days to submit written or oral comments on the proposed amendment. A regional water planning group may propose amendments to an approved regional water plan by submitting proposed amendments to the board for its consideration and possible approval under the standards and procedures of this chapter.

(g) A political subdivision in the regional water planning area may request a regional water planning group to consider specific changes to an adopted regional water plan based on changed conditions or new information. A regional water planning group must formally consider such request within 180 days after its submittal and shall amend its adopted regional water plan if it determines an amendment is warranted. If the political subdivision is not satisfied with the regional water planning group's decision on the issue, it may file a petition with the executive administrator to request board review the decision and consider changing the approved regional water plan. The political subdivision shall send a copy of the petition to the chair of the affected regional water planning group.

(1) The petition must state:

(A) the changed condition or new information that affects the approved regional water plan;

(B) the specific sections and provisions of the approved regional water plan that are affected by the changed condition or new information; and

(C) the proposed amendment to the approved regional water plan.

(2) If the executive administrator determines that the changed condition or new information warrants a change in the approved regional water plan, the executive administrator shall request the regional water planning group to consider making the appropriate change and provide the reason in writing. The political subdivision that submitted the petition will receive notice of any action requested of the regional water planning group by the executive administrator. If the regional water planning group does not amend its plan consistent with the request within 90 days, the executive administrator will present the issue to the board for consideration at a public meeting. Before presenting the issue to the board, the executive administrator will provide the regional water planning group, the political subdivision submitting the petition, and any political subdivision determined by the executive administrator to be affected by the issue 30 days notice.

(3) If the board determines that a change to the approved regional water plan is appropriate based on the changed condition or new information, it may direct the executive administrator to make the change. The executive administrator will make the required change to the approved regional water plan and any necessary changes to the state water plan as directed by the board. [~~A regional water planning group may propose amendments to an approved regional water plan by submitting proposed amendments to the board for its consideration and possible approval under the standards and procedures of this chapter.~~]

§357.14. Approval of Regional Water Plans by the Board.

Upon receipt of a regional water plan adopted by the regional water planning group, the board will consider approval of such plan based on the following criteria.

(1) (No change)

(2) The board shall approve the plan only if it finds that:

(A) the regional water plan meets the requirements contained in the Texas Water Code, Chapter 16, this chapter, and Chapter 358 of this title (relating to State Water Planning Guidelines);

(B) the plan includes water conservation practices and drought management measures incorporating, at a minimum, the provisions of §357.7(c) and (d) of this title (relating to Regional Water Plan Development); and

(C) the plan is consistent with long-term protection of the state's water resources, agricultural resources, and natural resources as embodied in the guidance principles in Chapter 358 of this title (relating to State Water Planning Guidelines). The regional water plan is consistent with the guidance principles if it is developed in accordance with §358.3 of this title (relating to Guidelines), §357.5 of this title (relating to Guidelines for Development of Regional Water Plans), §357.7 of this title (relating to Regional Water Plan Development), §357.8 of this title (relating to Ecologically Unique River and Stream Segments), and §357.9 of this title (relating to Unique Sites for Reservoir Construction).

(3) - (11) (No change)

§357.15. Interaction with Groundwater Conservation District Management Plans.

(a) A groundwater conservation district may file a written petition with the executive administrator stating that a potential conflict exists between the district's certified management plan developed under Texas Water Code, §36.1071 and an approved regional water plan. A copy of the petition shall be provided to the affected regional water planning group. The petition must state:

(1) the specific nature of the conflict;

(2) the specific sections and provisions of the certified management plan and approved regional water plan that are in conflict; and

(3) the proposed resolution to the conflict.

(b) Within 30 days of receipt of the petition, if the executive administrator determines a conflict exists, the executive administrator will coordinate with the groundwater conservation district and the affected regional water planning group to resolve the conflict. Coordination may include any of the following processes:

(1) requiring the regional water planning group to respond to the petition in writing;

(2) meeting with representatives from the groundwater conservation district and the regional water planning group to informally mediate the conflict; and/or

(3) coordinating a formal mediation session between representatives of the groundwater conservation district and the regional water planning group.

(c) The executive administrator will inform the parties how long they have to attempt to resolve the conflict. If the parties do not reach resolution in that time period, the executive administrator will recommend a resolution to the conflict to the board. Before presenting the issue to the board, the executive administrator will provide the regional water planning group, the groundwater conservation district submitting the petition, and any political subdivision determined by the executive administrator to be affected by the issue 30 days notice. If the board finds that a conflict exists, the board shall adopt a resolution to the conflict at a public meeting. Resolution may include:

(1) requiring a revision to an approved regional water plan; and/or

(2) requiring a revision to a district's certified management plan.

(d) If the board requires a revision to an approved regional water plan, the board shall suspend the approval of the plan and provide information to the regional water planning group on what revisions are required and why. The regional water planning group shall prepare the revisions to the regional water plan as an amendment pursuant to §357.11 of this title (related to Adoption of Regional Water Plans by Regional Water Planning Groups) and §357.12 of this title (related to Notice and Public Participation) and submit the amended plan to the board for approval pursuant to §357.14 of this title (related to Approval of Regional Water Plans by the Board).

(e) If the board requires a revision to the groundwater conservation district's certified management plan, the board shall suspend the certification of the plan and provide information to the groundwater conservation district on what revisions are required and why. The groundwater conservation district shall prepare any revisions to its plan required by the board and hold, after notice, at least one public hearing. The groundwater conservation district shall consider all public and board comments, prepare, revise, and adopt its plan, and submit the revised plan to the board for certification pursuant to Chapter 356 of this title (related to Groundwater Management).

(f) At the request of either the groundwater conservation district or the affected regional water planning group, the board shall include in the state water plan a discussion of the conflict and its resolution.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106301
Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: December 12, 2001
For further information, please call: (512) 463-7981

♦ ♦ ♦

CHAPTER 358. STATE WATER PLANNING GUIDELINES

The Texas Water Development Board (board) proposes amendments to 31 TAC §358.1 and §358.3 and new §358.5 and §358.6, concerning State Water Planning Guidelines. These amendments and new sections are proposed in response to Senate Bill 2, 77th Texas Legislature, Regular Session, 2001 and pursuant to the four-year rule review requirement of Texas Government Code §2001.039.

The board proposes to restructure the chapter into subchapter A, State Water Plan Development, consisting of §§358.1 - 358.4, and subchapter B, Data Collection, consisting of §358.5 and §358.6.

The board proposes amendments to §358.1 to mirror the language in Texas Water Code §16.051(a). Section 16.051(a) was amended by Senate Bill 2 to state that the board will prepare, develop, formulate, and adopt a comprehensive state water plan every five years. The amendments to §358.1 mirror this revised language to avoid confusion.

The proposed amendments to §358.3, like those for §358.1, are intended to mirror the language of Texas Water Code §16.051(a). However, the amendments also detail the responsibilities of the executive administrator in this process. Pursuant to this proposed rule, the board charges the executive administrator to prepare, develop, and formulate the state water plan and the board shall adopt a state water plan every five years. These changes will avoid potential conflict with the revised statutory language and specify the exact duties of the board and executive administrator. The division of responsibilities reflects the current rule's division, which specifies that the executive administrator develops the plan and the board adopts the plan.

The proposed new §358.5 is intended to comply with Texas Water Code, §16.012(m), which was added by Senate Bill 2. Section 16.012(m) authorizes the executive administrator to conduct surveys of entities using groundwater and surface water to gather data to be used for long-term water supply planning. Survey recipients are required by Texas Water Code §16.012(m) to complete and return the survey or they will be ineligible for funding from the board and new water permits, amendments, and renewals from the Texas Natural Resource Conservation Commission. The statutory provision also states that recipients who fail to complete and return the survey commit a Class C misdemeanor. The completed survey forms from non-governmental recipients are not subject to disclosure under the Texas Public Information Act, Texas Government Code, Chapter 552, unless they authorize it in writing. The proposed new §358.5 incorporates these statutory requirements, adds timelines for survey responses, and describes how a survey must be administratively complete to comply with the requirements of law. The time frames provide the recipients with sufficient time to answer the surveys and provide notice of when a recipient will be deemed ineligible for board funding due to incomplete surveys. The surveys will be performed at least annually and may be done either in hard copy or electronic format.

The proposed addition of §358.6 is intended to comply with Texas Water Code §16.053(d), which was amended by Senate Bill 2. Section 16.053(d) now requires the board to adopt a rule that requires holders of surface water permits, certified filings, certificates of adjudication for surface water, and permits for the export of groundwater from a groundwater conservation district, and retail public water suppliers, wholesale water providers,

irrigation districts, and any person transporting groundwater or surface water 20 miles or more to report information on water pipelines and other facilities that can be used for water conveyance to the board. The language in proposed §358.6(a) mirrors this statutory language. At §358.6(b), the proposed rule limits the types of pipelines and facilities on which a survey response should be submitted. The intent of these limitations is to restrict survey responses to those pipelines and facilities that transport water from one location to another that is at least 20 miles away or that would be of limited use for water conveyance between entities or areas, as opposed to internal distribution. Further, the limitations exclude pipelines and facilities that transport oil and gas. This is due to the fact that the Texas Railroad Commission already has a database of pipelines and facilities that transport these substances. Therefore, there is no need to require reporting of this information. Proposed §358.6(c) describes the reporting standards, which are similar to the United States Department of Transportation National Pipeline Mapping System standards for Pipeline and Liquefied Natural Gas Operator Submission. Because pipelines and facilities vary along their length, reports will be by segments. The proposed rule defines a segment as a portion of the pipeline or facility that has the same attributes, such as size and construction date. The information that must be reported is described at §358.6(c)(1) and (2). The reporting standards will enable the board to identify the pipeline or facility, designate its location on map, contact the owner/operator, and determine its capabilities. This is information that will be provided to the regional water planning groups for consideration and use in the regional water planning process. Due to the amount of information required to be reported on the pipelines and facilities, proposed §358.6(d) sets the deadline for submission of the first report as November 30, 2003. This will provide owners and operators with sufficient time to compile the report. After the initial report is submitted, the owners and operators will be asked to verify the accuracy of the report every five years. Further, they will be asked to submit revisions to the report within one year of a change of any required reporting element. This will enable the board to provide the regional water planning groups with accurate information that can be used to plan for the transport and distribution of water resources within and between regions.

Ms. Melanie Callahan, Director of Fiscal Services, has determined that for the first five-year period these changes are in effect there will be no fiscal implications to State government as a result of enforcement and administration of the sections beyond the fiscal implications associated with the enactment of Senate Bill 2, Acts of the 77th Texas Legislature, 2001. The board currently surveys water users annually and analyzes the results. The addition of pipeline and conveyance facility surveys by §358.6 will be performed by existing board staff as part of their duties.

Ms. Callahan has determined that for the first five years the changes as proposed are in effect, there will be fiscal impact to local government and certain private entities of approximately $200 to $5,000 total per report under proposed §358.6 for the five year period following the effective date of these proposed rules. Cost varies due to differing sizes of the pipeline and facility systems that are subject to the report. Costs may be reduced if the person or entity submitting the report is able to utilize existing ortho-quad maps provided by the board on its web site. There is also a benefit to these local governments and private entities in the form of state and regional water plans that utilize existing resources more efficiently and effectively. The board is unable to determine total costs for this proposed rule because it is unknown how many owners and operators of pipelines and conveyance facilities exist and the size of their systems.

There should be no significant additional cost due to proposed §358.5 because the board already surveys water use and 85 percent of the survey recipients respond. Those that do not respond are mostly water users who use comparatively smaller amounts of water. The requirement that these entities now respond to the survey should not impose any significant burden based on the low amount of water use involved.

Ms. Callahan has also determined that for the first five years the changes as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be to assure state and regional water plans that are more comprehensive, include more detail about water conveyance capabilities, and subject to review to resolve conflicts. This will provide the public with state and regional water plans that contain greater detail. Ms. Callahan has determined there will be no increased economic cost to small businesses or individuals, other than those who own or operate a pipeline or conveyance facility required to comply with the sections as proposed.

Comments on the proposed amendments and new sections will be accepted for 30 days following publication and may be submitted to Phyllis Thomas, Director, Research & Planning Fund Grants Management, (512) 463-3154, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711-3231, by e-mail at Phyllis.Thomas@twdb.state.tx.us, or by fax at (512) 463-9893.

SUBCHAPTER A. STATE WATER PLAN DEVELOPMENT

31 TAC §358.1, §358.3

The amendments are proposed under the authority of Texas Water Code §6.101.

The statutory provisions affected by the proposed amendments are Texas Water Code, Chapter 16, §16.053 and §16.054.

§358.1. General.

This subchapter [~~chapter~~] will govern the board's preparation, development, formulation, and adoption of the state water plan.

§358.3. Guidelines.

(a) The [~~state water plan adopted by the board in August 1997 shall remain in effect until a new state water plan is adopted by the board. A state water plan shall be developed by the~~] executive administrator shall prepare, develop, and formulate the state water plan and the board shall adopt a state water plan [~~adopted by the board~~] no later than January 5, 2002, and before the end of each successive five-year period after that date [~~at least every five years thereafter~~]. The executive administrator shall identify the beginning of the 50-year planning period for the state and regional water plans. The executive administrator shall incorporate into the state water plan presented to the board those regional water plans approved by the board pursuant to Chapter 357 of this title (relating to Regional Water Planning Guidelines). The board shall, not less than 30 days before adoption or amendment of the state water plan, publish notice in the *Texas Register* of its intent to adopt a state water plan and shall mail notice to each regional water planning group. The board shall hold a hearing, after which it may adopt a water plan or amendments thereto.

(b) (No change)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106306
Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: December 12, 2001
For further information, please call: (512) 463-7981

♦ ♦ ♦

SUBCHAPTER B. DATA COLLECTION

31 TAC §358.5, §358.6

The new sections are proposed under the authority of Texas Water Code §6.101.

The statutory provisions affected by the proposed new sections are Texas Water Code, Chapter 16, §16.053 and §16.054.

§358.5. Groundwater and Surface Water Use Surveys.

(a) The executive administrator shall conduct surveys at least annually of persons and/or entities using groundwater and surface water to gather data to be used for long-term water supply planning. The survey instrument will identify which responses are required and which are optional. The executive administrator will send the surveys to the appropriate recipients by first-class mail, electronic mail, or both. Recipients shall return the survey to the executive administrator within 60 days of the postmark date or electronic mail sent date. Surveys may be returned to the executive administrator electronically. The executive administrator shall determine if the survey is administratively complete. A survey is administratively complete if all required responses are provided. Incomplete surveys will be returned to the recipient, who will have 60 days from the new postmark date or electronic mail sent date to complete the items found deficient and return the survey to the executive administrator. A person or entity that fails to return their survey within 60 days or correct a survey that is not administratively complete within 60 days is ineligible for funding from board programs. Ineligibility will remain until the incomplete survey instruments are submitted to the executive administrator and determined to be administratively complete. Further, a person who fails to complete and return the survey commits an offense that is punishable as a Class C misdemeanor, pursuant to Texas Water Code §16.012(m).

(b) Survey forms completed and returned by non-governmental entities are excepted by Texas Water Code §16.012 from release under the Texas Public Information Act, Texas Government Code, Chapter 552, unless the person completing and returning the survey authorizes the board in writing to release the survey form pursuant to the Texas Public Information Act.

§358.6. Pipeline and Facility Reports.

(a) The following entities and persons shall report to the board information on water pipelines and other facilities that they own or operate and that can be used for water conveyance:

(1) holders of surface water permits, certified filings for surface water, or certificates of adjudication for surface water;

(2) holders of permits for the export of groundwater from a groundwater conservation district;

(3) retail public water suppliers;

(4) wholesale water providers;

(5) irrigation districts; and

(6) any person or entity transporting groundwater or surface water between points separated by a linear distance of 20 miles or more.

(b) Information shall be reported on a water pipeline and other conveyance facility segment that can be used for the conveyance of water unless:

(1) it has been used to transport wastewater, oil, gas, or any hazardous substance identified in 40 CFR, Chapter 1, Part 116, Designation of Hazardous Substances;

(2) it is a retail distribution system pipeline;

(3) lateral canals and other open channel water conveyance facilities that carry water from main canals; or

(4) it is a transmission pipeline of nominal diameter of six inches or less;

(c) Report standards. The executive administrator will provide reporting standards for pipeline and other water conveyance facilities information. These standards will be generally similar to the standards and reporting protocols described in the United States Department of Transportation National Pipeline Mapping System standards for Pipeline and Liquefied Natural Gas Operator Submission, dated March 1999. The information shall be reported on a segment-by-segment basis, with a description of which segments connect together. For purposes of this section, a segment is defined as a portion of the pipeline or water conveyance facility with the same attributes.

(1) Content standards. Pipeline and/or facility segment attributes to be reported include:

(A) owner;

(B) owner's contact information;

(C) operator;

(D) operator's contact information;

(E) system name;

(F) nominal diameter of the pipeline segment;

(G) top width and carrying capacity for open channel facility segments;

(H) construction material;

(I) construction date;

(J) whether or not, at the time of reporting, the pipeline or facility is operational; and

(K) other attributes as required by the executive administrator.

(2) Positional reporting standards. Provide the geographic information on the position and alignment of each pipeline and facility segment using one of the following methods:

(A) provide global position system coordinates with a mean accuracy of no less than +/- 10 meters;

(B) identify existing facilities now being reported on the board's Texas Strategic Mapping Program (StratMap) hydrography data layer that can be found at www.tnris.state.tx.; or

(C) draw the pipeline or facility on maps provided by the executive administrator, or modify existing StratMap data, from the

board's statewide digital orthophoto quad data layer, fitting the pipeline or facility to the image as closely as possible (within +/- 10 meters is preferred).

(d) Schedule and standards for responses.

(1) The information shall be submitted to the executive administrator no later than November 30, 2003.

(2) Entities listed under subsection (a) of this section shall report changes to the elements required in subsection (c) of this section within 12 months of their occurrence.

(3) Before November 30, 2008 and every five years thereafter, the reporting entity shall verify the accuracy of the information provided to the executive administrator.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106307
Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: December 12, 2001
For further information, please call: (512) 463-7981

♦ ♦ ♦

CHAPTER 382. WATER INFRASTRUCTURE FUND

The Texas Water Development Board (Board) proposes new Chapter 31 TAC Chapter 382, comprised of §§382.1-382.6, 382.21-382.26, and 382.41-382.43, Water Infrastructure Fund. The sections of the new chapter govern applications for financial assistance for the implementation of water projects under the Water Infrastructure Fund Program established by Texas Water Code, Chapter 15, Subchapter O.

The Water Infrastructure Fund (WIF) was established by Senate Bill 2 of the 77th Texas Legislative Session (S.B. 2). S.B. 2 provides for direct loans, zero interest loans and grants in the WIF program. S.B. 2 also provides for indirect financial assistance in the form of loans or grants to persons, including individuals and private entities through eligible political subdivisions for projects that develop water resources and assist in diversifying and developing the economy of the political subdivision and the state. The provisions of the bill that address zero interest loans, grants, and financial assistance to persons, including individuals and entities, through economic development programs, have not been included in the proposed rules. These provisions of S.B. 2 cannot be implemented without general revenue or another cash funding source and such revenues were not provided during the legislative session. The only viable source of funding for the WIF that is currently available are Water Financial Assistance general obligation bonds. Constitutional restrictions on bonds issued by the board prevent the proceeds from being used to provide zero interest loans and grants to political subdivisions, and also prohibit any form of financial assistance to individuals or private entities.

Additionally, S.B. 2 required that the Water Financial Assistance bonds transferred to the WIF must be repaid by the WIF, which, without appropriation support, basically will require that loan rates be established which are sufficient to pay the full amount of debt service on the Water Financial Assistance bonds. This requirement results in a loan rate that is essentially the same as the current Water Development Fund II loan program.

Proposed §§382.1 - 382.6 will comprise Subchapter A, Introductory Provisions. Section 382.1 describes the scope of the proposed new chapter and notices customers that additional requirements from Chapter 363, Subchapter A, relating to General Provisions of Financial Assistance Programs, apply to the water infrastructure fund, unless in conflict with the water infrastructure fund rules. Section 382.2 provides definitions to terms which have special meaning for this chapter and program. Section 382.3 provides for customers a brief summary of the uses which may be made of funds from the water infrastructure fund, but sets out a percentage limitation on the various uses of the funds in compliance with S.B. 2. Section 382.4 requires the board to make an annual determination of the amounts of funds available for various uses for the fiscal year. Section 382.5 provides customers information regarding the interest rates that will be charged for loans from the water infrastructure fund. Section 382.6 provides notice that funds in the water infrastructure fund will be invested in accordance with Chapter 365 of this title, relating to Investment Rules.

Proposed §§382.21 - 382.26 will comprise Subchapter B, Application Procedures. Section 382.21 notices applicants of the need to schedule a preapplication conference and describes the purpose of the conference. Section 382.22 provides notice to customers of the information that must be submitted in conjunction with an application for loan assistance to ensure that the applicant is authorized to incur debt and has the resources for repayment of the debt. It also provides information on the engineering planning, environmental and water conservation planning requirements that must be completed for the proposed project to be in compliance with state law. Section 382.23 advises customers of the process for utilizing pre-design funding and of the requirements for using the option. Section 382.24 provides notice of the process for board consideration of an application and notifying interested parties of the meeting at which the application will be considered. Section 382.25 sets out the statutory findings that the board is required to make in order to approve a loan. Section 382.26 provides notice to customers of the options available to the board in consideration of an application and the board's requirement to include an expiration date in the application. It also notices applicants that the board may change a commitment at the time the application expiration date is extended.

Proposed §§382.41 - 382.43 make up Subchapter C, Closing and Release of Funds. Section 382.41 provides notice to customers of the documents that must be submitted prior to closing a loan and sets out the terms and conditions of the loan. The terms and conditions ensure that the project is implemented and maintained in accordance with law and that the means of repaying the debt is properly monitored and documented. Section 381.42 advises customers of the permits and completion documents that will have to be submitted before funds are released. The section ensures that applicable laws and rules are complied with during the pre-construction and construction phases of the proposed project. Section 382.43 provides for executive administrator approval of engineering design documents and identifies for applicants the information regarding engineering contracts, plans and specifications that is necessary to ensure that the project

is in compliance with applicable laws and rules addressing construction.

Ms. Misti Hancock, Interim Director of Fiscal Services has determined that for the first five-year period these sections are in effect there will be no fiscal implications to state governments as a result of enforcement and administration of the proposed new sections. There will be potential fiscal implications to local governments in the form of savings, however those savings cannot be calculated at this time.

Ms. Hancock has also determined that for the first five years the proposed chapter is in effect there will be public benefit to customer political subdivisions in the form of financial assistance at terms equal to or better than otherwise available through other programs that provide State assistance for water development projects. Ms. Hancock has determined that there will be no economic impact to small businesses or individuals required to comply with the chapter, as proposed.

Comments of the proposed new sections will be accepted for 30 days following publication and may be submitted to Gail Allan, Director of Legal Administration, Texas Water Development Board, P.O. Box 13231, Austin Texas, 78711-3231 or by fax at 512/463-5580.

SUBCHAPTER A. INTRODUCTORY PROVISIONS

31 TAC §§382.1 - 382.6

The new sections are proposed under the authority of the Texas Water Code, §6.101 and §15.907.

The statutory provisions affected by the proposed new sections are Texas Water Code, Chapter 15, Subchapter O.

§382.1. Scope of Chapter.
This chapter shall govern applications for financial assistance from the Water Infrastructure Fund of the Water Assistance Fund, established by the Texas Water Code, Chapter 15, Subchapter O. The program described in this chapter shall be known as the Water Infrastructure Fund. Unless in conflict with the provisions of this chapter, the provisions of Chapter 363, Subchapter A of this title (relating to the General Provisions of Financial Assistance Programs) shall apply to applications for assistance from the Water Infrastructure Fund.

§382.2. Definitions of Terms.
Words and terms used in this chapter shall have the following meanings, unless the context clearly indicates otherwise. Words defined in Texas Water Code, Chapter 15 and not defined here shall have the meanings provided by the appropriate Texas Water Code chapter.

(1) Political subdivision - Political subdivision shall have the meaning established by Texas Water Code, §15.001(5).

(2) Fund - The Water Infrastructure Fund.

(3) Project - Any undertaking or work, including planning and design activities and work to obtain regulatory authority, to conserve, mitigate, convey, and develop water resources of the state, including any undertaking or work done outside the state that the board determines will result in water being available for use in or for the benefit of the state.

§382.3. Use of Funds.
(a) The board may use the fund for financial assistance as follows:

(1) to make loans to political subdivisions at or below market interest rates for projects; and

(2) to make loans to political subdivisions at or below market interest rates for planning and design costs, permitting costs, and other costs associated with state or federal regulatory activities with respect to a project.

(b) The board may make funding available under subsection (a) of this section only for implementation of projects which are:

(1) recommended in water management strategies in a board-approved regional water plan adopted pursuant to Texas Water Code, §16.053 or in the state water plan adopted pursuant to Texas Water Code, §16.051; or

(2) designed to develop existing sources of water consistent with sources and supplies listed in the board-approved regional water plan adopted pursuant to Texas Water Code, §16.053 or in the state water plan adopted pursuant to Texas Water Code, §16.051, provided that the fund may not be used to maintain a system or to develop a retail distribution system.

(c) Funding under subsection (a)(2) of this section may not exceed 10% of the amount of financial assistance budgeted by the board to be made available from the fund in a fiscal year.

§382.4. Availability of Funds.
For each fiscal year, the board will determine the amount of funds to be available from all sources to the fund for financial assistance.

§382.5. Interest Rates for Loans.
(a) The following procedures will be used to set fixed interest rates.

(1) The development fund manager will set fixed interest rates under this section for loans on a date that is five business days prior to the political subdivision's adoption of the ordinance or resolution authorizing its bonds and not more than 45 days before the anticipated closing of the loan from the board. After 45 days from the establishment of the interest rate of a loan, rates will be reconsidered, and may be extended only with the approval of the development fund manager.

(2) For loans from the fund, the development fund manager will set the interest rates in accordance with the following:

(A) to the extent that the source of funding is provided from bond proceeds issued through the Water Development Fund, the lending rate scale(s) will be determined as provided under §363.33(b) of this title (relating to Interest Rates for Loans and Purchase of Board's Interest in State Participation Projects; or

(B) for loans where the interest rates calculated in subparagraph (A) of this paragraph results in a true interest cost that is less than the minimum true interest cost of the lending rate scale established for those funds, interest will be calculated at a rate increased to match the minimum true interest costs so the board may recover all costs attributed to the bonds sold by the board; or

(C) for loans funded by the board with proceeds of bonds, the interest for which is intended to be tax exempt for purposes of federal tax law, the development fund manager will limit the interest set pursuant to this subsection at no higher than the rate permitted under federal tax law to maintain the tax exemption for the interest on the board's bonds.

(b) The board will establish separate lending rate scales for loans according to source of funds, if any funds other than Water Development Fund bond proceeds are used.

§382.6. Investment of Funds.
Funds will be invested in accordance with Chapter 365 of this title (relating to Investment Rules).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106326
Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: December 12, 2001
For further information, please call: (512) 463-7981

♦ ♦ ♦

SUBCHAPTER B. APPLICATION PROCEDURES

31 TAC §§382.21 - 382.26

The new sections are proposed under the authority of the Texas Water Code, §6.101 and §15.907.

The statutory provisions affected by the proposed new sections are Texas Water Code, Chapter 15, Subchapter O.

§382.21. Preapplication Meeting.

An applicant seeking financial assistance should schedule a preapplication conference with the board staff to obtain guidance and establish basic eligibility of the project and political subdivision for financial assistance.

§382.22. Application for Assistance.

(a) A political subdivision shall submit an application for financial assistance in writing.

(b) The following information is required on all applications to the board for financial assistance.

(1) General, fiscal and legal information required includes:

(A) the name and address of the political subdivision;

(B) a citation of the law under which the political subdivision operates and was created;

(C) the total cost of the project;

(D) the amount of financial assistance being requested;

(E) a description of the project;

(F) the name, address and telephone number of the authorized representative, engineer and any other consultant(s);

(G) the source of repayment and the status of legal authority to pledge selected revenues;

(H) the financing plan for repaying the total cost of the project;

(I) the political subdivision's default history;

(J) the most recent annual financial statements and latest monthly and year-to-date financial reports for the General Fund and Utility Fund of the political subdivision;

(K) a certified copy of a resolution of the political subdivision's governing body requesting financial assistance from the board, authorizing the submission of the application, and designating the authorized representative for executing the application, and for appearing before the board;

(L) a notarized affidavit from the authorized representative stating that:

(i) for a political subdivision, the decision to request financial assistance from the board was made in a public meeting held in accordance with the Open Meetings Act (Government Code, Chapter 551);

(ii) the information submitted in the application is true and correct according to the best knowledge and belief of the representative;

(iii) the applicant has no litigation or other proceedings pending or threatened against the applicant that would materially adversely affect the financial condition of the applicant or the ability of the applicant to issue debt; and

(iv) the applicant will comply with all applicable federal laws, rules, and regulations as well as the laws of this state and the rules and regulations of the board.

(M) any special request for repayment structure that reflects the particular needs of the political subdivision.

(2) Engineering feasibility report. An applicant shall submit an engineering feasibility report in accordance with §363.13 of this title (relating to Engineering Feasibility Data).

(3) Environmental assessment. An applicant shall submit an environmental assessment in accordance with §363.14 of this title (relating to Environmental Assessment).

(4) Required water conservation plan. An applicant shall submit a water conservation plan prepared in accordance with §363.15 of this title (relating to Required Water Conservation Plan).

(5) Additional application information. An applicant shall submit any additional information requested by the executive administrator as necessary to complete the financial, legal, engineering, and environmental reviews.

§382.23. Pre-design Funding Option.

(a) This loan application option will provide an eligible applicant that meets all applicable board requirements an alternative to secure a commitment and close a loan for the pre-design, design or building costs associated with funding of a project under §382.3(a)(1) of this title (relating to Use of Funds). Under this option, a loan may be closed and funds necessary to complete planning and design activities released. If planning requirements have not been satisfied, design and building funds will be held or escrowed and released in the sequence described in this section. Following completion of planning activities and environmental assessment, the executive administrator may require the applicant to make changes in order to proceed with the project. If the portion of a project associated with funds in escrow cannot proceed, the loan recipient shall use the escrowed funds to redeem bonds purchased by the board in inverse order of maturity.

(b) Reservoir projects are not eligible for funding under this option.

(c) The executive administrator may recommend to the board the use of this section if, based on available information, there appear to be no significant permitting, social, environmental, engineering, or financial issues associated with the project. An application for pre-design funding may be considered by the board despite a negative recommendation from the executive administrator.

(d) Applications for pre-design funding must include the following information:

(1) for loans including building cost, a preliminary engineering feasibility report which will include at minimum: a description and purpose of the project; area maps or drawings as necessary to fully locate the project area(s); a proposed project schedule; estimated project costs and budget including sources of funds; current and future populations and projected water needs and sources; alternatives considered; and a discussion of known permitting, social or environmental issues which may affect the alternatives considered and the implementation of the proposed project;

(2) contracts for engineering services;

(3) evidence that an approved water conservation plan will be adopted prior to the release of loan funds;

(4) all information required in §382.22(b)(1) of this title (relating to Application for Assistance); and

(5) any additional information the executive administrator may request to complete evaluation of the application.

(e) After board commitment and completion of all closing and release prerequisites as specified in §382.41 of this title (relating to Loan Closing) and §382.42 of this title (relating to Release of Funds), funds will be released in the following sequence:

(1) for planning and permitting costs, after receipt of executed contracts for the planning or permitting phase;

(2) for design costs, after receipt of executed contracts for the design phase and upon approval of an engineering feasibility report as specified in §363.13 of this title (relating to Engineering Feasibility Data) and compliance with §363.14 of this title (relating to Environmental Assessment); and

(3) for building costs, after issuance of any applicable permits, and after bid documents are approved and executed construction documents are contingently awarded.

(f) Board staff will use preliminary environmental data provided by the applicant, as specified in subsection (d) of this section and make a written report to the executive administrator on known or potential significant social or environmental concerns. Subsequently, these projects must have a favorable executive administrator's recommendation which is based upon a full environmental review during planning, as provided under §363.14 of this title.

(g) The executive administrator will advise the board concerning projects that involve major economic or administrative impacts to the applicant resulting from environmentally related special mitigative or precautionary measures from an environmental assessment under §363.14 of this title.

§382.24. Board Consideration of Application.

The executive administrator shall submit the application to the board with comments concerning financial assistance. The application will be scheduled on the agenda for board consideration at the earliest practical date. The applicant and other interested parties known to the board shall be notified of the time and place of such meeting.

§382.25. Findings Required.

The board, by resolution, may approve the application if it finds that:

(1) the application and the assistance applied for meet the requirements of this subchapter and board rules;

(2) the revenue or taxes, or both revenue and taxes, pledged by the applicant will be sufficient to meet all obligations assumed by the political subdivision; and

(3) the project will meet water needs in a manner consistent with the state and regional water plans as required by Texas Water Code, §16.053(j).

§382.26. Action of the Board on Application.

At the conclusion of the meeting to consider the project, the board may resolve to approve, disapprove, approve with conditions, or continue consideration of the application. A commitment will include a date after which the financial assistance will no longer be available unless extended by the board. The board may make any changes in the original commitment at the time of extension.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106327
Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: December 12, 2001
For further information, please call: (512) 463-7981

♦ ♦ ♦

SUBCHAPTER C. CLOSING AND RELEASE OF FUNDS

31 TAC §§382.41 - 382.43

The new sections are proposed under the authority of the Texas Water Code, §6.101 and §15.907.

The statutory provisions affected by the proposed new sections are Texas Water Code, Chapter 15, Subchapter O.

§382.41. Loan Closing.

(a) Instruments needed for closing. The documents which shall be required at the time of closing shall include the following:

(1) evidence that requirements and regulations of all identified local, state and federal agencies having jurisdiction have been met, including but not limited to permits and authorizations;

(2) certified copy of the ordinances or resolutions adopted by the governing body authorizing issuance of debt sold to the board which has received prior approval by the executive administrator and which shall have sections providing:

(A) that an escrow account, if applicable, shall be created which shall be separate from all other funds and that:

(i) the account shall be maintained at an escrow agent bank or maintained with the trust agent;

(ii) funds shall not be released from the escrow account without written approval by the executive administrator;

(iii) the escrow account bank statements or trust account statement will be provided on a monthly basis to the executive administrator's office; and

(iv) the escrow account will be adequately collateralized as determined by the executive administrator sufficient to protect the board's interest;

(B) that a construction fund shall be created which shall be separate from all other funds of the applicant;

(C) that a final accounting be made to the board of the total sources and authorized use of project funds and that any surplus loan funds be used in a manner as approved by the executive administrator;

(D) that an annual audit of the political subdivision, prepared in accordance with generally accepted auditing standards by a certified public accountant or licensed public accountant be provided annually to the executive administrator;

(E) that the political subdivision shall fix and maintain rates and collect charges to provide adequate operation, maintenance and insurance coverage on the project in an amount sufficient to protect the board's interest;

(F) that the political subdivision will implement any water conservation program required by the board until all financial obligations to the state have been discharged;

(G) that the political subdivision shall maintain current, accurate and complete records and accounts necessary to demonstrate compliance with financial assistance related legal and contractual provisions;

(H) that the political subdivision covenants to abide by the board's rules and relevant statutes, including the Texas Water Code, Chapters 15 and 17; and

(I) that the political subdivision, or an obligated person for whom financial or operating data is presented, will undertake, either individually or in combination with other issuers of the political subdivision's obligations or obligated persons, in a written agreement or contract to comply with requirements for continuing disclosure on an ongoing basis substantially in the manner required by Securities and Exchange Commission (SEC) rule 15c2-12 and determined as if the board were a participating underwriter within the meaning of such rule, such continuing disclosure undertaking being for the benefit of the board and the beneficial owner of the political subdivision's obligations, if the board sells or otherwise transfers such obligations, and the beneficial owners of the board's bonds if the political subdivision is an obligated person with respect to such bonds under rule 15c2-12;

(3) two copies of the political subdivision's water conservation program, including documentation of local adoption;

(4) unqualified approving opinions of the attorney general of Texas and a certification from the comptroller of public accounts that such debt has been registered in that office;

(5) if bonds are issued, an unqualified approving opinion by a recognized bond attorney acceptable to the executive administrator, or if a promissory note and loan agreement is used, an opinion from the corporation's attorney which is acceptable to the executive administrator;

(6) executed escrow agreement entered into by the entity and an escrow agent bank or an executed trust agreement entered into by the entity and the trust agent satisfactory to the executive administrator, in the event that construction funds are escrowed; and

(7) other or additional data and information, if deemed necessary by the executive administrator.

(b) Certified bond transcript. At such time as available following the final release of funds the political subdivision shall submit a transcript of proceedings relating to the debt purchased by the board which shall contain those instruments normally furnished a purchaser of debt.

(c) Closing requirements for bonds. A political subdivision shall be required to comply with the following closing requirements if the applicant issues bonds that are purchased by the board:

(1) all loans shall be closed in book-entry-only form;

(2) the political subdivision shall use a paying agent/registrar that is a depository trust company (DTC) participant;

(3) the political subdivision shall be responsible for paying all DTC closing fees assessed to the political subdivision by the board's custodian bank directly to the board's custodian bank; and

(4) the political subdivision shall provide evidence to the board that one fully registered bond has been sent to the DTC or to the political subdivision's paying agent/registrar prior to closing.

§382.42. Release of Funds.

(a) Release of funds for planning, design and permits. Prior to the release of funds for planning, design, and permits under §382.3(a)(2) of this title (relating to Use of Funds), the political subdivision shall submit for approval to the executive administrator the following documents:

(1) a statement as to sufficiency of funds to complete the activity;

(2) certified copies of each contract under which revenues for repayment of the political subdivision's debt will accrue;

(3) executed consultant contracts relating to services provided for planning, design, and/or permits;

(4) evidence that the requirements and regulations of all identified local, state, and federal agencies having jurisdiction have been met, including but not limited to permits and authorizations; and

(5) other such instruments or documents as the board or executive administrator may require.

(b) Pre-design funding. The funds needed for the total estimated cost of the engineering, planning, and design cost if the engineering feasibility report required under §363.13 of this title (relating to Engineering Feasibility Data) and the environmental assessment required under §363.14 of this title (relating to Environmental Assessment) have been approved, the cost of issuance associated with the loan, and any associated capitalized interest will be released to the loan recipient and the remaining funds will be escrowed to the escrow agent bank or to the trust agent until all applicable requirements in subsections (a) and (c) of this section and §382.23 of this title (relating to Pre-design Funding Option) have been met.

(c) Release of funds for building purposes. Prior to the release of funds for building purposes, the political subdivision shall submit for approval to the executive administrator the following documents:

(1) a tabulation of all bids received and an explanation for any rejected bids or otherwise disqualified bidders;

(2) one executed original copy of each construction contract the effectiveness and validity of which is contingent upon the receipt of board funds;

(3) evidence that the necessary acquisitions of land, leases, easements and rights-of-way have been completed or that the applicant has the legal authority necessary to complete the acquisitions;

(4) a statement as to sufficiency of funds to complete the project;

(5) certified copies of each contract under which revenues to the project will accrue;

(6) evidence that all requirements and regulations of all identified local, state, and federal agencies having jurisdiction have been met, including permits and authorizations; and

(7) other such instruments or documents as the board or executive administrator may require.

(d) Water rights certification. Prior to release of construction funds, the executive administrator shall make a written finding that the applicant:

(1) has the necessary water rights authorizing the applicant to appropriate and use the water that the project will provide, if the applicant is proposing surface water development; or

(2) has the right to use water that the project will provide, if the applicant is proposing groundwater development.

(e) Release of funds for projects constructed through one or more construction contracts. For projects constructed through one or more construction contracts, the executive administrator may approve the release of funds for all or a portion of the estimated project cost, provided all requirements of subsection (c) of this section have been met for at least one of the construction contracts.

(f) Escrow of funds. The executive administrator may require the escrow of an amount of project funding related to contracts which have not met the requirements of subsection (c) of this section at the time of loan closing.

§382.43. Engineering Design Approvals.

A political subdivision shall obtain executive administrator approval of contract documents, including engineering plans and specifications, prior to receiving bids and awarding the contract. The contract documents shall be consistent with the engineering information submitted with the application and must contain the following:

(1) provisions assuring compliance with the board's rules and all relevant statutes;

(2) provisions providing for the political subdivision to retain a minimum of 5.0% of the progress payments otherwise due to the contractor until the building of the project is substantially complete and a reduction in retainage is authorized by the executive administrator;

(3) a contractor's act of assurance form to be executed by the contractor which shall warrant compliance by the contractor with all laws of the State of Texas and all rules and published policies of the board; and

(4) any additional conditions that may be requested by the executive administrator.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106328
Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: December 12, 2001
For further information, please call: (512) 463-7981

♦ ♦ ♦

CHAPTER 384. RURAL WATER ASSISTANCE FUND

The Texas Water Development Board (board) proposes new 31 TAC §§384.1-384.7, 384.21-384.26, and 384.41-384.45, comprising Chapter 384, Rural Water Assistance Fund. New Chapter 384 addresses the creation, purposes and administration of the Rural Water Assistance Fund Program (Program). The Program will provide low interest loans to rural political subdivisions for water and water related projects pursuant to the provisions of the Texas Water Code, Chapter 15, Subchapter P. Funds were not appropriated for the Rural Water Assistance Fund and full operation of the Program depends upon appropriated funds. For this reason, provisions of the legislation that address buy-down of interest rates on loans and the provision of outreach and technical assistance services have not been included in the initial Program rules. The Program can provide low interest loans in a limited manner if approval is given to the board's application to the Bond Review Board to issue tax exempt private activity bonds under the State's private activity bond volume cap.

Proposed §§384.1-384.7 comprise Subchapter A, Introductory Provisions. Section 384.1 sets out the scope of proposed Chapter 384 and advises potential applicants that additional requirements from the provisions of Chapter 363, Subchapter A (relating to Financial Assistance Programs) will apply to the Program. Section 384.2 provides terms and specific meaning when the terms are used in the proposed chapter. Section 384.3 describes the types of financial assistance that are authorized by Texas Water Code, Chapter 15, Subchapter P to be provided through the Program. Section 384.4 provides for an annual determination of funds that will be available through the Program. Funds will be limited and it will be necessary to make a determination of the funds that will be available for authorized uses pursuant to Texas Water Code, Chapter 15, §15.954.

Section 384.5 details for potential applicants the formulas used in determining the interest rates for loans. The proposed means of calculation implements the legislative intent to provide low-cost financing to rural communities. Section 384.6 states the documents that will be needed to meet the certification requirements of the Federal Tax Code for private activity bond proceeds. Section 384.7 provides for the prudent investment of the Program funds through the principals and strategies set out in the board's Investment Rules.

Proposed §§384.21-384.26 comprise Subchapter B, Application Procedures. Section 384.21 instructs a potential loan applicant that is planning to construct a project to schedule a conference with board staff in the early stages of the planning process. This conference will provide valuable information to applicants on project requirements and how to apply for board loans. Section 384.22 provides a list of the information that must be submitted by a political subdivision as part of an application for board funding. Section 384.23 outlines the process whereby funds may be released for pre-design, design or building costs before all requirements are met for the release of funds for construction. This option provides the opportunity for customers to receive and expend funds for planning and design activities before all pre-construction requirements have been completed. Section 384.24 states the specific factors that the board must by law consider in reviewing an application for funding through the Rural Water Assistance Fund. Section 384.25 states the statutory findings that the board is required to make in approving an application for funding. Section 384.26 describes the various actions that the board may take on an application and provides

notice to applicants that board approvals for funding have time limitations which are detailed in the board resolution.

Proposed §§384.41-384.45 comprise Subchapter C, Closing and Release of Funds. Section 384.41 provides notice to applicants of the documents and contracts that will have to be submitted to the board before a loan closes and funds are released. These instruments are required under statute and prudent lending practices. Section 384.42 states the requirement that nonprofit water supply corporations must provide the board with a deed of trust on the corporation facilities and policy of title insurance. These documents will evidence clear title to the facilities and strengthen the security of the loan through the securing of collateral.

Section 384.43 lists additional documents that are required of the applicant and findings that must be made by executive administrator before funds may be released for pre-design or building purposes. The documents ensure that financial accountability will be maintained during the course of project development and that the proposed project utilizes sound engineering principals and complies with environmental regulations,

Section 384.44 provides that nonprofit water supply corporations may receive loan funds by entering into a loan agreement with the board. The loan agreement offers an alternative to the issuance of bonds and may be a less costly option for rural borrowers seeking smaller loans. Section 384.45 describes the engineering contracts and plans and specifications that must be submitted for a project to ensure that the project is in compliance with applicable laws and rules addressing construction.

Ms. Melanie Callahan, Director of Fiscal Services, has determined that for the first five-year period these sections are in effect there will be no fiscal implications to state governments as a result of enforcement and administration of the proposed new sections. There will be potential fiscal implications for local governments that apply for funding under the program. These fiscal implications would be in the form of savings on loans for water projects. However, at this time, no reliable estimates may be made of the amount of the potential savings.

Ms. Callahan has also determined that for the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be that the new program will provide an additional funding source to rural political subdivisions for developing water resources of the state. Ms. Callahan has determined there will not be economic costs to the State, to small businesses or individuals required to comply with the sections as proposed.

Comments on the proposed new sections will be accepted for 30 days following publication and may be submitted to Gail L. Allan, Director, Administration and Northern Legal Services, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711-3231, by e-mail to gallan@twdb.state.tx.us or by fax @ 512/463-5580.

SUBCHAPTER A. INTRODUCTORY PROVISIONS

31 TAC §§384.1 - 384.7

The new sections are proposed under the authority of the Texas Water Code, §6.101 and Chapter 15, Subchapter P.

The statutory provisions affected by the proposed new sections are Texas Water Code, Chapter 15, Subchapter P.

§384.1. Scope of Chapter.

This chapter shall govern applications for financial assistance from the Rural Water Assistance Fund established by the Texas Water Code, Chapter 15, Subchapter P. The program described in this chapter shall be known as the Rural Water Assistance Fund. Unless in conflict with the provisions of this chapter, the provisions of Chapter 363, Subchapter A of this title (relating to the General Provisions of Financial Assistance Programs) shall apply to applications for assistance from the Rural Water Assistance Fund.

§384.2. Definitions of Terms.

Words and terms used in this chapter shall have the following meanings, unless the context clearly indicates otherwise. Words defined in Texas Water Code Chapters 15 or 17 and not defined here shall have the meanings provided by the appropriate Texas Water Code chapter.

(1) Applicant - A rural political subdivision.

(2) District - A conservation or reclamation district created under Texas Constitution, Section 52, Article III, or Section 59, Article XVI.

(3) Federal agency - An agency or other entity of the United States Department of Agriculture or an agency or entity that is acting through or on behalf of that department.

(4) Fund - The Rural Water Assistance Fund.

(5) Rural political subdivision - A nonprofit water supply or sewer service corporation, district, or municipality with a service area of 10,000 or less in population or that otherwise qualifies for financing from a federal agency or a county in which no urban area exceeds 50,000 in population.

(6) State agency -An agency or other entity of the state, including the Department of Agriculture and the Texas Department of Housing and Community Affairs and any agency or authority that is acting through or on behalf of the Department of Agriculture or the Texas Department of Housing and Community Affairs.

§384.3. Use of Funds.

The fund may be used:

(1) to provide low-interest loans to rural political subdivisions for water or water-related projects, including the purchase of well fields, the purchase or lease of rights to produce groundwater, and interim financing of construction projects; or

(2) to enable a rural political subdivision to obtain water supplied by a larger political subdivision or to finance the consolidation or regionalization of neighboring political subdivisions, or both.

§384.4. Availability of Funds and Distribution of Loans.

For each fiscal year, the board will determine the amount of funds available from all sources for financial assistance from the Rural Water Assistance Fund for that fiscal year, and will determine the amount of funds available for loans and for other purposes for which the fund may be used.

§384.5. Interest Rates for Loans.

The procedure and method for setting fixed interest rates includes the following.

(1) The development fund manager will set fixed interest rates under this section for loans on a date that is five business days prior to the political subdivision's adoption of the ordinance or resolution authorizing its bonds and not more than 45 days before the anticipated closing of the loan from the board. After 45 days from the

establishment of the interest rate of a loan, rates will be reconsidered, and may be extended only with the approval of the development fund manager.

(2) For loans from the Rural Water Assistance Fund, the development fund manager will set the interest rates in accordance with the following:

(A) to the extent that the source of funding is provided from bond proceeds issued through the Water Development Fund specifically designated for this fund, the lending rate scale(s) will be determined as provided under §363.33(b) of this title (relating to Interest Rates for Loans and Purchase of Board's Interest in State Participation Projects); or

(B) for loans where the interest rates calculated in subparagraph (A) of this paragraph results in a true interest cost that is less than the minimum true interest cost of the lending rate scale established for those funds, interest will be calculated at a rate increased to match the minimum true interest costs so the board may recover all costs attributed to the bonds sold by the board; or

(C) for loans funded by the board with proceeds of bonds, the interest for which is intended to be tax exempt for purposes of federal tax law, the development fund manager will limit the interest set pursuant to this subsection at no higher than the rate permitted under federal tax law to maintain the tax exemption for the interest on the board's bonds.

(3) The board, at its discretion, may require applicants to receive a portion of the project funding from other board loan programs.

§384.6. Loans in Excess of 20 Years.

For loans for which the average maturity exceeds 20 years, the applicant must provide the following information:

(1) a schedule, prepared by the applicant's engineer, which lists the major components of the project, the anticipated date of placement into service of the components, the estimated useful life, in years, of the components, and the average estimated useful life of the project; and

(2) a certification by the applicant's attorney that the average weighted maturity of the obligations does not exceed 120% of the average estimated useful life of the project.

§384.7. Investment of Funds.

Funds will be invested in accordance with Chapter 365 of this title (relating to Investment Rules).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106329
Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: December 12, 2001
For further information, please call: (512) 463-7981

♦ ♦ ♦

SUBCHAPTER B. APPLICATION PROCEDURES

31 TAC §§384.21 - 384.26

The new sections are proposed under the authority of the Texas Water Code, §6.101 and Chapter 15, Subchapter P.

The statutory provisions affected by the proposed new sections are Texas Water Code, Chapter 15, Subchapter P.

§384.21. Preapplication Meeting.

An applicant seeking financial assistance should schedule a preapplication conference with the board staff to obtain guidance and establish basic eligibility of the project and of the rural political subdivision for financial assistance.

§384.22. Application for Assistance.

(a) A rural political subdivision shall submit an application for financial assistance in writing.

(b) The following information is required on all applications to the board for financial assistance.

(1) General, fiscal and legal information required includes:

(A) the name and address of the rural political subdivision;

(B) a citation of the law under which the rural political subdivision operates and was created;

(C) the total cost of the project;

(D) the amount of financial assistance being requested;

(E) a description of the project;

(F) the name, address and telephone number of the authorized representative, engineer and any other consultant(s);

(G) the source of repayment and the status of legal authority to pledge selected revenues;

(H) the financing plan for repaying the total cost of the project;

(I) the rural political subdivision's default history;

(J) the most recent annual financial statements and latest monthly and year-to-date financial reports for the General Fund and Utility Fund of the political subdivision;

(K) a certified copy of a resolution of the rural political subdivision's governing body requesting financial assistance from the board, authorizing the submission of the application, and designating the authorized representative for executing the application, and for appearing before the board;

(L) a notarized affidavit from the authorized representative stating that:

(i) for a rural political subdivision, the decision to request financial assistance from the board was made in a public meeting held in accordance with the Open Meetings Act (Government Code, Chapter 551);

(ii) the information submitted in the application is true and correct according to the best knowledge and belief of the representative;

(iii) the applicant has no litigation or other proceedings pending or threatened against the applicant that would materially adversely affect the financial condition of the applicant or the ability of the applicant to issue debt; and

(iv) the applicant will comply with all applicable federal laws, rules, and regulations as well as the laws of this state and the rules and regulations of the board.

(M) any special request for repayment structure that reflects the particular needs of the rural political subdivision.

(2) Engineering feasibility report. An applicant shall submit an engineering feasibility report in accordance with §363.13 of this title (relating to Engineering Feasibility Data).

(3) Environmental assessment. An applicant shall submit an environmental assessment in accordance with §363.14 of this title (relating to Environmental Assessment).

(4) Required water conservation plan. An applicant shall submit a water conservation plan prepared in accordance with §363.15 of this title (relating to Required Water Conservation Plan).

(5) Additional application information. An applicant shall submit any additional information requested by the executive administrator as necessary to complete the financial, legal, engineering, and environmental reviews.

§384.23. Pre-design Funding Option.

(a) This loan application option will provide an eligible applicant that meets all applicable board requirements an alternative to secure a commitment and close a loan for the pre-design, design or building costs associated with a project. Under this option, a loan may be closed and funds necessary to complete planning and design activities released. If planning requirements have not been satisfied, design and building funds will be held or escrowed and released in the sequence described in this section. Following completion of planning activities and environmental assessment, the executive administrator may require the applicant to make changes in order to proceed with the project. If the portion of a project associated with funds in escrow cannot proceed, the loan recipient shall use the escrowed funds to pay off the obligations to the board in inverse order of maturity.

(b) The executive administrator may recommend to the board the use of this section if, based on available information, there appear to be no significant permitting, social, environmental, engineering, or financial issues associated with the project. An application for pre-design funding may be considered by the board despite a negative recommendation from the executive administrator.

(c) Applications for pre-design funding must include the following information:

(1) for loans including building cost, a preliminary engineering feasibility report which will include at minimum: a description and purpose of the project; area maps or drawings as necessary to fully locate the project area(s); a proposed project schedule; estimated project costs and budget including sources of funds; current and future populations and projected water needs and sources; alternatives considered; and a discussion of known permitting, social or environmental issues which may affect the alternatives considered and the implementation of the proposed project;

(2) contracts for engineering services;

(3) evidence that an approved water conservation plan will be adopted prior to the release of loan funds;

(4) all information required in §384.22(b)(1) of this title (relating to Application for Assistance); and

(5) any additional information the executive administrator may request to complete evaluation of the application.

(d) After board commitment and completion of all closing and release prerequisites as specified in §384.41 of this title (relating to Loan Closing), §384.42 of this title (relating to Deed of Trust and Other Required Documentation), and §384.43 of this title (relating to Release of Funds), funds will be released in the following sequence:

(1) for planning and permitting costs, after receipt of executed contracts for the planning or permitting phase;

(2) for design costs, after receipt of executed contracts for the design phase and upon approval of an engineering feasibility report as specified in §363.13 of this title (relating to Engineering Feasibility Data) and compliance with §363.14 of this title (relating to Environmental Assessment);

(3) for building costs, after issuance of any applicable permits, and after bid documents are approved and executed construction documents are contingently awarded.

(e) Board staff will use preliminary environmental data provided by the applicant, as specified in subsection (d) of this section and make a written report to the executive administrator on known or potential significant social or environmental concerns. Subsequently, these projects must have a favorable executive administrator's recommendation which is based upon a full environmental review during planning, as provided under §363.14 of this title.

(f) The executive administrator will advise the board concerning projects that involve major economic or administrative impacts to the applicant resulting from environmentally related special mitigative or precautionary measures from an environmental assessment under §363.14 of this title.

§384.24. Board Consideration of Application.

(a) The executive administrator shall submit the application to the board with comments concerning financial assistance. The application will be scheduled on the agenda for board consideration at the earliest practical date. The applicant and other interested parties known to the board shall be notified of the time and place of such meeting.

(b) In passing on an application for financial assistance, the board shall consider:

(1) the needs of the area to be served by the project, the benefit of the project to the area, the relationship of the project to the overall state water needs, and the relationship of the project to the state water plan; and

(2) the availability of revenue to the rural political subdivision from all sources for the ultimate repayment of the cost of the water supply project, including all loan interest.

§384.25. Findings Required.

The board, by resolution, may approve the application if it finds that:

(1) the public interest is served by state assistance for the project; and

(2) the revenue or taxes pledged by the applicant will be sufficient to meet all obligations assumed by the applicant during the succeeding period of not more than 50 years.

§384.26. Action of the Board on Application.

At the conclusion of the meeting to consider the project, the board may resolve to approve, disapprove, approve with conditions, or continue consideration of the application. A commitment will include a date after which the financial assistance will no longer be available unless extended by the board. The board may make any changes in the original commitment at the time of extension.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106330
Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: December 12, 2001
For further information, please call: (512) 463-7981

♦ ♦ ♦

SUBCHAPTER C. CLOSING AND RELEASE OF FUNDS

31 TAC §§384.41 - 384.45

The new sections are proposed under the authority of the Texas Water Code, §6.101 and Chapter 15, Subchapter P.

The statutory provisions affected by the proposed new sections are Texas Water Code, Chapter 15, Subchapter P.

§384.41. Loan Closing.

(a) Instruments needed for closing. The documents which shall be required at the time of closing shall include the following:

(1) evidence that requirements and regulations of all identified local, state and federal agencies having jurisdiction have been met, including but not limited to permits and authorizations;

(2) certified copy of the ordinances or resolutions adopted by the governing body authorizing issuance of debt sold to the board which has received prior approval by the executive administrator and which shall have sections providing:

(A) that an escrow account, if applicable, shall be created which shall be separate from all other funds and that:

(i) the account shall be maintained at an escrow agent bank or maintained with the trust agent;

(ii) funds shall not be released from the escrow account without written approval by the executive administrator;

(iii) the escrow account bank statements or trust account statement will be provided on a monthly basis to the executive administrator's office; and

(iv) the escrow account will be adequately collateralized as determined by the executive administrator sufficient to protect the board's interest;

(B) that a construction fund shall be created which shall be separate from all other funds of the applicant;

(C) that a final accounting be made to the board of the total sources and authorized use of project funds and that any surplus loan funds be used in a manner as approved by the executive administrator;

(D) that an annual audit of the rural political subdivision, prepared in accordance with generally accepted auditing standards by a certified public accountant or licensed public accountant be provided annually to the executive administrator;

(E) that the rural political subdivision shall fix and maintain rates and collect charges to provide adequate operation, maintenance and insurance coverage on the project in an amount sufficient to protect the board's interest;

(F) that the rural political subdivision will implement any water conservation program required by the board until all financial obligations to the state have been discharged;

(G) that the rural political subdivision shall maintain current, accurate and complete records and accounts necessary to demonstrate compliance with financial assistance related legal and contractual provisions;

(H) that the rural political subdivision covenants to abide by the board's rules and relevant statutes, including the Texas Water Code, Chapters 15 and 17; and

(I) that the rural political subdivision or an obligated person for whom financial or operating data is presented, will undertake, either individually or in combination with other issuers of the rural political subdivision's obligations or obligated persons, in a written agreement or contract to comply with requirements for continuing disclosure on an ongoing basis substantially in the manner required by Securities and Exchange Commission (SEC) rule 15c2-12 and determined as if the board were a Participating Underwriter within the meaning of such rule, such continuing disclosure undertaking being for the benefit of the board and the beneficial owner of the rural political subdivision's obligations, if the board sells or otherwise transfers such obligations, and the beneficial owners of the board's obligations if the rural political subdivision is an obligated person with respect to such obligations under rule 15c2-12;

(3) two copies of the rural political subdivision's water conservation program, including documentation of local adoption;

(4) unqualified approving opinions of the attorney general of Texas and a certification from the comptroller of public accounts that such debt has been registered in that office;

(5) if obligations are issued, an unqualified approving opinion by a recognized bond attorney acceptable to the executive administrator, or if a promissory note and loan agreement is used, an opinion from the corporation's attorney which is acceptable to the executive administrator;

(6) executed escrow agreement entered into by the entity and an escrow agent bank or an executed trust agreement entered into by the entity and the trust agent satisfactory to the executive administrator, in the event that construction funds are escrowed;

(7) other or additional data and information, if deemed necessary by the executive administrator.

(b) Certified bond transcript. At such time as available following the final release of funds the rural political subdivision shall submit a transcript of proceedings relating to the debt purchased by the board which shall contain those instruments normally furnished a purchaser of debt.

(c) Closing requirements for obligations. A rural political subdivision shall be required to comply with the following closing requirements if the applicant issues obligations that are purchased by the board:

(1) all loans shall be closed in book-entry-only form;

(2) the rural political subdivision shall use a paying agent/registrar that is a depository trust company (DTC) participant;

(3) the rural political subdivision shall be responsible for paying all DTC closing fees assessed to the rural political subdivision by the board's custodian bank directly to the board's custodian bank;

(4) the rural political subdivision shall provide evidence to the board that one fully registered bond has been sent to the DTC or to the rural political subdivision's paying agent/registrar prior to closing.

§384.42. Deed of Trust and Other Required Documentation.

Prior to release of funds, a nonprofit water supply corporation must submit an executed Deed of Trust in the form provided by the executive administrator and must submit a policy of title insurance, written to the benefit of the board, which is acceptable in form and substance to the executive administrator.

§384.43. Release of Funds.

(a) Release of funds for planning, design and permits. Prior to the release of funds for planning, design, and permits, the rural political subdivision shall submit for approval to the executive administrator the following documents:

(1) a statement as to sufficiency of funds to complete the activity;

(2) certified copies of each contract under which revenues for repayment of the rural political subdivision's debt will accrue;

(3) executed consultant contracts relating to services provided for planning, design, and/or permits;

(4) evidence that the requirements and regulations of all identified local, state, and federal agencies having jurisdiction have been met, including but not limited to permits and authorizations; and

(5) other such instruments or documents as the board or executive administrator may require.

(b) Pre-design funding. The funds needed for the total estimated cost of the engineering, planning, and design cost if the engineering feasibility report required under §363.13 of this title (relating to Engineering Feasibility Data) and the environmental assessment required under §363.14 of this title (relating to Environmental Assessment) have been approved, the cost of issuance associated with the loan, and any associated capitalized interest will be released to the loan recipient and the remaining funds will be escrowed to the escrow agent bank or to the trust agent until all applicable requirements in subsections (a) and (c) of this section and §384.23 of this title (relating to Pre-design Funding Option) have been met.

(c) Release of funds for building purposes. Prior to the release of funds for building purposes, the rural political subdivision shall submit for approval to the executive administrator the following documents:

(1) a tabulation of all bids received and an explanation for any rejected bids or otherwise disqualified bidders;

(2) one executed original copy of each construction contract the effectiveness and validity of which is contingent upon the receipt of board funds;

(3) evidence that the necessary acquisitions of land, leases, easements and rights-of-way have been completed or that the applicant has the legal authority necessary to complete the acquisitions;

(4) a statement as to sufficiency of funds to complete the project;

(5) certified copies of each contract under which revenues to the project will accrue;

(6) evidence that all requirements and regulations of all identified local, state, and federal agencies having jurisdiction have been met, including permits and authorizations; and

(7) other such instruments or documents as the board or executive administrator may require.

(d) Water rights certification. Prior to release of construction funds, the executive administrator shall make a written finding that the applicant:

(1) has the necessary water rights authorizing the applicant to appropriate and use the water that the project will provide, if the applicant is proposing surface water development; or

(2) has the right to use water that the project will provide, if the applicant is proposing groundwater development.

(e) Release of funds for projects constructed through one or more construction contracts. For projects constructed through one or more construction contracts, the executive administrator may approve the release of funds for all or a portion of the estimated project cost, provided all requirements of subsection (c) of this section have been met for at least one of the construction contracts.

(f) Escrow of funds. The executive administrator may require the escrow of an amount of project funding related to contracts which have not met the requirements of subsection (c) of this section at the time of loan closing.

(g) Release of funds in installments. Funds may be released to rural political subdivisions in installments and pursuant to the provisions of this section.

§384.44. Loan Agreements for Nonprofit Water Supply Corporations.

(a) The board may provide financial assistance to an applicant that is a nonprofit water supply corporation by entering into a loan agreement with the nonprofit water supply corporation.

(b) In addition to executing a loan agreement, the applicant must execute a promissory note in the full amount of the loan.

(c) An applicant which utilizes the loan agreement option is not required to engage the services of a bond counsel or a financial advisor.

(d) The applicant must provide the board with an attorney's opinion as to the authority of the rural political subdivision to incur the debt.

§384.45. Engineering Design Approvals.

A rural political subdivision shall obtain executive administrator approval of contract documents, including engineering plans and specifications, prior to receiving bids and awarding the contract. The contract documents shall be consistent with the engineering information submitted with the application and must contain the following:

(1) provisions assuring compliance with the board's rules and all relevant statutes;

(2) provisions providing for the rural political subdivision to retain a minimum of 5.0% of the progress payments otherwise due to the contractor until the building of the project is substantially complete and a reduction in retainage is authorized by the executive administrator;

(3) a contractor's act of assurance form to be executed by the contractor which shall warrant compliance by the contractor with all laws of the state and all rules and published policies of the board; and

(4) any additional information or conditions that may be requested by the executive administrator.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106331
Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: December 12, 2001
For further information, please call: (512) 463-7981

♦ ♦ ♦

TITLE 34. PUBLIC FINANCE

PART 5. TEXAS COUNTY AND DISTRICT RETIREMENT SYSTEM

CHAPTER 103. CALCULATIONS OR TYPES OF BENEFITS

34 TAC §103.4

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas County and District Retirement System or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas County and District Retirement System proposes to repeal §103.4, which prohibits partial years of a member's age from being used to determine eligibility for service retirement. The repeal of the rule will allow partial years of age to be considered in determining eligibility for service retirement.

Joseph Cannon Froh, Director of the Texas County and District Retirement System, has determined that for the first five-year period after repeal of the rule there will be no fiscal implications for state government and the possibility of minimal costs to local governments.

Mr. Froh has also determined that for each of the first five years after repeal of the rule the public benefit anticipated as a result of the repeal is the ability of career employees who are members of the retirement system to retire at a slightly earlier time. There will be no costs to small businesses. There are no anticipated costs to persons who take advantage of the lack of the rule.

Comments on the proposed repeal may be submitted to Joseph Cannon Froh, Director, Texas County and District Retirement System, P.O. Box 2034, Austin, TX 78768-2034.

Repeal of the rule is proposed under §845.102, Government Code, which provides the board of trustees of the Texas County and District Retirement System with the authority to adopt rules necessary or desirable for efficient administration of the system.

Sections 844.207, 844.210, and 844.211, Government Code, are affected by this proposed repeal.

§103.4. Years of Attained Age.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106341
Joseph Cannon Froh
Director
Texas County and District Retirement System
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 637-3230

♦ ♦ ♦

34 TAC §103.10

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas County and District Retirement System or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas County and District Retirement System proposes to repeal §103.10, which provides for the calculation of interest to be credited to an account closed because a member has not performed service within a specified time. The repeal of the rule will not change current law, because the same calculation was added to §842.108(c), Government Code, by Senate Bill 523, 77th Legislature, Regular Session, 2001.

Joseph Cannon Froh, Director of the Texas County and District Retirement System, has determined that for the first five-year period after repeal of the rule there will be no fiscal implications for state government and no costs to local governments.

Mr. Froh has also determined that for each of the first five years after repeal of the rule the public benefit anticipated as a result of the repeal is the transfer to the legislature of the authority to determine the appropriate method of interest calculation in this circumstance. There will be no costs to small businesses. There are no anticipated costs to persons who take advantage of the lack of the rule.

Comments on the proposed repeal may be submitted to Joseph Cannon Froh, Director, Texas County and District Retirement System, P.O. Box 2034, Austin, TX 78768-2034.

Repeal of the rule is proposed under §845.102, Government Code, which provides the board of trustees of the Texas County and District Retirement System with the authority to adopt rules necessary or desirable for efficient administration of the system.

No statutory sections are affected by this proposed repeal.

§103.10. Membership Terminated by Absence from Service: Partial Year Interest.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106342

Joseph Cannon Froh
Director
Texas County and District Retirement System
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 637-3230

♦ ♦ ♦

34 TAC §103.11

The Texas County and District Retirement System proposes to delete Subsection (b) of §103.11, which requires claims for payment of supplemental death benefits based on extended coverage in the supplemental death benefit program to be filed within two years after the member's death. The deletion of Subsection (b) of the rule will allow extended coverage supplemental death benefits to be paid without regard to when a claim is filed.

Joseph Cannon Froh, Director of the Texas County and District Retirement System, has determined that for the first five-year period after deletion of Subsection (b) of the rule there will be no fiscal implications for state government and no costs to local governments.

Mr. Froh has also determined that for each of the first five years after deletion of Subsection (b) of the rule the public benefit anticipated as a result of the deletion is the ability to pay supplemental death benefits in cases in which the retirement system is not notified of a member's death within two years after that occurrence. There will be no costs to small businesses. There are no anticipated costs to persons who take advantage of the lack of the rule.

Comments on the proposed amendment may be submitted to Joseph Cannon Froh, Director, Texas County and District Retirement System, P.O. Box 2034, Austin, TX 78768-2034.

Amendment of the rule is proposed under §845.102, Government Code, which provides the board of trustees of the Texas County and District Retirement System with the authority to adopt rules necessary or desirable for efficient administration of the system.

Section 844.502, Government Code, is affected by this proposed amendment.

§103.11. Supplemental Death Benefit Based on Extended Coverage.

(a) A member of the retirement system, who had coverage in the supplemental death benefit program during the last month the member was required to make a contribution to the retirement system and who dies within 24 calendar months following that month, is considered to have received extended coverage in the supplemental death benefit program provided that the member was unable to engage in gainful employment or was on leave of absence under the Family and Medical Leave Act of 1993 ("the FMLA") throughout the period beginning with the date of the member's last required contribution and ending on the date of the member's death.

~~[(b) A claim for payment of a supplemental death benefit based on extended coverage must be filed with the retirement system before the second anniversary of the member's death.]~~

(b) ~~[(c)]~~ The person making the claim for payment of a supplemental death benefit based on extended coverage has the burden of establishing that the deceased member was unable to engage in gainful employment or was on leave under the FMLA throughout the entire period of extended coverage, and the claimant must provide evidence satisfactory to the retirement system of that fact.

(c) ~~[(d)]~~ The following are examples of documents relating to the member that may assist the claimant in meeting this burden of proof:

(1) copy of the decedent's death certificate;

(2) certified statements of attending physicians;

(3) certified statements of caregivers and custodians;

(4) certified statements of subdivisions regarding absences under the FMLA;

(5) certified statements of individuals having personal knowledge of the decedent's education, training and work experience;

(6) copies of the decedent's tax returns covering the period of extended coverage;

(7) findings of the Social Security Administration, Workers Compensation Commission or other entities providing compensation for disability, illness or injury.

(d) ~~[(e)]~~ In its determination of a claim filed under this section, the retirement system may consider whether the impairment or incapacity affecting the decedent's ability to engage in gainful employment could have been safely diminished by the decedent with reasonable effort to the extent that the decedent would have been able to engage in gainful employment.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106343
Joseph Cannon Froh
Director
Texas County and District Retirement System
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 637-3230

♦ ♦ ♦

CHAPTER 107. MISCELLANEOUS RULES

34 TAC §107.2

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas County and District Retirement System or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas County and District Retirement System proposes to repeal §107.2, which limits the number of recipients of benefits on the death of a member or annuitant to three. The repeal of the rule will allow any number of beneficiaries to receive death benefits.

Joseph Cannon Froh, Director of the Texas County and District Retirement System, has determined that for the first five-year period after repeal of the rule there will be no fiscal implications for state government and no costs to local governments.

Mr. Froh has also determined that for each of the first five years after repeal of the rule the public benefit anticipated as a result of the repeal is the greater flexibility of members and annuitants to determine the most appropriate distribution of their benefits.

There will be no costs to small businesses. There are no anticipated costs to persons who take advantage of the lack of the rule.

Comments on the proposed repeal may be submitted to Joseph Cannon Froh, Director, Texas County and District Retirement System, P.O. Box 2034, Austin, TX 78768-2034.

Repeal of the rule is proposed under §845.102, Government Code, which provides the board of trustees of the Texas County and District Retirement System with the authority to adopt rules necessary or desirable for efficient administration of the system.

No statutory sections are affected by this proposed repeal.

§107.2. Payment to Beneficiaries of Decedents.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 19, 2001.

TRD-200106344
Joseph Cannon Froh
Director
Texas County and District Retirement System
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 637-3230

♦ ♦ ♦

34 TAC §107.5

The Texas County and District Retirement System proposes amended §107.5, concerning the termination of membership on withdrawal of contributions and the deadline for canceling a refund. Under the proposed rule, membership will terminate only when a person withdraws contributions from all the person's accounts. The proposed rule extends from 30 to 60 days the period within which a refund may be canceled.

Joseph Cannon Froh, Director of the Texas County and District Retirement System, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state government and no costs to local governments.

Mr. Froh has also determined that for each of the first five years the rule is in effect the public benefit anticipated as a result of administering the rule is the ability of members with more than one account in the retirement system to receive a refund from one or more accounts while maintaining others. There will be no costs to small businesses. There are no anticipated costs to persons who take advantage of the rule.

Comments on the proposed amended rule may be submitted to Joseph Cannon Froh, Director, Texas County and District Retirement System, P.O. Box 2034, Austin, TX 78768-2034.

The rule is proposed under §845.102, Government Code, which provides the board of trustees of the Texas County and District Retirement System with the authority to adopt rules necessary or desirable for efficient administration of the system.

Sections 842.108 and 842.109, Government Code, are affected by this proposed rule.

§107.5. Date of Termination of Membership on [~~upon~~] Payment of Refund; Cancellation of Refund.

(a) The date on which the retirement system mails[~~,~~] or electronically transfers [~~in the event of an electronic funds transfer,~~] payment of all [~~any portion of the~~] accumulated contributions credited to a member's individual accounts [~~account~~] in the employees saving fund pursuant to §842.108(b), [~~the~~] Government Code, [~~§842.108~~] is the date on which the person's membership in the retirement system terminates under §842.109 of that code as a result of that payment.

(b) If the retirement system receives the amount withdrawn from a person's account within 60 days after the date the refund was mailed or electronically transferred [~~However, if the payment by the retirement system was made by check or checks and all such checks are returned to and received by the retirement system within 30 days of such date~~], together with the person's written request to be reinstated as a member,if the refund terminated membership, the person's account shall be reopened [~~to the same effect~~] as if the payment to the member had not been made.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 22, 2001.

TRD-200106354
Joseph Cannon Froh
Director
Texas County and District Retirement System
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 637-3230

♦ ♦ ♦

34 TAC §107.11

The Texas County and District Retirement System proposes new §107.11, concerning changes a subdivision may make in a plan for which it has assumed financial responsibility. Under the proposed rule, a successor subdivision may adopt an actuarially determined annual employer contribution rate for the plan. If it does, it may change the employee contribution rate, authorize credit for qualified military service, change the ratio by which it "matches" employee contributions, change eligibility provisions for service retirement, award cost-of-living increases to annuitants, authorize premembership service credit, authorize reestablishment of credit previously forfeited, or authorize a partial lump-sum distribution on retirement. A successor subdivision could also authorize supplemental death benefits.

Joseph Cannon Froh, Director of the Texas County and District Retirement System, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state government and no costs to local governments that do not choose to incur additional costs.

Mr. Froh has also determined that for each of the first five years the rule is in effect the public benefit anticipated as a result of administering the rule is greater flexibility for a participating subdivision to choose the benefits it wants to provide in a plan for which it has assumed financial responsibility. There will be no costs to small businesses. There are no anticipated costs to persons who are affected by the rule as the result of a subdivision's action.

Comments on the proposed rule may be submitted to Joseph Cannon Froh, Director, Texas County and District Retirement System, P.O. Box 2034, Austin, TX 78768-2034.

The rule is proposed under §842.002, Government Code, which specifically provides the board of trustees of the Texas County and District Retirement System with the authority to adopt rules relating to the powers and duties of a subdivision over a plan for which it has assumed financial responsibility.

No statutory section is affected by this proposed rule.

§107.11. Plan Changes by Successor Subdivision.

(a) A subdivision that has assumed financial responsibility for a plan that it did not create may adopt for the plan an annually determined contribution rate. If it adopts that method of determining employer contributions, the plan is subject to §844.702, Government Code, and the subdivision has the powers provided by §844.704 of that code.

(b) A subdivision that has assumed financial responsibility for a plan it did not create may make for the plan any election available under the supplemental death benefit program for which it accepts the premium actuarially determined for the coverage.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 22, 2001.

TRD-200106355
Joseph Cannon Froh
Director
Texas County and District Retirement System
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 637-3230

♦ ♦ ♦

34 TAC §107.12

The Texas County and District Retirement System proposes new §107.12, concerning retirement system payments that are due, have been suspended, or have not been negotiated on the date an annuitant dies. Under the proposed rule, payments of an annuity that is suspended because a retiree returns to work with the retiree's previous employer and other payments that have not been made by the retirement system or negotiated by the annuitant will be payable to the annuitant's beneficiary. Multiple beneficiaries will need to agree on one beneficiary to receive the payments on behalf of all beneficiaries.

Joseph Cannon Froh, Director of the Texas County and District Retirement System, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state government and no costs to local governments.

Mr. Froh has also determined that for each of the first five years the rule is in effect the public benefit anticipated as a result of administering the rule is the greater ability of the system to implement the wishes of its annuitants through their selection of beneficiaries, instead of directing benefits through the estate administration process. There will be no costs to small businesses. There are no anticipated costs to persons who are affected by the rule.

Comments on the proposed rule may be submitted to Joseph Cannon Froh, Director, Texas County and District Retirement System, P.O. Box 2034, Austin, TX 78768-2034.

The rule is proposed under §845.102, Government Code, which provides the board of trustees of the Texas County and District Retirement System with the authority to adopt rules necessary or desirable for the efficient administration of the system.

Section 842.110, Government Code, is affected by this proposed rule.

§107.12. Payments Due or Suspended on Death of Annuitant.

(a) Payments under an annuity that is suspended because a retiree is reemployed under §842.110, Government Code, are payable, if the retiree dies before making an application for resumption of the annuity, to the beneficiary selected at the time of the retirement for which the annuity originally was being paid.

(b) Payments of an annuity that are due and have not been made or have been made but not negotiated on the date of death of an annuitant are payable to the beneficiary of the annuitant on file with the retirement system for the annuity on the date of the annuitant's death.

(c) The retirement system shall make payments of an annuity described by Subsection (a) or (b) of this section and for which more than one beneficiary is on file with the system to a single beneficiary designated on one or more forms signed by all beneficiaries and filed with the system.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 22, 2001.

TRD-200106356
Joseph Cannon Froh
Director
Texas County and District Retirement System
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 637-3230

♦ ♦ ♦

TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 1. ORGANIZATION AND ADMINISTRATION

SUBCHAPTER I. FEES FOR COPIES OF RECORDS

37 TAC §1.125

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Department of Public Safety or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Public Safety proposes the repeal of §1.125, concerning Statistical Services Bureau Fees. The section is proposed for repeal due to being outdated and not following the General Services Commission's policy for the release of accident information in bulk. The repeal is filed simultaneously with a proposal for new §1.125 that will make the fee for the sale of accident reports consistent with statute.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Haas also has determined that for each year of the first five-year period the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be current and updated rules consistent with statute. There is no anticipated adverse economic effect on individuals, small businesses, or micro-businesses.

Comments on the proposal may be submitted to Frank Elder, Assistant Chief of Driver License Division, Texas Department of Public Safety, Box 4087, Austin, Texas 78773-0300, (512) 424-2768.

The repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work.

Texas Government Code, §411.004(3) is affected by this repeal.

§1.125. Statistical Services Bureau Fees.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 16, 2001.

TRD-200106226
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 424-2135

♦ ♦ ♦

37 TAC §1.125

The Texas Department of Public Safety proposes new §1.125, concerning Accident Records Bureau Fees. New §1.125 is necessary in order to place into rule the department's current business policies regarding the sale of accident reports and accident information. The section further makes the sale of accident reports consistent with the statutory fee of $6.00 as per House Bill 1544, passed during the 77th Texas Legislature, 2001. The new section is filed simultaneously with a proposal for repeal of current §1.125, which was outdated and did not follow the General Services Commission's policy for the release of accident information in bulk.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be a positive fiscal impact on state and local government. However, because the department is unable to estimate accurately the level of accident records sales by local government it is unable to estimate the gain in revenue to the state.

Mr. Haas also has determined that for each year of the first five-year period the rule is in effect the public benefit anticipated as a result of enforcing the rule will be current and updated rules consistent with statute. The anticipated cost to individuals, small businesses and micro-businesses will be the $6.00 cost of the accident report. The current cost is $4.00.

Comments on the proposal may be submitted to Frank Elder, Assistant Chief of Driver License Division, Texas Department of Public Safety, Box 4087, Austin, Texas 78773-0300, (512) 424-2768.

The new section is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work.

Texas Government Code, §411.004(3) is affected by this proposal.

§1.125. Accident Records Bureau Fees.

(a) The department has determined through a study of time, personnel, equipment and supplies that the cost to provide an accident report is $6.00. Certification of the report or accident information is $2.00. The department may issue a certification that no report or information is on file for a fee of $6.00.

(b) Copies of media containing accident information, other than the accident report itself; will be furnished in accordance with rules established by the Department of Information Resources regarding the release of public information. Fees for this media will also follow the Department of Information Resources guidelines. Fees will be based on the estimate of the costs involved including costs for programming, shipping expenses, postage, supplies, such as labels, boxes, and other supplies used to produce the requested information.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 16, 2001.

TRD-200106225
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 424-2135

♦ ♦ ♦

CHAPTER 5. CRIMINAL LAW ENFORCEMENT

SUBCHAPTER C. THREATS AGAINST PEACE OFFICER

37 TAC §§5.31 - 5.38

The Texas Department of Public Safety (DPS) proposes new Subchapter C, §§5.31-5.38, concerning Threats Against Peace Officer. The new sections promulgate the policies and procedures requiring law enforcement agencies that have determined that some individual that has made a threat against a police officer to report that incident according to department rules. The new sections are necessary as a result of the passage of House Bill 776, passed during the 77th Texas Legislature, 2001.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the rules are in effect there will be fiscal implications to state and local governments. The start-up fiscal impact to the department of these proposed rules is approximately $150,000 to modify the DPS law enforcement information systems to store and disseminate Threats Against Peace Officer File data. In addition, the department will incur on-going costs related to training and auditing of local agencies in systems use. Those costs will be absorbed by the present department training and auditing programs.

Fiscal impact on most local agencies will be minimal, with the exception that all local agencies will incur the costs associated with sending personnel to training in the use of the file. Those local agencies who have direct computer interfaces with the department law enforcement information systems will incur the programming costs associated with creating the capability within their systems to enter and access the Threats Against Peace Officer file data. Those costs will vary depending upon the local agencies systems.

Mr. Haas also has determined that for each year of the first five-year period the rules are in effect the public benefit anticipated as a result of enforcing the rules will be a centralized state database to identify those individuals who make threats against police officers. There is no anticipated adverse economic effect on individuals, small businesses, or micro-businesses.

Comments on the proposal may be submitted to David Boatright, Attorney-Criminal Law Enforcement, Texas Department of Public Safety, Box 4087, Austin, Texas 78773-0400, (512) 424-2646.

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Government Code, §411.048(c), (e), and (i) which provide that the director of the department shall adopt rules, subject to commission approval, to prescribe the form and manner to be used by a criminal justice agency reporting to the department its determination of a serious threat against a peace officer, to prescribe how an agency may use information disseminated to it by the department, and to require compliance with general federal intelligence guidelines.

Texas Government Code, §411.004(3) and §411.048 are affected by this proposal.

§5.31. Subchapter Definitions.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise.

(1) Agency -- means a criminal justice agency, including the Department of Public Safety (DPS) when submitting a Threat Against Peace Officer (TAPO) report.

(2) 28 CFR -- means 28 Code of Federal Regulations, Part 23.1 et seq., as promulgated by the U.S. Department of Justice, Office of Justice Programs.

(3) Consensual citizen encounter -- means the approach of a citizen by an officer under limited circumstances that are neither mandatory nor coercive and that do not rise to the level of a detention or arrest, where:

(A) the citizen is objectively aware of the freedom to leave; and

(B) the officer engages in casual conversation not interrogation.

(4) Criminal justice agency -- has the meaning assigned by the Code of Criminal Procedure, Article 60.01.

(5) Department or DPS -- means the Texas Department of Public Safety.

(6) Director -- means the director of the department.

(7) Officer -- means a peace officer.

(8) Peace officer -- has the meaning assigned by the Penal Code, §1.07(a).

(9) Serious threat against an officer -- means an individual's expression of intent to inflict serious bodily injury or death on a peace officer.

(10) TAPO -- means the Threat Against Peace Officer index managed by the department.

(11) TCIC -- means the Texas Crime Information Center managed by the department.

(12) Texas User Specifications -- means the latest draft of the DPS publication by that name and any cross-referenced material.

(13) TLETS -- means the Texas Law Enforcement Telecommunication System managed by the department.

§5.32. Applicability and Purpose.

(a) Non-applicability. This subchapter does not apply to every threat or offense targeting an officer or threats made by a group rather than an individual.

(b) Applicability. This subchapter applies to a threat determined by a Texas criminal justice agency:

(1) to be a serious threat against an officer, directed specifically against an individual officer or generally against some or all officers; and

(2) not to be from an anonymous source.

(c) Background and purpose. After an individual makes a serious threat against an officer, an appropriately disseminated alert about that threat may provide critical tactical information to an officer in the field.

(1) The timely sharing of centrally-collected threat information will help protect officers.

(2) This central index system, called "TAPO," is a pointer system designed to provide rapid, statewide access to information about these threats.

(3) This subchapter governs the submission, query, dissemination, use, and retention of an electronic record in the TAPO index and the information supporting that record.

§5.33. General requirements.

(a) DPS responsibility. The department assumes responsibility for 28 CFR compliance with respect to security and file maintenance of the TAPO index.

(b) Agency responsibility. Under Government Code, §411.048(i), an agency entering an electronic TAPO record must comply with the Texas User Specifications with respect to the information held by the agency to support the electronic record.

(1) Compliance with the Texas User Specifications and this subchapter is substantial compliance with 28 CFR.

(2) While DPS may assist the agency in its efforts to comply with 28 CFR, the agency assumes responsibility for 28 CFR compliance for the supporting information.

(c) Criminal predicate. No agency may submit an electronic TAPO record without a proper criminal predicate directly related to the threat information supporting the electronic record.

(1) A criminal predicate is shown for an electronic record when articulable information exists to establish sufficient facts to give a peace officer, investigator, or other trained criminal justice employee reasonable suspicion to believe that a particular individual has made a serious threat against an officer.

(2) The individual need not have been arrested for the threat being investigated or any other crime, as a predicate for submitting information to TAPO.

(d) Erroneous record. If information is disseminated from a TAPO record and later determined to be materially erroneous or incorrect, the submitting agency must notify each previous recipient of the error or correction in the record. The department may assist the agency in determining the identity of each recipient of the erroneous or incorrect record.

(e) Secondary database. No agency may use data received solely based on a TAPO query to populate another searchable database.

(f) Miscellaneous requirements. An agency shall comply with the following requirements of the Texas User Specifications:

(1) submission and collection;

(2) secure storage;

(3) inquiry and search capability;

(4) controlled dissemination; and

(5) purge and review process.

§5.34. Submission.

(a) Statutory report. Under Government Code, §411.048, a criminal justice agency must, upon determining that an individual has made a serious threat against an officer, immediately enter an electronic report of the determination into the DPS threat index in the form and manner provided by DPS rules.

(1) This section comprises the DPS rules concerning the form and manner for these reports.

(2) The form and manner may contain discretionary or mandatory provisions as described in the Texas User Specifications. Mandatory provisions describe the minimum information available to any agency making a proper TAPO query. Discretionary provisions describe additional intelligence information that may be stored by the department and available through a direct contact with DPS Special Crimes personnel.

(b) Form. An agency must, without regard to ultimate charge or case clearance, enter an electronic record into TAPO following the form required by the Texas User Specifications.

(c) Manner. An agency must enter the electronic record following the manner required by the Texas User Specifications.

(d) Removal. The department will remove an electronic TAPO record if:

(1) DPS receives an appropriate court order;

(2) DPS determines that the TAPO record is misleading, inaccurate, or otherwise no longer relevant; or

(3) the submitting agency fails or refuses to:

(A) provide adequate documentation of any material information supporting the record; or

(B) validate the supporting information within the five year review period described in the Texas User Specifications.

(e) Group membership. The department will not accept submission of an electronic TAPO record for an individual if the record is based solely on the individual's membership in a group.

(f) Target notification. An agency should take reasonable steps to notify the intended target of the threat.

§5.35. Query.

(a) Generally. An agency may query TAPO following the query requirements in the Texas User Specifications.

(b) Query responses. An agency with proper query access to TCIC through TLETS will receive a TAPO alert response to any one of several queries listed in the Texas User Specifications.

§5.36. Dissemination.

(a) By DPS. The department will disseminate a TAPO alert in compliance with this subchapter.

(b) By agency. The agency will immediately use a code to make the initial alert dissemination to an officer in the field by radio or other telecommunication system, unless there is a compelling reason to use plain English.

(1) The agency may provide other details of the alert, including the identity of the agency that submitted the electronic record to contact for specific, detailed information about the nature of the threat.

(2) The department encourages but does not require a uniform, statewide code to make the initial alert.

(c) Other dissemination by DPS. The department may disseminate selected information or analysis under this subchapter through a general statistical report, newsletter, bulletin, alert, or other appropriate media.

§5.37. Use.

(a) Generally limited. Generally, while TAPO is not designed to provide information to justify most official action, the same facts supporting the TAPO alert may be used as appropriate to support an action. TAPO merely alerts the officer and identifies the agency to contact in order to verify those facts. The officer may use the alert as expressly permitted by this section and, after contacting the agency, take other appropriate action based on direct information about any supporting fact.

(b) Use expressly prohibited. A TAPO alert indicates a potentially dangerous individual, not necessarily a wanted person. No officer or agency may use the TAPO by itself to provide:

(1) probable cause for a warrantless arrest;

(2) probable cause in an affidavit for an arrest or search warrant;

(3) a ground of denial for a permit or other license; or

(4) reasonable suspicion to stop or detain an individual.

(c) Use expressly permitted. An officer or agency may only use a TAPO alert to:

(1) take reasonable action to protect the officer or another;

(2) engage in a consensual citizen encounter; or

(3) establish reasonable suspicion to frisk a suspect stopped or detained for another independent reason.

§5.38. Retention and Review.

(a) Retention. An agency must retain the information supporting each electronic report submitted by the agency following the retention requirements in the Texas User Specifications.

(b) Review by agency. An agency must systematically review the information supporting each electronic report submitted by the agency to TAPO following the review requirements in the Texas User Specifications.

(c) Right of access by the subject. A individual, who is the subject of the information in a TAPO record, may request a copy of the TAPO record from DPS in compliance with the Public Information Act. The department shall promptly respond to the request.

(d) Review by the subject. A individual who is the subject of the information in a TAPO record, may request the director to review the information to determine whether the information complies with the rules adopted by the director. The department shall conduct the review using the same procedure under the Code of Criminal Procedure, Chapter 61, for reviewing criminal information collected on a criminal street gang.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 16, 2001.

TRD-200106224
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 424-2135

♦ ♦ ♦

CHAPTER 15. DRIVERS LICENSE RULES
SUBCHAPTER C. EXAMINATION REQUIREMENTS

37 TAC §15.59

The Texas Department of Public Safety proposes an amendment to §15.59, concerning Examination Requirements. Section 15.59 is amended to place into rule the department's current business policies regarding alternate methods of conducting driver license renewal and duplicate transactions. Amendments to the section will comply with House Bill 1762, passed during the 77th Texas Legislature, 2001, which authorizes duplicate driver license and identification certificate transactions via alternate methods.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local governments, or local economies.

Mr. Haas also has determined that for each year of the first five-year period the rule is in effect the public benefit anticipated as a result of enforcing the rule will be a convenience to the public in transacting business with the department and rules which are consistent with statute. There is no anticipated adverse economic effect on individuals, small businesses, or micro-businesses.

Comments on the proposal may be submitted to Frank Elder, Assistant Chief of Driver License, Texas Department of Public Safety, Box 4087, Austin, Texas 78773-0300, (512) 424-2768.

The amendment is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, §521.005.

Texas Government Code, §411.004(3) and Texas Transportation Code, §521.005 are affected by this proposal.

§15.59. Alternate Methods For Driver License Transactions[~~of Renewal~~].

(a) Provided certain conditions are met, the department may provide licensees or identification certificate holders with alternate methods of renewing or duplicating a Texas driver license or identification certificate[~~renewal~~]. Such alternate methods may include[~~renewal by~~] mail, [~~by~~]telephone or[~~over the~~] Internet.

(b) The department will only accept alternate renewals or duplicates from eligible licensees/identification certificate holders[~~licensees~~] and application must be made in the manner provided by the agency, accompanied by the applicable fee. A discount, convenience or service charge may be imposed for this type transaction[~~for a credit card payment~~]. Alternate renewal will not be extended to eligible licensees or identification certificate holders for any two consecutive renewal periods.

(c) Persons who are eligible for alternate renewal may elect to renew at any local Driver License office. A vision test will be conducted on all applicants renewing a driver license at a local Driver License office, in addition to any other tests prescribed by law.

(d) The following licensees will not be considered eligible to renew their license by an alternate method[~~mail~~]:

(1) holders of a provisional or occupational license or commercial driver license (CDL);

(2) licensees whose driver license reflects a restriction to driving with telescopic lenses or telescopic aids;

(3) licensees whose driver license reflects restrictions because of driving ability or a medical condition that requires a periodic review, including any medical or physical condition that may affect the licensees' ability to safely operate a motor vehicle;

(4) any licensee whose license is suspended, canceled, revoked, or denied;

(5) any licensee that to the best of the department's knowledge has an outstanding warrant or capias on a case filed by a DPS officer;[~~.~~]

(6) any licensee who does not have a social security number and digital image on file with the department; or[~~.~~]

(7) any licensee subject to the registration requirements of Chapter 62, Code of Criminal Procedure.

(e) The following identification certificate holders will not be considered eligible to renew or duplicate their certificate and the following driver license holders will not be considered eligible to duplicate their license by an alternate method: [~~For those licensees deemed eligible and upon receipt of the proper application and fee, the department will issue and mail to the licensee a renewal license which utilizes the previous digital image on file with the department.~~]

(1) any applicant who is subject to the registration requirements of Chapter 62, Code of Criminal Procedure;

(2) any applicant that does not have a digital image on file with the agency;

(3) any applicant whose certificate or driver license is canceled, suspended, revoked, or denied;

(4) any applicant who does not have a social security number on file with the department;

(5) any applicant that to the best of the department's knowledge has an outstanding warrant or capias on file by a DPS officer.

(f) For those licensees or identification certificate holders deemed eligible and upon receipt of the proper application and fee, the department will issue and mail to the individual a renewal/duplicate license or identification certificate which utilizes the previous digital image on file with the department.

(g) [~~(f)~~] The department may reject any application for alternate renewal/duplicate transaction[~~renewal~~] and require a personal appearance at a driver license office if it has information that the applicant has misrepresented eligibility for licensing in any manner, including medical and vision conditions.

(h) [~~(g) The department may also provide alternate methods for the renewal of an identification certificate. To be eligible, an individual must have a digital image on file with the agency~~]. The application[~~Application~~] must be made in the manner provided by the department and accompanied by the applicable fee. [~~A service charge may be imposed for a credit card payment. Alternate renewal will not be extended for any two consecutive renewal periods.~~]

(i) An additional fee will be charged on all payment transactions that are dishonored or refused for lack of funds or insufficient funds.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 16, 2001.

TRD-200106227
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 424-2135

♦ ♦ ♦

SUBCHAPTER D. DRIVER IMPROVEMENT

37 TAC §15.88

The Texas Department of Public Safety proposes new §15.88, concerning Driver Improvement. The new section promulgates the policies and procedures necessary to address the demand procedure for the surrender of suspended, cancelled, revoked, disqualified, or denied driver licenses. This section establishes conditions under which an individual may still retain physical possession of a driver license for identification purposes only. The new section is necessary due to the passage of Senate Bill 671, 77th Texas Legislature, 2001.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Haas also has determined that for each year of the first five-year period the rule is in effect the public benefit anticipated as a result of enforcing the rule will be a convenience to the public in that they may retain their license to be used for identification purposes only and also rules which are consistent with statute. There is no adverse economic effect on individuals, small businesses, or micro-businesses.

Comments on the proposal may be submitted to Frank Elder, Assistant Chief of Driver License, Texas Department of Public Safety, Box 4087, Austin, Texas 78773-0300, (512) 424-2768.

The new section is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, §521.005.

Texas Government Code, §411.004(3) and Texas Transportation Code, §521.005 are affected by this proposal.

§15.88. Demand for Surrender of Driver License.

(a) The department will demand the surrender of a person's driver license if that license is:

(1) canceled due to a conviction of Texas Transportation Code, §521.451;

(2) revoked due to a determination that the individual is incapable of safely operating a motor vehicle; or

(3) subject to a notice of suspension under Texas Transportation Code, Chapters 524 and 724.

(b) The department will demand the surrender of a person's commercial driver license if that license is suspended, revoked, canceled, disqualified, or issuance of the license has been denied.

(c) This section does not prohibit the department from demanding the surrender of any license when state law authorizes the surrender.

(d) A license that is suspended, revoked, canceled, disqualified or denied that is not demanded to be surrendered by the department can be held by the individual and used for identification purposes only. Actual possession of the driver license does not provide the individual whose license is suspended, revoked, canceled, disqualified or denied authorization to operate a motor vehicle.

(e) A license that has been surrendered to the department will be returned to the licensee upon termination of the suspension, revocation, cancellation, or denial. The license will not be returned if the license expires during the period it is held by the department.

(f) A license that is surrendered to the department that is damaged or mutilated will not be stored or returned. The licensee will be required to apply for a duplicate license upon termination of the suspension, revocation, cancellation or disqualification.

(g) The department is not responsible for licenses surrendered to another agency or entity. If the license is not forwarded to the department by the other agency or entity the licensee can either apply for a duplicate license upon termination of the suspension, revocation, cancellation or disqualification or contact the other agency or entity in order to locate the surrendered license.

(h) The surrendered license will be mailed to the address supplied to the department during the application, renewal or duplicate process only. If the licensee has moved the licensee will be required to apply for a duplicate license through the change of address process.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 16, 2001.

TRD-200106228
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 424-2135

♦ ♦ ♦

CHAPTER 16. COMMERCIAL DRIVERS LICENSE

SUBCHAPTER A. LICENSING REQUIREMENTS, QUALIFICATIONS, RESTRICTIONS, AND ENDORSEMENTS

37 TAC §§16.8, 16.9, 16.14

The Texas Department of Public Safety proposes amendments to §16.8, §16.9 and new §16.14, concerning Licensing Requirements, Qualifications, Restrictions, And Endorsements. Section 16.8 is amended to add the procedure for a commercial driver license (CDL) applicant to apply for a vision or limb waiver exemption from the Federal Motor Carrier Safety Administration.

Section 16.9 is amended to move the responsibility for the intrastate vision waiver program from the Traffic Law Enforcement (TLE) Motor Carrier Section to the Driver License Division (DLD) License Issuance CDL Section; creates evaluation criteria for an applicant's driver history prior to the issuance of a vision waiver consistent with federal guidelines and methodologies in other states; and eliminates the issuance of a limb waiver by the department.

New §16.14 promulgates the policies and procedures necessary for a commercial driver license applicant to apply for a limb waiver through the Federal Motor Carrier Safety Administration.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the rules are in effect there will be no fiscal implications for state or local governments, or local economies.

Mr. Haas also has determined that for each year of the first five year period the rules are in effect the public benefit anticipated as a result of enforcing the rules will be rules consistent with statute, federal policies, and a national trend towards the consistent evaluation of commercial driver license applicants when applying for vision or limb waivers. There is no anticipated adverse economic effect on individuals, small businesses, or micro-businesses.

Comments on the proposal may be submitted to Frank Elder, Assistant Chief of Driver License, Texas Department of Public Safety, Box 4087, Austin, Texas 78773-0300, (512) 424-2768.

The amendments and new section are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, §522.005.

Texas Government Code, §411.004(3) and Texas Transportation Code, §522.005 are affected by this proposal.

§16.8. Qualifications To Drive In Interstate Commerce.

(a) Interstate commerce is transportation of persons or property (a commodity) which crosses state or international boundaries. The bill of lading will be an indicator as to whether a shipment or commodity is interstate or intrastate. If there is no bill of lading, the origin and destination of the shipment will be an indicator.

(b) A person applying for a commercial driver's license (CDL) which authorizes operation of a commercial motor vehicle (CMV) in interstate commerce, must meet the following requirements.

(1) The applicant must be domiciled in Texas. For purposes of this requirement, the state of domicile means the state where a person has the person's true, fixed, and permanent home and principal residence and to which the person intends to return whenever absent. A person may have only one state of domicile.

(2) The applicant must be at least 21 years of age.

(3) The applicant must read and speak the English language. For purposes of this requirement, a person who has the ability in English to communicate to department personnel the need for a CDL will have complied.

(4) The applicant must meet the federal vision requirements set out in 49 Code of Federal Regulations, Part 391.41 or have been issued an exemption. Note: Vision waivers issued by the department are valid for intrastate operation only as stated in §16.9 of this title (relating to Qualifications to Drive In Intrastate Commerce). [~~The applicant must have distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70 in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber.~~]

(5) The applicant must meet the federal physical requirements set out in 49 Code of Federal Regulations, Part 391.41. The applicant must:

(A) have no loss of a foot, a leg, a hand, or an arm, or have been granted a Skill Performance Evaluation certificate[~~waiver~~];

(B) have no impairment of hand or finger which interferes with prehension or power grasping, or impairment of an arm, foot, or leg which interferes with the ability to perform normal tasks associated with operating a motor vehicle, or any other significant limb defect or limitation which interferes with the ability to perform normal tasks associated with operating a motor vehicle, or have been granted a Skill Performance Evaluation certificate[~~waiver~~];

(C) have no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control;

(D) have no current clinical diagnosis of myocardial infarction, angina pectoris, coronary insufficiency, thrombosis, or any other cardiovascular disease of a variety known to be accompanied by syncope, dyspnea, collapse, or congestive cardiac failure;

(E) have no established medical history or clinical diagnosis of a respiratory dysfunction likely to interfere with the ability to control and drive a motor vehicle safely;

(F) have no current clinical diagnosis of high blood pressure likely to interfere with the ability to operate a motor vehicle safely;

(G) have no established medical history or clinical diagnosis of pneumatic, arthritic, orthopedic, muscular, neuromuscular, or vascular disease which interferes with the ability to control and operate a motor vehicle safely;

(H) have no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a motor vehicle;

(I) have no mental, nervous, organic, or functional disease or psychiatric disorder likely to interfere with the ability to drive a motor vehicle safely;

(J) first perceive a forced whispered voice in the better ear at not less than five feet with or without the use of a hearing aid or, if tested by use of an audiometric device, do not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without a hearing aid when the audiometric device is calibrated to American National Standard (formerly ASA standard) Z24.5-1951;

(K) not use a Schedule I drug or other substance, an amphetamine, a narcotic, or any other habit-forming drug; and

(L) have no current clinical diagnosis of alcoholism.

(6) The applicant must not be disqualified from driving a motor vehicle.

(c) The vision exemptions which are acceptable in lieu of the vision requirements stated in subsection (b)(4) of this section and the Skill Performance Evaluation certificates[~~physical waivers~~] for missing or impaired limbs which are acceptable in lieu of the physical requirements stated in subsection (b)(5)(A) and (B) of this section are issued by the Federal Motor Carrier Safety Administration.[~~Highway Administration and the Motor Carrier Safety Bureau of the department. Waivers issued by the department are valid for intrastate operation only.~~] Drivers who wish to operate in interstate commerce must obtain a waiver from the Federal Motor Carrier Safety Administration[~~Highway Administration~~]. An applicant must present the applicable[~~physical~~] waiver document at the time of application.

§16.9. Qualifications To Drive In Intrastate Commerce.

(a) Persons who do not qualify to drive in interstate commerce may still qualify to drive in intrastate commerce. In such cases the commercial driver's license (CDL) will contain an "M" restriction which will indicate that the holder of the license is restricted to travel in intrastate commerce.

(b) Intrastate commerce is the transportation of persons or property (a commodity) within the State of Texas where both the point of origin and the destination point are within the state and where no state line or international boundary is crossed. The bill of lading will be an indicator as to whether a shipment or commodity is interstate of intrastate.

(c) A person applying for a CDL which authorizes operation of a commercial motor vehicle (CMV) in intrastate commerce, must meet the same requirements as those for interstate driving, except for the following:

(1) The applicant must be at least 18 years of age.

(2) There is no English language requirement.

(3) An applicant may present a vision waiver certificate (Medical Examiner's Certificate, Form LI-5 or LI-5A[~~MCS-5~~]) in lieu of meeting the vision requirement. [~~These are the certificates issued by the department during the two-year period ending December 31, 1989.~~] Waivers issued by the department may be renewed through the License Issuance Bureau[~~prior to December 31, 1989, may be renewed through the Motor Carrier Safety Bureau~~] of the department in Austin.

(4) A driver who operates a motor vehicle in intrastate commerce only, and does not transport property requiring a hazardous material placard, and was regularly employed operating a commercial motor vehicle in Texas prior to August 28, 1989, is not required to meet the federal physical and vision standards.

(5) Effective September 1, 1995, a driver who operates a CMV in intrastate commerce only may obtain a vision waiver from the department provided:

(A) the person has 20/40 (Snellen) or better distant visual[~~binocular~~] acuity with or without corrective lenses [~~.~~]in the better eye; and

(B) has the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber.

(6) Applicants may be referred to a vision specialist in cases involving a failure on the vision examination:

(A) when the applicant protests the results of the vision examination; or

(B) when other conditions necessitate verification by a medical professional.

(7) Applicants for a Texas Intrastate Vision Waiver must be able to meet all other physical requirements specified in 49 CFR, Part 391.41 without the benefit of any other waiver.

(8) Applicants for a CDL must present a vision waiver certificate (Medical Examiner's Certificate, form LI-5 or LI-5A[~~MCS-5~~]) which they obtain from the department's License Issuance [~~Motor Carrier Safety~~] Bureau in Austin. Waivers will be issued in accordance with §3.62 of this title (relating to Regulations Governing Transportation Safety). In addition, this waiver may be used to obtain a Hazardous Materials Endorsement when applying for a CDL.

(9) Applications for a Texas Intrastate Vision Waiver will include a review of the applicant's driving record for the three-year period immediately preceding the date of the application. An applicant may obtain a vision waiver from the department only if their driving record:

(A) contains no suspensions, revocations, or cancellations of the driver license for the operation of any motor vehicle, including a personal vehicle;

(B) contains no involvement in an accident for which a citation was issued for a moving violation;

(C) contains no convictions for a disqualifying offense, as defined in 49 CFR 383.51(b)(2), or more than one serious traffic conviction, as defined in 49 CFR, 383.5, while driving a CMV during the three-year period, which disqualified or should have disqualified the applicant in accordance with the driver disqualification provisions of 49 CFR 383.51; and

(D) contains no more that two convictions for moving violations or accident involvement, but does not indicate the type of vehicle operated or the number of miles per hour above the posted speed limit, the department may request additional official documentation (e.g., a copy of the citation or accident report, or copies of court records) from the applicant. If the applicant is arrested, cited for , or convicted of any disqualifying offense or other moving violations during the period an application is pending, the applicant must immediately report such arrests, citations, or convictions to the department. No waiver determination will be completed while any charge against

the applicant, for what would be a disqualifying offense, is still pending. Convictions occurring during the processing of an application will be considered in the overall driving record. The applicant must also report any conviction that is not listed on the driving record because of processing delays. If a subsequent review of the applicant's driving record identifies incidents that should have been reported, any waiver issued may be subject to revocation.

(10) All recipients of a Texas Intrastate Vision Waiver will be required to have a license with the appropriate "M" (CDL-Intrastate Commerce Only), "P" (valid Texas vision/limb waiver required) and any other restrictions as they apply. Waiver recipients will be notified in writing by means of the most recent address on file of the requirement to add the restrictions and will be given sixty days to comply. The waiver recipient's driver record will be alarmed until the appropriate restrictions have been added to their license. Failure to comply within the specified period may result in the revocation of any waiver and their disqualifications as commercial drivers.

(11) If at any time the department becomes aware of the conviction for a disqualifying offense of a driver that holds a valid Texas vision waiver, the waiver may be subject to revocation and the driver disqualified from operating a commercial motor vehicle.

(12) If the holder of a Texas vision waiver fails to renew the waiver, the driver will be notified in writing by the department of this requirement via the most recent address on file. The driver will be granted a sixty-day grace period from the date of the notice to complete a renewal application. Failure to comply within the specified period may result in the revocation of any waiver and their disqualification as a commercial driver.

(13) The Department no longer issues limb waivers to CDL applicants for intrastate operation. Applicants desiring a limb waiver must apply to the State Director, Federal Motor Carrier Safety Administration as described in §16.14, of this title (relating to Qualifications To Obtain Interstate Limb Waiver).

§16.14. Qualifications To Obtain Interstate Limb Waiver.

(a) A person who is not physically qualified to operate a commercial motor vehicle under 49 CFR, §391.41(b)(1) or (b)(2) who is otherwise qualified, may drive a commercial motor vehicle if the State Director, Federal Motor Carrier Safety Administration has granted a Skill Performance Evaluation (SPE) Certificate to that person.

(b) A letter of application for an SPE certificate may be submitted jointly by the driver applicant who seeks an SPE certificate and by the motor carrier that will employ the driver applicant. Applications submitted by Texas drivers must be addressed to the Federal Motor Carrier Safety Administration regional office at Room 8A00, Federal Building, 819 Taylor Street, P. O. Box 902003, Fort Worth, Texas 76102.

(c) The State Director, Federal Motor Carrier Safety Administration may deny the application for an SPE certificate or may approve it totally or in part and issue the SPE certificate subject to such terms, conditions, and limitations as deemed consistent with the public interest. An SPE certificate is valid for a period not to exceed two years from the date of issue, and may be renewed thirty days prior to the expiration date.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 16, 2001.

TRD-200106229
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 424-2135

♦ ♦ ♦

SUBCHAPTER B. APPLICATION REQUIREMENTS AND EXAMINATIONS

37 TAC §16.34

The Texas Department of Public Safety proposes an amendment to §16.34, concerning Application Requirements and Examinations. Section 16.34 is amended to place into rule the Driver License Division's (DLD) current policies regarding the Commercial Driver License (CDL) skills test waiver procedure. The amendment clarifies that the skills waiver test does not apply to an applicant obtaining a "P" endorsement (passenger) and that the skills test must be taken in a bus meeting the requirements of the CDL applied for.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Haas also has determined that for each year of the first five year period the rule is in effect the public benefit anticipated as a result of enforcing the rule will be current and updated rules consistent with statute and department policy. There is no anticipated adverse economic effect on individuals, small businesses, or micro-businesses.

Comments on the proposal may be submitted to Frank Elder, Assistant Chief of Driver License Division, Texas Department of Public Safety, Box 4087, Austin, Texas 78773-0300, (512) 424-2768.

The amendment is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, §522.005.

Texas Government Code, §411.004(3) and Texas Transportation Code, §522.005 are affected by this proposal.

§16.34. CDL-3 Substitute for Commercial Driver's License (CDL) Driving Skills Test.

(a) This certificate must be completed if the applicant for a CDL is claiming waiver from the CDL driving skills test.

(b) The waiver applies to all skills tests including those skills tests required for endorsements, except endorsement "P". An applicant obtaining a "P" endorsement must take a driving skills test in a bus meeting the requirements of the CDL applied for.

(c) To be accepted, the applicant must be employed in an exempt status or legally operating a commercial motor vehicle (CMV).

(d) This waiver may only be claimed one time. This waiver certification may only be completed when converting from a non-commercial driver's license to a CDL or when applying for an original Texas CDL when coming from another state. Any later transaction including advance in grade, removal of restrictions, or addition of an endorsement will necessitate a skills test if required by law or regulation.

(e) The CDL-3 form must be accompanied by a CDL-3A form.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 16, 2001.

TRD-200106230
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 424-2135

♦ ♦ ♦

CHAPTER 21. EQUIPMENT AND VEHICLE STANDARDS

37 TAC §21.6

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Department of Public Safety or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Public Safety proposes the repeal of §21.6, concerning Minimum Standards for Scales Not furnished by the Texas Department of Public Safety and Used for Law Enforcement Purposes. The section is proposed for repeal due to substantial changes being made. This repeal is being proposed simultaneously with a proposal to adopt new §21.6 that clarifies department policy regarding certification procedures for portable, semiportable, and fixed scales not furnished by the Texas Department of Public Safety.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Haas also has determined that for each year of the first five-year period the repeal is in effect the public benefit anticipated as a result of enforcing the rule will be current and updated rules. There is no anticipated adverse economic effect on individuals, small businesses, or micro businesses.

Comments on the proposal may be submitted to Major Coy Clanton, Traffic Law Enforcement Division, Texas Department of Public Safety, Box 4087, Austin, Texas 78773-0500, (512) 424-2116.

The repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, §621.402.

Texas Government Code, §411.004(3) and Texas Transportation Code, §621.402 are affected by this proposal.

§21.6. Minimum Standards for Scales Not Furnished by the Texas Department of Public Safety and Used for Law Enforcement Purposes.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 16, 2001.

TRD-200106231
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 424-2135

♦ ♦ ♦

37 TAC §21.6

The Texas Department of Public Safety proposes new §21.6, concerning Minimum Standards for Scales not Furnished by the Texas Department of Public Safety and Used for Law Enforcement Purposes. New §21.6 establishes the minimum standards for scales not furnished by the Texas Department of Public Safety and used for law enforcement purposes. The section further promulgates the minimum standards for portable, semiportable, and fixed scale models, the approval procedures, the list of approved scales, and the procedures for cancellation or suspension of approval. The new section is proposed simultaneously with a proposal for repeal of current §21.6.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Haas also has determined that for each year of the first five-year period the rule is in effect the public benefit anticipated as a result of enforcing the rule will be clarification of department policy regarding scale certifications. There is no anticipated adverse economic effect on individuals, small businesses, or micro-businesses.

Comments on the proposal may be submitted to Major Coy Clanton, Traffic Law Enforcement Division, Texas Department of Public Safety, Box 4087, Austin, Texas 78773-0500, (512) 424-2116.

The new section is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, §621.402.

Texas Government Code, §411.004(3) and Texas Transportation Code, §621.402 are affected by this proposal.

§21.6. Minimum Standards for Scales Not Furnished by the Texas Department of Public Safety and Used for Law Enforcement Purposes.

(a) Portable, semiportable and fixed scale models. Portable, semiportable and fixed scale models evaluated under the National Type Evaluation Program (NTEP) and found to comply with the applicable technical requirements set out in the National Institute of Standards and Technology (NIST) Handbook 44, "Specifications, Tolerances, and Other Technical Requirements for Weighing and Measuring Devices," will be approved for law enforcement purposes by the Texas Department of Public Safety and may include only the following exceptions.

(1) Weight readout may be truncated to the next lower increment reading.

(2) Hold mode may hold scale reading until manually released.

(b) Approval procedures.

(1) Portable, semiportable, and fixed scales. Any person, firm or corporation desiring approval shall submit to the Texas Department of Public Safety a properly attested verification affidavit, on a form which will be furnished by the department upon request. The affidavit shall state, in part, that the make and model of the particular

portable, semiportable, or fixed scale meets the criteria set forth in subsection (a) of this section. A copy of the NTEP Certificate of Conformance, provided by the National Conference on Weights and Measures (NCWN), shall be submitted with the required affidavit.

(2) List of approved scales. The department will furnish upon request a list of approved makes and models of scales.

(3) Cancellation or suspension of approval. If, at any time, it is determined that any approved scale does not comply with the required specifications, the department will cancel the approval of said make and model; provided, however, that the person, firm, or corporation holding such an approval is entitled to 30 days' notice of such proposed cancellation of approval. During such 30-day period, the holder of the approval shall have an opportunity to submit proof that the make and model number in question does in fact comply with these specifications. Such proof shall include attestation from an independent testing agency that the scale in question complies with the criteria set forth in subsection (a) of this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 16, 2001.

TRD-200106232
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 424-2135

♦ ♦ ♦

37 TAC §21.8

The Texas Department of Public Safety proposes new §21.8, concerning Equipment and Vehicle Standards. New §21.8 promulgates the standards, and specifications that apply to the color, size, and mounting position of the flag required to be attached to the rear of All-Terrain Vehicles (ATV), and is necessary due to the passage of House Bill 651, passed during the 77th Texas Legislature, 2001.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Haas also has determined that for each year of the first five-year period the rule is in effect the public benefit anticipated as a result of enforcing the rule will be better visibility of ATV operators by other motorists. There is no anticipated adverse economic effect on small businesses or micro-businesses. The anticipated economic cost to individuals will be the actual cost of the flag and mounting hardware.

Comments on the proposal may be submitted to Major E. C. Sherman, Traffic Law Enforcement Division, Texas Department of Public Safety, Box 4087, Austin, Texas 78773-0500, (512) 424-2115.

The new section is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, §663.037.

Texas Government Code, §411.004(3) and Texas Transportation Code, §663.037 are affected by this proposal.

§21.8. All Terrain Vehicle (ATV) Warning Flag.

A person who operates an ATV on a public highway pursuant to Texas Transportation Code, §663.037 must have affixed thereto a warning flag that meets the following standards:

(1) The warning flag is comprised of a fluorescent orange colored triangular shaped flag, a staff or pole, and a mounting apparatus;

(2) The flag must measure not less that 7 1/2 inches nor more than 10 inches across the base and not less than 16 inches nor more than 24 inches from the base to the point of the triangle and must be constructed of a coated fabric or other material sufficient to render it resistant to deterioration by the elements;

(3) The staff or pole must measure not less than 8 feet nor more than 9 feet from the mounting surface to the tip, must be not less than 1/4 inch nor more than 1/2 inch in diameter, and must be constructed of a material or in such a manner as to allow it to flex or bend as much as 45 degrees without breaking and return to a vertical position; and,

(4) The mounting apparatus must be sufficient to attach it securely at the base to the rear area of the vehicle and in an upright position.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 16, 2001.

TRD-200106233
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 424-2135

♦ ♦ ♦

CHAPTER 23. VEHICLE INSPECTION SUBCHAPTER E. CERTIFICATION OF INSPECTORS

37 TAC §23.61, §23.62

The Texas Department of Public Safety proposes amendments to §23.61 relating to Procedures for Certification, and a new §23.62, relating to Certification of External Inspector Training Schools. The main purpose of the rulemaking is to propose new §23.62, which establishes requirements for individuals who wish certification as external instruction facilities and instructors and offer training to applicants who seek to become state certified vehicle inspectors. The Department has determined that external inspector training must be taught by qualified personnel who have a working knowledge of all required testing equipment and meet all the qualifications of a state certified inspector. The external training school application includes a $300 application fee and the external instructor application fee is $100, which covers the administrative review of the curriculum, credentials and any other investigation or review that may be necessary.

The main purpose of the amendments to §23.61 is to amend the text to facilitate the certification of individuals trained at external inspector training facilities and clarify the certification procedures. The amendment revises the certification procedures, processes and actions taken by individuals applying for certification depending on the source of their training.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect, there will be no fiscal implications for state and local governments.

Mr. Haas has also determined that for each year of the first five year period the rules are in effect the public benefit anticipated as a result of enforcing the rules will be to provide more options for individuals in the state vehicle inspection industry to obtain training, certification and re-certification. The ultimate public benefit is enhanced state vehicle inspection service.

There is an anticipated minor economic cost to individuals, small businesses, or micro-businesses required to comply with the rules as proposed should they wish to become certified external inspector training schools or instructors. This cost includes the $300 external training school application fee and the biennial (every two years) renewal cost, as well as the $100 instructor application fee, which is also renewed biennially.

Comments on the proposal may be submitted to E. Eugene Summerford, Legal Counsel, Vehicle Inspections and Emissions, Texas Department of Public Safety, Box 4087, Austin, TX 78773-0543, (512) 424-2777.

The new section and amendments are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, §548.002 and §548.401. Texas Government Code, §411.004(3) and Texas Transportation Code, §548.002 and §548.401 are affected by this proposal.

§23.61. Procedures for Certification.

(a) Duties and responsibilities of certified inspectors. Before a person may inspect vehicles under the Texas Vehicle Inspection Act, the person must[~~will~~] be [~~examined and~~] certified by the Texas Department of Public Safety.

(1) A certified inspector will be thoroughly instructed in the vehicle inspection program.

(2) A certified inspector shall conduct a thorough and efficient inspection of every vehicle presented for an official inspection, as authorized by the station's endorsement.

(3) Each certified inspector shall qualify, by training and examination approved by the department, for one or more of the following qualifications which indicate the type of inspection certificates the inspector is certified to issue and the types of inspections the inspector is qualified to perform. The qualifications are as follows:

(A) S. May inspect any vehicle requiring a safety only vehicle inspection windshield certificate, i. e., one-year, two-year, trailer, and motorcycle.

(B) C. May inspect any vehicle requiring a commercial inspection windshield certificate, i. e., commercial motor vehicle and commercial trailer.

(C) E. May inspect any vehicle requiring an emissions test windshield certificate, i.e., one-year safety/emissions, and one-year emissions only (unique emissions test-only inspection certificate).

(4) [~~(3)~~] A certified inspector shall not use alcohol or drugs, nor be under the influence of either while on duty. Prescription drugs may be used when prescribed by a licensed physician, provided the inspector is not impaired [~~normal faculties will not be impaired~~] while on duty.

(5) [~~(4)~~] A certified inspector shall inspect a vehicle presented for inspection within a reasonable time.

(6) [~~(5)~~] A certified inspector shall notify the department representative supervising the vehicle inspection station immediately if his driver's license is suspended or revoked.

(7) [~~(6)~~] A certified inspector shall conduct each inspection, and affix each inspection certificate, in the approved inspection area of the vehicle inspection station location designated on the certificate of appointment. The road test may be conducted outside this area.

(8) [~~(7)~~] The certified inspector shall consult the vehicle owner or operator prior to making a repair or adjustment.

(9) [~~(8)~~] The certified inspector shall not delegate responsibility for a proper and thorough inspection to any other person, and shall have complete control of the vehicle to be tested during the entire test procedure.

(10) [~~(9)~~] The certified inspector shall not require a vehicle owner whose vehicle has been rejected to have repairs made at a specific garage.

(11) [~~(10)~~] The certified inspector shall maintain a clean and orderly appearance and be courteous in his contact with the public.

(b) Qualifications for certification as a certified inspector. To qualify as an inspector an applicant shall:

(1) be at least 18 years of age;

(2) hold a valid driver's license from [~~his or her~~] state of residence during period of certification;

(3) submit to a criminal history and drivers license check by the department[~~be employed by a licensed vehicle inspection station~~];

(4) not be subject to denial of an application nor suspension or revocation of a certificate for felony conviction or other reasons stated in §23.15(a)(13) of this title (relating to Inspection Station and Certified Inspector Denial, Revocation, Suspensions, and Administrative Hearings);

(5) not be under suspension in the Texas vehicle inspection program;

(6) make an application for inspector certification on a[~~the application~~] form prescribed by the department[~~for certified inspectors, VI-3~~];

(7) attend a training session approved[~~conducted~~] by the department;

(8) pass, with a grade of not less than 80, an[~~written or oral~~] examination on the law and rules and regulations of the department pertinent to the vehicle inspection program;

(9) successfully demonstrate[~~his~~] ability to correctly operate the testing devices at the vehicle inspection station[~~where he is employed~~]; and

(10) submit a statutory fee of $10 when the certification process [~~by the technician~~]is completed and the person is ready for issuance of an inspector's certificate [~~; and~~] .

(11) applicants shall be exempt from the inspector certification fee if employed at a governmental inspection station. Dual

authorization for another class of inspection station would require an inspector certification fee.

(c) How instruction is furnished. Instruction is furnished by:

(1) inspector schools conducted by the department[~~;~~], or

(2) external inspector training schools certified by the department[~~studying Rules and Regulations Manual for Official Inspection Stations and Certified Inspectors;~~].

~~[(3) individual instruction by a department representative or by an equipment company representative; and]~~

~~[(4) learning through association with others--mechanics, service managers, etc.]~~

~~[(d) Where certification process may take place.]~~

~~[(1) The written examination may be conducted at the vehicle inspection station where the person is employed, at the Department of Public Safety office, or any place decided upon by the Department of Public Safety.]~~

~~[(2) The demonstration of the ability to correctly operate the testing devices will ordinarily be conducted at the vehicle inspection station where the person is employed, but it may be conducted elsewhere. In every instance, the demonstration will be performed on the same brand name or type device as used at the place of employment.]~~

~~[(e) Process for certification and recertification of inspectors.]~~

(d) Certification after attendance at department training school.

(1) Periodic certified inspector schools may[~~will~~] be conducted by the department for persons currently employed by certified vehicle inspection stations.

(2) After each certified inspector school, [~~oral or written~~]examinations will be given individually or in groups by the department representative or an individual certified by the department. Examinations will not necessarily be given during the same hours the school is held.

(3) When training and examinations are successfully completed and fees are submitted, the applicant is provisionally certified pending final departmental approval.

(e) Certification after attendance at departmental approved external training school.

(1) The external training school shall issue a three-part certificate of completion (copy 1-department, copy 2-applicant, copy 3-school) for each eligible applicant to be turned in to the department representative upon making application to become a certified inspector.

(2) The certified instructor shall notify the applicant to submit the certificate of completion along with a completed application and application fee to the department for certification processing prior to performing any inspections.

(3) The applicant shall submit the certificate of completion, inspector application and applicable fees to the department within 90 days of completing the external training school.

(4) The application shall be submitted for processing through the designated department office in which the individual is making application to become a certified inspector.

(5) Once the department representative receives the certificate, the application and fee; the application and certificate shall be forwarded to the Manager of Vehicle Inspection Records, Austin, Texas.

(6) Vehicle Inspection Records shall process inspector applications and review for completeness. Applications will be checked for the following items:

(A) full name of applicant;

(B) applicant's complete home address (street, city, state, zip);

(C) applicant's driver license number;

(D) applicant's social security number;

(E) information on station employing the applicant, to include station certificate number, business phone number, address;

(F) signature of applicant; and

(G) signature of department representative.

(7) Any application missing any of the information above will be returned to the department representative processing the application for corrections.

(8) The Manager of Vehicle Inspection Records shall perform an inquiry to check for valid driver license and for any court imposed punishment. If the applicant is found eligible, a certificate will be generated. If the applicant is found to be ineligible, the application shall be returned to the applicant with a denial letter.

(9) Vehicle Inspection Records shall forward the applicant's inspector certificate to the department representative for issuance to inspector. This certificate is conditional upon compliance with rules and regulations issued by the department and is subject to renewal.

(f) Where certification examination process may take place.

(1) The written examination may be conducted at the Department of Public Safety office, or any place approved by the Department of Public Safety.

(2) The demonstration of the ability to correctly operate the testing devices will ordinarily be conducted at the vehicle inspection station where the person is employed, but it may be conducted elsewhere. In every instance, the demonstration will be performed on the same type device as used at the place of employment.

(g) [~~(f)~~] Failure to pass the examination.

(1) Each applicant will be given a minimum of two opportunities to pass an inspector's examination. Applicants will be notified of any failure, shown their mistakes, and given the correct answers to questions missed on the first examination. Applicants will be advised of where and when a subsequent retest may be administered.

(2) Applicants who fail their first examination will be given a different examination for the second examination.

(3) Applicants who fail their second examination given by the department must wait at least 30 days before taking a subsequent examination.

(h) [~~(g)~~] Failure to pass the demonstration test.

(1) Persons failing the demonstration test will be notified of any mistakes, shown correct usage, and advised where and when a subsequent test may be taken.

(2) After two consecutive failures, additional tests will be conducted only after due evaluation of the circumstances involved.

(i) [~~(h)~~] Applicant passing the written test and the demonstration test.

(1) An applicant passing the written and demonstration tests will be so notified.

(2) The individual, service manager or station owner will be notified of the applicant's successful completion of the required tests.

(3) Inspection procedure, record keeping, and security regulations will be reviewed by the department.

(j) Renewal testing. The department may require testing and/or training of certified inspectors prior to certification renewal.

(k) [~~(i)~~] Expiration of certification of inspectors. An inspector's certification will expire:

(1) when provisional[~~individual~~] certification has been withdrawn by the department;

[~~(2) when the certified inspector's driver's license is suspended or expired; ~~]

(2) [~~(3)~~] when the certified inspector fails to attend a required renewal testing and/or training[~~recertification school~~]; or

(3) [~~(4)~~] August 31 of each even-numbered year following the date of appointment. Thereafter, appointment as inspector shall be made for two-year periods.

[~~(j) Certification after denial. Except as provided in subsection (k) of this section, no person may apply for a license as a certified inspector within one year from the date of the denial by the director of an application from the same person.~~]

(l) [~~(k)~~] Certification after suspension.

(1) After expiration of a period of suspension, a person desiring reinstatement may request reinstatement by notifying in writing the appropriate regional supervisor and:

(A) make a written application for reinstatement;

(B) meet all qualifications for appointment;

(C) pass the complete written and demonstration test; and

(D) submit the inspector's certification fee if certification has expired during suspension.

(2) If the certified inspector passes all tests, the inspector certificate card, [~~VI-66,~~]will be reissued.

(m) [~~(l)~~] Reexamination; revocation[~~withdrawal~~] of certification. The department representative may require the certified inspector to take all or part of the written and demonstration tests at any time or may require attendance at any training program. Failure to pass a required test may result in revocation of the inspector's certificate[~~disqualifies the certified inspector immediately~~].

(n) [~~(m)~~] Dual authorization. A certified inspector may be certified at more than one vehicle inspection station at the same time. Inspection station owners shall furnish information as may be required by the department pertaining to inspectors employed at stations within three working days of a change in the inspector's employment.

(o) [~~(n)~~] Changes in employment.

(1) If a certified inspector changes their[~~his~~] place of employment, the inspector[~~he~~] shall prove their[~~his~~] ability to correctly operate the testing equipment at such new vehicle inspection station, and may be required to take a complete written examination before the inspector[~~he~~] will be allowed to inspect at the new location.

[~~(2) No inspections shall be performed by a certified inspector at an idle emission inspection and maintenance station until he has demonstrated to the department representative supervising the station his ability to correctly operate the testing equipment at such station.~~]

(2) [~~(3)~~] The inspection station owner shall notify the department representative supervising the station within three working days of a change in employment of inspectors at that station.

(p) [~~(o)~~] Certified inspector schools.

(1) Schools given by the department are conducted on a regionwide schedule according to need at any time during the year.

(2) The department may certify external inspector training schools to provide training to applicants to be certified as inspectors as provided in §23.62 of this title (relating to Certification of External Inspector Training Schools).

(q) [~~(p)~~] Withdrawal of application. An application for a license as a certified inspector may be withdrawn by the applicant at any time. An application will be deemed withdrawn when 60 days elapses:

(1) from the first failure of the inspector's written examination; or

(2) from the successful completion of the written [~~idle~~] emissions examination when the applicant has not requested that a demonstration test on the testing equipment be given.

§23.62. Certification of External Inspector Training Schools.

(a) Definitions. The following words and terms, when used in this rule, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Certified external inspector training school - A privately owned or public institution (Vocational-Technical or state university) certified by the department for the purpose of training applicants to be certified inspectors for the Vehicle Inspection Program in the State of Texas.

(2) Instruction area - A designated space approved by the department for classroom instruction purposes.

(b) Application for certification as a certified inspector external training school.

(1) Request for certification. Requests for certification as a certified inspector external training school are initiated by notifying the department Regional Supervisor or his designee by telephone, letter or fax. At that time the applicant will be informed of the minimum certification requirements.

(2) Each application for certification will be investigated by the department.

(3) Approval cannot be granted, nor operation permitted to continue, without full compliance of the minimum certified inspector external training school requirements.

(4) Certified inspector external training school facilities will be inspected for a clean and orderly appearance.

(5) Certified inspector external training schools shall grant free access to representatives of the department for monitoring the conduct of the school, materials used, procedures being used and school records.

(6) Application for a certified inspector external training school certification shall be made on forms supplied by the Department of Public Safety. The application must include the following:

(A) Certification by the applicant that, if a corporation, the franchise taxes owed to the State of Texas under the Tax Code, Chapter 171, are current, or that the corporation is exempt from or not subject to the Texas franchise tax, and

(B) An application fee of three hundred dollars ($300.00) made payable to the Texas Department of Public Safety.

(7) The department will notify the applicant if application is approved. The application fee of three hundred dollars ($300) shall constitute the initial certification fee and a Certificate of Appointment will be issued to the applicant. The initial period of certification expires on August 31st of the odd-numbered year following the date of appointment as a certified inspector external training school. Recertification will be for two-year periods and the certification fee for each such period will be three hundred dollars ($300). All fees shall be submitted by check, cashier's check or money order, made payable to the Texas Department of Public Safety.

(8) The application fee may be waived for public institutions.

(c) Instruction areas. Certified inspector external training school instructional areas must meet the following requirements:

(1) located entirely within a building,

(2) provide adequate space for all students attending class to include separate seating and writing space for each student in attendance,

(3) be available and meeting all requirements at any time classes are being conducted,

(4) be clean and well lighted at all times during classroom instructions, and

(5) be separate from normal work area during classroom instruction and shall be free from outside disturbances and distractions.

(d) Required Equipment. Certified inspector external training schools must meet the following equipment standards.

(1) All equipment required of a certified inspection station including, but not limited to, such items as approved testing devices, tools, measuring devices, display board, brake machines, and marked brake test area. Certified inspector external training schools that conduct emissions training must have all required equipment for conducting emissions testing.

(2) All equipment necessary to present department approved instructional material.

(3) The owner/operator of the school shall agree to obtain all required equipment for practical testing and all required upgrades of this equipment.

(4) The minimum tools, equipment, and approved testing devices shall be kept and maintained in proper working condition at all times in the instruction area or an area where the practical portion of test is conducted.

(5) All vehicle testing equipment utilized in required instruction shall be approved by the department.

(e) School Owner/Operator Responsibilities. The owner/operator of each certified inspector external training school shall be responsible for completing the below listed requirements.

(1) Notifying the department, not less than forty-eight (48) hours before the start of a class, of all required information concerning a class. The notification shall be delivered to the Manager, Vehicle Inspection Records in Austin and the Regional Supervisor of the region or his designee where the school is being conducted. Receipt of this notification by Manager, Vehicle Inspection Records must be validated by the owner /operator. This notification shall be on a form prescribed by the department and include:

(A) student's:

(i) name,

(ii) driver license number,

(iii) date of birth, and

(iv) Social Security number;

(B) times and dates of instruction;

(C) location of instruction; and

(D) name of instructor(s) teaching the class.

(2) Submission of any applicable fees to Manger, Vehicle Inspection Records for the criminal history and driver license checks completed on students in training.

(3) Notifying students of their eligibility status based on the results of the criminal history and driver license check conducted by the department.

(4) Securing all department issued equipment and forms.

(5) Accepting for instruction and testing any and all applicants desiring to be certified.

(6) Insuring, in the case that the school facility is also an inspection station, that vehicle inspection activities take priority over instruction.

(7) Providing an area and equipment for practical training at the school location or having provisions for this training at another location approved by the department.

(8) Notifying the department, within (48) forty-eight hours, of any equipment problems or if they desire to cease conducting classes.

(9) Conducting classes and training only with instructors certified by the department.

(10) Insuring that instruction is in accordance with department rules and regulations.

(11) All records and forms used in conducting training of inspector applicants shall be maintained for a period of one (1) year.

(f) Certified Instructor Qualifications.

(1) Each certified instructor must meet all qualifications required of a certified inspector, except that a certified instructor need not be employed by an inspection station.

(2) To become a certified instructor, each applicant must:

(A) complete and submit application on a form prescribed by the department,

(B) submit fee of one hundred dollars ($100) made payable to Texas Department of Public Safety, and

(C) attend and successfully complete a training course conducted or approved by the department.

(3) Every certified instructor shall have a working knowledge of all testing devices used during state vehicle inspections.

(4) Expiration and renewal of instructor certification will follow the same guidelines as used for certified inspectors.

(5) The department may approve authorization for a certified instructor to instruct at more than one school.

(g) Certified Instructor Responsibilities. Each certified instructor shall be responsible for:

(1) security of all department issued equipment and forms,

(2) completing all forms required by the department for the certification of students,

(3) obtaining written approval from the department to instruct at additional certified inspector external training schools, and

(4) incorporating any changes or updates to the instructional program as prescribed by the department.

(h) Instruction. All instruction in a certified inspector external training school shall be performed by department certified instructors in locations approved by the department.

(1) The certified instructor shall ascertain that all classroom and practical testing will be conducted in accordance with department rules and regulations.

(2) The number of students per class shall not exceed the ratio of students to instructors of twenty-five (25) students to one (1) instructor per class at any time.

(3) All classroom instruction will be conducted in the approved instruction area.

(4) Students shall receive approved classroom instruction for each endorsement certification for which the student has requested (safety, emissions, commercial) and pass a written examination for each with a minimum passing score of (80) eighty.

(5) After passing the written portion of test, each student shall demonstrate proficiency with a practical test appropriate to each endorsement of certification requested (safety, emissions, commercial). During practical tests, each student must demonstrate, without assistance, the ability to conduct a proper inspection, the proper utilization of the required equipment, and adherence to procedures required by the department. The inability to properly conduct testing procedures will constitute a failure of the test.

(6) After completing certified inspector external training school, the instructor will notify students of the following information.

(A) Students are to submit the inspector application, training completion certificate containing all required information signed by the certified instructor, school/owner operator, and the required fee to designated department offices within ninety (90) days after completing the class.

(B) The department will not certify students as certified vehicle inspectors until the process as stated in paragraph (6)(A) of this subsection is completed.

(i) Denial, Suspension, and Revocation Procedures. The procedures for notice and review of denial, suspension, and revocation of a certificate of appointment as a vehicle inspection station apply to the review of a denial, suspension, and revocation of certification as a certified inspector external training school certificate of appointment and/or the certified instructor(s).

(j) Violations and Penalties.

(1) Schedule of penalties for Certified External Inspector Training School Owner/Operator. The complete operation of a certified external inspector training school shall be the responsibility of the owner/operator. Failure to comply with the appropriate provisions of this section will be considered sufficient cause for suspension of certification privileges. In addition, violators may be subject to criminal prosecution.

(2) Every certified external inspector training school shall be subject to the schedule of penalties and suspension as listed in Figure 1: 37 TAC §23.62(j)(2)

(3) Schedule of penalties for certified external inspector training school instructor. The instruction and training of each inspector applicant is the responsibility of each certified external inspector training school instructor. Failure to comply with the appropriate provisions of this section will be considered sufficient cause for suspension of instructor certification. In addition, violators may be subject to criminal prosecution.

(4) Every certified external inspector training school instructor shall be subject to the schedule of penalties and suspension as listed in
Figure 2: 37 TAC §23.62(j)(4)

(k) Compliance. Certified inspector external training schools and/or instructors are required to comply with all applicable municipal ordinances, state and federal statutes, and rules, regulations, policies and operational procedures of the Texas Department of Public Safety. Failure to comply may constitute grounds for cessation of training, and/or denial, suspension, or revocation of instructor certification.

(l) The department, at its discretion, may use certified inspector external training schools for renewal of certified inspectors.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 16, 2001.

TRD-200106234
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 424-2135

♦ ♦ ♦

SUBCHAPTER G. VEHICLE EMISSIONS INSPECTION AND MAINTENANCE PROGRAM

37 TAC §23.93

The Texas Department of Public Safety proposes amendments to §23.93, concerning vehicle emissions inspection requirements. The primary reasons for this proposed rulemaking is to implement portions of House Bill 2134, 77th Texas Legislature, 2001, related to waivers and test-on-resale, and authorization to require different types of emissions tests; and the United States Environmental Protection Agency's (EPA's) Amendments to Vehicle Inspection Maintenance Program Requirements Incorporating the On-Board Diagnostic Check, Final Rule.

This proposed rulemaking is also to implement portions of House Bill 2787, 77th Texas Legislature, 2001, relating to the emissions

testing of vehicles permitted to drive or park on public institutions located in counties having a vehicle emission inspection and maintenance program. The proposed rulemaking authorizes certified inspection stations to emission test these vehicles and provides instructions to inspectors for the issuance of appropriate inspection certificates.

The Texas Natural Resource Conservation Commission (TNRCC) adopted rules on December 6, 2000 and published in the January 12, 2001 issue of the *Texas Register* (26 TexReg 362) which modified the vehicle emissions testing program by implementing acceleration simulation mode (ASM-2) testing and on-board diagnostics (OBD) testing for vehicles that are registered and primarily operated in the counties included in the state's vehicle emission inspection and maintenance program. The TNRCC rules affect the Dallas Fort Worth (DFW) I/M program area (Collin, Dallas, Denton, and Tarrant Counties), the extended DFW (EDFW) program area (Ellis, Johnson, Kaufman, Parker, and Rockwall Counties), the Houston/Galveston (HGA) program area (Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties), and El Paso County; and become effective in certain counties beginning May 1, 2002. The department's proposed amendments incorporate these changes in its implementation of the vehicle emissions inspection and maintenance program.

The proposed rulemaking, as provided in HB 2134, removes the Minimum Expenditure Waiver and proposes replacement with a Low Mileage Waiver. The Low Mileage Waiver is available if the vehicle has failed both its initial emissions inspection and re-test; incurred qualified emissions-related repairs costing at least $100; and the vehicle has been and will be driven less than 5,000 miles per inspection cycle.

The proposed rulemaking, as provided in HB 2134, provides for an "Emissions Test on Resale". The proposed rule defines the term, allows these vehicles to be emission tested at certified inspection stations, and provides instructions to inspectors for the issuance of appropriate inspection certificates.

The proposed rulemaking further provides clarification on the types of emission testing equipment, such as replacing the term "Loaded mode I/M test" with the term "Acceleration Simulation Mode (ASM-2) I/M test", adding the definition for Two-speed idle (TSI) I/M test, and defining that the term "On-board Diagnostic (OBD)" refers to On-board Diagnostic II (OBDII). The proposed rulemaking also clarifies the type of vehicles on which the test equipment is used and station testing equipment requirements.

The proposed rulemaking also clarifies procedures the inspection stations are to perform for On-road testing (Remote Sensing Program) verification. The proposed rule defines the term, allows vehicles notified by the department to be emission tested, and provides instructions to inspectors how to issue certificates.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the rules are in effect, there may be fiscal implications, which are not anticipated to be significant, for units of state and local government located within the Dallas Fort Worth (DFW) I/M program area, the extended DFW (EDFW) program area, and the Houston/Galveston (HGA) program area. This impact results from upgrading or purchasing new emission testing equipment, which could cost as much as $40,000, to comply with the proposed amendments. In El Paso County, the cost to upgrade existing analyzers to a system that can perform both TSI and OBD tests will be approximately $4,000, while the cost to purchase a new system to conduct these tests will cost approximately $20,000.

Mr. Haas also has determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from enforcement of and compliance with the proposed amendments will be improved air quality by the potential reduction of on-road vehicle emissions. A clearer interpretation and understanding of the vehicle emissions inspection program requirements is expected.

Mr. Haas has also determined there will be significant fiscal implications, which may be significant to small and micro-businesses engaged in the business of state inspections of vehicles resulting from the implementation of the proposed amendment. The primary fiscal implications would be the requirement to upgrade or purchase new vehicle emission testing equipment in order to continue participating in the state's I/M program, which could cost as much as $40,000 per vehicle emission analyzer.

Comments may be submitted to E. Eugene Summerford, Legal Counsel, Vehicle Inspections and Emissions, Texas Department of Public Safety, Box 4087, Austin, Texas 78773-0543; or by fax at (512) 424-2774. All comments must be received by 5:00 p.m. on October 28, 2001 and should make reference to "Proposed Rule 37 TAC §23.93" in the subject line or in the beginning of the text.

The amendment is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, §548.301, which authorizes the Commission to adopt rules establishing a motor vehicle emission inspection and maintenance program.

Texas Government Code, §411.004(3) and Texas Transportation Code, §548.301 are affected by this proposal.

§23.93. Vehicle Emissions Inspection Requirements.

(a) General. The rules of the Texas Department of Public Safety set out herein are to maintain compliance with the Texas Clean Air Act. The department is authorized to establish and implement a vehicle emissions testing program that is a part of the annual vehicle safety inspection program, in accordance with Texas Transportation Code, Chapter 548, the Health and Safety Code, Chapter 382 and rules adopted thereunder.

(b) Terms and/or Definitions. Unless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the Texas Department of Public Safety (DPS), the terms used by the DPS have the meanings commonly ascribed to them in the fields of air pollution control and vehicle inspection. In addition to the terms which are defined by the TCAA, the following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Affected county -- refers to any county with a motor vehicle emissions inspection and maintenance program under Texas Transportation Code, §548.301 and Health and Safety Code, §382.037. These counties are specified in Texas Natural Resource Conversation Commission (TNRCC) rules, 30 TAC §114.50. [~~Adjusted annually -- refers to the percentage, if any, by which the Consumer Price Index (CPI) for the preceding calendar year differs (as of August 31) from the CPI for 1989; adjustments shall be effective on January 1 of each year.~~]

(2) Acceleration Simulation Mode (ASM-2) I/M test -- the Acceleration Simulation Mode (ASM-2) test is an emissions test using a dynamometer (a set of rollers on which a test vehicle's tires rest)

which applies an increasing load or resistance to the drive train of a vehicle thereby simulating actual tailpipe emissions of vehicle as it is moving and accelerating. The ASM-2 vehicle emissions test is comprised of two phases:

(A) the 50/15 mode -- in which the vehicle is tested on the dynamometer simulating the use of 50% of the vehicle available horsepower to accelerate at a rate of 3.3 miles per hour (mph) per second to a constant speed of 15 mph; and

(B) the 25/25 mode -- in which the vehicle is tested on the dynamometer simulating the use of 25% of the vehicle available horsepower to accelerate at a rate of 3.3 mph per second to a constant speed of 25 mph.

(3) [~~(2)~~] Department--refers to the Texas Department of Public Safety.

[~~(3) Designated Counties--refers to:~~]

[~~(A) Dallas, Tarrant, Harris, and El Paso counties;~~]

[~~(B) Dallas, Tarrant, Denton, Collin, Harris, and El Paso counties, effective May 1, 2002 through April 31, 2003; and~~]

[~~(C) Dallas, Tarrant, Denton, Collin, Ellis, Johnson, Kaufman, Parker, Rockwall, Harris and El Paso counties effective May 1, 2003 and thereafter.~~]

(4) Designated Vehicles--refers to all motor vehicles, as defined in the Texas Transportation Code, §541.201, unless otherwise exempted or excepted, that are:

(A) capable of being powered by gasoline;

(B) from two years old to and including 24 years old;[~~and~~]

(C) registered in or required to be registered in and primarily operated in a designated county; and[~~,~~]

(D) subject to "Emissions Test on Resale" requirement.

(5) Director--refers to the director of the Texas Department of Public Safety or the designee of the director.

(6) Emissions control component--refers to a device designed to control or reduce the emissions of substances from a motor vehicle or motor vehicle engine installed on or incorporated in a motor vehicle or motor vehicle engine in compliance with requirements imposed by the Motor Vehicle Air Pollution Control Act (42 United States Code, §1857 et seq) or other applicable law. This term shall include, but not be limited to the following components: air injection system (AIS); catalytic converter; coil; distributor; evaporative canister; exhaust gas recirculation (EGR) valve; fuel filler cap/gas cap; ignition wires; oxygen sensor; positive crank case ventilation (PCV) valve; spark plugs; thermal reactor/thermostatic air cleaner; and hoses, gaskets, belts, clamps, brackets, filters or other accessories and maintenance items related to these emissions control components and systems.

(7) Emissions Test on Resale -- refers to an emissions test performed on a vehicle coming into an affected county from another county within the state which does not have an I/M program (non-affected county), the ownership has changed as the result of a retail sale; and a registration and/or titling change is necessary. This test is not required on model year 1996 and newer vehicles if it has less than 50,000 "original" miles[~~tune-up--refers to a basic tune-up along with functional checks and any necessary replacement or repair of emissions control components~~].

(8) EPA--refers to the United States Environmental Protection Agency; the federal agency that monitors and protects air and water resources.

(9) Exempt vehicles--refers to vehicles otherwise considered "designated vehicles" that are:

(A) antique vehicles, as defined by Texas Transportation Code, §502.275;

(B) slow-moving vehicles, as defined by Texas Transportation Code, §547.001; or

(C) motorcycles, as defined by Texas Transportation Code, §502.001.

(D) motor vehicles registered in an affected county but not primarily operated in an affected county.

(10) I/M--refers to Inspection and Maintenance.

(11) Inspection station--refers to an inspection station/facility as defined in the Texas Transportation Code, §548.001.

(12) Inspector--refers to an inspector as defined in the Texas Transportation Code, §548.001.

[~~(13) Loaded mode I/M test--Loaded mode I/M test equipment specifications shall meet EPA requirements for Acceleration Simulation Modes equipment. The Acceleration Simulation Mode (ASM-2) test is an emissions test using a dynamometer (a set of rollers on which a test vehicle's test vehicle's tires rest) which applies an increasing load or resistance to the drive train of a vehicle, thereby simulating actual tailpipe emissions of a vehicle as it is moving and accelerating. The ASM-2 vehicle emissions test is comprised of two phases:~~]

[~~(A) the 50/15 mode--in which the vehicle is tested on the dynamometer simulating the use of 50% of the vehicle available horsepower to accelerate at a rate of 3.3 miles per hour (mph) per second at a constant speed of 15 mph; and~~]

[~~(B) the 25/25 mode--in which the vehicle is tested on the dynamometer simulating the use of 25% of the vehicle available horsepower to accelerate at a rate of 3.3 mph per second at a constant speed of 25 mph.~~]

(13) [~~(14)~~] Motorist--refers to a person or other entity responsible for the inspection, repair, maintenance or operation of a motor vehicle, which may include, but is not limited to, owners or lessees.

[~~(15) Non-attainment area--refers to any portion of an air quality control region where any pollutant exceeds the National Ambient Air Quality Standards (NAAQS) for the pollutant as designated pursuant to the Federal Clean Air Act (FCAA).~~]

(14) [~~(16)~~] Out-of-cycle test--refers to an emissions test not associated with the annual vehicle safety inspection testing cycle.

(15) [~~(17)~~] OBD (On-board diagnostic system)--Computer system installed in a 1996 and newer vehicles by the manufacturer which monitors the performance of the vehicle emissions control equipment, fuel metering system, and ignition system for the purpose of detecting malfunction or deterioration in performance that would be expected to cause the vehicle not to meet emissions standards. All references to OBD should be interpreted to mean the second generation of this equipment, sometimes referred to as OBD II.

(16) [~~(18)~~] Person--refers to a human being, a partnership or a corporation that is recognized by law as the subject of rights and duties.

(17) [~~(19)~~] Primarily operated in--refers to the use of a motor vehicle greater than 60 days per calendar year in designated counties. It is presumed that a vehicle is primarily operated in the county in which it is registered; the burden is on the motorist to overcome this presumption by a preponderance of the evidence.

~~[(20) Program area--refers to county or counties in which the Texas Department of Public Safety administers the vehicle emissions inspection and maintenance program contained in the revised Texas Inspection and Maintenance (I/M) State Implementation Plan. These program areas include:]~~

~~[(A) Dallas/Fort Worth (DFW) program area which consists of the following counties: Dallas and Tarrant counties. Effective May 1, 2002, this program area will consist of Dallas, Denton, Colin, and Tarrant counties;]~~

~~[(B) El Paso program area which consists of El Paso County;]~~

~~[(C) Houston/Galveston program area which consists of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties; and]~~

~~[(D) Extended DFW (EDFW) program area which consists of Ellis, Johnson, Kaufman, Parker, and Rockwall Counties. These counties will become part of the program area as of May 1, 2003.]~~

(18) [~~(21)~~] Re-test--refers to a successive vehicle emissions inspection following the failure of an initial emissions test by a vehicle.

(19) [~~(22)~~] Revised Texas I/M SIP--refers to the most current Texas Inspection and Maintenance State Implementation Plan.

(20) [~~(23)~~] Safety inspection--refers to a compulsory vehicle inspection performed as required by Texas Transportation Code, Chapter 548, by an official inspection station issued a certificate of appointment by the department.

(21) [~~(24)~~] Safety inspection certificate--refers to an inspection certificate issued under Texas Transportation Code, Chapter 548, after a safety inspection as defined herein.

(22) [~~(25)~~] Tampering-related repairs--refers to repairs to correct tampering modifications, including but not limited to engine modifications, emissions system modifications, or fuel-type modifications disapproved by the TNRCC or the EPA.

(23) [~~(26)~~] Testing cycle--refers to an annual cycle for which a motor vehicle is subject to a vehicle emissions inspection.

(24) [~~(27)~~] Test-only facilities--refers to inspection stations certified to do emissions testing that are not engaged in repairing, replacing and/or maintaining emissions control components of vehicles. Acceptable repairs in test-only facilities shall be oil changes, air filter changes, repairs and/or maintenance of non-emissions control components, and the sale of auto convenience items.

(25) [~~(28)~~] Test-and-repair facilities--refers to inspection stations certified to do emissions testing that engage in repairing, replacing and/or maintaining emissions control components of vehicles.

(26) [~~(29)~~] TNRCC--refers to the Texas Natural Resource Conservation Commission.

(27) Two-speed idle (TSI) I/M test -- a test equipment meeting TNRCC specifications for the measurement of the tailpipe exhaust emissions of a vehicle while the vehicle idles, first at a lower speed and then again at a higher speed.

(28) [~~(30)~~] Two years old--refers to a vehicle upon the expiration of the initial two-year inspection certificate or any time the vehicle is presented for inspection or required to be inspected during the year when the vehicle model year is two years less than the current calendar year (current calendar year minus two years), whichever comes first.

(29) [~~(31)~~] Twenty-four years old--refers to a vehicle when the vehicle model year is 24 years less than the current calendar year (current calendar year minus 24 years).

(30) [~~(32)~~] Uncommon part--refers to a part that takes more than 30 days for expected delivery and installation.

(31) [~~(33)~~] VIR--refers to the Vehicle Inspection Report.

(32) [~~(34)~~] VRF--refers to the Vehicle Repair Form.

(c) Applicability. The requirements of this section and those contained in the Revised Texas I/M SIP shall be applied to motorists, vehicles, vehicle inspection stations and inspectors certified by the department to inspect vehicles, and to Recognized Emissions Repair Facilities of Texas and Recognized Emissions Repair Technicians of Texas, as defined herein.

(d) Control requirements.

(1) In affected[~~designated~~] counties, in order to be certified by the department as a vehicle inspection station, the vehicle inspection station must be certified by the department to perform[~~do~~] vehicle emissions testing. This provision does not apply to vehicle inspection stations certified by the department as vehicle inspection stations endorsed only to issue one or more of the following inspection certificates: trailer certificates, motorcycle certificates, commercial windshield certificates, commercial trailer certificates.

(2) In affected[~~designated~~] counties, only department certified inspection stations that are certified by the department to do emissions testing may perform the annual vehicle safety inspection on designated vehicles.

(3) An inspection station in a county not designated[~~"designated"~~] as an affected[~~a designated~~] county herein shall not inspect a vehicle that is capable of being powered by gasoline, from two years old to and including twenty-four years old and registered in an affected[~~a designated~~] county unless the inspection station is certified by the department to do emissions testing, or unless the motorist presenting the vehicle signs an affidavit on a form provided by the department stating one of the following: (The affidavit will be held by the inspection station for collection by the department.)

(A) the vehicle is not a designated vehicle;

(B) the vehicle no longer qualifies as a designated vehicle; or

(C) the vehicle will not return to an affected[~~a designated~~] county prior to the expiration of the current inspection certificate however immediately upon return to an affected[~~a designated~~] county the vehicle will be reinspected at an inspection station certified to do vehicle emissions testing.

(4) All designated vehicles must be emissions tested at the time of and as a part of the designated vehicle's annual vehicle safety inspection at a DPS certified inspection station that is certified to do vehicle emissions testing. The exceptions to this provision are for:

(A) commercial motor vehicles as defined by the Texas Transportation Code, §548.001, that meet the definition of "designated vehicle" as defined herein. Said "designated" commercial motor vehicles must be emissions tested at a DPS certified inspection station that

is certified to do vehicle emissions testing and must have a unique emissions test-only inspection certificate, as authorized by Texas Transportation Code, §548.251, affixed to the lower left-hand corner of the windshield of the vehicle, immediately above the registration sticker, prior to receiving a commercial motor vehicle safety inspection certificate pursuant to Texas Transportation Code, Chapter 548. The unique emissions test-only inspection certificate must be issued within 15 calendar days prior to[~~of~~] the issuance of the commercial motor vehicle safety inspection certificate. The unique emissions test-only inspection certificate will expire at the same time the newly issued commercial motor vehicle safety inspection certificate expires; and

(B) vehicles presented for inspection by motorists in counties not designated as affected counties [~~herein~~] that meet the requirements of paragraph (3)(C) of this subsection.

(5) A vehicle with a currently valid safety inspection certificate presented for an "Emissions Test on Resale" inspection shall receive an emissions test. The owner may choose one of two options:

(A) a complete safety and emissions test and receipt of a new inspection certificate, or

(B) an emissions test and receipt of the unique emissions test-only inspection certificate affixed to the lower left-hand corner of the windshield of the vehicle, immediately above the registration sticker. The unique emissions test-only inspection certificate will expire at the same time as the safety inspection certificate currently displayed on the vehicle at the time the unique emissions test-only certificate is issued.

(6) Any vehicle not listed as an exempt vehicle that is capable of being powered by gasoline, from two years old to and including 24 years old, presented for the annual vehicle safety inspection in affected[~~designated~~] counties will be presumed to be a designated vehicle and will be emissions tested as a part of the annual vehicle safety inspection. Emissions testing will be conducted as follows:

(A) effective until April 30, 2002, all designated vehicles will be emission tested using approved two-speed idle I/M test equipment (TSI).

(B) effective May 1, 2002:

(i) all 1996 model year and newer designated vehicles, which are equipped with an On-board diagnostic system, will be emission tested using approved OBD I/M test equipment; and

(ii) all 1995 model year and older designated vehicles in all affected counties, excluding El Paso County, will be emission tested using a Acceleration Simulation Mode (ASM-2) I/M test. All 1995 model year designated vehicles in El Paso will be emissions tested using approved two-speed idle I/M test equipment (TSI).

(iii) Vehicles which can not be tested using the prescribed emission testing equipment will be tested using the following default methods. OBD vehicles will be tested using ASM-2, if the vehicle cannot be tested on ASM-2 (except for El Paso County, four-wheel drive and unique transmissions), then the vehicle will be tested using TSI.

(7) [~~(6)~~] Vehicles registered in affected[~~designated~~] counties will be identified by a distinguishing validation registration sticker as determined by the Texas Department of Transportation.

(8) [~~(7)~~] Vehicles inspected under the vehicle emissions testing program and found to meet the requirements of the program in addition to all other vehicle safety inspection requirements will be passed by the certified inspector, who will thereafter affix to the windshield a unique emissions inspection certificate pursuant to Texas Transportation Code, §548.251. The only valid inspection certificate for designated vehicles shall be a unique emissions inspection certificate issued by the department, unless otherwise provided herein.

(9) [~~(8)~~] The department shall perform challenge tests to provide for the reinspection of a motor vehicle at the option of the owner of the vehicle as a quality control measure of the emissions testing program. A motorist whose vehicle has failed an emissions test may request a free challenge test through the department within 15 calendar days, not including the date of the emissions test being challenged or questioned.

(10) [~~(9)~~] Federal and State governmental or quasi-governmental agency vehicles that are primarily operated in affected[~~designated~~] counties that fall outside the normal registration or inspection process shall be required to comply with all vehicle emissions I/M requirements contained in the Texas I/M SIP.

(11) [~~(10)~~] Any motorist in an affected[~~a designated~~] county whose designated vehicle has been issued an emissions-related recall notice shall furnish proof of compliance with the recall notice prior to having their vehicle emissions tested the next testing cycle. As proof of compliance, the motorist may present a written statement from the dealership or leasing agency indicating the emissions repairs have been completed.

(12) [~~(11)~~] Inspection certificates issued prior to an[~~the~~] effective date in [~~of~~] this section shall be valid and shall remain in effect until the expiration date thereof.

(13) [~~(12)~~] A unique emissions test-only inspection certificate expires at the same time the annual vehicle safety inspection certificate it relates to expires.

(14) [~~(13)~~] The department will perform quarterly gas audits on all vehicle exhaust gas analyzers used to perform vehicle emissions tests. If a vehicle exhaust gas analyzer fails the calibration process during the gas audit, the department shall cause the appropriate inspection station to cease vehicle emissions testing with the failing exhaust gas analyzer until all necessary corrections are made and the vehicle exhaust gas analyzer passes the calibration process.

(15) [~~(14)~~] Pursuant to the Revised Texas I/M SIP, the department shall administer and monitor a follow-up loaded mode I/M test on at least 0.1% of the vehicles subject to vehicle emissions testing in a given year to evaluate the mass emissions test data as required in 40 CFR 51.353(c)(3). A contractor(s) may be used to assist in collecting, reviewing and evaluating program data.

(16) On-road testing (Remote Sensing Program) verification emissions inspection. Vehicle owners receiving a notice from the department requiring an emission test shall receive an out-of-cycle test, if the vehicle already has a valid safety and emission inspection certificate. This test will be conducted in accordance with the terms of the department's notice. The results of this verification emissions inspection shall be reported (on-line) to the Texas Information Management System Vehicle Identification Database (VID). Vehicles identified to be tested by the notice will receive the prescribed test regardless of the county of registration and whether the vehicle has a currently valid safety inspection certificate or a valid safety and emissions inspection certificate. When the vehicle has a currently valid safety inspection certificate or a valid safety and emissions inspection certificate, the owner may choose one of two options:

(A) a complete safety and emissions test and receipt of a new inspection certificate, or

(B) an emissions test and receipt of the unique emissions test-only inspection certificate affixed to the lower left-hand corner of the windshield of the vehicle, immediately above the registration sticker. The unique emissions test-only inspection certificate will expire at the same time as the safety inspection certificate currently displayed on the vehicle at the time the unique emissions test-only certificate is issued.

(17) Emissions testing of vehicles requiring vehicle identification insignias issued by public institutes of higher learning. Effective January 1, 2002 as per §51.207 of the Texas Education Code, public institutions of higher learning located in affected counties will require vehicles to be emissions tested as a condition to receive a permit to park or drive on the grounds of the institution, including vehicles registered out-of-state. The following instructions are provided for handling this type of inspection.

(A) Vehicles presented under this subsection shall receive an emissions inspection and be issued a unique emissions test-only inspection certificate which will be affixed to the lower left-hand corner of the windshield of the vehicle. Since this inspection certificate is not dated, this certificate will expire as follows:

(i) Vehicles registered in this state from counties without an emissions testing program. The unique emissions test-only inspection certificate will expire at the same time as the safety inspection certificate currently displayed on the vehicle at the time the unique emissions test-only certificate is issued.

(ii) Vehicles registered in another state. The unique emissions test-only inspection certificate will expire on the twelfth (12th) month after the month indicated on the date of the Vehicle Inspection Report (VIR) generated by the emissions inspection. Under no circumstances is the inspection station authorized to remove an out-of-state inspection and/or registration certificate, to include either safety, emissions, or combination of any of the aforementioned.

(B) The operator of a vehicle presented for an emissions inspection under this subsection will be notified to retain the Vehicle Inspection Report (VIR) as proof of emissions testing under the requirements of §51.207 of the Texas Education Code.

(e) Waivers and extensions. Under this section, the department may issue an emissions testing waiver or time extension to any vehicle that passes all requirements of the standard safety inspection portion of the annual vehicle safety inspection and meets the established criteria for a particular waiver or time extension. An emissions testing waiver or a time extension defers the need for full compliance with vehicle emissions standards of the vehicle emissions I/M program for a specified period of time after a vehicle fails an emissions test. The department will accept applications for emissions testing waivers and time extensions.[~~Applications for emissions testing waivers and time extensions shall be accepted by the department.~~] There are four types of emissions testing waivers and time extensions: Low Mileage[~~Minimum Expenditure~~] Waiver; Individual Vehicle Waiver; Parts Availability Time Extension; and Low-Income Time Extension. The motorist may apply once each testing cycle for the Low Mileage[~~Minimum Expenditure~~] Waiver, Individual Vehicle Waiver, and Parts Availability Time Extension. The motorist may apply every other testing cycle for the Low-Income Time Extension.

(1) Low Mileage[~~Minimum Expenditure~~] Waiver.

(A) Eligibility. A vehicle may be eligible for a Low Mileage[~~Minimum Expenditure~~] Waiver provided that it has:

(i) failed both its initial emissions inspection and re-test; and

(ii) incurred qualified emissions-related repairs, as defined herein, whose cost is equal to at least $100; and[~~or are in excess of the minimum expenditure amounts, as defined herein for the county in which the vehicle is registered.~~]

(iii) the vehicle has been driven less than 5,000 miles in the previous inspection cycle; and

(iv) the vehicle will be reasonably expected to be driven fewer than 5,000 miles before the next safety inspection is required.

(B) Qualified Emissions-Related Repairs. Qualified emissions-related repairs are those repairs to emissions control components, including diagnosis, parts and labor, which[~~that~~] count toward a Low Mileage Waiver[~~minimum expenditure waiver~~]. In order to be considered qualified emissions-related repairs, the repair(s):

(i) must be directly applicable to the cause for the emissions test failure;

(ii) must be performed after the initial emissions test or have been performed within 60 days prior to the initial emissions test;

(iii) must not be tampering-related repairs, as defined herein;

(iv) must not be covered by any available warranty coverage unless the warranty remedy has been denied in writing by the manufacturer or authorized dealer; and

(v) must be performed by a Recognized Emissions Repair Technician of Texas at a Recognized Emissions Repair Facility of Texas in order to include the labor cost and/or diagnostic costs. When repairs are not performed by a Recognized Emissions Repair Technician of Texas at a Recognized Emissions Repair Facility of Texas, only the purchase price of parts, applicable to the emissions test failure, qualify as a repair expenditure for the Low Mileage Waiver[~~minimum expenditure waiver~~].

(C) [~~Minimum expenditure amounts. The minimum expenditure waiver in any program area shall be at least $450 or that amount adjusted by the Consumer Price Index.~~]

[~~(D) Validity. A Minimum Expenditure Waiver shall be valid through the end of the twelfth month from the date of issuance.~~]

[~~(E)~~] Conditions. The following conditions must be met in order to receive a Low Mileage[~~Minimum Expenditure~~] Waiver:

(i) the vehicle must pass a visual inspection performed by a department representative to insure that the emissions repairs being claimed have actually been performed;

(ii) the diagnosis, parts and labor receipts for the qualified emissions-related repairs must be presented to the department and support that the emissions repairs being claimed have actually been performed; and

(iii) the valid re-test Vehicle Inspection Report (VIR) and valid Vehicle Repair Form (VRF) for the applicant vehicle must be presented to the department. If labor and/or diagnostic charges are being claimed towards the low mileage waiver[~~minimum expenditure~~] amount, the VRF shall be completed by a Recognized Emissions Repair Technician of Texas.

(2) Low-Income Time Extension. A Low-Income Time Extension may be granted in accordance with the following conditions:

(A) The applicant must supply to the department proof in writing that:

(i) the vehicle failed the initial emissions inspection test; proof shall be in the form of the original failed VIR;

(ii) the vehicle has not been granted a Low-Income Time Extension in the previous testing cycle;

(iii) the applicant is the owner of the vehicle that is the subject of the Low-Income Time Extension; and

(iv) the applicant receives financial assistance from the Texas Department of Human Services due to indigence (subject to approval by the director) or the applicant's adjusted gross income (if the applicant is married, the applicant's adjusted gross income is equal to the applicant's adjusted gross income plus the applicant's spouse's adjusted gross income) is at or below the current federal poverty level as published by the United States Department of Health and Human Services, Office of the Secretary, in the Federal Register; proof shall be in the form of a federal income tax return or other documentation authorized by the director that the applicant certifies as true and correct.

(B) After a vehicle receives an initial Low-Income Time Extension, the vehicle must pass an emissions test prior to receiving another Low-Income Time Extension.

(3) Parts Availability Time Extension. A Parts Availability Time Extension may be granted in accordance with the following conditions:

(A) The applicant must demonstrate to the department:

(i) reasonable attempts were made to locate necessary emissions control parts by retail or wholesale parts suppliers; and

(ii) emissions-related repairs cannot be completed before the expiration of the safety inspection certificate or before the 30-day period following an out-of-cycle inspection because the repairs require an uncommon part, as defined herein.

(B) The applicant shall provide to the department:

(i) an original VIR indicating the vehicle failed the emissions test;

(ii) an invoice, receipt, or original itemized document indicating the uncommon part(s) ordered by: name; description; catalog number; order number; source of part(s), including name, address and phone number of parts distributor; and expected delivery and installation date(s). The original itemized document must be prepared by a Recognized Emissions Repair Technician of Texas before a Parts Availability Time Extension can be issued.

(C) A Parts Availability Time Extension is not allowed for tampering-related repairs, as defined herein.

(D) If the vehicle does not pass an emissions re-test prior to the expiration of the Parts Availability Time Extension, the applicant must provide to the department, adequate documentation that one of the following conditions exists:

(i) the motorist qualifies for a Low Mileage[~~Minimum Expenditure~~] Waiver, Low-Income Time Extension or Individual Vehicle Waiver; or

(ii) the motor vehicle will no longer be operated in the affected county[~~program area, as defined herein~~].

(E) A vehicle that receives a Parts Availability Time Extension in one testing cycle must have the vehicle repaired and re-tested prior to the expiration of such extension or must qualify for another type of waiver or time extension, in order to be eligible for a Parts Availability Time Extension in the subsequent testing cycle.

(F) The length of a Parts Availability Time Extension shall depend upon expected delivery and installation date(s) of the uncommon part(s) as determined by the department representative on a case by case basis. Parts Availability Time Extensions will be issued for either 30, 60 or 90 days.

(G) The department shall issue a unique time extension sticker for Parts Availability Time Extensions.

(4) Individual Vehicle Waiver. If a vehicle has failed an emissions test, a motorist may petition the director for an Individual Vehicle Waiver. Upon demonstration that the motorist has taken every reasonable measure to comply with the requirements of the vehicle emissions I/M program contained in the Revised Texas I/M SIP and such waiver shall have minimal impact on air quality, the director may approve the petition, and the motorist may receive a waiver. Motorists may apply for the Individual Vehicle Waiver each testing cycle.

(f) Prohibitions.

(1) No person may operate or allow to be operated any motor vehicle that does not comply with:

(A) all applicable air pollution emissions control-related requirements included in the annual vehicle safety inspection administered by the department, as evidenced by a current valid inspection certificate affixed to the vehicle windshield; and

(B) the vehicle emissions inspection and maintenance requirements contained in the Revised Texas I/M SIP.

(2) No person or entity may own, operate, or allow the operation of a designated vehicle in an affected[~~a designated~~] county unless the vehicle has complied with all applicable vehicle emissions inspection and maintenance requirements contained in the Revised Texas I/M SIP, unless otherwise provided for herein.

(3) No person may issue or allow the issuance of a Vehicle Inspection Report (VIR), as authorized by the department, unless all applicable air pollution emissions control-related requirements of the annual vehicle safety inspection and the vehicle emissions inspection and maintenance requirements and procedures contained in the Revised Texas I/M SIP are completely and properly performed in accordance with the rules and regulations adopted by the department and the TNRCC.

(4) No person may allow or participate in the preparation, duplication, sale, distribution, or use of false, counterfeit, or stolen inspection certificates, VIRs, VRFs, vehicle emissions repair documentation, or other documents which may be used to circumvent the vehicle emissions inspection and maintenance requirements and procedures contained in Texas Transportation Code, Chapter 548 and the Revised Texas I/M SIP.

(5) No organization, business, person, or other entity may represent itself as an inspector certified by the department, unless such certification has been issued pursuant to the certification requirements and procedures contained in the Revised Texas I/M SIP and the rules and regulations of the department.

(6) No person may act as or offer to perform services as a Recognized Emissions Repair Technician of Texas or a Recognized Emissions Repair Facility of Texas, as defined in subsections (h) and (i) of this section, without first obtaining and maintaining recognition by the department.

(g) Violation/Penalties. Pursuant to Texas Transportation Code, §548.601, any person who operates a designated vehicle in an affected[~~a designated~~] county without displaying a valid unique

emissions inspection certificate, may be subject to a fine in an amount not to exceed that set out in Texas Transportation Code, §548.604.

(h) Requirements for Recognized Emissions Repair Technicians of Texas. The department will recognize automotive repair technicians that meet the qualifications as set forth herein.

(1) In order to be recognized by the department as a Recognized Emissions Repair Technician of Texas, the technician must:

(A) have a minimum of three years full-time automotive repair service experience;

(B) possess current certification in the following areas based on the following tests offered by the National Institute of Automotive Service Excellence (ASE):

(i) Engine Repair (ASE Test Al);

(ii) Electrical/Electronic Systems (ASE Test A6);

(iii) Engine Performance (ASE Test A8); and

(iv) Advanced Engine Performance Specialist (ASE Test Ll); and

(C) must be employed by a Recognized Emissions Repair Facility of Texas, as defined herein.

(2) A Recognized Emissions Repair Technician of Texas shall perform the following duties:

(A) complete and certify the VRF form(s); and

(B) notify the DPS in writing within 14 days of changes in the technician's ASE testing status.

(3) Failure to comply with these rules and failure to meet the qualifications set out herein may result in the department ceasing to recognize the technician.

(i) Requirements for Recognized Emissions Repair Facilities of Texas.

(1) In order to be recognized by the department as a Recognized Emissions Repair Facility of Texas, the facility must:

(A) employ at least one full-time Recognized Emissions Repair Technician of Texas, as described in subsection (h) of this section; and

(B) possess equipment to perform the functionality of the following items:

(i) ammeter;

(ii) compression tester[~~alternator, regulator or starting circuit tester~~];

(iii) cooling system tester[~~battery load tester~~];

(iv) dwellmeter[~~compression tester~~];

(v) engine analyzer[~~cooling system tester~~];

(vi) five gas exhaust analyzer (which can perform diagnostic repair for at least hydrocarbon (HC), carbon monoxide (CO), carbon dioxide (CO2), and oxides of nitrogen (NOX) [~~dwellmeter~~];

(vii) fuel pressure/pressure drop tester[~~engine analyzer~~];

(viii) ohmmeter[~~exhaust gas analyzer (which meets department and TNRCC specifications)~~];

(ix) repair reference information[~~fuel pressure/pressure drop tester~~];

(x) scan tool/or OBDII capable testing equipment[~~ohmmeter~~];

(xi) tachometer[~~propane gas bottle (carburetor lean drop check)~~];

(xii) timing light[~~repair reference information~~];

(xiii) vacuum/pressure gauge[~~scan tool~~];

(xiv) vacuum pump; and[~~tachometer~~];

(xv) volt meter. [~~timing light;~~]

~~*[(xvi)* vacuum/pressure gauge;]~~

~~*[(xvii)* vacuum pump;]~~

~~*[(xviii)* volt meter;]~~

~~*[(xix)* a department-approved device with required adapters for checking fuel cap pressure; and]~~

~~*[(xx)* OBD testing equipment.]~~

(2) A Recognized Emissions Repair Facility of Texas shall:

(A) notify the DPS in writing within 14 days of changes in the facility's technicians' ASE testing status or employment status and the facility's equipment functionality status; and

(B) agree in writing upon application for recognition by the department to maintain compliance with the qualifications enumerated in paragraph (1) of this subsection, in order to maintain recognition by the department.

(3) Failure to comply with these rules and failure to meet the qualifications set out herein, may result in the department ceasing to recognize the facility.

(j) Certified emissions inspection station requirements.

(1) In order to be certified by the department as an emissions inspection station, for purposes of the emissions I/M program, the station must:

(A) be licensed by the department as an official vehicle inspection station;

(B) comply with the DPS Rules and Regulations Manual for Official Vehicle Inspection Stations and Certified Inspectors and other applicable rules and regulations of the department;

(C) complete all applicable forms and reports as required by the department;

(D) purchase or lease emissions testing equipment that is currently certified by the TNRCC to emissions test vehicles, or upgrade existing emissions testing equipment to meet the current certification requirements of the TNRCC;

(E) have a designated telephone line dedicated for each vehicle exhaust gas analyzer to be used to perform vehicle emissions tests; and

(F) enter into and maintain a business arrangement with the Texas Information Management System[~~Datalink~~] contractor to obtain a telecommunications link to the Texas Information Management System[~~Datalink~~] System Vehicle Identification Database (VID) for each vehicle exhaust gas analyzer to be used to inspect vehicles as described in the Revised Texas I/M SIP.

(G) All public certified emissions inspection stations in affected counties, excluding El Paso County shall offer both the ASM-2 test and the OBD test. Certified emissions inspection stations in these affected counties desiring to offer OBD-only emission testing to the

public must request a waiver as low volume emissions inspection station from the department Regional Supervisor. All public certified emissions inspection stations in El Paso County shall offer both the TSI test and the OBD test.

(2) Failure to comply with these rules may result the in denial, suspension or revocation of an inspection station's certificate of appointment, pursuant to Texas Transportation Code, §548.405, or in a fine, pursuant to Texas Transportation Code, §542.301, in an amount not to exceed that set out in Texas Transportation Code, §542.401.

(k) Certified emissions inspector requirements.

(1) To qualify as a certified inspector, an individual must:

(A) be licensed by the department as an official vehicle inspector;

(B) must complete the training required for the Vehicle Emissions Inspection Program and receive the department's current approved inspector's certificate for such training;

(C) must comply with the DPS Rules and Regulations Manual for Official Vehicle Inspection Stations and Certified Inspectors and other applicable rules and regulations of the department; and

(D) complete all applicable forms and reports as required by the department.

(2) Failure to comply with these rules may result in the denial, suspension or revocation of a certified inspector's certificate, pursuant to Texas Transportation Code, §548.405, or in a fine, pursuant to Texas Transportation Code, §542.301, in an amount not to exceed that set out in Texas Transportation Code, §542.401.

(l) Inspection and Maintenance Emissions Testing Fees. The fees for emissions testing will be set by the TNRCC. The fee for an emissions test shall provide for one free re-test for each failed initial emissions inspection, provided that the motorist has the re-test performed at the same inspection station where the vehicle originally failed and the re-test is conducted within 15 calendar days of the initial emissions test, not including the date of the initial emissions test.

(m) Audits.

(1) The department is authorized to perform covert and overt audits pertaining to the emissions testing program.

(2) The department may authorize enforcement personnel or other individuals to remove, disconnect, adjust, or make inoperable vehicle emissions control equipment, devices, or systems and to operate a vehicle in the tampered condition in order to perform a quality control audit of an inspection station or other quality control activities as necessary to assess and ensure the effectiveness of the vehicle emissions inspection and maintenance program.

(n) Authority to publish manuals. The Public Safety Commission authorizes the director of the Department of Public Safety to promulgate, publish and distribute necessary manuals of instruction and procedure for the implementation of the emissions I/M testing program in a manner not inconsistent with these rules. The department adopts by reference the VEHICLE EMISSIONS INSPECTION AND MAINTENANCE RULES AND REGULATIONS MANUAL FOR OFFICIAL VEHICLE INSPECTION STATIONS AND CERTIFIED INSPECTORS as the standard for conducting emissions inspections in designated counties. Any violation of these rules and regulations may result in the suspension or revocation of the certificate of appointment of the vehicle inspection station or certificate of the certified inspector. Such manual(s) shall be available for public inspection at reasonable times at offices of the department as designated by the director.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 16, 2001.

TRD-200106235
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 424-2135

♦ ♦ ♦

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 7. TEXAS COUNCIL ON PURCHASING FROM PEOPLE WITH DISABILITIES

CHAPTER 189. PURCHASES OF PRODUCTS AND SERVICES FROM PEOPLE WITH DISABILITIES

40 TAC §§189.3, 189.5 - 189.8, 189.11

The Texas Council on Purchasing from People with Disabilities proposes to amend §§189.3, 189.5, 189.6, 189.7, 189.8, and 189.11, concerning purchases of products and services from people with disabilities. The amendments provide details for assistance provided by the commission, contracting with one or more central nonprofit agencies, the responsibilities of central nonprofit agencies, establishment of an advisory committee, the responsibilities of the advisory committee, and hiring staff to carry out council's duties. The amendments will also provide more detailed procedures for the council's responsibilities under the public information act, and detailed procedures regarding items purchased under exceptions.

Ms. Margaret Pfluger Chairperson of the Texas Council on Purchasing from People with Disabilities, has determined for the first five year period the rules are in effect, there will be no fiscal implication for the state or local governments as a result of enforcing/administering these amended rules.

Ms. Margaret Pfluger, Chairperson, of the Texas Council on Purchasing from People with Disabilities, further determines that for each year of the first five-year period the amendments are in effect, the public benefit anticipated as a result of enforcing these rules will be a clearer understanding of the program provided by the Texas Council on Purchasing from People with Disabilities and the creation of more efficient rules. There will be no effect on large, small or micro-businesses. There is no anticipated economic costs to persons who are required to comply with these rules and there is no impact on local employment.

Comments on the proposals may be submitted to Kelvin Moore, Program Administrator, Texas Council on Purchasing from People with Disabilities, P.O. Box 13047, Austin, TX 78711-3047. Comments must be received no later than thirty days from the date of publication of the proposal to the *Texas Register*.

The amendments are proposed under the authority of the Texas Government Code, Title 8, Chapter 122 which provides the Texas Council on Purchasing from People with Disabilities with the authority to promulgate rules necessary to implement the legislative intent of House Bill 1691 77th Legislature.

The following code is affected by these rules: Government Code, Title 8 Chapter 122.

§189.3. Organization.

(a) The council is composed of nine members appointed by the governor, with the advice and consent of the senate, to set policy and exercise all authority and responsibility accorded the council pursuant to Chapter 122.

(b) The presiding officer shall appoint a subcommittee, the pricing subcommittee, composed of three council members to review the data used to determine fair market value and make recommendations to the council concerning fair market price for products and/or services.

(c) The presiding officer shall appoint other subcommittees as necessary to consider matters destined for full council attention and recommend action.

(d) The presiding officer shall recommend a vice-presiding officer to the council for approval.

(e) The council may employ staff as necessary to carry out the council's duties. Employed staff shall provide:

(1) Day-to-day administration of the provisions of this chapter as delegated by the council, and

(2) Policy recommendations and administrative support as requested by the council.

(f) The council may establish advisory committees as deemed necessary. The membership of each advisory committee shall be determined and selected by the council.

(1) The council shall specify the purpose and duties of each advisory committee, which must include:

(A) Reviewing the effectiveness of the program administered under this chapter; and

(B) Recommending procedures to create higher-skilled and higher-paying employment opportunities for people with disabilities.

(2) Members of all advisory committees serve at the will of the council. The council may dissolve any advisory committee when it deems it appropriate to do so.

(3) the council shall make reasonable attempts to have balanced representation on each advisory committee, including attempting to have representatives with knowledge of this chapter from the following:

(A) the Lighthouses for the Blind community rehabilitation programs;

(B) the Goodwill community rehabilitation programs;

(C) the Texas Department of Mental Health and Mental Retardation community rehabilitation program;

(D) other community rehabilitation programs;

(E) representatives from central non-profit agencies;

(F) representatives from disability advocacy groups;

(G) government purchasing agents;

(H) private industry; and

(I) private citizens who have a disability and have knowledge of the sale of products and services.

(g) [~~(e)~~] The council shall accept legal, [~~clerical, administrative,~~]and other necessary support from the commission in accordance with legislative appropriation.

(h) The council shall coordinate with the upper-level management employee appointed by the commission to enable the commission to meet its requirements of this chapter.

(i) The council shall coordinate with the commission to facilitate the inclusion of the programs administered under this chapter in the commission's procurement policy manual(s).

§189.5. Open Meetings; Public Testimony and Access.

(a) A quorum of the full council or council subcommittee shall deliberate and make decisions in open meeting in accordance with Chapter 551 of the Texas Government Code and the open meeting shall be conducted pursuant to Robert's Rules of Order. The full council may meet in executive session for authorized purposes during a public meeting as allowed under Chapter 551 of the Texas Government Code.

(b) The public will be provided a reasonable opportunity to appear before the council or council subcommittee in an open meeting and present testimony pertinent to an agenda item duly posted for said open meeting or any issue under the jurisdiction of the council.

(c) The council shall comply with federal and state laws related to program and facility accessibility. Each CNA shall develop, for council's approval, a written plan that describes how a person who does not speak English can be provided reasonable access to the council's programs and services under its management.

(d) The council may deliberate and take action on public testimony regarding an agenda item at the meeting for which the agenda item was duly posted.

(e) If a member of the public inquires about a subject for which notice has not been given as required by Chapter 551 of the Texas Government Code, the notice provisions do not apply to:

(1) a statement of specific factual information given in response to the inquiry; or

(2) a recitation of existing policy in response to the inquiry.

(f) Any deliberation of or decision about a subject of the inquiry shall be limited to a proposal to place the subject on the agenda for a subsequent meeting.

(g) Protests/Dispute Resolution/Hearing

(1) Any central non-profit agency which has a dispute with the council or any CRP which is aggrieved in connection with the disapproval or suspension of its ability or its product or service to participate in the state use program may formally protest to the presiding officer of the council. Such protests must be in writing and received in by the presiding officer within 10 working days after such aggrieved person or entity knows, or should have known, of the occurrence of the action which is protested. The written protest must be presented to the presiding officer not later than thirty (30) days prior to the regularly scheduled council meeting. Formal protests must conform to the requirements of this paragraph [~~subsection~~] and paragraph [~~subsection~~] (2) of this subsection [~~section~~], and shall be resolved in accordance with the procedure set forth in paragraphs [~~subsections~~] (3) and (4) of this subsection [~~section~~].

(2) A formal protest must be sworn and contain:

(A) a specific identification of the statutory or regulatory provision(s) that the action complained of is alleged to have violated;

(B) a specific description of each act alleged to have violated the statutory or regulatory provision(s) identified in subparagraph [~~paragraph~~] (A) of this paragraph [~~subsection~~];

(C) a precise statement of the relevant facts;

(D) an identification of the issue or issues to be resolved;

(E) argument and authorities in support of the protest; and

(F) a statement that copies of the protest have been mailed or delivered to the using agency and/or the CNA.

(3) A quorum of the full council shall have the authority to settle and resolve the dispute concerning the disapproval or suspension of a CRP or its product and/or service to participate in the state use program.

(4) The council will deliberate and decide whether the disputed action is to be reversed, modified or affirmed during the regularly scheduled meeting following receipt of the formal written protest. Should the [~~The~~] council's final determination be rejected by the disputant central non-profit agency or disputant CRP and the disputed action is to be contested further by a central non-profit agency or CRP, the dispute shall first be submitted to alternative dispute resolution [~~will be final~~].

§189.6. Criteria for Recognition and Approval of Community Rehabilitation Programs.

(a) The council shall establish and follow a documented process for the certification of community rehabilitation programs.

(b) [~~(a)~~] Any CRP currently participating in the state use program on the date these rules are adopted will be allowed to continue so long as they comply with the criteria given in this chapter.

(c) [~~(b)~~] A CRP must be a government entity, private nonprofit unincorporated entity which has its own nonprofit status and federal tax identification number and has as its primary purpose the employment of persons with disabilities to produce products or perform services for compensation, or a private nonprofit incorporated entity with its own federal tax identification number, articles of incorporation and bylaws that establish its existence for the primary purpose of employing persons with disabilities to produce products or perform services for compensation.

(d) [~~(c)~~] A CRP must maintain payroll, human resource functions, accounting and documentation of disability for people employed to produce goods or services under the state use program.

(e) [~~(d)~~] A CRP must maintain contracts and billing and payment records if it contracts with outside entities for services of any kind.

(f) [~~(e)~~] A CRP desiring to provide services under the state use program must comply with the following requirements to obtain approval from the council:

(1) A minimum of thirty-five percent (35%) of the contract price of the service must be paid to persons with disabilities who perform the service in the form of wages and benefits; however, the council may accept a lower percentage when it is satisfied that this percentage is not feasible for a particular service.

(2) Supply costs for the service must not exceed twenty percent (20%) of the contract price of the service; however, the council may accept a larger percentage when it is satisfied that this percentage is not feasible for a particular service.

(3) Administrative costs allocated to the service must not exceed ten percent (10%) of the contract price for the service. At least seventy-five percent (75%) of the hours of direct labor necessary to perform a service must be done by persons with disabilities; however, the council may accept a lower percentage when it is satisfied that this percentage is not feasible for a particular service.

(g) [~~(f)~~] A CRP must comply with the following requirements to obtain approval from the council for state use products:

(1) At least seventy-five percent (75%) of the hours of direct labor necessary to reform raw materials, assemble components, manufacture, prepare, process and/or package a product must be done by persons with disabilities; however, the council may accept a lower percentage when it is satisfied that this percentage is not feasible for a particular product.

(2) Appreciable contribution to the product by persons with disabilities must be determined on a product-by-product basis to be substantial based on acceptable documentation provided to the council upon application for a product to be approved for the state use program.

(h) [~~(g)~~] The rules governing the approval of products to be offered by community rehabilitation programs apply to all items that a community rehabilitation program proposes to offer to state agencies or political subdivisions, regardless of the method of acquisition by the agency, whether by sale or lease. A community rehabilitation program must in fact own any product or products it leases. A proposal by a community rehabilitation program to rent or lease a product to a state agency is a proposal to offer a product, not a service, and the item offered must meet the requirements of these rules governing products. If the product is offered for lease by the community rehabilitation program, the unit cost of the product, for purposes of applying the standards set forth in these rules, is the total cost to the state agency of leasing the product over its expected useful life.

(i) [~~(h)~~] Any necessary subcontracted services shall be performed to the maximum extent possible by other community rehabilitation programs and in a manner that maximizes the employment of persons with disabilities.

(j) [~~(i)~~] Raw materials or components may be obtained from companies operated for profit, but a community rehabilitation program must own any product that it offers for sale to state agencies or political subdivisions through the state use program and make an appreciable contribution to the product which accounts for a substantial amount of the value added to the product.

(k) [~~(j)~~] The organization must not serve, in whole or in part, as an outlet or front for any entity whose primary purpose is not the employment of people with disabilities.

(l) [~~(k)~~] The council may:

(1) recognize a CRP that maintains accreditation by a nationally accepted vocational rehabilitation accrediting organization, and

(2) approve CRP services that have been approved for a purchase by a state habilitation or rehabilitation agency.

(m) [~~(l)~~] The council, at its sole discretion, may review, or have reviewed, any CRP approved to participate in this program to verify that the CRP meets the applicable qualifications contained in this chapter.

(n) [~~(m)~~] Violation of any of the criteria given in this chapter, or verified instances of conflict of interest for a CRP may result in suspension of approval or in disapproval of a CRP's eligibility to

participate in this program, and/or may result in suspension or disqualification of any product or service.

(o) [~~(n)~~] Neither the council, nor any individual member, the State of Texas, nor any other Texas state agency will be responsible for any loss or losses, financial or otherwise, incurred by any CRP should its product not be approved for the state use program as provided by law.

§189.7. Contracting with [~~a~~] Central Nonprofit Agencies [~~Agency~~].

(a) The council may [~~shall~~] contract with one or more [~~a~~]central nonprofit agencies [~~agency~~] and shall contract through a request for proposals for a period not to exceed five years to perform, at a minimum, the duties set forth in §122.019(a)(b) of Chapter 122 of the Human Resources Code.

(b) The management fee rate charged by a central nonprofit agency for its services to the CRP(s) and its method of calculation must be approved by the council. The maximum management fee rate must be:

(1) computed as a percentage of the selling price of the product; or

(2) the contract price of a service; and

(3) must be included in the selling price or contract price; and

(4) must be paid at the time of sale.

(c) The council, at its sole discretion, may negotiate and approve varying management fees for a CNA to provide a fee structure that corresponds to the level of service being given by a CNA to each of the CRPs.

(d) A percentage of the management fee described in subsection (b) of this section shall be set by the council and paid to the council in an amount necessary to reimburse the general revenue fund for direct and reasonable costs incurred by the commission in administering its duties under Chapter 122.

(e) In accordance with the Texas Human Resources Code, §122.019(d), the council shall, at least once during the [~~two year~~] contract period, but more often if the council deems necessary, review services by and the performance of a CNA, and the revenue required to accomplish the program. The purpose of the review shall be to determine whether a CNA has complied with statutory requirements, contract requirements, and performance standards set forth in §189.12 of this title (relating to performance standards for a central nonprofit agency). Following the review of a CNA as required by §122.019(d) of the Human Resources Code, the council at its sole discretion, may

[~~(1)~~] approve the performance of the central nonprofit agency and the continuation of the contract through its termination date; or

[~~(2) if the contract expires within twelve months after the completion of the review and the council has approved the performance of the central nonprofit agency, the council may negotiate a new contract with the same CNA to begin upon expiration of the current contract or enter into a new contract in accordance with Subtitle D, Title 10, Government Code, using competitive bidding or competitive sealed proposals, as recommended by the commission.~~]

(f) The council may issue [~~use~~] a request for proposals [~~competitive bidding, competitive sealed proposals pursuant to Subtitle D, Title 10, Texas Government Code,~~] or negotiate an emergency contract not to exceed one year, when a contract with a CNA is terminated by the council because:

(1) the central nonprofit agency ceases operations;

(2) the central nonprofit agency gives notice that it can not complete the contract;

(3) the central nonprofit agency's performance contract has been terminated due to its failure to perform its contractual obligations; or

(4) review of the central nonprofit agency results in disapproval of its performance.

(g) In the event a new CNA succeeds to the contract for any reason provided in these rules, the prior CNA shall cooperate fully and assist the new CNA to take over CNA duties and responsibilities as soon as possible with minimal disruption to the operations of the program. Such cooperation and assistance will include turning over to the council the terminated CNA's records described in the Texas Human Resources Code §122.009(a), which includes but is not limited to a marketing plan, a listing of CRPs participating in the state use program, copies of all contracts with CRPs participating in the state use program, a listing of state agencies that purchase state use products and services, program funding requirements, and job descriptions for staffing a CNA to perform its duties under its contract with the council.

(h) Not later than the 60th day before the date the council adopts or renews a contract, the council shall publish notice of the proposed contract in the *Texas Register*.

(i) No later than October 1st of each year the CNA will provide to the council, regarding CRP(s) which have contracted with the CNA, the following information for the period of July 1st through June 30th of each year:

(1) for [~~from each~~] CRPs [~~CRP~~]:

(A) a collective executive summary of the CRPs annual state use program evaluations [~~summary data from CRP annual business reports~~];

(B) the number of disabled persons employed by type of disability and the number of nondisabled workers employed in programs managed by the CRP(s) or who are employed by businesses or workshops that receive supportive employment from CRPs;

(C) the amount of annual wages and the average and range of weekly earnings for disabled and nondisabled workers who are employed in CRPs under this chapter[~~paid to disabled employees in CRPs~~];

(D) a summary of the sale of products offered by the CRP(s);

(E) a list of products and/or services offered by a CRP;

(F) the geographic distribution of CRP(s); and

(G) a report of all CRPs that have not met the criteria for participation in the state use program in a format approved by the council.

(2) from each CRP data on individual outplacement or supported employment to include:

(A) the number of individuals in outplacement employed;

(B) the hourly wage range;

(C) the range of hours worked; and

(D) the number of disabled persons employed by primary type of disability.

(j) In accordance with the Texas Human Resource Code, §122.019 (c) and (d), a CNA will provide or make available to the council:

(1) quarterly reports for each calendar quarter of its contract of sales of products or services, wages paid and hours worked by persons with disabilities for [~~each~~] CRPs [~~CRP~~] participating in the state use program;

(2) quarterly reports for each calendar quarter listing CRPs that do not meet criteria for participation in the state use program and the reasons that each CRP listed does not meet the criteria;

(3) at least once a year by October 31st, and prior to any review and/or renegotiation of the contract:

(A) an updated marketing plan;

(B) a proposed annual budget with estimated sales, commissions, and expenses;

(C) a program budget with details on how the expected revenue and expenses will be allocated to directly support and expand the state use program and other programs that expand direct services and/or the enhancement of employment opportunities for persons with disabilities; and

(D) an audited annual financial statement which should include information on FDIC coverage of all cash balances, earnings attributed to the management fee for the state use program, accounts receivable, cash reserves, line of credit borrowings, interest payments, bad debt, administrative overhead and any detailed supporting documentation requested by the council;

(4) quarterly reports of categories of expenditures in reporting format approved by the council;

(5) records in accordance with the Texas Human Resources Code §§122.009 (a) and 122.0019(d) for audit purposes, provided however, that any records provided by a CNA which may be subject to any exception to Chapter 552 of the Texas Government Code, would not be disclosed to any third party except with the permission of the CNA or in accordance with the provisions of Chapter 552, Government Code (the "Public Information Act"); and

(6) any other information the council requests as set forth in Chapter 189 of this title (relating to Purchase of Products and Services from Persons with Disabilities).

(k) Duties of a CNA include, but not be limited to:

(1) recruit and assist community rehabilitation programs in developing and submitting applications for the selection of suitable products and services;

(2) facilitate the distribution of orders among community rehabilitation programs;

(3) manage and coordinate the day-to-day operations of the program, including the general administration of contracts with community rehabilitation programs;

(4) promote increased supported employment opportunities for persons with disabilities;

(5) investigate products and services before they are proposed by CRPs for the state use program and after their approval for compliance with Texas Government Code §§2155.138 and 2155.069; and

(6) monitor CRPs to ensure that all criteria for participation in the state use program are met.

(l) The services of a central nonprofit agency may include marketing and marketing support services, such as:

(1) assistance to CRPs regarding solicitation and negotiation of contracts;

(2) direct marketing of products and services to state agencies and political subdivisions;

(3) research and development of products and services;

(4) public relations activities to promote the program;

(5) customer relations;

(6) education and training;

(7) accounting services related to purchase orders, invoices, and payments to CRPs; and

(8) other duties as designated by the council that may include:

(A) establishing a payment system with a goal to pay CRPs within fourteen (14) to twenty-one (21) calendar days, but not less than thirty (30) days of completion of work and proper invoicing;

(B) resolving contract issues and/or problems as they arise between the CRPs and customers of the program, referring those that cannot be resolved to the council;

(C) maintaining a system that tracks and monitors product and service sales; and

(D) tracking and reporting quality and delivery times of products and services.

(m) Each year by October 31st, a central nonprofit agency will establish performance goals for the next fiscal year in support of objectives set by the council. Those performance goals will include, but not be limited to:

(1) sales of products or services;

(2) wages paid to persons with disabilities;

(3) hours worked by persons with disabilities;

(4) response time to customers' inquiries and/or complaints; and

(5) quality standards and delivery goals for CRP programs operations.

(n) The CNA shall have an authorized representative present at all council meetings who can bind the CNA to any representations, agreements or decisions regarding agenda items subject to the council's authority.

(o) The council may terminate a contract with a central non-profit agency if:

(1) the council finds substantial evidence of the central non-profit agency's noncompliance with contractual obligations or of conflict of interest; and

(2) the council has provided at least 30 days written notice to that central non-profit agency of the termination of the contract.

(p) The council may request an audit by the state auditor of:

(1) the management fee set for any central non-profit agency; or

(2) the financial condition of any central non-profit agency.

(q) A person may not operate a community rehabilitation program and at the same time contract with the council as a central nonprofit agency.

(r) The council must annually review the management fees the CRPs are charged by the CNAs.

§189.8. Product Specifications and Exceptions.

(a) A product manufactured for sale through the commission to any office, department, institution or agency of the state shall be manufactured or produced according to specifications developed by the commission. If the commission has not developed specifications for a particular product, the production shall be based on commercial or federal specifications in current use by the industry.

(b) Requisitions for products and/or services required by state agencies are processed by the commission according to commission rules.

(c) An exception from subsection (a) of this section may be made in any case as follows:

(1) under the rules of the commission, the product and/or service so produced or provided does not meet the reasonable requirements of the office, department, institution, or agency; or

(2) the requisitions made cannot be reasonably complied with through provision of products and/or services produced by persons with disabilities.

(d) An office, department, institution, or agency may not evade purchasing products and/or services produced or provided by persons with disabilities by requesting variations from standards adopted by the commission when the products and/or services produced or provided by persons with disabilities, per established standards, are reasonably adapted to the actual needs of the office, department, institution, or agency and comply with Government Code §2155.138 and §2155.069.

(e) The commission shall provide the council with a list of items known to have been purchased under the exceptions provided in subsection (c) of this section monthly, in the format adopted by the council.

(f) The council, subcommittee, or staff shall review and process the exception reports received from state agencies, and the commission that purchase products or services available from a central non-profit agency or community rehabilitation program under this chapter, but purchased from another business that is not a central non-profit agency or community rehabilitation program under this chapter.

(g) The council shall coordinate with the respective employee, designated by each state agency, to assist in attaining future compliance with this chapter, when an agency makes and reports an unjustified purchase or purchases of a product available under the programs authorized by this chapter,

(h) Council may request an Attorney General opinion prior to engaging in alternative dispute resolution.

§189.11. Records.

(a) The commission is the depository for all records of the council's operations and disclosure of records are subject to requirements of Chapter 552 of the Texas Government Code (the "Public Information Act").

(b) The council or the council's staff, when approved in advance by the council, may access financial or other information and records from a central nonprofit agency or a community rehabilitation program if the council determines the information and records are necessary for the effective administration of this chapter and rules adopted under this chapter.

(c) Information and records must be obtained under subsection (b) of this section in recognition of the privacy interest of persons employed by central nonprofit agencies or community rehabilitation programs. The information and records may not be released or made public on subpoena or otherwise, except that release may be made:

(1) for statistical purposes, but only if a person is not identified;

(2) with the consent of each person identified in the release; or

(3) regarding a compensation package of any central nonprofit agency employee or subcontractor if determined by the council to be relevant to the administration of this chapter.

(d) No records may be accessed or released without the council chairperson's written approval given in response to a written request. Anyone, including one or more council members, council staff, or any other individual or entity, seeking to access or receive copies of a record or records belonging to a central non-profit agency or a community rehabilitation program shall follow the following procedure.

(1) Any of those named in this subsection shall write a letter to the chairperson of the council petitioning for the access to or copies of records belonging to a central nonprofit agency or a community rehabilitation program.

(2) Within ten days of receipt of the request the chairperson shall acknowledge the request in writing and shall advise the requestor of the actions being taken on the request. If the chairperson has any question concerning the propriety of the request or release of the information, the chairperson may consult with legal counsel to decide to release or withhold the information requested. The chairperson will evaluate the request and, if the request is within the council's jurisdiction as given in this chapter, will decide the granting or rejecting of the request. If the request is outside the council's jurisdiction as given in this chapter, the chairperson may request an opinion from the attorney general based on the Public Information Act including, but not limited to §552.305, Govt. Code.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on October 17, 2001.

TRD-200106264
Juliet King
Legal Counsel
Texas Council on Purchasing from People with Disabilities
Earliest possible date of adoption: December 2, 2001
For further information, please call: (512) 463-3244

♦ ♦ ♦

WITHDRAWN RULES

An agency may withdraw a proposed action or the remaining effectiveness of an emergency action by filing a notice of withdrawal with the ***Texas Register***. The notice is effective immediately upon filling or 20 days after filing as specified by the agency withdrawing the action. If a proposal is not adopted or withdrawn within six months of the date of publication in the ***Texas Register***, it will automatically be withdrawn by the office of the Texas Register and a notice of the withdrawal will appear in the ***Texas Register.***

TITLE 28. INSURANCE

PART 2. TEXAS WORKERS' COMPENSATION COMMISSION

CHAPTER 134. BENEFITS - GUIDELINES FOR MEDICAL SERVICES, CHARGES, AND PAYMENTS

SUBCHAPTER A. MEDICAL POLICIES

28 TAC §134.1

The Texas Workers' Compensation Commission has withdrawn from consideration proposed amendment to §134.1 which appeared in the July 13, 2001, issue of the *Texas Register* (26 TexReg 5198).

Filed with the Office of the Secretary of State on October 19, 2001.

TRD-200106298
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Effective date: October 19, 2001
For further information, please call: (512) 804-4287

♦ ♦ ♦

SUBCHAPTER C. MEDICAL FEE GUIDELINES

28 TAC §§134.202 - 134.208

The Texas Workers' Compensation Commission has withdrawn from consideration proposed amendment to §§134.202-134.208 which appeared in the July 13, 2001, issue of the *Texas Register* (26 TexReg 5199).

Filed with the Office of the Secretary of State on October 19, 2001.

TRD-200106299
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Effective date: October 19 , 2001
For further information, please call: (512) 804-4287

♦ ♦ ♦

ADOPTED RULES

An agency may take final action on a section 30 days after a proposal has been published in the ***Texas Register***. The section becomes effective 20 days after the agency files the correct document with the ***Texas Register***, unless a later date is specified or unless a federal statute or regulation requires implementation of the action on shorter notice.

If an agency adopts the section without any changes to the proposed text, only the preamble of the notice and statement of legal authority will be published. If an agency adopts the section with changes to the proposed text, the proposal will be republished with the changes.

TITLE 1. ADMINISTRATION

PART 5. GENERAL SERVICES COMMISSION

CHAPTER 125. SUPPORT SERVICES DIVISION - TRAVEL AND VEHICLE

SUBCHAPTER A. TRAVEL MANAGEMENT SERVICES

1 TAC §125.29

The General Services Commission adopts amendments to Title 1, T.A.C., §125.29 concerning Texas Counties Use of Contract Airline Fares and/or Travel Agency Services. The amendments are adopted without changes to the proposed text that was published in the August 17, 2001 issue of the *Texas Register* (26 TexReg 6077) and the text will not be republished.

The amendments to Title 1, T.A.C., §125.29 are made in compliance with the legislative requirements of H.B. 3150, 77th Leg. (2001) which amends Texas Government Code, §2171.055 to allow a county officer or employee, when engaging in official county business, to use the state contracted travel services in order to obtain reduced travel agent fees. This law went into effect on June 11, 2001.

The amendments to §125.29 extend state contract travel agency services at reduced travel agent fees to Texas counties. The amendments will also charge a portion of the administrative cost incurred by the state to Texas counties for extending the state contracted travel agency program to them.

No comments were received concerning the proposed amendments to Title 1, T.A.C, §125,29.

The amendments to Title 1, T.A.C., §125,29 are adopted under the Texas Government Code, Title 10, Subtitle D, §§2152,003, 2171.002, and 2171.055, and H.B. 3150, 77th Leg. (2001) which provides the commission with authority to promulgate rules under this Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 19, 2001.

TRD-200106308

Juliet U. King
Acting General Counsel
General Services Commission
Effective date: November 8, 2001
Proposal publication date: August 17, 2001
For further information, please call: (512) 463-3960

♦ ♦ ♦

PART 12. COMMISSION ON STATE EMERGENCY COMMUNICATIONS

CHAPTER 251. REGIONAL PLANS-STANDARDS

1 TAC §251.5

The Advisory Commission on State Emergency Communications adopts the amendment to §251.5, concerning guidelines for 9-1-1 equipment management, disposition and capital recovery, without changes to the proposed text as published in the August 17 issue of the *Texas Register* (26 TexReg 6078).

The amendments revise sections of the rule to meet requirements set in the CSEC's Appropriations Bill rider by the 77th Texas Legislature. The references to capital recovery are being deleted since that component will no longer be allowed effective September 1, 2001. The title of the rule is also changed to Guidelines for 9-1-1 Equipment Management and Disposition to remove reference to capital recovery.

There were no comments received on the proposed amendments.

The amendments are adopted under the authority of the Texas Health and Safety Code, Chapter 771, §§771.051, 771.055, 771.056, 771.071, 771.0711, 771.072, 771.075, 771.078 and 771.079 which provide the Commission on State Emergency Communications with the authority to adopt policies and procedures prescribing the distribution and use of 9-1-1 funds.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 22, 2001.

TRD-200106394

Paul Mallett
Executive Director
Commission on State Emergency Communications
Effective date: November 11, 2001
Proposal publication date: August 17, 2001
For further information, please call: (512) 305-6933

♦ ♦ ♦

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 12. WEIGHTS AND MEASURES
SUBCHAPTER E. LICENSED SERVICE COMPANIES

4 TAC §12.40, §12.43

The Texas Department of Agriculture adopts amendments to Chapter 12 Weights and Measures, Subchapter E. Licensed Service Companies, §12.40 and §12.43 without changes to the proposed text as published in the August 24, 2001 issue of the *Texas Register* (26 TexReg 6202). The amendments to § 12.40 are adopted to modify the class 7 license. The amendments to § 12.43 are adopted to increase the company license fee charged for each license class. The amendments are also adopted to increase fees charged for metrology services to recover cost of upgrading the department's metrology lab facility, replacing outdated equipment and providing more detailed documentation on certificates of calibration. The fees increased by this adoption submission have not been increased by the department since 1991. The National Voluntary Laboratory Accreditation Program (NVLAP) standards require metrology laboratories to meet stringent documentation, temperature, humidity, and vibration controls in order to become accredited. The current facility will not meet the required environmental standards. Increasing demand from companies requesting the department to provide ISO9000 compliance certification will require an upgrade of the department's laboratory. Associated cost for the facility upgrade, replacing equipment, and providing this information will affect the cost recovery as required by the Texas Agriculture Code §12.0144. The increase in fees will allow the department to recover some of its cost associated with testing, in accordance with §12.0144. The amendment to §12.40(b)(1)(G) deletes the language "One 100 gallon" from the description of Class 7 LPG measuring devices. The amendment to §12.43 increases the license fee for licensed service companies from $50 to $75.

No comments were received on the proposal.

The amendments are adopted under the Texas Agriculture Code (Code), §13.002 which provides the department with the authority to adopt rules necessary for the enforcement and administration of the departments Weights and Measures program; and §13.115(c) and 13.115(d), which provides the department with the authority to set and charge a fee for the testing of a weight or measure by the departments metrology laboratory.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 16, 2001.

TRD-200106211
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: November 5, 2001
Proposal publication date: August 24, 2001
For further information, please call: (512) 463-4075

♦ ♦ ♦

SUBCHAPTER F. LICENSED INSPECTION COMPANIES

4 TAC §12.50, §12.53

The Texas Department of Agriculture adopts amendments to Chapter 12 Weights and Measures, Subchapter F. Licensed Inspection Companies, §12.50 and §12.53 without changes to the proposed text, as published in the August 24, 2001 issue of the *Texas Register* (26 TexReg 6203). The amendments to § 12.50 are adopted to modify the class 7 license. The amendment to § 12.53 is adopted to increase the company license fee charged for each license class. The amendments are also adopted to increase fees charged for metrology services to recover cost of upgrading the department's metrology lab facility, replacing outdated equipment and providing more detailed documentation on certificates of calibration. The fees increased in this adoption submission have not been increased by the department since 1991. The National Voluntary Laboratory Accreditation Program (NVLAP) standards require metrology laboratories to meet stringent documentation, temperature, humidity, and vibration controls in order to become accredited. The current facility will not meet the required environmental standards. Increasing demand from companies requesting the department to provide ISO9000 compliance certification will require an upgrade of the department's laboratory. Associated cost for the facility upgrade, replacing equipment, and providing this information will affect the cost recovery as required by the Texas Agriculture Code §12.0144. The increase in fees will allow the department to recover some of its cost associated with testing, in accordance with §12.0144. In addition to increasing tolerance testing fees, the amendments also provide, a new subsection (c), that the increased fees will apply to any testing performed after August 31, 2001. The amendment to §12.50(b)(1)(G) deletes the language "One 100 gallon" from the description of Class 7 LPG measuring devices. The amendment to §12.53 increases the license fee for licensed inspection companies from $50 to $75.

No comments were received regarding the adoption of these amendments.

The amendments are adopted under the Texas Agriculture Code (Code), §13.002 which provides the department with the authority to adopt rules necessary for the enforcement and administration of the departments Weights and Measures program; and §13.115(c) and 13.115(d), which provides the department with the authority to set and charge a fee for the testing of a weight or measure by the departments metrology laboratory.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 16, 2001.

TRD-200106210
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: November 5, 2001
Proposal publication date: August 24, 2001
For further information, please call: (512) 463-4075

♦ ♦ ♦

SUBCHAPTER G. REGISTERED TECHNICIANS

4 TAC §12.60

The Texas Department of Agriculture adopts amendments to Chapter 12 Weights and Measures, Subchapter G. Registered Technicians, §12.60 without changes to the proposed text, as published in the August 24, 2001 issue of the *Texas Register* (26 TexReg 6203). The amendments to §12.60 are adopted to modify the examination procedure and to increase the examination fee charged for each exam administered. The amendment to subsection (e) is also adopted to increase fees charged for metrology services in order to recover costs of upgrading the department's metrology lab facility, replacing outdated equipment and providing more detailed documentation on certificates of calibration. The fees increased by this adoption submission have not been increased by the department since 1991. The National Voluntary Laboratory Accreditation Program (NVLAP) standards require metrology laboratories to meet stringent documentation, temperature, humidity, and vibration controls in order to become accredited. The current facility will not meet the required environmental standards. Increasing demand from companies requesting the department to provide ISO9000 compliance certification will require an upgrade of the department's laboratory. Associated cost for the facility upgrade, replacing equipment, and providing this information will affect the cost recovery as required by the Texas Agriculture Code §12.0144. The increase in fees will allow the department to recover some of its cost associated with testing, in accordance with §12.0144. The amendment to subsection (b) eliminates language stating that an examination can not be taken more than once within a seven day period. The amendment to subsection (e) increases the examination fee for registered technicians from $20 to $50.

No comments were received regarding the adoption of these amendments.

The amendments are adopted under the Texas Agriculture Code (Code), §13.002 which provides the department with the authority to adopt rules necessary for the enforcement and administration of the departments Weights and Measures program; and §13.115(c) and §13.115(d), which provides the department with the authority to set and charge a fee for the testing of a weight or measure by the departments metrology laboratory.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 16, 2001.

TRD-200106209
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: November 5, 2001
Proposal publication date: August 24, 2001
For further information, please call: (512) 463-4075

♦ ♦ ♦

PART 10. TEXAS BOLL WEEVIL ERADICATION FOUNDATION

CHAPTER 195. ORGANIC COTTON REGULATIONS

4 TAC §§195.1 - 195.5

The Texas Department of Agriculture (department) adopts the repeal of Title 4, TAC, Part 10, Chapter 195, concerning organic cotton regulations established by the Texas Boll Weevil Eradication Foundation (foundation), without changes to the proposal published in the September 7, 2001, issue of the *Texas Register* (26 TexReg 6814). The repeal of Chapter 195 is adopted by the department because under the Texas Agriculture Code, Chapter 74, Subchapter D, the law establishing the boll weevil eradication program for Texas, the foundation no longer has the statutory authority to promulgate regulations relating to the implementation of the state's boll weevil eradication program. The department now has the sole authority to promulgate regulations for implementation of the eradication program. Moreover, the department has adopted regulations governing the production of organic cotton in eradication zones, found at Title 4, Texas Administrative Code, Chapter 3, Subchapter J. The adopted repeal eliminates Chapter 195, §§195.1-195.5 relating to regulation of organic producers, notification of organic production, payment of assessment and provisions for indemnity funds.

No comments were received on the proposal.

The repeal of Chapter 195, §§195.1-195.5 is adopted under the Texas Agriculture Code (the Code), §12.016, which provides the Texas Department of Agriculture with authority to adopt rules for administering the Code; and the Code, §74.120, which provides the department with the authority to adopt rules to carry out the Code, Chapter 74, Subchapter D.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 15, 2001.

TRD-200106201
Dolores Alvarado Hibbs
Deputy General Counsel, Texas Department of Agriculture
Texas Boll Weevil Eradication Foundation
Effective date: November 4, 2001
Proposal publication date: September 7, 2001
For further information, please call: (512) 463-4075

♦ ♦ ♦

CHAPTER 196. ASSESSMENT AND ASSESSMENT COLLECTION

4 TAC §196.1

The Texas Department of Agriculture (department) adopts the repeal of Title 4, TAC, Part 10, Chapter 196, concerning assessment and assessment collection by the Texas Boll Weevil Eradication Foundation (foundation), without changes to the proposal published in the September 7, 2001, issue of the *Texas Register* (26 TexReg 6814). The repeal of Chapter 196 is adopted by the department because under the Texas Agriculture Code, Chapter 74, Subchapter D, the law establishing the boll weevil eradication program for Texas, the foundation no longer has the statutory authority to promulgate regulations relating to the implementation of the state's boll weevil eradication program. The department now has the sole authority to promulgate regulations for implementation of the eradication program. The adopted repeal eliminates Chapter 196, §196.1 relating to policy for assessment and assessment collection.

No comments were received on the proposal.

The repeal of Chapter 196, §196.1 is adopted under the Texas Agriculture Code (the Code), §12.016, which provides the Texas Department of Agriculture with authority to adopt rules for administering the Code; and the Code, §74.120, which provides the department with the authority to adopt rules to carry out the purposes of the Code, Chapter 74, Subchapter D.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 15, 2001.

TRD-200106202
Dolores Alvarado Hibbs
Deputy General Counsel, Texas Department of Agriculture
Texas Boll Weevil Eradication Foundation
Effective date: November 4, 2001
Proposal publication date: September 7, 2001
For further information, please call: (512) 463-4075

♦ ♦ ♦

CHAPTER 197. REFERENDA RULES AND REGULATIONS

4 TAC §197.1

The Texas Department of Agriculture (department) adopts the repeal of Title 4, TAC, Part 10, Chapter 197, concerning referenda to discontinue a zone eradication program by the Texas Boll Weevil Eradication Foundation (foundation), without changes to the proposal published in the September 7, 2001, issue of the *Texas Register* (26 TexReg 6815). The repeal of Chapter 197 is proposed by the department because under the Texas Agriculture Code, Chapter 74, Subchapter D, the law establishing the boll weevil eradication program for Texas, the foundation no longer has the statutory authority to promulgate regulations relating to the implementation of the state's boll weevil eradication program. The department now has the sole authority to promulgate regulations for implementation of the eradication program. Moreover, the department has adopted a regulation establishing procedures and requirements for conducting a referenda to discontinue a zone eradication program, found at Title 4, Texas Administrative Code, Chapter 3, §3.11. The adopted repeal eliminates Chapter 197, §197.1, relating to conducting of a referenda to discontinue a zone eradication program.

No comments were received on the proposal

The repeal of Chapter 197, §197.1 is adopted under the Texas Agriculture Code (the Code), §12.016, which provides the Texas Department of Agriculture with authority to adopt rules for administering the Code; and the Code, §74.120, which provides the department with the authority to adopt rules to carry out the purposes of the Code, Chapter 74, Subchapter D.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 15, 2001.

TRD-200106203
Dolores Alvarado Hibbs
Deputy General Counsel, Texas Department of Agriculture
Texas Boll Weevil Eradication Foundation
Effective date: November 4, 2001
Proposal publication date: September 7, 2001
For further information, please call: (512) 463-4075

♦ ♦ ♦

TITLE 7. BANKING AND SECURITIES

PART 1. FINANCE COMMISSION OF TEXAS

CHAPTER 1. CONSUMER CREDIT COMMISSIONER

SUBCHAPTER R. MOTOR VEHICLE INSTALLMENT SALES CONTRACT PROVISIONS

7 TAC §§1.1303, 1.1305, 1.1307

The Finance Commission of Texas adopts amendments to 7 TAC §§1.1303, 1.1305, and 1.1307 concerning motor vehicle installment sales contract provisions.

The purpose of the amendments are to clarify the definitions for the accrual method and scheduled installment earnings method. The 77th Legislature enacted House Bill 2154 which purported to authorize a late charge in addition to the regular accrual of interest for certain motor vehicle installment sale contracts. The term "accrual" as used in House Bill 2154 has a broad meaning and is intended to encompass contracts written using a true daily earnings method as well as the scheduled installment earnings method. These rules as they were adopted in September 2000 established a definition for the term "accrual" that conflicts with the usage and intended meaning of House Bill 2154. The amendments to these rules correct the definition as well as prescribing the appropriate model language for a creditor to contract for the late charges authorized by House Bill 2154. The new amendments are adopted without changes to the proposal

as published in the, August 31, 2001, issue of the *Texas Register* (26 TexReg 6514).

The agency received no written comments on this proposal.

The amendments adopted under the Texas Finance Code §11.304, which authorizes the Finance Commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code §14.108 grants the Consumer Credit Commissioner and the Finance Commission the authority to interpret the provisions of Title 4, Subtitle B, in which Chapter 348 is located.

These rules affect Chapter 348, Texas Finance Code. Except as modified by this amendment, 7 TAC §§1.1301-1.1308 remain in full force and effect.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 19, 2001.

TRD-200106334
Leslie L. Pettijohn
Commissioner
Finance Commission of Texas
Effective date: November 8, 2001
Proposal publication date: August 31, 2001
For further information, please call: (512) 936-7640

♦ ♦ ♦

PART 4. TEXAS SAVINGS AND LOAN DEPARTMENT

CHAPTER 80. MORTGAGE BROKER AND LOAN OFFICER LICENSING

SUBCHAPTER A. LICENSING

7 TAC §80.5

The Finance Commission adopts an amendment to §80.5 of the regulations (the "Regulations") that implement the Mortgage Broker License Act, *Finance Code*, Chapter 156 (the "Act") without changes to the proposed text as published in the August 31, 2001, issue of the *Texas Register* (26 TexReg 6518). The new subsection provides for the staggering of the dates on which licenses expire and are subject to renewal.

Background and Summary of Factual Basis for the Rules

Section 156.208 of the Act provides, among other things, that the Savings and Loan Commissioner (the "Commissioner") may, by rule, adopt a system by which licenses expire on a date other than December 31st. Effective September 1, 2001, the Finance Commission was given the responsibility for adoption of regulations to implement the Act.

When the Act became effective in September 1999 and required mortgage brokers and loan officers to become licensed in order to conduct business on or after January 1, 2000, the Savings and Loan Department (the "Department") had to process a very large volume of license application during a very short period. More than 75 percent of the licenses issued during the first year for which the Act was in effect were issued between the period December 1999 to March 2000. These licenses will come due for renewal on the second anniversary of their issuance. Therefore, unless a system for the staggering of renewals is adopted, the Department will continue to have to handle a disproportionately large portion of its license renewal activity during the period December through March every other year. The amendment to §80.5 of the Regulations will create a system whereby licenses issued during the period immediately preceding and following the effective date of the licensure requirement, January 1, 2000, will have staggered expiration dates, thereby spreading more evenly the Department's workload and ability to administer license renewals efficiently.

The proposed rule was reviewed with the Mortgage Broker Advisory Committee on August 1, 2001, and with the Finance Commission on August 17, 2001. The Finance Commission approved the proposed amendment to the Regulations for publication for public comment, and it was published for public comment in the August 31, 2001, issue of the *Texas Register*. No comments were received.

On October 9, 2001, the Mortgage Broker Advisory Committee reviewed the amendment for final adoption and advised the Commissioner and the Finance Commission that the amendment should be adopted without changes to the form in which it was published.

The amendment is adopted under the authority of §156.102 to adopt regulations to implement the Act and §156.208 to adjust expiration and renewal dates for mortgage broker and loan officer licenses.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 22, 2001.

TRD-200106346
Timothy K. Irvine
General Counsel
Texas Savings and Loan Department
Effective date: November 11, 2001
Proposal publication date: August 31, 2001
For further information, please call: (512) 475-1350

♦ ♦ ♦

SUBCHAPTER I. INSPECTIONS AND INVESTIGATIONS

7 TAC §80.20, §80.21

The Finance Commission adopts an amendment to add new §80.20 and §80.21 of the regulations (the "Regulations") that implement the Mortgage Broker License Act, *Finance Code*, Chapter 156 (the "Act") without changes to the proposed text as published in the August 31, 2001, issue of the *Texas Register* (26 TexReg 6520). The new sections establish guidelines and procedures for the Texas Savings and Loan Department (the "Department") in the conduct of inspections and investigation of licensees under the Act.

Background and Summary of Factual Basis for the Rules

Section 156.301 of the Act was amended, effective September 1, 2001, to provide for inspection of licensees under the Act and to

permit the Commissioner to investigate licensees upon a finding of reasonable cause.

The new sections of the Regulations, in proposed form, were reviewed with the Mortgage Broker Advisory Committee on August 1, 2001, and with the Finance Commission on August 17, 2001. The Finance Commission approved the proposed amendments to the Regulations for publication for public comment, and they were published for public comment in the August 31, 2001, issue of the *Texas Register*. No comments were received.

On October 9, 2001, the Mortgage Broker Advisory Committee reviewed the amendments for final adoption and advised the Commissioner and the Finance Commission that the new sections should be adopted without changes to the form in which they were published.

The new sections are adopted under the authority of §156.102 to adopt regulations to implement the Act and §156.301 of the Act regarding the inspection of licensees and the authority of the Commissioner to investigate certain matters.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 22, 2001.

TRD-200106347
Timothy K. Irvine
General Counsel
Texas Savings and Loan Department
Effective date: November 11, 2001
Proposal publication date: August 31, 2001
For further information, please call: (512) 475-1350

♦ ♦ ♦

SUBCHAPTER J. FORMS

7 TAC §80.22

The Finance Commission adopts a new §80.22 of the regulations (the "Regulations") that implement the Mortgage Broker License Act, *Finance Code*, Chapter 156 (the "Act") with changes to the proposed text as published in the August 31, 2001, issue of the *Texas Register* (26 TexReg 6521). The new section provides for the adoption of two forms, one for licensees to use to notify loan applicants and other appropriate persons of the status of a mortgage loan application and one to advise when the applicant's credit has been approved.

Background and Summary of Factual Basis for the Rules

HB 1636, 77th Legislature, amended the Act through the adoption of a new §156.105, directing the Finance Commission to adopt one or more standard forms for use by mortgage brokers and loan officers in representing that an applicant for a mortgage loan is preapproved or prequalified for the loan.

The rule, in proposed form, was reviewed with the Mortgage Broker Advisory Committee on August 1, 2001, and with the Finance Commission on August 17, 2001. The Commission approved the proposed amendment to the Regulations for publication for public comment, and it was published for public comment in the August 31, 2001, issue of the *Texas Register*. Four comments were received. The comments that were received were all considered and are discussed below, grouped according to whether they addressed the regulatory language, the proposed form of language in both letters, or only the proposed form of the Conditional Qualification Letter or the proposed form of the Conditional Approval Letter.

Comments Relating to Regulatory Language

Section 80.22(a)(1) and §80.22(b)(1) provided that the descriptive headings on the forms - "Conditional Qualification Letter" and Conditional Approval Letter" - may be omitted.

One commenter urged that licensees not be given the option of omitting the descriptive headings on the forms. While it is believed that this descriptive heading may enable a reader to recognize quickly what the form relates to, the substantive nature of what is being communicated requires that the entire document be read and understood, and in the context of a thorough reading, the heading would be largely superfluous. Therefore, the final adopted regulation leaves to the licensee the ability to omit the descriptive heading.

Comments Relating to the Proposed Forms of Both the Conditional Qualification Letter and the Conditional Approval Letter

Both of these forms provide for the person providing the form to give their name, address, and phone number. One commenter urged that telephone numbers and addresses on such letters should be the telephone number and address of the mortgage broker of record. Since many licensed mortgage brokers use loan officers, many of whom operate at different locations from the primary office of their sponsoring mortgage broker, requiring the use of the broker's address and telephone number could create confusion. Many applicants will be dealing with loan officers without having any connection with the sponsoring broker. Since each location at which licensed activity occurs must display a license which shows who the mortgage broker sponsoring each loan officer is, the identity and location of each sponsoring mortgage broker should be readily available to any loan applicant. Therefore, the final regulation does not require the specific use of the sponsoring mortgage broker's address and telephone number. A mortgage broker would still be able to require that his or her name and address be included on the form.

One commenter stated a belief that both of the form letters should address the issue of the credit worthiness of a loan applicant. The commenter suggested that a credit report be required prior to issuance of such a letter. In drafting the forms, there was an awareness of the need to communicate the nature and extent of the review that had been conducted, and it is believed that the forms, as proposed, accomplish that. To require a licensee to engage in specific steps prior to issuing a loan approval is believed to be an unwarranted insertion of regulatory oversight and control into a licensee's decision as to how best to conduct his or her business.

The third commenter suggested that the form specifically state if a mortgage loan is subject to the sale of another property. The form makes adequate provision for describing any requirements or conditions imposed by the licensee providing the letter, and if that is a requirement, the licensee should include it. Accordingly, no change to the forms has been made in this regard.

Comments Related to Proposed Form of Conditional Qualification Letter

There were no comments limited solely to this form.

Comments Related to the Proposed Form of Conditional Approval Letter

One commenter provided a suggested revision of the form of Conditional Approval Letter. Comparing the suggested revision to the proposed form revealed several differences. The commenter proposed a form that would (1) include a description of the type of approval represented (electronic automated, FNMA, FHLMC, or full approval with validation by an underwriter); (2) delete any information about points, assuming that they would be addressed in the good faith estimate; (3) include a statement that the applicant has sufficient assets to close and indicate if they have or have not been verified; and (4) include a statement as to whether proof of income has been verified or not. With regard to points 1, 3, and 4, it appears that the information that would be communicated would not change the conclusion being provided; it would only serve to explain in more detail how the licensee delivering the letter arrived at the conclusion. The form, as initially proposed, conveys that the applicant has been conditionally approved, explains what the nature of that approval is, and explains what the conditions on that approval, if any, are.

On October 9, 2001, the Mortgage Broker Advisory Committee reviewed the regulation and the forms prior to final adoption. There was an extended discussion of the proposed form of the Conditional Approval Letter. Members of the public appeared and testified that the inclusion in the form of information relating to points and fees could place licensees at a competitive disadvantage. It was the consensus of the Committee that because the disclosure of this information is permissive, not mandatory, as set forth in § 80.22(b)(3) of the regulations, the form should be revised to move the optional information, clearly labeled as such, and the final form, as adopted reflects this non-substantive change. The Committee advised the Commissioner and the Finance Commission that the regulations and the forms, as set forth below, should be adopted.

The amendment is adopted under the authority of §156.102 regarding the authority to adopt regulations to implement the Act and §156.105 regarding the adoption of forms for use by mortgage brokers and loan officers in representing that an applicant for a mortgage loan is prequalified or preapproved for that loan.

§80.22. Loan Status Forms.

(a) Whenever a mortgage broker or loan officer provides a loan applicant with written confirmation of the status of a mortgage loan that has not been approved, the licensee shall use the form attached as Form A below. Such form may be modified as follows:
Figure: 7 TAC §80.22(a)

(1) The descriptive heading "Conditional Qualification Letter" maybe omitted;

(2) Additional aspects of the Loan may be described as long as they are not misleading;

(3) Additional items that the mortgage broker or loan officer has review may be described; and

(4) Additional terms, conditions, and requirements may be added.

(b) Whenever a mortgage broker or loan officer provides a loan applicant with confirmation that an application for a mortgage loan has been approved as to credit but not as to collateral, the licensee may use the form attached as Form B below. Such form maybe modified as follows:
Figure: 7 TAC §80.22(b)

(1) The descriptive heading "Conditional Approval Letter" may be omitted;

(2) Additional aspects of the Loan may be described as long as they are not misleading;

(3) Fees charged may be disclosed but such disclosure shall not serve as a substitute for the disclosure required by § 156.004 of the Act or the Good Faith Estimate required by the Real estate Settlement Procedures Act;

(4) Additional items that the mortgage broker or loan officer has reviewed may be described;

(5) Additional terms, conditions, and requirements may be added;

(6) An alternative form prepared by an attorney licensed in Texas may be used if it provides at least the same information as is set forth in the approved form.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 22, 2001.

TRD-200106348
Timothy K. Irvine
General Counsel
Texas Savings and Loan Department
Effective date: November 11, 2001
Proposal publication date: August 31, 2001
For further information, please call: (512) 475-1350

♦ ♦ ♦

PART 5. OFFICE OF CONSUMER CREDIT COMMISSIONER

CHAPTER 85. RULES OF OPERATION FOR PAWNSHOPS

SUBCHAPTER D. OPERATION OF PAWNSHOPS

7 TAC §85.405

The Finance Commission of Texas adopts amendments to 7 TAC §85.405, concerning pawn transactions.

The purpose of the amendments is to harmonize the administrative pawnshop operational rules with the amendment made by the 77th Legislature to the Texas Pawnshop Act in Senate Bill 317. In the legislation, the grace period for pawn transactions was shortened from 60 days to 30 days. The rule makes technical changes to correspond to the legislative amendment. Further, the rule clarifies that a pawnbroker may voluntarily use a longer grace period. The new amendments are adopted with non-substantive changes to the proposal as published in the, August 31, 2001, issue of the *Texas Register* (26 TexReg 6522).

The agency received no written comments on this proposal.

The amendments are adopted under the Texas Finance Code §371.006, which authorizes the Finance Commission to adopt rules to enforce the Texas Pawnshop Act.

These rules affect Chapter 371, Texas Finance Code.

§85.405. Pawn Transaction.

(a) Pawn Ticket.

(1) Prescribed form.

(A) The front and back of the original pawn ticket are prescribed in Figures 1 and 2: 7 TAC 85.405(a)(1)(A). The original portion of the pawn ticket must be given to the pledgor when the pawn transaction is made.
Figure 1: 7 TAC §85.405(a)(1)(A) (No Change).
Figure 2: 7 TAC §85.405(a)(1)(A) (No change).

(B) The prescribed back of the printed copy of the pawn ticket, as shown in Figure: 7 TAC 85.405(a)(1)(B), must be maintained in the numerical pawn ticket file.
Figure: 7 TAC §85.405(a)(1)(B) (No change).

(2) Modifications of the pawn ticket.

(A) Spacing. Spacing of the forms prescribed may be modified.

(B) Other changes. Any other changes to the prescribed forms must be approved, in writing, in advance, by the commissioner.

(3) Information required on pawn ticket. The pawn ticket must contain all information required in the Texas Finance Code, §371.157, and satisfy the requirements of the Truth-in-Lending Act, 15 U.S.C. §1601 *et seq*., and Regulation Z, 12 CFR §226.1 *et seq*. The pawn ticket must disclose the date that is thirty (30) days following the maturity date, and it must be captioned "last day of grace." The system used to create and store information about pawn transactions must include alphabetical or numerical characters sufficient to identify the pawnshop employee or owner writing the pawn ticket and handling the renewal or redemption of the pawn transaction. All parts of the pawn ticket form must be sequentially numbered by the automated information system unless produced manually in accordance with the requirements of §85.402(f) of this title, of this chapter.

(4) Prescribed copies.

(A) Original. The top original copy is to be given to pledgor. This is the copy that is to be presented upon redemption and filed with the numerical file of redemptions and renewals.

(B) Alphabetical. This copy is for use in maintaining an alphabetical index. This copy may be omitted where an automated system is capable of producing the alphabetical index.

(C) Law enforcement copy. This copy is for the use of law enforcement as defined in §85.406 of this title. If the law enforcement agency is given all of the information on the pawn ticket electronically, this copy may be omitted.

(D) Hard card. This copy is maintained in a sequential file in the records of the pawnshop.

(5) Legible information. Reasonable procedures must be in place to ensure that all information on the original pawn ticket and all copies of the pawn ticket is legible.

(6) Proper identification. The pledgor must present a proper form of identification at the time of the pawn transaction. For purposes of this paragraph, any form of identification found in Texas Finance Code, §371.174(b), that is either current or has not been expired for more than one (1) year, will be considered acceptable.

(b) Term of transaction. The maturity date of a pawn transaction may not be greater than one month from the date of the transaction. The "last day of grace" is a date no less than thirty days following the maturity day. A pawnbroker may, at the pawnbroker's option, choose to extend the last day of grace. The pawn loan will be considered to be an open pawn loan until the expiration of the last day of grace or until the pawnbroker exercises the option to take the pledged goods into inventory as provided in section §85.414, whichever is later.

(c) Identification of pledged goods. A unique label for each item pledged must be produced in order to ensure that the correct item is returned to the pledgor.

(d) Voided pawn tickets. Voided pawn tickets must be clearly marked "VOID." All printed parts of a voided pawn ticket except those produced for local law enforcement must be retained and filed with the fourth part of the pawn ticket. The printed part must be made available to a local law enforcement agency.

(e) Standards for describing goods. Pledged goods and purchases must be accurately and fully described. All serial numbers, including vehicle identification numbers and boat hull numbers that are reasonably available, must be accurately entered on required documents. Any visible owner applied number or other identifying marks must be recorded on the original pawn ticket and all copies and entered in the system that produces the pawn ticket. As applicable, the item type, brand, make, model number, engraving, inscriptions, color, size, length, unique markings, and design must be recorded. In addition, a record of the additional descriptors in paragraphs (1)- (4) of this subsection, must be included as applicable.

(1) Firearms. Descriptions of firearms must include caliber and type of firearm (e.g., handgun, rifle, shotgun, black powder weapon).

(2) Jewelry. Descriptions of jewelry must include weight, type of metal including purity, style, stones, and the gender of the person for which the item was manufactured. Stones must be described as to type, including results of electronic testing, color as apparent to the untrained eye, shape, number, size, and approximate weight. Class ring descriptions must also include school name and class year.

(3) Motor vehicles. Descriptions of motor vehicles must also include the year of manufacture, model, body style, license plate number, and state of registration.

(4) Accessories. Descriptions of accessories must include the applicable information required within this subsection.

(f) Titled goods.

(1) Negotiation. Goods pledged on a pawn transaction, a motor vehicle, or other property having a certificate of title may be accepted. When entering into the pawn transaction, the pawnbroker must not permit or require the owner to endorse the title to effect transfer.

(2) Limited power of attorney. If a pawn transaction involves titled property, the owner may be required to sign a power of attorney form appointing the pawnbroker as the owner's attorney-in-fact for the sole purpose of transferring the ownership of the property in the event the pledgor fails to pay the pawn transaction.

(3) Documentation. A notation of the location of powers of attorney, certificates of title, and registration receipts must be made on the printed copy of the ticket in the numerical pawn ticket file or an alternative filing method must be provided to facilitate retrieval of these documents.

(g) Items usually sold as a set in a retail transaction or pledged together with their accessories.

(1) Items usually sold as a set in a retail transaction or pledged together with their accessories may not be required to be split into separate transactions or that they be pledged separately where the result would be a total pawn service charge over the legal maximum for the single transaction.

(2) If items usually sold as a set in a retail transaction or pledged together with their accessories are split into separate transactions, the effective rate of the separate transactions must not be greater than the rate a single transaction would have produced.

(3) Items that may usually sold as a set in a retail transaction or pledged together with their accessories, but which are pledged on separate days will not normally be considered to fall within the provisions in paragraph (2) of this subsection.

(4) If a pledgor requests separate pawn transactions on items usually sold as a set in a retail transaction or pledged together with their accessories, a notation of that request in the description field of the pawn ticket must be made and will not normally be considered to fall within the provisions in paragraph (2) of this subsection.

(h) Alphabetical file of pawn tickets. Either an automated or a manual system capable of allowing searches utilizing the pledgor's name in the case of a lost or destroyed pawn ticket must be maintained.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 19, 2001.

TRD-200106339
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Effective date: November 8, 2001
Proposal publication date: August 31, 2001
For further information, please call: (512) 936-7640

♦ ♦ ♦

TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 9. TEXAS COMMUNITY DEVELOPMENT PROGRAM

SUBCHAPTER A. ALLOCATION OF PROGRAM FUNDS

10 TAC §9.1, §9.7

The Texas Department of Housing and Community Affairs (TDHCA) adopts amendments to §9.1 and §9.7 concerning the allocation of Community Development Block Grant (CDBG) nonentitlement area funds under the Texas Community Development Program (TCDP) without changes to the proposed text for §9.1 and with changes to the proposed text for §9.7 that was published in the August 31, 2001, issue of the *Texas Register* (26TexReg6524).

The amendments establish the standards and procedures by which TDHCA will recapture and use deobligated funds, unobligated funds, program income and establish the standards and procedures for allocating 2001 fiscal year economic development funds designated for the Texas Capital Fund Program and, more specifically, to make changes to the application requirements, repayment requirements, and selection criteria for the Texas Capital Fund Program. The amendments are further adopted to make the application process more efficient. In regards to the amendments to the repayment requirements, the amendments are adopted to make the construction of public infrastructure more attractive for communities and to make this section more consistent with the overall goals and objectives of the program. In regards to the amendments to the selection criteria, the amendments are adopted to make the program more accessible to smaller and more rural communities across the state and also to make the selection criteria more consistent with the overall goals and objectives of the program.

The amendments make changes to the recapture and use of deobligated funds, unobligated funds, and program income and the application requirements, repayment requirements, and selection criteria for the Texas Capital Fund Program.

Section 9.7, at subparagraph (f)(3)(D) is adopted with changes based on comments received on the proposal. The language of this subparagraph has been changed to continue to allow for applicants that have two or less open contracts to receive a maximum of five points on this criteria. This change is made in response to comments received requesting that the proposed changes to this subparagraph not be adopted, and arguing that allowing for no contracts would penalize those cities and counties that are actively seeking projects to improve their communities and that often the fact that a contract remains open is due to circumstances outside the applicant's control.

The amendments to subsection (d) of §9.7 eliminate the repayment requirements for public infrastructure projects and for rail improvements on public property. The amendments to subsection (f), at new paragraph (2) provide that depending on availability of funds, jumbo awards may not be made after the first round of funding in program year 2001. Amendments to new paragraph (3), regarding scoring of community need, increase to 40 the maximum points give to this item; clarify what unemployment data will be used to determine unemployment rate; clarify what poverty data will be used to determine the county poverty rate and state how points will be distributed; change subparagraph (D) to provide that applicants having no open contracts will receive a maximum of 5 points; and, add new subparagraph (E), which adds a community population item with a maximum 10 point allowance. New subparagraph (E) also provides how points will be distributed. The amendments to new paragraph (6) decrease the maximum points allowed for leverage/match to 10 points and delete the community match ratio item found at old subparagraph (6)(A).

Both oral and written comments were received on the proposed amendments to §9.7. Oral comments were received in the course of a public hearing conducted by the Texas Department of Agriculture, the current administrator of the Texas Capital Fund Program, on September 28, 2001, in Austin. Comments received on the amendments to subsection (d) of §9.7 were in favor of eliminating the repayment requirement for certain public infrastructure projects. In regards to the addition of new paragraph (f)(2), relating to limiting the number of jumbo grant awards in program year 2001, one commenter suggested that two or three jumbos still be allocated each year. Another individual at the public hearing noted that the proposed rule was ambiguous in that it gives no clear indication of whether or not additional jumbo awards will be made in program year 2001, and stated that the agency needed to clarify the issue as soon as possible. The adopted rule provides discretion to limit the number of jumbo awards made in program year 2001. TDHCA believes that there should be discretion and flexibility given for

limiting the number of jumbo awards for program year 2001 due to a reduced funding level for the remainder of program year 2001, the transferring of the authority to implement the Texas Capital Fund Program from TDHCA to the newly established Office of Rural Community Affairs (ORCA) and the transfer of the administration of the program from the Texas Department of Economic Development (TDED) to the Texas Department of Agriculture (TDA). One jumbo award has been approved in 2001, and a second is in the funding range and approval is probable, leaving the possibility of funding one additional jumbo award in program year 2001, under existing policies. TDA intends to make a determination regarding whether or not additional jumbo awards will be funded during the last funding round and will notify prospective applicants of that decision with ample time for applications to be prepared and submitted by the December 3 submission deadline.

In regards to the scoring changes proposed to amend Subsection 9.7 (f), paragraph(3), subparagraphs (A), (B) and (E), relating to community need, comment received on subparagraphs (f)(3)(A) and (B) was limited to one individual, who commented in favor of amendments to subparagraph (3)(A), and also commented that subparagraph (f)(3)(B) should use the average weekly wage rate instead of the poverty rate. TDHCA does not agree with the comment that the average weekly wage rate should be used in subparagraph (B) and has made no changes to this subparagraph. TDHCA believes that the use of the poverty rate is appropriate in this case because poverty rates provide a better reflection of the economic need in the community, and TDHCA is not convinced that the average weekly rate provides a better indication of the need for economic development activities in a particular community.

The proposed amendments to subparagraph 9.7(f)(3)(D), relating to open contracts, received the most comments, with the majority of those commenting opposing any change to the present rule, one individual suggesting a change in the points and parameters, and another individual agreeing with the proposed amendment. As previously stated, TDHCA agrees with the comments that there should be no changes made to subparagraph (f)(3)(D) and has adopted that subparagraph as it currently exists.

Many comments were received regarding the proposed amendments to subparagraph 9.7(f)(3)(E), regarding community population. Several comments favored eliminating any score related to population, while the majority of comments received favored a larger minimum population size for getting points. The primary comment in support of establishing a larger population size was that communities of smaller populations are often not able to accommodate a project and/or do not have the resources to attract projects and go through the application process. Others commented that if no changes could be made at this time, that the reworking of this subparagraph be considered in the future. TDHCA disagrees with comments in opposition to the scoring changes made for community population, and is adopting this subparagraph with no changes to the proposal. TDHCA notes that while 75% (769 of 1032) of the eligible communities have a population of less than 3,000, the majority of applicants come from larger communities. This change is intended to attract interest and applications from the smaller communities that have not historically been as active in the program.

In regards to the proposed amendments to subparagraph 9.7(f)(6)(B), one comment was received opposing the elimination of the community match section of the rules. TDHCA disagrees with this comment and has made no changes to this subparagraph. TDHCA believes that small communities often have limited ability to match the funds provided by the program, and yet are in need of economic development as much, or more, than communities with more funding options. As with some of the changes relating to the community need criteria, this change is also intended to attract interest and applications from smaller communities.

The amendments are adopted under Texas Government Code, Chapter 2306, §2306.098, which provides TDHCA with the authority to allocate Community Development Block Grant non-entitlement area funds to eligible counties and municipalities according to department rules.

Texas Administrative Code, Title 10, Part I, Chapter 9, is affected by the adoption of the amendments to §9.1 and § 9.7.

§9.7. Texas Capital Fund.

(a) General Provisions. This fund covers projects which will result in either an increase in new, permanent employment within a community or retention of existing permanent employment. Under the main street improvements program, projects may also qualify if they meet the national program objective of aiding in the prevention or elimination of slum or blighted areas.

(1) For an activity that creates/retains jobs, the city/county and business must document that at least 51% of the jobs are or will be held by low and moderate income persons. For purposes of determining whether a job is or will be held by a low or moderate income person or not, the following options are available.

(A) The business must survey all persons filling a created/retained job. Persons filling a created job should be surveyed at the time of employment. Persons holding a retained job should be surveyed prior to application submission. This determination is based on the family's size and previous 12 month income and is normally documented on the Family Income/Size Certification form, which is filled out, dated and signed by employees; or

(B) The person(s) employed by the business for created/retained jobs may be presumed to be a low or moderate income person if the person resides within a census tract or block numbering area that either is part of a Federally-designated Empowerment Zone or Enterprise Community or the person(s) reside in a census tract or block numbering area that meets the following criteria:

(i) The census tract or block numbering area has a poverty rate of at least 20% as determined by the most recently available decennial census information;

(ii) The census tract or block numbering area does not include any portion of a central business district, as this term is used in the most recent Census of Retail Trade, unless the tract has a poverty rate of at least 30% as determined by the most recently available decennial census information; and

(iii) The census tract or block numbering area shows evidence of pervasive poverty and general distress by meeting at least one of the following standards:

(I) All block groups in the census tract have poverty rates of at least 20%; or

(II) The specific activity being undertaken is located in a block group that has a poverty rate of at least 20%; or

(III) Has at least 70% of its residents who are low- and moderate-income persons; or

(IV) The assisted business is located within a census tract or block numbering area that meets the requirements of

sub paragraph (B) of this section, and the job under consideration is to be located within that census tract or block numbering area.

(2) If the project is designed to aid in the prevention or elimination of slum or blighted areas, then it must meet the area slum or blight or spot slum or blight criteria and threshold requirements outlined in the separate main street program application.

(3) A firm financial commitment from all funding sources other than the United States Department of Commerce or the United States Department of Agriculture is required upon submission of an application.

(4) The leverage ratio between all funding sources to the Texas Capital Fund (TCF) request may not be less than 1:1 for awards of $750,000 or less (except for the main street improvements program in which case a 0.5:1 match for cities with a population of less than 5,000 is acceptable), 4:1 for awards of $750,001 to $1,000,000, and 9:1 for awards of $1,000,001 to $1,500,000.

(5) In order for an applicant to be eligible, the cost per job calculation must not exceed $25,000 for awards of $750,000 or less; $10,000 for awards of $750,001 to $1,000,000; and $5,000 for awards of $1,000,001 to $1,500,000. These requirements do not apply to the Main Street Program.

(6) No financial assistance will be provided to projects involved in the relocation of any industrial or commercial plant, facility or operation, from one state to another state, if the relocation is likely to result in a significant loss of employment in the labor market area from which the relocation occurs. No assistance will be provided for projects intended to facilitate the relocation of any industrial or commercial plant, facility or operation from one unit of general local government within Texas to another unit of general local government within Texas unless a 10% net gain of jobs will occur and one or more of the following requirements has been met prior to submitting an application for consideration under this section:

(A) Business to relocate with approval of current locality. Local government must provide written documentation within the application, verifying the chief elected official (mayor or judge) of the unit of local government from which the business is relocating supports and approves the relocation proposal. A written agreement between the two local governments involved in the business relocation is preferred.

(B) Business to relocate out-of state. Business must provide written documentation between business and out-of-state contact verifying the business has secured out-of-state location.

(C) Local government notification with no response. Local government must provide written documentation that a letter has been mailed (by registered mail) to the local government from which the business is relocating, notifying it of the relocation. The local government, upon receipt of the notification, then has 30 days to object to the relocation, in writing, to the Texas Department of Economic Development before the Texas Capital Fund application can be considered. A written objection to a relocation from a local government will prevent the application from being considered.

(7) The Texas Department of Economic Development will not consider any application for funding which will result in the provision of assistance for an economic development project where the applicant and one or more other cities or counties are competing to provide economic development project funds to that project.

(8) The Texas Department of Economic Development will not consider any application for funding in which the business or principals to be assisted thereunder, or a business that shares common principals has filed under the Federal Bankruptcy Code, and the matter is in the process of being adjudicated or in which such business has been adjudicated bankrupt. On a case by case basis, extenuating circumstances will be evaluated.

(9) With the exception of the main street improvements program, the Texas Department of Economic Development will only consider applications that provide funding for one business.

(10) The Texas Department of Economic Development will consider a project proposed by a city that is in the city's corporate limits or its extraterritorial jurisdiction, and will consider a project proposed by a county that is in the unincorporated area of the county. Counties may not sponsor an application for a business located in a city, if that business is currently participating in a TCF project with that city. TDED may consider providing funding for an economic development project proposed by a city that is outside the city's corporate limits or extraterritorial jurisdiction, but within the county that the city is located and will consider a project proposed by a county that is within an incorporated city, if the applicant demonstrates that the project is appropriate to meet its needs, if the applicant has the legal authority to engage in such a project and if at least fifty-one percent (51%) of the principal beneficiaries reside within the applicant's jurisdiction.

(11) A business which is currently being provided assistance from the Texas Capital Fund must create at least 50 permanent jobs in each additional proposed Texas capital fund project in order for such project to be considered for funding.

(12) A Texas Capital Fund contractor must satisfactorily close out a contract in support of a specific business or main street improvements project in order to be eligible to receive additional funds under the Texas Capital Fund for the same business or main street city. The contractor is eligible for an additional Texas Capital Fund award in support of a specific business, provided that the prerequisite program income choice has been selected, if the assisted business is not in the designated main street geographic area or if the main street project selected the elimination of slums and blight as its national program objective and the assisted business will create or retain jobs to meet the national program objective.

(13) The Texas Department of Economic Development will not consider or accept an application for funding from a community, in support of a business project that is currently receiving Texas Capital Fund assistance through that same community.

(14) The minimum and maximum award amount that may be requested/awarded for a project funded under the Texas Capital Fund infrastructure or real estate development programs, regardless of whether the application is submitted by a single applicant or jointly by two or more eligible jurisdictions is addressed here. Award amounts are directly related to the number of jobs to be created/retained and the level of matching funds in a project. Projects that will result in a significantly increased level of jobs created/retained and a significant increase in the matching capital expenditures may be eligible for a higher award amount, commonly referred to as jumbo awards. TCF monies are not specifically reserved for projects that could receive the increased maximum award amount, however, jumbo awards may not exceed $4,500,000 in total awards during the program year, unless a jumbo award is deobligated during the program year, in which case another jumbo award, of up to $1,500,000, may be awarded as a replacement. Additionally, no more than $3,000,000 in jumbo awards will be approved in either of the first two rounds. The maximum amount for a jumbo award is $1.5 million and the minimum award amount is $750,001. The maximum amount for a normal award is $750,000 and the minimum award amount is $50,000. These amounts are the maximum funding levels. The program can fund only the actual, allowable,

and reasonable costs of the proposed project, and may not exceed these amounts. All projects awarded under the TCF program are subject to final negotiation between TDED and the applicant regarding the final award amount, but at no time will the award exceed the amount originally requested in the application.

(15) TDED will allocate the available funds for the year, less $600,000 for the Main Street program, as follows:

(A) First round. 50% of the annual allocation plus any deobligated and program income funds available, as of the application due date.

(B) Second round. 60% of the remaining allocation plus any deobligated and program income funds available, as of the application due date.

(C) Third round. Any remaining allocation plus any deobligated and program income funds available, as of the application due date.

(b) Overview. This fund is distributed to eligible units of general local government for eligible activities in the following program areas:

(1) The infrastructure program. The infrastructure program provides funds for eligible activities such as the construction or improvement of water/wastewater facilities, public roads, natural gas-line main, electric-power services, and railroad spurs.

(2) The real estate program. The real estate program provides funds to purchase, construct, or rehabilitate real estate that is wholly or partially owned by the community and leased to a specific benefitting business (either a for-profit entity or a non-profit entity).

(3) The main street improvements program. The main street improvements program provides public improvements in support of Texas main street program designated municipalities.

(c) Application Dates. The Texas Capital Fund (except for the Main Street Program) is available three times during the year, on a competitive basis, to eligible applicants statewide. Applications for the Main Street Program are accepted annually. Applications will not be accepted after 5:00 pm on the final day of submission. The application deadline dates are included in the program guidelines.

(d) Repayment Requirements. TCF awards for real estate improvements and private infrastructure require repayment. Infrastructure payments and real estate lease payments are intended to be paid by the benefitting business to the applicant/contractor and constitute program income. The repayment is structured as follows:

(1) Real estate improvements. These improvements are intended to be owned by the applicant and leased to the business. Real estate improvements require full repayment. At a minimum, the lease agreement with the business must be for a minimum three year period or until the TCF contract between the applicant and TDED has been satisfactorily closed (whichever is longer). A minimum monthly lease payment will be required to be collected from the original business and any subsequent business which occupies the real estate funded by the TCF, which equates to the principal funded by the TCF divided over a maximum 20 year period (240 months), or until the entire principal has been recaptured. The repayment term is determined by TDED and may not be for the maximum of 20 years for smaller award amounts. There is no interest expense associated with an award. Payments begin the first day of the first month following the construction completion date or acquisition date. Payments received 15 calendar days or more late will be assessed a late charge/fee of 5% of the payment amount. After the contract between the applicant and the department is satisfactorily closed, the applicant will be responsible for continuing to collect the minimum lease payments only if a business (any business) occupies the real estate. The lease agreement may contain a purchase option, if the option is effective after a minimum five year ownership requirement and if the purchase price equals (at a minimum) the remaining principal amount originally funded by the TCF which has not been recaptured.

(2) Infrastructure improvements.

(A) Private Infrastructure is infrastructure that will be located on the business's site or on adjacent and/or contiguous property, to the site, that is owned by the business, principals, or related entities. All funds for private infrastructure improvements require full repayment. Terms for repayment will be interest free, with repayment not to exceed 20 years and are intended to be repaid by the business through a repayment agreement. Payments begin the first day of the first month following the construction completion date. Payments received 15 calendar days or more late will be assessed a late charge/fee of 5% of the payment amount.

(B) Public Infrastructure is infrastructure located on public property or right-of-ways and easements granted by entities unrelated to the business or its owners and not included or identified as private infrastructure. All funds for public infrastructure do not require repayment.

(C) Rail improvements on private property require full repayment. Terms for repayment will be no interest, with repayment not to exceed 20 years and are intended to be repaid by the business through a repayment agreement. Payments begin the first day of the first month following the construction completion date. Payments received 15 calendar days or more late will be assessed a late charge/fee of 5% of the payment amount.

(e) Application process for the infrastructure and real estate programs. The Texas Department of Economic Development will only accept applications during the months identified in the program guidelines. Applications are reviewed after they have been competitively scored. Staff makes recommendation for award to TDED executive director. TDED executive director makes the final decision. The application and selection procedures consist of the following steps:

(1) Each applicant must submit a complete application to TDED's Trade and Investment Division. No changes to the application will be allowed after the application deadline date, unless they are a result of TDED staff recommendations. Any change that occurs will only be considered through the amendment/modification process after the contract is signed.

(2) Upon receipt of applications, TDED staff reviews scores for validity and ranks them in descending order.

(3) TDED staff will then review the applications for eligibility and completeness in descending order based on the scoring. In those instances where the staff determines that the application has 12 or less deficiencies on the Application Checklist, unless an extension is granted, the applicant will be given 10 business days to rectify all deficiencies. An application containing more than 12 deficiencies will be determined incomplete and returned. In the event staff determines that an application contains activities that are ineligible for funding, the application will be restructured or returned to the applicant. An application resubmitted for future funding cycles will be competing with those applications submitted for that cycle. No preferential placement will be given an application previously submitted and not funded.

(4) TDED staff then conducts a review of each complete application to make threshold determinations with respect to:

(A) The financial feasibility of the business to be assisted based on a credit analysis;

(B) The strength of commitments from all other public and/or private investments identified in the application;

(C) Whether the use of Texas Capital Funds is appropriate to carry out the project proposed in the application;

(D) Whether efforts have been made to maximize other financial resources. The applicant must document that other funds are unavailable to fund the project. Cities that collect an economic development sales tax must document status of funds, including balance available, monthly collections and a detailed list of outstanding commitments;

(E) Whether there is evidence that the permanent jobs created or retained will primarily benefit low-and-moderate income persons; and

(F) The ability of the applicant to operate or maintain any public facility, improvements, or services funded with Texas Community Development Program funds.

(5) A copy of a complete application must be provided to the appropriate Regional Review Committee (RRC). Proposals submitted for funding under the Texas Capital Fund require regional review "from the standpoint of consistency with regional plans and other such considerations" as provided for under the Texas Review and Comment System and Chapter 391, Texas Local Government Code. It has been determined that the participation by the RRC, as defined in the TCDP Annual Action Plan, meets the intent and purpose of these statutes through this concurrent review process. Each regional review committee may, at its option, review and comment on an economic development proposal from a jurisdiction within its state planning region. These comments become part of the application file and are considered by the staff provided, such comments are received by the staff prior to a recommendation to management.

(6) Upon TDED staff determination that an application supports a feasible and eligible project, staff normally will schedule a visit to the applicant jurisdiction to discuss the project and program rules with the chief elected official (or designee), business representative(s), and to visit the project site.

(7) TDED staff prepares a project report with recommendations (for approval or denial) to TDED's executive director.

(8) TDED executive director reviews the recommendation and announces the final decision.

(9) TDED staff works with the recipient to execute the contract agreement. While the contract award must be based on the information provided in the application, TDED staff may negotiate some elements of the final contract agreement with the recipient.

(10) The contract is drafted and then reviewed by management and legal prior to two copies being mailed to award recipient. Upon receipt, the award recipient has 30 days to review and execute both copies. Once returned to TDED, the contract will be fully executed by the executive director and then a single copy is returned to contractor.

(f) Scoring criteria for the infrastructure and real estate programs. There is a minimum 25-point threshold requirement. Applications will be reviewed for feasibility in descending order based on the scoring criteria. There are a total of 100 points possible.

(1) In the event of a tie score and insufficient funds to approve all applications, the following tie breaker criteria will be used.

(A) The tying applications are ranked from lowest to highest based on poverty rate stated on the score sheet. Thus, preference is given to the applicant with the higher poverty rate.

(B) If a tie still exists after applying the first criteria then applications are ranked from lowest to highest based on unemployment rate stated on the score sheet. Thus, preference is then given to the applicant with the higher unemployment rate.

(2) Depending on availability of funds, TDED may elect not to make jumbo awards in program year 2001 after the April 30, 2001 round of applications.

(3) Community Need (maximum 40points) Measures the economic distress of the applicant community.

(A) Unemployment (maximum 5 points). Awarded if the applicant's unemployment rate (for cities, the prior annual city rate will be used; for counties, the prior annual census tract rate, for where the business site is located will be used) is higher than the annual state rate, indicating that the community is economically below the state average.

(B) Poverty (maximum 15 points). Awarded if the applicant's 1999 county poverty rate, as provided in Appendix A of the Application, (for cities, the prior annual city rate will be used; for counties, the prior annual census tract rate for where the business site is located will be used) is higher than the annual state rate, indicating that the community is economically below the state average. Applicants will score 5 points if their rate meets or exceeds the state average of 16.54%; score 10 points if this figure exceeds 19.02% (15% over the state average); and score 15 points if this figure exceeds 20.68% (25% over state average).

(C) Enterprise/Empowerment/Defense Zone (maximum 5 points). A project located in a state designated enterprise zone, federal enterprise community, federal empowerment zone, or defense zone receives these five points.

(D) Open Contracts (Maximum 5 Points). Awarded to applicants that have two (2) or less open TCF contracts.

(E) Community Population (maximum 10 points). Points are awarded to applying cities with populations of 3,000 or less and counties with a population of 32,343 or less, using 1990 census data. For cities: score 5 points if the city population is less that 3,000 and score 10 points if the city population is less than 1,177. For counties: score 5 points if the county population is less than 32,343 and score 10 points if the county population is less than 15,072.

(4) Jobs (maximum 30 points).

(A) Job Impact (maximum 15 points). Awarded by taking the Business' total job commitment, created & retained, and dividing by applicant's 1990 unadjusted population. This equals the job impact ratio. Score 5 points if this figure exceeds the median job impact ratio for prior years; score 10 points if this figure exceeds 200% of the ratio; and score 15 points if this figure exceeds 400% of the ratio. County applicants should deduct the 1990 census population amounts for all incorporated cities, except in the case where the county is sponsoring an application for a business that is or will be located in an incorporated city. In this case the city's population would be used, rather than the county's.

(B) Cost per Job (maximum 15 points). Awarded by dividing the amount of TCF monies requested (including administration) by the number of full-time job equivalents to be created and/or retained. Points are then awarded in accordance with the following scale:

(i) Below $10,000--15 points.

(ii) Below $15,000--10 points.

(iii) Below $20,000--5 points.

(5) Business Emphasis (maximum 20 points).

(A) Manufacturers (max 10 points). Awarded if the Business' primary Standard Industrial Classification (SIC) code number starts with 20-39 or if their primary North American Industrial Classification System (NAICS) code number starts with 31-33. This is based on the SIC number reported on the Business' Texas Workforce Commission (TWC) Quarterly Contribution Report, Form C-3 or their IRS business tax return. Foreign businesses that have not had an SIC/NAICS code number assigned to them by either the TWC or IRS may submit alternative documentation to support manufacturing as their primary business activity to be eligible for these points.

(B) Small businesses (maximum 5 Points). Awarded if the Business employs no more than 100 employees for all locations both in and out of state. This number is determined by the business and any related entities, such as parent companies, subsidiaries & common ownership. Common ownership is considered 51% or more of the same owners.

(C) HUB--Historically Underutilized Business (maximum 5 Points). Awarded if a business is certified by the state General Services Commission (GSC) as a Historically Underutilized Business (HUB). Provide a copy of GSC's certification in the application.

(6) Leverage/Match (maximum 10 points). Awarded by dividing the total amount of other funds committed to this project divided by the requested TCF amount, including administration. Points are then awarded in accordance with the following scale:

(A) 1.25 : 1 (125 percent)--5 points.

(B) 2.00 : 1 (200 percent)--10 points

(g) Equity requirement by the business. All businesses are required to make financial contributions to the proposed project. A cash injection of a minimum of 2.5% of the total project cost is required. Total equity participation must be no less than 10% of the total project cost. This equity participation may be in the form of cash and/or net equity value in fixed assets utilized within the proposed project. A minimum of a 33% equity injection (of the total projects costs) in the form of cash and/or net equity value in fixed assets is required, if the business has been operating for less than three years and is accessing the R/E program. TDED staff will consider a business to have been operating for at least three years if:

(1) The business or principals have been operating for at least three years with comparable product lines or services;

(2) The parent company (100% ownership of the business) has been operating for at least three years with comparable product lines or services; or

(3) An individual or partnership (100% ownership of the business) has been in existence/operation for at least three years with comparable product lines or services.

(h) Application process for the main street program. The application and selection procedures consist of the following steps:

(1) Each applicant must submit two complete applications to Texas Historical Commission (THC). No changes to the application are allowed after the application deadline date, unless they are a result of TDED staff recommendations. Any change that occurs will only be considered through the amendment/modification process after the contract is signed.

(2) Upon receipt of the applications, THC evaluates applications based on the scoring criteria and ranks them in descending order.

(3) TDED staff will then review the four highest ranking applications for eligibility and completeness in descending order based on the scoring. Applications with 13 or more deficiencies will be considered ineligible. If that occurs than the next highest ranking application will be substituted. In those instances where the staff determines that the application has 12 or less deficiencies on the Application Checklist, unless an extension is granted, the applicant will be given 10 business days to rectify all deficiencies. In the event staff determines the application contains activities that are ineligible for funding, the application will be restructured or considered ineligible. An application resubmitted for future funding cycles will be competing with those applications submitted for that cycle. No preferential placement will be given an application previously submitted and not funded.

(4) TDED staff then conducts a review of each complete application to make threshold determinations with respect to:

(A) The project feasibility;

(B) The strength of commitments from all other public and/or private investments identified in the application;

(C) Whether the use of Texas Capital Funds is appropriate to carry out the project proposed in the application;

(D) Whether efforts have been made to maximize other financial resources. The applicant must document that other funds are unavailable to fund the project. Cities that collect an economic development sales tax must document status of funds, including balance available, monthly collections and a detailed list of outstanding commitments; and

(E) The ability of the applicant to operate or maintain any public facility, improvements, or services funded with Texas Community Development Program funds.

(5) A copy of a complete application must be provided to the appropriate Regional Review Committee (RRC). Proposals submitted for funding under the Texas Capital Fund require regional review "from the standpoint of consistency with regional plans and other such considerations" as provided for under the Texas Review and Comment System and Chapter 391, Texas Local Government Code. It has been determined that the participation by the RRC, as defined in the TCDP Annual Action Plan, meets the intent and purpose of these statutes through this concurrent review process. Each regional review committee may, at its option, review and comment on an economic development proposal from a jurisdiction within its state planning region. These comments become part of the application file and are considered by THC and TDED provided, such comments are received by TDED prior to a recommendation to management.

(6) Upon TDED staff determination that an application supports a feasible and eligible project, an on-site visit to the four highest scoring applicants may be conducted by THC and TDED staff to discuss the project and program rules with the chief elected official, as applicable, or their designee and to visit the Main Street area.

(7) TDED staff prepares a project report with recommendations (for approval or denial) for credit committee and then credit committee makes a recommendation to TDED's executive director for the final decision.

(8) TDED executive director reviews the recommendation and announces the project selected for funding.

(9) TDED staff works with the recipient to execute the contract agreement. While the contract award must be based on the information provided in the application, TDED staff may negotiate some elements of the final contract agreement with the recipient.

(10) The contract is drafted and then reviewed by management and legal prior to two copies being mailed to award recipient. Upon receipt, unless an extension is granted, award recipient has 30 days to review and execute both copies. Once returned to TDED, the contract will be fully executed by the executive director and then a single copy is returned to contractor.

(i) Scoring criteria for the main street program. There is a minimum 25-point threshold requirement. Applications will be reviewed for feasibility and placed in descending order based on the scoring criteria. There is a total of 100 points possible.

(1) In the event of a tie score, applications are ranked from the lowest to the highest based on the current aggregate available balance, from all existing open TCF contracts. Thus, an applicant that has a TCF project balance of $250,000 in existing projects would be ranked above one having a balance of $600,000.

(2) Project Feasibility (maximum 70 points). Measures the applicant's potential for a successful project. Each applicant must submit detailed and complete support documentation for each category. Compliance with the ten criteria for Main Street Recognition is required. First year Main Street Cities must receive prior approval from THC to apply and must submit the Main Street Criteria for Recognition Survey with the TCF application. The ten criteria include the following:

(A) Broad-based public support for commercial district revitalization--(10 points)

(B) Local Main Street program's organization's vision and mission-(5 points)

(C) Main Street work/marketing plan--(5 points)

(D) Historic preservation ethic--(10 points)

(E) Involvement of board of directors and committees--(10 points)

(F) Main Street operating budget--(5 points)

(G) Professional Main Street program manager experience--(10 points)

(H) Local Main Street program training--(5 points)

(I) Reinvestment statistics related to financial reinvestment, job creation, and new business creation--(5 points)

(J) Participation in the National Main Street Network--(5 points)

(3) Applicant (maximum 10 points).

(A) Applicant has not received a TCF main street grant--(5 points)

(B) Applicant has not received a TCF main street grant and the applicant has been an Official Texas Main Street City for more than 5 years--(10 points)

(4) Leverage (5 points). Score 5 points if matching dollars are greater than or equal to the following ratios based on two separate population categories:

(A) Applicant's population less than 5,000 persons--0.75:1

(B) Applicant's population equal to or greater than 5,000 persons--1.5:1

(5) Minority Hiring (maximum 5 points). Measures applicant's hiring practices. Percentage of minorities presently employed by the applicant divided by the percentage of minority residents within the local community. In the event 10% or less of the applicant's population base is composed of minority residents, the applicant has seven or fewer non-seasonal full-time employees, or 5% or more of the applicant's population base is living in quarters or institutions, the applicant is assigned the average score on this factor for all applicants for the previous program year or the score based on the actual figures, whichever is higher.

(6) Main Street Reinvestment Statistics (maximum 10 points). (Private Sector Reinvestment) Formulates amount based on per capita, per year in program.

(j) Threshold criteria for the main street improvements program. In order for its application to be considered, an applicant must meet the requirements of either paragraph (1) or (2) and paragraph (3) of this subsection.

(1) The national objective of aiding in the prevention or elimination of Slum or Blight on a spot basis. To show how this objective will be met, the applicant must:

(A) document that the project qualifies as slum or blighted on a spot basis under local law; and

(B) describe the specific condition of blight or physical decay that is to be treated.

(2) Area slums/blight objective. Document the boundaries of the area designated as a slum or blighted, document the conditions which qualified it under the definition in §9.1(a)(14) of this title (relating to General Provisions), and the way in which the assisted activity addressed one or more of the conditions which qualified the area as slum or blighted.

(3) Main street designation. The applicant must be designated by the Texas Historical Commission as a Main Street City prior to submitting a Texas Capital Fund application for main street improvements.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 17, 2001.

TRD-200106252
Ruth Cedillo
Acting Executive Director
Texas Department of Housing and Community Affairs
Effective date: November 6, 2001
Proposal publication date: August 31, 2001
For further information, please call: (512) 475-3726

♦ ♦ ♦

TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS

SUBCHAPTER E. CERTIFICATION, LICENSING AND REGISTRATION

16 TAC §26.102, §26.107

The Public Utility Commission of Texas (commission) adopts amendments to §26.102, relating to Registration of Pay Telephone Service Providers, and §26.107, relating to Registration of Interexchange Carriers, Prepaid Calling Services Companies, and Other Nondominant Telecommunications Carriers, with no changes to the text as published in the July 27, 2001 *Texas Register* (26 TexReg 5558). The revisions are necessary to remove language inadvertently inserted into §26.107(f)(2) and to move the language to §26.102(f)(2). These amendments are adopted under Project Number 23236.

After publication in the *Texas Register*, the commission received comments on the proposed amendment to §26.102 from the Texas Payphone Association (TPA).

Comments on §26.102(f)(2)

Subsection (f)(2) refers to the revocation or suspension of registration for pay telephone service providers if the commission finds the registrant is repeatedly in violation of the Public Utility Regulatory Act (PURA) or commission rules. Language allowing the commission to direct all certificated telecommunications utilities (CTUs) to disconnect the registrant is inserted in §26.102(f)(2) and removed from §26.107(f)(2).

TPA supported the proposed language as reinforcing the commission's regulatory authority, encouraging regulatory compliance and providing an effective tool to protect the public interest. TPA stated that it believes there are numerous payphone providers operating in the state who have never registered with the commission and who do not comply with the commission's rules and regulations. TPA also recommended that the commission instruct CTUs to notify their payphone customers who are not posted on the commission's web site that their service will be disconnected within a certain period of time for failure to register with the commission.

The commission shares TPA's concerns regarding payphone providers who are not in compliance with the required rules and regulations. However, TPA's recommendation would place a new requirement on CTUs that was not noticed in the proposed rule. Therefore, the commission declines to adopt this recommendation as it is outside the scope of this proceeding.

These amendments are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998 & Supplement 2001) (PURA), which provides the commission with authority to make and enforce rules reasonably required in the exercise of its power and jurisdiction and specifically PURA §55.173, which provides that a Pay Telephone Service Provider must register with the commission.

Cross Reference to Statutes: Public Utility Regulatory Act, §14.002; Chapter 15, Subchapter B; Chapter 17, Subchapter B, and Chapter 55, Subchapter H.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 16, 2001.

TRD-200106238
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Effective date: November 5, 2001
Proposal publication date: July 27, 2001
For further information, please call: (512) 936-7308

♦ ♦ ♦

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 60. TEXAS COMMISSION OF LICENSING AND REGULATION

SUBCHAPTER A. AUTHORITY AND RESPONSIBILITIES

16 TAC §60.10

The Texas Department of Licensing and Regulation adopts amendments to §60.10 concerning the Texas Commission of Licensing and Regulation, without changes, as published in the August 3. 2001, issue of the *Texas Register* (26 TexReg 5728) and will not be republished.

These rules are necessary to implement statutory changes to Title 2, Texas Occupations Code, Chapter 51. The statutory changes to Chapter 51 were enacted by Acts of the 77th Legislature; HB 1214. The rules related to HB 1214, §41(b) define "Commissioner" as being the Executive Director of the Texas Department of Licensing and Regulation and define the "Executive Director" as being the Commissioner of the Texas Department of Licensing and Regulation.

The amendments will function by clarifying the definition of Commissioner and Executive Director. No comments were received regarding adoption of the amendments.

The amendments are adopted under Texas Occupations Code, Chapter 51, §51.203. The Department interprets §51.203 as authorizing the Executive Director to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department. The Department interprets §41(b) of HB 1214, Acts of the 77th Texas Legislature, as authorizing the Executive Director of the Texas Department of Licensing and Regulation to promulgate and enforce a code of rules and take all action necessary to assure compliance with the intent and purpose of Chapter 51.

The statutory provisions affected by the adoption related to HB 1214 is Texas Occupations Code, Chapter 51, §51.001. No other statutes, articles, or codes are affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 16, 2001.

TRD-200106245

William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: November 5, 2001
Proposal publication date: August 3, 2001
For further information, please call: (512) 463-7348

♦ ♦ ♦

CHAPTER 68. ARCHITECTURAL BARRIERS

The Texas Department of Licensing and Regulation adopts the repeal of 16 Texas Administrative Code, §§68.1, 68.10, 68.20, 68.21, 68.30, 68.31, 68.33, 68.60, 68.61, 68.62, 68.63, 68.64, 68.65, 68.66, 68.70, 68.90, 68.93, 68.100, 68.101 and new §§68.1, 68.10, 68.20, 68.30, 68.31, 68.50-68.54, 68.65, 68.70, 68.75, 68.76, 68.79, 68.90, 68.93, 68.100, and 68.101 concerning architectural barriers.

No comments were received regarding the repeal of §§68.1, 68.10, 68.20, 68.21, 68.30, 68.31, 68.33, 68.60, 68.61, 68.62, 68.63, 68.64, 68.65, 68.66, 68.70, 68.90, 68.93, 68.100 and 68.101. The repeal is adopted without change as published in the August 3, 2001 issue of the *Texas Register* (26 TexReg 5729).

New §§68.1, 68.20, 68.30, 68.31, 68.51, 68.53, 68.65, 68.70, 68.75, 68.79, 68.90, 68.93, 68.100, and 68.101 are adopted without changes as published in the August 3, 2001 issue of the *Texas Register* (26 TexReg 5729) and will not be republished. New §§68.10, 68.50, 68.52, 68.54 and 68.76 are adopted with changes to the proposed text as published in the August 3, 2001 issue of the *Texas Register* (26 TexReg 5729). The new rules rearrange, consolidate, and revise existing language for clarification. *Summary of Changes to Proposed Rules*

In proposed rule §68.10 (11), the definition of "issue" has been changed to include an alternative definition of the term that will apply in the context of state-funded or other public works projects. The Department believes that this change will allow a more equitable and realistic treatment of state-funded and other public works projects. The Department also removed language from this definition that would have allowed a licensing agency with authority over a person issuing construction documents to promulgate an alternative definition of the term for its licensees. The Department deemed this provision to be unnecessary, because these other licensing agencies have been afforded the opportunity to give input during the rulemaking process.

In proposed rule §68.10, a definition of "overall responsibility" has been added, to clarify the meaning of this term as it is used in the statute and the rules.

Proposed rule §68.50(a) has been changed to state that construction documents must be submitted to the Department for buildings and facilities "subject to subsection 5(j) of the Architectural Barriers Act," rather than buildings and facilities "subject to compliance with TAS." The Department believes the new language provides a more accurate description of projects for which construction documents must be submitted.

Proposed rule §68.50 has been changed to clarify its current meaning, so that persons subject to the Act and the rules will know with greater clarity that the registration requirement is independent of the submittal requirement and that failure to register a construction project will be considered a separate violation from failure to submit construction documents.

Proposed rule §68.52(c) has been changed to require that the Department, registered accessibility specialist, or contract provider notify the owner of an impending inspection and simply obtain his approval to proceed with the inspection, rather than requesting the owner's presence for the inspection. The Department believes that the new language more accurately reflects standard industry practice.

Proposed rule §68.52(d) has been changed to state that the owner will be advised of the results of an inspection in writing and to clarify that verbal notification alone will not be sufficient.

Proposed rule §68.54 has been changed to clarify that the Notice of Substantial Compliance will be issued by the Department. This change will more accurately reflect the Department's existing process for issuance of these notices.

Proposed rule §68.76(d) has been changed to include a general, objective description of the circumstances in which a conflict of interest exists. The Department believes that the new language will give the registered accessibility specialist greater guidance in determining when a conflict of interest exists. The Department also removed from this proposed rule the four listed examples of situations in which conflicts of interest may occur. With the provision of the general description, it was deemed unnecessary to list the specific examples in this subsection. Those situations deemed worthy of mention were relocated into proposed rule §68.76(e), and described as specific types of prohibited conduct.

Proposed rule §68.76(e) has been changed to include descriptions of three specific situations in which a registered accessibility specialist (RAS) is prohibited from performing a plan review, inspection, or related activity: (1) when the RAS is an owner of the building or facility, or an employee of the owner; (2) when the RAS is an employee of the state agency that will occupy the building or facility; and (3) when the RAS participated, for compensation, in creating the overall design of the current project. The Department believes that this change will give the registered accessibility specialist greater guidance in determining what types of conduct should be avoided, and will also afford greater protection to the public.

Purpose of Adoption

The proposed rules are to implement the provisions of Senate Bill 484, enacted by the 77th Texas Legislature in 2001. Senate Bill 484 amends the Texas Architectural Barriers Act, Texas Revised Civil Statutes, Article 9102, relating to the review of plans and specifications and the inspection of buildings and facilities for the purpose of eliminating architectural barriers encountered by persons with disabilities. Senate Bill 484 creates a certificate of registration program through which individuals with the necessary qualifications may be approved to perform the State's review and inspection functions. Senate Bill 484 took effect on June 17, 2001.

Rulemaking Process

The Department drafted and distributed the proposed rules to persons internal and external to the agency, held a public hearing concerning the rules on July 11, 2001, and has received written comments for and against the proposed rules.

The Department wishes to thank all of the persons and organizations who participated in its rulemaking process and submitted comments on the proposed rules.

Summary of Comments Received on the Proposed Rules and the Department's Responses to Comments

Comment on proposed rule §68.10(11), the definition of "issue": The Coalition of Texans with Disabilities commented that the term "issue," as used in rule §68.50, should be defined as the release of construction documents for the purpose of permitting, for the purpose of beginning construction, or for both purposes.

Response to comment: Agree in part.

The Department agrees with the suggestion of defining "issue" as release for the purpose of construction. However, the Department does not agree with the suggestion of defining "issue" to include release for the purpose of permitting. Permitting should not be used as a triggering event for the submission of plans for review, for two reasons: (1) not all jurisdictions in the state of Texas require permitting, and (2) even if a project is permitted, it may end up not being constructed, in which case it would be a waste of time and resources to perform a plan review.

Comment on proposed rule §68.10(11), the definition of "issue": The rules should include a separate definition of the term "issue" as it applies to state-funded and other public works projects, because such projects typically involve complex and time-consuming approval and funding processes. For these projects, "issue" should be defined as the release of the construction documents for the purpose of publicly posting the project for bids. Construction documents will be final by the date of posting for bids, and this date is easy to verify.

Response to comment: Agree.

Comment on proposed rule §68.10(11), the definition of "issue": The Texas Board of Architectural Examiners (TBAE) commented that the term "issue" should be defined as "to mail, deliver, send, transmit, or otherwise release sealed plans or specifications to an owner, lessee, contractor, subcontractor, or any other person acting for an owner or lessee, or to a local building official or other person responsible for the approval or disapproval of an application for a building permit or other regulatory approval."

Response to comment: Agree in part.

The Department's proposed definition contains essentially the same elements as the definition suggested by TBAE, with the exception of the provision referencing release to local permitting officials. The Department's proposed definition is limited to the release of construction documents for certain purposes only.

The Department does not believe, however, that permitting should be used as a triggering event for the submission of plans for review, for two reasons: (1) not all jurisdictions in the state of Texas require permitting, and (2) even if a project is permitted, it may end up not being constructed, in which case it would be a waste of time and resources to perform a plan review.

Comment on proposed rule §68.10(11), the definition of "issue": The Department should allow TBAE and the Texas Society of Architects (TSA) to establish the definition of "issue."

Response to comment: Disagree.

As the agency with the primary responsibility for administering and enforcing the Texas Architectural Barriers Act, the Department believes itself to be the most appropriate agency to define terms and otherwise promulgate rules necessary to assure compliance with the Act.

Comment on proposed rule §68.10(11), the definition of "issue": Submission to TDLR should be required when the accessibility elements of construction documents have reached a "substantially complete" form, because the accessibility elements of a project are often completed long before the remaining elements. If the Department's review reveals that all accessibility elements are satisfactory, the Department should issue a conditional approval stipulating that changes or additions to the accessibility elements will require further review.

Response to comment: Disagree.

The Department already has a procedure in place by which owners or design professionals may obtain a preliminary accessibility review of construction documents that are not yet complete. Owners and design professionals may take advantage of this process on a voluntary basis, at any time prior to submitting finalized construction documents for the mandatory plan review. The Department does not believe it would be prudent to mandate plan reviews at the early stage suggested by the commenter, because many projects for which preliminary plans are drafted will end up not being constructed, in which case it would be a waste of time and resources to perform a plan review.

Comment on proposed rule §68.10, Definitions: TBAE commented that the term "overall responsibility" should be defined as "the level of responsibility held by an architect, landscape architect, interior designer, or engineer who prepares construction documents for and coordinates the various aspects of the design of a building or facility."

Response to comment: Agree.

Comment on proposed rule §68.10, Definitions: The term "registered" should be defined as TDLR's receipt of the filing fee.

Response to comment: Disagree.

Senate Bill 484 amends §5 of the Texas Architectural Barriers Act, Texas Revised Civil Statutes, Article 9102, by establishing an obligation for municipal building officials to confirm that a project has been registered with the Department prior to accepting an application for a permit. The Department's primary purpose in defining the term "register" is to assist municipal officials in complying with this statutory requirement. The Department has proposed defining "registered building or facility" as "a construction project that has been assigned a project registration number by the department." A project registration number is issued by the Department after it has received all necessary information to identify and locate a project that is subject to plan review and inspection for the purpose of eliminating architectural barriers.

The Department's proposed definition provides a simple and effective method by which a municipal official may confirm that a project has been registered with the Department. When an owner or design professional files an application for a permit, the municipal official may simply request the project registration number for the project. Project registration numbers may be easily verified by accessing the Department's web site.

Comment on proposed rule §68.10, Definitions: For purposes of §5(k) of the Act, a project should be considered "registered" when it has been assigned an EABPRJ number by TDLR. For purposes of submittal requirements for plan review, "registered" should mean assignment of an EABPRJ number, and receipt by TDLR or a RAS of complete construction documents, review fees, and filing fees.

Response to comment: Agree in part.

The first definition in this comment is consistent with the Department's proposed definition. The second definition in this comment, however, addresses administrative procedures related to

registration. The Department does not believe that it is appropriate to address these administrative procedures in the rules, because they relate solely to the Department's internal procedures, the Department needs flexibility to implement and change its administrative procedures as circumstances warrant, and because these procedures are not matters that will lead to enforcement actions against regulated persons.

Comment on proposed rule §68.10, Definitions: The term "received" should be defined as the date the RAS has received a complete submittal, including complete plans, review fee, registration fee, and Project Registration Form.

Response to comment: Disagree.

The information and materials a registered accessibility specialist may need in order to begin a plan review is a matter of administrative procedure. The Department does not believe that it is appropriate to address these administrative procedures in the rules, because they relate solely to the Department's internal procedures, the Department needs flexibility to implement and change its administrative procedures as circumstances warrant, and because these procedures are not matters that will lead to enforcement actions against regulated persons.

Comment on proposed rule §68.10, Definitions: The term "submitted" should be defined as the date a project is assigned an EABPRJ number.

Response to comments: Disagree.

It is unnecessary to define the term "submitted." Its commonly understood meaning is sufficient for the contexts in which the term is used in the statute and rules.

Comment on proposed rule §68.10, Definitions: TBAE commented that the following terms, as used in rule §68.50, should be defined: "multiple phases," "fast track," and "bid packages."

Response to comment: Disagree.

The provisions in proposed rule §68.50 referencing these terms were already in effect and were originally promulgated in order to reflect industry practices. In the proposed set of rules, language concerning these terms has simply been relocated. Throughout the time that these terms have appeared in the rules, no confusion has arisen over their meanings. In the current rulemaking process, the Department had no intention of altering the meaning of these terms.

Comment on proposed rule §68.10, Definitions: TSA commented that the term "registered accessibility specialist" is not an appropriate term for registrants who will perform the review and inspection functions of the Department. The term should be changed to "registered accessibility reviewer" or "registered reviewer." The term "specialist" implies that the registrant is more qualified than the architect to make accessibility decisions, or is more committed to the goal of accessibility. The architect is the true author of construction documents. The registrant is simply an editor who helps refine the final product. Also, the term "reviewer" would better inform clients and the general public as to what service the registrant performs.

Response to comment: Disagree.

The term "specialist" contemplates a registrant's ability to perform both the review and inspection functions of the Department, in addition to other related services. The suggested term "reviewer" would appear to exclude the inspection and other functions.

Comment on proposed rule §68.31(a): The rule should be clarified to state that a single variance application is acceptable when there are multiple instances of the same condition.

Response to comment: Disagree.

The Department believes that requests to combine multiple conditions on a single variance application form are most appropriately addressed on a case-by-case basis, with due consideration given to the unique circumstances of each situation.

Comment on proposed rule §68.31(b): The rule should be clarified to state whether a Project Registration Form must be submitted along with the variance application.

Response to comment: Disagree.

This issue is already adequately addressed in the instructions for the Department's variance application form. This is a matter of administrative procedure. The Department does not believe that it is appropriate to address these administrative procedures in the rules, because they relate solely to the Department's internal procedures, the Department needs flexibility to implement and change its administrative procedures as circumstances warrant, and because these procedures are not matters that will lead to enforcement actions against regulated persons.

Comment on proposed rule §68.50(a): TBAE commented that the rule should refer to buildings or facilities "subject to subsection 5(j) of the Architectural Barriers Act" rather than "subject to compliance with TAS." All projects are required to comply with TAS (the Texas Accessibility Standards), but design professionals are only required to submit construction documents for those projects with a construction cost of $50,000 or more.

Response to comment: Agree.

Comment on proposed rule §68.50(b): At the end of subsection (b), the phrase "applicable review fee" should be changed to "applicable review and registration fees" or "applicable fees." The current language does not accurately reflect all necessary fees.

Response to comment: Agree.

Comment on proposed rule §68.50(b): The rule needs to be clarified to state that the on-line registration form will suffice for the Project Registration Form.

Response to comment: Disagree.

The Department will modify its on-line registration form to make its title and content consistent with the paper form. This is a matter of administrative procedure. The Department does not believe that it is appropriate to address these administrative procedures in the rules, because they relate solely to the Department's internal procedures, the Department needs flexibility to implement and change its administrative procedures as circumstances warrant, and because these procedures are not matters that will lead to enforcement actions against regulated persons.

Comment on proposed rule §68.50(e): TBAE commented that, in subsection (e), the terms "building drawings" and "drawings" should be changed to "construction documents."

Response to comment: Agree.

Comment on proposed rule §68.50: TBAE commented that the rule is not always clear as to who is responsible for what.

Response to comment: Disagree.

The statute specifies who is responsible for what. It is not necessary to repeat statutory law in a rule.

Comment on proposed rule §68.50: TBAE commented that the Architectural Barriers Act does not make design professionals responsible for payment of any fees. The Department's rules should not do so either.

Response to comment: Disagree.

The rules do not make design professionals responsible for payment of fees. The statute specifies that the owner is responsible for all fees.

Comment on proposed rule §68.50: The rule needs to be clarified to address when design revisions should and should not be submitted to the Department.

Response to comment: Disagree.

This concern is addressed in proposed rule §68.51(c), and also in the statute.

Comment on proposed rule §68.52(c): Rather than requesting that the owner be present for an inspection, the registered accessibility specialist should notify the owner and obtain his approval to proceed with the inspection. Owners most often do not want to be present for the inspection.

Response to comment: Agree.

Comment on proposed rule §68.54: The rule should specify who is responsible for issuing the notice.

Response to comment: Agree.

Comment on proposed rule §68.70(b): For the registered accessibility specialist who will perform inspection services, the qualifications should be modified to allow experience credit for a college degree.

Response to comment: Disagree.

The qualifications for registered accessibility specialists, as stated in the proposed rule, are the same as the qualifications previously in place for independent contract providers. During the transitional period of implementing Senate Bill 484, the Department does not intend to make changes to the qualifications. However, the Department will take the suggestion under advisement for future consideration.

Comment on proposed rule §68.75(d): The registered accessibility specialist should not be required to verify ownership of a building or facility. The registered accessibility specialist is not qualified to perform this function, it takes too much time, and it is not necessary unless there is an enforcement issue. Also, verification of ownership could be interpreted as the unauthorized practice of law.

Response to comment: Disagree.

The registered accessibility specialist (RAS) already should be verifying ownership of each building or facility, because the statute makes the property owner responsible for payment of all fees, and because the RAS is required to provide a copy of the inspection report to the owner. It is important that ownership be verified before the inspection report is mailed out, because if the report is mailed to the wrong person, enforcement efforts would be hindered.

Comment on proposed rule §68.76(d): Rules should not contain any conflict-of-interest provisions for registered accessibility specialists.

Response to comment: Disagree.

The Department believes that conflict-of-interest provisions will assist registered accessibility specialists in identifying and avoiding situations that may jeopardize their integrity and independence of judgment in performing the Department's plan review and inspection functions.

Comment on proposed rule §68.76(d)(1): The Coalition of Texans with Disabilities commented that conflict-of-interest provisions should be extended to prohibit review or inspection of a facility by a registrant who is an employee of the state agency that would lease or occupy the facility.

Response to comment: Agree in part.

The Department agrees with the suggested change in connection with a state agency that will "occupy" a facility, but not in connection with an agency that may "lease" a facility. The Texas Building and Procurement Commission (formerly General Services Commission) often executes leases on behalf of other state agencies. The suggested language would prohibit staff of the Texas Building and Procurement Commission from performing plan reviews and inspections.

Comment on proposed rule §68.76(d)(2): Family relationships should not be characterized as giving rise to a conflict of interest.

Response to comment: Disagree.

The Department believes that a registered accessibility specialist's (RAS') family relationships could give rise to true conflicts of interest that may jeopardize the RAS' integrity and independence of judgment in performing the Department's plan review and inspection functions.

Comments on proposed rule §68.76(d)(3) and (4): A registered accessibility specialist who suggests design solutions or acts as an accessibility consultant should not be "conflicted out" of doing the plan review or inspection by virtue of being characterized as part of the design team. Other variations of this comment are as follows:

that the overall goal is accessibility, the registered accessibility specialists are the professionals with the most expertise in the area of accessibility, and if registered accessibility specialists are not permitted to offer solutions, then they are reduced to a "gotcha" mentality: "you have something wrong in your plans, and I know how to fix it, but I'm not going to tell you";

that allowing registered accessibility specialists to suggest design solutions furthers the overall goal of accessibility;

that the purpose of a conflict-of-interest provision is to prevent a RAS from checking his own work and that, as long as a RAS is not the person who actually drafts the construction plans, it should be permissible for him to offer suggestions;

that city building officials are permitted to suggest solutions regarding the codes they enforce, and RAS's should be allowed the same discretion;

that, if a design professional accepts a suggestion made by a RAS and changes his plans, the design professional is still assuming responsibility for the overall correctness of the plans;

that a RAS can qualify his suggested design solutions to make it clear that they are simply suggestions, and that he is not considering other building codes;

that Department staff regularly answers questions of a technical nature, so a RAS should be allowed the same discretion;

that the rules as written would lead to inaccurate and irrational results, by characterizing a RAS as part of the design team when his input has fallen far short of that role; and

that, with respect to proposed rule subsections (3) and (4), the phrase "in whole or in part" be removed, and that the phrase "design" be changed to "overall design."

Response to comments: Agree in part.

The Department agrees that a RAS should be permitted and encouraged to offer design solutions on a case-by-case basis, in response to specific questions from an owner or design professional, provided that the RAS does not receive financial compensation for the advice. However, the Department does not agree that a RAS should be permitted to act as an "accessibility consultant" and receive a fee for such services during the design phase, and then go on to perform the plan review, inspection, or both. A RAS who acts as a paid accessibility consultant during the design phase is acting as part of the design team, and therefore brings into question his independence of judgment as a plan reviewer or inspector for the same project. At the very least, the distinction between the designer and the reviewer definitely would be blurred in these circumstances.

Comments on proposed rule §68.76(d)(3) and (4): Registered accessibility specialists should not be allowed to suggest design solutions because they are not knowledgeable in other building codes; a design solution suggested by a RAS may conflict with other building codes; suggesting a solution may constitute the unauthorized practice of architecture; and suggesting a design solution could result in the RAS being blamed, if the design professional or owner misinterprets or otherwise misapplies the advice. On the other hand, it is not productive to force design professionals to keep guessing until they happen to hit upon an acceptable solution.

Response to comments: Disagree.

The Department believes that a RAS should be permitted and encouraged to offer design solutions on a case-by-case basis, in response to specific questions from an owner or design professional, provided that the RAS does not receive financial compensation for the advice. However, the Department does not believe that a RAS should be permitted to act as an "accessibility consultant" and receive a fee for such services during the design phase, and then go on to perform the plan review, inspection, or both. A RAS who acts as a paid accessibility consultant during the design phase is acting as part of the design team, and therefore brings into question his independence of judgment as a plan reviewer or inspector for the same project. At the very least, the distinction between the designer and the reviewer would be definitely blurred in these circumstances.

Comments on proposed rule §68.76(d)(4): The situation in which a registered accessibility specialist (RAS) works for the same company as the design professional who drafted the plans should not be considered a conflict of interest in all cases in which this occurs. A RAS may be faced with a true conflict of interest as a result of many relationships or situations, not just the employment relationship. When working in the same office as the design professional, if the RAS can clearly act as an independent reviewer, then no conflict should be found.

The rules should give a general definition of conflict of interest, similar to that contained in the Texas Engineering Practice Act and Rules, and then leave it up to the RAS to identify when a true conflict exists, as a result of working in the same company, or as a result of any other situation. The rules should establish an obligation for the RAS to report possible conflicts of interest to a supervisor. If changed as suggested, the rules would not limit or prohibit the RAS' practice simply because something may be perceived as a conflict of interest. It would remain within the RAS' professional judgment to determine whether he could legitimately accept an assignment without jeopardizing his independence and integrity.

Response to comments: Agree in part.

The Department agrees with the suggestion of providing a general definition of "conflict of interest", but prefers a more objective definition than that provided by this comment. The Department does not agree with the suggestion that a RAS should be obligated to report perceived conflicts of interest. Many RASs will be one-man operations. In such cases, it is unclear to whom the RAS would report a perceived conflict. Reporting it to the owner would not be appropriate because the RAS, unlike the engineer, is not a fiduciary of the owner. Reporting it to the Department would not be appropriate because the Department would likely have no jurisdiction to take action against the person causing the conflict.

Comment on proposed rule §68.79: Contract providers should be subject to the same fees as registered accessibility specialists.

Response to comment: Agree.

This issue will be handled in contract negotiations with entities seeking to become contract providers. The Department will require, as a term of the contract, that any person performing a plan review or inspection on behalf of a contract provider be registered with the Department as a registered accessibility specialist.

Comment on the rules in general: The $50,000 threshold for review of plans should be referenced in the rules for the sake of consistency, because the $12,000 threshold for state-leased facilities is already mentioned in the rules.

Response to comment: Disagree.

The $12,000 threshold was mentioned in the rules for the purpose of clarification of the statute. No similar clarification is needed in connection with the $50,000 threshold. The Department does not believe it appropriate to write a rule that simply duplicates law already stated in a statute. Duplication of a statutory provision in an administrative rule is inefficient and creates a potential for inconsistent provisions of law. It is not unreasonable to expect a registered accessibility specialist, building owner, or design professional to read and become familiar with the statute as well as the Department's rules.

Comment on the rules in general: The owner's obligation to pay fees should be stated in the rules.

Response to comment: Disagree.

The owner's obligation to pay fees is already clearly stated in the statute. The Department does not believe it appropriate to write a rule that simply duplicates law already stated in a statute. Duplication of a statutory provision in an administrative rule is inefficient and creates a potential for inconsistent provisions of law. It is not unreasonable to expect a registered accessibility specialist, building owner, or design professional to read and become familiar with the statute as well as the Department's rules.

Comment on the rules in general: Language that includes the term "may," as opposed to "shall," should not be used in the rules, because it is not enforceable.

Response to comment: Disagree.

The Department does not believe it has used the term "may" in the rules in a context that would remove the mandatory nature of a provision.

16 TAC §§68.1, 68.10, 68.20, 68.21, 68.30, 68.31, 68.33, 68.60 - 68.66, 68.70, 68.90, 68.93, 68.100, 68.101

The repeal is adopted under Texas Civil Statutes, Article 9102 and provides the Texas Department of Licensing and Regulation the authority to promulgate and enforce rules and to take action necessary to assure compliance with the intent and purpose of the Article.

The statutory provisions affected by the repeal are those set forth in Texas Civil Statutes, Article 9102 and the Texas Occupations Code, Chapter 51. No other statutes, articles, or codes are affected by the repeal.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 16, 2001.

TRD-200106243
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: November 5, 2001
Proposal publication date: August 3, 2001
For further information, please call: (512) 463-7348

♦ ♦ ♦

16 TAC §§68.1, 68.10, 68.20, 68.30, 68.31, 68.50 - 68.54, 68.65, 68.70, 68.75, 68.76, 68.79, 68.90, 68.93, 68.100, 68.101

The new rules are adopted under Senate Bill 484, enacted by the 77th Texas Legislature in 2001, which amends Article 9102 of Texas Civil Statutes, and provides the Texas Department of Licensing and Regulation the authority to promulgate and enforce rules and to take action necessary to assure compliance with the intent and purpose of the Article.

The statutory provisions affected by the adopted new rules are those set forth in Texas Civil Statutes, Article 9102 and the Texas Occupations Code, Chapter 51. No other statutes, articles, or codes are affected by the adopted new rules.

§68.10. Definitions.

The following words and terms, when used in this chapter shall have the following meanings, unless the context clearly indicates otherwise.

(1) Act--The Texas Architectural Barriers Act, Texas Civil Statutes, Article 9102.

(2) Building--Any structure located in the State of Texas that is used and intended for supporting or sheltering any use or occupancy.

(3) Business days--Calendar days, not including Saturdays, Sundays, and legal holidays.

(4) Commencement of Construction--Placement of engineering stakes, delivery of lumber or other construction materials to the job site, erection of batter boards, formwork, or other construction related work.

(5) Commissioner--As used in Article 9102 and in this chapter, has the same meaning as Executive Director.

(6) Completion of Construction--That phase of a construction project which results in occupancy or the issuance of a certificate of occupancy.

(7) Construction Documents--Documents used for construction of a building or facility, including working drawings, specifications, addenda, and applicable change orders.

(8) Contract Provider--The state agency or political subdivision under contract with the department to perform plan reviews, inspections, or both.

(9) Designated Agent--An individual designated by the owner to act on the owner's behalf.

(10) Facility--All or any portion of buildings, structures, site improvements, complexes, equipment, roads, walks, passageways, parking lots, or other real property located in the State of Texas.

(11) Issue--To mail or deliver plans or specifications to an owner, lessee, contractor, subcontractor, or any other person acting for an owner or lessee for the purpose of construction, or in the case of a state-funded or other public works project, for the purpose of publicly posting the project for bids, after such plans or specifications have been sealed by an architect, interior designer, landscape architect, or engineer.

(12) Lessee--With respect to state leased or occupied space, the state agency that enters into a contract with a building owner. In instances of free space or where a written contract is non-existent, reference to the lessee shall mean the occupying state agency.

(13) Overall responsibility--The level of responsibility held by an architect, landscape architect, interior designer, or engineer who prepares construction documents for and coordinates the various aspects of the design of a building or facility.

(14) Owner--The person or persons, company, corporation, authority, commission, board, governmental entity, institution, or any other entity that holds title to the subject building or facility. For purposes under these rules and the Act, an owner may designate an agent.

(15) Registered Building or Facility--For the purposes of Article 9102, §5(k), a registered building or facility is a construction project that has been assigned a project registration number by the department.

(16) Registered Accessibility Specialist--An individual who is certified by the department to perform the review functions, inspection functions, or both review and inspection functions of the department.

(17) Religious Organization--An organization that qualifies as a religious organization as provided in Vernon's Texas Statutes and Codes Annotated Tax Code, Title 1, Subtitle C, Chapter 11, §11.20(c).

(18) Renovated, Modified, or Altered--Any construction activity, including demolition, involving any part or all of a building or facility. Cosmetic work and normal maintenance do not constitute a renovation, modification, or alteration.

(19) Rules--Title 16, Texas Administrative Code, Chapter 68, the administrative rules of the Texas Department of Licensing and

Regulation promulgated pursuant to the Texas Architectural Barriers Act.

(20) State Agency--A board, commission, department, office, or other agency of state government.

(21) TAS--the Texas Accessibility Standards.

(22) Variance Application--The formal documentation filed with the department, by which the owner petitions the department to rule on the impracticality of applying one or more of the standards or specifications to a building or facility.

§68.50. Submission of Construction Documents.

(a) An architect, interior designer, landscape architect, or engineer with overall responsibility for the design of a building or facility subject to subsection 5(j) of the Architectural Barriers Act, shall mail, ship, or hand-deliver the construction documents to the department, a registered accessibility specialist, or a contract provider not later than five (5) business days after the design professional issues the construction documents.

(b) An Architectural Barriers Project Registration form must be completed for each subject building or facility and submitted along with the applicable fees not later than ten (10) business days after the design professional issues the construction documents.

(c) In projects involving multiple phases, construction documents pertaining to each phase shall be submitted in accordance with this chapter.

(d) In projects involving "fast-track" construction, partial submittals of construction documents may be made. Construction documents pertaining to each portion of the work shall be submitted in accordance with these rules.

(e) When bid packages involve multiple facilities such as prototypes or other identical facilities, only one set of construction documents need be submitted. An Architectural Barriers Project Registration form must be submitted for each separate building and facility. Construction documents noting site adaptations are required for each location.

§68.52. Inspections.

(a) The building or facility owner shall request an inspection from the department, a registered accessibility specialist, or a contract provider no later than thirty (30) calendar days after the completion of construction, renovation, modification, or alteration of the subject building or facility.

(b) Inspections shall be performed during the normal operating hours of the owner. Any deviation from operating hours shall be at the convenience of the owner.

(c) The department, registered accessibility specialist, or contract provider shall notify the owner of an impending inspection, and obtain the owner's approval to proceed with the inspection.

(d) The owner shall be advised in writing of the results of each inspection.

§68.54. Notice of Compliance.

The Department shall provide a Notice of Substantial Compliance to the owner, after a newly constructed building or facility has had a satisfactory inspection or submitted verification of corrective modifications.

§68.76. Standards of Conduct for the Registered Accessibility Specialist.

(a) *Competency*. The registered accessibility specialist shall be knowledgeable of and adhere to the Act, the rules, the TAS, Technical Memoranda published by the department, and all procedures established by the department for plan reviews and inspections. It is the obligation of the registered accessibility specialist to exercise reasonable judgment and skill in the performance of plan reviews, inspections, and related activities.

(b) *Integrity*. A registered accessibility specialist shall be honest and trustworthy in the performance of plan review, inspection, and related activities, and shall avoid misrepresentation and deceit in any fashion, whether by acts of commission or omission. Acts or practices that constitute threats, coercion, or extortion are prohibited.

(c) *Interest*. The primary interest of the registered accessibility specialist is to ensure compliance with the Act, the rules, and the TAS. The registered accessibility specialist's position, in this respect, should be clear to all parties concerned while conducting plan reviews, inspections, and related activities.

(d) *Conflict of Interest*. A registered accessibility specialist is obliged to avoid conflicts of interest and the appearance of a conflict of interest. A conflict of interest exists when a registered accessibility specialist performs or agrees to perform a plan review, inspection, or related activity for a project in which he has a financial interest, whether direct or indirect. A conflict of interest also exists when a registered accessibility specialist's professional judgment and independence are affected by his own family, business, property, or other personal interests or relationships.

(e) *Specific Rules of Conduct*. A registered accessibility specialist shall not:

(1) participate, whether individually or in concert with others, in any plan, scheme, or arrangement attempting or having as its purpose the evasion of any provision of the Act, the rules, or the TAS;

(2) knowingly furnish inaccurate, deceitful, or misleading information to the department, a building owner, or other person involved in a plan review, inspection, or related activity;

(3) state or imply to the building owner that the department will grant a variance;

(4) engage in any activity that constitutes dishonesty, misrepresentation, or fraud while performing a plan review, inspection, or related activity;

(5) perform a plan review, inspection, or related activity in a negligent or incompetent manner;

(6) perform a plan review, inspection, or related activity on a building or facility in which the registered accessibility specialist is an owner, either in whole or in part, or an employee of a full or partial owner;

(7) perform a plan review, inspection, or a related activity on a building or facility that is or will be leased or occupied by an agency of the State of Texas, when the registered accessibility specialist is an employee of the state agency that will occupy the facility; or

(8) perform a plan review, inspection, or related activity on a building or facility wherein the registered accessibility specialist, for compensation, participated in creating the overall design of the current project.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 16, 2001.

TRD-200106242
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: November 5, 2001
Proposal publication date: August 3, 2001
For further information, please call: (512) 463-7348

♦ ♦ ♦

CHAPTER 75. AIR CONDITIONING AND REFRIGERATION CONTRACTOR LICENSE LAW

16 TAC §75.10, §75.100

The Texas Department of Licensing and Regulation adopts the amendments to §75.10 and §75.100 concerning the regulation of air conditioning and refrigeration contractors without changes to the proposed text as published in the August 3, 2001 issue of the *Texas Register* (26 TexReg 5736) and will not be republished.

These rules are necessary to implement statutory changes to Title 132, Texas Civil Statutes, Article 8861, Air Conditioning and Refrigeration Contractor License Law. The statutory changes to Article 8861 were enacted by Acts of the 77th Legislature; HB 196 and HB 1214. The rule revisions related to HB 196 change the references to codes to be applied by air conditioning and refrigeration contractors performing installation services and in fulfilling the standards of practice for their professional services. The rules related to HB 1214 define "Commissioner" as being the Executive Director of the Texas Department of Licensing and Regulation and define the "Executive Director" as being the Commissioner of the Texas Department of Licensing and Regulation.

The amendments will function by providing increased industry oversight and clarifying contractors responsibilities under municipal codes affecting air conditioning and refrigeration services. No comments were received regarding adoption of the amendments.

The amendments are adopted under Texas Occupations Code, Chapter 51, §51.203 and Texas Civil Statutes, Article 8861, §3. The Department interprets §51.203 as authorizing the Executive Director to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department. The Department interprets §3 of Article 8861 and §41(b) of HB 1214, Acts of the 77th Texas Legislature, as authorizing the Executive Director of the Texas Department of Licensing and Regulation to promulgate and enforce a code of rules and take all action necessary to assure compliance with the intent and purpose of Article 8861.

The statutory provisions affected by the adoption related to HB 196 are Texas Occupations Code, Chapter 51 and Texas Civil Statutes, Article 8861. The statutory provisions affected by the adoption related to HB 1214 are Texas Occupations Code, Chapter 51, §51.001 and Texas Civil Statutes, Article 8861, §2. No other statutes, articles, or codes are affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 16, 2001.

TRD-200106244
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: November 5, 2001
Proposal publication date: August 3, 2001
For further information, please call: (512) 463-7348

♦ ♦ ♦

CHAPTER 76. WATER WELL DRILLERS AND WATER WELL PUMP INSTALLERS

The Texas Department of Licensing and Regulation adopts the repeal of 16 Texas Administrative Code §§76.10, 76.200-76.206, 76.220, 76.300, 76.600-76.602, 76.700-76.707, 76.900, 76.910, and 76.1000-76.1009 and new §§76.10, 76.200-76.206, 76.220, 76.300, 76.600-76.602, 76.700-76.708, 76.900, 76.910, and 76.1000-76.1010 concerning water well drillers and water well pump installers.

No comments were received regarding the repeal of §§76.10, 76.200-76.206, 76.220, 76.300, 76.600-76.602, 76.700-76.707, 76.900, 76.910, and 76.1000-76.1009. The repeal is adopted without change as published in the August 10, 2001, issue of the *Texas Register* (26 TexReg 5934) and will not be republished.

New §§76.200-76.206, 76.300, 76.600-76.602, 76.700-76.708, 76.900, 76.910, and 76.1001-76.1010 are adopted without changes to the proposed text as published in the August 10, 2001, issue of the *Texas Register* (26 TexReg 5934) and will not be republished. New §§76.10, 76.220 and 76.1000 are adopted with changes to the proposed text as published in the August 10, 2001, issue of the *Texas Register* (26 TexReg 5934). The new rules rearrange, consolidate, and revise existing language for clarification.

The adopted rules add the definitions of continuing education, continuing education programs, and test wells. Also added were the definitions of "Commissioner" and "Executive Director". The definitions of Commissioner and Executive Director are necessary to implement statutory changes that affect the Texas Water Code, Chapters 32 and 33. The statutory changes were enacted by Acts of the 77th Legislature; HB 1214. The definitions related to HB 1214 define "Commissioner" as being the Executive Director of the Texas Department of Licensing and Regulation and define the "Executive Director" as being the Commissioner of the Texas Department of Licensing and Regulation.

The adopted rules establish the following: the requirement that a driller needs experience in water well drilling; a renewal for apprentice and a waiver for continued education requirements for licensees; criteria for continued education providers; procedures for reporting the drilled wells and plugged wells electronically; procedures for reporting undesirable water or constituents reports electronically; the requirement of capping unattended wells; criteria for licensees to adhere to manufacturer's recommended well construction materials and equipment; a time frame for plugging test wells; a new procedure for sealing a water well that encounters undesirable water or constituents; and a new procedure for plugging large-diameter and bored wells.

The new rules will function by improving water well drilling and pump installation techniques, give a more workable timeframe

to allow water well and pump installation professionals to accrue continuing education hours, and improve communication of important water well and pump installation information to the Department.

The Department drafted and distributed the proposed new rules to persons internal and external to the agency, held a public hearing concerning the rules on August 30, 2001, and has received written comments regarding the proposed new rules. The Department wishes to thank all of the persons and organizations who participated in its rulemaking process and submitted comments. Below is a summary of comments received and the Department's response.

Comments on proposed rule §76.220(a) *Continuing Education*: Several persons commented that licensees be allowed to get applicable continuing education when it is available in their area and be allowed to use them for up to thirty-six months from the date of issuance. *Agency Response: Agree in part.* The Department agrees to change the time frame for continuing education from four hours each year to eight hours in a two-year period to give more time for licensees to attend applicable continuing education classes.

Comments on proposed rule §76.1000(c)(1) *Technical Requirements-Locations and Standards of Completion for Wells*: A commenter stated that Certain Teed 6" and 8" SDR 17 Yelomine pipe is produced from a special PVC compound with enhanced UV resistance and would be equivalent to SCH 80 when used as a surface completion. *Agency Response: Agree.* The Department agrees with the comment and has added the appropriate language.

Comments on proposed rule §76.1000(a)(1) *Technical Requirements-Locations and Standards of Completion for Wells*: A commenter stated that water wells should be pressure cemented from the top of the packer to land surface. *Agency Response: Disagree.* The suggestion would increase the regulatory requirements of the proposed rules and cannot be considered in this rulemaking.

16 TAC §§76.10, 76.200 - 76.206, 76.220, 76.300, 76.600 - 76.602, 76.700 - 76.707, 76.900, 76.910, 76.1000 - 76.1009

The repeal is adopted under Texas Occupations Code, Chapter 51, §51.203, Texas Water Code, Chapters 32 and 33, §§32.009 and 33.007, and Acts of the 77th Legislature, HB 1214, §41(b). The Department interprets §51.203 as authorizing the Executive Director to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department. The Department interprets §§32.009 and 33.007 of the Texas Water Code, and §41(b) of HB 1214, as authorizing the Executive Director of the Texas Department of Licensing and Regulation to promulgate and enforce a code of rules and take all action necessary to assure compliance with the intent and purpose of the Texas Water Code, Chapters 32 and 33.

The statutory provisions affected by the repeal are Texas Water Code, Chapters 32 and 33 and Texas Occupations Code, Chapter 51. No other statutes, articles, or codes are affected by the repeal.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 19, 2001.

TRD-200106304
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: November 8, 2001
Proposal publication date: August 10, 2001
For further information, please call: (512) 463-7348

♦ ♦ ♦

16 TAC §§76.10, 76.200 - 76.206, 76.220, 76.300, 76.600 - 76.602, 76.700 - 76.708, 76.900, 76.910, 76.1000 - 76.1010

The new rules are adopted under Texas Occupations Code, Chapter 51, §51.203, Texas Water Code, Chapters 32 and 33, §§32.009 and 33.007, and Acts of the 77th Legislature, HB 1214, §41(b). The Department interprets §51.203 as authorizing the Executive Director to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department. The Department interprets §§32.009 and 33.007 of the Texas Water Code, and §41(b) of HB 1214, as authorizing the Executive Director of the Texas Department of Licensing and Regulation to promulgate and enforce a code of rules and take all action necessary to assure compliance with the intent and purpose of the Texas Water Code, Chapters 32 and 33.

The statutory provisions affected by the adopted new rules are Texas Water Code, Chapters 32 and 33 and Texas Occupations Code, Chapter 51. No other statutes, articles, or codes are affected by the adopted new rules.

§76.10. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Abandoned well--A well that has not been used for six consecutive months. A well is considered to be in use in the following cases:

(A) a non-deteriorated well which contains the casing, pump, and pump column in good condition; or

(B) a non-deteriorated well which has been capped.

(2) Annular space--The space between the casing and borehole wall.

(3) Atmospheric barrier--A section of cement placed from two feet below land surface to the land surface when using granular sodium bentonite as a casing sealant or plugging sealant in lieu of cement.

(4) Bentonite--A sodium hydrous aluminum silicate clay mineral (montmorillonite) commercially available in powdered, granular, or pellet form which is mixed with potable water and used for a variety of purposes including the stabilization of borehole walls during drilling, the control of potential or existing high fluid pressures encountered during drilling below a water table, and to provide a seal in the annular space between the well casing and borehole wall.

(5) Bentonite grout--A fluid mixture of sodium bentonite and potable water mixed at manufacturers' specifications to a slurry consistency that can be pumped through a pipe directly into the annular space between the casing and the borehole wall. Its primary function

is to seal the borehole in order to prevent the subsurface migration or communication of fluids.

(6) Capped well--A well that is closed or capped with a covering capable of preventing surface pollutants from entering the well and sustaining weight of at least 400 pounds and constructed in such a way that the covering cannot be easily removed by hand.

(7) Casing--A watertight pipe which is installed in an excavated or drilled hole, temporarily or permanently, to maintain the hole sidewalls against caving, advance the borehole, and in conjunction with cementing and/or bentonite grouting, to confine the ground waters to their respective zones of origin, and to prevent surface contaminant infiltration.

(A) Plastic casing - National Sanitation Foundation (NSF-WC) or American Society of Testing Material (ASTM) F-480 minimum SDR 26 approved water well casing.

(B) Steel Casing - New ASTM A-53 Grade B or better and have a minimum weight and thickness of American National Standards Institute (ANSI) schedule 10.

(C) Monitoring wells may use other materials, such as fluoropolymer (Teflon), glass-fiber-reinforced epoxy, or various stainless steel alloys.

(8) Cement--A neat portland or construction cement mixture of not more than seven gallons of water per 94-pound sack of dry cement, or a cement slurry which contains cement along with bentonite, gypsum or other additives.

(9) Chemigation--A process whereby pesticides, fertilizers or other chemicals, or effluents from animal wastes is added to irrigation water applied to land or crop, or both, through an irrigation distribution system.

(10) Commission--The Texas Commission of Licensing and Regulation.

(11) Commissioner--as used in Texas Water Code, Chapters 32 and 33 and in these rules, has the same meaning as Executive Director.

(12) Complainant--A person who has filed a complaint with the Texas Department of Licensing and Regulation (Department) against any party subject to the jurisdiction of the Department. The Department may be the complainant.

(13) Completed monitoring well--A monitoring well which allows water from a single water-producing zone to enter the well bore, but isolates the single water-producing zone from the surface and from all other water-bearing zones by proper casing and/or cementing procedures. The single water-producing zone shall not include more than one continuous water-producing unit unless a qualified geologist or a groundwater hydrologist has determined that all the units screened or sampled by the well are interconnected naturally.

(14) Completed to produce undesirable water--A completed well which is designed to extract water from a zone which contains undesirable water.

(15) Completed water well--A water well, which has sealed off access of undesirable water to the well bore by proper casing and/or cementing procedures.

(16) Constituents--Elements, ions, compounds, or substances which may cause the degradation of the soil or ground water.

(17) Continuing Education--Eight hours of education in a two-year period required as a condition of licensure or certification under the Code.

(18) Continuing Education Program--A formal offering of instruction or information to licensees or certificate holders for the purpose of maintaining skills necessary for the protection of groundwater and the health and general welfare of the citizens and the competent practice of the construction of water wells, the installation of pumps or pumping equipment or water well monitoring. A school, clinic, forum, lecture, course of study, educational seminar, workshop, conference, convention, or short course approved by the Department, may offer such programs.

(19) Dry litter poultry facility--Fully enclosed poultry operation where wood shavings or similar material is used as litter.

(20) Easy access--Access is not obstructed by other equipment and the fitting can be removed and replaced with a minimum of tools without risk of breakage of the attachment parts.

(21) Edwards aquifer--That portion of an arcuate belt of porous, water bearing, predominantly carbonate rocks known as the Edwards and Associated Limestones in the Balcones Fault Zone trending from west to east to northeast in Kinney, Uvalde, Medina, Bexar, Hays, Travis, and Williamson Counties; and composed of the Salmon Peak Limestone, McKnight Formation, West Nueces Formation, Devil's River Limestone, Person Formation, Kainer Formation, Edwards Formation and Georgetown Formation. The permeable aquifer units generally overlie the less-permeable Glen Rose Formation to the south, overlie the less-permeable Comanche Peak and Walnut formations north of the Colorado River, and underlie the less-permeable Del Rio Clay regionally.

(22) Environmental soil boring--An artificial excavation constructed to measure or monitor the quality and quantity or movement of substances, elements, chemicals, or fluids beneath the surface of the ground. The term shall not include any well that is used in conjunction with the production of oil, gas, or any other minerals.

(23) Executive Director--as used in Texas Water Code, Chapter 32 and 33 and in these rules, has the same meaning as Commissioner.

(24) Flapper--The clapper, closing, or checking device within the body of the check valve.

(25) Foreign substance--Constituents that includes recirculated tailwater and open-ditch water when a pump discharge pipe is submerged in the ditch.

(26) Freshwater--Water whose bacteriological, physical, and chemical properties are such that it is suitable and feasible for beneficial use.

(27) Granular sodium bentonite--Sized, coarse ground, untreated, sodium based bentonite (montmorillonite) which has the specific characteristic of swelling in freshwater.

(28) Groundwater conservation district--Any district or authority created under Article III, Section 52, or Article XVI, Section 59 of the Texas Constitution or under the provisions of Chapters 35 and 36 of the Texas Water Code that has the authority to regulate the spacing or production of water wells.

(29) Irrigation distribution system--A device or combination of devices having a hose, pipe, or other conduit which connects directly to any water well or reservoir connected to the well, through which water or a mixture of water and chemicals is drawn and applied to land. The term does not include any hand held hose sprayer or other

similar device, which is constructed so that an interruption in water flow automatically prevents any backflow to the water source.

(30) Monitoring well--An artificial excavation constructed to measure or monitor the quality and/or quantity or movement of substances, elements, chemicals, or fluids beneath the surface of the ground. Included within this definition are environmental soil borings, piezometer wells, observation wells, and recovery wells. The term shall not include any well that is used in conjunction with the production of oil, gas, coal, lignite, or other minerals.

(31) Mud for drilling--A relatively homogenous, viscous fluid produced by the suspension of clay-size particles in water or the additives of bentonite or polymers.

(32) Piezometer--A device so constructed and sealed as to measure hydraulic head at a point in the subsurface.

(33) Piezometer well--A well of a temporary nature constructed to monitor well standards for the purpose of measuring water levels or used for the installation of piezometer resulting in the determination of locations and depths of permanent monitor wells.

(34) Plugging--An absolute sealing of the well bore.

(35) Pollution--The alteration of the physical, thermal, chemical, or biological quality of, or the contamination of, any water that renders the water harmful, detrimental, or injurious to humans, animals, vegetation, or property, or to public health, safety, or welfare, or impairs the usefulness or the public enjoyment of the water for any or reasonable purpose.

(36) Public water system--A system supplying water to a number of connections or individuals, as defined by current rules and regulations of the Texas Natural Resource Conservation Commission, 30 TAC Chapter 290.

(37) Recharge zone--Generally, that area where the stratigraphic units constituting the Edward Aquifer crop out, including the outcrops of other geologic formations in proximity to the Edwards Aquifer, where caves, sinkholes, faults, fractures, or other permeable features would create a potential for recharge of surface waters into the Edwards Aquifer. The recharge zone is identified as that area designated as such in official maps in the appropriate regional office of the Texas Natural Resource Conservation Commission.

(38) Recovery well--A well constructed for the purpose of recovering undesirable groundwater for treatment or removal of contamination.

(39) Sanitary well seal--A watertight device to maintain a junction between the casing and the pump column.

(40) Test well--A well drilled to explore for groundwater.

(41) Undesirable water--Water that is injurious to human health and the environment or water that can cause pollution to land or other waters.

(42) Water or waters in the state--Groundwater, percolating or otherwise, lakes, bays, ponds, impounding reservoirs, springs, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Gulf of Mexico inside the territorial limits of the state, and all other bodies of surface water, natural or artificial, inland or coastal, fresh or salt, navigable or nonnavigable, and including the beds and banks of all watercourses and bodies of surface water, that are wholly or partially inside or bordering the state or inside the jurisdiction of the state.

(43) Well--A water well, test well, injection well, dewatering well, monitoring well, piezometer well, observation well, or recovery well.

(44) State well report (Well Log)--A log recorded on forms prescribed by the Department, at the time of drilling showing the depth, thickness, character of the different strata penetrated, location of water-bearing strata, depth, size, and character of casing installed, together with any other data or information required by the Executive Director.

§76.220. Continuing Education.

(a) A licensed driller or pump installer is required to show proof of eight (8) hours of continuing education every two (2) years with two (2)-hours dedicated to rules and regulations related to the Well Driller/Pump Installer industry. Only courses approved by the Department can be used to satisfy this requirement.

(b) Competence in the performance of services requires that the licensee's knowledge and skills encompass current knowledge of the rules and regulations, drilling and completion, pump installation, plugging techniques, areas of health and safety, and of the occurrence and availability of groundwater to the extent that the performance of services by the driller or pump installer does not create a risk of water pollution. Therefore, licensees must maintain proficiency in the field of well drilling and pump installation.

(c) Each licensee must submit with the renewal request a copy of the certificates of completion as proof of meeting the continuing education requirements.

(d) Only courses or programs designated or approved by the Department shall be acceptable for license renewal.

(e) General requirements for approval of continuing education programs. The Department shall approve applications from providers for continuing education programs. Approval will be granted for a specific number of hours. To be approved, all continuing education programs must meet the following general requirements.

(1) Course content must relate directly to the Department regulated well industry and shall include (but not limited to) well and water well pump standards, geologic characteristics of the state, state groundwater laws and related regulations, well construction and pump installation practices and techniques, areas of health and safety, environmental protection, technological advances, and business management.

(2) Approval of courses or programs shall be issued by the Department before the course or program is offered. A written request by the provider's entity shall provide a detailed narrative describing the courses or programs offered and the qualification of the instructors.

(3) Program presenters must be a graduate from an accredited four-year college or university with a degree in the field they are teaching or related experience may be substituted on a year for year basis.

(4) The program provider will give each attendee a certificate of completion and submit a complete attendance roster to the Department no later than thirty (30) days after the occurrence of each program and shall include the following information:

(A) name and address of individuals attending,

(B) program title,

(C) date(s) attended, and

(D) number of hours credited to attendees.

(5) Each program, course offering, or seminar shall be individually reviewed and approved.

(6) Courses or programs conducted by manufacturers specifically to promote their products will not be considered for continuing education.

(7) A provider may not train his or her own employees.

(f) To obtain approval of a continuing education program, a provider shall submit an application that includes the following information:

(1) business name, address and telephone number,

(2) business representative's name,

(3) name, location and date(s) of the program,

(4) number of continuing education hours credited, and

(5) description of the instructors' qualifications.

(g) The course application shall be accompanied by the following.

(1) A sample of the Certificate of Completion. The Certificate of Completion must include:

(A) name and brief description of course,

(B) name of provider,

(C) name and signature of the provider representative,

(D) course completion date,

(E) name of the person who attended,

(F) number of continuing education hours credited, and

(G) the Department's course number.

(2) A copy of the course outline. This outline should include a description of each segment of course and the time allotted. All segments must directly relate to the training course.

(3) Copies of videos, tapes, handouts, study materials and any additional documentation. These course materials will become property of the Department and will not be returned.

(4) A resume of qualifications for each instructor who will teach. Providers must explain an instructor's qualifications to teach the course including educational and well drilling or pump installer experience. (Note: An updated instructor's resume must be submitted when instructors are added or removed from the staff).

(5) Any other information or data that is necessary to adequately describe or explain the course.

(h) Responsibilities of the Recognized Private Provider.

(1) After the Department has approved an application, the provider is entitled to state upon its publication: "This course has been approved by the Texas Department of Licensing and Regulation for continuing education credit under the Well Drilling and Pump Installation Regulation."

(2) Providers shall retain student attendance records for a period of two years, make copies available to former students, and provide copies to the Department upon request.

(3) A participant roster shall be provided to the Department and shall include actual hours attended.

(4) Providers or instructors shall fully assist any employee of the Department in the performance of an audit or investigation of a complaint, and shall provide requested information within the time frame set by the Department.

(5) Providers shall notify the Department of the intent to provide an approved course at least 30 days before the date of the course.

(i) The approval of a program may be withdrawn or suspended by the Department if it is determined that:

(1) the program teaching method or program content has been changed without notice to the Department,

(2) a certificate of completion has been issued to an individual who did not attend or complete the approved program,

(3) certificates of completion are not given to all individuals who have satisfactorily completed the approved activity,

(4) fraud or misrepresentation occurred in the application process for program approval, maintenance or records, teaching method program content, or issuance of certificates for a particular course or program, or

(5) failure to notify the Department of the intent to provide a course at least 30 days prior to the course.

§76.1000. Technical Requirements -- Locations and Standards of Completion for Wells.

(a) Wells shall be completed in accordance with the following specifications and in compliance with the local groundwater conservation district rules or incorporated city ordinances:

(1) The annular space to a minimum of ten (10) feet shall be three (3) inches larger in diameter than the casing and filled from ground level to a depth of not less than ten (10) feet below the land surface or well head with cement slurry, bentonite grout, or eight (8) feet solid column of granular sodium bentonite topped with a two (2) foot cement atmospheric barrier, except in the case of monitoring, dewatering, piezometer, and recovery wells when the water to be monitored, recovered, or dewatered is located at a more shallow depth. In that situation, the cement slurry or bentonite column shall only extend down to the level immediately above the monitoring, recovery, or dewatering level. Unless the well is drilled within the Edwards Aquifer, the distances given for separation of wells from sources of potential contamination in subsection (b)(2) of this section may be decreased to a minimum of fifty (50) feet provided the well is cemented with positive displacement technique to a minimum of one hundred (100) feet to surface or the well is tremie pressured filled to the depth of one hundred (100) feet to the surface provided the annular space is three inches larger than the casing. For wells less than one hundred (100) feet deep, the cement slurry, bentonite grout, or bentonite column shall be placed to the top of the producing layer. In areas of shallow, unconfined groundwater aquifers, the cement slurry, bentonite grout, or bentonite column need not be placed below the static water level. In areas of shallow, confined groundwater aquifers having artesian head, the cement slurry, bentonite grout, or bentonite column need not be placed below the top of the water-bearing strata. Wells that are subject to completion standards of the Texas Natural Resource Conservation Commission under 30 TAC, Chapter 331 for class V injection wells, are exempt from this section.

(2) A well is cemented with positive displacement technique to a minimum of one hundred (100) feet to surface or the well is tremie pressured filled to the depth of one hundred (100) feet to the surface provided the annular space is three inches larger than the casing may encroach up to five feet of the property line. For wells less than one hundred (100) feet deep, the cement slurry, bentonite grout, or bentonite column shall be placed to the top of the producing layer. In areas of shallow, unconfined groundwater aquifers, the cement slurry, bentonite grout, or bentonite column need not be placed below the static water level. In areas of shallow, confined groundwater aquifers having artesian head, the cement slurry, bentonite grout, or bentonite column need not be placed below the top of the water-bearing strata.

(3) A well shall be located a minimum horizontal distance of fifty (50) feet from any water-tight sewage and liquid-waste collection facility, except in the case of monitoring, dewatering, piezometer, and recovery wells which may be located where necessity dictates.

(4) Except as noted in paragraph (1) and (2) of this subsection, a well shall be located a minimum horizontal distance of one hundred fifty (150) feet from any concentrated sources of potential contamination such as, but not limited to, existing or proposed livestock or poultry yards, cemeteries, pesticide mixing/loading facilities, and privies, except in the case of monitoring, dewatering, piezometer, and recovery wells which may be located where necessity dictates. A well shall be located a minimum horizontal distance of one hundred (100) feet from an existing or proposed septic system absorption field, septic systems spray area, a dry litter poultry facility and fifty (50) feet from any property line provided the well is located at the minimum horizontal distance from the sources of potential contamination.

(5) A well shall be located at a site not generally subject to flooding; provided, however, that if a well must be placed in a flood prone area, it shall be completed with a watertight sanitary well seal, so as to maintain a junction between the casing and pump column, and a steel sleeve extending a minimum of thirty six (36) inches above ground level and twenty four (24) inches below the ground surface.

(6) The following are exceptions to the property line distance requirement where:

(A) groundwater conservation district rules are in place regulating the spacing of wells;

(B) platted or deed restriction subdivision spacing of wells and on-site sewage systems are part of planning; or

(C) public wastewater treatment is provided and utilized by the landowner.

(b) In all wells where plastic casing is used, except when a steel or polyvinyl chloride (PVC) sleeve or pitless adapter, as described in paragraph (3) of this subsection, is used, a concrete slab or sealing block shall be placed above the cement slurry around the well at the ground surface.

(1) The slab or block shall extend laterally at least two (2) feet from the well in all directions and have a minimum thickness of four (4) inches and should be separated from the well casing by a plastic or mastic coating or sleeve to prevent bonding of the slab to the casing.

(2) The surface of the slab shall be sloped to drain away from the well.

(3) The top of the casing shall extend a minimum of twelve (12) inches above the land surface except in the case of monitoring wells when it is impractical or unreasonable to extend the casing above the ground. Monitoring wells shall be placed in a waterproof vault the rim of which extends two (2) inches above the ground surface and a sloping cement slurry shall be placed a minimum twelve (12) inches from the edge of the vault and two (2) feet below the base of the vault between the casing and the wall of the borehole so as to prevent surface pollutants from entering the monitoring well. The well casing shall have a locking cap that will prevent pollutants from entering the well. The annular space of the monitoring well shall be sealed with an impervious bentonite or similar material from the top of the interval to be tested to the cement slurry below the vault of the monitoring well.

(4) The well casing of a temporary monitoring well shall have a locking cap and the annular space shall be sealed from zero (0) to one (1) foot below ground level with an impervious bentonite or similar material; after 48 hours, the well must be completed or plugged in accordance with this section and §76.1004 of this title (relating to Technical Requirements - Standards for Capping and Plugging of Wells and Plugging Wells that Penetrate Undesirable Water or Constituent Zones).

(5) The annular space of a closed loop injection well used to circulate water or other fluids shall be backfilled to the total depth with impervious bentonite or similar material, closed loop injection well where there is no water or only one zone of water is encountered you may use sand, gravel or drill cuttings to back fill up to thirty (30) feet from the surface. The top thirty (30) feet shall be filled with impervious bentonite or similar materials and meets the standards pursuant to Texas Natural Resource Conservation Commission 30 TAC, Chapter 331.

(c) In wells where a steel or PVC sleeve is used:

(1) The steel sleeve shall be a minimum of 3/16 inches in thickness and/or the plastic sleeve shall be a minimum of Schedule 80 sun resistant or SDR 17 in the 6" and 8" inch sun resistant and be twenty four (24) inches in length, and shall extend twelve (12) inches into the cement, except when steel casing or a pitless adapter as described in paragraph (2) of this subsection is used. The casing shall extend a minimum of twelve (12) inches above the land surface, and the steel/plastic sleeve shall be two inches larger in diameter than the plastic casing being used and filled entirely with cement; or

(2) A slab or block as described in paragraph (1) and (2) of this subsection is required above the cement slurry except when a pitless adapter is used. Pitless adapters may be used in such wells provided that:

(A) the adapter is welded to the casing or fitted with another suitably effective seal;

(B) the annular space between the borehole and the casing is filled with cement to a depth not less than twenty (20) feet below the adapter connection; and

(C) in lieu of cement, the annular space may be filled with a solid column of granular sodium bentonite to a depth of not less than twenty (20) feet below the adapter connection.

(d) All wells, especially those that are gravel packed, shall be completed so that aquifers or zones containing waters that differ in chemical quality are not allowed to commingle through the borehole-casing annulus or the gravel pack and cause quality degradation of any aquifer or zone.

(e) The well casing shall be capped or completed in a manner that will prevent pollutants from entering the well.

(f) Each licensed well driller drilling, deepening, or altering a well shall keep any drilling fluids, tailings, cuttings, or spoils contained in such a manner so as to prevent spillage onto adjacent property not under the jurisdiction or control of the well owner without the adjacent property owners' written consent.

(g) Each licensed well driller drilling, deepening, or altering a well shall prevent the spillage of any drilling fluids, tailings, cuttings, or spoils into any body of surface water.

(h) Unless waived by written request from the landowner, a new, repaired, or reconditioned well or pump installation or repair on a well used to supply water for human consumption shall be properly disinfected. The well shall be properly disinfected with chlorine or other appropriate disinfecting agent under the circumstances. A disinfecting solution with a minimum concentration of fifty (50) milligrams per liter (mg/l) (same as parts per million), shall be placed in the well

as required by the American Water Works Association (AWWA), pursuant to ANST/AWWA C654-87 and the United States Environmental Protection Agency (EPA).

(i) Unless waived in writing by the landowner, after performing an installation or repair, the licensed installer shall disinfect the well by:

(1) treating the water in the well casing to provide an average disinfectant residual to the entire volume of water in the well casing of fifty (50) mg/l. This may be accomplished by the addition of calcium hypochlorite tablets or sodium hypochlorite solution in the prescribed amounts;

(2) circulating, to the extent possible, the disinfected water in the well casing and pump column; and

(3) pumping the well to remove disinfected water for a minimum of fifteen (15) minutes.

(4) If calcium hypochlorite (granules or tablets) is used, it is suggested that the installer dribble the tablets of approximately five-gram (g) size down the casing vent and wait at least thirty (30) minutes for the tablets to fall through the water and dissolve. If sodium hypochlorite (liquid solution) is used, care should be taken that the solution reaches all parts of the well. It is suggested that a tube be used to pipe the solution through the well-casing vent so that it reaches the bottom of the well. The tube may then be withdrawn as the sodium hypochlorite solution is pumped through the tube. After the disinfectant has been applied, the installer should surge the well at least three times to improve the mixing and to induce contact of disinfected water with the adjacent aquifer. The installer should then allow the disinfected water to rest in the casing for at least twelve hours, but for not more than twenty-four hours. Where possible, the installer should pump the well for a minimum of fifteen (15) minutes after completing the disinfection procedures set forth above until a zero disinfectant residual is obtained. In wells where bacteriological contamination is suspected, the installer shall inform the well or property owner that bacteriological testing may be necessary or desirable.

(j) A test well that is drilled for exploring for groundwater must be completed or plugged within six (6) months unless such site is located within a groundwater conservation district where district rules shall prevail if applicable.

(k) Water wells located within public water supply system sanitary easements must be constructed to public well standards pursuant to 30 TAC, Chapter 290.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 19, 2001.

TRD-200106305
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: November 8, 2001
Proposal publication date: August 10, 2001
For further information, please call: (512) 463-7348

♦ ♦ ♦

16 TAC §76.800

The Texas Department of Licensing and Regulation adopts amendments to §76.800 concerning the fees for the Water Well Drillers and Water Well Pump Installers program without changes to the proposed text as published in the July 13, 2001, issue of the *Texas Register* (26 TexReg 5178) and will not be republished.

The amendments increase the application exam fees for driller and installer examinations from $125 to $150 for each examination; increase the fee for re-examination from $100 to $125 for each re-examination; increase the license fees for driller and installer licenses (both initial and renewal) from $170 to $200 each; increase the license and renewal fees for the combination driller and installer license from $220 to $310; and add the combination driller and installer apprentice registration (both initial and renewal) of $100.

No comments were received regarding adoption of these amendments.

The Department is required by Texas Occupations Code, Chapter 51, §51.202 and Texas Water Code, Chapters 32 and 33, §32.002 and §33.002, to set fees in amounts reasonable and necessary to cover the costs of administering programs, which include the Water Well Drillers and Water Well Pump Installers program. The fees currently in place are below the amounts needed to cover program costs in current and future periods.

The amendments are adopted under the Texas Occupations Code, Chapter 51, §51.202 and Texas Water Code, Chapters 32 and 33, §32.002 and §33.002. The Department interprets §51.202 as authorizing the Texas Commission of Licensing and Regulation (the Commission) to set fees in amounts reasonable and necessary to cover the costs of administering the programs and activities under its jurisdiction. The Department interprets §32.002 as authorizing the Commission to set fees for examinations, re-examinations, and licenses under Chapter 32 with respect to the Water Well Drillers program. The Department interprets §33.002 as authorizing the Commission to set fees for examinations, re-examinations, and licenses with respect to the Water Well Pump Installers program.

The statutory provisions affected by the adoption are Texas Occupations Code, Chapter 51, §51.202 and Texas Water Code, Chapters 32 and 33, §32.002 and §33.002. No other statutes, articles, or codes are affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 16, 2001.

TRD-200106246
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: November 5, 2001
Proposal publication date: July 13, 2001
For further information, please call: (512) 463-7348

♦ ♦ ♦

TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 97. PLANNING AND ACCREDITATION
SUBCHAPTER DD. PROCEDURES FOR INVESTIGATIVE REPORTS AND SANCTIONS

19 TAC §§97.1031, 97.1033, 97.1035

The Texas Education Agency (TEA) adopts new §§97.1031, 97.1033, and 97.1035, concerning investigative reports and sanctions, with changes to the proposed text as published in the July 27, 2001, issue of the *Texas Register* (26 TexReg 5560). The new sections define the procedures for on-site investigations and reports as required by Texas Education Code (TEC), §39.076, and the procedures for accreditation sanctions under TEC, §39.131, resulting from such reports. The new sections also provide for notice to any person whom the report finds to have committed a violation of law, rule, or policy, and provide for an informal review of such findings before they may become final. House Bill (HB) 6, 77th Texas Legislature, 2001, added TEC, §12.1162, which requires the commissioner to sanction open-enrollment charter schools based on the results of on-site investigations and reports under TEC, §39.076.

In response to comments, the following changes have been made to the sections since published as proposed.

Language in §97.1031 was revised to provide ten calendar days from the "date of mailing" instead of "issuance."

Language in §97.1031 and §97.1033 was revised to require that the notice and request for informal review state the name and department of the individual to whom a written request for informal review is or may be addressed.

Language in §97.1035 was revised to clarify its application in the context of TEC, §39.131(c) and (e). In addition, a minor technical correction was made in §97.1035(b).

The following comments were received regarding adoption of the new sections.

Proposed §97.1031. Preliminary Investigative Report.

Comment. An individual asked that these procedures be applied to special investigations such as those for leaver data.

Agency Response. These procedures will apply to all findings resulting from an investigation under TEC, §39.074 or §39.075, including those related to leaver data. (See also 2001 Accountability Manual, Section VIII ("System Safeguards"), adopted by reference at Title 19, Texas Administrative Code, §97.1002 ("Adoption by Reference: Standard Procedures")).

Comment. An individual requested that these procedures be extended to include conducting the investigative visit.

Agency Response. The comment does not address the rule proposed by the agency, which is proposed pursuant to TEC, §39.076(b). The procedures for conducting an investigative visit under TEC, §39.076(a), have previously been adopted by the agency. (See 2001 Accountability Manual, Section VIII ("System Safeguards").)

Comment. An individual suggested that ten calendar days be defined as ten calendar days after the certified receipt of the notice. Another individual suggested that ten calendar days be defined as ten calendar days from the date of mailing. Another individual suggested that ten calendar days be changed to 14 business days. Another individual suggested that ten calendar days be changed to 15 business days.

Agency Response. The agency is modifying the rule to provide ten calendar days from the "date of mailing" instead of "issuance." This is more specific, and therefore will avoid confusion. The agency disagrees with comments seeking a longer time period for requesting informal review. The rule provides minimum procedures that apply in a broad variety of circumstances. The agency conducts a wide array of investigative activities, and this rule contemplates that each division responsible for investigations will issue a notice with information tailored to the circumstances of that report. It would be inappropriate in many circumstances to impose a deadline that is as short as the minimum allowed by this rule, but in many circumstances a longer period would be equally inappropriate. In order to permit this general rule to operate effectively in a wide variety of circumstances, the rule should not be amended to mandate a longer period for the request for informal review.

Comment. An individual suggested the notice include the name and department of the individual to whom a written request for the informal review be addressed.

Agency Response. The agency agrees with this comment, and has modified the rule to require that the notice state the name and department of the individual to whom a written request for informal review may be addressed.

Proposed §97.1033. Informal Review of Preliminary Investigative Report; Final Investigative Report.

Comment. An individual asked for clarification that these procedures would be safeguards before public release of a report.

Agency Response. The agency disagrees with the comment. The adopted section does provide procedural safeguards, but cannot govern the public release of a document subject to the Public Information Act, Government Code, Chapter 552. TEC, §39.076(b), requires that these procedural safeguards be followed before issuing a report with final findings described in that section, but again, this provision does not govern the release of a report pursuant to the Public Information Act.

Proposed §97.1035. Procedures for Accreditation Sanctions.

Comment. An individual asked that guidelines be developed for the commissioner in applying various levels of sanctions.

Agency Response. Such guidelines have previously been adopted by the agency. (See 2001 Accountability Manual, Section VIII ("System Safeguards").)

Comment. An individual suggested that the commissioner be required to repeat the procedures in proposed new §97.1031 and §97.1033 each time sanctions are escalated.

Agency Response. The agency disagrees. TEC, §39.131, gives the commissioner flexibility to select the level of intervention that is needed to bring the public school into compliance with accreditation standards. A determination that a district, charter, or campus has failed to meet accreditation standards must be made using the procedure set forth in this rule, but there is no such requirement governing the choice of sanction. Rather, the statute requires the commissioner to take any of the listed actions to the extent the commissioner determines necessary. The commissioner is required to conduct an annual review under, TEC §39.131(c), and may be required to increase the sanction based on that review, but only if the sanction is accompanied by a lowered accreditation rating. A later-

adopted provision, TEC, §39.075(c), gives the commissioner discretion to impose a sanction under TEC, §39.131(a)(1)-(8), without lowering an accreditation rating. In such circumstances, new §97.1035(c) establishes appropriate provisions. In all cases where a master or a management team is imposed, the commissioner must review the need for the sanction every 90 days under TEC, §39.131(e). If reviews are required both annually under TEC, §39.131(c) and quarterly under TEC, §39.131(e), then the 90-day review under TEC, §39.131(e) may satisfy the annual review under TEC, §39.131(c). As proposed, new §97.1035(c) began with the phrase, "except as provided by TEC, §39.131." This limits the application of proposed new §97.1035(c) to situations where TEC, §39.131(c) and (e), do not require a different result. Language in §97.1035(c) has been modified and a new subsection (f) has been added to clarify the application of §97.1035 in the context of TEC, §39.131(c) and (e).

The new sections are adopted under the Texas Education Code (TEC), §39.076, which authorizes the TEA to adopt written procedures for conducting on-site investigations relating to accreditation status and TEC, §12.1162, added by House Bill (HB) 6, 77th Texas Legislature, 2001, which authorizes the commissioner of education to adopt rules to implement procedures for accreditation sanctions. HB 6 requires the commissioner to sanction open- enrollment charters based on the results of on-site investigation and reports under TEC, §39.076.

§97.1031. Preliminary Investigative Report.

(a) Findings resulting from an investigation under Texas Education Code (TEC), §39.074 and §39.075, must be presented in a preliminary investigative report.

(b) Before issuing a final investigative report, the Texas Education Agency (TEA) must notify the person whom the TEA proposes to find has violated a law, rule, or policy. The notice must be in writing and must:

(1) include a copy of a preliminary investigative report finding that the person has violated a law, rule, or policy;

(2) state the procedures for obtaining an informal review of the findings in the preliminary investigative report under TEC, §39.076(b), including the name and department of the person to whom the request may be addressed; and

(3) set a deadline, which shall not be less than ten calendar days from the date of mailing of the preliminary investigative report, for requesting an informal review of such findings.

§97.1033. Informal Review of Preliminary Investigative Report; Final Investigative Report.

(a) A person who is found in a preliminary investigative report to have violated a law, rule, or policy may request, in writing, an informal review under this section.

(b) A written request for informal review of the preliminary investigative report must be addressed to the Texas Education Agency (TEA) representative identified in the notice under §97.1031(b)(2) of this title (relating to Preliminary Investigative Report). The written request must be received by the TEA representative on or before the deadline specified in §97.1031(b)(3).

(c) The person requesting the informal review of the preliminary investigative report may submit written information to the TEA representative identified in the notice under §97.1031(b)(2). In addition, the TEA representative may meet with the person at TEA headquarters in Austin, Texas to discuss the findings and accept additional written information for review.

(d) Following the informal review of the preliminary investigative report by the TEA representative identified in the notice under §97.1031(b)(2), a final investigative report will be issued. The final report may include changes or additions to the preliminary investigative report and such modifications are not subject to another informal review procedure.

(e) If no informal review of the preliminary investigative report is requested by the deadline specified in §97.1031, or if no violation of law, rule, or policy is found in the report, a final investigative report may be issued without informal review.

(f) An informal review of the preliminary investigative report is not governed by Texas Education Code, §7.057, or by Government Code, Chapter 2001.

§97.1035. Procedures for Accreditation Sanctions.

(a) If the commissioner of education finds that a district, campus, or open-enrollment charter school does not satisfy applicable accreditation criteria, the commissioner may lower its accreditation rating and take appropriate action under Texas Education Code (TEC), §39.131.

(b) Regardless of whether the commissioner lowers the accreditation rating under subsection (a) of this section, the commissioner may take action under TEC, §39.131(a)(1)-(8), if the commissioner determines that the action is necessary to improve any area of performance by the district or open-enrollment charter school.

(c) Subject to subsection (f) of this section, once the commissioner takes action under TEC, §39.131, the commissioner may take any other action under that section to the extent the commissioner determines necessary.

(d) The commissioner shall notify the district or open-enrollment charter school in writing of a sanction imposed under this section. The notice must state the finding(s) indicating that the district or open-enrollment charter school does not satisfy applicable accreditation criteria. The finding(s) must be made in a final investigative report or based on a final investigative report.

(e) A determination under subsections (b) and (c) of this section must be made in writing and must be included in a written notice under subsection (d) of this section. The determination must be made in a final investigative report or based on a final investigative report. A determination under subsection (c) of this section may be based on a report on the progress of a prior action under TEC, §39.131.

(f) The commissioner shall annually review a sanction imposed under subsection (a) of this section and shall increase the sanction, as required by TEC, §39.131(c). The commissioner shall quarterly review the need for a master or a management team imposed under subsections (a) or (b) of this section, as required by TEC, §39.131(e). If reviews are required under both TEC, §39.131(c) and (e), a quarterly review under TEC, §39.131(e) may satisfy the annual review under TEC, §39.131(c). An annual or quarterly review is not subject to the requirements of subsections (a) through (e) of this section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 17, 2001.

TRD-200106265

Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Effective date: November 6, 2001
Proposal publication date: July 27, 2001
For further information, please call: (512) 463-9701

♦ ♦ ♦

CHAPTER 100. CHARTERS
SUBCHAPTER AA. COMMISSIONER'S RULES CONCERNING OPEN-ENROLLMENT CHARTER SCHOOLS
DIVISION 1. AMENDMENT AND RENEWAL PROCEDURES AND CRITERIA

19 TAC §100.1011

The Texas Education Agency (TEA) adopts new §100.1011, concerning open-enrollment charter schools, without changes to the proposed text as published in the July 27, 2001, issue of the *Texas Register* (26 TexReg 5562) and will not be republished. In accordance with House Bill (HB) 6, 77th Texas Legislature, 2001, the new section clarifies the status of a charter pending final determination on an application for renewal. Texas Education Code (TEC), §12.116, as amended by House Bill (HB) 6, 77th Texas Legislature, 2001, requires the commissioner of education to adopt a procedure to be used for modifying, placing on probation, revoking, or denying renewal of the charter of an open-enrollment charter school.

The Administrative Procedure Act specifies in Government Code, §2001.054, that a licensee that submits a timely and sufficient application for renewal of the license may continue to enjoy that license until the agency makes a final determination regarding the pending application. This provision applied to open-enrollment charters until HB 6 amended TEC, §12.116, to provide that the renewal of a charter under that section is not governed by the Administrative Procedure Act. To continue in effect the protections of Government Code, §2001.054, new §100.1011 provides that a charter continues in effect pending final determination of an application for its renewal.

No comments were received regarding adoption of the new section.

The new section is adopted under the Texas Education Code (TEC), §12.116, amended by House Bill 6, 77th Texas Legislature, 2001, which authorizes the commissioner of education to adopt a procedure to be used for modifying, placing on probation, revoking, or denying renewal of the charter of an open-enrollment charter school.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 17, 2001.

TRD-200106266

Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Effective date: November 6, 2001
Proposal publication date: July 27, 2001
For further information, please call: (512) 463-9701

♦ ♦ ♦

DIVISION 2. ADVERSE ACTION AND INTERVENTION

19 TAC §§100.1021, 100.1023, 100.1025

The Texas Education Agency (TEA) adopts new §§100.1021, 100.1023, and 100.1025, concerning open- enrollment charter schools, with changes to the proposed text as published in the July 27, 2001, issue of the *Texas Register* (26 TexReg 5562). In accordance with House Bill (HB) 6, 77th Texas Legislature, 2001, the new sections establish the commissioner's rules on adverse action and interventions based on charter violations and the health, safety, or welfare of students. Texas Education Code (TEC), §§12.115, 12.116, and 12.1162, as amended and added by HB 6, requires the commissioner of education to make all decisions on sanctions and to adopt the procedural rules for doing so. The new sections incorporate language from existing State Board of Education (SBOE) rules for adverse action against charters since the authority for this action was transferred to the commissioner by HB 6. The existing SBOE rules for revoking charters will be repealed after the new commissioner's rules take effect.

In response to comments, the following changes have been made to the sections since published as proposed.

Section 100.1021 was modified to specify that a failure to protect the health, safety, or welfare of students must have been determined by the commissioner under §100.1025 as a prerequisite to action under §100.1021(a)(3).

Section 100.1021 was modified to delete subsection (b) entirely, subsequent subsections are renumbered accordingly.

Section 100.1021 was modified by adding a new subsection (c) to require the charter holder to provide notice to parents and guardians by posting the notice required by §100.1021(b) in the manner required for posting a meeting under the Texas Open Meetings Act, Government Code, §§551.043, 551.051, and 551.052.

Section 100.1023 was modified to clarify that state funds, as defined in §100.1061(7), are the funding to be temporarily withheld in an intervention based on charter violations.

Section 100.1025 was modified by adding language to subsection (b) to require that the commissioner must notify the charter holder in writing of action taken.

Section 100.1025 was modified by adding a new subsection (e) to require the charter holder to provide notice to parents and guardians by posting the notice required by §100.1025(b) in the manner required for posting a meeting under the Texas Open Meetings Act, Government Code, §§551.043, 551.051, and 551.052.

Section 100.1025 was modified to state that all funds that would be due the charter holder but for the commissioner's action must be restored if the determination called for by this section is in favor of the charter holder.

The following comments were received regarding adoption of the new sections.

Proposed §100.1021. Adverse Action on an Open-Enrollment Charter.

Comment. An individual asked for clarification or definition of the term "material violation of the contract."

Agency Response. The agency disagrees with the comment. The phrase "material violation of the charter" is taken directly from current law, at Texas Education Code (TEC), §12.115(a)(1). That phrase has been interpreted and applied in a number of contested cases, and has acquired specific meaning through that process. Moreover, "materiality" is a legal concept that is defined and clarified by the common law applicable to proceedings under TEC, §12.115.

Comment. An individual asked for definition of the term "protect" and clarification of the legal obligations of the charter holder. Another individual asked for a definition of "health, safety, and welfare" as used in this section.

Agency Response. The agency agrees that the grounds for action under new TEC, §12.115(a)(3), should be clarified. The section has been amended to specify that a failure to protect the health, safety, or welfare of students must be determined by the commissioner under §100.1025 as a prerequisite to action under §100.1021(a)(3).

Comment. An individual suggested limiting the acts of agents, employees, or contractors for which charter holders could be held responsible under proposed §100.1021(b) to acts "within the scope of their employment." Another individual asked for definition of the term "acts" stating that this use appeared very general. Another individual asked if responsibility for acts of agents, employees, or contractors extends only to acts of which the charter holder is aware, or goes beyond these. Another individual asked for clarification of the scope of responsibilities covered by this section. Another individual suggested that the language be changed to read, "acts related to charter business." Another individual asked if a volunteer is considered an agent under this section and, if so, asked for a definition of that term. Another individual requested clarification of the misconduct covered under this section. Another individual asked for a definition of the term "agent" as used in this section. Another individual questioned the application of this section to any agent, employee, or contractor of the charter school, since the charter holder could not control the acts of these persons. Another individual asked whether independent school districts have similar requirements.

Agency Response. The agency agrees that proposed §100.1021(b) is unnecessary and confusing, and has revised the section by deleting subsection (b) entirely. Proposed §100.1021(b) was based on 19 TAC §100.101(b), which was adopted by the State Board of Education to clarify that the "person operating the charter school" (as used in TEC, §12.115(a)) was the chief operating officer (CEO) of the charter holder. That rule further provided that the CEO was responsible for the acts of any agent or employee of the charter school or the charter holder. This clarification was necessary to resolve an ambiguity between TEC, §12.101 and §12.115, but that ambiguity was removed in HB 6 by replacing the phrase, "person operating the charter school" with the defined term, "charter holder."

Comment. A representative of a state organization encouraged the commissioner to use the powers given to him by HB 6 to strengthen the charter school movement. Another organization supported the provisions, which give the commissioner the ability to move more quickly in the case of a failing charter school.

Agency Response. No response required.

Comment. An individual asked if the charter school would be required to notify parents when the commissioner begins an adverse action, and whether the Texas Education Agency is required to notify the State Board of Education and public officials.

Agency Response. The agency agrees that the charter holder should provide notice to parents and guardians under TEC, §12.116(b). The rule has been modified by adding a new subsection (c) to require the charter holder to provide such notice by posting the notice required by §100.1021(b) in the manner required for posting a meeting under the Texas Open Meetings Act, Government Code, §§551.043, 551.051, and 551.052. The agency is not required to notify public officials of such action. (Compare TEC, §12.1101 ("Notification of Charter Application"), which does require such notice in another context.)

Comment. An individual suggested the deadline for requesting a hearing be extended beyond ten calendar days. Another individual suggested that the deadline for requesting a hearing be ten instructional or ten working days. Another individual stated that the deadline of ten calendar days for requesting a hearing appeared adequate. Another individual requested more than six calendar days for filing exceptions. Another individual suggested that the deadline for filing exceptions be 30 calendar days and that the replies to the exceptions be filed on or before 50 calendar days. Another individual suggested that business days be used instead of calendar days.

Agency Response. The agency disagrees with comments suggesting that the minimum timelines for litigating sanctions under TEC, §12.115, be lengthened. A primary concern expressed during the debate on HB 6 was the length of time required to revoke the charters of schools failing to meet state standards. The proposed timelines are taken from rules adopted by the State Board of Education for litigating cases under TEC, §12.115, and those rules were used successfully in a number of cases.

Comment. An individual asked how the phrase "may order" as used by the administrative law judge would be interpreted. Specifically, does this mean that the judge may allow written testimony? Does it preclude oral testimony?

Agency Response. The rule gives the administrative law judge discretion to limit any evidence offered by parents and guardians to pre-filed written testimony. It does not affect any evidence offered by the charter holder or by the agency, which may include oral testimony by parents or guardians of students at the school.

Proposed §100.1023. Intervention Based on Charter Violations.

Comment. An individual asked for a definition of the term "material violation." An organization requested the same.

Agency Response. The agency disagrees with the comment. The phrase "material violation of the charter" is taken directly from current law, at TEC, §12.115(a)(1). That phrase has been interpreted and applied in a number of contested cases, and has acquired specific meaning through that process. Moreover, "materiality" is a legal concept that is defined and clarified by the common law applicable to these proceedings.

Comment. An organization requested revisions to strengthen procedural protections, including a longer notice period, a requirement for notice by certified mail, and a process to appeal investigative findings.

Agency Response. The agency disagrees with the comment. Proposed new 19 TAC Chapter 97, Subchapter DD ("Procedures for Investigative Reports and Sanctions"), strengthens those protections and provides a process to appeal investigative findings. (See also 2001 Accountability Manual, Section VIII ("System Safeguards"), adopted by reference at Title 19, Texas Administrative Code, §97.1002 ("Adoption by Reference: Standard Procedures").)

Proposed §100.1025. Intervention Based on Health, Safety, or Welfare of Students.

Comment. An individual suggested that examples of severe problems be provided.

Agency Response. The agency cannot provide a list of circumstances that might endanger the health, safety, or welfare of public school students. Rather, TEC, §12.1162(b), provides a standard for commissioner action under inherently exigent circumstances. The agency believes that a list of examples would not significantly enhance the clarity of this standard, and could create confusion instead.

Comment. An individual asked whether the charter holder would receive all funds due if the charter holder prevailed in the hearings held under this section.

Agency Response. The agency agrees that the rule is not clear enough on this point. The rule has been modified to state that all funds that would be due the charter holder but for the commissioner's action must be restored if the determination called for by this section is in favor of the charter holder.

Comment. An individual asked whether notice of any suspension and hearing would be provided to parents, legislators, and the public. An individual asked who would be responsible for expenses incurred if notice is required. An organization requested language requiring notification of suspension of funds and of the public hearing on the suspension to parents of charter students, legislators representing the area, and school district board members and superintendents in the area served by the charter.

Agency Response. The agency agrees that the charter holder should provide notice to parents and guardians of an action under §100.1025. The rule has been modified by including language in subsection (b) that the commissioner must provide written notification to the charter holder of action taken and by adding a new subsection (e) to require the charter holder to provide such notice by posting the notice required by §100.1025(b) in the manner required for posting a meeting under the Texas Open Meetings Act, Government Code, §§551.043, 551.051, and 551.052.

Comment. An organization requested an addition to subsection (d) to provide an opportunity at the hearing for individuals notified under §100.1025 to provide oral and/or written testimony.

Agency Response. The agency disagrees with the comment. Unlike TEC, §12.116(b), TEC, §12.1162, contains no provision for parents or guardians to provide testimony. However, nothing prevents either the charter holder or the agency from offering such evidence in support of their case.

Comment. An organization requested revisions to strengthen procedural protections, including a longer notice period, a requirement for notice by certified mail, and a process to appeal investigative findings.

Agency Response. The agency disagrees with the comment. Proposed new 19 TAC Chapter 97, Subchapter DD ("Procedures for Investigative Reports and Sanctions"), strengthens those protections and provides a process to appeal investigative findings. (See also 2001 Accountability Manual, Section VIII ("System Safeguards"), adopted by reference at Title 19, Texas Administrative Code, §97.1002 ("Adoption by Reference: Standard Procedures").) In addition, at the sole discretion of the charter holder, the rule as proposed provides for the full hearing applicable to action under TEC, §12.115.

The new sections are adopted under the Texas Education Code (TEC), §12.1162, added by House Bill 6, 77th Texas Legislature, 2001, which authorizes the commissioner of education to adopt rules to implement procedures on adverse action and interventions based on charter violations and the health, safety, or welfare of students.

§100.1021. Adverse Action on an Open-Enrollment Charter.

(a) The commissioner of education may modify, place on probation, revoke, or deny renewal of an open- enrollment charter if the commissioner determines the charter holder:

(1) committed a material violation of the charter;

(2) failed to satisfy generally accepted accounting standards of fiscal management;

(3) failed to protect the health, safety, or welfare of the students enrolled at the school, as determined by the commissioner under §100.1025 of this title (relating to Intervention Based on Health, Safety, or Welfare of Students); or

(4) failed to comply with the requirements of the Texas Education Code (TEC), Chapter 12, Subchapter D, or other applicable state and/or federal law or rule.

(b) The commissioner shall notify the charter holder before modifying, placing on probation, revoking, or denying renewal of the school's charter. The notice shall clearly specify the following, either in the notice or by reference to other documents included with the notice:

(1) the action sought and the grounds for taking such action;

(2) the date, time, and place for a hearing on the action sought, which shall be provided to the charter holder and to parents and guardians of students in the school, if requested in accordance with subsection (e) of this section;

(3) a statement of the legal authority and jurisdiction under which the hearing will be held; and

(4) a reference to the particular sections of the statutes and rules involved.

(c) The charter holder shall notify the parents and guardians of students in the school by posting the notice described in subsection (b) of this section, and any amendment to such notice, in the manner required by Texas Government Code, §§551.043, 551.051, and 551.052. Notwithstanding any failure by the charter holder to comply with this subsection, notice to the charter holder shall be notice to parents and guardians of students in the school, and the commissioner may conduct the hearing.

(d) Within ten calendar days after receiving the notice, the charter holder may request a hearing and submit a written response to the commissioner containing specific answers to each of the findings included in the notice. If a request for hearing and a written response are not submitted within ten calendar days, the recommendations of the Texas Education Agency (TEA) on the proposed action shall be submitted to the commissioner for consideration.

(e) A hearing held under this section shall be governed by Chapter 157, Subchapter AA, of this title (relating to General Provisions for Hearings Before the Commissioner of Education), except as provided herein. The hearing shall be open to the public and must be held at the facility at which the program is operated unless a different location is agreed to by the charter holder and TEA. The hearing shall be held not fewer than ten calendar days from the date the school receives notice.

(f) Exceptions to a proposal for decision under this section shall be filed on or before the expiration of six calendar days from the date of the proposal for decision. Replies to the exceptions shall be filed on or before the expiration of ten calendar days from the date of the proposal for decision.

(g) A motion for rehearing is not a prerequisite to any judicial appeal authorized by law. No finding of imminent peril is required. No motion for rehearing shall toll or delay any applicable time period or deadline.

(h) The administrative law judge may order that testimony and evidence from parents and guardians of students at the school be taken via prefiled written testimony.

§100.1023. Intervention Based on Charter Violations.

(a) The commissioner of education shall temporarily withhold state funds, suspend the authority of an open- enrollment charter school to operate, impose a sanction under Texas Education Code, §39.131(a), and/or take any other reasonable action the commissioner determines necessary, if the commissioner determines that a charter holder:

(1) committed a material violation of the school's charter;

(2) failed to satisfy generally accepted accounting standards of fiscal management; or

(3) failed to comply with this subchapter or another applicable rule or law.

(b) A determination under this section shall be made under Chapter 97, Subchapter DD, of this title (relating to Procedures for Investigative Reports and Sanctions).

§100.1025. Intervention Based on Health, Safety, or Welfare of Students.

(a) The commissioner of education may temporarily withhold state funds, suspend the authority of an open- enrollment charter school to operate, and/or take any other reasonable action the commissioner determines necessary to protect the health, safety, or welfare of students enrolled at the school based on evidence that conditions at the school present a danger to the health, safety, or welfare of the students.

(b) The commissioner must notify the charter holder in writing of the action taken in subsection (a) of this section. After the commissioner acts under subsection (a), the open-enrollment charter school may not receive state funds and may not resume operating until a determination is made that:

(1) despite initial evidence, the conditions at the school do not present a danger of material harm to the health, safety, or welfare of students; or

(2) the conditions at the school that presented a danger of material harm to the health, safety, or welfare of students have been corrected.

(c) Not later than the third business day after the date the commissioner acts under subsection (a) of this section, the commissioner shall provide the charter holder an opportunity for a hearing.

(d) The hearing under this section may be conducted under the procedures governing informal review of a preliminary investigative report specified in §97.1033 of this title (relating to Informal Review of Preliminary Investigative Report; Final Investigative Report) or, at the request of the charter holder, may be conducted under Chapter 157, Subchapter AA, of this title (relating to General Provisions for Hearings Before the Commissioner of Education).

(e) The charter holder shall notify the parents and guardians of students in the school by posting the notice described by subsection (b) of this section, and any amendment to such notice, in the manner required by Texas Government Code, §§551.043, 551.051, and 551.052. Notwithstanding any failure by the charter holder to comply with this subsection, the commissioner may conduct the hearing.

(f) An action under subsection (a) of this section remains in effect until a determination under subsection (b) of this section becomes final under the procedures elected by the charter holder under subsection (d) of this section.

(1) If the determination is in favor of the charter holder, the commissioner must cease the action under subsection (a) of this section immediately and restore all funds to which the charter holder would be entitled but for such action.

(2) If the determination is against the charter holder, the commissioner must initiate adverse action against the charter under §100.1021 of this title (relating to Adverse Action on an Open- Enrollment Charter). The action under subsection (a) of this section then remains in effect until the final decision under §100.1021.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 17, 2001.

TRD-200106267
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Effective date: November 6, 2001
Proposal publication date: July 27, 2001
For further information, please call: (512) 463-9701

DIVISION 3. CHARTER SCHOOL FUNDING

19 TAC §100.1041

The Texas Education Agency (TEA) adopts new §100.1041, concerning open-enrollment charter schools, with changes to the proposed text as published in the July 27, 2001, issue of the *Texas Register* (26 TexReg 5564). In accordance with House Bill (HB) 6, 77th Texas Legislature, 2001, the new section revises the manner in which state funds are allocated to open-enrollment charter schools. Texas Education Code (TEC), §12.106, as amended by House Bill (HB) 6, 77th Texas Legislature, 2001, establishes that the commissioner of education may adopt rules to provide and account for state funding of open-enrollment charter schools. The new section also provides clarification regarding the status and use of state funds and provisions relating to depository contracts.

In the 74th Regular Session of the Texas Legislature, 1995, open-enrollment charter schools were authorized and a method

for funding them was adopted. The formula calculations for funding utilized state and local revenue amounts to which each student's home district had access. The 77th Texas Legislature, 2001, revised the method of funding open-enrollment charters and replaced data elements attributable to the home district with state average data, beginning with charter schools that open after September 1, 2001. The new section specifies the revised method of funding. Specifically, the revised formulas incorporate the state average adjusted allotment in first tier calculations and a state average tier II enrichment tax rate in the guaranteed yield calculation for the second tier. A systematic method for making the transition from the previous method of computing allocations to the revised method was also provided in statute, depending upon when the charter school became operational.

In response to comments, the following changes have been made to the section since published as proposed.

Section 100.1041 was modified to add clarification relating to the use of state funds. Language added to this section was removed from proposed §100.1063 and relocated to §100.1041 to remove confusion that resulted from mixing the use of property acquired with state funds and the use of state funds that was presented in the proposal.

Other technical edits were made throughout the section to comply with Texas Register style and formatting requirements.

The following comments were received regarding adoption of the new section.

Comment. An individual requested that a minimum of 50 students be required before a charter holder could receive state funds. An organization suggested language requiring minimum attendance of 50 students as of September 1, 2001, to qualify as operating and to receive funding based on the old formulas.

Agency Response. The agency disagrees with the comments. The charter holder is entitled by TEC, §12.106, to state funding for all students in attendance, as authorized by the contract for charter and all applicable laws and rules. A minimum student enrollment has been adopted by the State Board of Education at 19 TAC §100.1(i), Application and Selection Procedures and Criteria.

The new section is adopted under the Texas Education Code (TEC), §12.106, amended by House Bill (HB) 6, 77th Texas Legislature, 2001, which authorizes the commissioner of education to adopt rules to provide and account for state funding of open-enrollment charter schools.

§100.1041. State Funding.

(a) Funding formula elements. An open-enrollment charter school is entitled to funding from both tiers of the Foundation School Program (FSP) in accordance with the funding formulas for school districts pursuant to Texas Education Code (TEC), Chapter 42.

(1) Tier I program allocations are determined by substituting the statewide average adjusted allotment in place of the district's calculated adjusted allotment. The state average adjusted allotment takes into account the cost of education index and the small, mid-size, and sparsity adjustments specified in TEC, §§42.102, 42.103, 42.104, and 42.105. It is computed by dividing the state total cost for the regular education program by the number of students in the state counted in attendance in a regular education program in accordance with TEC, §42.101.

(2) An allocation for the guaranteed yield allotment for Tier II of the FSP is determined by substituting a statewide average enrichment tax rate in place of the district's calculated enrichment tax rate (DTR) pursuant to TEC, §42.302. The state average tax rate is computed by first summing the Maintenance and Operations tax collections up to its DTR maximum limit for each district in the state and then dividing that result by the sum of all district property values as defined in TEC, §42.252.

(3) The new formula elements described in this subsection will take effect for open-enrollment charter schools that begin operation in the 2001-2002 school year or later. Open-enrollment charter schools that report attendance that occurs prior to September 2, 2001, are considered to be in operation on September 1, 2001, and will be funded as described in House Bill 6, Section 40(b), 77th Texas Legislature, 2001. Open-enrollment charter schools that report no attendance that occurs prior to September 2, 2001, are considered to begin operation in the 2001-2002 school year or later, and will be funded according to this subsection and TEC, §12.106.

(b) Status and use of state funds.

(1) State funds received by a charter holder are public funds for all purposes under state law, and may be used only for a purpose for which a school district may use local funds under TEC, §45.105(c). Any other use or application of such funds constitutes misuse and misapplication of public funds and is subject to the civil and criminal laws governing misuse or misapplication of Texas public funds.

(2) State funds received by a charter holder are held by the charter holder in trust for the benefit of the students of the open-enrollment charter school. In their use of public funds, the governing body of a charter holder, and the governing body and officers of an open-enrollment charter school, shall be held to the standard of care and fiduciary duties that a trustee owes a beneficiary under Texas law.

(c) Depository contract. Pending their use, state funds received by a charter holder must be deposited into a bank with which the charter holder has entered into a depository contract. Each year within the period prescribed for the information required by TEC, §12.119(b), the charter holder must file a copy of the depository contract with the agency.

(1) State funds received by a charter holder must be deposited into an account owned and controlled by the charter holder pending their use. Once properly deposited, the charter holder may immediately use the funds for any purpose described in subsection (b)(1) of this section, subject to the standard of care and fiduciary duties described in subsection (b)(2) of this section.

(2) A "bank" is defined by TEC, §45.201. Although the term excludes a bank the deposits of which are not insured by the Federal Deposit Insurance Corporation (FDIC), deposits exceeding FDIC-insured amounts need not be collateralized for the institution to constitute a "bank" under this subsection.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 17, 2001.

TRD-200106268

Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Effective date: November 6, 2001
Proposal publication date: July 27, 2001
For further information, please call: (512) 463-9701

♦ ♦ ♦

DIVISION 4. PROPERTY OF OPEN-ENROLLMENT CHARTER SCHOOLS

19 TAC §§100.1061, 100.1063, 100.1065, 100.1067, 100.1069

The Texas Education Agency (TEA) adopts new §§100.1061, 100.1063, 100.1065, and 100.1067, concerning open-enrollment charter schools, with changes to the proposed text as published in the July 27, 2001, issue of the *Texas Register* (26 TexReg 5565). Section 100.1069 is adopted without changes to the proposed text as published in the July 27, 2001, issue of the *Texas Register* (26 TexReg 5565) and will not be republished. In accordance with House Bill (HB) 6, 77th Texas Legislature, 2001, the new sections implement new statutory requirements relating to property acquired by a charter holder with state funds. Texas Education Code (TEC), §12.128, establishes that the commissioner may adopt rules relating to property purchased or leased with state funds by open-enrollment charter schools.

TEC, §12.128, as added by HB 6, changes the character of property acquired using state funds from private property to public property. The new sections interpret new TEC, §12.128, concerning the meaning of "public property" under the new provision, what property is considered "public," and the character of property acquired before the effective date of HB 6. The new sections clarify that the charter holder is full owner of the property while it operates an open-enrollment charter school. The sections also require that the charter holder keep contemporaneous records of property acquired using state funds and create a "safe harbor" for all property that is properly accounted for during the life of the charter. The additional records are required to be an "exhibit" to the financial statements that charters currently maintain.

In response to comments, the following changes have been made to the sections since published as proposed.

Section 100.1061(7) was modified to clarify that the definition of "state funds" includes federal funds to the extent permitted by federal law.

Section 100.1061 was modified by adding new paragraphs (8) and (9) to add a definition of state funds received on or after September 1, 2001, and a definition of state funds received before September 1, 2001.

Section 100.1061 was modified to clarify that the property defined in renumbered paragraph (10) refers to property that is acquired, improved, or maintained.

The headings for several sections within Division 4 were revised to clarify the intent of those sections.

Section 100.1063 was modified to clarify that TEC, §12.128(a)(2), provides that the public property held by a charter holder are held in constructive trust for the benefit of the students enrolled in the charter school, and to clarify that this heightens the fiduciary obligations owed by board members and officers of a charter school.

Section 100.1063 was modified to clarify that the charter holder may use public property only to implement a program described and approved in its contract for charter.

Section 100.1063 was modified by removing subsection (f), respecting the depositing of funds into a depository bank, from Division 4 ("Property of Open-Enrollment Charter Schools") and adding it to Division 3 ("Charter School Funding"), with conforming and clarifying changes.

Sections 100.1063, 100.1065, and 100.1067 were modified to clarify how they apply to property acquired, improved, or maintained partly using public funds and partly using other funds.

Sections 100.1063, 100.1065, and 100.1067 were modified to clarify provisions related to accounting for public property.

Section 100.1065 was modified to clarify provisions related to non-public property and public property.

Section 100.1067 was modified to clarify provisions related to the possession and control of public property and to clarify that the provisions apply only in proportion to the amount of state funds expended to acquire, improve, or maintain the property, with conforming and clarifying changes.

Other technical edits were made throughout the sections to comply with Texas Register style and formatting requirements.

The following comments were received regarding adoption of the new sections.

Proposed §100.1061. Definitions.

Comment. An individual questioned why "cash" is considered personal property in paragraph (5)(D).

Agency Response. The agency disagrees with the comment, because excluding cash from the coverage of TEC, §12.128, would defeat its purpose. However, the agency agrees to the extent that proposed §100.1063(f), regarding the depositing of funds into a depository bank, does not belong within Division 4 ("Property of Open- Enrollment Charter Schools"). These provisions from proposed §100.1063(f) have been moved to Division 3 ("Charter School Funding"), with conforming and clarifying changes.

Comment. An individual asked whether the definition and requirements for former charter holders could be applied retroactively.

Agency Response. TEC, §12.1071(a), provides that existing charter holders may avoid the application of any provision of HB 6 to a transaction occurring before September 1, 2001, by refusing to accept state funds after the effective date of that provision. Thus, a charter holder that accepts state funds after September 1, 2001, is subject to TEC, §12.128, including the rules implementing that section. But a charter holder that accepts no state funds after September 1, 2001, is not bound by TEC, §12.128, or these rules. This could be the case where, for example, a charter was revoked or returned and the charter holder never accepted any state funds after September 1, 2001.

Proposed §100.1063. Property Acquired with State Funds After September 1, 2001.

Comment. An individual asked for definition of the term "acquired after September 1, 2001."

Agency Response. The agency agrees with the comment in part, and disagrees in part. The agency has modified §100.1061 to add a definition of "state funds received on or after September 1,

2001," and a definition of "state funds received before September 1, 2001." In addition, the headings for several sections in Division 4 have been revised to clarify the intent of those sections. The date on which a property interest is "acquired" is not relevant to TEC, §12.128, or to the proposed rule. The September 1 date is used in comparable fashion in at least three places in HB 6: TEC, §§12.107 ("Status and Use of State Funds"), 12.1071 ("Effect of Accepting State Funding"), and 12.128 ("Property Purchased or Leased with State Funds"). In each case, HB 6 makes the date on which a charter holder accepts state funds a trigger for determining whether a new legal obligation imposed in HB 6 applies to that charter holder. This triggering date, September 1, 2001, is the effective date of the new law. HB 6 consistently uses the decision of the charter holder to continue accepting state funds after this date to determine whether new provisions apply to it.

Comment. An individual asked how the term "acquired after September 1, 2001" would be applied to property purchased with a loan repaid with funds received after September 1, 2001.

Agency Response. As noted previously, the date on which a property interest is acquired is not relevant to TEC, §12.128, or to the proposed rule. Under the rule as proposed, using state funds received on or after September 1, 2001, to repay a loan will subject any property acquired through that loan to §100.1063. (See §100.1061(8).)

Comment. An organization asked that property acquired using state funds include loans that are expected to be paid using state funds received in the future.

Agency Response. The agency disagrees with the comment. Under the rule as proposed, if any state funds received after September 1, 2001, are in fact used to repay a loan, then any property acquired through that loan is subject to §100.1063. However, the mere expectation of using such funds is not relevant to TEC, §12.128. If another source of funds were used instead, §100.1063 would not apply to the property.

Comment. An individual asked if property in trust is considered "acquired."

Agency Response. Yes. Whatever rights or benefits accrue to the charter holder by virtue of the use of state funds is subject to §100.1063. Thus, any benefits enjoyed by the charter holder as the trustee of a trust established using state funds are "acquired" with state funds within the meaning of proposed §100.1061(8).

Comment. An individual asked whether the equity position of the charter holder prior to September 1, 2001, is retained. §Agency Response. Under proposed §100.1063(b), the charter holder retains all of its property unless or until it is seized under §100.1067. However, the beneficial use of an "equity position" - in the sense of real property - acquired using 50% or more public funds received prior to September 1, 2001, is subject to the requirements set forth in the remainder of §100.1067. An "equity position" - in the sense of stocks or other securities - would be excluded by proposed §100.1065(a), because it is personal property. Also note that, when the charter holder ceases to operate, §100.1067 provides that the commissioner must take possession and assume control of any real estate equity acquired with funds received on or after September 1, 2001, but not real estate equity acquired with funds received before that date.

Comment. An individual asked whether the requirements related to misuse or misapplication of public property included notice and bidding requirements.

Agency Response. This comment may be more appropriately directed toward a rule under TEC, §12.107(a)(3), than toward a rule under TEC, §12.128(a)(2). The restrictions imposed by new TEC, §12.1053 ("Applicability of Laws Relating to Public Purchasing and Contracting") cannot be applied to property that is subject to the proposed rule, because that property has already been acquired - either using required procedures or otherwise. Even property that has been acquired with public funds using an improper procedure is subject to TEC, §12.128. It is conceivable that failure to comply with TEC, §12.1053, in purchasing property may constitute a violation of TEC, §12.107, but this question is outside the scope of the rule.

Comment. An individual suggested deleting the second sentence in subsection (d) referring to the fiduciary duties and responsibilities of the governing body of a charter school and the governing body and officers of an open- enrollment charter school. Another individual disagreed with this suggestion. Another individual stated that the second sentence in subsection (d) broadened liability too much. Another individual expressed concern that subsection (d) includes "officers" of the open-enrollment charter school.

Agency Response. The agency disagrees with the comments suggesting that the second sentence of proposed subsection (d) be eliminated or narrowed. The agency interprets TEC, §12.128(a)(2) and §12.107(a)(2), to provide that the board members and officers of a charter school hold public funds and public property in constructive trust for the benefit of the students enrolled in the charter school. The heightened fiduciary obligations imposed by these provisions are clearly intended. The provisions in subsection (d) have been modified and moved to adopted §100.1041 to clarify this legislative intent.

Comment. An individual asked for a definition of the allowable uses of public property.

Agency Response. In contrast to TEC, §12.107(a)(3) (relating to use of public funds), TEC, §12.128(a)(3), provides only general guidance respecting the purposes for which a charter holder may use public property. The agency has modified and relocated the provisions in proposed §100.1063(e) to clarify that the charter holder may use public property only to implement a program described and approved in its contract for charter. For example, public funds may not be used to operate unapproved grade levels or campuses, or to serve students from outside the geographic area (and transfer areas) approved in the charter. Even where a program is clearly described in the charter, the heightened fiduciary obligations under proposed §100.1063(d) have important implications for the kind of expenditures that may be advisable for the governing board or officers to approve in pursuit of that program. The provisions in proposed §100.1063(d) have been moved to §100.1041(d) consistent with the effort to arrange rules related to the status and use of state funds in Division 3.

Comment. An organization suggested that the purposes for which state funds may be used should be clarified to include purposes approved in a charter or by the commissioner.

Agency Response. The agency disagrees with this comment. TEC, §12.107(a)(3), specifically provides the purposes for which state funds may be used, and the rule cannot contradict the statute. This comment may have been intended to deal with TEC, §12.128(a)(3), which does not provide such a clear standard. As noted previously, the agency has revised proposed

§100.1063(e) and moved provisions to other appropriate subsections to clarify that the charter holder may use public property only to implement a program described and approved in its contract for charter. A similar clarification will be made relative to the use of state funds. In addition, the agency believes that the placement of proposed subsection (f) (regarding the depositing of funds into a depository bank) within Division 4 ("Property of Open-Enrollment Charter Schools") is confusing. These provisions have been moved to Division 3 ("Charter School Funding"), with conforming and clarifying changes.

Comment. An individual asked how this section affected a church that rented property to a charter school.

Agency Response. The rule imposes no obligation on the church as a third-party lessor, but imposes stringent standards on the charter holder as lessee. Specifically, the standard of care and other duties owed by the members of the governing body and the officers of the charter holder are the fiduciary duties owed by a trustee acting on behalf of the beneficiaries of a trust. So, for example, where an individual board member or officer of the charter holder has an interest or an official position in the church/lessor, that individual must comply not only with the applicable requirements of TEC, §12.1054 ("Applicability of Laws Relating to Conflict of Interest"), but also with these common-law duties. These duties may be irreconcilable with a transaction that is permissible under TEC, §12.1054.

Comment. An individual asked for clarification that the requirements for a depository contract applied only to state funds.

Agency Response. The agency disagrees with the comment. All funds received by the charter holder by virtue of TEC, §12.106, are public funds within the meaning of the proposed rule. This includes all grant and discretionary funding received by virtue of the entitlement to receive public funds, and all federal funds, except to the extent that application of TEC, §12.107 and §12.128, or rules under those sections, would conflict with a federal law or regulation. As noted previously, these provisions relating to depository contracts have been moved to Division 3 ("Charter School Funding"), with conforming and clarifying changes. In addition, the definition of "state funds" in proposed §100.1061(7) has been amended to clarify the intent of the rule, including the specification regarding federal funds.

Comment. An individual asked whether the Texas Education Agency would supply a form to be used for the depository contract.

Agency Response. Unlike the form required to be used by school districts (see 19 TAC §109.52(b)), there is no mandatory form for a depository contract that would satisfy the requirement of TEC, §12.107(a)(4) and (b). However, the agency may develop a sample form.

Comment. An individual asked whether these rules would apply to any property purchased with federal funds.

Agency Response. Yes. All funds received by the charter holder by virtue of TEC, §12.106, are public funds within the meaning of the proposed rule. This includes all grant and discretionary funding received by virtue of the entitlement to receive public funds, and all federal funds, except to the extent that application of TEC, §12.107 and §12.128, or rules under those sections, would conflict with a federal law or regulation. The definition of "state funds" in §100.1061(7) has been modified to clarify the intent of the rule.

Comment. An organization supports the position that resources purchased with state funds belong to the state. Another organization supports holding board members accountable for fulfilling their fiduciary responsibilities.

Agency Response. No response required.

Proposed §100.1065. Property Acquired with State Funds Before September 1, 2001.

Comment. An individual suggested that "acquired" be interpreted as acquired by mortgage before September 1, 2001.

Agency Response. The agency disagrees with the comment. Section 100.1061 has been modified to add a definition of "state funds received on or after September 1, 2001," and a definition of "state funds received before September 1, 2001." In addition, the headings for several sections have been revised to clarify the intent of those sections. As noted previously, the date on which a property interest is "acquired" is not relevant to TEC, §12.128, or to the proposed rule. If any state funds "received" on or after September 1, 2001, are included in payments made on the mortgage, that property is subject to the rules governing public property. Those rules take into account the proportion of state funds to other funds paid. They have been modified to clarify the intent of the rules with respect to this issue.

Comment. An individual suggested that "purchased" be defined from the day the charter school received the title to property as opposed to the date the funds were received by the charter school.

Agency Response. The agency disagrees with the comment. As noted previously, the date on which a property interest is purchased is not relevant to TEC, §12.128, or to the proposed rule. Under §100.1065, using state funds received on or after September 1, 2001, to gain title to property subjects that property to the rules governing public property. Those rules, as proposed, take into account the proportion of state funds to other funds paid. They have been modified to clarify the intent of the rules with respect to this issue.

Comment. An individual asked how a down payment would be interpreted in terms of property acquired with 50% of more state funds in proposed subsection (c).

Agency Response. Personal property acquired using funds received before September 1, 2001, is not public property, and so a down payment on personal property would yield the same result. Where real property is concerned, the down payment would be included in determining the total amount of funds expended to acquire the real property interest, and the proportion of state funds included in the total. In addition, however, a down payment often secures valuable rights by itself, such as the payment accompanying an earnest-money contract, an option contract or a right of first refusal. If any type of interest in real property is acquired using 50% or more state funds, then the interest is public property.

Comment. An organization suggested a revision to provide that if the property was purchased, leased, or acquired prior to September 1, 2001, the state has no interest unless 50% of the funds used prior to September 1, 2001, were state funds.

Agency Response. The agency disagrees with the comment. As noted previously, the date on which a property interest is purchased, leased, or acquired is not relevant to TEC, §12.128, or to §100.1065. Under §100.1065, using state funds received on or after September 1, 2001, to pay for, improve, maintain, or

pay taxes on property subjects that property to the restrictions governing public property. It is not relevant that the property may have been purchased, leased, or acquired before that date. The rule, as proposed, takes into account the proportion of state funds to other funds. However, it has been modified to clarify the intent of HB 6 with respect to pro-rata funding.

Proposed §100.1067. Property of a Former Charter Holder.

Comment. An individual suggested changes to clarify that the commissioner will take possession of property of a former charter holder to the extent purchased with state funds.

Agency Response. The agency agrees that the rules are not sufficiently clear in this respect. As proposed, §100.1063(g) provides that proposed §100.1067 applies to property only to the extent it was purchased with state funds, except that the exhibit required by proposed §100.1067(c) must include the property. However, proposed §100.1067(c) has been rewritten and moved to adopted §100.1063. In addition, the rules have been modified to clarify (1) that the section containing accounting requirements applies to all property acquired in part using state funds, but (2) that the seizure process will apply only in proportion to the amount of state funds expended to acquire the property. Other conforming changes have been made.

Comment. An individual asked for clarification that personal property acquired before September 1, 2001, would be retained by the former charter holder. An individual inquired about the reference to personal property of the former charter holder partly acquired using state funds.

Agency Response. The agency agrees that the rules are not sufficiently clear in this respect. As proposed, §100.1065(a) provides that proposed §100.1067 does not apply to personal property, except that the exhibit required by proposed §100.1067(c) must include the property. However, proposed §100.1067(c) has been rewritten and moved to adopted §100.1063. In addition, the rules have been modified to clarify (1) that the section containing accounting requirements applies to all property acquired in part using state funds, but (2) that the seizure process will not apply to personal property acquired with funds received before September 1, 2001. Other conforming changes have been made.

Comment. An individual commented that the section regarding the annual audit report exhibit appears to be misplaced since it refers to all charter holders not just former charter holders.

Agency Response. The agency agrees that the rules are not sufficiently clear in this respect. Proposed §100.1067(c) has been rewritten and moved to adopted §100.1063. Other conforming changes have been made.

Comment. An individual asked whether this section could be applied retroactively.

Agency Response. TEC, §12.1071(a), provides that existing charter holders may avoid the application of any provision of HB 6 to a transaction occurring before September 1, 2001, by refusing to accept state funds after the effective date of that provision. Thus, a charter holder that accepts state funds after September 1, 2001, is subject to TEC, §12.128, including the rules implementing that section. But a charter holder that accepts "no" state funds after September 1, 2001, is not bound by TEC, §12.128, or these rules. This could be the case where, for example, a charter was revoked or returned and the charter holder never accepted any state funds after September 1, 2001.

Comment. An individual asked for clarification of the requirements for fixed assets and capitalized personal property in reference to subsection (c).

Agency Response. The agency agrees that further detail is needed pertaining to the audit standards governing the exhibit required by proposed §100.1067(c). These audit standards must be defined in time for application to the current fiscal year. Audited financial reports for the current fiscal year are due to be submitted to the agency in December 2002. Rules setting forth such financial standards and audit requirements under TEC, §12.101(b) and §12.106(c), will be included in another filing.

Comment. An organization suggested an addition to include language providing that failure of the commissioner to reject an annual audit in whole or part within 90 days of receipt operates as a waiver of objections for purposes of this section.

Agency Response. The agency disagrees with the comment. TEC, §44.008, makes no provision for a waiver of the commissioner's duty under that section. Adopting such a requirement by rule could defeat the purpose of such review in some cases. Proposed §100.1067 has been amended to clarify that the commissioner may determine compliance with §100.1063(f) at any time, and to provide a method for curing defects in the exhibits required by that section.

Proposed §100.1069. Rights and Duties Not Affected.

Comment. An individual asked whether the commissioner would take a position on foreclosures in terms of property purchased with public dollars.

Agency Response. Under proposed §100.1063(b), the state is not the owner of any property held by an operating charter holder. Consequently, the state has no immediate interest in a foreclosure on the property of an operating charter. TEC, §12.128(e), as implemented by §100.1069, underscores this point. Under TEC, §12.128(c), however, the commissioner must take possession and assume control of public property held by a "former" charter holder. After such an action, the state may be the real party in interest in any foreclosure proceedings affecting property controlled by the commissioner. In this case, the commissioner may well take positions in such proceedings through the Texas Attorney General.

The new sections are adopted under the Texas Education Code (TEC), §12.128, added by House Bill 6, 77th Texas Legislature, 2001, which authorizes the commissioner of education to adopt rules relating to property purchased or leased with state funds by open-enrollment charter schools.

§100.1061. Definitions.

The following words and terms, when used in this subchapter, shall have the following meaning, unless the context clearly indicates otherwise.

(1) Charter holder, governing body of a charter holder, governing body of an open-enrollment charter school, and officer of an open-enrollment charter school--The definitions of these terms are assigned in Texas Education Code (TEC), §12.1012.

(2) Former charter holder--An entity that is or was a charter holder, but that has ceased to operate because the charter has been revoked, surrendered, or denied renewal, or because all programs have been ordered closed under TEC, §39.131(a)(10). A charter holder whose authority to operate has been suspended under TEC, §12.1162, is not a former charter holder.

(3) Real estate--An interest, including a lease interest, in real property recognized by Texas law, or in improvements such as buildings, fixtures, utilities, landscaping, or other improvements.

(4) Lease interest--The legal rights obtained under a lease. These include the right to occupy, use, and enjoy the real estate given by the property owner in exchange for rental payments or other consideration specified in the lease, together with any associated rights that the lease confers on the tenant under the lease or other law.

(5) Personal property--An interest in personal property recognized by Texas law, including:

(A) furniture, equipment, supplies, and other goods;

(B) computer hardware and software;

(C) contract rights, intellectual property such as patents, and other intangible property;

(D) cash, currency, funds, bank accounts, securities and other investment instruments;

(E) the right to repayment of a loan or to the payment of other receivables; and

(F) any other form of personal property recognized by Texas law.

(6) Capitalized personal property, fixed assets, ownership interest, cost basis, accumulated depreciation, and fair market valuation--The definitions of these terms are as assigned either by §109.41 of this title (relating to Financial Accountability System Resource Guide) and/or by generally accepted accounting principles.

(7) State funds--Funds received by the charter holder under TEC, §12.106, and any grant or discretionary funds received through or administered by the Texas Education Agency, including all federal funds. The rules in this division shall apply to property acquired, improved, or maintained with federal funds to the extent that such application is consistent with applicable federal law or regulations.

(8) State funds received on or after September 1, 2001--State funds are received on or after September 1, 2001, if the Texas Comptroller of Public Accounts issues a warrant for such funds on or after that date, or if an electronic transfer of such funds is made on or after that date.

(9) State funds received before September 1, 2001--State funds are received before September 1, 2001, if the Texas Comptroller of Public Accounts issues a warrant for such funds before that date, or if an electronic transfer of such funds is made before that date.

(10) Property acquired, improved, or maintained using state funds--Property for which the title, control over the property, use of the property, or benefit from the property is obtained directly or indirectly through expenditure of or control over state funds. This includes the proceeds of loans, credit, or other financing that:

(A) is secured with state funds, or with property acquired, improved, or maintained using state funds, or

(B) is extended, in whole or part, based on the charter holder's control over state funds.

§100.1063. Use of Public Property by a Charter Holder.

(a) Public property. An interest in real estate or personal property acquired, improved, or maintained using state funds that were received by the charter holder on or after September 1, 2001, is public property for all purposes under state law. The date on which the property was acquired, improved, or maintained is not determinative. An interest in real estate acquired, improved, or maintained using state funds that were received by the charter holder before September 1, 2001, is public property only to the extent specified by §100.1065 of this title (relating to Property Acquired with State Funds Received Before September 1, 2001--Special Rules).

(b) Fiduciary duty respecting public property. Public property is held by the charter holder in trust for the benefit of the students of the open-enrollment charter school. With respect to the public property they manage, the members of the governing body of a charter holder, and the members of the governing body and officers of an open-enrollment charter school, are trustees under Texas law; and the students enrolled in the school are beneficiaries of a trust. Each trustee shall be held to the standard of care and fiduciary duties that a trustee owes the beneficiary of a trust under Texas law.

(c) Use of public property. Public property may be used only for a purpose for which a school district may use school district property and only to implement a program described in the charter.

(1) Any use or application of public property for a purpose other than implementing a program described in the charter constitutes misuse and misapplication of such property, and is subject to the civil and criminal laws governing misuse or misapplication of Texas public property.

(2) The members of the governing body of a charter holder, and the members of the governing body and officers of an open-enrollment charter school, shall authorize all uses and applications of the public property under their control, and shall not authorize any use or application that is not for a program described in the charter.

(3) If pursuant to Texas Education Code, §12.111(9), the daily management of public property is delegated to any person, including a management company, the members of the governing body of the charter holder, and the members of the governing body and officers of the open-enrollment charter school, shall remain fully responsible to authorize all uses and applications of public property.

(d) Ownership of public property. Public property is owned by the charter holder, regardless of the funds used to acquire it. Subject to the requirements of §100.1067 of this title (relating to Possession and Control of the Public Property of a Former Charter Holder) and this section, a charter holder retains all title to the property, exercises complete control over the property, and is entitled to all use and benefit from the property.

(e) Public property mixed with private property. Property acquired, improved, or maintained partly using state funds and partly using other funds is mixed public and private property, and is subject to all requirements of this section.

(f) Accounting for public property. Each charter holder shall include in its annual audit report an exhibit identifying the fixed assets of the charter holder and the ownership interest of all parties for all real estate and capitalized personal property presently held by the charter holder or acquired, improved, or maintained by the charter holder during the term of the charter.

(1) Pursuant to the requirements in §109.41 of this title (relating to Financial Accountability System Resource Guide), the annual audit report must separately disclose the cost basis and accumulated depreciation of all public property as determined by this division, and all other property held, acquired, improved, or maintained by the charter holder.

(2) Alternatively, the charter holder may omit the exhibit required by paragraph (1) of this subsection and substitute a statement, in accordance with the requirements in §109.41, that all property acquired, improved, or maintained during the term of the charter, and all

property presently held by the charter holder, is public property under this division.

(3) All property held, acquired, improved, or maintained by the charter holder is subject to this subsection regardless whether it is public or private property.

§100.1065. Property Acquired with State Funds Received Before September 1, 2001--Special Rules.

(a) Non-public property.

(1) An interest in personal property acquired, improved, and maintained solely using state funds that were received by the charter holder before September 1, 2001, is non-public property. If any part of the state funds used were received on or after September 1, 2001, then subsection (b) of this section applies to that property.

(2) An interest in real estate acquired, improved, and maintained using less than 50% state funds is non-public property if all state funds used were received before September 1, 2001. If any part of the state funds used were received on or after September 1, 2001, then subsection (b) of this section applies to that property.

(3) Non-public property under this section is exempt from §100.1063 of this title (relating to Use of Public Property by a Charter Holder) and exempt from §100.1067 of this title (relating to Possession and Control of the Public Property of a Former Charter Holder). However, non-public property under this section must be included in the exhibit required by §100.1063(f).

(b) Public property.

(1) An interest in real estate acquired, improved, or maintained using 50% or more state funds is public property, even if all the state funds used were received by the charter holder before September 1, 2001.

(2) An interest in real estate acquired, improved, or maintained partly using state funds received on or after September 1, 2001, and partly using state funds received before September 1, 2001, is public property.

(3) An interest in personal property acquired, improved, or maintained partly using state funds received on or after September 1, 2001, and partly using state funds received before September 1, 2001, is public property.

(4) Public property under this section is subject to §100.1063 of this title (relating to Use of Public Property by a Charter Holder).

(5) Public property under this section is subject to §100.1067 of this title (relating to Possession and Control of the Public Property of a Former Charter Holder) only to the extent it was acquired, improved, or maintained using state funds received on or after September 1, 2001.

§100.1067. Possession and Control of the Public Property of a Former Charter Holder.

(a) Disposition of audited property. If the exhibits to the annual audit reports filed by a former charter holder are in substantial compliance with §100.1063(f) of this title (relating to Use of Public Property by a Charter Holder), the commissioner of education shall take possession, assume control, and supervise the disposition of the public property disclosed by those exhibits as provided by subsection (c) of this section.

(b) Disposition of property--defective audit. If the exhibits to the annual audit reports filed by a former charter holder are not in substantial compliance with §100.1063(f) of this title (relating to Use of Public Property by a Charter Holder), the commissioner shall use such legal process as may be available under Texas law to take possession and assume control of all property of the former charter holder and, using such legal process, supervise the disposition of such property in accordance with law.

(1) At any time prior to taking possession and assuming control of the affected property, the commissioner may determine whether the exhibits to the annual audit reports filed by a former charter holder substantially comply with §100.1063(f).

(2) At the commissioner's sole discretion, the commissioner may cure any defects in the filed exhibits by securing, at the former charter holder's expense, such professional services as may be required to create and/or audit the necessary exhibits to the annual audit reports.

(3) If successful in curing all defects in such exhibits, the commissioner may, at the commissioner's sole discretion, take possession, assume control, and supervise the disposition of the public property disclosed by those exhibits as provided by subsection (c) of this section.

(c) Method for audited property. In taking possession, assuming control, and supervising the disposition of property that has been properly recorded by a former charter holder under §100.1063(f) of this title (relating to Use of Public Property by a Charter Holder), the commissioner:

(1) shall accept and rely on the cost basis disclosure of all public property and all other property acquired by the former charter holder disclosed by the annual audit reports already on file with the agency and, if needed, by the annual audit report for the fiscal year in which the charter holder ceased operations;

(2) shall take possession and assume control over all public property disclosed by the annual audit reports;

(3) shall permit the former charter holder to designate the property to be used by the commissioner to satisfy the amount required by paragraph (2) of this subsection, and defer to the reasonable wishes of the former charter holder in this respect;

(4) may liquidate property designated by the former charter holder and, if the commissioner determines it to be necessary, liquidate other property; and

(5) shall return to the possession and control of the former charter holder any property in excess of the ownership interest of the State of Texas and/or federal grant or funding agencies of all public property disclosed by the annual audit reports, in accordance with current fair market valuation of the property.

(d) Use of legal process. Notwithstanding subsection (c) of this section, the commissioner of education may use such legal process as may be available under Texas law to take possession and assume control over the public property disclosed by the annual audit reports and, using such legal process, supervise the disposition of such property in accordance with law.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 17, 2001.

TRD-200106269

Cristina De La Fuente-Valadez
Manager, Planning Policy
Texas Education Agency
Effective date: November 6, 2001
Proposal publication date: July 27, 2001
For further information, please call: (512) 463-9701

♦ ♦ ♦

TITLE 22. EXAMINING BOARDS

PART 6. TEXAS BOARD OF PROFESSIONAL ENGINEERS

CHAPTER 131. PRACTICE AND PROCEDURE SUBCHAPTER B. APPLICATION FOR LICENSE

22 TAC §131.31

The Texas Board of Professional Engineers adopts an amendment to §131.31, concerning application for license, with changes to the proposed text as published in the September 7, 2001, issue of the *Texas Register* (26 TexReg 6823).

The rule was adopted with several corrections to the punctuation.

Section 131.31 corrects grammatical errors and clarifies the Board's authority to collect fees for services, which are necessary for the performance of its duties.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Civil Statutes, Article 3271a, §8(a), which provide the Texas Board of Professional Engineers with the authority to promulgate rules in accordance with the Texas Engineering Practice Act, §20A.

§131.31. Purpose.

The board shall promulgate and adopt rules as authorized and required by statute, which are necessary for the performance of its duties. Such rules shall establish standards of conduct and ethics for engineers, ensure strict compliance with and enforcement of the provisions of the Act, ensure uniform standards of practice and procedure, including fees for services, and provide for public participation, notice of the agency actions, and a fair and expeditious determination of causes before the board.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 22, 2001.

TRD-200106357
Victoria J.L. Hsu, P.E.
Executive Director
Texas Board of Professional Engineers
Effective date: November 11, 2001
Proposal publication date: September 7, 2001
For further information, please call: (512) 440-7723

♦ ♦ ♦

22 TAC §131.52, §131.53

The Texas Board of Professional Engineers adopts the amendments to §131.52 and §131.53, concerning application for license. Section 131.52 is adopted with changes to the proposed text as published in the September 7, 2001, issue of the *Texas Register* (26 TexReg 6824). Section 131.53 is adopted without changes and will no be republished.

Section 131.52 is adopted with minor changes to the language in §131.52(f)(4) for consistency with other sections and also to correct several grammatical errors.

Section 131.52 corrects awkward language concerning the Fundamentals of Engineering examination, clarifies that official transcripts are only necessary to substantiate qualifying degrees for licensure, adds two engineering disciplines to the list of recognized branches, and extends the period of time an application will be held pending receipt of all required documentation to 45 days.

Section 131.53 clarifies language concerning the examination requirement for licensure and the submission of an application to the board.

No comments were received regarding adoption of the amendments.

The amendments are adopted under Texas Civil Statutes, Article 3271a, §8(a), which provide the Texas Board of Professional Engineers with the authority to promulgate rules in accordance with the Texas Engineering Practice Act, §20A.

§131.52. Applications for a Professional Engineer License.

(a) The board may issue a license only to applicants who submit sufficient evidence that they have credentials meeting the minimum requirements set forth in Texas Engineering Practice Act (Act), §12(a)(1) or (2).

(b) All persons must pass the Fundamentals of Engineering examination or believe to the best of their knowledge that they are eligible for a waiver from the Fundamentals of Engineering examination before submitting an application.

(c) Applicants must speak and write the English language. Proficiency in English may be evidenced by possession of an accredited bachelor of science degree taught exclusively in English, or passage of the Test of English as a Foreign Language (TOEFL) with a score of at least 550 and passage of the Test of Spoken English (TSE) with a score of at least 45, or other evidence such as significant academic or work experience in English acceptable to the executive director.

(d) Applicants requesting waivers of all or part of the examinations, the TOEFL, the TSE, or a commercial evaluation of non-accredited degrees shall submit the requests and supporting reasoning to the executive director in writing.

(e) Applications for a license shall be submitted on forms prescribed by the board, sworn under oath and accompanied by the current application fee.

(f) In addition to the application form, applicants shall submit their:

(1) social security number, as required under Texas Family Code, §231.302;

(2) supplementary experience record;

(3) official transcript(s) of qualifying degree(s);

(4) number of reference statements required under §131.71(b) of this title (relating to References), or are required to

meet §131.81(a)(3) of this title (relating to Experience Evaluation) or §131.101(g) of this title (relating to Engineering Examinations Required for a License To Practice as a Professional Engineer) if those sections are applicable;

(5) current application fee;

(6) verification of examination(s);

(7) verification of a current license, if applicable;

(8) a completed Texas Ethics of Engineering Examination;

(9) scores of TOEFL and TSE, if applicable;

(10) a commercial evaluation of a non-accredited degree;

(11) statement describing criminal convictions, if any;

(12) written requests for waivers, if applicable.

(g) Applicants shall indicate a primary branch of engineering under which experience has been gained. Applicants seeking permission to take the Principles and Practice of Engineering examination shall indicate a primary branch for which there is an available National Council of Examiners for Engineering and Surveying (NCEES) examination as denoted, or other Board approved examination, or for which the Board will issue a license under applicable examination waiver rules. The branches and their corresponding alphabetical code are:

(1) (AGR) agricultural (NCEES);

(2) (CHE) chemical (NCEES);

(3) (CIV) civil (NCEES);

(4) (CSE) control systems (NCEES);

(5) (ELE) electrical, electronic, computer, communications (NCEES);

(6) (ENV) environmental (NCEES);

(7) (FIR) fire protection (NCEES);

(8) (IND) industrial (NCEES);

(9) (MEC) mechanical (NCEES);

(10) (MIN) mining/mineral (NCEES);

(11) (MET) metallurgical (NCEES);

(12) (MAN) manufacturing (NCEES);

(13) (NUC) nuclear (NCEES);

(14) (PET) petroleum (NCEES);

(15) (SDE) naval architecture/marine engineering (NCEES);

(16) (STR) structural (NCEES);

(17) (A/A) aeronautical/aerospace;

(18) (BIO) biomedical;

(19) (CRM) ceramic;

(20) (ESG) engineering sciences/general;

(21) (GEO) geological;

(22) (OCE) ocean;

(23) (TEX) textile;

(24) (SAN) sanitary;

(25) (SWE) software;

(26) (BAR) building architectural;

(27) (OTH) other.

(h) Applications shall be accepted for processing on the date the application and fee are received. Applicants shall be notified by the board at the earliest possible opportunity of deficiencies found during initial review of their application. Applications shall be held no more than forty-five (45) days from the date of notification for applicants to correct those deficiencies. Failure to correct the deficiencies may be cause for administrative withdrawal of the application. Upon request of the applicant, thirty-day (30) extensions may be granted by the executive director for submitting deficient information.

(i) Once an application is accepted, the fee shall not be returned, and the application and all submissions shall become a permanent part of the board records.

(j) An applicant who is a citizen of another country and is physically present in this country shall show sufficient documentation to the board to verify the immigration status for the determination of their eligibility for a professional license in accordance with the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 22, 2001.

TRD-200106358
Victoria J.L. Hsu, P.E.
Executive Director
Texas Board of Professional Engineers
Effective date: November 11, 2001
Proposal publication date: September 7, 2001
For further information, please call: (512) 440-7723

♦ ♦ ♦

SUBCHAPTER C. REFERENCES

22 TAC §131.71

The Texas Board of Professional Engineers adopts an amendment to §131.71, concerning references, without changes to the proposed text as published in the September 7, 2001, issue of the *Texas Register* (26 TexReg 6825).

Section 131.71 clarifies that a professional engineer who has not worked with or directly supervised an applicant for licensure may review and judge the applicant's experience and serve as a licensed engineer reference.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Civil Statutes, Article 3271a, §8(a), which provide the Texas Board of Professional Engineers with the authority to promulgate rules in accordance with the Texas Engineering Practice Act, §20A.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 22, 2001.

TRD-200106359
Victoria J.L. Hsu, P.E.
Executive Director
Texas Board of Professional Engineers
Effective date: November 11, 2001
Proposal publication date: September 7, 2001
For further information, please call: (512) 440-7723

♦ ♦ ♦

SUBCHAPTER D. ENGINEERING EXPERIENCE

22 TAC §131.81

The Texas Board of Professional Engineers adopts an amendment to §131.81, concerning engineering experience, without changes to the proposed text as published in the September 7, 2001, issue of the *Texas Register* (26 TexReg 6826).

Section 131.81 clarifies the format and content of the supplementary experience record and defines design, analysis, implementation, and/or communication as an acceptable combination of engineering experience criteria for licensure. The section, as adopted, removes teaching experience from the list of engineering activities as a result of Senate Bill 1797, 77th Legislature, Regular Session, and clarifies experience credit for post-baccalaureate engineering degrees.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Civil Statutes, Article 3271a, §8(a), which provide the Texas Board of Professional Engineers with the authority to promulgate rules in accordance with the Texas Engineering Practice Act, §20A.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 22, 2001.

TRD-200106360
Victoria J.L. Hsu, P.E.
Executive Director
Texas Board of Professional Engineers
Effective date: November 11, 2001
Proposal publication date: September 7, 2001
For further information, please call: (512) 440-7723

♦ ♦ ♦

SUBCHAPTER E. EDUCATION

22 TAC §§131.91 - 131.93

The Texas Board of Professional Engineers adopts the amendments to §§131.91-131.93, concerning education. Section 131.93 is adopted with changes to the proposed text as published in the September 7, 2001, issue of the *Texas Register* (26 TexReg 6828). Section 131.91 and §131.92 are adopted without changes and will not be republished.

Section 131.93(a) is adopted with changes to provide further clarification for transcripts utilized to meet the educational requirements for certification or licensure.

Section 131.91(1)(B) clarifies that applicants must have a bachelor's degree in engineering or one of the mathematical, physical, or engineering sciences to fulfill the educational requirements for licensure under the Texas Engineering Practice Act, §12(a)(1). Section 131.92(a) clarifies that an applicant using a degree from a non-accredited engineering program to qualify for licensure under the Act must furnish an evaluation of the degree from a commercial evaluation service approved by the board. Section 131.92(b) clarifies that the executive director may waive the evaluation if the degree program has been deemed substantially equivalent by the Engineering Accreditation Commission of the Accreditation Board for Engineering and Technology (EAC/ABET) or an EAC/ABET-accredited institution. Section 131.93 clarifies the submission requirements for transcripts necessary to meet the educational requirements for licensure.

No comments were received regarding adoption of the amendments.

The amendments are adopted under Texas Civil Statutes, Article 3271a, §8(a), which provide the Texas Board of Professional Engineers with the authority to promulgate rules in accordance with the Texas Engineering Practice Act, §20A.

§131.93. Transcripts.

(a) An official transcript (including either grades or mark sheets and proof that the degree was conferred) shall be provided for the degree(s) utilized to meet the educational requirements for certification or licensure. Official or notarized copies of transcripts of all other engineering or mathematical, physical, or engineering science degrees shall also be submitted to the board. Applicants utilizing non-accredited degree(s) for licensure shall also provide a transcript from each school where more than 15 semester hours were earned towards the degree. Official transcripts shall be forwarded directly to the board office by the respective registrars. The applicant is responsible for ordering and paying for all such transcripts. Additional academic information including but not limited to grades and transfer credit shall be submitted to the board at the request of the executive director.

(b) If transcripts cannot be transmitted directly to the board from the issuing institution, the executive director may recommend alternatives to the Licensing Committee for its approval. Such alternatives may include validating transcripts in the applicant's possession through a board-approved commercial evaluation service.

(c) The commercial evaluation of a degree will not be accepted in lieu of an official transcript.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 22, 2001.

TRD-200106361
Victoria J.L. Hsu, P.E.
Executive Director
Texas Board of Professional Engineers
Effective date: November 11, 2001
Proposal publication date: September 7, 2001
For further information, please call: (512) 440-7723

♦ ♦ ♦

SUBCHAPTER F. EXAMINATIONS

22 TAC §131.101

The Texas Board of Professional Engineers adopts an amendment to §131.101, concerning examinations, with changes to the proposed text as published in the September 7, 2001, issue of the *Texas Register* (26 TexReg 6829).

Section 131.101(a), (c), (d), (e), (f), (g), (h) and (i) provides clarification and consistency with the examination requirements established by statute, clarifies language regarding a waiver of an examination, and provides that the Principles and Practice of Engineering examination will be offered according to the availability by the National Council of Examiners for Engineering and Surveying.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Civil Statutes, Article 3271a, §8(a), which provide the Texas Board of Professional Engineers with the authority to promulgate rules in accordance with the Texas Engineering Practice Act, §20A.

§131.101. Engineering Examinations Required for a License to Practice as a Professional Engineer.

(a) Written examinations prescribed by the board shall consist of experience and knowledge examinations and an ethics of engineering examination for the purpose of determining the applicant's qualifications to design and supervise engineering works, ensuring the safety of life, health, and property.

(1) All examinations shall be in the English language.

(2) Experience and knowledge examinations shall be an eight-hour Fundamentals of Engineering examination and Principles and Practice of Engineering examination prepared by the National Council of Examiners for Engineering and Surveying (NCEES).

(A) Examinations shall be held in Austin or places designated by the board as scheduled by NCEES.

(B) Examinations may be scheduled by obtaining the necessary forms from the board office and submitting it to the board with the appropriate fee.

(C) Engineering students may schedule the Fundamentals of Engineering examination at their participating school through the engineering dean's office.

(D) Individuals who plan to take an examination must have their completed examination scheduling form and the appropriate fee in the board office by the close of regular business on the date established by the examination policy adopted by the board.

(E) The Principles and Practice of Engineering examination is open only to licensed engineers and to applicants who have received board approval to take it.

(F) Examination fees shall be not be refunded.

(3) The Texas Ethics of Engineering Examination shall be open book and shall be prepared and administered by the board. Each applicant must satisfactorily complete this examination and submit it with the application.

(b) The board shall adopt an examination policy at least once a year which shall include at least the following as listed in paragraphs (1)-(4) of this subsection:

(1) the places where the examinations shall be held;

(2) the dates of the examinations and the deadline date for an examinee to schedule an examination;

(3) fees for each examination;

(4) types of examinations offered.

(c) An undergraduate student who is within two full-time regular semesters (not including summer sessions) of graduating and who is enrolled in an EAC/ABET-accredited engineering program, a TAC/ABET-accredited four year baccalaureate technical program, or an engineering-related science program of four years or more that has been approved by the board, may take the Fundamentals of Engineering examination at their school provided the school administers the examination as prescribed by the board.

(d) A graduate student may take the Fundamentals of Engineering examination at their school provided the school administers the examination as prescribed by the board, that student is enrolled in an EAC/ABET-accredited graduate degree program or in a graduate program at an institution which has an EAC/ABET-accredited undergraduate degree program in that discipline, and the student has:

(1) a baccalaureate degree that is EAC/ABET-accredited;

(2) an engineering or engineering-related science program degree that has been approved by the board; or

(3) a non-engineering related curriculum or other degree in which the student has provided evidence acceptable to the executive director as meeting the minimum requirements of Texas Engineering Practice Act (Act), §12(a)(1) or (2).

(e) Persons who appear to meet the educational requirements for a license and who have not passed the Fundamentals of Engineering examination while in college may apply to the board to take the examination in Austin or at other sites designated by the board.

(f) It is the intent of the board to utilize the examination as an integral part of the licensing process; all applicants are expected to have passed the examinations or to offer sufficient evidence of their qualifications in the absence of passage of the examinations. The board may waive the Fundamentals of Engineering examination for any applicant with at least four years of creditable experience and who holds at least the educational credentials described in paragraph (3)(A) of this subsection. The board may or may not waive one or both of the experience and knowledge examinations for applicants who do not pose a threat to the public health, safety, or welfare; request a waiver in writing at the time the application is filed; have not taken and failed the Principles and Practice of Engineering examination within the previous four years; and meet one of the following requirements listed in paragraphs (1)-(3) of this subsection:

(1) persons who have 12 or more years of engineering experience and meet the educational requirements of the Act, §12(a)(1); or

(2) persons who have 16 years of engineering experience and meet the educational requirements of the Act, §12(a)(2); or

(3) persons who have:

(A) a Ph.D. degree in engineering from a recognized college or university that offers an EAC/ABET-approved undergraduate or master's degree program in a related branch of engineering or a Ph.D. degree in engineering or other related field of science or mathematics that is individually assessed and approved by the board during the evaluation process; and

(B) taught in an EAC/ABET program for at least six years, or have at least six years of experience consisting of an acceptable combination of other creditable engineering experience or EAC/ABET teaching experience.

(g) Applicants requesting a waiver from any examination(s) shall file any additional information needed to substantiate the eligibility for the waiver with the application. Applicants requesting a waiver from the Principles and Practice of Engineering examination and who have never been licensed in any jurisdiction shall provide at least nine references, five of which shall be from licensed professional engineers. The board shall review all elements of the application to evaluate waiver request(s) and may grant a waiver(s) to qualified applicants.

(h) Applicants providing an official verification from an NCEES member board certifying that they have passed at least the eight-hour examination in that state shall not be required to take that examination again.

(i) The following shall apply to the Principles and Practice of Engineering examination.

(1) The following individuals may register to take the Principles and Practice of Engineering examination:

(A) license holders who wish to take the examination for record purposes;

(B) applicants for a license approved by the board;

(C) other persons who have been approved or directed by the board to take the examination.

(2) Applicants approved to take the Principles and Practice of Engineering examination:

(A) shall be advised of the first examination date for which they are eligible;

(B) shall be solely responsible for timely registration for the examination and any payment of examination fees;

(C) shall have no more than four consecutive examination opportunities, including the examination given on the date of the first available examination, to pass the examination. No extensions shall be granted under any circumstances.

(3) Applications for applicants who do not pass the examination within the allotted time shall be non-approved.

(4) After an application has been non-approved for not passing the examination, an applicant may immediately apply for a license under the law and rules in place when submitting the new application.

(5) The Principles and Practice of Engineering examination(s) will be offered according to the availability by the NCEES.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 22, 2001.

TRD-200106362

Victoria J.L. Hsu, P.E.

Executive Director

Texas Board of Professional Engineers

Effective date: November 11, 2001

Proposal publication date: September 7, 2001

For further information, please call: (512) 440-7723

♦ ♦ ♦

22 TAC §§131.103 - 131.106

The Texas Board of Professional Engineers adopts the repeal of §§131.103-131.106, concerning examinations, without changes to the proposed text as published in the September 7, 2001, issue of the *Texas Register* (26 TexReg 6831).

The repeal of §§131.103-131.106 enables the board to recodify §§131.103 and 131.104 as new sections in Subchapter H. Licensing, and to recodify §§131.105 and 131.106 as new §§131.103 and 131.104 in this subchapter.

No comments were received regarding adoption of the repeals.

The repeals are adopted under Texas Civil Statutes, Article 3271a, §8(a), which provide the Texas Board of Professional Engineers with the authority to promulgate rules in accordance with the Texas Engineering Practice Act, §20A.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 22, 2001.

TRD-200106363

Victoria J.L. Hsu, P.E.

Executive Director

Texas Board of Professional Engineers

Effective date: November 11, 2001

Proposal publication date: September 7, 2001

For further information, please call: (512) 440-7723

♦ ♦ ♦

22 TAC §131.103, §131.104

The Texas Board of Professional Engineers adopts new §131.103 and §131.104, concerning examinations, without changes to the proposed text as published in the September 7, 2001, issue of the *Texas Register* (26 TexReg 6831).

New §131.103 establishes the policies and procedures for an examination analysis in accordance with the uniform examination procedures established by the National Council of Examiners for Engineering and Surveying. New §131.104 establishes the corrective measures available to the board when an examinee does not abide by the National Council of Examiners for Engineering and Surveying policies and procedures for the administration of the examinations.

No comments were received regarding adoption of the new sections.

The new sections are adopted under Texas Civil Statutes, Article 3271a, §8(a), which provide the Texas Board of Professional Engineers with the authority to promulgate rules in accordance with the Texas Engineering Practice Act, §20A.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 22, 2001.

TRD-200106364
Victoria J.L. Hsu, P.E.
Executive Director
Texas Board of Professional Engineers
Effective date: November 11, 2001
Proposal publication date: September 7, 2001
For further information, please call: (512) 440-7723

♦ ♦ ♦

SUBCHAPTER G. BOARD REVIEW OF APPLICATION

22 TAC §§131.111, 131.112, 131.116

The Texas Board of Professional Engineers adopts amendments to §131.111 and §131.116, and new §131.112, concerning board review of application. Section 131.112 is adopted with changes to the proposed text as published in the September 7, 2001, issue of the *Texas Register* (26 TexReg 6832). Section 131.111 and §131.116 are adopted without changes and will not be republished.

Section 131.111 incorporates the streamlining procedures the board will implement for reviewing, evaluating and processing an application for licensure. Section 131.116(e)(1)(3) provides clear and concise language concerning the completion process for licensure.

Section 131.112 as adopted provides consistency in the terminology concerning the reactivation of an administratively withdrawn application and the reactivation fee.

New §131.112 establishes the procedures for processing administratively withdrawn applications for licensure.

No comments were received regarding adoption of the amendments and new section.

The amendments and new section are adopted under Texas Civil Statutes, Article 3271a, §8(a), which provide the Texas Board of Professional Engineers with the authority to promulgate rules in accordance with the Texas Engineering Practice Act, §20A.

§131.112. Processing of Administratively Withdrawn Applications.

(a) To reactivate an administratively withdrawn application, the applicant must submit:

(1) a reactivation fee as set by the board;

(2) a new application complete with signatures; and

(3) supplementary experience records for the time period since the application was first submitted.

(b) If the application has been administratively withdrawn for a period of six months, the application shall be recommended for non-approval.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 22, 2001.

TRD-200106365
Victoria J.L. Hsu, P.E.
Executive Director
Texas Board of Professional Engineers
Effective date: November 11, 2001
Proposal publication date: September 7, 2001
For further information, please call: (512) 440-7723

♦ ♦ ♦

22 TAC §131.112

The Texas Board of Professional Engineers adopts the repeal of §131.112, concerning board review of application, without changes to the proposed text as published in the September 7, 2001, issue of the *Texas Register* (26 TexReg 6834).

The repeal of §131.112 enables the board to adopt new §131.112 due to extensive modification of the section.

No comments were received regarding adoption of the repeal.

The repeal is adopted under Texas Civil Statutes, Article 3271a, §8(a), which provide the Texas Board of Professional Engineers with the authority to promulgate rules in accordance with the Texas Engineering Practice Act, §20A.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 22, 2001.

TRD-200106366
Victoria J.L. Hsu, P.E.
Executive Director
Texas Board of Professional Engineers
Effective date: November 11, 2001
Proposal publication date: September 7, 2001
For further information, please call: (512) 440-7723

♦ ♦ ♦

SUBCHAPTER H. LICENSING
DIVISION 1. PROFESSIONAL ENGINEER LICENSE

22 TAC §131.137, §131.138

The Texas Board of Professional Engineers adopts new §131.137 and §131.138, concerning licensing. Section 131.138 is adopted with changes to the proposed text as published in the September 7, 2001, issue of the *Texas Register* (26 TexReg 6834). Section 131.137 is adopted without changes and will not be republished.

Section 131.138 is adopted with changes to clarify the submission and retention of a transcript.

New §131.137 establishes the eligibility requirements for certification as an engineer-in-training. New §131.138 establishes the administrative procedures for obtaining certification as an engineer-in-training.

No comments were received regarding adoption of the new sections.

The new sections are adopted under Texas Civil Statutes, Article 3271a, §8(a), which provide the Texas Board of Professional Engineers with the authority to promulgate rules in accordance with the Texas Engineering Practice Act, §20A.

§131.138. Engineer-in-Training Certificates.

A certificate as an engineer-in-training expires eight years from the date of issuance. This certification does not entitle an individual to practice as a professional engineer. The fee for engineer-in-training certification will be established by the board. To become enrolled as an engineer-in-training, a certificate may be issued to an eligible individual who requests the certificate, submits an official transcript in accordance with §131.93 of this title (relating to Transcripts), and pays the established fee. Although the certificate has an expiration date, the records of the board will indicate that an individual has passed the Fundamentals of Engineering examination and these records will be maintained in the file indefinitely and will be made available as requested by the individual or another licensing jurisdiction. The certificate may be renewed. Official transcripts will be kept on file and an EIT may request its use when filing the professional engineer application.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 22, 2001.

TRD-200106367
Victoria J.L. Hsu, P.E.
Executive Director
Texas Board of Professional Engineers
Effective date: November 11, 2001
Proposal publication date: September 7, 2001
For further information, please call: (512) 440-7723

♦ ♦ ♦

TITLE 25. HEALTH SERVICES

PART 1. TEXAS DEPARTMENT OF HEALTH

CHAPTER 157. EMERGENCY MEDICAL CARE

SUBCHAPTER C. EMERGENCY MEDICAL SERVICES TRAINING AND COURSE APPROVAL

25 TAC §§157.33, 157.34, 157.38

Texas Department of Health (department) adopts amendments to §157.33, §157.38 and new §157.34 concerning minimum standards and requirements for recertification of emergency medical services (EMS) personnel with changes to the proposed text as published in the June 1, 2001, issue of the *Texas Register* (26 TexReg 3907).

Specifically, these amendments and new section cover new options for the recertification process. An amendment to §157.33 removes the recertification requirements out of the section and places them in the new §157.34, which describes five different options for an EMS certificant to recertify. An amendment to §157.38 reflects the new requirements contained in the continuing education (CE) option of the new rule.

These final rules were erroneously submitted by the department to the Texas Register Division for publication with the wrong effective date of October 11, 2001, instead of January 1, 2002. The effective date of the rules was actually January 1, 2002, and was listed in the Board Order that the Board of Health approved at its September 21, 2001, meeting. The republished rules with the correct effective date of January 1, 2002, will override the unauthorized rules published in the October 5, 2001, issue of the *Texas Register* (26 TexReg 7871) with the wrong effective date of October 11, 2001. There is also a miscellaneous notice published in the "In Addition" Section in this issue of the *Texas Register* which further explains the error. The valid effective date of the adoption of the amendments to §§157.33, 157.38, and new §157.34 is January 1, 2002.

The following comments were received concerning the proposed sections. Following each comment is the department's response and any resulting change(s).

Comment: Concerning §157.34(b)(4)(A), one commenter opposed the language requiring the recertification course be completed during last year of certification.

Response: The department agrees that the requirement is restrictive and unnecessary. That language has been deleted.

Comment: Concerning §157.34(b)(2), one commenter opposed the continuing education requirement stating that the requirement would be too difficult for certificants in rural areas to obtain.

Response: The department disagrees. The proposed rule provides four other options for recertification in addition to continuing education. No change was made as a result of this comment.

Comment: Concerning §157.34(b)(3), one commenter opposed providing applicants with the option of obtaining National Registration for recertification purposes.

Response: The department disagrees. National EMS Registry has been an acceptable equivalent to Texas certification since 1991 and has the National EMS Registry examination has been accepted in lieu of the state certification examination since 1996. No change was made as a result of this comment.

The department received no other public comments during the comment period for these proposed new rule and amendments. However, the department is making the following minor changes due to staff comments to clarify the intent and improve the accuracy of the section.

Change: Concerning §157.33(e)(3), language amended to clarify that "a refresher course and passing of the retest exam, must be completed within one year after the initial course was completed."

Change: Concerning proposed §157.33(j), language is redundant and has been deleted.

Change: Concerning proposed §157.33(k)(2), relettered as new (j)(2), language was amended for clarification.

Change: Concerning proposed §157.33(k), relettered as new (j), paragraph 5 was added for clarification.

Change: Concerning proposed §157.33(l)(2)(B), relettered as new §157.33(k)(2)(B), language was added for the option to take and pass the National Registry Examination.

Change: Concerning proposed §157.33(n), language is redundant and has been deleted.

Change: Concerning §157.34(a)(2), language has been amended for clarification.

Change: Concerning §157.34(d)(1), in order to regain active status, language was added to state all requirements must be completed within one year of the course completion date of the recertification course.

Change: Concerning §157.34(e), references to specific cites have been amended for clarification.

Change: Concerning §157.38(e)(8), the words "two-year" were deleted from the CE period.

In accordance with Health and Safety Code, Chapter 773, 76th Legislature, 1999, the department is required to adopt rules concerning minimum requirements for recertification of EMS personnel.

All commenters were not against the rules in their entirety, however they expressed concerns, asked questions, and suggested recommendations for change as discussed in the summary of comments.

The amendments and new section are adopted under the Health and Safety Code, Chapter 773, which provides the department with the authority to adopt rules concerning the standards and requirements for recertification of emergency medical services (EMS) personnel; and §12.001 which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

§157.33. Certification.

(a) Certification requirements. A candidate for emergency medical services (EMS) certification shall:

(1) be at least 18 years of age;

(2) have a high school diploma or GED certificate;

(3) have successfully completed a Texas Department of Health (department)- approved course; and

(4) submit an application and the following nonrefundable fees as applicable:

(A) $50 for emergency care attendant (ECA) or emergency medical technician (EMT);

(B) $75 for EMT-intermediate (EMT-I) or EMT-paramedic (EMT-P); and

(C) EMS volunteer - no fee. However, if such an individual receives compensation during the certification period, the exemption ceases and the individual shall pay a prorated fee to the department based on the number of years remaining in the certification period when employment begins. The nonrefundable fee for ECA or EMT certification shall be $12.50 per each year remaining in the certification. The nonrefundable fee for EMT-I or EMT-P shall be $18.75 per each year remaining in the certification. Any portion of a year will count as a full year; and

(5) pass the department's written examination or the National Registry examination.

(b) Length of certification. A candidate who meets the requirements of subsection (a) of this section shall be certified for four years beginning on the date of issuance of a certificate and wallet-size certificate.

(c) Scheduling authority for certification examinations.

(1) The department has final authority for scheduling all certification examination sessions.

(2) Examinations shall be administered at regularly scheduled times in regional test centers.

(3) The candidate shall be responsible for making appropriate arrangements for the examination.

(4) The department is not required to set special examination schedules for a single candidate or for a specific group of candidates.

(d) Time limits for completing requirements.

(1) A candidate shall complete all requirements for certification no later than one year after the candidate's course completion date.

(2) A candidate who does not complete all requirements for certification within one year of the candidate's initial course completion date must meet the requirements of subsection (a) of this section including the completion of another initial course to achieve certification.

(e) Retesting.

(1) A candidate who does not pass the department's written examination may retest after:

(A) submitting an application to retest; and

(B) paying a nonrefundable fee of $25, if applicable.

(2) A candidate who does not pass a retest may request a second retest after:

(A) submitting documentation that verifies completion of a department-approved formal refresher course;

(B) submitting an application to retest; and

(C) paying a nonrefundable fee of $25, if applicable.

(3) A candidate who does not pass a second retest must meet the requirements of subsection (a) of this section, which includes a refresher course and passing of the retest examination, within one year after the initial course was completed.

(f) Prolonged application process by the department. If the application approval process is prolonged due to a felony/misdemeanor conviction investigation or other administrative procedure within the department, the time period for determination of certification eligibility will be extended to reasonably accommodate the candidate and/or the department.

(g) Non-transferability of certificate. A certificate is not transferable. A duplicate certificate may be issued if requested with a nonrefundable fee of $5.

(h) Completion of higher level courses. Individuals who successfully complete certification requirements for a higher level of certification are considered certified only at the higher level. The completion of a course at a higher level of certification shall satisfy the course completion requirements for a lower level of certification, and the individual may apply for certification at the lower level by following the procedure listed in subsections (a)-(c) of this section.

(i) Voluntary downgrades. An individual who holds EMS certification may be certified at a lower level voluntarily for the remainder of a current certification by submitting an application for certification

and the applicable nonrefundable fee as required in subsection (a)(4) of this section;

(j) Inactive status. A certified EMT, EMT-I, or EMT-P may make application to the department for inactive status at any time during or after the certification period so long as the certification can be verified by department.

(1) The request for inactive status shall be accompanied by a nonrefundable fee of $25 in addition to the regular nonrefundable application fee.

(2) The initial inactive status period shall remain in effect until the end of the current certification period for those candidates who are currently certified and may be renewable every four years thereafter by submitting an application and the appropriate nonrefundable fee as in subsection (a)(4)(A) and (B) of this section.

(3) The initial inactive status period shall remain in effect for four years from the date of issuance for those candidates not currently certified.

(4) While on inactive status, a person shall not practice other than to act as a bystander rendering first aid or cardiopulmonary resuscitation (CPR) or the use of an Automated External Defibrillator in the capacity of a lay person. Practicing in any other capacity for compensation or as a volunteer shall be cause for denial of reentry and decertification.

(5) An individual shall not simultaneously hold inactive and active EMS personnel certification.

(k) Reciprocity. A person currently certified by the National Registry or in another state may be certified by submitting an application and a nonrefundable fee of $100.

(1) After evaluation of the application and verification of the certification by the department, the candidate will be certified for one year.

(2) Prior to the expiration of the one-year certification, the certificant shall:

(A) submit a completed personnel certification application and a nonrefundable fee as in subsection (a)(4) of this section;

(B) pass the department's written examination or the National Registry examination within one year after the initial reciprocity certification has been granted.

(3) After verification by the department of the information submitted, a candidate who meets the requirements of this section shall be certified for four years beginning on the date of issuance of the certificate.

(l) Equivalency.

(1) A candidate for certification who completed EMS training outside the United States or its possessions, or a candidate who is certified or licensed in another healthcare discipline shall:

(A) be at least 18 years of age;

(B) submit a copy of the curriculum completed by the candidate for review by a regionally accredited post secondary institution approved by the department to sponsor an EMS education program;

(C) document correction of any deficiencies identified during review of the curriculum by submitting evidence of remedial training from a department approved EMS education program;

(D) submit an application and appropriate nonrefundable fee listed in subsection (a) of this section to the department; and

(E) pass the department's initial written examination.

(2) Evaluations of curricula conducted by post secondary educational institutions under this subsection shall be consistent with the institution's established policies and procedures for awarding credit by transfer or advanced placement.

§157.34. Recertification.

(a) Recertification.

(1) Not later than the 30th day before the date a person's certificate is scheduled to expire, the department may send to the person a notice of expiration at the address shown in the current records of the department.

(2) If a certificant has not received a notice of expiration from the bureau 30 days prior to the expiration, it is the duty of the certificant to notify the bureau and to request an application for recertification or download an application from the Internet.

(3) To maintain certification status without a lapse, a completed application for recertification shall be submitted to the department prior to the expiration date of the current certificate, but no earlier than 1 year prior to the expiration date. When submitting an application, applicants should consider the department's processing time as described in §157.3 of this title (relating to Processing of EMS Provider Licenses and Applications for EMS Personnel Certification and License).

(4) The certificant shall submit an application and the following non-refundable fees as applicable:

(A) $50 for Emergency Care Attendant (ECA) or Emergency Medical Technician (EMT);

(B) $75 for EMT-Intermediate (EMT-I) or EMT-Paramedic (EMT-P); and

(C) EMS volunteer - no fee. However, if such an individual receives compensation during the certification period, the exemption ceases and the individual shall pay a prorated fee to the department based on the number of years remaining in the certification period when employment begins. The non-refundable fee for ECA or EMT certification shall be $12.50 per each year remaining in the certification. The non-refundable fee for EMT-I or EMT-P shall be $18.75 per each year remaining in the certification. Any portion of a year will count as a full year.

(5) An application for a level of certification lower than the applicant's current level may be submitted with the applicable fee as described in subsection (a)(4) of this section if the applicant meets the requirements for the level of certification requested as described.

(6) A certificate is not transferable.

(7) Military personnel. A person certified by the department who is deployed in support of military, security, or other action by the United Nations Security Council, a national emergency declared by the president of the United States, or a declaration of war by the United States Congress is eligible for recertification under timely recertification requirements from the person's date of demobilization until one calendar year after the date of demobilization but will not be certified during that period.

(b) Recertification Options. Upon submission of a completed application for recertification, the applicant shall commit to, and recertify through, only one of the options described in paragraphs (1)-(5) of this subsection.

(1) Option 1 - Written Examination Recertification Process

(A) The applicant shall pass the state's written examination for recertification, which is designed to measure ongoing competencies and current EMS practices for the applicant's level of certification.

(B) If the applicant fails the examination for recertification, the applicant may attempt two retests of the examination after:

(i) submitting a retest application for each attempt at any eligible level; and,

(ii) submitting a non-refundable retest fee of $25 for each attempt.

(C) An applicant may recertify by taking an initial recertification examination for a lower level of certification for each subsequent attempt.

(D) An applicant who attempts and fails the recertification examination may not gain recertification by any other option.

(E) An applicant who does not pass the recertification examination:

(i) shall successfully complete a Formal Recertification Course as described in subsection (b)(4)(A) and (B) of this section; and

(ii) shall submit a course completion certificate of the Formal recertification course, reflecting that the course was completed after the 2nd retest failure; and

(iii) shall pass the state written recertifying examination in accordance with the provisions in subparagraphs (A)-(D) of this paragraph.

(F) The certification status of an applicant who does not successfully complete the examination recertification process as described in subsection (b)(1)(A)-(E) of this section shall expire on the date of the current certificate. The applicant will have until 90 days after expiration date of the current certificate to successfully complete the examination recertification process. If applicant does not successfully complete recertification process within 90 days following expiration, applicant shall meet requirements of late recertification described in subsection (f)(4) of this section. Successful completion of the late recertification process shall be accomplished within one year of expiration as described in subsection (f)(6) of this section.

(2) Option 2 - Continuing Education Recertification Process. The certificant shall attest to accrual of department approved EMS continuing education as specified in §157.38 of this title (relating to Continuing Education).

(3) Option 3 - National Registry Recertification Process. The applicant shall attest to current National Registry certification at the time of applying for recertification.

(4) Option 4 - Formal Course Recertification Process. The applicant shall attest to successful completion of a department approved recertification course.

(A) The recertification course, as prescribed by the Education and Training Manual, shall be a formal, classroom-presented, live participation, training course as approved by the department and conducted within the four year certification period.

(B) The minimum contact hours required for recertification courses are:
Figure: 25 TAC §157.34(b)(4)(B)

(5) Option 5 - CCMP Recertification Process. An applicant affiliated with an EMS provider that has a department-approved Comprehensive Clinical Management Program (CCMP) may be recertified if:

(A) the applicant is currently credentialed in the provider's CCMP;

(B) the applicant has been enrolled in the provider's CCMP for at least six continuous months; and

(C) the applicant submits to the department a statement, signed by the medical director, of participation in the provider's CCMP.

(c) After verification by the department of the information submitted by the applicant, that the information is true, correct and complete with regard to the applicant meeting recertification requirements by the certification expiration date, the department shall recertify the applicant for four years, commencing on the day following the expiration date of the most recent certificate.

(d) Return to active status.

(1) To regain active status, an applicant holding inactive certification shall complete the following requirements. All requirements shall be completed within one year of the course completion date of the recertification course described in subparagraph (A) of this paragraph.

(A) The applicant shall successfully complete a department approved recertification course as described in subsection (b)(4) of this section;

(B) The applicant shall submit an application and the non-refundable fees applicable, as described in subsection (a)(4) of this section, before expiration of the inactive certification period;

(C) The applicant shall successfully complete the examination recertification process, as described in subsection (b)(1)(A)-(F) of this section.

(2) A candidate whose inactive certification expires shall comply with late recertification as described in subsection (f)(1)-(6) of this section.

(e) Renewal of inactive status. To renew inactive status, an applicant holding inactive certification shall submit an application and the non-refundable fee applicable, as described in §157.33(a)(4) and §157.33(k)(1) of this title, before expiration of the inactive certification period.

(f) Late recertification.

(1) A candidate whose certificate has been expired for 90 days or less may renew the certificate by submitting an application and paying to the department a non-refundable renewal fee that is equal to 1-1/2 times the normally required application renewal fee for that level as listed in subsection (a)(4) of this section. Applicant shall meet one of the recertification options described in subsection (b)(1)-(5) of this section.

(2) The candidate whose certification has expired shall be considered as non-certified and may not function in the capacity of an EMS certificant or represent that the candidate is EMS certified until recertification is issued.

(3) An individual who has not met the requirements for recertification prior to his expiration date shall be considered late.

(4) A candidate whose certificate has been expired for more than 90 days but less than one year may renew the certificate by submitting an application and paying to the department a non-refundable

renewal fee that is equal to two times the normally required application renewal fee as listed in subsection (a)(4) of this section. An applicant shall submit documentation that verifies completion of a formal Recertification course, which reflects completion date to be within one year prior to application. An applicant shall pass the department's written exam for recertification as described in subsection (b)(1)(A)-(F) of this section.

(5) The applicant shall be recertified for a period of four years beginning on the date of issuance.

(6) A candidate whose certificate has been expired for one year or more may not renew the certificate. The candidate may become certified by complying with the requirements of §157.33(a) of this title.

(7) A candidate who was certified in this state, moved to another state, and is currently certified or licensed and has been in practice in the other state for the two years preceding the date of application may become certified without reexamination. The candidate may gain recertification by:

(A) submitting to the department a non-refundable fee that is equal to two times the normally required renewal fee for certification as listed in subsection (a)(4) of this section; and

(B) attesting to regular practice of emergency medical care in the other state for the two years preceding the date of application.

§157.38. Continuing Education.

(a) Purpose. The purpose of this section is to establish the minimum continuing education (CE) requirements necessary for emergency medical services (EMS) personnel electing to maintain certification through the CE recertification process. These requirements are intended to keep the certificant knowledgeable of current techniques and practice, maintain the quality of emergency medical services provided to the public, and encourage improvement in the skill and competence of EMS personnel.

(b) General. CE is a recertification option provided by provisions of §157.34 of this title (relating to Recertification). A contact hour shall consist of 50 consecutive minutes of attendance and participation in an approved CE experience. Credit units for CE activities will only be awarded for certification period in which they are completed; and if participating in a graded activity, only if the individual receives a grade of "C" or better, or "Pass" in a "Pass/Fail" grading system.

(c) Content requirements. Candidates at each certification level shall, at a minimum, accrue department-approved CE in the following content areas.
Figure: 25 TAC §157.38(c)

(d) CE course approval criteria. A CE provider shall meet the following criteria.

(1) The program shall be pre-approved by the department.

(2) The program shall be at least one contact hour in length.

(3) Learner objectives shall be written and be the basis for determining content and evaluation.

(4) The target audience for the program shall be identified.

(5) The content shall be relevant to identified topic areas, and be related to and consistent with, program objectives.

(6) The instructor shall be knowledgeable and competent in the subject matter taught. There shall be documentation of the instructor's expertise in the content area.

(7) Learning experiences shall be appropriate to achieve the objectives of the program. Principles of adult education shall be used in the design of the program.

(8) A schedule shall be provided which identifies the content areas covered and the number of contact hours awarded in each content area.

(9) Facilities and educational resources shall be adequate to implement the program.

(10) A written test with a minimum of a "Pass/Fail" grading system which covers the entire scope of learner objectives will be provided except for conferences and authorship.

(11) The grading system shall be appropriate for the type of program presented.

(12) A program evaluation tool shall be utilized which provides the participant an opportunity to comment on:

(A) achievement of the objectives;

(B) teaching effectiveness of each instructor;

(C) relevance of content presented to stated objectives;

(D) effectiveness of teaching methods; and

(E) appropriateness of physical facilities and educational resources.

(e) Types of CE programs and additional specific criteria necessary for consideration of CE approval.

(1) Department-approved CE programs endorsed by national and state accrediting organizations.

(2) Ongoing CE programs provided by department-approved EMS initial training programs, licensed EMS providers, registered first responder organizations, hospitals accredited by the Joint Commission for the Accreditation of Healthcare Organizations (JCAHO), or accredited educational institutions that have met the course approval criteria in subsection (d) of this section.

(A) Approved EMS certification training programs that are categorized by the department as an Annual Program or JCAHO accredited hospitals, may receive approval for a two-year ongoing CE program upon completion and approval of a biennial CE application.

(B) Licensed EMS providers or registered first responder organizations who have a documented quality assessment plan with CE as part of their improvement plan and have a state certified coordinator, instructor, or medical director who is responsible for the CE program, may receive approval for a two-year ongoing CE program upon completion and approval of a biennial CE application.

(3) National or state standardized courses and conferences.

(A) National and state standardized courses such as Advanced Cardiac Life Support (ACLS), Basic Trauma Life Support (BTLS), Prehospital Trauma Life Support (PHTLS), Pediatric Advanced Life Support (PALS), and Pediatric Prehospital Provider Course (PPPC), all of which must have an adequate evaluation tool which covers the entire scope of objectives taught as part of the program, will be listed with pre-approved credit hours assigned. An approved CE activity list of these programs shall be maintained by the department.

(B) National and state conferences may be preapproved based solely on the merit of content and subject matter experts and placed on the approved CE activity list with credit hours assigned.

(4) Directed activities, single or multiple offering, which is not included in paragraphs (1)-(3) of this subsection.

(A) A program which is offered one or more times, such as a workshop, or seminar, shall complete all criteria listed in subsection (d) of this section and shall be approved prior to the delivery of the single activity or the initial delivery of the multiple offering activity.

(B) Instructors of these programs are not required to be state-certified instructors or coordinators, but shall have expertise in the content areas taught.

(C) If the CE application is for a multiple-offering activity, then approval may be given for up to a two-year time period.

(5) Independent study. Independent study such as CE articles in professional journals, ongoing serial productions or interactive computer programs shall:

(A) be pre-approved by the department;

(B) be developed by a professional group such as an educational institution, corporation, professional association or other approved provider of continuing education;

(C) involve the learner by requiring an active and appropriate response to the educational materials presented;

(D) provide a test as in subsection (d)(10) of this section; and

(E) provide a record of completion which complies with subsection (f) of this section concerning records indicating completion of the program.

(6) Authorship.

(A) A candidate may receive CE credit for development and publication of a manuscript in a periodical.

(B) The number of CE credit hours awarded for each article shall be determined by the department.

(C) CE credit will be awarded in the appropriate content areas as related to the manuscript.

(D) Credit for publication will be awarded only once per two-year CE time period and the candidate must, upon audit, submit a letter from the publisher indicating acceptance or a copy of the published work.

(7) Academic courses.

(A) Upon review by the department, a candidate may receive CE credit for academic courses within the specified content areas for each level of certification.

(B) Completion of academic course work shall be credited on the basis of up to 15 CE contact hours for each semester hour successfully completed, within appropriate content areas. Less than 15 hours may be awarded if the academic course content is only partially applicable to content areas.

(C) When approved, the candidate shall receive notification from the department of acceptance of academic hours and amount of CE credit awarded.

(8) Instruction in approved initial training and continuing education courses. EMS personnel instructing in an approved initial training course or in an approved CE program may apply the contact hours of actual teaching to the appropriate content areas during the CE period.

(9) CE by optional examination.

(A) Candidates may receive CE credit for passing the National Registry of Emergency Medical Technicians written and practical examination for their current level of EMS personnel certification.

(B) Passing the examination shall be credited on the basis of 20 contact hours for EMT level, 30 contact hours for EMT-I level, and 40 contact hours for EMT-P level. CE credit for passing the National Registry examination shall be an option only once during the four-year certification period.

(f) Records for the CE provider.

(1) Records of programs shall be kept by the CE provider for a minimum period of five years from the date of completion.

(2) Records shall include target audience, objectives and content areas with corresponding number of hours, outline of instructor qualifications, dates of instruction, teaching methods, evaluation tools, and a list of participants.

(3) The CE provider shall furnish each participant documentation of completion specifying the CE provider, title, date and location of program, content areas and contact hours, and grades or Pass/Fail, if applicable. Documentation shall be identified on a course certificate, completion document, or a verification letter on official letterhead.

(g) Reporting requirements. Continuing education requirements shall be fulfilled and reported on a two-year cycle. Implementation of this section was effective on September 1, 1994.

(1) Certificants with a certification expiration date before September 1, 1996, shall comply with the two-year reporting requirements after becoming recertified.

(2) Certificants with a certification expiration date after September 1, 1996, shall comply with the two-year reporting requirements for the last two years of the current certification period.

(3) Certificants with a certification expiration date on or after September 30, 1998, shall be responsible for reporting at both two-year cycles in their four-year certification period.

(h) Activities which are not acceptable as CE. The following activities do not fulfill the requirements necessary to receive continuing education credits:

(1) CPR courses designed for lay persons;

(2) orientation programs sponsored by the employing agency to provide specific information about the work setting, policies and procedures, on-the-job training, and equipment demonstration;

(3) organizational activity such as serving on committees, councils, or professional organizations;

(4) any program or activity which is not preapproved in accordance with this section;

(5) any experience which does not fit into the content areas specified for each level of certification; and

(6) activities which have been completed more than once during the two-year CE time period.

(i) Responsibilities of individual certificant.

(1) It is the responsibility of certificants to select and participate in CE activities that will meet their educational needs in conjunction with the direction of their EMS medical director and/or provider, where appropriate. In addition, it is the responsibility of the certificant to determine if the continuing education is approved by the department.

(2) Each certificant shall be responsible for maintaining their own CE records. These records shall document completion as evidenced by course certificates, verification letters written on official letterhead, or academic transcripts, to include notification from the department of the number of hours accepted, and shall include faculty names, titles, dates, content, number of clock hours, and grades of "Pass/Fail," if applicable. The burden of proof of CE participation/completion shall rest solely on the certificant.

(3) These records shall be maintained by the certificant for a minimum of five years from the date of the application for recertification. Copies of documentation shall be submitted to the department within 15 days, if requested upon audit.

(4) If participation is in a program in which grades are provided, a grade equivalent to a "C" or better shall be required or "Pass" on a "Pass/Fail" grading system to receive credit for CE.

(5) Certificants attending approved national or state conferences/courses shall be responsible for distributing the CE hours within the appropriate content areas for the level of certification if the content areas have not been preassigned.

(j) Audit.

(1) The department shall randomly audit certificant's continuing education summary forms. Audits shall be conducted in a timely fashion on at least the minimum number of summary forms necessary to make the audit statistically valid. The department shall also randomly audit a statistically valid sampling of actual teaching during CE programs.

(2) The department may audit the summary form of a specific certificant in response to a complaint, or if there is reason to suspect that a certificant may have falsified CE documentation. The department may also audit actual teaching during CE programs in response to a complaint, or if there is reason to suspect that a CE provider may not be providing their CE program in accordance with the submitted outline and objectives.

(3) Falsification of CE documentation shall be cause for probation, suspension, or decertification as in §157.36 of this title (relating to Criteria for Denial and Disciplinary Actions for EMS Personnel and Voluntary Surrender of a Certificate or License); §157.16 of this title (relating to Emergency Suspension, Suspension, Probation, Revocation of a License); §157.43 of this title (relating to Course Coordinator Certification); §157.44 of this title (relating to EMS Instructor Certification); and/or §157.32 of this title (relating to Emergency Medical Services Education Program and Course Approval).

(4) The department may audit any records of the CE provider.

(5) If any deficiencies are found during an audit, pre-approval for the remaining period shall be revoked. After deficiencies have been corrected, each CE presentation shall have pre-approval for the remainder of the two-year period or until such time as the on-going program status has been reinstated.

(k) Failure to complete required CE.

(1) A certificant who has failed to complete the requirements by the expiration date of the certification period will be granted a 90-day extension period to complete and submit the required CE.

(2) A certificant who has failed to complete and submit all the CE requirements prior to the expiration of their certification may apply for late recertification in accordance with §157.34(f) of this title (relating to Recertification).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 16, 2001.

TRD-200106247
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: January 1, 2002
Proposal publication date: June 1, 2001
For further information, please call: (512) 458-7236

♦ ♦ ♦

TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 1. GENERAL ADMINISTRATION
SUBCHAPTER J. PROCEDURES FOR VENDOR PROTESTS OF PROCUREMENTS

28 TAC §§1.1101 - 1.1107

The Commissioner of Insurance adopts new §§1.1101 - 1.1107 concerning procedures for vendor protests. Sections 1.1101 - 1.1107 are adopted without changes to the proposed text published in the September 14, 2001 issue of the *Texas Register* (26 TexReg 7065) and will not be republished.

The new sections are necessary to establish the procedures for vendor protests of procurements in accordance with §2155.076 of the Texas Government Code. Section 2155.076 requires that each state agency by rule shall develop and adopt protest procedures for resolving vendor protests regarding purchasing issues. The rules must also include standards for maintaining documentation about the purchasing process to be used in the event of a protest.

The new sections set forth the procedures for vendor protests. Section 1.1101 contains definitions and states that the purpose of the subchapter is to implement the provisions of Section 2155.076 of the Government Code. Section 1.1102 addresses the procedures for filing a bid protest. Section 1.1103 describes the process for review and determination of a bid protest. Section 1.1104 addresses appeals of a bid protest determination. Section 1.1105 states that protests and appeals must be filed timely in order to be considered. Section 1.1106 describes the status of the procurement during a protest and appeal. Section 1.1107 indicates the period of time that the department must retain documents related to the procurement.

No comments were received regarding adoption of the new sections.

The new sections are adopted under the Government Code §2155.076 and the Insurance Code §36.001. Section 2155.076 provides that each state agency shall adopt by rule protest procedures for resolving vendor protests regarding purchasing issues. Section 36.001 provides that the Commissioner of Insurance may adopt rules to execute the duties and functions of the Texas Department of Insurance.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 17, 2001.

TRD-200106270
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: November 6, 2001
Proposal publication date: September 14, 2001
For further information, please call: (512) 463-6327

♦ ♦ ♦

TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 363. FINANCIAL ASSISTANCE PROGRAMS

The Texas Water Development Board (the board) adopts amendments to 31 TAC §§363.1, 363.2, 363.501, and 363.503 and new §§363.521-363.524 concerning the Economically Distressed Areas Program (EDAP), without changes to the proposed amendments as published in the August 31, 2001 issue of the *Texas Register* (26 TexReg 6614) and will not be republished. The changes will facilitate implementation of the provisions of SB 312 related to water supply and wastewater projects that are to be completed through the self-help efforts and initiatives of the residents who will receive water or wastewater service from the completed project. The 77th Legislature in SB 312 added a new Subchapter P to the Texas Water Code, Chapter 15 (§§15.951-15.959), for the first time authorizing the board to provide financial assistance to tax exempt nonprofit organizations who assist with and facilitate the self-help efforts of residents of economically distressed areas to obtain otherwise unavailable water and wastewater services. The amendments and new sections are intended to provide the application requirements and parameters for financial assistance to be provided by the board for such projects.

Amendments are adopted to §363.1, Scope of Subchapter, and to §363.2, Definitions of Terms, to add the Colonia Self-Help Program authorized by the new Water Code provisions to those programs to which Subchapter A of Chapter 363 is applicable. Section 363.501, Scope of Subchapter, is amended to add the new program to those applicable under the provisions of Subchapter E of Chapter 363. Section 363.503, Determination of Economically Distressed Area, is also amended to make it consistent with the new §363.524, clarifying the board's discretion to consider all relevant information in making this determination.

Chapter 363, Subchapter E, Economically Distressed Areas, will be restructured into two divisions. The existing §§363.501-363.509 will comprise Division 1, Economically Distressed Areas Program. The adopted new §§363.521-363.524 will comprise Division 2, Colonia Self-Help Program, and will contain the provisions under which the board will consider providing grant assistance to a qualified tax exempt nonprofit organization that incurs reimbursable expenses related to a water supply or wastewater project completed through the self-help efforts and initiatives of the residents receiving service from the project.

New §§363.521-363.524 provides the requirements for an application for financial assistance under the Colonia Self-Help Program. The application must be submitted by a qualified tax exempt nonprofit organization and must include organization information, documentation which demonstrates that the project area is economically distressed, project description and estimated cost information, and documentation which demonstrates that the conventional costs of the proposed project will be significantly reduced through the efforts of the residents that will benefit from the completed project. The application must further demonstrate that the design and construction of the project will be reviewed and inspected by the political subdivision that will provide the utility services.

No comments were received on the proposed amendments and new sections.

SUBCHAPTER A. GENERAL PROVISIONS
DIVISION 1. INTRODUCTORY PROVISIONS

31 TAC §363.1, §363.2

The amendments are adopted under the authority of the Texas Water Code, §6.101 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State including, specifically, §15.958 of the Water Code related to the Colonia Self-Help Program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 18, 2001.

TRD-200106272
Susanne Schwartz
General Counsel
Texas Water Development Board
Effective date: November 7, 2001
Proposal publication date: August 31, 2001
For further information, please call: (512) 463-7981

♦ ♦ ♦

SUBCHAPTER E. ECONOMICALLY DISTRESSED AREAS
DIVISION 1. ECONOMICALLY DISTRESSED AREAS PROGRAM

31 TAC §363.501, §363.503

The amendments are adopted under the authority of the Texas Water Code, §6.101 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State including, specifically, §15.958 of the Water Code related to the Colonia Self-Help Program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 18, 2001.

TRD-200106273
Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: November 7, 2001
Proposal publication date: August 31, 2001
For further information, please call: (512) 463-7981

♦ ♦ ♦

DIVISION 2. COLONIA SELF-HELP PROGRAM

31 TAC §§363.521 - 363.524

The new sections are adopted under the authority of the Texas Water Code, §6.101 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State including, specifically, §15.958 of the Water Code related to the Colonia Self-Help Program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 18, 2001.

TRD-200106274
Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: November 7, 2001
Proposal publication date: August 31, 2001
For further information, please call: (512) 463-7981

♦ ♦ ♦

SUBCHAPTER I. PILOT PROGRAM FOR WATER AND WASTEWATER LOANS TO RURAL COMMUNITIES

The Texas Water Development Board (Board) adopts new 31 TAC §§363.901 - 363.906, 363.921 - 363.923, 363.931 - 363.936, and 363.951 - 363.955 comprising new Subchapter I, Pilot Program for Water and Wastewater Loans to Rural Communities, to Chapter 363, Financial Assistance Programs. Sections 363.901 - 363.906, 363.923, 363.931 - 363.936, and 363.951 - 363.955 are adopted without change to the proposed text as published in the August 31, 2001, issue of the *Texas Register* (26 TexReg 6616) and will not be republished. Section 363.921 and §363.922 are adopted with changes to correct minor typographical errors. The new sections govern applications for loans of financial assistance to rural communities for the construction of water and wastewater facilities under the rural community water and wastewater loan fund established by Texas Water Code, Chapter 15, Subchapter O.

Sections 363.901 - 363.906 will comprise Division 1, Introductory Provisions. Section 363.901 describes the scope of the proposed new subchapter and notices customers that additional requirements from the Chapter 363 General Provisions apply to the program for rural communities unless in conflict with the rural communities rules. Section 363.902 provides definitions for two terms that have specific meanings for this subchapter and program. Section 363.903 provides a brief summary for customers of who may receive funds for which kind of project. Section 363.904 limits the term of loans to 20 years and the amount of the loan to $250,000. The section further advises customers that no loan fee is charged. Section 363.905 implements legislation allowing rural communities to incur long-term debt by entering into a loan agreement and promissory note. Section 363.906 further implements legislation that allows a municipality or county to pledge a percentage of the sales and use tax revenue to secure the debt.

Sections 363.921 - 363.923 will comprise Division 2, Application Procedures. Section 363.921 provides notice to customers of the information that must be submitted in conjunction with an application for loan assistance, in part to ensure that the applicant is authorized to incur debt and has the resources for repaying the debt. Section 363.922 provides information on the environmental activities that must be completed for the proposed project to be in compliance with state law. Section 363.923 advises customers of the statutory findings that the Board is required to make in order to approve the loan.

Sections 363.931 - 363.936 will comprise Division 3, Closing and Release of Funds. Section 363.931 sets out the terms and conditions for debt that is evidenced through a loan agreement and promissory note. The terms of the loan agreement ensure that the funded project is constructed and maintained in accordance with law and that the means of repaying the debt is properly monitored and documented. Section 363.932 advises customers of the permits and completion documents that will have to be submitted before funds are released. The section ensures that applicable laws and rules are complied with in the pre-construction and construction phases of the proposed project. Section 363.933 provides notice to applicants of the process for applying for pre-design funding and describes the requirements for using the option. Section 363.934 describes engineering contracts, plans and specifications that must be submitted for a project to ensure that the project is in compliance with applicable laws and rules addressing construction. Section 363.935 provides for the interest rate that will be charged on loans in this program. The interest rate implements the legislative intent to provide low-cost financing to rural communities. Section 363.936 provides notice to customers that the Board reserves the right to conduct audits to ensure that projects are constructed according to Board approvals and that the borrower is following responsible financial accountability practices.

Sections 363.951 - 363.955 will comprise Division 4, Construction and Post-Construction. Section 363.951 describes construction contract requirements. These requirements comply with statutory requirements as to competitive bidding, retainage, standard of work done under a contract, and the use of local labor. Section 363.952 implements a statutory requirement for an engineering review by Board staff of construction contracts and plans and specifications. Section 363.953 requires borrowers to hire a registered professional to inspect and certify to construction work. The section also reserves the right of the Board to inspect the construction of the project to ensure that the facility is being built according to the specifications,

plans and representations of the borrower. Section 363.954 provides that after approval, no material alterations in the project plans may be made without the authorization of the executive administrator so as to ensure that the project built is the project that was approved by the Board. Section 363.955 states the circumstances under which a certificate of approval of the project will not be issued.

No comments were received on the proposed new sections.

DIVISION 1. INTRODUCTORY PROVISIONS

31 TAC §§363.901 - 363.906

The new sections are adopted under the authority of the Texas Water Code, §6.101 and §15.909.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 18, 2001.

TRD-200106275
Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: November 7, 2001
Proposal publication date: August 31, 2001
For further information, please call: (512) 463-7981

♦ ♦ ♦

DIVISION 2. APPLICATION PROCEDURES

31 TAC §§363.921 - 363.923

The new sections are adopted under the authority of the Texas Water Code, §6.101 and §15.909.

§363.921. Applications.

A rural community seeking loan assistance shall submit a written application for financial assistance which includes:

(1) the citation of the law under which the rural community operates and was created;

(2) a description of the water or wastewater project for which the financial assistance will be used;

(3) the total cost of the project;

(4) the name of the rural community and its principal officers;

(5) the amount of state financial assistance requested;

(6) the plan for repaying the total cost of the project;

(7) whether the rural community has adopted a program of water conservation;

(8) any other information the executive administrator requires to evaluate the application; and

(9) an affidavit stating that:

(A) the facts and information contained in the application are true and correct;

(B) the applicant will comply with all representations in the application and with all laws of the state and all rules and policies of the board;

(C) there is no litigation or other proceeding pending or threatened where an adverse decision would materially adversely affect the financial condition of the applicant or its ability to issue debt; and

(D) the application for financial assistance was approved by the governing body in an open meeting.

§363.922. Environmental Review before Board Approval.

Board staff will use preliminary environmental data provided by the rural community, as specified in §363.14 of this title (relating to Environmental Assessment) and make a written report to the executive administrator on known or potentially significant social or environmental concerns. The executive administrator may recommend approval of the project to the board if, based on preliminary information, there appear to be no significant environmental, permitting, or social issues associated with the project. Where a loan agreement is utilized, the loan agreement will provide the terms and conditions for completion of the environmental review process, which will be consistent with §363.14 of this title and with identified mitigation measures with the intent to ensure environmentally responsible and legally compliant project design and implementation.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 18, 2001.

TRD-200106276
Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: November 7, 2001
Proposal publication date: August 31, 2001
For further information, please call: (512) 463-7981

♦ ♦ ♦

DIVISION 3. CLOSING AND RELEASE OF FUNDS

31 TAC §§363.931 - 363.936

The new sections are adopted under the authority of the Texas Water Code, §6.101 and §15.909.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 18, 2001.

TRD-200106277
Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: November 7, 2001
Proposal publication date: August 31, 2001
For further information, please call: (512) 463-7981

♦ ♦ ♦

DIVISION 4. CONSTRUCTION AND POST-CONSTRUCTION

31 TAC §§363.951 - 363.955

The new sections are adopted under the authority of the Texas Water Code, §6.101 and §15.909.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 18, 2001.

TRD-200106278
Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: November 7, 2001
Proposal publication date: August 31, 2001
For further information, please call: (512) 463-7981

♦ ♦ ♦

TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION
SUBCHAPTER L. MOTOR FUEL TAX

34 TAC §3.185

The Comptroller of Public Accounts adopts an amendment to §3.185, concerning diesel tax prepaid user permit, without changes to the proposed text as published in the August 24, 2001, issue of the *Texas Register* (26 TexReg 6278). The 77th Legislature, 2001, in House Bill 1241, amended Tax Code, Chapter 153 to provide a definition of an agriculture purpose of motor fuel.

Subsection (c) is amended to further clarify that an agricultural purpose does not include processing, packing, or marketing of agricultural products by someone other than the original producer. The amendment adds timber operations to the list of examples of farms, and it includes wildlife management as an agricultural non highway purpose.

No comments were received concerning the proposed amendment.

This amendment is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §§153.205, 153.209, and 153.210.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 19, 2001.

TRD-200106303
Martin Cherry
Deputy General Counsel for Tax Policy and Agency Affairs
Comptroller of Public Accounts
Effective date: November 8, 2001
Proposal publication date: August 24, 2001
For further information, please call: (512) 305-9881

♦ ♦ ♦

SUBCHAPTER DD. OIL FIELD CLEANUP REGULATORY FEE

34 TAC §3.731

The Comptroller of Public Accounts adopts an amendment to §3.731, concerning the imposition and collection of the oil fee, without changes to the proposed text as published in the September 7, 2001, issue of the *Texas Register* (26 TexReg 6858).

This section is amended pursuant to Senate Bill 310, 77th Legislature, 2001. Senate Bill 310 increased the oil field cleanup fee for crude oil produced in the state to five-eighths of $.01 per taxable barrel of crude oil, effective September 1, 2001.

No comments were received concerning the proposed amendment.

This amendment is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Natural Resource Code, §81.116.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 16, 2001.

TRD-200106216
Martin Cherry
Deputy General Counsel for Tax Policy and Agency Affairs
Comptroller of Public Accounts
Effective date: November 5, 2001
Proposal publication date: September 7, 2001
For further information, please call: (512) 305-9881

♦ ♦ ♦

PART 3. TEACHER RETIREMENT SYSTEM OF TEXAS

CHAPTER 41. INSURANCE PROGRAMS
SUBCHAPTER C. TEXAS SCHOOL EMPLOYEES GROUP HEALTH

34 TAC §41.31, §41.32

The Teacher Retirement System of Texas (TRS) adopts new §41.31 and §41.32 concerning the requirements to bid for contracts related to the Texas School Employees Uniform Group Health Coverage Program ("Program") without changes to the

proposed text as published in the August 24, 2001 issue of the *Texas Register* (26TexReg6283).

The new sections partially implement new Insurance Code article 3.50-7, which was passed by the 77th Texas Legislature, 2001 in House Bill 3343 (the "Act"). In accordance with the Act, the new sections establish competitive bidding requirements for the selection of contractors. The selection requirements include minimum premium, service or product income requirements and minimum service volume requirements. These criteria are necessary to ensure that potential bidders have demonstrated financial stability and experience in handling groups of the Program's size. The requirements are designed to ensure the integrity of the new Program and are consistent with the Act, which provides that TRS may consider "ability to service contracts, past experiences, financial stability, and other relevant criteria." The sections also set forth certain procedural requirements for bid submission.

Summary of comments received:

The TRS Board of Trustees ("Board") provided interested parties the opportunity to make oral comments regarding the proposed sections before their adoption at the Board's September 27, 2001 meeting. In addition, the Board received and reviewed written comments submitted in response to the proposal. The comments are summarized below. The Board's responses are set forth separately below the summary of comments.

A representative of the Association of Texas Professional Educators made supportive comments and offered to assist TRS with communication efforts.

A representative of the Pollan Culley Advocacy Group opposed the sections as proposed, suggesting that the eligibility requirements be amended to allow vendors to meet either the premium-income requirement or the service-volume requirement, but not both. Similar written comments indicated that requirements in the proposed sections might preclude some qualified entities from submitting bids.

The Texas Association of Health Plans (TAHP) and the Texas Association of Preferred Provider Organizations (TAPPO) submitted joint written comments opposing adoption of the sections as proposed. They stated that the minimum premium, services or product income requirement of at least $1 billion effectively prohibits submission of bids by health maintenance organizations (HMOs) and preferred provider organizations (PPOs), and that they believe the intent of the enabling legislation was to include HMOs and PPOs in the Program.

The Superintendent of La Vega Independent School District spoke in opposition to the sections as proposed. He expressed concern that costs to the district may increase under the Program and that employees may lose the option to participate in their existing plans.

The Scott and White Health Plan (Scott & White) submitted written comments opposing adoption of the sections as proposed. Scott & White is a basic service HMO and asserts that 54 school districts in central Texas will no longer be able to offer the Scott & White plan to their employees under the proposed sections. Scott & White believes that the Legislature did not intend for small school districts to lose the option of continuing with their existing carriers and that the proposed sections effectively remove that option for their small school district clients. Scott & White also asserted that implementing the Program through an administrator of a self-funded program is inconsistent with legislative intent. Finally, Scott and White suggested that TRS collaborate with the Employees Retirement System of Texas to establish a program similar to the one already available to State of Texas employees.

Employees of various school districts made written comments opposing the sections as proposed. Specifically, these individuals expressed concern that the proposed sections would not allow them to continue using their current providers, that the Program will not be comparable to state employee insurance coverage, that their choices will be limited, that quality of care may suffer and that premium and deductible costs will be higher under the Program than under their current plans. They generally expressed satisfaction with their current providers and frustration with inability to opt out of the Program.

TRS response:

A number of the comments relate to premium and deductible costs under the Program or to quality of care issues relating to the Program. However, the proposed sections do not purport to establish a plan of coverage. Instead, the proposed sections only relate to competitive bidding requirements for the selection of contractors, including the qualifications required for bidder eligibility.

The TRS Board of Trustees ("Board") acknowledges that the minimum premium, services or product income requirement will disqualify entities that fail to meet the criteria from submitting bids. However, the Board's insurance consultant, Watson Wyatt Worldwide, advised that the most effective approach to initial implementation of a statewide program involving over 800 employers is to seek bidders that have demonstrated financial stability and proven administration capabilities involving very large programs. Once a statewide network is established, the Board may consider expanding the program to include additional providers such as regional HMOs or PPOs.

The Board disagrees with the comment that either the premium-income requirement or the service-volume requirement would be sufficient to ensure qualified bidders. Based on the advice of Watson Wyatt Worldwide, the Board has determined that both the $1 billion premium-income requirement and the 300,000 lives service-volume requirement are important factors in obtaining bidders with an established history of financial stability and the ability to service a group of the Program's expected size. Insurance Code article 3.50-7, §3(d), expressly authorizes the Board to consider ability to service the contract, past experience, financial stability and other relevant factors in the selection process.

The Board disagrees with commentators who interpret the Act's legislative intent as requiring the inclusion of regional HMOs and PPOs in the Program. Specifically, the Board interprets the Act as granting broad discretion to the Board, as trustee, to implement the Program in whatever manner it determines is best designed to ensure the financial integrity of the Program. Although the Act permits the Board to include regional HMOs and PPOs in the Program if appropriate, it does not require that the Board do so.

The Board disagrees that "the Legislature never intended for small school districts to lose the option of continuing with their existing carriers for health insurance coverage." To the contrary, House Bill 3343 amended the Insurance Code and the Education Code to expressly prohibit participating school districts from renewing existing health insurance contracts after the Program is implemented (with the exception of certain optional insurance coverages). See, e.g., Insurance Code article 3.51, §3.

The Board also disagrees with the comment that implementation of a self-funded plan is contrary to legislative intent. Insurance Code article 3.50-7, §3(a) and §4(b) grant the Board broad authority to implement and administer the Program and to define the requirements of each coverage plan. Further, §4(b) generally indicates that coverage under the Program should be "at least as extensive" as the TRS-Care 2 plan under Insurance Code article 3.50-4 and should be "comparable in scope" to the Employees Retirement System (ERS) plan under Insurance Code article 3.50-2. Both the TRS-Care plan and the Health Select portion of the ERS plan are self-funded. Therefore, the possibility that the Program will be self-funded is expressly contemplated by the legislation.

The new sections are adopted under the Government Code, Chapter 825, §825.102, which authorizes the Board of Trustees of the Teacher Retirement System to adopt rules for the administration of the funds of the retirement system. Further, they are proposed under the Act, including §3(d), which provides that competitive bidding shall be required under rules adopted by TRS and §3(c), which authorizes TRS to adopt rules relating to the Program as considered necessary by TRS.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 16, 2001.

TRD-200106213
Charles L. Dunlap
Executive Director
Teacher Retirement System of Texas
Effective date: November 5, 2001
Proposal publication date: August 24, 2001
For further information, please call: (512) 542-2115

♦ ♦ ♦

TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 23. VEHICLE INSPECTION

SUBCHAPTER D. VEHICLE INSPECTION RECORDS

37 TAC §23.52

Texas Department of Public Safety adopts an amendment to §23.52, concerning Vehicle Inspection Forms, with changes to the proposed text as published in the August 3, 2001, issue of the *Texas Register* (26 TexReg 5776) and will be republished.

It was noted that a discrepancy existed between §23.52, which authorizes the new green sheet form, and 37 TAC §23.80, which states how the fee is collected and submitted. Subsection (g)(1)(A) of the proposed text stated that the driver of the vehicle would receive the original copy of the VI-30 to use for registration purposes. Prior to the submission of the proposed amendment to 37 TAC §23.80, the rule which provides procedures for the use of the VI-30, the procedure was changed to provide the driver of the vehicle with the first copy and submission of the original to the department. The reason for the change was because the bar symbol on the original copy was the only one which is readable by the agency's bar code readers. This necessitated the change in this rule's text. The complete text of the adopted rule is being republished for clarification purposes.

The section is necessary to efficiently implement the recording and tracking of information related to the collection of funds under the plan for the diesel emissions reduction incentive program, the motor vehicle purchase or lease incentive program, the new technology research and development program, and the energy efficiency grant program.

Amendment to the section creates a new form used in the verification of the vehicle identification number (VIN) for out-of-state vehicles during first time state inspection under Texas Transportation Code §548.256.

No comments were received during a public hearing held by the department on Wednesday, August 15, 2001, regarding adoption of this amendment. No comments were received during the comment period.

The amendment is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, Texas Transportation Code, §548.002, and §548.256(c), as amended by the provisions of Senate Bill 5 passed by the 77th Texas Legislature, 2001.

§23.52. Vehicle Inspection Forms.

(a) Rejection receipt, Form VI-7, shall be executed in duplicate by the certified inspector when a vehicle fails to conform to the standards of safety. The original shall be given to the driver of the rejected vehicle; duplicates shall be kept in the vehicle inspection station's records.

(1) The owner or operator of the vehicle shall pay the inspection fee for each complete inspection conducted on a vehicle.

(A) An inspection certificate shall be issued for the vehicle if it meets all inspection requirements.

(B) If the vehicle fails to meet inspection requirements, the owner or operator of the rejected vehicle may:

(i) have the necessary repairs made on the vehicle by the inspection station;

(ii) pay the required inspection fee, accept a rejection receipt showing all defects for which the vehicle was rejected, and have the vehicle repaired at any place he chooses;

(iii) after required adjustments have been made, return the vehicle to the vehicle inspection station that issued the rejection for one reinspection without charge, provided the vehicle is returned within 15 days of the date of the initial inspection.

(C) If a vehicle inspection station cannot reinspect a vehicle for which it has issued a rejection receipt, it will return the inspection fee to the owner or operator of the vehicle.

(2) A rejection receipt issued to a vehicle which does not have a valid current inspection certificate does not entitle such vehicle to legally operate on a public street or highway.

(b) Every vehicle inspection station shall have a signature card, Form VI-13, on file with the department.

(1) The owner, or person whose signature appears on the inspection station application, Form VI-2, shall endorse the signature

card in the space provided at the bottom of the signature card. Signatures of other designated employees may be affixed to the signature card upon approval by the vehicle inspection station owner or operator.

(2) A requisition, Form VI-18, shall be signed by a person who is associated with the business requesting certificates or by the owner or employee with the proper signature as it appears on the signature card on file with the department.

(3) The vehicle inspection station owner or operator shall notify the department representative when an employee authorized to sign the requisition, Form VI-18, resigns or otherwise leaves the vehicle inspection station.

(c) Requisition for certificates, Form VI-18.

(1) The initial order for certificates is supplied by the department representative when the vehicle inspection station is placed into operation.

(2) Any subsequent order for certificates shall be submitted by the vehicle inspection station and directed to the Texas Department of Public Safety, Vehicle Inspection Section, Austin, or those local Texas Department of Public Safety offices which have certificates available.

(3) Requisition, Form VI-18, shall be accompanied by a cashier's check or money order made payable to the Texas Department of Public Safety.

(4) All information required on the requisition, VI-18, shall be completed. The signature on the requisition shall be a signature that has been authorized on the signature card, VI-13, on file with the department, or the signature of a person who is associated with the business requesting certificates.

(5) The original and one copy of the requisition, Form VI-18, shall be submitted by the vehicle inspection station.

(d) Vehicle inspection station reports, Forms VI-8 and VI-8a, shall be executed in duplicate with the original showing all required information on inspections for the previous period. It shall be mailed to Vehicle Inspection Records Bureau in Austin. The duplicate shall be retained by the vehicle inspection station for one year.

(e) Warning notice, Form VI-20, will be issued to the owner or operator of a vehicle inspection station or to the certified inspector at a vehicle inspection station for a violation of the provisions of the Uniform Act or the Rules and Regulations Manual for Official Vehicle Inspection Stations and Certified Inspectors. The warning notice:

(1) will be filled out as directed by the department;

(2) no penalty will be assessed;

(3) will be entered into the vehicle inspection station's record at the department if it is an inspection station warning; and

(4) will be entered into the certified inspector's record at the department if it is a certified inspector warning.

(f) Receipt for Texas inspection certificate, Form VI-41, will be issued by the department representative investigating a motor vehicle traffic accident when it is apparent that the vehicle involved is damaged to the extent that repair would be necessary before passing inspection. Reinspection of the vehicle is required within 30 days after receipt is issued.

(g) Out-of-State Verification Forms. The department shall furnish serially numbered identification certificates, to all vehicle inspection stations for the purpose of verifying the vehicle identification number on vehicles coming into Texas from another state or country. Effective September 1, 2001 until August 30, 2008, two separate forms are used:

(1) Vehicle Identification Certificate, VI-30, shall be executed in triplicate by the certified inspector when the vehicle is presented for inspection for the purpose of registration in this state and the vehicle is subject to collection of the Texas Emissions Reduction Plan Fund Fee.

(A) The first copy of the identification certificate will be presented to the driver of the vehicle for use in registering and titling the vehicle. The original of the identification certificate will be forwarded to the department weekly with the Texas Emissions Reduction Plan Fund Fee collected, minus the statutorily authorized station administrative cost. The second copy of the inspection certificate will be retained in the certificate book by the inspection station.

(B) Form VI-30 will be obtained from the department by requisition using Form VI-18, signed by a person who is the owner or employee of the inspection station with the proper signature as it appears on the signature card on file with the department. These requisitions shall be submitted by the vehicle inspection station and directed to the Texas Department of Public Safety, Vehicle Inspection Records, Austin, or those local Texas Department of Public Safety offices, which have certificates available. Inspection stations will maintain a sufficiently reasonable number of VI-30 forms on-hand to adequately provide for out-of-state vehicles, however requisitions of VI-30 forms in bulk numbers are not allowed.

(C) The issuance of Form VI-30 by inspection stations will be recorded on the VI-8, VI-8a, and VI-8b.

(2) Vehicle Identification Certificate VI-30A, shall be executed in duplicate by the certified inspector when the vehicle is presented for inspection for the purpose of registration in this state and the owner of the vehicle is exempt from the Texas Emissions Reduction Plan Fund Fee.

(A) The original of the identification certificate will be presented to the driver of the vehicle for use in registering and titling the vehicle. The copy of the identification certificate will be retained by the inspection station.

(B) Form VI-30A will be obtained from the department by requisition using Form VI-18, signed by a person who is the owner or employee of the inspection station with the proper signature as it appears on the signature card on file with the department. These requisitions shall be submitted by the vehicle inspection station and directed to the Texas Department of Public Safety, Vehicle Inspection Records, Austin, or those local Texas Department of Public Safety offices, which have certificates available. Inspection stations, particularly those on or near military bases, will maintain a sufficiently reasonable number of VI-30A forms on-hand to adequately provide for out-of-state vehicles, however orders of bulk numbers of this form for exempted vehicle owners are not allowed.

(C) The issuance of Form VI-30A by inspection stations will be recorded on the VI-8, VI-8a, and VI-8b.

(3) Form VI-30 or Form VI-30A certificates shall be safeguarded in the same manner required to safeguard safety inspection certificates.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 16, 2001.

TRD-200106237
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: November 5, 2001
Proposal publication date: August 3, 2001
For further information, please call: (512) 424-2135

♦ ♦ ♦

SUBCHAPTER H. COMMERCIAL MOTOR VEHICLE COMPULSORY INSPECTION PROGRAM

37 TAC §23.101

The Texas Department of Public Safety adopts an amendment to §23.101, relating to Commercial Motor Vehicle Compulsory Inspection Program, without changes to the proposed text as published in the August 3, 2001, issue of the *Texas Register* (26 TexReg 5780) and will not be republished.

The section is necessary to efficiently implement the recording and tracking of information related to the collection of funds under the plan for the diesel emissions reduction incentive program, the motor vehicle purchase or lease incentive program, the new technology research and development program, and the energy efficiency grant program.

Amendment to the section provides procedures for the collection of inspection surcharge for the Texas Emission Reduction Plan Fund. Under the rule amendment, each commercial vehicle inspection performed under Texas Transportation Code, §548.504 will require an annual additional surcharge of $10 collected for the Texas Emission Reduction Plan Fund.

A public hearing was held by the department on Wednesday, August 15, 2001, to take public comment on the proposal. The department received no comments regarding adoption of this amendment.

The amendment is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, §548.505 and §548.504.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 16, 2001.

TRD-200106236
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: November 5, 2001
Proposal publication date: August 3, 2001
For further information, please call: (512) 424-2135

♦ ♦ ♦

REVIEW OF AGENCY RULES

This Section contains notices of state agency rules review as directed by Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review*, which invite public comment to specified rules; and (3) notices of *readoption*, which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the ***Texas Administrative Code*** on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the ***Texas Register*** office.

Proposed Rule Reviews

Texas State Board of Medical Examiners

Title 22, Part 9

The Texas State Board of Medical Examiners proposes to review Chapter 166 (§§166.1-166.6), concerning Physician Registration, pursuant to the Appropriations Act of 1997, House Bill 1, Article IX, §167.

Elsewhere in this issue of the *Texas Register*, the Texas State Board of Medical Examiners proposes amendments to §§166.1-166.6.

The Texas State Board of Medical Examiners will consider, among other things, whether the reasons for adoption of these rules continue to exist.

Comments on the proposed review may be submitted to Pat Wood, P.O. Box 2018, MC-901, Austin, Texas 78768-2018.

TRD-200106419
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Filed: October 23, 2001

♦ ♦ ♦

The Texas State Board of Medical Examiners proposes to review Chapter 175 (§§175.1-175.5), concerning Fees, Penalties and Applications, pursuant to the Appropriations Act of 1997, House Bill 1, Article IX, §167.

Elsewhere in this issue of the *Texas Register*, the Texas State Board of Medical Examiners proposes amendments to §§175.1-175.4, the repeal and replacement of §175.4 and the repeal of §175.5.

The Texas State Board of Medical Examiners will consider, among other things, whether the reasons for adoption of these rules continue to exist.

Comments on the proposed review may be submitted to Pat Wood, P.O. Box 2018, MC-901, Austin, Texas 78768-2018.

TRD-200106420
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Filed: October 23, 2001

♦ ♦ ♦

Texas Water Development Board

Title 31, Part 10

The Texas Water Development Board (Board) files this notice of intent to review 31 TAC, Part X, Chapter 355, Research and Planning Fund, in accordance with the Texas Government Code, §2001.039. The Board finds that the reason for adopting the chapter continues to exist.

As required by §2001.039 of the Texas Government Code, the Board will accept comments and make a final assessment regarding whether the reason for adopting each of the rules in Chapter 355 continues to exist. The comment period will last 30 days beginning with the publication of this notice of intention to review.

Comments or questions regarding this rule review may be submitted to Ron Pigott, Attorney, Texas Water Development, P.O. Box 13231, Austin, Texas, 78711-3231, by e-mail to ron.pigott@twdb.state.tx.us or by fax @ 512/463-5580.

TRD-200106279
Suzanne Schwartz
General Counsel
Texas Water Development Board
Filed: October 18, 2001

♦ ♦ ♦

The Texas Water Development Board (Board) files this notice of intent to review 31 TAC, Part X, Chapter 356, Groundwater Management Plan Certification, in accordance with the Texas Government Code, §2001.039. The Board finds that the reason for adopting the chapter continues to exist. The Board concurrently proposes amendments to §§356.1 through 356.6 and new §356.10 in response to Senate Bill 2, 77th Legislature, Regular Session, 2001.

As required by §2001.039 of the Texas Government Code, the Board will accept comments and make a final assessment regarding whether

the reason for adopting each of the rules in 31 TAC Chapter 356 continues to exist. The comment period will last 30 days beginning with the publication of this notice of intention to review.

Comments or questions regarding this rule review may be submitted to Ron Pigott, Attorney, Texas Water Development, P.O. Box 13231, Austin, Texas, 78711-3231, by e-mail to ron.pigott@twdb.state.tx.us or by fax @ 512/463-5580.

TRD-200106280
Suzanne Schwartz
General Counsel
Texas Water Development Board
Filed: October 18, 2001

♦ ♦ ♦

The Texas Water Development Board (Board) files this notice of intent to review 31 TAC, Part X, Chapter 357, Regional Water Planning Guidelines, in accordance with the Texas Government Code, §2001.039. The Board finds that the reason for adopting the chapter continues to exist. The Board concurrently proposes amendments to §§357.2, 357.7, 357.8, 357.11, and 357.14 and new §357.15, concerning Regional Water Planning Guidelines. These amendments and new sections are proposed in response to Senate Bill 2, 77th Legislature, Regular Session, 2001.

As required by §2001.039 of the Texas Government Code, the Board will accept comments and make a final assessment regarding whether the reason for adopting each of the rules in 31 TAC Chapter 357 continues to exist. The comment period will last 30 days beginning with the publication of this notice of intention to review.

Comments or questions regarding this rule review may be submitted to Ron Pigott, Attorney, Texas Water Development, P.O. Box 13231, Austin, Texas, 78711-3231, by e-mail to ron.pigott@twdb.state.tx.us or by fax @ 512/463-5580.

TRD-200106281
Suzanne Schwartz
General Counsel
Texas Water Development Board
Filed: October 18, 2001

♦ ♦ ♦

The Texas Water Development Board (Board) files this notice of intent to review 31 TAC, Part X, Chapter 358, State Water Planning Guidelines, in accordance with the Texas Government Code, §2001.039. The Board finds that the reason for adopting the chapter continues to exist. The Board concurrently proposes amendments to §358.1 and §358.3 and new §358.5 and §358.6, concerning State Water Planning Guidelines. These amendments and new sections are proposed in response to Senate Bill 2, 77th Legislature, Regular Session, 2001.

As required by §2001.039 of the Texas Government Code, the Board will accept comments and make a final assessment regarding whether the reason for adopting each of the rules in 31 TAC Chapter 358 continues to exist. The comment period will last 30 days beginning with the publication of this notice of intention to review.

Comments or questions regarding this rule review may be submitted to Ron Pigott, Attorney, Texas Water Development, P.O. Box 13231, Austin, Texas, 78711-3231, by e-mail to ron.pigott@twdb.state.tx.us or by fax @ 512/463-5580.

TRD-200106282
Suzanne Schwartz
General Counsel
Texas Water Development Board
Filed: October 18, 2001

♦ ♦ ♦

Texas Workers' Compensation Commission

Title 28, Part 2

The Texas Workers' Compensation Commission files this notice of intention to review the rules contained in Chapter 104 concerning General Provisions, Rule Making. This review is pursuant to the General Appropriations Act, Article IX, §167, 75th Legislature, the General Appropriations Act, Section 9-10, 76th Legislature, and Texas Government Code §2001.039 as added by SB-178, 76th Legislature.

The agency's reason for adopting the rule contained in these chapters continues to exist and it proposes to readopt these rules.

Comments regarding whether the reason for adopting this rule continues to exist must be received by 5:00 p.m. on December 3, 2001, and submitted to Nell Cheslock, Office of General Counsel, Mailstop #4-D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH 35, Austin, Texas 78704-7491.

CHAPTER 104. General Provisions-Rule-Making. §104.1. Contents of Rule-Making Petitions.

TRD-200106296
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Filed: October 19, 2001

♦ ♦ ♦

The Texas Workers' Compensation Commission files this notice of intention to review the rules contained in Chapter 108 concerning Fees. This review is pursuant to the General Appropriations Act, Article IX, §167, 75th Legislature, the General Appropriations Act, Section 9-10, 76th Legislature, and Texas Government Code §2001.039 as added by SB-178, 76th Legislature.

The agency's reason for adopting the rule contained in these chapters continues to exist and it proposes to readopt these rules.

Comments regarding whether the reason for adopting this rule continues to exist must be received by 5:00 p.m. on December 3, 2001, and submitted to Nell Cheslock, Office of General Counsel, Mailstop #4-D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH 35, Austin, Texas 78704-7491.

CHAPTER 108. Fees. §108.1. Charges for Copies of Public Information.

TRD-200106297
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Filed: October 19, 2001

♦ ♦ ♦

Adopted Rule Reviews

Texas Department of Banking

Title 7, Part 2

The Finance Commission of Texas (commission), on behalf of the Texas Department of Banking (department), has completed the review of a portion of Texas Administrative Code, Title 7, Chapter 15, Subchapter F, comprised of §§15.101-15.117, regarding Applications for Merger, Conversion and Purchase or Sale of Assets.

Notice of the review of these sections was published in the June 22, 2001, issue of the *Texas Register* (26 TexReg 4747). No comments were received with respect to these rules. The department believes that the reasons for initially adopting these rules continue to exist.

The department identified a need to amend and update §§15.101-15.117 in response to recent legislation, primarily to better integrate interstate merger transactions and eliminate unnecessarily restrictive language regarding bank powers. A drafting project to address this need is underway and amendments will be proposed as soon as feasible.

The commission finds that the reasons for initially adopting §§15.101-15.117 continue to exist and readopts these sections without changes pursuant to the requirements of Government Code, §2001.039.

TRD-200106332
Everette D. Jobe
Certifying Official
Texas Department of Banking
Filed: October 19, 2001

♦ ♦ ♦

The Finance Commission of Texas (commission), on behalf of the Texas Department of Banking (department), has completed the review of a portion of Texas Administrative Code, Title 7, Chapter 25 (Prepaid Funeral Contracts), specifically §§25.1-25.8, regarding Contract Forms, and §§25.10-25.12, regarding Regulation of Licenses, and has completed the review of Title 7, Chapter 26 (Perpetual Care Cemeteries), comprised of §26.1, regarding Fees and Assessments.

Notice of the review of these sections was published in the January 19, 2001, issue of the *Texas Register* (26 TexReg 781). No comments were received with respect to these rules. The department believes that the reasons for initially adopting these rules continue to exist, except that the department concludes that §§25.1-25.6 must be substantially modified to implement revisions to Chapter 154, Finance Code, enacted by the 77th Legislature and effective September 1, 2001. The department anticipates that conforming proposed rules will be published in this issue of the *Texas Register* for comment.

Subject to the proposed revision of §§25.1-25.6, the commission finds that the reasons for initially adopting these rules continue to exist and readopts these sections without changes pursuant to the requirements of Government Code, §2001.039.

TRD-200106333
Everette D. Jobe
Certifying Official
Texas Department of Banking
Filed: October 19, 2001

♦ ♦ ♦

Texas Savings and Loan Department

Title 7, Part 4

The Finance Commission of Texas (the "commission") has completed the review of Texas Administrative Code, Title 7, Chapter 65, comprised of §§65.1-65.24, relating to Loans and Investments of Savings and Loan Associations.

Notice of the review was published in the August 31, 2001, issue of the *Texas Register* (26 TexReg 6737). No comments were received with respect to these rules. The commission believes that the reasons for adopting these rules continue to exist.

The commission readopts these sections, pursuant to the requirements of the Government Code, §2001.039, and finds that the reasons for adopting these rules continue to exist.

TRD-200106451
Timothy K. Irvine
General Counsel
Texas Savings and Loan Department
Filed: October 24, 2001

♦ ♦ ♦

The Finance Commission of Texas (the "commission") has completed the review of Texas Administrative Code, Title 7, Chapter 67, comprised of §§67.1-67.17, relating to Savings and Deposit Accounts of Savings and Loan Associations.

Notice of the review was published in the August 31, 2001, issue of the *Texas Register* (26 TexReg 6737). No comments were received with respect to these rules. The commission believes that the reasons for adopting these rules continue to exist.

The commission readopts these sections, pursuant to the requirements of the Government Code, §2001.039, and finds that the reasons for adopting these rules continue to exist.

TRD-200106452
Timothy K. Irvine
General Counsel
Texas Savings and Loan Department
Filed: October 24, 2001

♦ ♦ ♦

The Finance Commission of Texas (the "commission") has completed the review of Texas Administrative Code, Title 7, Chapter 69, comprised of §§69.1-69.11, relating to Reorganization, Merger, Consolidation, Acquisition, and Conversion of Savings and Loan Associations.

Notice of the review was published in the August 31, 2001, issue of the *Texas Register* (26 TexReg 6737). No comments were received with respect to these rules. The commission believes that the reasons for adopting these rules continue to exist.

The commission readopts these sections, pursuant to the requirements of the Government Code, §2001.039, and finds that the reasons for adopting these rules continue to exist.

TRD-200106453
Timothy K. Irvine
General Counsel
Texas Savings and Loan Department
Filed: October 24, 2001

♦ ♦ ♦

The Finance Commission of Texas (the "commission") has completed the review of Texas Administrative Code, Title 7, Chapter 73, comprised of §§73.1-73.6, relating to Subsidiary Corporations of Savings and Loan Associations.

Notice of the review was published in the August 31, 2001, issue of the *Texas Register* (26 TexReg 6738). No comments were received with respect to these rules. The commission believes that the reasons for adopting these rules continue to exist.

The commission readopts these sections, pursuant to the requirements of the Government Code, §2001.039, and finds that the reasons for adopting these rules continue to exist.

TRD-200106454
Timothy K. Irvine
General Counsel
Texas Savings and Loan Department
Filed: October 24, 2001

♦ ♦ ♦

TABLES & GRAPHICS

Graphic material from the emergency, proposed, and adopted sections is published separately in this tables and graphics section. Graphic material is arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic material is indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 4 TAC §20.22(a)

Pest Mgmt Zone	Planting Dates	Destruction Deadline	Destruction Method (also see footnotes)
1	Feb. 1 - March 31	September 1	shred and plow a,b
2 – Area 1	No dates set	September 1	shred and plow a,b
2 – Area 2	No dates set	September 1	shred and plow a,b
2 – Area 3	No dates set	September 1	shred and plow a,b
2 – Area 4	No dates set	October 1	shred and plow a
3 -Area 1 (Matagorda County)	March 5 - May 15	October 1	shred and plow a,b
3 -Area 1 (Jackson & Wharton Counties)	March 5 - May 15	October 29	shred and plow a,b
3 - Area 2	March 5 - May 15	October 29	shred and plow a,b
4	No dates set	October 10	shred and plow a,b
5	No dates set	November 19	shred and/or plow a,c
6	No dates set	October 31	shred and/or plow a,c
7	March 20 - May 31	November 30	shred and/or plow a,c
8	March 20 - May 31	November 30	shred and/or plow a,c
9	No dates set	March 15	shred and plow b,d
10	No dates set	February 1	shred and plow b,d

a/ Alternative destruction methods are allowed (see paragraph (b)).

b/ Destruction shall be performed in a manner to prohibit the presence of live cotton plants.

c/ Destruction shall periodically be performed to prevent presence of fruiting structures.

d/ Soil shall be tilled to a depth of 2 or more inches in Zone 9, and to a depth of 6 or more inches in Zone 10.

Figure: 7 TAC §25.2(c)

Model Waiver of Right to Cancel in English.

To use this form: You must reproduce this form on ONE PAGE. The caption in this form is in Arial 14pt, the narrative paragraphs are in Times 12pt, and the consumer inquires and complaints disclosure is in Arial 9pt fonts.

Waiver of Right to Cancel
(For Prepaid Funeral Benefit Contracts)

Name of Purchaser: _____

Contract Number: _____

Contract Effective Date: _____

Seller: _____

1. I am the purchaser of the Contract listed above. By signing my name below, I am waiving my right to cancel the Contract, as permitted by the Texas Finance Code, Section 154.155.

2. I understand that I will **NOT** be able to cancel the Contract and receive any refund from the Seller in the future **even if I move out of the community in which I currently live or change my mind.**

3. This waiver is not valid unless both you and the Seller signed it at least 15 days after the date the Contract is effective. The effective date is when both parties accept the Contract.

_____	_____
My signature as Purchaser	Acknowledgement of Seller (Or Seller's Agent)
Date Signed: _____	Date Signed: _____

The Seller is required to deliver a copy of this signed Waiver to the Purchaser.

The Texas Department of Banking regulates the sale of prearranged funeral contracts and has approved the form of this Waiver. You can file a consumer complaint with the Department by calling (877) 276-5554 (a toll free call). The Department's website address is http:\\www.banking.state.tx.us.

[Form # 9/01 Waiver]

Figure: 7 TAC §25.3(b)

Funeral Goods And Services Selected.

To use this form: You must reproduce this form on ONE PAGE. The caption in this form is in Arial 10pt, the narrative paragraphs are in Times 8.5pt, and the section detailing the funeral goods and services selected is in Arial 8.5pt fonts.

Statement of Funeral Goods and Services Selected

The Total Contract Price below includes the goods and services to be delivered at the time of the Contract Beneficiary's death. You are not purchasing goods and services left blank. You may purchase those goods and services at the time of the funeral service, if desired or required by law or by a cemetery or crematory.

BASIC SERVICES OF FUNERAL HOME STAFFAND OVERHEAD.....$_____

EMBALMING: (explanation below**)**
Embalming services .....$_____

OTHER CARE OF BODY:
Bathing body.....$_____
Cosmetic/Beautician.....$_____
Dressing/Casketing.....$_____
Refrigeration fee (# days_____).....$_____
Other _____$_____

USE OF BUILDING AND STAFF:
Rosary or prayer service.....$_____
Viewing/Visitation (# days_____).....$_____
Funeral service at funeral home .....$_____
Funeral service at other facility .....$_____
Memorial service at funeral home.....$_____
Memorial service at other facility .....$_____
Graveside service .....$_____
Other.....$_____

TRANSPORTATION SERVICES:
Transfer of remains to funeral home
(_____ mile radius).....$_____
Hearse (funeral coach).....$_____
Funeral Sedan.....$_____
Limousine.....$_____
Pallbearer car .....$_____
Clergy car.....$_____
Flower car .....$_____
Other.....$_____

GOODS:

Casket……..$_____
Wood Type: _____
Steel: 16 ga 18 ga 20 ga ___ ga Stainless
Bronze: 32 oz 48 oz. Copper: 32 oz 48 oz .
Other: _____
Seal Nonseal Protective Nonprotective N/A
Interior Lining: Crepe Velvet Satin Other _____
Shell: Square Round Exterior color: (opt)_____

Outer burial container (explanation below)……. $_____
describe):
_____
: _____
Concrete
Steel: 8 ga 10 ga 12 ga Stainless
Bronze _____ oz. Copper _____ oz.
Other:_____
Seal Nonseal Protective Nonprotective N/A

Alternative Container (describe)_____.$_____

Urn (Name and Primary Construction)
_____ $_____
Shipping Container (describe)
_____ $_____
Clothing (describe)
_____ $_____
Stationery/Cards (describe)
_____ (#_____) $_____
Acknowledgement cards (describe)
_____ (#_____) $_____
Other _____ $_____
Other _____ $_____

OTHER SERVICES:
Forwarding remains to another funeral home
(describe method) _____ $_____
Receiving remains from another funeral home ...$_____
Other _____ $_____

Immediate Burial, with:
Purchaser-provided casket .....$_____
Alternative container .....$_____
Funeral Home's container
(describe) _____ $_____

Direct Cremation, with:
Purchaser-provided container .....$_____
Alternative container .....$_____
Funeral Home's container
(describe)_____$_____

CASH ADVANCE ITEMS: *We charge You for our services in obtaining the items with the boxes marked:*
- ❑ _____ $_____
- ❑ _____ $_____
- ❑ _____ $_____
- ❑ _____ $_____
- ❑ _____ $_____

Subtotal: .....$_____

Discounts/Adjustments:_____ $_____

TOTAL CONTRACT PRICE:	$

This contract provides only the goods and services itemized ABOVE. A prepaid funeral contract normally does not include the following:

Embalming Due to Autopsy	Cemetery Set-up (tent-chairs)	Clergy Honorarium
Embalming Due to Organ/Tissue Donor	Cemetery Opening/Closing Fee	Death Certificates
Funeral Home Overtime Fees (e.g. holiday service)	Cemetery Property	Flowers
Donation of Body to Hospital/Medical School	Cemetery Overtime Fees	Newspaper Notices
Special-need Cosmetic Procedures	Crematory Fees	Musicians and Singers
Unforeseen Expenses	Outside Facility Rental	Police Escorts
		Public Transportation

Unless otherwise specified in the Statement of Funeral Goods and Services Selected, the Funeral Home will charge and require payment for any of these items, which may be selected at the time of the funeral. Initial here to confirm You have read this._____

Figure: 7 TAC §25.3(g)

Changes to a Contract at the Death of the Contract Beneficiary.

To use this form: You must reproduce the narrative of this form exactly as written. The caption in this form is in Arial 11pt and the narrative paragraphs are in Times 10pt fonts.

5. Changes to a Contract at the Death of the Contract Beneficiary

If the Seller is required to deliver the funeral goods and services selected with no further payments due, then this contract is fully paid.

Relating to fully paid contracts: The law states that the Responsible Person may decide to change the funeral goods or services selected up to 10% of the Total Contract Price at the time of the funeral. Additionally, the Seller, Funeral Home and Responsible Person may agree in writing to more extensive changes. The Responsible Person must pay any increased costs resulting from any changes. The Seller is not required to refund any money, or apply any money to another contract or funeral, if the contract is decreased.

- **If this contract provides a funeral for someone other than You** and the Contract Beneficiary did not leave written directions that meet legal requirements, then the Responsible Person may change the funeral goods and services selected at the time of the funeral service. Changes could include the method of final disposition stated in this contract. (For example, the Responsible Person could exchange a ground burial service and substitute a cremation service.) The Responsible Person can also change other contract selections. (For example, the Responsible Person can change your casket choice.)

- **If this contract provides for YOUR OWN funeral,** then You are the only person who can change the method of final disposition that You have chosen, such as by ground burial or by cremation service. However, the Responsible Person can change other contract selections unless you sign below. (For example, the Responsible Person can change your casket choice.)

Relating to contracts not paid in full: If You do not fully pay for this contract, then the final funeral arrangements could be significantly different from the funeral that You have planned under this contract. However, laws relating to the final disposition of the body of the Contract Beneficiary still remain in effect.

If the selections You made are important to You, You should discuss the funeral goods and services selected with your family and tell them what is important to You. If You wish to prevent changes to this contract, You must sign the space below:

This contract is for my funeral service and, if paid in full at the time of my death, the funeral goods and services selected may not be changed after my death. Sign here if this is your choice. _____

Figure: 7 TAC §25.3(j)

Consumer Inquiries And Complaints Disclosure.

To use these forms: You must reproduce the narrative of the correct form exactly as written. This form is set in Times 8.5pt font.

FOR A TRUST-FUNDED CONTRACT:

Inquiries should be directed as below. All complaints must be in writing.

Concerning the prepaid contract:
Texas Department of Banking
2601 N. Lamar Austin, Texas 78705
1-877-276-5554 (toll free)
http:\\www.banking.state.tx.us

Concerning the funeral service or funeral director:
Texas Funeral Service Commission
P.O. Box 12217, Austin, Texas 78711
1-888-667-4881 (toll free)
http:\\www.tfsc.state.tx.us

FOR AN INSURANCE-FUNDED CONTRACT:

Inquiries should be directed as below. All complaints must be in writing.

Concerning
the prepaid contract:
Texas Department of Banking
2601 N. Lamar Austin, Texas 78705
1-877-276-5554 (toll free)
www.banking.state.tx.us

Concerning
the funeral service or funeral director:
Texas Funeral Service Commission
P.O. Box 12217, Austin, Texas 78711
1-888-667-4881 (toll free)
www.tfsc.state.tx.us

Concerning
the Insurance Policy:
Texas Department of Insurance
P.O. Box 149194, Austin, Texas 78714
1-800-252-3439 (toll free)
www.tdi.state.tx.us

Figure: 7 TAC §80.22(a)

Form A

Conditional Qualification Letter

Date:
Prospective Applicant:
Mortgage Broker or Loan Officer:
License Number _____
Address _____
Phone # _____
Loan (describe as follows):
Loan Amount:
Qualifying Interest Rate:
Term:
Maximum Loan-to-Value Ratio:
Loan Type and Description:
Mortgage Broker ☐ **has** ☐ **has not** received a signed application for the Loan from the Prospective Applicant
Mortgage Broker ☐ **has** ☐ **has not** reviewed the Prospective Applicant's credit report
Mortgage Broker ☐ **has** ☐ **has not** reviewed the Prospective Applicant's credit score
☐ Mortgage Broker has reviewed the following additional items (list):
The Prospective Applicant has provided the Mortgage Broker ☐ verbally ☐ in writing with information about the Prospective Applicant's income, available cash for a down payment and payment of closing costs, debts, and other assets.
Based on the information that the Prospective Applicant has provided to the Mortgage Broker, as described above, the Mortgage Broker has determined that the Prospective Applicant is eligible and qualified to meet the financial requirements of the Loan.
This is not an approval for the Loan. Approval of the Loan requires: (1) the Mortgage Broker to verify the information that the Prospective Applicant has provided; (2) the Prospective Applicant's financial status and credit report to remain substantially the same until the Loan closes; (3) the collateral for the Loan (the subject property) to satisfy the lender's requirements (for example, appraisal, title, survey, condition, and insurance); (4) the Loan, as described, to remain available in the market; (5) the Prospective Applicant to execute loan documents the lender requires, and (6) the following additional items (list):

_____
Mortgage Broker or Loan Officer

Figure: 7 TAC §80.22(b)

Form B

Conditional Approval Letter

Date:
Applicant:
Mortgage Broker or Loan Officer:
License Number _____
Address _____
Phone # _____
Loan (describe as follows):
Loan Amount:
Interest Rate:
Interest Rate Lock Expires (if applicable):
Maximum Loan-to-Value Ratio:
Loan Type and Program:
Secondary financing terms (if applicable):
Optional Information: *Points:*
Origination: _____
Discount: _____
Commitment: _____
Other (describe): _____

Subject Property:
Mortgage Broker has received a signed application from the Applicant.
Mortgage Broker has reviewed Applicant's credit report and credit score and has verified Applicant's income, available cash for a down payment and closing costs, debts, and other assets.
Applicant is approved for the Loan provided that the Applicant's creditworthiness and financial position do not materially change prior to closing and provided that:

1. The Subject Property is appraised for an amount not less than $_____ .
2. The Lender does not object to encumbrances to title shown in the title commitment or survey;
3. The Subject Property's condition meets Lender's requirements
4. The Subject Property is insured in accordance with Lender's requirements;
5. The Applicant executes the loan documents Lender requires; and
6. The following additional conditions are complied with (list):

This Conditional Approval expires on _____.

_____
Mortgage Broker or Loan Officer

Figure: 22 TAC §183.12(a)(11)

Form to be Completed by Patient, Notifying the Acupuncturist of Whether He/She Has Been Evaluated by a Physician, and Other Information.

(Pursuant to the requirements of section 183.6(e) of this title (relating to Denial of License; Discipline of Licensee) and Tex. Occ. Code Ann., section 205.351, governing the practice of acupuncture.)

I (patient's name) _____, am notifying the acupuncturist (practitioner's name), _____ of the following:

___ Yes ___ No I have been evaluated by a physician or dentist for the condition being treated within 12 months before the acupuncture was performed. I recognize that I should be evaluated by a physician or dentist for the condition being treated by the acupuncturist.

_____ (initials of patient) Date: _____

___ Yes ___ No I have received a referral from my chiropractor within the last 30 days for acupuncture.

After being referred by a chiropractor, if after 120 days or 30 treatments, whichever comes first, no substantial improvement occurs in the condition being treated, I understand that the acupuncturist is required to refer me to a physician. It is my responsibility and choice whether to follow this advice.

Signature _____ Date _____

AVISO SOBRE QUEJAS

Se pueden presentar quejas acerca de médicos, así también como de otras personas autorizadas y registradas por la Junta de Examinadores Médicos del Estado de Texas (Texas State Board of Medical Examiners), incluyendo a ayudantes médicos y acupunturistas, para su investigación, en la siguiente dirección:

Texas State Board of Medical Examiners

Attention: Investigations

333 Guadalupe, Tower 3, Suite 610

P.O. Box 2018, MC-263

Austin, Texas 78768-2018

Se puede obtener ayuda para presentar una queja llamando al siguiente número telefónico: 1-800-201-9353

Figure: 22 TAC §183.18(b)

ACUPUNCTURE TRAINING ADVISORY STATEMENT

You are advised that the practice of acupuncture in Texas requires licensure by the Texas State Board of Acupuncture Examiners and is governed by the Medical Practice Act (the Act), Texas Civil Statutes, Article 4495b, subchapter F, and the rules of the Texas State Board of Medical Examiners, 22 TAC §§183.1 et. seq.

You are further advised that for an acupuncture school located in the United States or Canada to be considered to be an approved acupuncture school by the Texas State Board of Acupuncture Examiners for purposes of meeting the educational requirements for obtaining an acupuncture license, the school must comply and must meet the requirements set forth below:

Acceptable approved acupuncture school - Effective January 1, 1996, with the exception of the provisions outlined in §183.4(h) of this title (relating to Exceptions),

(A) a school of acupuncture located in the United States or Canada which, at the time of the applicant's graduation, was a candidate for accreditation by the Accreditation Commission for Acupuncture and Oriental Medicine (ACAOM), offered no more than a certificate upon graduation, and had a curriculum of 1,800 hours with at least 450 hours of herbal studies which at a minimum included the following:

(i) basic herbology including recognition, nomenclature, functions, temperature, taste, contraindications, and therapeutic combinations of herbs;

(ii) herbal formulas including traditional herbal formulas and their modification/variations based on traditional methods of herbal therapy;

(iii) patent herbs including the names of the more common patent herbal medications and their uses; and

(iv) clinical training emphasizing herbal uses; or

(B) a school of acupuncture located in the United States or Canada which, at the time of the applicant's graduation, was accredited by ACAOM, offered a masters degree upon graduation, and had a curriculum of 1,800 hours with at least 450 hours of herbal studies which at a minimum included the following:

(i) basic herbology including recognition, nomenclature, functions, temperature, taste, contraindications, and therapeutic combinations of herbs;

(ii) herbal formulas including traditional herbal formulas and their modifications or variations based on traditional methods of herbal therapy;

(iii) patent herbs including the names of the more common patent herbal medications and their uses; and

(iv) clinical training emphasizing herbal uses; or

(C) a school of acupuncture located outside the United States or Canada that is determined by the board to be substantially equivalent to a school defined in subparagraph (B) of this paragraph through an evaluation by a board-approved credential evaluation service; and

(D) the requirements of this section shall be in addition to the requirements of the Medical Practice Act, §6.07, subsection (c), and shall be construed and applied so as to be consistent with the Act.

You are additionally advised that _____ (name of institution) is not currently a candidate for accreditation by the Accreditation Commission for Acupuncture and Oriental Medicine (ACAOM) and is not currently accredited by ACAOM. If such candidate status or accreditation is not obtained by this institution by the time of your graduation, under the current rules of the Texas State Board of Acupuncture Examiners you will not be eligible for a Texas acupuncture license based on training received at this institution.

Figure: 22 TAC §185.21(c)

AVISO SOBRE QUEJAS

Se pueden presentar quejas acerca de médicos, así también como de otras personas autorizadas y registradas por la Junta de Examinadores Médicos del Estado de Texas (Texas State Board of Medical Examiners), incluyendo a ayudantes médicos y acupunturistas, para su investigación, en la siguiente dirección:

Texas State Board of Medical Examiners

Attention: Investigations

333 Guadalupe, Tower 3, Suite 610

P.O. Box 2018, MC-263

Austin, Texas 78768-2018

Se puede obtener ayuda para presentar una queja llamando al siguiente número telefónico: 1-800-201-9353

Figure: 22 TAC §188.1(c)

AVISO SOBRE QUEJAS

Se pueden presentar quejas acerca de médicos, así también como de otras personas autorizadas y registradas por la Junta de Examinadores Médicos del Estado de Texas (Texas State Board of Medical Examiners), incluyendo a ayudantes médicos y acupunturistas, para su investigación, en la siguiente dirección:

Texas State Board of Medical Examiners

Attention: Investigations

333 Guadalupe, Tower 3, Suite 610

P.O. Box 2018, MC-263

Austin, Texas 78768-2018

Se puede obtener ayuda para presentar una queja llamando al siguiente número telefónico: 1-800-201-9353

Figure: 22 TAC §188.1(d)

NOTICE CONCERNING COMPLAINTS

Complaints about physicians, as well as other licensees and registrants of the Texas State Board of Medical Examiners, including physician assistants and acupuncturists, may be reported for investigation at the following address:

Texas State Board of Medical Examiners

Attention: Investigations

333 Guadalupe, Tower 3, Suite 610

P.O. Box 2018, MC-263

Austin, Texas 78768-2018

Assistance in filing a complaint is available by calling the following telephone number: 1-800-201-9353

AVISO SOBRE QUEJAS

Se pueden presentar quejas acerca de médicos, así también como de otras personas autorizadas y registradas por la Junta de Examinadores Médicos del Estado de Texas (Texas State Board of Medical Examiners), incluyendo a ayudantes médicos y acupunturistas, para su investigación, en la siguiente dirección:

Texas State Board of Medical Examiners

Attention: Investigations

333 Guadalupe, Tower 3, Suite 610

P.O. Box 2018, MC-263

Austin, Texas 78768-2018

Se puede obtener ayuda para presentar una queja llamando al siguiente número telefónico: 1-800-201-9353

Figure: 25 TAC §157.34(b)(4)(B)

CONTENT AREAS	ECA	EMT-B	EMT-I	EMT-P
PREPARATORY	3	6	9	12
AIRWAY MGMT/VENTILATION	3	6	9	12
PATIENT ASSESSMENT	2	4	6	8
TRAUMA	3	6	9	12
MEDICAL	9	18	27	36
SPECIAL CONSIDERATIONS	3	6	9	12
CLINICALLY RELATED OPERATIONS	1	2	3	4
TOTAL MINIMUM CONTACT HOURS	24	48	72	96

Figure: 25 TAC §157.38(c)

CONTENT AREAS	ECA	EMT-B	EMT-I	EMT-P
PREPARATORY	3	6	9	12
AIRWAY MANAGEMENT/VENTILATION	3	6	9	12
PATIENT ASSESSMENT	2	4	6	8
TRAUMA	3	6	9	12
MEDICAL	9	18	27	36
SPECIAL CONSIDERATIONS	3	6	9	12
CLINICALLY RELATED OPERATIONS	1	2	3	4
MINIMUM UNITS IN CONTENT AREAS	24	48	72	96
ADDITIONAL UNITS IN ANY APPROVED CATEGORY	12	24	36	48
TOTAL REQUIRED FOR RECERTIFICATION ELIGIBILITY	36	72	108	144

Figure: 37 TAC §23.62(j)(2)

	Duration of Suspension		
Type of Violation	**1st Offense**	**2nd Offense**	**3rd and Subsequent Offenses**
Category 1 (Fraudulent Activities)			
(i) Furnish, lend, give, sell or receive a training certificate of completion	1 year	Permanent	
(ii) Failure to conduct school in accordance with department rules and regulations	6 months	1 year	Permanent
(iii) Fraudulent record keeping	6 months	1 year	Permanent
(iv) Failure to produce records upon demand by Department quality assurance officer or other authorized State representative or agent	3 months or until produced	6 months or until produced	1 year or until produced
Category 2 (Improper Activities)			
(i) Conducting school with instructor not certified by the department	1 year	Permanent	
(ii) Failure to meet minimum requirements	3 months or until corrected	6 months or until corrected	1 year or until corrected
(iii) Improper record keeping	3 months	6 months	1 year
(iv) Failure to notify the department of school within 48 hours	3 months	6 months	1 year
(v) Failure to secure department issued equipment and forms	Warning	3 months	6 months
(vi) Failure to use approved training area	Warning	3 months	6 months
Category 3 (Careless Activities)			
(i) Careless record keeping	Warning	3 months	6 months
(ii) Unclean inspection area	Warning	3 months	6 months
(iii) “Insufficient funds” checks	Two or more outstanding insufficient funds checks, school will be suspended and all training certificates surrendered until the checks have cleared. Once the	Second incident involving an insufficient funds check will again result in suspension of the school until the check(s) has cleared. Once the school reopened, payments	A third incident involving an insufficient funds check(s) will result in suspension of the school and the require-ment that payments will only be allowed by cashier's

	school reopened, payment by check will only be by cashier's check or money order for a minimum six-month time period.	will only be allowed by cashier's check or money order for a minimum of 18 month time period.	check or money order for an indefinite time period.
Category 4 (Negligent Activities)			
(i) Failure to report discontinuance of business	1 year	2 years	Permanent
(ii) Failure to notify the Department of changes of ownership, location or other changes affecting a certified external inspector training school	3 months	6 months	1 year
(iii) Failure to purchase and maintain required equipment and tools	Warning, if repaired or replaced; if not, suspension until tools are repaired or replaced	1 month or until tools are repaired or replaced, whichever is greater	6 months or until tools are repaired or replaced, whichever is greater

Figure: 37 TAC §23.62(j)(4)

	Duration of Suspension		
Type of Violation	**1st Offense**	**2nd Offense**	**3rd and Subsequent Offenses**
Category 1 (Fraudulent Activities)			
(i) Furnish, lend, give, sell or receive a training certificate of completion	1 year	Permanent	
(ii) Failure to conduct training in accordance with department rules and regulations	6 months	1 year	Permanent
(iii) Failure to require student to demonstrate proficiency	6 months	1 year	Permanent
Category 2 (Improper Activities)			
(i) Failure to safeguard department issued equipment and forms	Warning	3 months	6 months
(ii) Failure to complete all forms required by the department	Warning	3 months	6 months
(iii) Failure to meet minimum requirements	3 months or until corrected	6 months or until corrected	1 year or until corrected
(iv) Failure to have written approval to instruct at additional certified inspector external training schools	Warning	3 months	6 months
Category 3 (Careless Activities)			
(i) Failure to use department approved classroom instruction	Warning	3 months	6 months
(ii) Conducting classroom instruction in unapproved area	Warning	3 months	6 months
Category 4 (Negligent Activities)			
(i) Failure to incorporate changes or updates as required	Warning	3 months	6 months
(ii) Exceeding student-to-instructor ratio	Warning	3 months	6 months

IN ADDITION

The ***Texas Register*** is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings, changes in interest rate and applications to install remote service units, and consultant proposal requests and awards.

To aid agencies in communicating information quickly and effectively, other information of general interest to the public is published as space allows.

Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for these activities extends 30 days from the date published on the Coastal Coordination Council web site. Requests for federal consistency review were received for the following projects(s) during the period of October 12, 2001, through October 18, 2001. The public comment period for these projects will close at 5:00 p.m. on November 23, 2001.

FEDERAL AGENCY ACTIONS:

Applicant: Key Allegro Canal & Property Owners' Association; Location: The project is located in Bonito and Redfish Canals in Little Bay and Key Allegro (Frandolig Island), approximately two miles northeast of Rockport and at Rockport Beach and Ninemile Point, adjacent to Aransas Bay, Aransas County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Rockport, Texas. Approximate UTM Coordinates: Zone: 14; Easting: 693500; Northing: 3103250. CCC Project No.: 01-0364-F1; Description of Proposed Action: The applicant proposes to mechanically maintenance dredge approximately 4,500 cubic yards of sediment (90%) sand from Bonito and Redfish Canals. The canals would be dredged to a depth of 6.2 feet below mean high tide with a 30-foot wide bottom cut. Dredged material would be transported to up to three proposed locations: Rockport Beach, a stockpile north of Little Bay, and adjacent to Bayshore Drive on Aransas Bay shoreline at Ninemile Point. The purposes of the project are to maintain boat access within the canals, nourish Rockport Beach, stabilize the Ninemile Point shoreline, and stockpile sand for future shoreline stabilization and erosion control projects. Type of Application: U.S.A.C.E. permit application #22456 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §§125-1387). NOTE: The CMP consistency review for this project may be conducted by the Texas General Land Office as part of their authorization to use state-owned lands.

Applicant: Texas General Land Office; Location: The project site is a bird island located north of Corpus Christi in Nueces Bay adjacent to the U.S. Highway 181 Causeway. The island is situated on the north side of the causeway just east of Rincon Channel, Nueces County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Corpus Christi, Texas. Approximate UTM Coordinates: Zone: 14; Easting: 660006; Northing: 3080575. CCC Project No.: 01-0365-F1; Description of Proposed Action: The applicant proposes to construct approximately 1,900 linear feet of protective breakwater and 835 linear feet of shoreline protection to provide erosion protection along the perimeter of the existing bird island and to maintain and protect an established rookery site in Nueces Bay. In addition, a sandy beach approximately 800 feet long and a maximum of 50 feet wide would be nourished with dredged material. Up to 0.9 acres of sandy bay bottom would be covered by beach fill, approximately 1.7 acres of bay bottom would be covered by breakwater, and approximately 0.4 acres of beach would be covered by geotube shoreline protection. The total surface area filled would be approximately 3 acres.

Type of Application: U.S.A.C.E. permit application #22487 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §§125-1387). NOTE: The CMP consistency review for this project may be conducted by the Texas Natural Resource Conservation Commission as part of its certification under § 401 of the Clean Water Act.

Applicant: Mr. Allen Junek; Location: The project is located along the Gulf Intracoastal Waterway (GIWW), south of Port O'Connor, Calhoun County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Port O'Connor, Texas. Approximate UTM Coordinates: Zone: 14; Easting: 754000; Northing: 3149000. CCC Project No.: 01-0370-F1; Description of Proposed Action: The applicant proposes to construct a canal subdivision. The applicant proposes to dredge canals from the GIWW into his property. The project includes both excavating and filling three ponds on the property to create the canals and the house lots. The applicant proposes to construct 51 single family lots, two multifamily buildings, a service building, and a private boat ramp. The applicant proposes to compensate for the loss of

habitat by scraping down 0.024 acres of uplands to create 0.024 acres of wetlands. Type of Application: U.S.A.C.E. permit application #22348 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §§125-1387).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information for the applications listed above may be obtained from Ms. Diane P. Garcia, Council Secretary, Coastal Coordination Council, 1700 North Congress Avenue, Room 617, Austin, Texas 78701-1495, or diane.garcia@glo.state.tx.us. Comments should be sent to Ms. Garcia at the above address or by fax at 512/475-0680.

TRD-200106462
Larry R. Soward
Chief Clerk, General Land Office
Coastal Coordination Council
Filed: October 24, 2001

♦ ♦ ♦

Comptroller of Public Accounts

Local Sales Tax Rate Changes Effective October 1, 2001

LOCAL SALES TAX RATE CHANGES EFFECTIVE OCTOBER 1, 2001

The 1% local sales and use tax is effective October 1, 2001 in the cities listed below.

City Name	Local Code	New Rate	Total Rate
Austwell (Refugio Co)	2196040	.010000	.072500
Cove (Chambers Co)	2036062	.010000	.077500
Hawk Cove (Hunt Co)	2116118	.010000	.077500
Pecan Hill (Ellis Co)	2070167	.010000	.072500
Point Venture (Travis Co)	2227196	.010000	.082500

The 1/4% city sales and use tax for improving and promoting economic and industrial development as permitted under Article 5190.6, Section **4A** was abolished and an additional 1/4% sales and use tax for improving and promoting economic and industrial development as permitted under Article 5190.6, Section **4B** is effective October 1, 2001 in the city listed below. There is no change in the local rate or total rate.

City Name	Local Code	Local Rate	Total Rate
Leonard (Fannin Co)	2074047	.020000	.082500

The 1/2% city sales and use tax for improving and promoting economic and industrial development as permitted under Article 5190.6, Section **4A** was abolished and an additional 1/2% sales and use tax for improving and promoting economic and industrial development as permitted under Article 5190.6, Section **4B** is effective October 1, 2001 in the city listed below. There is no change in the local rate or total rate.

City Name	Local Code	Local Rate	Total Rate
McLean (Gray Co)	2090029	.015000	.077500

The 1/4% city sales and use tax for property tax relief was abolished and an additional 1/4% sales and use tax for improving and promoting economic and industrial development as permitted under Article 5190.6, Section **4A** is effective October 1, 2001 in the city listed below. There is no change in the local rate or total rate.

City Name	Local Code	Local Rate	Total Rate
Dripping Springs (Hays Co)	2105040	.020000	.082500

An additional 1/2% city sales and use tax for improving and promoting economic and industrial development as permitted under Article 5190.6, Section **4A** is effective October 1, 2001 in the city listed below.

City Name	Local Code	New Rate	Total Rate
Burleson (Johnson Co)	2126045	.020000	.082500
Burleson (Tarrant Co)	2126045	.020000	.082500

An additional 1/2% city sales and use tax for improving and promoting economic and industrial development as permitted under Article 5190.6, Section **4B** is effective October 1, 2001 in the cities listed below.

City Name	Local Code	New Rate	Total Rate
Alvarado (Johnson Co)	2126054	.020000	.082500
Buda (Hays Co)	2105031	.015000	.082500
Clute (Brazoria Co)	2020104	.015000	.082500
Georgetown (Williamson Co)	2246031	.015000	.077500
Iraan (Pecos Co)	2186024	.015000	.077500
McCamey (Upton Co)	2231029	.015000	.077500
Odem (San Patricio Co)	2205058	.015000	.077500
Rankin (Upton Co)	2231010	.015000	.077500
Stockdale (Wilson Co)	2247021	.015000	.077500
Yantis (Wood Co)	2250061	.015000	.082500

An additional 1% city sales and use tax for improving and promoting economic and industrial development that includes an additional 1/2% as permitted under Article 5190.6, Section **4A** plus an additional 1/2% as permitted under Article 5190.6, Section **4B** is effective October 1, 2001 in the cities listed below.

City Name	Local Code	New Rate	Total Rate
Godley (Johnson Co)	2126090	.020000	.082500
Joshua (Johnson Co)	2126072	.020000	.082500

An additional 1/2% sales and use tax for property tax relief is effective October 1, 2001 in the city listed below.

City Name	Local Code	New Rate	Total Rate
Clyde (Callahan Co)	2030013	.020000	.082500

An additional 3/4% city sales and use tax that includes a 1/4% sales and use tax as permitted under Article 5190.6, Section **4A** and an additional 1/2% sales and use tax for improving and promoting economic and industrial development as permitted under Article 5190.6, Section **4B** is effective October 1, 2001 in the city listed below.

City Name	Local Code	New Rate	Total Rate
Roscoe (Nolan Co)	2177025	.017500	.080000

An additional 1% city sales and use tax that includes a 1/2% sales and use tax for property tax relief and an additional 1/2% sales and use tax for improving and promoting economic and industrial development as permitted under Article 5190.6, Section **4B** is effective October 1, 2001 in the cities listed below.

City Name	Local Code	New Rate	Total Rate
Aubrey (Denton Co)	2061051	.020000	.082500
Santa Fe (Galveston Co)	2084116	.020000	.082500

An additional 1/2% sales and use tax for county property tax relief is effective October 1, 2001 in the counties listed below.

County Name	Local Code	New Rate	Total Rate
Live Oak	4149002	.005000	**See Note 1**
Reagan	4192008	.005000	**See Note 2**

The 1/2% Special Purpose District sales and use tax was abolished effective October 1, 2001 in the Special Purpose Districts listed below.

SPD Name	Local Code	New Rate	Total Rate
Denton County Development District No 2	5061514	.000000	.062500
Williamson County Development District	5246503	.000000	.062500

A 1/4% Special Purpose District sales and use tax is effective October 1, 2001 in the Special Purpose Districts listed below.

SPD Name	Local Code	New Rate	Total Rate
Azle Crime Control District	5184516	.002500	**See Note 3**
Forest Hill Crime Control District	5220656	.002500	**See Note 4**

A 1/2% Special Purpose District sales and use tax is effective October 1, 2001 in the Special Purpose Districts listed below.

SPD Name	Local Code	New Rate	Total Rate
Baytown Municipal Development District	5036516	.005000	**See Note 5**
Blue Mound Crime Control District	5220665	.005000	**See Note 6**
Denton County Development District No 5	5061532	.005000	**See Note 7**
Denton County Development District No 7	5061541	.005000	**See Note 8**
El Paso Co Emergency Serv Dist. No 2	5071503	.005000	**See Note 9**
Parker County Development District No 1	5184507	.005000	**See Note 10**

A 1% Special Purpose District sales and use tax is effective October 1, 2001 in the Special Purpose District listed below.

SPD Name	Local Code	New Rate	Total Rate
Travis Co Emergency Serv Dist. No 4	5227533	.010000	**See Note 11**

A 2% Combined Area sales and use tax is effective October 1, 2001 in the combined area listed below.

Combined Area Name	Local Code	Local Rate	Total Rate
The Colony/Denton Co Devel Dist No5	6061603	.020000	**See Note 12**

NOTE 1: The total rate in the unincorporated area of Live Oak County is .067500. The city of George West in Live Oak County imposes a 1½% city sales tax. The total rate in this city is .082500. The city of Three Rivers in Live Oak County imposes a 1% city sales tax. The total rate in this city is .077500.

NOTE 2: The total rate in the unincorporated area of Reagan County is .067500. The city of Big Lake in Reagan County imposes a 1½% city sales tax. The total rate in this city is .082500.

NOTE 3: The boundaries of the Azle Crime Control and Prevention District are the same boundaries as the City of Azle. The City of Azle, which is located in multiple counties, currently imposes a 1% city sales tax. The total rate for the City of Azle in Parker County is .080000. The total rate for the City of Azle in Tarrant County is .075000.

NOTE 4: The Forest Hill Crime Control and Prevention District has the same boundaries as the City of Forest Hill. The City of Forest Hill currently imposes a 1½% city sales tax and an additional ¼% sales tax for the Forest Hill Library District. The total rate for the City of Forest Hill is .082500.

NOTE 5: The boundaries of the Baytown Municipal Development District are the same boundaries as the City of Baytown, **excluding** any portion of the city within Chambers County. The City of Baytown, which is located in multiple counties, currently imposes a 1% city sales tax and an additional ½% sales tax for the Baytown Crime Control District. The total rate for the City of Baytown in Harris County is .082500. Contact the City of Baytown at 281/422-8281 for additional boundary information.

NOTE 6: The boundaries of the Blue Mound Crime Control District are the same boundaries as the City of Blue Mound. The City of Blue Mound currently imposes a 1% city sales tax and is located in the Fort Worth MTA, which imposes a ½% transit sales tax. The total rate for the City of Blue Mound is .082500.

NOTE 7: The Denton County Development District Number 5 is located entirely within the City of The Colony. *See comments for NOTE 12 for a more detailed description of this special purpose district.

NOTE 8: The Denton County Development District Number 7 is located in the northeast portion of Denton County. The district is composed of two adjoining tracts of land north of the City of Denton. ZIP code 76208 is partially located within the Denton County Development District Number 7. Contact the district representative at 512/477-7161 for additional boundary information.

NOTE 9: The boundaries of the El Paso County Emergency Services District No. 2 are the same boundaries as El Paso County, which has a county sales and use tax, **excluding** any area within the cities of El Paso and Horizon City. The cities of Anthony, Clint, Socorro, and Vinton currently impose a 1% city sales tax. The total rate in these cities is .082500. The unincorporated areas of El Paso County have a total rate of .072500.

NOTE 10: The Parker County Development District No. 1 is located in the southeast portion of Parker County, which has a county sales and use tax, but the district does not include all of Parker County. ZIP code 76086 is partially located within the Parker County Development District No. 1. Contact the district representative at 512/477-7161 for additional boundary information.

NOTE 11: The Travis County Emergency Services District No. 4 is a non-contiguous district located in various portions of northeast and northwest Travis County**, excluding** any area within the City of Austin. The unincorporated areas of Travis County in ZIP codes 78724, 78725, 78726, 78727, 78728, 78729, 78730, 78750, 78753, 78754, and 78759 are partially located within the Travis County Emergency Services District No. 4. The Travis County Emergency Services District No. 4 also includes a portion of the Austin MTA, but does not include any area within the City of Austin. Contact the district representative at 512/836-7566 for additional boundary information.

NOTE 12: The tax rate for the overlapping portion of the City of The Colony and the Denton County Development District No. 5 is 2% and should be reported by using the combined area local code of 6061603. The Colony/Denton County Development District No. 5 combined area is located in the northern portion of the City of The Colony. Contact the district representative at 512/477-7161 for additional boundary information.

TRD-200106302
Martin Cherry
Deputy General Counsel for Tax Policy and Agency Affairs
Comptroller of Public Accounts
Filed: October 19, 2001

♦ ♦ ♦

Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in Sections 303.003 and 303.009, Tex. Fin. Code.

The weekly ceiling as prescribed by Sections 303.003 and 303.009 for the period of 10/29/01 - 11/04/01 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit thru $250,000.

The weekly ceiling as prescribed by Sections 303.003 and 303.09 for the period of 10/29/01 - 11/04/01 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-200106411
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: October 23, 2001

♦ ♦ ♦

Texas Department of Criminal Justice

Notice to Bidders

The Texas Department of Criminal Justice invites bids for the construction of return air supply duct repair. The project consists of furnishing and installing all materials, labor and supervision for a complete replacement of return air supply ducts at the existing Michael Unit, P.O. Box 4500, Tennessee Colony, Texas. The work includes re-routing supply duct system upon the roof or below the ceiling of the Inmate Population buildings, installing the necessary exhaust fans if required depending on which installation is preferred and insulating the and other miscellaneous items as further shown in the Contract Documents prepared by: Freese & Nichols, Inc.

The successful bidder will be required to meet the following requirements and submit evidence within five days after receiving notice of intent to award from the Owner:

A. Contractor must have a minimum of five consecutive years of experience as a General Contractor and provide references for at least three projects that have been completed of a dollar value and complexity equal to or greater than the proposed project.

B. Contractor must be bondable and insurable at the levels required.

All Bid Proposals must be accompanied by a Bid Bond in the amount of 5.0% of greatest amount bid. Performance and Payment Bonds in the amount of 100% of the contract amount will be required upon award of a contract. The Owner reserves the right to reject any or all bids, and to waive any informality or irregularity.

Bid Documents can be purchased from the Architect/Engineer at a cost of $50 (non-refundable) per set, inclusive of mailing/delivery costs, or they may be viewed at various plan rooms. Payment checks for documents should be made payable to the Architect/Engineer : Freese & Nichols, Inc., 4055 International Plaza, Suite 200, Fort Worth, Texas 76109-4895, Attention: James R. Notman, P.E., Phone: (817) 735-7300, Fax: (817) 735-7491, E-Mail: jn@freese.com.

A Pre-Bid conference will be held at 10AM on November 8, 2001, at the Michael Unit, Tennessee Colony, Texas, followed by a site-visit. ONLY ONE SCHEDULED SITE VISIT WILL BE HELD FOR REASONS OF SECURITY AND PUBLIC SAFETY; THEREFORE, BIDDERS ARE STRONGLY ENCOURAGED TO ATTEND.

Bids will be publicly opened and read at 2PM on November 27, 2001, in the Contracts and Procurement Conference Room located in the West Hill Mall, Suite 525, Two Financial Plaza, Huntsville, Texas.

The Texas Department of Criminal Justice requires the Contractor to make a good faith effort to include Historically Underutilized Businesses (HUB's) in at least 57.2% of the total value of this construction contract award. Attention is called to the fact that not less than the minimum wage rates prescribed in the Special Conditions must be paid on these projects.

TRD-200106444

Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Filed: October 24, 2001

♦ ♦ ♦

Notice to Offerors - Correction

The Texas Department of Criminal Justice invites costs and technical proposals in anticipation of an award of a proposed Job Order Contract. The Request for Proposals will be issued on or about October 26, 2001, with proposals due not later than 5PM, November 30, 2001.

The proposed contract is for general construction covering a geographically defined area known as the North Zone. The contract will have a base period of three full years with two one-year option periods and shall not exceed a total of $25 million for all work ordered. Work will be ordered by issuance of an individual job order ranging in an average value of $15,000 to $999,999.

The successful Offeror will be required to meet the following requirements and submit evidence within five days after receiving notice of intent to award from the Owner:

A. Contractor must have a minimum of five consecutive years of experience as a General Contractor and provide references for at least two Job Order Contracts that have been completed or currently being performed of a dollar value and complexity equal to or greater than the proposed contract.

B. Contractor must be bondable and insurable at the levels required.

Performance and Payment Bonds in the amount of $5,000,000 will be required upon award of a contract. The Owner reserves the right to reject any or all offers, and to waive any informality or irregularity.

To be considered, Proposals must be submitted in strict compliance with the requirements of the Request for Proposal. Interested parties should submit their written request for the solicitation package to: The Texas Department of Criminal Justice, Contracts and Procurement, Two Financial Plaza, Ste. 525, Huntsville, Texas 77340, Contact: Terri Bennett, Phone: (936) 437-7111, Fax: (936) 437-7099 / (936) 437-7009.

A Pre-Proposal Conference will be held November 8, 2001, at 1:00 PM in the Criminal Justice Center, Texas Room at the Sam Houston State University Campus located at 816 17th Street, Huntsville, Texas 77340. ONLY ONE SCHEDULED PRE-PROPOSAL CONFERENCE WILL BE HELD, THEREFORE, OFFERORS ARE STRONGLY ENCOURAGED TO ATTEND. All questions shall be submitted in writing and should be provided prior to the conference.

TDCJ is committed to increasing the use of Historically Underutilized Businesses (HUBs) in its ongoing construction program. Any contract awarded subsequent to this solicitation process will require the contractor to make a good faith effort to meet or exceed the agency's goal of 26.1% Hub participation in performing the contract.

TRD-200106445
Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Filed: October 24, 2001

♦ ♦ ♦

Texas Education Agency

Notice of Amendment to Standard Application System Concerning Public Charter Schools, 2001-2002

The Texas Education Agency (TEA) published Standard Application System (SAS) #A526 concerning public charter schools in the October 12, 2001, issue of the *Texas Register* (26 TexReg 1193). The TEA is amending the Texas Register notice as follows:

(1) The TEA is amending the Deadline for Receipt of Applications to read, "Applications must be received in the Document Control Center of the Texas Education Agency no later than 5:00 p.m. (Central Time), Thursday, November 29, 2001, to be considered for funding." The amendment reflects a change in the due date from November 15, 2001, to November 29, 2001.

Further Information. For clarifying information about the SAS, contact Esther Murguia Garcia, Division of Charter Schools, TEA, (512) 463-9575.

TRD-200106461
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Filed: October 24, 2001

♦ ♦ ♦

Texas Department of Health

Correction of Error

The Texas Department of Health proposed an amendment to 25 TAC §289.230 in the October 5, 2001, issue of the *Texas Register* (26 TexReg 7780).

Due to an error by the Texas Register, in §289.230(ii)(4)(B), the beginning of subparagraph (B) should have stated "if the facility..." instead of "f the facility..."

TRD-200106470

♦ ♦ ♦

Emergency Medical Services (EMS) Rules Concerning Standards and Recertification of EMS Personnel Effective January 1, 2002

The Texas Department of Health (department) submitted the adoption of amendments to 25 TAC, §157.33, §157.38 and new §157.34 concerning minimum standards and requirements for recertification of emergency medical services (EMS) personnel with changes to the proposed text as published in the June 1, 2001, issue of the *Texas Register* (26 TexReg 3907). These final adopted rules were then published in the October 5, 2001, issue of the *Texas Register* (26 TexReg 7871) incorrectly noting an effective date of October 11, 2001.

These final adopted rules were erroneously submitted by the department to the Texas Register Division for publication with the wrong effective date of October 11, 2001, instead of January 1, 2002. The effective date of the rules is actually January 1, 2002, and was so noted in the Board Order that the Board of Health approved at its September 21, 2001, meeting. These rules, as they are now republished in this November 2, 2001, issue, with the correct effective date of January 1, 2002, will override the unauthorized rules published in the October 5, 2001, issue of the *Texas Register* (26 TexReg 7871) with the wrong effective date of October 11, 2001. The final rules are published in this same issue of the *Texas Register* under the "Adopted Rules" section and the valid effective date of the adoption of the amendments to 25 TAC, §§157.33, 157.38, and new §157.34 is January 1, 2002.

Please submit any questions to Jim Arnold, Emergency Medical Services, 1100 West 49th Street, Austin, Texas 78756, phone number (512) 834-6700, or Email address at Jim.Arnold@tdh.state.tx.us.

TRD-200106459
Susan Steeg
General Counsel
Texas Department of Health
Filed: October 24, 2001

♦ ♦ ♦

Licensing Actions for Radioactive Materials

LICENSING ACTIONS FOR RADIOACTIVE MATERIALS

The Texas Department of Health has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables. The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout Texas" indicates that the radioactive material may be used on a temporary basis at job sites throughout the state.

NEW LICENSES ISSUED:

Location	Name	License #	City	Amend -ment #	Date of Action
McAllen	McAllen PET Imaging Center LLC	L05460	McAllen	00	10/09/01
Richardson	Richardson Diagnostic Imaging I LP	L05468	Richardson	00	10/04/01
Sherman	Scela Inc.	L05461	Sherman	00	10/05/01
Throughout Tx	City of Abilene Housing Authority	L05459	Abilene	00	10/08/01
Throughout Tx	Angelo Iafrate Construction LLC	L05437	DFW Airport	00	09/28/01
Throughout Tx	City of Garland Neighborhood Development	L05458	Garland	00	10/12/01

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend -ment #	Date of Action
Angleton	Angleton Danbury General Hospital	L02544	Angleton	26	10/05/01
Austin	Columbia St Davids Healthcare System LP	L03273	Austin	41	10/02/01
Austin	Seton Medical Center	L02896	Austin	59	10/02/01
Austin	Goodrich Aerospace Component Overhaul & Repair Inc.	L03372	Austin	08	10/05/01
Austin	Seton Medical Center Risk Management Dept.	L02896	Austin	60	10/05/01
Austin	Seton Medical Center	L02896	Austin	61	10/12/01
Baytown	Bayer Corporation	L01577	Baytown	54	10/05/01
Beaumont	Christus St. Elizabeth Hospital	L00269	Beaumont	82	10/12/01
Beaumont	Lifeshare Blood Centers	L04884	Beaumont	06	10/12/01
Bryan	St Joseph Health Center	L00573	Bryan	57	10/12/01
Burnet	Daughters of Charity Health Services of Austin	L03515	Burnet	24	10/01/01
Conroe	CHCA Conroe LP	L01769	Conroe	59	10/11/01
Corpus Christi	Coastal Refining and Marketing Inc.	L01268	Corpus Christi	23	10/08/01
Dallas	Methodist Hospitals of Dallas Radiology Services	L00659	Dallas	39	10/01/01
Denton	University of North Texas Physics Department	L00101	Denton	69	10/08/01
DeSoto	Visha Lammata MD PA	L05311	DeSoto	01	10/10/01
DFW Airport	Delta Airlines Inc.	L03967	DFW Airport	20	10/05/01
Edinburg	Radiology Associates of McAllen	L04512	Edinburg	10	10/05/01
Fort Worth	Bell Helicopter Textron Inc.	L05340	Fort Worth	02	10/12/01
Houston	Eric A. Orzeck M.D.	L01599	Houston	12	09/28/01
Houston	Richmond Imaging Affiliates LTD	L04342	Houston	42	10/05/01
Houston	Eric A. Orzeck MD	L01599	Houston	13	10/04/01
Houston	Wyle Laboratories Inc.	L04813	Houston	05	10/08/01
Houston	Positron Corporation	L03806	Houston	23	10/12/01
Houston	Baylor Coll of Med Off of Environmental Safety	L00680	Houston	73	10/12/01
Katy	Memorial Hermann Hospital System	L03052	Katy	32	10/03/01
Lake Jackson	Southern Services Inc.	L05270	Lake Jackson	17	10/12/01
Lubbock	Cardiologist of Lubbock PA	L05038	Lubbock	07	10/09/01
Lubbock	Texas Tech University	L01536	Lubbock	69	10/09/01

CONTINUED AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend -ment #	Date of Action
Nassau Bay	Christus Health	L03291	Nassau Bay	21	10/02/01
Plano	Columbia Medical Center of Plano Subsidiary LP	L02032	Plano	53	10/12/01
Quitman	East Texas Medical Center Quitman	L03376	Quitman	12	10/05/01
Richmond	Polly Ryon Hospital Authority	L02406	Richmond	27	09/28/01
Round Rock	Thermo Measssuretech	L03524	Round Rock	60	10/09/01
San Antonio	Cardiology Clinic of San Antonio PA	L04489	San Antonio	17	09/28/01
San Antonio	Methodist Healthcare System of San Antonio LTD	L02266	San Antonio	74	09/28/01
San Antonio	The Univ. of Tx Hlth. Sci. Ctr. at San Antonio	L01279	San Antonio	89	10/05/01
San Antonio	Radiology Associates of San Antonio PA	L04305	San Antonio	27	10/10/01
San Antonio	Radiology Associates of San Antonio PA	L04927	San Antonio	15	10/10/01
San Antonio	Radiology Associates of San Antonio PA	L05358	San Antonio	04	10/10/01
San Antonio	Heart Institute of South Texas	L04377	San Antonio	16	10/11/01
Sulphur Springs	Hopkins County Memorial Hospital	L02904	Sulphur Springs	10	10/05/01
Throughout Tx	Bryant Consultants Inc.	L05096	Addison	02	10/12/01
Throughout Tx	Exxon Mobil Oil Corporation	L00603	Beaumont	64	10/08/01
Throughout Tx	Applied Standards Inspection Inc.	L03072	Beaumont	69	10/08/01
Throughout Tx	Terracon Inc.	L05268	Dallas	05	10/05/01
Throughout Tx	Millennium Engineering Group Inc.	L05388	Edinburg	01	10/10/01
Throughout Tx	Oceaneering International Inc.	L04463	Houston	26	10/05/01
Throughout Tx	Stork Southwestern Laboratories Inc.	L00299	Houston	112	10/08/01
Throughout Tx	Real Inspection Training Engineering	L05136	Houston	03	10/12/01
Throughout Tx	American Pipe Inspection Company I LTD	L02576	Houston	18	10/10/01
Throughout Tx	Southern Services Inc	L05270	Lake Jackson	16	10/04/01
Throughout Tx	Non Destructive Inspection Corporation	L02712	Lake Jackson	94	10/12/01
Throughout Tx	Rhodes Testing	L04702	Longview	09	09/28/01
Throughout Tx	Norm Decon Services LLC	L04917	Midland	14	09/28/01
Throughout Tx	Black Warrior Wireline Corp	L04473	Odessa	16	10/08/01
Throughout Tx	Conam Inspection	L05010	Pasadena	39	09/28/01
Throughout Tx	Drash Consulting Engineers Inc.	L04724	San Antonio	08	09/28/01
Throughout Tx	Southwest Research Institute	L00775	San Antonio	64	10/11/01
Tyler	The University of Texas Health Center at Tyler	L01796	Tyler	53	09/28/01
Tyler	Trinity Mother Frances Health System	L01670	Tyler	90	10/05/01
Tyler	The University of Texas Health Center at Tyler	L04117	Tyler	26	10/05/01
Webster	Bharat Patel MD PA	L05444	Webster	01	10/01/01
Wichita Falls	Howmet Corporation	L05106	Wichita Falls	04	10/10/01

RENEWALS OF EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend -ment #	Date of Action
Fort Worth	Adventist Health System Sunbelt Healthcare Corp.	L02920	Fort Worth	22	10/04/01
Nacogdoches	Nacogdoches Heart Clinic	L04382	Nacogdoches	06	09/28/01
Throughout Tx	Kooney X-Ray Inc.	L01074	Barker	93	10/12/01
Throughout Tx	City of Bryan	L03002	Bryan	10	10/12/01
Throughout Tx	APAC – Texas Inc.	L04503	Dallas	08	10/10/01
Throughout Tx	ION Beam Application Inc.	L03851	Fort Worth	26	10/12/01
Throughout Tx	American Surveys Inc.	L02086	Manvel	11	10/08/01
Throughout Tx	Deep Well Tubular Service Inc.	L04462	Midland	05	10/05/01

TERMINATIONS OF LICENSES ISSUED:

Location	Name	License #	City	Amend -ment #	Date of Action
Bryan	Koch Microelectronic Service Company	L05286	Bryan	02	10/12/01
Throughout Tx	Rio Grande Materials Inc.	L05328	El Paso	01	10/08/01
Wallisville	Envirotech Treatment Systems Inc.	L05161	Wallisville	03	09/28/01

In issuing new licenses, amending and renewing existing licenses, or approving exemptions to Title 25 Texas Administrative Code (TAC) Chapter 289, the Texas Department of Health, Bureau of Radiation Control, has determined that the applicants are qualified by reason of training and experience to use the material in question for the purposes requested in accordance with 25 TAC Chapter 289 in such a manner as to minimize danger to public health and safety or property and the environment; the applicants' proposed equipment, facilities and procedures are adequate to minimize danger to public health and safety or property and the environment; the issuance of the new, amended, or renewed license (s) or the issuance of the exemption (s) will not be inimical to the health and safety of the public or the environment; and the applicants satisfy any applicable requirements of 25 TAC Chapter 289.

This notice affords the opportunity for a hearing on written request of a licensee, applicant, or person affected within 30 days of the date of publication of this notice. A person affected is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. A licensee, applicant, or person affected may request a hearing by writing Richard A. Ratliff, P.E., Chief, Bureau of Radiation Control (Director, Radiation Control Program), Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3189. For information call (512) 834-6688.

TRD-200106399
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: October 22, 2001

♦ ♦ ♦

Health and Human Services Commission

Notice of Proposed Medicaid Provider Payment Rate for the Transition Add-On

As single state agency for the state Medicaid program, the Health and Human Services Commission proposes a new rate to be paid to a provider for a consumer who is admitted to a small non-state operated intermediate care facility for the mentally retarded (ICF/MR), operated by the Texas Department of Mental Health Mental Retardation (TDMHMR), from a large state-operated facility. The payment rate for Transition Add-On proposed is as follows: **Proposed Rate** $65.48 per day

The proposed rates were determined in compliance with the rate setting methodology codified at 1 T.A.C. ch. 355, subch. D, §355.456.

A public hearing will be held on Monday, November 5, 2001 at 9:00a.m. in the auditorium of the TDMHMR Central Office building (Building 2) at 909 West 45th Street, Austin, Texas 78751.

Written comments may be submitted to Reimbursement and Analysis Section, Medicaid Administration, Texas Department of Mental Health and Mental Retardation, P. O. Box 12668, Austin, Texas 78711-2668, or faxed to (512) 206-5693. Hand deliveries will be accepted at 909 West 45th Street, Austin, Texas 78751. Comments must be received by noon on November 5, 2001. Interested parties may obtain a copy of the reimbursement-briefing package by calling the Reimbursement and Analysis Section at (512) 206-5753.

Persons requiring Americans with Disabilities Act (ADA) accommodation should contact Tom Wooldridge by calling (512) 206-5753, at least 72 hours prior to the hearing. Persons requiring an interpreter for the deaf or hearing impaired should contact Tom Wooldridge through the Texas Relay operator by calling 1-800-735-2988.

TRD-200106463
Marina S. Henderson
Executive Deputy Commissioner
Health and Human Services Commission
Filed: October 24, 2001

♦ ♦ ♦

Texas Higher Education Coordinating Board

Notice of Contract Award

Notice of Award: Pursuant to Chapter 2254, Chapter B, the Texas Higher Education Coordinating Board ("Board") announces this notice of consulting contract award.

The notice of request for proposals was published in the August 24, 2001 issue of the *Texas Register* at (26TexReg 6446).

The consultant will assist the Board in administrative oversight of the Centers for Teacher Education at institutions that are members of the Texas Association of Developing Colleges (TADC) by performing the following activities: (1) facilitate and coordinate a collaborative strategic planning process to involve TADC college administration in planning for collaborative distance education, upgrading of technology, curriculum development and redesign and improvement of ExCET preparation; (2) work in collaboration with the Board and TADC college administration to identify training needs of college

faculty in the centers for teacher education in the areas related to distance education, curriculum development and improvement of ExCET preparation; (3) facilitate and coordinate college administration and faculty professional development workshops to meet areas of need for delivery of distance education, curriculum development and redesign and improvement of ExCET preparation; and (4) report progress in TADC teacher education enrollment, level of participation in the distance education program, successful student placements, and other evaluative measures.

The contract was awarded to: Texas Association of Developing Colleges, Inc., 1140 Empire Central, Suite 550, Dallas, TX 75247. The total amount of this contract is not to exceed $65,000.00.

The term of the contract is October 15, 2001 through August 31, 2002. Final reports for each phase of the project will be presented on the following schedule: Phase I -- November 15, 2001; Phase II -- March 1, 2002; Phase III -- July 28, 2002.

TRD-200106290
Gary Prevost
Director of Business Services
Texas Higher Education Coordinating Board
Filed: October 19, 2001

♦ ♦ ♦

Texas Department of Housing and Community Affairs

Multifamily Housing Revenue Bonds (Fallbrook Apartments) Series 2001

Notice is hereby given of a public hearing to be held by the Texas Department of Housing and Community Affairs (the "Department") at the Oak Forest Branch Library, 1349 West 43rd Street, Houston, Texas 77018 at 6 p.m. on November 19, 2001 with respect to an issue of tax-exempt multifamily residential rental project revenue bonds in the aggregate principal amount not to exceed $13,500,000 and taxable bonds, if necessary, in an amount to be determined, to be issued in one or more series (the "Bonds"), by the Texas Department of Housing and Community Affairs (the "Issuer"). The proceeds of the Bonds will be loaned to Fallbrook Apartments Limited Partnership (or a related person or affiliate thereof) (the "Borrower"), to finance a portion of the costs of acquiring, constructing and equipping a multifamily housing project (the "Project") described as follows: 280-unit multifamily residential rental development to be constructed on approximately 19.66 acres of land located on the west side of Bammell North Houston Road directly across from the intersection of Deer Ridge Lane and Bammell North Houston Road, Houston, Harris County, Texas 77086. The Project will be initially owned and operated by Fallbrook Apartments Limited Partnership (or a related person or affiliate thereof).

All interested parties are invited to attend such public hearing to express their views with respect to the Project and the issuance of the Bonds. Questions or requests for additional information may be directed to Robert Onion at the Texas Department of Housing and Community Affairs, 507 Sabine, Austin, Texas 78701; (512) 475-3872 and/or ronion@tdhca.state.tx.us.

Persons who intend to appear at the hearing and express their views are invited to contact Robert Onion in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Robert Onion prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Gina Esteves, ADA Responsible Employee, at (512) 475-3943 or Relay Texas at 1 800 735-2989 at least two days before the meeting so that appropriate arrangements can be made.

TRD-200106439
Ruth Cedillo
Acting Executive Director
Texas Department of Housing and Community Affairs
Filed: October 23, 2001

♦ ♦ ♦

Notice of Administrative Hearing

Wednesday, November 14, 2001, 1:00 p.m.

State Office of Administrative Hearings, Stephen F. Austin Building, 1700 N Congress, 11th Floor, Suite 1100

Austin, Texas

AGENDA

Administrative Hearing before an administrative law judge of the State Office of Administrative Hearings in the matter of the complaint of the Texas Department of Housing and Community Affairs vs. Village Aus-Tex, Inc. (formally Aus-Tex Parts and Service, Inc.) dba Village Homes to hear alleged violations of Sections 7(j)(6) and 8(d) of the Texas Manufactured Housing Standards Act and Section 80.28(a) of the Administrative Rules (amended 1998) (current version at 80.119(f) of the Rules) regarding the selling of a used manufactured home without the appropriate, timely transfer of a good and marketable title and failing to properly submit the Form T/Installation Report for a home. SOAH 332-02-0459. Department MHD2000000599-T.

Contact: Jerry Schroeder, P.O. Box 12489, Austin, Texas 78711-2489, (512) 475-2894, jschroed@tdhca.state.tx.us

TRD-200106448
Ruth Cedillo
Acting Executive Director
Texas Department of Housing and Community Affairs
Filed: October 24, 2001

♦ ♦ ♦

Notice of Administrative Hearing

Monday, November 12, 2001, 1:00 p.m.

State Office of Administrative Hearings, Stephen F. Austin Building, 1700 N Congress, 11th Floor, Suite 1100

Austin, Texas

AGENDA

Administrative Hearing before an administrative law judge of the State Office of Administrative Hearings in the matter of the complaint of the Texas Department of Housing and Community Affairs vs. Palm Harbor Homes I, L.P. dba Palm Harbor Village to hear alleged violations of Section 8(d) of the Texas Manufactured Housing Standards Act regarding the selling of a used manufactured home without the appropriate, timely transfer of a good and marketable title. SOAH 332-02-0439. Department MHD2001001644-T.

Contact: Jerry Schroeder, P.O. Box 12489, Austin, Texas 78711-2489, (512) 475-2894, jschroed@tdhca.state.tx.us

TRD-200106449

Ruth Cedillo
Acting Executive Director
Texas Department of Housing and Community Affairs
Filed: October 24, 2001

♦ ♦ ♦

Notice of Administrative Hearing

Monday, November 12, 2001, 1:00 p.m.

State Office of Administrative Hearings, Stephen F. Austin Building, 1700 N Congress, 11th Floor, Suite 1100

Austin, Texas

AGENDA

Administrative Hearing before an administrative law judge of the State Office of Administrative Hearings in the matter of the complaint of the Texas Department of Housing and Community Affairs vs. Conseco Finance Servicing Corporation to hear alleged violations of Section 8(d) of the Texas Manufactured Housing Standards Act regarding the selling of a used manufactured home without the appropriate, timely transfer of a good and marketable title. SOAH 332-02-0440. Department MHD2001001644-T.

Contact: Jerry Schroeder, P.O. Box 12489, Austin, Texas 78711-2489, (512) 475-2894, jschroed@tdhca.state.tx.us

TRD-200106450
Ruth Cedillo
Acting Executive Director
Texas Department of Housing and Community Affairs
Filed: October 24, 2001

♦ ♦ ♦

Texas Department of Insurance

Insurer Services

Application to change the name of GREAT LAKES LIFE & HEALTH INSURANCE COMPANY to RENAISSANCE LIFE & HEALTH INSURANCE COMPANY, a foreign life, accident and health company. The home office is in Indianapolis, Indiana.

Application to change the name of ZURICH REINSURANCE (NORTH AMERICA), INC. to CONVERIUM REINSURANCE (NORTH AMERICA) INC., a foreign fire and casualty company. The home office is in Stamford, Connecticut.

Application to change the name of ZC INSURANCE COMPANY to CONVERIUM INSURANCE (NORTH AMERICA) INC., a foreign fire and casualty company. The home office is in Fort Lee, New Jersey.

Application for admission to the State of Texas by PROFESSIONAL SOLUTIONS INSURANCE COMPANY, a foreign fire and casualty company. The home office is in West Des Moines, Iowa.

Application for admission to the State of Texas by UNIVERSAL BONDING INSURANCE COMPANY, a foreign fire and casualty company. The home office is in Lyndhurst, New Jersey.

Any objections must be filed with the Texas Department of Insurance, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-200106458
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: October 24, 2001

♦ ♦ ♦

Notice

The Commissioner of Insurance, or his designee, will consider approval of a rate filing request submitted by Maryland Casualty Company proposing to use rates for private passenger automobile insurance that are outside the upper or lower limits of the flexibility band promulgated by the Commissioner of Insurance, pursuant to TEX. INS. CODE ANN. art 5.101 §3(g). The Company is requesting the following flex percent of -6.6% for Liability, -45.4% for Personal Injury Protection, -64.3% for Medical Payments, +125.3% for Uninsured Motorists, +15.3% for Comprehensive, and -41.9% for Collision for their initial Special Interest Automobile Program. This overall rate change is +118.6%.

Copies of the filing may be obtained by contacting George Russell, at the Texas Department of Insurance, Automobile/Homeowners Division, P.O. Box 149104, Austin, Texas 78714-9104, telephone (512) 305-7468.

This filing is subject to Department approval without a hearing unless a properly filed objection, pursuant to art. 5.101 §3(h), is made with the Chief Actuary for P&C, Mr. Phil Presley, at the Texas Department of Insurance, MC 105-5F, P.O. Box 149104, Austin, Texas 78701 by November 26, 2001.

TRD-200106455
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: October 24, 2001

♦ ♦ ♦

Notice

The Commissioner of Insurance, or his designee, will consider approval of a rate filing request submitted by Maryland Casualty Company proposing to use rates for private passenger automobile insurance that are outside the upper or lower limits of the flexibility band promulgated by the Commissioner of Insurance, pursuant to TEX. INS. CODE ANN. art 5.101 §3(g). The Company is requesting the following flex percent of -76.6% for Liability, -86.3% for Personal Injury Protection, -91.1% for Medical Payments, -43.7% for Uninsured Motorists, -12.3% for Comprehensive, and -59.5% for Collision for their initial Collectible Automobile Program. This overall rate change is +33.4%.

Copies of the filing may be obtained by contacting George Russell, at the Texas Department of Insurance, Automobile/Homeowners Division, P.O. Box 149104, Austin, Texas 78714-9104, telephone (512) 305-7468.

This filing is subject to Department approval without a hearing unless a properly filed objection, pursuant to art. 5.101 §3(h), is made with the Chief Actuary for P&C, Mr. Phil Presley, at the Texas Department of Insurance, MC 105-5F, P.O. Box 149104, Austin, Texas 78701 by November 26, 2001.

TRD-200106456
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: October 24, 2001

♦ ♦ ♦

Notice of Proposed Amendment to the Texas Health Reinsurance System Plan of Operation

The Texas Health Reinsurance System was created by the Legislature in 1993 and began engaging in the reinsurance of small employer group health insurance plans in 1995. The Commissioner of Insurance is an ex-officio member of the Board of Directors of the System. Insurance Code, Article 26.55, requires the Board of Directors to adopt a plan of operation. The Plan of Operation becomes effective on the written approval of the Commissioner. The Commissioner approved the Plan of Operation on September 6, 1995. An amendment to the Plan of Operation was approved on September 18, 2001.

The Board of Directors of the System recommended the following clarifying amendment to the Plan of Operation at a meeting on October 11, 2001. The amendment concerns the confidentiality of information obtained during an audit of claims filed by a member insurer with the System. The amendment will be considered at a public hearing on November 12, 2001.

The amendment proposes to amend the Plan of Operation, Article XI.1 - External Audit Functions, by deleting the language of paragraph G and substituting new language. The existing language is struck through and the new language is underlined.

External Audit Functions

A. Each reinsuring company member of the System shall hire a certified public accountant (CPA) or other party approved by the board to conduct audits of various items related to the System reinsurance and assessments. To be acceptable, the auditor must be independent, in accordance with standards established by the Audit Committee. The audits must be made in accordance with generally accepted auditing standards as adopted by the membership of the American Institute of Certified Public Accountants.

B. The audits shall be conducted in accordance with a uniform audit program (hereinafter called "Audit") for system members, as developed by the Board. This Audit shall clearly specify all items to be audited. It shall include a certification statement form, to be completed by the Auditor, to verify the completion of all prescribed audit procedures as dictated by the Audit. Also, details regarding the number and types of records reviewed and any errors found shall be submitted in a report which accompanies the certification statement. A copy of this report and the certification statement shall be submitted to the Board by the auditor.

C. The audit shall include, but not be limited to, detail testing of representative samples of the following items.

1. Reinsurance claims submitted to the System, in particular:

a. Eligibility of claimants and their small employers for reinsurance by the System;

b. Proper determination of reinsurance claim amount by the member.

2. Reinsurance premiums submitted to the system, including:

a. Eligibility of those lives for whom premium is paid for reinsurance by the System;

b. Proper determination of reinsurance premium amounts paid.

3. Data submitted to the System for use in the calculation of member assessments for net losses.

D. A minimum of three (3), but no more than five (5) members will be audited each year. The members shall be selected on the basis of the amount of premium volume in the Texas small employer marketplace. If necessary, the auditors shall select the other members(s) for the audit. The cost of the audit of a member shall be borne by that member.

E. Random audits of provider bills or other records shall be conducted as deemed necessary by the Audit Committee to verify the accuracy and appropriateness of reinsurance claim submissions.

F. The Board shall have the right to conduct such additional audits of members as it deems appropriate.

G. **All information disclosed in the course of the audit of a member company shall be only released in compliance with applicable federal and state privacy requirements.** [All information disclosed in the course of the audit of a member company shall be considered privileged information by the member company, the auditing firm and the System.]

H. The System shall have an annual audit of its operations conducted by an independent certified public accountant, as approved by the Board. The Board shall file this annual audit with the Commissioner for his review. This audit shall encompass at least the following items:

1. The handling and accounting of assets and money for the System;

2. The annual fiscal report of the System;

3. The calculation of the premium rates charged for reinsurance by the System;

4. The calculation and the collection of any assessments of members for net losses; and

5. The reinsurance premiums due to the system and the claim reimbursements made to the members.

Comments must be submitted in writing within 15 days of publication of the proposal in the *Texas Register* to Archie Clayton, Staff Attorney, Legal & Compliance Division, Texas Department of Insurance, Mail Code 110-1A, P. O. Box 149104, Austin, Texas 78714-9104.

TRD-200106408
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: October 22, 2001

♦ ♦ ♦

Notice of Public Meeting

The Windstorm Building Code Advisory Committee on Specifications and Maintenance will hold a meeting of the advisory committee on January 16, 2002, at 10:00 a.m. in Room 102 of the William P. Hobby State Office Building, 333 Guadalupe Street in Austin, Texas. Topics to be discussed include proposed changes to the current windstorm building code specifications and the effect that structural provisions of the new International Residential Code may have on the current windstorm building code. Only those proposed changes that are submitted to the Texas Department of Insurance not later than the 30th day before the date of the scheduled meeting and in compliance with the Insurance Code, Article 21.49, §6C, as enacted by Senate Bill 677, 76th Legislature, will be discussed at the meeting.

The Committee, appointed by the Commissioner of Insurance, operates pursuant to Article 21.49, §6C of the Insurance Code, which was enacted by the 76th Legislature in S.B. 677 to be effective on September 1, 1999. The purpose of the Committee is to advise and make recommendations to the Commissioner on windstorm building code specifications that are required for structures to be certified by the Department for insurability by the Texas Windstorm Insurance Association

(TWIA). All interested parties, including members of the general public, are invited to attend. Persons interested in additional information and/or in obtaining a copy of the form for proposing changes may contact the Engineering Section of the Texas Department of Insurance at 512/322-2212.

TRD-200106410
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: October 22, 2001

♦ ♦ ♦

Interagency Council on Early Childhood Intervention

Request for Proposals

Amended Notice of Request for Proposals

The Interagency Council on Early Childhood Intervention (ECI) announces a Request for Proposals (RFP) for funding a contractor to design and implement an early childhood intervention time study, based on random moment time study methodology. In addition, the contractor will collect cost data from ECI programs, use the time study data to establish the cost of specific ECI services, and establish a proposed fee-for-service reimbursement methodology. The original Request for Proposals Notice of Invitation was published in the September 14, 2001 issue of the *Texas Register* (26 TexReg 7150).

Contact Person

The RFP is available to all interested parties upon written request to Glenn Hart, Interagency Council on Early Childhood Intervention, 4900 North Lamar Blvd., Austin, Texas 78751-2399. A copy may also be obtained by calling (512) 424-6830 or by visiting the ECI administrative office at the above address. Questions should be directed to Glenn Hart at (512) 424-6830.

Closing Date

Written proposals must be received at the Interagency Council on Early Childhood Intervention, 4900 North Lamar Blvd., Austin, Texas 78751-2399 by 5:00 p.m. on December 3, 2001. Proposals received after this time and date will not be considered. ECI reserves the right to reject all proposals if necessary.

Selection Criteria

Proposals will be reviewed by ECI staff members. The first review phase will consist of an initial compliance evaluation to determine whether each proposal meets all mandatory submission requirements and is sufficiently responsive to the RFP to receive consideration. Proposals which are determined to be responsive shall be submitted to the second phase of the evaluation process, which consists of an evaluation based on the following criteria: understanding of the requirements, qualifications and experience, organization and staffing, methodology, project plan, and cost. Review teams will make recommendations to the ECI Board for approval or denial of proposals received.

TRD-200106457
Donna Samuelson
Deputy Executive Director
Interagency Council on Early Childhood Intervention
Filed: October 24, 2001

♦ ♦ ♦

Texas Lottery Commission

Instant Game No. 252 "Merry Money"

1.0 Name and Style of Game.

A. The name of Instant Game No. 252 is "MERRY MONEY". The play style is "key number match with auto win".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 252 shall be $1.00 per ticket.

1.2 Definitions in Instant Game No. 252.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - One of the symbols which appears under the Latex Overprint on the front of the ticket. Each Play Symbol is printed in Symbol font in black ink in positive. The possible play symbols are: 01, 02, 03, 04, 05, 06, 07, 08, 09, 10, 11, 12, 13, 14, 15, $1.00, $2.00, $5.00, $10.00, $20.00, $30.00, $50.00, $100, $1,000, and WREATH SYMBOL.

D. Play Symbol Caption - the small printed material appearing below each Play Symbol which explains the Play Symbol. One and only one of these Play Symbol Captions appears under each Play Symbol and each is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Table 1 of this section Figure 1:16 TAC GAME NO. 252 - 1.2D

Figure 1: GAME NO. 252 - 1.2D

PLAY SYMBOL	CAPTION
01	ONE
02	TWO
03	THR
04	FOR
05	FIV
06	SIX
07	SEV
08	EGT
09	NIN
10	TEN
11	ELVN
12	TWLV
13	THRTN
14	FRTN
15	FIFTN
$1.00	ONE$
$2.00	TWO$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$30.00	THIRTY
$50.00	FIFTY
$100	ONE HUN
$1,000	ONE THOU
WREATH SYMBOL	WREATH

Table 2 of this section. Figure 2:16 TAC GAME NO. 252 - 1.2E

E. Retailer Validation Code - Three small letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are:

Figure 2: GAME NO. 252 - 1.2E

CODE	PRIZE
$1.00	ONE
$2.00	TWO
$5.00	FIV
$10.00	TEN
$20.00	TWN

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 digit number appearing under the latex scratch-off covering on the front of the ticket. There is a four (4) digit security number which will be boxed and placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be : 0000000000000.

G. Low-Tier Prize - A prize of $1.00, $2.00, $5.00, $10.00, and $20.00.

H. Mid-Tier Prize - A prize of $30.00, $50.00, and $100.

I. High-Tier Prize - A prize of $1,000.

J. Bar Code - A 22 character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A twenty-two (22) digit number consisting of the three (3) digit game number (252), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 000 and end with 249 within each pack. The format will be: 252-0000001-000.

L. Pack - A pack of "MERRY MONEY" Instant Game tickets contain 250 tickets, which are packed in plastic shrink-wrapping and fanfolded in pages of five (5). Ticket 000 to 004 will be on the top page. Tickets 005 to 009 on the next page and so on. Tickets 245 to 249 will be on the last page. Tickets 000 and 249 will be folded down to expose the pack-ticket number through the shrink-wrap. There will be no breaks between the tickets in a pack.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "MERRY MONEY" Instant Game No. 252 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "MERRY MONEY" Instant Game is determined once the latex on the ticket is scratched off to expose 13 (thirteen) play symbols. If any of the player's YOUR NUMBERS match the LUCKY NUBMER, the player will win the prize shown. If the player gets a wreath symbol, the player will win that prize automatically. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 13 (thirteen) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 13 (thirteen) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 13 (thirteen) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 13 (thirteen) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) OR refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets within a book will not have identical patterns.

B. No duplicate non-winning prize symbols on a ticket.

C. Non-winning prize symbols will not match a winning prize symbol on a ticket.

D. The auto win symbol (wreath) will never appear more than once on a ticket.

E. The auto win symbol (wreath) will only appear on winning tickets.

F. The auto win symbol (wreath) will never appear as the Lucky Number.

2.3 Procedure for Claiming Prizes.

A. To claim a "MERRY MONEY" Instant Game prize of $1.00, $2.00, $5.00, $10.00, $20.00, $30.00, $50.00, or $100, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00 or $100 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "MERRY MONEY" Instant Game prize of $1,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "MERRY MONEY" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resource Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code

F. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "MERRY MONEY" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "MERRY MONEY" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated therefor, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated therefor, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated therefor. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 15,567,000 tickets in the Instant Game No. 252. The approximate number and value of prizes in the game are as follows:

Table 3 of this section Figure 3:16 TAC GAME NO. 252- 4.0

Figure 3: GAME NO. 252 - 4.0

Prize Amount	Approximate Number of Prizes*	Approximate Odds are 1 in **
$1.00	1,868,276	8.33
$2.00	871,889	17.85
$5.00	373,540	41.67
$10.00	62,233	250.14
$20.00	46,710	333.27
$30.00	29,202	533.08
$50	18,279	851.63
$100	3,899	3,992.56
$1,000	124	125,540.32

*The number of actual prizes may vary based on sales, distribution, testing, and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.75. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 252 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 252, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200106352
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: October 22, 2001

♦ ♦ ♦

Texas Natural Resource Conservation Commission

Enforcement Orders

An agreed order was entered regarding NOR SHAM, INC., Docket No. 1999-1034-MWD-E on October 11, 2001 assessing $15,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting JOSHUA OLSZEWSKI, Staff Attorney at (512)239-3645, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding GERALD HEIM DBA HEIM WATER SYSTEM, Docket No. 2000-1009-PWS-E on October 11, 2001 assessing $1,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting KIMBERLY MCGUIRE, Enforcement Coordinator at TROY NELSON, Staff Attorney at (713)422-8918, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ALLIANT ENERGY DESDEMONA, L.P., Docket No. 2000-1093-AIR-E on October 11, 2001 assessing $7,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting GEORGE ORTIZ, Enforcement Coordinator at (915)698-9674, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding HIGHLAND BAYOU ESTATES WATER SUPPLY CORPORATION, Docket No. 2000-1379-PWS-E on October 11, 2001 assessing $438 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting ELVIA MASKE, Enforcement Coordinator at (512)239-0789, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CITGO REFINING & CHEMICALS COMPANY, L.P., Docket No. 2000-1061-AIR-E on October 11, 2001 assessing $22,800 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting SHEILA SMITH, Enforcement Coordinator at (512)239-1670, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CITY OF DEKALB, Docket No. 2000-1246-MWD-E on October 11, 2001 assessing $5,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting TONI TOLIVER, SEP Coordinator at (512)239-6122, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding GRAND RANCH TREATMENT COMPANY, Docket No. 2001-0269-MWD-E on October 11, 2001 assessing $5,400 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting GARY SHIPP, Enforcement Coordinator at (806)796-7092, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding WILLIAM D. SMITH DBA SUNSET MOBILE HOME PARK II, Docket No. 2000-1295-PWS-E on October 11, 2001 assessing $313 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting SHAWN HESS, Enforcement Coordinator at (806)468-0502, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding INDUSTRIAL APPARATUS SERVICE, INC., Docket No. 2001-0304-AIR-E on October 11, 2001 assessing $5,400 in administrative penalties with $1,080 deferred.

Information concerning any aspect of this order may be obtained by contacting SUSAN KELLY, Enforcement Coordinator at (409)899-8704, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding EPGT TEXAS PIPELINE, L.P. (FORMERLY PG&E TEXAS PIPELINE, L.P.), Docket No. 2000-1387-AIR-E on October 11, 2001 assessing $2,250 in administrative penalties with $450 deferred.

Information concerning any aspect of this order may be obtained by contacting STACEY YOUNG, Enforcement Coordinator at (512)239-1899, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding SOPHIA ENTERPRISES, L.P. DBA HTC INDUSTRIES, INC., Docket No. 2001-0114-AIR-E on October 11, 2001 assessing $1,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting MARK NEWMAN, Enforcement Coordinator at (915)655-9479, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding FORTSON CONTRACTING, INCORPORATED, Docket No. 2001-0041-MLM-E on October 11, 2001 assessing $4,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting TONI TOLIVER, SEP Coordinator at (512)239-6122, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding DUKE ENERGY FIELD SERVICES LP, Docket No. 2000-0386-AIR-E on October 11, 2001 assessing $304,463 in administrative penalties with $60,893 deferred.

Information concerning any aspect of this order may be obtained by contacting TONI TOLIVER, SEP Coordinator at (512)239-6122, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding WB HP IND, LTD., Docket No. 2001-0248-EAQ-E on October 11, 2001 assessing $2,250 in administrative penalties with $450 deferred.

Information concerning any aspect of this order may be obtained by contacting MICHAEL MEYER, Enforcement Coordinator at (512)239-4492, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding WISE COUNTY DETAILING INCORPORATED, Docket No. 2000-1289-AIR-E on October 11, 2001 assessing $5,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting SUZANNE WALRATH, Enforcement Coordinator at (512)239-2134, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding COAL CITY COB COMPANY, INC., Docket No. 2001- 0445-MSW-E on October 11, 2001 assessing $225 in administrative penalties with $45 deferred.

Information concerning any aspect of this order may be obtained by contacting CATINA EAST, Enforcement Coordinator at (512)239-6589, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding LYONDELL-CITGO REFINING LP, Docket No. 2001- 0294-ISW-E on October 11, 2001 assessing $2,500 in administrative penalties with $500 deferred.

Information concerning any aspect of this order may be obtained by contacting STEVEN LOPEZ, Enforcement Coordinator at (512)239-1896, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding RACETRAC PETROLEUM INC., Docket No. 2001- 0151-PST-E on October 11, 2001 assessing $6,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting REBECCA JOHNSON, Enforcement Coordinator at

(713)422-8931, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding OHMSTEDE, INC., Docket No. 2000-1044-IWD-E on October 11, 2001 assessing $11,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting TONI TOLIVER, SEP Coordinator at (512)239-6122, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding GORES INC. DBA GORE BROTHERS DAIRY #2 AND #3, Docket No. 2000-1247-MWD-E on October 11, 2001 assessing $6,000 in administrative penalties with $1,200 deferred.

Information concerning any aspect of this order may be obtained by contacting MICHELLE HARRIS, Enforcement Coordinator at (512)239-0492, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding BAYLOR WATER SUPPLY CORPORATION, Docket No. 2001-0158-WTR-E on October 11, 2001 assessing $500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting GEORGE ORTIZ, Enforcement Coordinator at (915)698-9674, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding DENNIS SCHKADE & SCHKADE MINES, INC., Docket No. 2001-0159-WR-E on October 11, 2001 assessing $2,500 in administrative penalties with $500 deferred.

Information concerning any aspect of this order may be obtained by contacting GEORGE ORTIZ, Enforcement Coordinator at (915)698-9674, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding GYMNASTICS USA, INC., Docket No. 2001-0333- PWS-E on October 11, 2001 assessing $625 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting MICHELLE HARRIS, Enforcement Coordinator at (512)239-0492, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding DAVID H. JONES DBA SOUTH TEXAS TIRE DISPOSAL, Docket No. 2001-0249-MSW-E on October 11, 2001 assessing $5,000 in administrative penalties with $1,000 deferred.

Information concerning any aspect of this order may be obtained by contacting MALCOLM FERRIS, Enforcement Coordinator at (210)403-4061, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding NEW BEGINNINGS, INC., Docket No. 2000-1300- PWS-E on October 11, 2001 assessing $1,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting TONI TOLIVER, SEP Coordinator at (512)239-6122, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding FRANK DUNCAN & JOE HACKLER DBA ALPHA UTILITY COMPANY, Docket No. 2000-0822-PWS-E on October 11, 2001 assessing $5,950 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting LAURIE EAVES, Enforcement Coordinator at (512)239-4495, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding HOPE CENTER YOUTH & FAMILY SERVICES, Docket No. 2000-0941-MWD-E on October 11, 2001 assessing $5,625 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting SUSAN KELLY, Enforcement Coordinator at (409)899-8704, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding GARCIA GRAIN TRADING CORPORATION, Docket No. 2000-0812-AIR-E on October 11, 2001 assessing $1,800 in administrative penalties with $360 deferred.

Information concerning any aspect of this order may be obtained by contacting SANDRA ALANIS, Enforcement Coordinator at (956)430-6044, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding LEE GARDNER, Docket No. 2001-0157-SLG-E on October 11, 2001 assessing $3,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting JORGE IBARRA, Enforcement Coordinator at (817)469-6750, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding WILLIAM D. KELLEY CHARITABLE TRUST, Docket No. 2001-0516-EAQ-E on October 11, 2001 assessing $2,500 in administrative penalties with $500 deferred.

Information concerning any aspect of this order may be obtained by contacting LAWRENCE KING, Enforcement Coordinator at (512)339-2929, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding LYONDELL CHEMICAL COMPANY, Docket No. 2001-0165-IWD-E on October 11, 2001 assessing $22,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting SUSHIL MODAK, Enforcement Coordinator at (512)239-2142, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding DUKE ENERGY FIELD SERVICES LLC, Docket No. 2001-0062-AIR-E on October 11, 2001 assessing $11,690 in administrative penalties with $2,338 deferred.

Information concerning any aspect of this order may be obtained by contacting JOHN BARRY, Enforcement Coordinator at (409)899-8781, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding EBCO LAND DEVELOPMENT, LTD., Docket No. 2001-0140-WR-E on October 11, 2001 assessing $1,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting CATHERINE ALBRECHT, Enforcement Coordinator at (713)767-3672, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding AQUILA GAS PIPELINE CORPORATION, Docket No. 2001-0086-AIR-E on October 11, 2001 assessing $2,250 in administrative penalties with $450 deferred.

Information concerning any aspect of this order may be obtained by contacting TONI TOLIVER, SEP Coordinator at (512)239-6122, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding BANK OF AMERICA, Docket No. 2001-0135-PWS-E on October 11, 2001 assessing $313 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting SUBHASH JAIN, Enforcement Coordinator at (512)239-5867, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CITY OF BEAUMONT, Docket No. 2000-1415-MWD- E on October 11, 2001 assessing $10,000 in administrative penalties with $2,000 deferred.

Information concerning any aspect of this order may be obtained by contacting TONI TOLIVER, SEP Coordinator at (512)239-6122, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding MARK WILLIAMS DBA BLOOMS LANDSCAPE GARDENS, Docket No. 1997-0398-LII-E on October 11, 2001 assessing $902 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting SCOTT MCDONALD, Staff Attorney at (817)588-5888, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding MARK VEACH DBA GREENLAWN, Docket No. 2000-0069-IRR-E on October 11, 2001 assessing $875 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting SCOTT MCDONALD, Staff Attorney at (817)588-5888, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-200106432
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: October 23, 2001

♦ ♦ ♦

Extension of Comment Period

In the September 28, 2001 issue of the *Texas Register*, the Texas Natural Resource Conservation Commission (commission) published a Notice of Public Hearings on the Northeast Texas Ozone State Implementation Plan (26 TexReg 7648). The public hearing notice stated that the commission must receive all written comments by 5:00 p.m., October 24, 2001. The commission has extended the deadline for receipt of written comments to 5:00 p.m., November 7, 2001 for this proposal.

Comments should be mailed to Joyce Spencer, Office of Environmental Policy, Analysis, and Assessent, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. For further information, please contact Rex Shaddox, Strategic Assessment Division, (512) 239-3503, or Alan Henderson, Policy and Regulations Division, (512) 239-1510. Copies of the SIP revision can be obtained from the commission's website at *www.tnrcc.state.tx.us/oprd/sips/cover.html*, or by calling Ms. Spencer at (512) 239-5017.

TRD-200106440
Stephanie Bergeron
Division Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: October 23, 2001

♦ ♦ ♦

Extension of Deadline for Written Comments

In the September 28, 2001 issue of the *Texas Register*, the Texas Natural Resource Conservation Commission (commission) published proposed amendments to 30 TAC Chapter 321, Control of Certain Activities by Rule, Subchapter B, Concentrated Animal Feeding Operations (26 TexReg 7482). The preamble to the proposal stated that the commission must receive all written comments by 5:00 p.m., October 29, 2001. The commission has extended the deadline for receipt of comments to 5:00 p.m., November 12, 2001. Comments may be mailed to Lola Brown, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711- 3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 2001-041-321- WT. For further information, please contact Ray Henry Austin, Policy and Regulations Division, (512) 239-6814.

TRD-200106446
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: October 24, 2001

♦ ♦ ♦

Notice - Extension of Comment Period on the Review of Chapters 30, 285, 290, 325, 330, 334, 344

In the September 18, 2001, issue of the *Texas Register* (26 TexReg 7427), the Texas Natural Resource Conservation Commission (commission) published Consideration for publication of, and hearing on, proposed new 30 TAC Chapter 30, Occupational Licenses and Registrations, and proposed amended, new, and/or repealed sections in Chapter 285, On-Site Sewage Facilities; Chapter 290, Public Drinking Water, Subchapter A; Chapter 325, Certificates of Competency; Chapter 330, Municipal Solid Waste, Subchapter M; Chapter 334, Underground and Aboveground Storage Tanks; Chapter 344, Landscape Irrigators; and consideration for publication of, and hearing on, a notice of intention to review and repeal Chapter 290, Subchapter A. The deadline date for written comments was submitted as October 18, 2001.

The commission has extended the deadline for receipt of written comments to 5:00 p.m., October 22, 2001, for the proposed review and readoption of Chapters 30, 285, 290, 325, 330, 334, and 344.

Comments should be mailed to Angela Slupe, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. For further information on the proposed review, please contact Melissa Estes, Policy and Regulations Division, at (512) 239-3937.

TRD-200106401
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: October 22, 2001

♦ ♦ ♦

Notice of Application for Industrial Hazardous Waste Permits

For the period of October 12, 2001

APPLICATION Rohm and Haas Texas Inc. 1900 Tidal Road, Deer Park, Harris County, Texas 77536, a chemical manufacturing facility, has applied to the Texas Natural Resource Conservation Commission (TNRCC) for Class 3 permit and compliance plan modifications to authorize (1) removal of TNRCC Permit Unit No. 2 (G-East Landfill) from the compliance monitoring program currently authorized under the compliance plan and addition of the unit to the detection monitoring program currently authorized under the permit for TNRCC Permit Unit No. 1 (Landfill J); (2) specification of waste-specific analytical parameters under the detection monitoring program for TNRCC Permit Unit No. 2: (3) updating of the facility groundwater sampling and analysis plan; and (4) addition of the W/AS Process Area as an unpermitted unit requiring a RCRA (Resource Conservation and Recovery Act) Facility Investigation (RFI) due to detection of hazardous constituents. This application was submitted to the TNRCC on April 5, 2000.

The TNRCC executive director has reviewed this action for consistency with the goals and policies of the Texas Coastal Management Program (CMP) in accordance with the regulations of the Coastal Coordination Council and has determined that the action is consistent with the applicable CMP goals and policies.

The TNRCC executive director has completed the technical review of the application and prepared draft permit and compliance plan modifications. The draft permit and compliance plan modification, if approved, would establish the conditions under which the facility must operate. The executive director has made a preliminary decision that this permit and compliance plan, if issued, meets all statutory and regulatory requirements. The permit and compliance plan modification applications, executive director's preliminary decision, and draft permit and compliance plan modifications are available for viewing and copying at the Deer Park Public Library, 3009 Center Street, Deer Park, Texas.

PUBLIC COMMENT / PUBLIC MEETING. You may submit public comments or request a public meeting about this application. The purpose of a public meeting is to provide the opportunity to submit comments or to ask questions about the application. Generally, the TNRCC will hold a public meeting if the executive director determines that there is a significant degree of public interest in the application, if requested in writing by an affected person, or if requested by a local legislator. A public meeting is not a contested case hearing. Written public comments and requests for a public meeting must be submitted to the Office of the Chief Clerk, MC 105, TNRCC, P.O. Box 13087, Austin, TX 78711-3087 within 45 days from the date of newspaper publication of this notice.

OPPORTUNITY FOR A CONTESTED CASE HEARING. After the deadline for public comments, the executive director will consider the comments and prepare a response to all relevant and material or significant public comments. The response to comments, along with the executive director's decision on the application, will be mailed to everyone who submitted public comments or requested to be on the mailing list for this application. If comments are received, the mailing will also provide instructions for requesting a contested case hearing or reconsideration of the executive director's decision. A contested case hearing is a legal proceeding similar to a civil trial in a state district court. A contested case hearing will only be granted based on disputed issues of fact that are relevant and material to the Commission's decision on the application. Further, the Commission will only grant a hearing on issues that were raised during the public comment period and not withdrawn. Issues that are not raised in public comments may not be considered during a hearing.

EXECUTIVE DIRECTOR ACTION. The executive director may issue final approval of the application unless a timely contested case hearing request or request for reconsideration is filed. If a timely hearing request or request for reconsideration is filed, the executive director will not issue final approval of the [permit/compliance plan] and will forward the application and requests to the TNRCC Commissioners for their consideration at a scheduled Commission meeting.

MAILING LIST. In addition to submitting public comments, you may ask to be placed on a mailing list to receive future public notices mailed by the Office of the Chief Clerk. You may request to be added to: (1) the mailing list for this specific application; (2) the permanent mailing list for a specific applicant name and permit number; and/or (3) the permanent mailing list for a specific county. Clearly specify which mailing list(s) to which you wish to be added and send your request to the TNRCC Office of the Chief Clerk at the address below. Unless you otherwise specify, you will be included only on the mailing list for this specific application.

INFORMATION. If you need more information about this permit application or the permitting process, please call the TNRCC Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TNRCC can be found at our web site at www.tnrcc.state.tx.us. The permittee's compliance history during the life of the permit being modified is available from the Office of Public Assistance.

Further information may also be obtained from Rohm and Haas, Inc., at the address stated above or by calling Mr. Ralph M. Kennedy at (281)288-2920.

TRD-200106434
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: October 23, 2001

♦ ♦ ♦

Notice of Application for Industrial Hazardous Waste Permits

For the period of October 15, 2001

APPLICATION NSSI/Recovery Services, Inc., 5711 Etheridge, Houston, Harris County, Texas, 77087, a commercial industrial and hazardous waste and mixed waste storage and treatment facility has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a renewal/major amendment to authorize the continued operation of 20 existing tanks and 7 existing container storage areas for the storage and processing of hazardous and mixed wastes/radioactive waste and Class 1, Class 2 and Class 3 non-hazardous industrial solid waste. The company has requested a major amendment to authorize an additional tank for waste management activities and to increase the storage capacity for the Building No. 4 Container Storage Area from 5,500 gallons to 18,400 gallons. This application was submitted to the TNRCC on March 22, 2000.

The TNRCC executive director has completed the technical review of the application and prepared a draft permit. The draft permit, if approved, would establish the conditions under which the facility must operate. The executive director has made a preliminary decision that this permit, if issued, meets all statutory and regulatory requirements. The permit application, executive director's preliminary decision, and draft permit are available for viewing and copying at Mancuso Public Library, 6727 Bellfort, Houston, Texas 77087.

PUBLIC COMMENT / PUBLIC MEETING. You may submit public comments or request a public meeting about this application. The purpose of a public meeting is to provide the opportunity to submit comments or to ask questions about the application. Generally, the TNRCC will hold a public meeting if the executive director determines that there is a significant degree of public interest in the application if requested

in writing by an affected person, or if requested by a local legislator. A public meeting is not a contested case hearing.

Written public comments and requests for a public meeting must be submitted to the Office of the Chief Clerk, MC 105, TNRCC, P.O. Box 13087, Austin, TX 78711-3087 within 45 days from the date of newspaper publication of this notice.

OPPORTUNITY FOR A CONTESTED CASE HEARING. After the deadline for public comments, the executive director will consider the comments and prepare a response to all relevant and material or significant public comments. The response to comments, along with the executive director's decision on the application, will be mailed to everyone who submitted public comments or is on the mailing list for this application. If comments are received, the mailing will also provide instructions for requesting a contested case hearing or reconsideration of the executive director's decision. A contested case hearing is a legal proceeding similar to a civil trial in a state district court.

A contested case hearing will only be granted based on disputed issues of fact that are relevant and material to the Commission's decision on the application. Further, the Commission will only grant a hearing on issues that were raised during the public comment period and not withdrawn. Issues that are not raised in public comment may not be considered during a hearing.

EXECUTIVE DIRECTOR ACTION. The executive director may issue final approval of the application unless a timely contested case hearing request or request for reconsideration is filed. If a timely hearing request or request for reconsideration is filed, the executive director will not issue final approval of the permit and will forward the application and requests to the TNRCC Commissioners for their consideration at a scheduled Commission meeting.

MAILING LIST. In addition to submitting public comments, you may ask to be placed on a mailing list to receive future public notices mailed by the Office of the Chief Clerk. You may request to be added to: (1) the mailing list for this specific application; (2) the permanent mailing list for a specific applicant name and permit number; and/or (3) the permanent mailing list for a specific county. Clearly specify which mailing list(s) to which you wish to be added and send your request to the TNRCC Office of the Chief Clerk at the address below. Unless you otherwise specify, you will be included only on the mailing list for this specific application.

INFORMATION. If you need more information about this permit application or the permitting process, please call the TNRCC Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TNRCC can be found at our web site at www.tnrcc.state.tx.us.

Further information may also be obtained from NSSI/Recovery Services, Inc., at the address stated above or calling Mr. Robert D. Gallagher at 713-641-0391.

TRD-200106435
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: October 23, 2001

♦ ♦ ♦

Notice of Application for Industrial Hazardous Waste Permits

For the period of October 16, 2001

APPLICATION AK STEEL CORPORATION located at 12527 Greens Bayou Drive, Houston, Harris County, Texas has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a permit renewal/major amendment to authorize continued post-closure care for a closed landfill. The major amendment will authorize the modification of the ground water sampling and analysis plan for the site. This application was submitted to the TNRCC on April 13, 2000.

The TNRCC executive director has completed the technical review of the application and prepared a draft permit. The draft permit, if approved, would establish the conditions under which the facility must operate. The executive director has made a preliminary decision that this permit, if issued, meets all statutory and regulatory requirements. The permit application, executive director's preliminary decision, and draft permit are available for viewing and copying at the Harris County Public Library, 921 Akron, Houston, Texas.

PUBLIC COMMENT / PUBLIC MEETING. You may submit public comments or request a public meeting about this application. The purpose of a public meeting is to provide the opportunity to submit comments or to ask questions about the application. Generally, the TNRCC will hold a public meeting if the executive director determines that there is a significant degree of public interest in the application if requested in writing by an affected person, or if requested by a local legislator. A public meeting is not a contested case hearing.

Written public comments and requests for a public meeting must be submitted to the Office of the Chief Clerk, MC 105, TNRCC, P.O. Box 13087, Austin, TX 78711-3087 within 45 from the date of newspaper publication of this notice.

OPPORTUNITY FOR A CONTESTED CASE HEARING. After the deadline for public comments, the executive director will consider the comments and prepare a response to all relevant and material or significant public comments. The response to comments, along with the executive director's decision on the application, will be mailed to everyone who submitted public comments or is on the mailing list for this application. If comments are received, the mailing will also provide instructions for requesting a contested case hearing or reconsideration of the executive director's decision. A contested case hearing is a legal proceeding similar to a civil trial in a state district court.

A contested case hearing will only be granted based on disputed issues of fact that are relevant and material to the Commission's decision on the application. Further, the Commission will only grant a hearing on issues that were raised during the public comment period and not withdrawn. Issues that are not raised in public comment may not be considered during a hearing.

EXECUTIVE DIRECTOR ACTION. The executive director may issue final approval of the application unless a timely contested case hearing request or request for reconsideration is filed. If a timely hearing request or request for reconsideration is filed, the executive director will not issue final approval of the [permit/compliance plan] and will forward the application and requests to the TNRCC Commissioners for their consideration at a scheduled Commission meeting.

MAILING LIST. In addition to submitting public comments, you may ask to be placed on a mailing list to receive future public notices mailed by the Office of the Chief Clerk. You may request to be added to: (1) the mailing list for this specific application; (2) the permanent mailing list for a specific applicant name and permit number; and/or (3) the permanent mailing list for a specific county. Clearly specify which mailing list(s) to which you wish to be added and send your request to the TNRCC Office of the Chief Clerk at the address below. Unless you otherwise specify, you will be included only on the mailing list for this specific application.

INFORMATION. If you need more information about this permit application or the permitting process, please call the TNRCC Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TNRCC can be found at our web site at www.tnrcc.state.tx.us.

Further information may also be obtained from AK Steel Corporation at 1755 Federal Road, Houston, Texas 77015 or by calling Mr. Carl Batlinger, at 513-985-9121 in Cincinnati, Ohio.

TRD-200106436
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: October 23, 2001

♦ ♦ ♦

Notice of Bulk Fuel Terminal General Operating Permit Issuance

Notice is hereby given that the Texas Natural Resource Conservation Commission (TNRCC) executive director issued the Bulk Fuel Terminal General Operating Permit (GOP) Number 515 under the requirements of 30 TAC Chapter 122, Subchapter F (relating to General Operating Permits) on October 19, 2001.

The GOP is available for use by the owners or operators of major source sites (sites) or nonmajor sites subject to the operating permits program. The GOP provides an alternate permitting mechanism for bulk fuel terminal sites under 30 TAC Chapter 122, consistent with Title 40 Code of Federal Regulations Part 70 requirements that authorize the operation of multiple sites that are similar in terms of operations, processes, and emissions.

Beginning on October 19, 2001, the GOP is subject to public petition for 60 days as specified under 30 TAC §122.360. Any person affected by the decision of the executive director to issue the GOP may petition the United States Environmental Protection Agency (EPA) to make an objection. Petitions shall be based only on objections to the GOP that were raised with reasonable specificity during the public comment period, unless the petitioner demonstrates in the petition to the EPA that it was not possible to raise the objections within the public comment period. The petition shall identify all objections. A copy of the petition shall be provided to the executive director by the petitioner. The executive director shall have 90 days from the receipt of an EPA objection to resolve any objection and, if necessary, terminate or revise the GOP.

Copies of the GOP and final technical summary may be obtained from the TNRCC website located at *http://www.tnrcc.state.tx.us/permitting/airperm/opd/permtabl.htm* or by contacting the Texas Natural Resource Conservation Commission, Office of Permitting, Remediation, and Registration, Air Permits Division, at (512) 239-1334. For further information or questions concerning the GOP, contact Mr. Eduardo Acosta, Office of Permitting, Remediation, and Registration, Air Permits Division, at (512) 239-0450.

TRD-200106415
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: October 23, 2001

♦ ♦ ♦

Notice of Intent to Delete (Delist)

The executive director of the Texas Natural Resource Conservation Commission (TNRCC or commission) is issuing this public Notice of Intent to Delete (delist) the Solvent Recovery Services (SRS) State Superfund Site (the Site) from the State Registry, the list of state Superfund sites which may constitute an imminent and substantial endangerment to public health and safety or the environment due to a release or threatened release of hazardous substances into the environment. The commission is proposing this deletion because the executive director has determined that the Site no longer presents such an endangerment, due to the removal actions that have been performed at the Site.

The Site, including all land, structures, appurtenances, and other improvements, is located at 5502 Highway 521, about 0.2 mile south of the intersection with Highway 6, in Arcola, Fort Bend County, Texas. The Site also included any areas where hazardous substance(s) had come to be located as a result, either directly or indirectly, of releases of hazardous substance(s) from the Site.

About 0.5 acre of the five-acre site was used for recycling of waste paint solvents from 1976 to 1984. The current property owner bought the property in March 1983. Operations ceased in late 1984 when the facility was closed due its inability to meet the Resource Conservation and Recovery Act financial assurance requirements. Closure of the facility began in 1986, but was never completed by the operator.

The operations at the Site consisted of a 3,000 square foot concrete pad, three spent-solvent recovery tanks (total volume of 24, 000 gallons). The distillation units consisted of one 1,300-gallon tank and two 50-gallon condenser tanks.

In 1989, the SRS Task Force (comprised of companies that sent waste to the facility) began an investigation. The investigation involved installing groundwater monitoring wells, and sampling and analysis of soils, waste materials, surface water, and groundwater. Phase I of the Remedial Investigation (RI) was completed in 1990 and determined that the waste materials and soils contained elevated levels of several metals, and volatile and semivolatile compounds.

Removal actions were conducted in 1991. All materials originally on-site were removed as part of the removal actions. The materials consisted of the concrete pad, and the waste consolidation area on the concrete pad, surrounding soils, two tanks of waste sludge, decontamination liquids, and several 55-gallon drums.

Based on the results of Phase I of the RI and the removal action, an Administrative Order (AO) was executed in April 1995. The AO identified the chemicals of concern (COCs), required a Phase II of the RI and preparation of the Feasibility Study (FS). During Phase II of the RI, buried containers were discovered. The containers were removed and additional sampling of the remaining soils and sediments was conducted. A review of the results indicated that no surface or subsurface soils exceeded the residential cleanup levels.

Numerous rounds of groundwater sampling from six monitoring wells were conducted during Phase I of the RI, Phase II of the RI, and during preparation of the FS. The analytical results indicated that no COCs were detected at levels that exceeded the groundwater cleanup levels. Since the soils and groundwater met the cleanup levels, the FS recommended no further action for the soils and groundwater.

The following is a list of reports documenting the remedial investigations and removal action activities: 1.) Solvent Recovery Services Site, Remedial Investigation Report, September 1990; 2.) Removal Action Report, Solvent Recovery Services Site, Arcola, Texas, March 1995; 3.) Phase II Remedial Investigation Report, Solvent Recovery Services State Superfund Site, Arcola, Texas, March 2000; and 4.) Final Feasibility Study Report, Solvent Recovery Services State Superfund Site, Arcola, Texas, June 2001.

Based on the results of the RIs, removal actions, and the FS previously described, the Site does not pose unacceptable excess risk to human health or the environment, and no further remedial action is warranted at the Site. The Site is appropriate for residential use according to state risk reduction regulations applicable to the Site as of October 10, 2001.

Contaminants deposited on the Site were removed to meet the residential soil criteria established by 30 Texas Administrative Code (TAC)

§335.555 (Risk Reduction Standard Number 2). The groundwater investigation showed that the concentrations of COCs met the residential exposure conditions and, therefore, no action was needed. As a result of the removal actions that have been performed at the Site, the executive director has determined that the Site no longer presents an imminent and substantial endangerment to public health and safety and the environment. Therefore, the Site is eligible for deletion from the State Registry as provided by 30 TAC §335.344(c).

In accordance with 30 TAC §335.344(b), the commission will hold a public meeting to receive comment on this proposed deletion. This meeting will not be a contested case hearing within the meaning of Texas Government Code, Chapter 2001. The meeting will be held at 7:00 p.m., on Thursday, December 6, 2001, at the City of Arcola City Hall, 13222 State Highway 6, Arcola, Texas, and will consist of two parts: an informal discussion period and a formal comment period.

All persons desiring to make comments regarding the proposed deletion of the Site may do so prior to or at the public meeting. All comments submitted prior to the public meeting must be received by 5:00 p.m. on December 6, 2001, and sent in writing to Mr. Alvie L. Nichols, Project Manager, TNRCC Superfund Cleanup Section, Remediation Division, MC-143, P. O. Box 13087, Austin, Texas 78711-3087. The public comment period for this action will end at the close of the public meeting on December 6, 2001.

A portion of the record for the Site, including documents pertinent to the executive director's proposed deletion, are available for review during regular business hours at the Missouri City Branch Library, 1530 Texas Parkway, Missouri City, Texas 77489, telephone number: (281) 499-1511. The complete public file may be obtained during regular business hours at the commission's Records Management Center, Building D, North Entrance, Room 190, 12100 Park 35 Circle, Austin, Texas 78753, telephone numbers: (800) 633-9363 or (512) 239-2920. Fees are charged for photocopying file information.

TRD-200106418
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: October 23, 2001

♦ ♦ ♦

Notice of Oil and Gas General Operating Permits Issuance

Notice is hereby given that the Texas Natural Resource Conservation Commission (TNRCC) executive director issued the Oil and Gas General Operating Permits (GOPs) Number 511-514 under the requirements of 30 TAC Chapter 122, Subchapter F (relating to General Operating Permits) on October 19, 2001.

The GOPs are available for use by the owners or operators of major source sites (sites) or nonmajor sites subject to the operating permits program. The GOPs will provide an alternate permitting mechanism for oil and gas sites under 30 TAC Chapter 122, consistent with Title 40 Code of Federal Regulations Part 70 requirements that authorize the operation of multiple sites that are similar in terms of operations, processes, and emissions.

Beginning on October 19, 2001, the GOPs are subject to public petition for 60 days as specified under 30 TAC §122.360. Any person affected by the decision of the executive director to issue the GOPs may petition the United States Environmental Protection Agency (EPA) to make an objection. Petitions shall be based only on objections to the GOPs that were raised with reasonable specificity during the public comment period, unless the petitioner demonstrates in the petition to the EPA that it was not possible to raise the objections within the public comment period. The petition shall identify all objections. A copy of the petition shall be provided to the executive director by the petitioner. The executive director shall have 90 days from the receipt of an EPA objection to resolve any objection and, if necessary, terminate or revise the GOPs.

Copies of the GOPs and final technical summaries may be obtained from the TNRCC website located at *http://www.tnrcc.state.tx.us/permitting/airperm/opd/g_o_gops.htm* or by contacting the Texas Natural Resource Conservation Commission, Office of Permitting, Remediation, and Registration, Air Permits Division, at (512) 239-1334. For further information or questions concerning the GOPs, contact Mr. Eduardo Acosta, Office of Permitting, Remediation, and Registration, Air Permits Division, at (512) 239-0450.

TRD-200106414
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: October 23, 2001

♦ ♦ ♦

Notice of Opportunity to Participate in Permitting Matters

A person may request to be added to a mailing list for public notices processed through the Office of the Chief Clerk for air, water, and waste permitting activities at the TNRCC. You may request to be added to: (1) a permanent mailing list for a specific applicant name and permit number; and/or (2) a permanent mailing list for a specific county or counties.

Note that a request to be added to a mailing list for a specific county will result in notification of all permitting matters affecting that particular county.

To be added to a mailing list, send us your name and address, clearly specifying which mailing list(s) to which you wish to be added. Your written request should be sent to the TNRCC, Office of the Chief Clerk, Mail Code 105, P. O. Box 13087, Austin, TX 78711-3087.

Individual members of the public who wish to inquire about the information contained in this notice, or to inquire about other agency permit applications or permitting processes, should call the TNRCC Office of Public Assistance, Toll Free, at 1-800-687-4040.

TRD-200106431
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: October 23, 2001

♦ ♦ ♦

Notice of Public Hearing

In accordance with the requirements of Texas Government Code, Chapter 2001, Subchapter B, the Texas Natural Resource Conservation Commission (TNRCC or commission) will conduct a public hearing to receive testimony concerning the proposed amendments to §§321.32 - 321.35, and 321.39; and new §321.48 and §321.49 of 30 TAC Chapter 321, Control of Certain Activities by Rule; Subchapter B, Concentrated Animal Feeding Operations.

The proposed amended and new sections would implement provisions of House Bill 2912, Senate Bill (SB) 2, and SB 1339 enacted by the 77th Legislature, 2001. The proposal would establish requirements for certain concentrated animal feeding operations (CAFOs) located in a "major sole- source impairment zone" or in the "protection zone" of a "sole-source surface drinking water supply," and would conditionally exclude certain poultry operations from the commission's CAFO rules.

A public hearing on this proposal will be held in Stephenville, Texas, on November 5, 2001 at 7:00 p.m., Texas A & M Research and Extension Center, Room 130-131, 1229 North US Highway 281, located at the corner of US Highways 281 and 8. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, agency staff members will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing. Previous hearings on this proposal were held in Austin on October 23, 2001 and in Waco on October 25, 2001.

Comments may be submitted to Lola Brown, MC 205, Texas Natural Resource Conservation Commission, Office of Environmental Policy, Analysis, and Assessment, P.O. Box 13087, Austin, Texas 78711-3087, or by fax to (512) 239-4808. All comments should reference Rule Log Number 2001-041-321-WT. The comment period was originally scheduled to close on October 29, 2001, but the commission has extended the deadline for receipt of comments to November 12, 2001. Comments must be received by *5:00 p.m., November 12, 2001*. For further information contact Ray Henry Austin at (512) 239-6814.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

TRD-200106447
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: October 24, 2001

♦ ♦ ♦

Notice of Water Quality Applications

The following notices were issued during the period of September 17, 2001 through October 17, 2001.

The following require the applicants to publish notice in the newspaper. The public comment period, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P O Box 13087, Austin Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THIS NOTICE.

MAC ANTHONY who operates a sawmill and wood products manufacturing facility, has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 04255, to authorize the discharge of wet decking wastewater and storm water runoff on an intermittent and flow variable basis via Outfall 001. The facility is located on the east side of U.S. Highway 69, approximately five miles south of the intersection of U.S. Highway 190 and U.S. Highway 69, south of the City of Woodville, Tyler County, Texas.

AQUASOURCE DEVELOPMENT COMPANY has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 14243-001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 225,000 gallons per day. The facility is located three miles northeast of the intersection of State Highway 359 and State Highway 723 in Fort Bend County, Texas.

CAMP OLYMPIA, INC. a recreational, outdoor campground facility, has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 14261-001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 50,000 gallons per day. The facility is located 4.7 miles southeast of the intersection of State Highway 94 and State Highway 3188 in Trinity County, Texas.

CITY OF DENTON has applied for a renewal of TNRCC Permit No. 01992, which authorizes the discharge of cooling tower blowdown and previously monitored effluents at a daily average flow not to exceed 900,000 gallons per day via Outfall 001. Issuance of this Texas Pollutant Discharge Elimination System (TPDES) permit will replace the existing NPDES Permit No. TX0068616 issued on December 9, 1988 and TNRCC Permit No. 01992, issued on February 18, 1994. The applicant operates the Denton Spencer Steam Electric Station. The plant site is located on 1701 A. Spencer Road, approximately 0.75 miles north of the intersection of interstate Highway 35E and loop 288, adjacent to the City of Denton Water Treatment Plant in the City of Denton, Denton County, Texas.

EXXON MOBIL CORPORATION which operates a petrochemical manufacturing plant, has applied for a renewal of TNRCC Permit No. 01215, which authorizes the discharge of storm water and wastewater on an intermittent and flow variable basis via Outfalls 001 and 002. The draft permit authorizes the discharge of storm water runoff (commingled with other wastewaters) on an intermittent and flow variable basis via Outfalls 001, 002, and 003. The facility is located at the intersection of Burleson Street and Wooster Cedar Bayou County Road in the City of Baytown, Harris County, Texas.

GB BIOSCIENCES CORPORATION has applied for a major amendment to TNRCC Permit No. 00749. The applicant is requesting the following changes at Outfall 001: to reduce the monitoring frequency for certain parameters; to remove effluent limitations and monitoring requirements for dacthal and total manganese; to reduce the biomonitoring frequency for the test species Mysidopsis bahia. The applicant is requesting the following changes at Outfall 101: to discharge formulations unit process area stormwater runoff and process wastewater on an intermittent and flow variable basis to the on-site waste water treatment plant; and to discontinue monitoring requirements for dacthal, chlorothalonil, and hexachlorobenzene; and to remove effluent limitations but maintain a reporting requirement for several pollutants. The current permit authorizes the discharge of treated process wastewater, incinerator wastewater, groundwater and non-process wastewater at a daily average flow not to exceed 900,000 gallons per day via Outfall 101; the discharge of treated stormwater on an intermittent and flow variable basis via Outfall 201; and the discharge of commingled effluents from Outfalls 101 and 201 via Outfall 001. The applicant operates the Greens Bayou Plant which manufactures and formulates agricultural pesticide products. The plant site is located at 2239 Haden Road in the extraterritorial jurisdiction of the City of Houston, Harris County, Texas

CITY OF HEREFORD has applied for a new permit, Proposed Permit No. 10186-002, to authorize the disposal of treated domestic wastewater at an annual average flow not to exceed 2,500,000 gallons per day via surface irrigation of 583 acres of agricultural land. This permit will not authorize a discharge of pollutants into waters in the State. The facility and disposal site are located in the southwest corner of the city's farm, which is approximately 2 miles northeast of the intersection of U.S. Highway 60 and Farm-to-Market Road 2943 and 0.5 mile east of the intersection of U.S. Highway 60 and County Road 8 in Deaf Smith County, Texas.

HOOKS INDEPENDENT SCHOOL DISTRICT has applied for a renewal of TPDES Permit No. 13634-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 12,500 gallons per day. The facility is located on the east side of Farm-to-Market Road 560, approximately three (3) miles north of Interstate Highway 30 in Bowie County, Texas.

TOWN OF LAKESIDE has applied for a renewal of Permit No. 11573-001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 30,000 gallons per day via irrigation of approximately 16 acres of land. This permit will not authorize a discharge of pollutants into waters in the State. The facility and disposal site are located in the southwest portion of the Town of Lakeside and about 700 feet south of the intersection of Aquilla Drive and Crestidge Drive in Tarrant County, Texas.

MILDRED INDEPENDENT SCHOOL DISTRICT has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a major amendment to Permit No. 11646-001, to authorize the relocation of the wastewater treatment facility within the applicant's property boundaries, to authorize an increase in the daily average flow from 5,000 gallons per day to 20,000 gallons per day via irrigation, and to authorize an increase of the acreage irrigated from 5 acres to 30.7 acres. The facility and disposal site are located approximately 5.0 miles southeast of the City of Corsicana and 800 feet north of U.S. Highway 287 in Navarro County, Texas.

CITY OF PADUCAH has applied for a renewal of Permit No. 10112-001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 170,000 gallons per day via surface irrigation of 87 acres of pasture land. This permit will not authorize a discharge of pollutants into waters in the State. The facility and disposal site are located approximately two miles southeast of the City of Paducah on Farm-to-Market Road 1038 in Cottle County, Texas. The facility and disposal site are located in the drainage basin of Wichita/North Fork Wichita River in Segment No. 0218 of the Red River Basin.

PURINA MILLS, INC. which operates a facility which produces liquid livestock feeds, has applied for a new permit, Proposed Permit No. 04296 to authorize the disposal of process wastewater, wash water, and storm water at a daily average flow not to exceed 950 gallons per day via evaporation. The Notice of Receipt of Application did not include the applicant's subsequent request to increase the flow to the evaporation pond from 500 gallons per day to 950 gallons per day. This permit will not authorize a discharge of pollutants into waters in the State. The facility and disposal area are located approximately one mile west of the intersection of U.S. Highway 60 and Farm-to-Market Road 2943, on South Progressive Road, in the City of Hereford, Deaf Smith County, Texas.

CITY OF PYOTE has applied for a new permit, Proposed Permit No. 13986-001, to authorize the disposal of treated domestic wastewater at an interim phase daily average flow not to exceed 11,000 gallons per day via irrigation of 6.52 acres of land and a final phase daily average flow not to exceed 22,000 gallons per day via irrigation of 13.04 acres of land. No discharge of pollutants into water in the State is authorized by this permit. The wastewater treatment facilities and disposal site will be located between U.S. Highway 80 (Business Interstate Route 20) and Interstate Highway 20, approximately 500 feet east of the intersection of Rogers Street (State Highway 115) and U.S. Highway 80 (Business Interstate Route 20) in Ward County, Texas.

ROYAL OAK ARROW, LLC which operates a charcoal processing plant, has applied for a renewal of Permit No. 03201, which authorizes the disposal of coal storage area rainfall runoff on an intermittent and flow variable basis via evaporation and dust suppression. The proposed permit authorizes the disposal of coal storage area storm water runoff and wash water from materials handling and production areas on an intermittent and flow variable basis via evaporation and dust suppression. This permit will not authorize a discharge of pollutants into waters in the State. The facility and disposal area are located at 410 Selman Street in the City of Jacksonville, Cherokee County, Texas.

SAVANNAH DEVELOPMENT, LTD. has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 14222-001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 500,000 gallons per day. The facility is located approximately 2 miles northeast of the intersection of State Highway 6 and Farm-to-Market Road 521 in Hunt County, Texas.

CITY OF STAR HARBOR has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 14268-001, to authorize the discharge of filter backwash water at a daily average flow not to exceed 38,000 gallons per day. The facility is located approximately 2.5 miles northwest of the intersection of State Highway 198 and Farm-to-Market Road 3062, just north of the City of Malakoff, and lies on a peninsula of Cedar Creek Reservoir in Henderson County, Texas.

TEMPLE-INLAND FOREST PRODUCTS CORPORATION which operates the Pineland Logyard, a wet deck log storage facility, has applied for a renewal of TNRCC Permit No. 03848, which authorizes the discharge of wet decking process wastewater and storm water on an intermittent and flow variable basis via Outfall 001. The facility is located approximately 0.6 miles east of State Highway 1 and 0.5 miles north of Farm-to-Market Road 2426 in the City of Pineland, Sabine County, Texas.

Written comments or requests for a public meeting may be submitted to the Office of the Chief Clerk, at the address provided in the information section above, WITHIN 10 DAYS OF THE ISSUED DATE OF THIS NOTICE

The Texas Natural Resource Conservation Commission (TNRCC) has initiated a minor modification of the Texas Pollutant Discharge Elimination System (TPDES) permit issued to CITY OF HOUSTON to increase the Chronic Ceriodaphnia dubia testing frequency to once per quarter and revise conditions in the Contributing Industries and Pretreatment Requirements. The existing permit authorizes the discharge of treated domestic wastewater at an annual average flow not to 21,000,000 gallons per day. The facility is located approximately 0.25 mile west of the confluence of Cole Creek and Whiteoak Bayou and approximately 1.5 miles northeast of the intersection of U.S. Highway 290 and Antoine Drive in the City of Houston in Harris County, Texas.

The Texas Natural Resource Conservation Commission (TNRCC) has initiated a minor amendment of the TNRCC permit issued to TEXAS LEHIGH CEMENT COMPANY to incorporate the expiration date of February 1, 2005 into the existing permit. The existing permit authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 2,700 gallons per day via surface irrigation of 240 acres of company owned farmland. This permit will not authorize a discharge of pollutants into waters in the State. The facility and disposal site are located approximately 1.0 mile west of Interstate Highway 35, at a point approximately 2.0 miles south of Buda in Hays County, Texas.

TRD-200106433
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: October 23, 2001

♦ ♦ ♦

Public Notice of Intent to Delete

The executive director (ED) of the Texas Natural Resource Conservation Commission (TNRCC or commission) is issuing a Public Notice of Intent to Delete the Sampson Horrice state Superfund Site (the site)

from the state registry, the list of state Superfund sites which may constitute an imminent and substantial endangerment to public health and safety or the environment due to a release or threatened release of hazardous substances into the environment. The commission is proposing this deletion because the ED has determined that the site no longer presents such an endangerment, due to the removal action that has been performed at the site.

The site, including all land, structures, appurtenances, and other improvements, is a former gravel pit located in a residential and industrial area at 2000 and 2006 Plainfield Drive in Dallas, Dallas County, Texas. Drums of solid and hazardous wastes were accepted at the site, in late 1983 or early 1984. The TNRCC scored the site under the Hazard Ranking System (HRS). The site received a HRS score of 9.37, and was proposed for listing on the Texas registry of state Superfund sites on November 15, 1996. The site was then investigated under the state Superfund Program from July 1999 through August 2000. The investigation revealed that the constituents of concern (COCs) at the site include benzene, toluene, ethyl benzene, xylene, total petroleum hydrocarbons, lead, mercury, chromium, dieldrin, aldrin, and DDT. Concurrent with the remedial investigation, a removal action was performed at the site.

A removal action began in August 1999, that included excavation, sampling, and removal of 349 drums and 200 yards of impacted soil. Verification samples were collected at the completion of the removal activities and confirmed that the remaining soils were below the TNRCC Risk Reduction Standard 2 residential standards for the COCs at the site. The excavation was then filled with surrounding clean soils, completing the removal action in January 2000.

In April 2001, the TNRCC completed a risk evaluation report, which included both a human health risk assessment and an ecological assessment. Based on these assessments, the site no longer poses an unacceptable risk to human health or the environment. A complete discussion of the risk evaluation can be found in the *Baseline Risk Evaluation Report, Sampson Horrice Proposed State Superfund Site,* April 2001.

In accordance with Title 30 Texas Administrative Code (TAC) §350.53, the TNRCC determined that the appropriate land use for the site is residential. Therefore, the cleanup levels for the site were based on a residential land use criteria.

As a result of the removal action, remedial investigation, risk evaluation, and land use determination described above, the ED has determined that the site no longer presents an imminent and substantial endangerment to the public health and safety and the environment. Therefore, the site is eligible for deletion from the State Registry as provided by 30 TAC §335.344(c).

In accordance with 30 TAC §335.344(b) the TNRCC will hold a public meeting to receive comments on this proposed deletion. This meeting will not be a contested case hearing within the meaning of Texas Government Code, Chapter 2001. The meeting is structured for receipt of oral or written comments by interested persons. The meeting will be held on Tuesday, December 4, 2001 at 7:00 p.m. at the Nancy Moseley Elementary School Auditorium, 10400 Rylie Road, Dallas, Texas, and will consist of two parts; an informal discussion period and a formal comment period.

All persons desiring to make comments regarding the proposed deletion of the site may do so prior to or at the public meeting. All comments submitted prior to the public meeting must be received by 5:00 p.m. December 4, 2001, and should be sent in writing to Mr. Dean Perkins, Project Manager, TNRCC, Superfund Cleanup Section, Remediation Division, MC-143, P. O. Box 13087, Austin, Texas 78711-3087 or faxed to the attention of Mr. Dean Perkins at (512) 239-2449. The public comment period for this action will end at the close of the public meeting on December 4, 2001.

A portion of the record for the site including documents pertinent to the ED's proposed deletion are available for review during regular business hours at the Pleasant Grove Branch Library, 1125 South Buckner Blvd., Dallas, Texas 75217, telephone (214) 670-0965. The complete public file may be obtained during regular business hours at TNRCC's Records Management Center, Building D, North Entrance, Room 190, 12100 Park 35 Circle, Austin, Texas 78753, telephone numbers 1-800-633-9363 or (512) 239-2920. Fees are charged for photocopying file information.

TRD-200106409
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: October 22, 2001

♦ ♦ ♦

Texas Parks and Wildlife Department

Request for Proposals - **Consultant Services**

In accordance with the provisions of Government Code, §2254.029, the Texas Parks and Wildlife (TPWD) requests proposals to provide management consulting services.

Description of Services. The selected consultant will perform a comprehensive management review of the business practices of the Texas Parks and Wildlife Department, will make recommendations for improvements, and will provide an implementation plan and schedule for the proposed improvements. The review will include among other things the following:

1. Examination of issues and recommendations of the State Auditor's Office in it's Audit Report on Revenue Management at Texas Parks and Wildlife and proposed improvements and changes to be made by the Department in response to this audit report.

2. Identification of strategic issues that will be addressed by the Commission

3. Examination of current long-term financial obligations.

This review will necessitate the interviewing of TPWD staff, Parks and Wildlife Commissioners, staff and board members of the Parks and Wildlife Foundation, members of the executive and legislative branches of state government, the Attorney General's Office, state and federal agencies, and others.

Evaluation and Selection. The Chief of Staff as designee of the Executive Director, the Chairman and Vice-Chairman of the Parks and Wildlife Commission will consider the demonstrated competence, knowledge and qualification of the consultant in the selection process. The selected consultant should have a track record of:

1. Successful management reviews of large private and/or governmental entities.

2. A thorough familiarity with the legislative and appropriations processes of Texas state government.

Preference will be given, all other considerations being equal, to a consultant whose principal place of business is within the state or who will manage the contracted project entirely from its offices within the state. No contract will be awarded unless the price is determined to be fair and reasonable in terms of services rendered.

Contract Subject to Availability of Funds. The award of the contract, the contract amount and final scope of services will be dependent on the availability of funds.

Contact Person. For additional information, interested parties should contact Gene McCarty, Chief of Staff, Texas Parks and Wildlife Department (512) 389-4651.

Instructions for the Submission of Proposals. Proposals should adhere to the following format: transmittal letter; table of contents; qualifications of the consultant and project team members including resumes with references; description of the general approach to conducting the management review (including timelines showing that the review will be completed within four months); proposed fees to be paid by TPWD to the consultant and team for successfully completing the review.

TPWD may decline to enter into a final contract with any and all respondents.

Proposals to perform these consulting services will be accepted only in writing and actually received in the office of Gene McCarty, Chief of Staff, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744, by no later than 3:00 p.m., November 18, 2001. Four copies of the proposal should be submitted.

TRD-200106345
Gene McCarty
Chief of Staff
Texas Parks and Wildlife Department
Filed: October 19, 2001

♦ ♦ ♦

Public Utility Commission of Texas

Notice of Application by Sharyland Utilities, L.P. to Designate Default Retail Electric Provider and Request for Expedited Action

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on October 19, 2001 to designate a default retail electric provider (REP) in the service area of Sharyland Utilities, L.P. (Sharyland). Sharyland is an investor- owned utility that services a 6000 acre master-planned multi-use community called Sharyland Plantation, situated between the cities of McAllen and Mission in Hidalgo County along the border between Texas and Mexico.

Docket Number and Style: Docket Number 24873, Application of Sharyland Utilities, L.P. to Designate Default Retail Electric Provider and Request for Expedited Action.

As an investor-owned electric utility, Sharyland is subject to the provisions of the Public Utility Regulatory Act (PURA), Chapter 39, governing retail electric competition. Accordingly, Sharyland's customers will have customer choice regarding who provides their retail electric service effective January 1, 2002. Sharyland advises that it does not plan to form an affiliated REP to provide retail electric service after January 1, 2002. Therefore, Sharyland customers who do not affirmatively select an alternative REP will automatically be assigned to the provider of last resort for Sharyland's service area.

Sharyland requests that the commission approve First Choice Power (First Choice) as the default REP for Sharyland's service area. Under the proposal, any current customer who does not affirmatively select a REP for retail electric service commencing January 1, 2002, will automatically be assigned to First Choice as the default REP instead of the provider of last resort on that date.

A complete copy of the application may be reviewed at Sharyland Utilities' offices at 4403 West Military Highway, Suite 700, McAllen, Texas 78503 or may be obtained by contacting Mr. Mark Caskey, General Manager of Sharyland Utilities at (956) 687-5600. The application may also be accessed through the commission's website at www.puc.state.tx.us using the Interchange.

Persons who wish to intervene in this proceeding or comment upon action sought should contact the Public Utility Commission of Texas at P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Customer Protection Division at (512) 936-7120 or (888) 782-8477 no later than Wednesday, November 21, 2001. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All comments or inquires should reference Docket Number 24873.

TRD-200106442
Rhonda Dempsey
Rule Coordinator
Public Utility Commission of Texas
Filed: October 23, 2001

♦ ♦ ♦

Notice of Application for a Certificate to Provide Retail Electric Service

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on October 17, 2001, for retail electric provider (REP) certification, pursuant to §§39.101 - 39.109 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of TXU SESCO Energy Services Company for Retail Electric Provider (REP) certification, Docket Number 24855 before the Public Utility Commission of Texas.

Applicant's requested service area by geography includes the geographic area of the Electric Reliability Council of Texas (ERCOT) or territory of another independent organization to the extent it is within Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Customer Protection Division at (512) 936-7120 no later than November 9, 2001. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-200106369
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 22, 2001

♦ ♦ ♦

Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On October 16, 2001, Quick-Tel Communications, Inc. filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60170. Applicant intends to (1) reflect a change in ownership/control to Affordaphone, Inc.; (2) change its service area to include the entire State of Texas; and (3) remove the resale-only restriction.

The Application: Application of Quick-Tel Communications, Inc. for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 24852.

Persons with questions about this docket, or who wish to intervene or otherwise participate in these proceedings should make appropriate filings or comments to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326 no later than November 7, 2001. You may contact the commission's Customer Protection Division at (512) 936-7120. Hearing and speech- impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 24852.

TRD-200106285
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 18, 2001

♦ ♦ ♦

Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on October 15, 2001, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of NTERA, INC. for a Service Provider Certificate of Operating Authority, Docket Number 24838 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service, ADSL, ISDN, HDSL, SDSL, RADSL, VDSL, Optical Services, T1-Private Line, Switch 56 KBPS, Frame Relay, Fractional T1, long distance, and wireless services.

Applicant's requested SPCOA geographic area includes the area of Texas currently served by Southwestern Bell Telephone Company, Verizon Southwest, Inc., United Telephone Company of Texas, Inc., and Central Telephone Company of Texas, doing business as Sprint.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Customer Protection Division at (512) 936-7120 no later than November 7, 2001. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-200106284
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 18, 2001

♦ ♦ ♦

Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on October 18, 2001, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of National Discount Telecom, LLC for a Service Provider Certificate of Operating Authority, Docket Number 24863 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service, ADSL, ISDN, HDSL, SDSL, RADSL, VDSL, Optical Services, T1-Private Line, Switch 56 KBPS, Frame Relay, Fractional T1, long distance, and wireless services.

Applicant's requested SPCOA geographic area includes the entire State of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Customer Protection Division at (512) 936-7120 no later than November 7, 2001. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-200106372
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 22, 2001

♦ ♦ ♦

Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on October 19, 2001, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of Calpoint (Telecommunications Texas), L.P. for a Service Provider Certificate of Operating Authority, Docket Number 24871 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service, ADSL, ISDN, HDSL, SDSL, RADSL, VDSL, Optical Services, T1-Private Line, Switch 56 KBPS, Fractional T1, and long distance services.

Applicant's requested SPCOA geographic area includes the entire State of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Customer Protection Division at (512) 936-7120 no later than November 7, 2001. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-200106407
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 22, 2001

♦ ♦ ♦

Notice of Petition for Expanded Local Calling Service

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of a petition on September 10, 2001, for expanded local calling service (ELCS), pursuant to Chapter 55, Subchapter C of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Project Title and Number: Petition of the Possum Kingdom Exchange for Expanded Local Calling Service, Project Number 24642.

The petitioners in the Possum Kingdom Exchange request ELCS to the exchanges of Breckenridge, Graham, Jacksboro, and Weatherford.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Customer Protection Division at (512) 936-7120 no later than November 14, 2001. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-200106370
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 22, 2001

♦ ♦ ♦

Notice of Petition for Expanded Local Calling Service

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of a petition on September 10, 2001, for expanded local calling service (ELCS), pursuant to Chapter 55, Subchapter C of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Project Title and Number: Petition of the Pritchett Exchange for Expanded Local Calling Service, Project Number 24643.

The petitioners in the Pritchett Exchange request ELCS to the exchange of Tyler.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Customer Protection Division at (512) 936-7120 no later than November 14, 2001. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-200106371
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 22, 2001

♦ ♦ ♦

Public Notice of Amendment to Interconnection Agreement

On October 16, 2001, Southwestern Bell Telephone Company and Ciera Network Systems, Inc., collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under Section 252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2001) (PURA). The joint application has been designated Docket Number 24853. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing ten copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 24853. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by November 13, 2001, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this project or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. You may call the commission's Customer Protection Division at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 24853.

TRD-200106287
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 18, 2001

♦ ♦ ♦

Public Notice of Intent to File Pursuant to P.U.C. Substantive Rule §26.214

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of a long run incremental cost (LRIC) study pursuant to P.U.C. Substantive Rule §26.214

Docket Title and Number. United Telephone Company of Texas, Inc. doing business as Sprint Application for Approval of LRIC Study for Individual Voice Channels for Sprint Custom Access Solutions℠ Pursuant to P.U.C. Substantive Rule §26.214 on or about October 29, 2001, Docket Number 24856.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket Number 24856. Written comments or recommendations should be filed no later than 45 days after the date of a sufficient study and should be filed at the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. You may call the commission's Customer Protection Division at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200106404
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 22, 2001

♦ ♦ ♦

Public Notice of Intent to File Pursuant to P.U.C. Substantive Rule § 26.214

Notice is given to the public of the filing with the Public Utility Commission of Texas of a long run incremental cost (LRIC) study pursuant to P.U.C. Substantive Rule §26.214

Docket Title and Number. Central Telephone Company of Texas doing business as Sprint Application for Approval of LRIC Study for Individual Voice Channels for Sprint Custom Access Solutions[sm] Pursuant to P.U.C. Substantive Rule §26.214 on or about October 29, 2001, Docket Number 24858.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket Number 24858. Written comments or recommendations should be filed no later than 45 days after the date of a sufficient study and should be filed at the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. You may call the commission's Customer Protection Division at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200106405
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 22, 2001

♦ ♦ ♦

Public Notice of Interconnection Agreement

On October 18, 2001, United Telephone Company of Texas, Inc., doing business as Sprint, Central Telephone Company of Texas doing business as Sprint (collectively, Sprint), and 2- Infinity, Inc., collectively referred to as applicants, filed a joint application for approval of interconnection agreement under Section 252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2001) (PURA). The joint application has been designated Docket Number 23393. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing ten copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 23393. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by November 14, 2001, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this project or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. You may call the commission's Customer Protection Division at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 23393.

TRD-200106373
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 22, 2001

♦ ♦ ♦

Public Notice of Interconnection Agreement

On October 16, 2001, Valor Telecommunications of Texas, LP and Quality Telephone, collectively referred to as applicants, filed a joint application for approval of interconnection agreement under Section 252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2001) (PURA). The joint application has been designated Docket Number 24842. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing ten copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 24842. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by November 13, 2001, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this project or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. You may call the commission's Customer Protection Division at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 24842.

TRD-200106286
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 18, 2001

♦ ♦ ♦

Public Notice of Request for Comments on its Preliminary Order Adopting Numbering Plan Area Relief

The Public Utility Commission of Texas (commission) hereby requests comments on its Preliminary Order Adopting Numbering Plan Area Relief in Project Number 22749. By the Preliminary Order the commission adopted an all-services distributed overlay as area code relief for the 903 area code in northeast Texas. Copies of the Preliminary Order may be downloaded from the commission's website at www.puc.state.tx.us under Telecom/Projects/22749.

Comments may be filed by submitting ten copies to the commission's Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326 and must be submitted on or before November 20, 2001. All responses should reference Project Number 22749.

Questions concerning the Preliminary Order or this notice should be referred to Jennifer Fagan, Attorney, Legal Division, (512) 936-7278. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200106368
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 22, 2001

♦ ♦ ♦

Public Notice of Workshop on Implementation of HB 1351

On November 14, 2001, the Public Utility Commission of Texas (commission) will host a workshop in Project Number 24520, *Rulemaking to Implement HB 1351, Funding and Operation of the Universal Service Fund as it Applies to Pay Telephone Providers*. The workshop will provide interested persons an opportunity to comment on the first draft of amended Substantive Rule §26.420, relating to the *Administration of Texas Universal Service Fund (TUSF)*. On or before November 8, 2001, commission staff will file a workshop draft which will be available in Central Records and on the commission's website under Project Number 24520. Copies will also be available at the workshop.

The workshop will begin at 1:30 p.m. on Wednesday, November 14, 2001, in Hearing Room Gee, located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701.

The commission requests that persons planning on attending the workshop register electronically or by phone with Isabel Herrera, Policy Development Division, isabel.herrera@puc.state.tx.us, (512) 936-7205.

While not required, interested parties may file written comments on the workshop draft on or before November 13, 2001. Comments may be filed by submitting 16 copies to the commission's Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. All comments should reference Project Number 24520.

An agenda will be distributed at the workshop. Questions concerning the workshop or this notice should be referred to Lori Hartman, Policy Development Division at (512) 936-7223 or lori.hartman@puc.state.tx.us or Betsy Tyson, Telecommunications Division at (512) 936-7323 or betsy.tyson@puc.state.tx.us. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200106406
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 22, 2001

♦ ♦ ♦

Southwest Texas State University

Request for Proposals

Southwest Texas State University (SWT) requests proposals for the disposition of a tract of land. SWT prefers settlement by means of long-term lease, but will consider selling the property. The property is

located at the intersection of McCarty Lane and Hunter Road in San Marcos, Texas. The property consists of approximately 42.6 acres. Please call 512-245-2244 to have a map faxed or mailed to you.

SWT will begin reviewing proposals November 26, 2001. Upon receipt and review of the proposals, SWT will enter into discussions with the firm(s) with the most promising offer(s). Specific contract terms will then be negotiated with one firm whose proposal is judged to represent the "Best Value" to SWT. SWT reserves the right to reject any and all proposals.

SWT expects at the least a minimum market rate of return. SWT is conducting an independent appraisal analysis to use for comparison with the proposals received. Proposed uses of the properties must be consistent with any environmental concerns in the area and compliant with any Federal or State restrictions in their regard.

The proposal should contain a brief description of the proposed use of the property, any expected participation by SWT, and the projected financial return to SWT. It is acceptable to provide a range of potential returns to SWT, provided the scenario related to each one in adequately explained in the proposal.

The impact of property tax assessments will be the responsibility of the firm. Adequate insurance coverage will be required, as appropriate naming SWT as an additional insured. Performance bonds and/or other bond coverage to assure the viability of the arrangement may be required as deemed appropriate by SWT. Additional information may be requested in order to assure SWT that the firm is capable of entering into a contract. Material submitted will remain confidential to the fullest extent allowable by law.

Proposals and questions may be directed to the attention of: Ms. Kathleen Voges Special Assistant to the Vice President for Finance and Support Services Southwest Texas State University 601 University Drive San Marcos, TX 78666 (512) 245-2399; Fax (512) 245-2033

TRD-200106263
William A. Nance
Vice President for Finance and Support Services
Southwest Texas State University
Filed: October 17, 2001

♦ ♦ ♦

Texas Department of Transportation

Public Notice - Aviation

Pursuant to Transportation Code, §21.111, and Title 43, Texas Administrative Code, §30.209, the Texas Department of Transportation conducts public hearings to receive comments from interested parties concerning proposed approval of various aviation projects.

For information regarding actions and times for aviation public hearings, please go to the following web site:

http://www.dot.state.tx.us

Click on Aviation, click on Aviation Public Hearing. Or, contact Karon Wiedemann, Aviation Division, 150 East Riverside, Austin, Texas 78704, (512) 416-4520 or 1-800-68 PILOT.

TRD-200106289
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: October 18, 2001

♦ ♦ ♦

The University of Texas System

Notice of Entering into a Major Consulting Services Contract

The University of Texas System has entered into a contract for consulting services. The consultant will assist the University with implementation of an on-line booking program known as GetThere.

The name and address of the consultant are as follows:

Academic Travel Consulting

12531 Stanwood Place

Los Angeles, California 90066

The University will pay a fixed fee of $21,000. The contract will run from October 15, 2001 until July 31, 2002. Any reports required will be due no later than July 31, 2002.

Any questions regarding this posting should be directed to:

Mr. Arthur B. Martinez

Associate Director

Office of Business and Administrative Services

The University of Texas System

201 West 7th Street

Austin, Texas 78701

Voice: (512) 499-4584

Email: Amartinez@utsystem.edu

TRD-200106443
Francie Frederick
Counsel and Secretary to the Board of Regents
The University of Texas System
Filed: October 23, 2001

♦ ♦ ♦

How to Use the Texas Register

Information Available: The 13 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following a 30-day public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Open Meetings - notices of open meetings.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 26 (2001) is cited as follows: 26 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "26 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 26 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For subscription information, see the back cover or call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code (TAC)*** is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles (using Arabic numerals) and Parts (using Roman numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15:

1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 19, April 13, July 13, and October 12, 2001). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).

Texas Register
Services

The *Texas Register* offers the following services. Please check the appropriate box (or boxes).

Texas Natural Resource Conservation Commission, Title 30

❑ **Chapter 285** $25 ❑ update service $25/year *(On-Site Wastewater Treatment)*
❑ **Chapter 290** $25 ❑ update service $25/year *(Water Hygiene)*
❑ **Chapter 330** $50 ❑ update service $25/year *(Municipal Solid Waste)*
❑ **Chapter 334** $40 ❑ update service $25/year *(Underground/Aboveground Storage Tanks)*
❑ **Chapter 335** $30 ❑ update service $25/year *(Industrial Solid Waste/Municipal Hazardous Waste)*

Update service should be in ❑ printed format ❑ 3 1/2" diskette

Texas Workers Compensation Commission, Title 28

❑ Update service $25/year

Texas Register Phone Numbers	**(800) 226-7199**
Documents	(512) 463-5561
Circulation	(512) 463-5575
Marketing	(512) 305-9623
Texas Administrative Code	(512) 463-5565

Information For Other Divisions of the Secretary of State's Office

Executive Offices	(512) 463-5701
Corporations/	
Copies and Certifications	(512) 463-5578
Direct Access	(512) 475-2755
Information	(512) 463-5555
Legal Staff	(512) 463-5586
Name Availability	(512) 463-5555
Trademarks	(512) 463-5576
Elections	
Information	(512) 463-5650
Statutory Documents	
Legislation	(512) 463-0872
Notary Public	(512) 463-5705
Uniform Commercial Code	
Information	(512) 475-2700
Financing Statements	(512) 475-2703
Financing Statement Changes	(512) 475-2704
UCC Lien Searches/Certificates	(512) 475-2705

Please use this form to order a subscription to the *Texas Register*, to order a back issue, or to indicate a change of address. Please specify the exact dates and quantities of the back issues required. You may use your VISA or Mastercard. All purchases made by credit card will be subject to an additional 2.1% service charge. Return this form to the Texas Register, P.O. Box 13824, Austin, Texas 78711-3824. For more information, please call (800) 226-7199.

❒ **Change of Address**
(Please fill out information below)

❒ **Paper Subscription**
❒ One Year $150 ❒ Six Months $100 ❒ First Class Mail $250

❒ **Back Issue ($10 per copy)**

_____ Quantity

Volume _____, Issue #_____.
(Prepayment required for back issues)

NAME _____

ORGANIZATION_____

ADDRESS _____

CITY, STATE, ZIP _____

PHONE NUMBER _____

FAX NUMBER _____

Customer ID Number/Subscription Number _____
(Number for change of address only)

❒ **Bill Me** ❒ **Payment Enclosed**

Mastercard/VISA Number _____

Expiration Date _____ Signature _____

Please make checks payable to the Secretary of State. Subscription fees are not refundable.
Do not use this form to renew subscriptions.
Visit our home on the internet at http://www.sos.state.tx.us.

_____
_____
Periodical Postage

PAID

Austin, Texas
and additonal entry offices
_____
_____