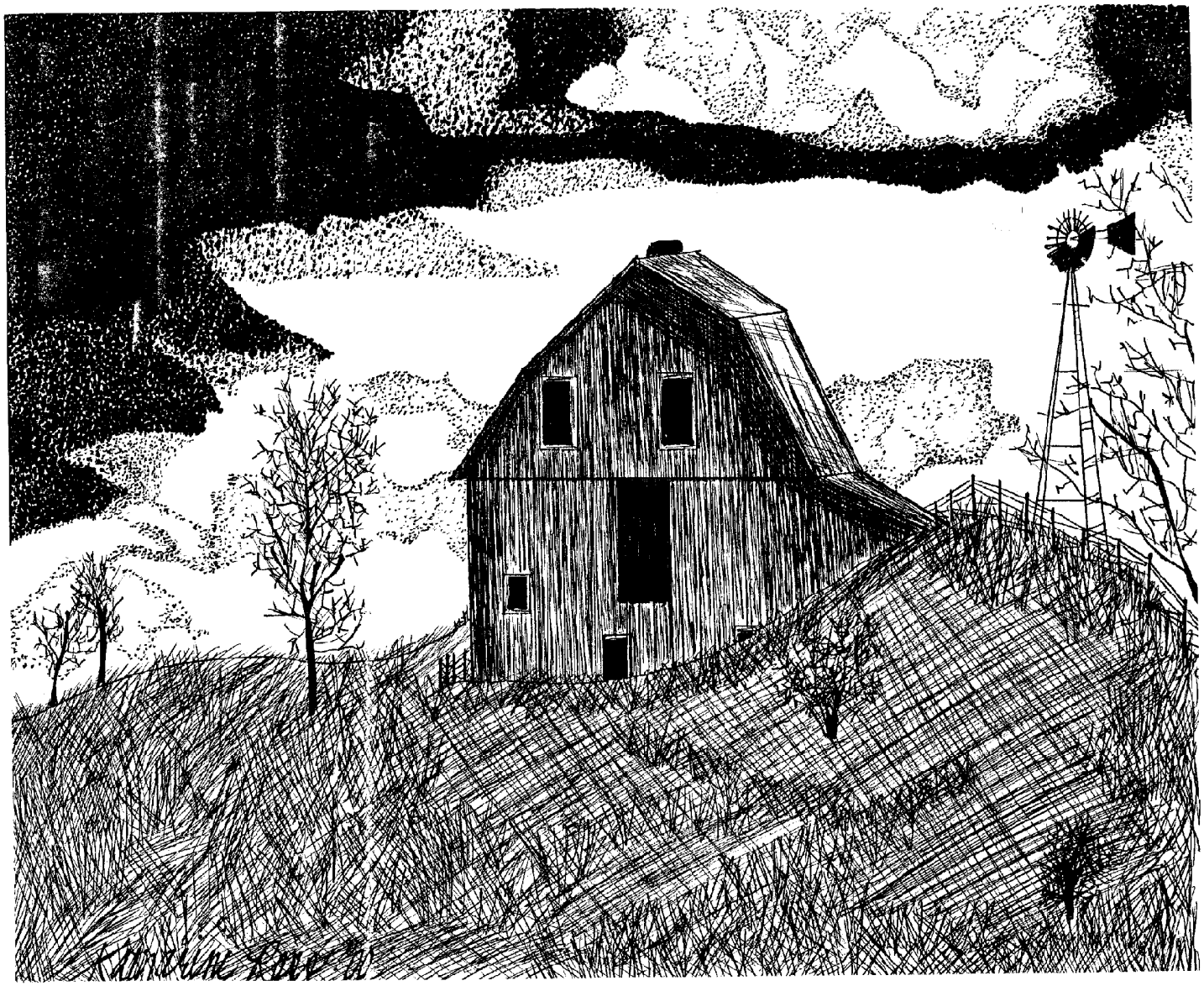
TEXAS REGISTER

Volume 26 Number 48 November 30, 2001 *Pages 9665-9990*



PART I of II

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

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 November 6, 2001

Appointed to the Governor's Commission for Women for terms to expire October 31, 2003, replacing the current membership, Keely Santerre Appleton of Arlington, Julie K. Attebury of Amarillo, Suzanne P. Azoulay of El Paso, Valorie Raquel Burton of Dallas, Vivien H. Caven of Houston, Suehing Yee Chiang of Sugar Land, Lisa de la Garza of Harlingen, Diana Ramirez Garza of Mercedes, Peggy Thigpen Hairgrove of Haskell, Patty Hayes Huffines of Austin, Sonceria Messiah-Jiles of Houston, Christie McAdams Leedy, DDS of Abilene, Pam Sibley of Waco, Julie Brink Straus of San Antonio, Connie Weeks of Austin, Jimmy Elizabeth Westcott of Dallas.

Appointments for November 9, 2001

Appointed to the University of Houston Board of Regents for terms to expire August 31, 2007, Michael John Cemo of Houston (replaced Eduardo Aguirre of Houston whose term expired), Raul A. Gonzalez of Austin (replaced Gary Rosenthal of Houston who term expired), Leroy Hermes of Houston (replaced Charles McMahen of Houston whose term expired).

Appointment for November 13, 2001

Appointed to the Oilfield Cleanup Fund Advisory Committee for a term at the pleasure of the Governor, John Siebert "Jack" Miller of Amarillo. Mr. Miller is being appointed pursuant to SB 310, 77th Legislature.

Appointment for November 14, 2001

Appointed to the Telecommunications Infrastructure Fund Board for a term to expire August 31, 2007, Blair Fitzsimons of San Antonio (replaced Thomas Powers of Houston whose term expired

TRD-200107048
Rick Perry, Governor

♦ ♦ ♦

Proclamation

BY THE GOVERNOR OF THE STATE OF TEXAS (41-2889)

TO ALL TO WHOM THESE PRESENTS SHALL COME:

I, RICK PERRY, Governor of Texas, do hereby certify that severe storms and flooding has caused a disaster in Bee, Bell, Duval, Goliad, Jim Hogg, Jim Wells, Karnes, Matagorda, Maverick, and Wilson Counties, in the State of Texas from August 28 through September 14, 2001.

THEREFORE, in accordance with the authority vested in me by Section 418.014 of the Texas Government Code, I do hereby proclaim the existence of such disaster and direct that all necessary measures both public and private as authorized under Section 418.015 of the code be implemented to meet that disaster.

In accordance with the Statutory requirements, copies of this proclamation shall be filed with the applicable authorities.

IN TESTIMONY WHEREOF, I have hereunto signed my name and have officially caused the Seal of State to be affixed at my Office in the City of Austin, Texas, this the 3rd day of October, 2001.

Rick Perry, Governor

TRD-200107049

♦ ♦ ♦

Proclamation

BY THE GOVERNOR OF THE STATE OF TEXAS (41-2890)

TO ALL TO WHOM THESE PRESENTS SHALL COME:

I, RICK PERRY, Governor of Texas, do hereby certify that severe storms and tornadoes have caused a disaster in Gillespie, McLennan, Medina and Wise Counties, in the State of Texas on October 12, 2001.

THEREFORE, in accordance with the authority vested in me by Section 418.014 of the Texas Government Code, I do hereby proclaim the existence of such disaster and direct that all necessary measures both public and private as authorized under Section 418.015 of the code be implemented to meet that disaster.

In accordance with the Statutory requirements, copies of this proclamation shall be filed with the applicable authorities.

IN TESTIMONY WHEREOF, I have hereunto signed my name and have officially caused the Seal of State to be affixed at my Office in the City of Austin, Texas, this the 25th day of October, 2001.

Rick Perry, Governor

TRD-200107050

♦ ♦ ♦

Proclamation

BY THE GOVERNOR OF THE SATE OF TEXAS (41-2891)

TO ALL TO WHOM THESE PRESENTS SHALL COME:

WHEREAS, a vacancy now exists in the Texas Senate in the membership of District 30, which consists of Archer, Armstrong, Baylor, Briscoe, Carson, Castro, Childress, Clay, part of Collin, Collingsworth, Cooke, Cottle, part of Denton, Dickens, Donley, Fisher, Floyd, Foard, Grayson, Hall, Hardeman, Haskell, Jones, Kent, King, Knox, Montague, Motley, Scurry, Stonewall, Swisher, part of Taylor, Throckmorton, Wheeler, Wichita, and Wilbarger Counties; and

WHEREAS, the results of the special election have been officially declared; and

WHEREAS, no candidate in the special election received a majority of the votes cast, as required by Section 203.003 of the Texas Election Code; and

WHEREAS, Section 2.025(a) of the Texas Election Code requires a special runoff election to be held not earlier than the 20th or later than the 30th day after the date the final canvass of the special election is completed;

WHEREAS, Tex. Elec. Code Ann. §3.003 (Vernon 1986) requires the election to be ordered by proclamation of the Governor;

NOW, THEREFORE, I, RICK PERRY, GOVERNOR OF TEXAS, under the authority vested in me by the Constitution and Statutes of the State of Texas, do hereby order a special runoff election to be held in District 30 on Tuesday, the 4th day of December, 2001, for the purpose of electing a State Senator for District 30 to serve out the unexpired term of the Honorable Tom Haywood.

Early voting by personal appearance shall begin on Monday, November 26, 2001 or earlier if ordered by the County Clerk of each County, in accordance with Tex. Elec. Code Ann. §85.001(c) (Vernon Supp. 2001).

A copy of this order will be mailed immediately to each County Judge in the district, and all appropriate writs will be issued and all proper proceedings will be followed to the end that said election may be held to fill the vacancy in District 30 and its result proclaimed in accordance with law.

IN TESTIMONY WHEREOF, I have hereunto signed my name and have officially caused the Seal of State to be affixed at my Office in the City of Austin, Texas, this the 13th of November, 2001.

Rick Perry, Governor

TRD-200107051

♦ ♦ ♦

Proclamation

BY THE GOVERNOR OF THE STATE OF TEXAS (41-2892)

TO ALL TO WHOM THESE PRESENTS SHALL COME:

WHEREAS, a vacancy now exists in the Texas House of Representatives in the membership of District 150, which consists of part of Harris County; and

WHEREAS, Tex. Elec. Code Ann. §203.002 (Vernon 1986) requires that a special election be ordered upon such vacancy; and

WHEREAS, Tex. Elec. Code Ann. §203.004 (Vernon Supp. 2001) requires that, absent a finding of an emergency, the special election be held on the first uniform election date occurring on or after the 36th day after the date the election is ordered; and

WHEREAS, Tex. Elec. Code Ann. §41.001(e), as added by Acts 2001, 77th Leg., R.S., ch. 340, §2, prohibits an election from being held on the February uniform election day if a majority vote is required and §203.003 (Vernon 1986) requires a majority vote in this special election; and

WHEREAS, May 4, 2002 is the next such available uniform election date occurring after the date the election is ordered; and

WHEREAS, Tex. Elec. Code Ann. §3.003 (Vernon 1986) requires the election to be ordered by proclamation of the Governor;

NOW, THEREFORE, I, RICK PERRY, GOVERNOR OF TEXAS, under the authority vested in me by the Constitution and Statutes of the State of Texas, do hereby order a special election to be held in District 150 on Saturday, the 4th day of May, 2002, for the purpose of electing a State Representative for District 150 to serve out the unexpired term of the Honorable Paul J. Hilbert.

Candidates who wish to have their names placed on the special election ballot must file their applications with the Secretary of State no later than 5:00 p.m. on Wednesday, the 3rd day of April, 2002, in accordance with Tex. Elec. Code Ann. §201.054(a) (Vernon Supp. 2001).

Early voting by personal appearance shall begin on Wednesday, April 17, in accordance with Tex. Elec. Code Ann. §85.001(a) (Vernon Supp. 2001).

A copy of this order will be mailed immediately to the County Judge in Harris County, and all appropriate writs will be issued and all proper proceedings will be followed to the end that said election may be held to fill the vacancy in District 150 and its result proclaimed in accordance with law.

IN TESTIMONY WHEREOF, I have hereunto signed my name and have officially caused the Seal of State to be affixed at my Office in the City of Austin, Texas, this the 13th of November, 2001.

Rick Perry, Governor

TRD-200107052

♦ ♦ ♦

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.

Request for Opinions

RQ-0457-JC

Mr. Jeff Moseley, Executive Director, Texas Department of Economic Development, 1700 North Congress Avenue, Austin, Texas 78711-2728

Re: Whether a member of the Texas Economic Development Board is eligible to serve as a member of the legislature, and related questions (Request No. 0457-JC).

Briefs requested by December 12, 2001.

RQ-0458-JC

The Honorable Bobbye C. Hill Wheeler, County Attorney, Box 469, Wheeler, Texas 79096

Re: Whether a county treasurer may simultaneously hold the office of school district trustee (Request No. 0458-JC)

Briefs requested by December 12, 2001

RQ-0459-JC

The Honorable Kenneth Armbrister, Chair, Criminal Justice Committee, Texas State Senate, P.O. Box 12068, Austin, Texas 78711

Re: Validity of a school district policy regarding corporal punishment and physical restraint of students (Request No. 0459-JC)

Briefs requested by December l2, 2001

RQ-0460-JC

Mr. Robert J. Huston, Chair, Texas Natural Resource Conservation Commission, 12100 Park 35 Circle, Austin, Texas 78711

Re: Applicability of new requirements for portable facilities and concrete crushers imposed by amendments to the Texas Clean Air Act (Request No. 0460-JC)

Briefs requested by December 12, 2001

RQ-0461-JC

The Honorable Bob Turner, Chair, Public Safety Committee, Texas House of Representatives, P.O. Box 2910, Austin, Texas 78768-2910

Re: Whether the Commissioner of Insurance may require a health maintenance organization or a preferred provider association to disclose certain information to a participating physician or provider (Request No. 0461-JC)

Briefs requested by December 14, 2001

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

TRD-200107088
Susan D. Gusky
Assistant Attorney General
Office of the Attorney General
Filed: November 16, 2001

♦ ♦ ♦

TEXAS ETHICS COMMISSION

The Texas Ethics Commission is authorized by the Government Code, §571.091, to issue advisory opinions in regard to the following statues: the Government Code, Chapter 302; the Government Code, Chapter 305; the Government Code, Chapter 572; the Election Code, Title 15; the Penal Code, Chapter 36; and the Penal Code, Chapter 39.

Requests for copies of the full text of opinions or questions on particular submissions should be addressed to the Office of the Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070, (512) 463-5800.

Advisory Opinion Request Closure

AOR-484. Closed. Answered by letter.

The Texas Ethics Commission is authorized by section 571.091 of the Government Code to issue advisory opinions in regard to the following statutes: (1) Chapter 572, Government Code; (2) Chapter 302, Government Code; (3) Chapter 303, Government Code; (4) Chapter 305, Government Code; (5) Chapter 2004, Government Code; (6) Title 15, Election Code; (7) Chapter 36, Penal Code; and (8) Chapter 39, Penal Code.

Questions on particular submissions should be addressed to the Texas Ethics Commission, P.O. Box 12070, Capitol Station, Austin, Texas 78711-2070, (512) 463-5800.

TRD-200107081
Tom Harrison
Executive Director
Texas Ethics Commission
Filed: November 16, 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 19. EDUCATION

PART 7. STATE BOARD FOR EDUCATOR CERTIFICATION

CHAPTER 230. PROFESSIONAL EDUCATOR PREPARATION AND CERTIFICATION SUBCHAPTER O. TEXAS EDUCATOR CERTIFICATES BASED ON CERTIFICATION AND COLLEGE CREDENTIALS FROM OTHER STATES OR TERRITORIES OF THE UNITED STATES

19 TAC §230.462

The State Board for Educator Certification is renewing the effectiveness of the emergency adoption of amended §230.462, for a 60-day period. The text of amended §230.462 was originally published in the August 24, 2001, issue of the *Texas Register* (26 TexReg 6191). An emergency amendment was made to §230.462 in the October 12, 2001, issue of the *Texas Register* (26 TexReg 7962)

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

TRD-200107128
Dan Junell
Interim Executive Director
State Board for Educator Certification
Effective date: December 8, 2001
Expiration date: February 6, 2002
For further information, please call: (512) 469-3011

♦ ♦ ♦

CHAPTER 245. CERTIFICATION OF EDUCATORS FROM OTHER COUNTRIES

19 TAC §245.5

The State Board for Educator Certification is renewing the effectiveness of the emergency adoption of amended §245.5, for a 60-day period. The text of amended §245.5 was originally published in the August 24, 2001, issue of the *Texas Register* (26 TexReg 6192).

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

TRD-200107126
Dan Junell
Interim Executive Director
State Board for Educator Certification
Effective date: December 8, 2001
Expiration date: February 6, 2002
For further information, please call: (512) 469-3011

♦ ♦ ♦

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 111. EXECUTIVE ADMINISTRATION DIVISION

SUBCHAPTER B. HISTORICALLY UNDERUTILIZED BUSINESS PROGRAM

1 TAC §§111.14, 111.17, 111.28

The General Services Commission proposes amendments to Title 1, TAC, Chapter 111, Subchapter B, §111.14, relating to subcontracts, §111.17, relating to Certification Process; and §111.28, relating to the Mentor Protégé Program. The amendments are proposed due to the enactment of Senate Bill 311 (SB 311), Article 13, 77th Leg. (2001) which amended the statutory language of §§2161.061 and 2161.253, Texas Government Code. The amended statutory language found in §13.01, SB 311 relates to the Commission's approval of local governments or nonprofit organizations certification programs for businesses that substantially fall under the same definition for Historically Underutilized Business found in §2161.001, Texas Government Code. Amended statutory language in §13.02, SB 311 determines that a contractor has made a good faith effort if a contractor participates in a Mentor-Protégé Program and submits a Protégé as a subcontractor in the contractor's historically underutilized business subcontracting plan.

Henry Johnson, Program Director for Historically Underutilized Business, 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 or administering these proposed rules.

Mr. Johnson 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 compliance with law enacted in SB 311, Article 13, 77th Leg (2001) relating to the Historically Underutilized Business Certification Program and the Mentor Protege Program. There will be no effect on large, small or micro-businesses. There is no anticipated economic cost 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 Mr. Wm. J. Philbin, Legal Counsel, General Services Commission, P.O. Box 13047, Austin, Texas 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 10, Subtitle D, §§2152.003, 2161.002, 2161.061, and 2161.253 which provides the General Services Commission with the authority to promulgate rules necessary to implement the sections.

The following code is affected by these rules: Government Code, Title 10, Subtitle D, Chapter 2161.

§111.14. Subcontracts.

(a) Requirement for HUB subcontracting plans. In accordance with the Texas Government Code, Chapter 2161, Subchapter F, each state agency that considers entering into a contract with an expected value of $100,000 or more shall, before the agency solicits bids, proposals, offers, or other applicable expressions of interest, determine whether subcontracting opportunities are probable under the contract.

(1) State agencies shall use the following steps in making the determination of whether subcontracting opportunities are probable under the contract:

(A) Use the HUB participation goals in §111.13 of this title (relating to Annual Procurement Utilization Goals);

(B) Research the Centralized Master Bidders List, the HUB Directory, the Internet, and other directories, identified by the commission, for HUBs that may be available to perform the contract work;

(C) Additionally, determination of subcontracting opportunities may include, but is not limited to, the following:

(i) contacting other state and local agencies and institutions of higher education to obtain information regarding similar contracting and subcontracting opportunities; and

(ii) reviewing the history of similar agency purchasing transactions.

(2) If subcontracting opportunities are probable, each agency's invitation for bids or other purchase solicitation documents for construction, professional services, other services, and commodities for $100,000 or more shall state that probability and require a HUB subcontracting plan. Accordingly, potential contractor/vendor responses that do not include a completed HUB subcontracting plan shall be rejected as a material failure to comply with advertised specifications in accordance with §113.6 (a) of this title (relating to Bid Evaluation and Award). The plan shall include goals established pursuant to §111.13 of this title (relating to Annual Procurement Utilization Goals).

(b) Development and evaluation of HUB subcontracting plans. A state agency shall require a potential contractor vendor to state whether it is a Texas certified HUB. Potential contractors/vendors shall follow, but are not limited to, procedures in subsection (b)(1) of this section when developing the HUB subcontracting plan. The HUB subcontracting plan shall include the form provided by the agency identifying the subcontractors that will be used during the course of the contract, the expected percentage of work to be subcontracted, and the approximate dollar value of that percentage of work. The potential contractor/vendor shall provide all additional information required by the agency.

(1) Evidence of good faith effort in developing a HUB subcontracting plan includes, but is not limited to, the following procedures:

(A) Divide the contract work into reasonable lots or portions to the extent consistent with prudent industry practices.

(B) Notify HUBs of the work that the potential contractor/vendor intends to subcontract. The preferable method of notification shall be in writing. The notice shall, in all instances, include the scope of the work, information regarding the location to review plans and specifications, information about bonding and insurance requirements, and identify a contact person. The notice shall be provided to potential HUB subcontractors prior to submission of the contractor's/vendor's bid. The potential contractor/vendor shall provide potential HUB subcontractors reasonable time to respond to the potential contractor's/vendor's notice. "Reasonable time to respond" in this context is no less than five working days from receipt of notice, unless circumstances require a different time period, which is determined by the agency and documented in the contract file. The potential contractor/vendor shall effectively use the commission's Centralized Master Bidders List, the HUB Directory, Internet resources, and other directories as identified by the commission or agency when searching for HUB subcontractors. Contractors/Vendors may rely upon the services of minority, women, and community organizations contractor groups, local, state, and federal business assistance offices, and other organizations that provide assistance in identifying qualified applicants for the HUB program who are able to perform all or select elements of the HUB subcontracting plan. The potential contractor/vendor shall provide the notice described in this subsection to three or more HUBs that perform the type of work required. Upon request, the potential contractor/vendor shall provide official written documentation (i.e. phone logs, fax transmittals, etc.) to demonstrate compliance with the notice required in this subsection.

(C) Provide written justification of the selection process, if a non HUB subcontractor is selected through means other than competitive bidding, or a HUB bid is the best value responsive bidder to a competitive bid invitation, but is not selected.

(D) Advertise HUB subcontracting opportunities in general circulation, trade association, and/or minority/woman focus media concerning subcontracting opportunities.

(E) Encourage a selected noncertified minority or woman owned business subcontractor to apply for certification by the commission in accordance with the procedures set forth in §111.17 of this title (relating to Certification Process).

(2) If the contract is a lease contract, the lessor shall comply with the requirements of this section from and after the occupancy date provided in the lease, or such other time as may be specified in the invitation for bid for the lease contract.

(3) In making a determination whether a good faith effort has been made in the development of the required HUB subcontracting plan, a state agency shall require the potential contractor/vendor to submit supporting documentation explaining in what ways the potential contractor/vendor has made a good faith effort according to each criterion listed in subsection (b)(1) of this section. The documentation shall include at least the following:

(A) Whether the potential contractor/vendor divided the contract work into reasonable lots or portions consistent with prudent industry practices.

(B) Whether the potential contractor/vendor notices contain adequate information about bonding, insurance, the availability of plans, the specifications, scope of work, and other requirements of the contract to three or more qualified HUBs allowing reasonable time for HUBs to participate effectively.

(C) Whether the potential contractor/vendor negotiated in good faith with qualified HUBs, not rejecting qualified HUBs who were also the best value responsive bidder.

(D) Whether the potential contractor/vendor documented reasons for rejection of a HUB or met with the rejected HUB to discuss the rejection.

(E) Whether the potential contractor/vendor advertised in general circulation, trade association, and/or minority/women focus media concerning subcontracting opportunities.

(F) Whether the potential contractor/vendor assisted non-certified HUBs to become certified.

(G) Whether the contractor has entered into a fully executed agreement and the same has been registered with the commission prior to submitting the plan.

(i) The sub-contracting plan can only be in the scope of work as described in the Mentor/Protégé Agreement and signed by both parties to satisfy the subcontracting plan requirement.

(ii) The potential contractor/vendor should indicate the use of a Protégé HUB firm to satisfy this requirement of the subcontracting plan. The Protégé must be approved for participation in the Mentor/Protege Program as prescribed in §111.28 of this title (relating to the Mentor Protégé Program). The Protégé firm should have the ability to perform the scope of work indicated in the subcontracting plan and the signed agreement.

(iii) A contractor's participation in a mentor-Protégé program under Texas Government Code, §2161.065 and submission of a Protégé as a subcontractor in the HUB subcontracting plan constitutes a good faith effort for the particular area of the plan including the protege.

(4) The HUB subcontracting plan shall be reviewed and evaluated prior to contract award and, if accepted, shall become a provision of the agency's contract. No changes shall be made to an accepted subcontracting plan prior to its incorporation into the contract. State agencies shall review the supporting documentation submitted by the potential contractor/vendor to determine if a good faith effort has been made in accordance with this section and the bid specifications. If the agency determines that a submitted HUB subcontracting plan was not developed in good faith, the agency shall treat the lack of good faith as a material failure to comply with advertised specifications, and the subject bid or other response shall be rejected. The reasons for rejection shall be recorded in the procurement file.

(5) If the potential contractor/vendor can perform all the subcontracting opportunities identified by the agency, a statement of the potential contractor's/vendor's intent to complete the work with its employees and resources without any subcontractors will be submitted with the potential contractor's/vendor's bid, proposal, offer, or other expression of interest. If the potential contractor/vendor is selected and decides to subcontract any part of the contract after the award, as a provision of the contract, the contractor/vendor must comply with provisions of this section relating to developing and submitting a subcontracting plan before any modifications or performance in the awarded contract involving subcontracting can be authorized by the state agency. If the selected contractor/vendor subcontracts any of the work without prior authorization and without complying with this section, the contractor/vendor would be deemed to have breached the contract and be subject to any remedial actions provided by Texas Government Code, Chapter 2161, state law and this section. Agencies may report non-performance relative to its contracts to the commission in accordance with Chapter 113, Subchapter F of this title (relating to the Vendor Performance and Debarment Program).

(c) Submission, review and determination of changes to an approved subcontracting plan during contract performance. If at any time during the term of the contract, a contractor/vendor desires to make changes to the approved subcontracting plan, such proposed changes must be received for prior review and approval by the state agency before changes will be effective under the contract. The contractor/vendor must comply with provisions of subsection (b) of this section relating to developing and submitting a subcontracting plan for substitution of work or of a subcontractor, prior to any alternatives being approved under the subcontracting plan. The state agency shall approve changes by amending the contract or by another form of written agency approval. The reasons for amendments or other written approval shall be recorded in the procurement file.

(d) Determining contractor/vendor contract compliance. The contractor/vendor shall maintain business records documenting its compliance with the HUB subcontracting plan and shall submit a compliance report to the contracting agency periodically and in the format required by the contract documents. During the term of the contract, the state agency shall determine whether the value of the subcontracts to HUBs meets or exceeds the HUB subcontracting provisions specified in the contract. Accordingly, state agencies shall audit and require a contractor/vendor to whom a contract has been awarded to report to the agency the identity and the amount paid to its subcontractors in accordance with 111.16(c) of this title (relating to State Agency Reporting Requirements). If the contractor/vendor is meeting or exceeding the provisions, the state agency shall maintain documentation of the contractor's/vendor's efforts in the contract file. If the contractor/vendor fails to meet the HUB subcontracting provisions specified in the contract, the state agency shall notify the contractor of any deficiencies. The state agency shall give the contractor/vendor an opportunity to submit documentation and explain to the state agency why the failure to fulfill the HUB subcontracting plan should not be attributed to a lack of good faith effort by the contractor/vendor.

(1) In determining whether the contractor/vendor made the required good faith effort, the agency may not consider the success or failure of the contractor/vendor to subcontract with HUBs in any specific quantity. The agency's determination is restricted to considering factors indicating good faith effort including, but not limited to, the following:

(A) Whether the contractor gave timely notice to the subcontractor regarding the time and place of the subcontracted work.

(B) Whether the contractor facilitated access to the work site, electrical power, and other necessary utilities.

(C) Whether documentation or information was provided that included potential changes in the scope of contract work.

(2) If a determination is made that the contractor/vendor failed to implement the HUB subcontracting plan in good faith, the agency, in addition to any other remedies, may report nonperformance to the commission in accordance with Chapter 113, Subchapter F of this title (relating to Vendor Performance and Debarment Program).

(3) State agencies shall review their procurement procedures to ensure compliance with this section. In accordance with § 111.26 of this title (relating to HUB coordinator responsibilities) the agency's HUB coordinator and contract administrators should facilitate institutional compliance with this section.

§111.17. Certification Process.

(a) A business seeking certification as an historically underutilized business must submit an application to the commission on a form prescribed by the commission, affirming under penalty of perjury that the business qualifies as an historically underutilized business.

(b) If requested by the commission, the applicant must provide any and all materials and information necessary to demonstrate active participation in the control, operation, and management of the historically underutilized business.

(c) Texas Government Code, §2161.231, provides that a person commits a felony of the third degree if the person intentionally applies as an historically underutilized business for an award of a purchasing contract or public works contract and the person knowingly does not meet the definition of an historically underutilized business.

(d) The commission shall certify the applicant as an historically underutilized business or provide the applicant with written justification of its denial of certification within 60 days after the date the commission receives a satisfactorily completed application from the applicant.

(e) The commission reviews and evaluates applications, and may reject an application based on one or more of the following:

(1) the application is not satisfactorily completed;

(2) the applicant does not meet the requirements of the definition of historically underutilized business;

(3) the application contains false information;

(4) the applicant does not provide required information in connection with the certification review conducted by the commission; or

(5) the applicant's record of performance of any prior contracts with the state.

(f) The Commission may approve the existing Certification Program of one or more local governments or non-profit organizations

in this state that certify historically underutilized businesses, minority business enterprises, women's business enterprises, disadvantaged business enterprises that substantially fall under the same definition, to the extent applicable for Historically Underutilized Business found in §2161.001, Texas Government, and maintain them on the Commission's Historically Underutilized Businesses list, if

(1) the local government or non-profit organization meets or exceeds the standards established by the Commission as set out in Chapter 111, Subchapter B of this title (relating to the Historically Underutilized Business Program).

(2) agrees to the terms and conditions as required by statue relative to the agreement between the local government and/or non-profits for the purpose of certification of Historically Underutilized Businesses.

(g) The agreement in subsection (f) of this section must take effect immediately and contain conditions as follows:

(1) allow for automatic certification of business certified by the local government or non-profit organization (Program) as prescribed by the commission;

(2) provide for the efficient updating of the commission database containing information about historically underutilized businesses and potential historically underutilized businesses as prescribed by the commission;

(3) provide for a method by which the commission may efficiently communicate with businesses certified by the local government or non-profit organization;

(4) provide those businesses with information about the state's Historically Underutilized Business Program; and

(5) require that a local government or non-profit organization that enters into an agreement under subsection (f) of this section, complete the certification of an applicant with written justification of its certification denial within the period established by the commission in its rules for certification.

(h) The commission will not accept the certification of a local government or non-profit organization that charges for the certification of businesses to be listed on the Historically Underutilized Business list maintained by the commission.

(i) The commission may terminate an agreement made under this section if a local government or non-profit organization fails to meet the standards established by the commission for certifying Historically Underutilized Businesses. In the event of the termination of an agreement, those HUB's that were certified as a result of the agreement will maintain their HUB status during the fiscal year in which the agreement was in effect. Those HUB's who are removed from the HUB list as a result of the termination of an agreement with a local government or non-profit organization may apply directly to the commission for certification as a Historically Underutilized Business.

~~[(f) The commission will develop agreements with local governments to identify historically underutilized businesses and assist these businesses in obtaining state certification through the commission.]~~

(j) [~~(g)~~] The commission will send all certified HUBs an orientation packet including a certificate, description of certification value/significance, list of agency purchasers, and information regarding electronic commerce, the Texas Marketplace, and the state procurement process.

§111.28. Mentor Protégé Program.

(a) In accordance with the Texas Government Code, Section 2161.065, the commission shall design a Mentor Protégé Program to foster long-term relationships between contractors/vendors and Historically Underutilized Businesses (HUBs) and to increase the ability of HUBs to contract with the state or to receive subcontracts under a state contract. The objective of the Mentor Protégé Program is to provide professional guidance and support to the Protégé to facilitate their development and growth. All participation is voluntary and program features should remain flexible so as to maximize participation. Each state agency with a biennial appropriation that exceeds $10 million shall implement a Mentor Protégé Program.

(b) In efforts to design a Mentor Protégé Program, each agency, because of its unique mission and resources, is encouraged to implement a Mentor Protégé Program that considers;

(1) the needs of Protégé businesses requesting to be mentored;

(2) the availability of mentors who possess unique skills, talents, and experience related to the mission of the agency's Program; and

(3) the agency's staff and resources.

(c) Agencies may elect to implement Mentor Protégé Programs individually or cooperatively with other agencies, and/or other public entities and private organizations, with skills, resources and experience in Mentor Protégé Programs. Agencies are encouraged to implement a Mentor Protégé Program to address the needs of its Protégé businesses in the following critical areas of the state's procurements:

(1) construction,

(2) commodities, and/or

(3) services.

(d) State agencies may consider, but are not limited to, the following factors in developing their Mentor Protégé Program:

(1) Develop and implement internal procedures, including an application process, regarding the Mentor Protégé Program which identifies the eligibility criteria and the selection criteria for mentors and potential HUB Protégé businesses;

(2) Recruit contractor/vendor mentors and proteges to voluntarily participate in the Program;

(3) Establish a Mentor Protégé Program objective identifying both the roles and expectations of the agency, mentor and the protege;

(4) Monitor the progress of the mentor Protégé relationship;

(5) Identify key agency resources including senior managers and procurement personnel to assist with the implementation of the Program; and

(6) Encourage partnerships with local governmental and nonprofit entities to implement a community based Mentor Protégé Program.

(e) An agency's Mentor Protégé Program must include mentor eligibility and selection criteria. In determining the eligibility and selection of a mentor, state agencies may consider the following criteria:

(1) Whether the mentor is a registered bidder on the commission's Centralized Master Bidders List (CMBL);

(2) Whether the mentor has extensive work experience and can provide developmental guidance in areas that meet the needs of the protege, including but not limited to, business, financial, and personnel management; technical matters such as production, inventory control and quality assurance; marketing; insurance; equipment and facilities; and/or other related resources.

(3) Whether the mentor is in "good standing" with the State of Texas and is not in violation of any state statutes, rules or governing policies;

(4) Whether the mentor has mentoring experience; and

(5) Whether the mentor has a successful past work history with the agency.

(f) An agency's Mentor Protégé Program must include Protégé eligibility and selection criteria. In determining the eligibility and selection of HUB protege, state agencies may use the following criteria:

(1) Whether the Protégé is eligible and willing to become certified as a HUB;

(2) Whether the Protégé's business has been operational for at least one year;

(3) Whether the Protégé is willing to participate with a mentoring firm and will identify the type of guidance that is needed for its development;

(4) Whether the Protégé is in "good standing" with the State of Texas and is not in violation of any state statutes, rules or governing policies; and

(5) Whether the Protégé is involved in a mentoring relationship with another contractor/vendor.

(g) The mentor and the protégé should agree on the nature of their involvement under the agency's mentor/protégé initiative. Each agency will monitor the process of the relationship. The mentor and Protégé relationship should be reduced to writing and that agreement may include, but is not limited to, the following:

(1) Identification of the developmental areas in which the Protégé needs guidance ;

(2) The time period which the developmental guidance will be provided by the mentor;

(3) Name, address, phone and fax numbers, and the points of contact that will oversee the agreement of the mentor and protege;

(4) Procedure for a mentor firm to notify the protégé in advance if it intends to voluntarily withdraw from the program or terminate the mentor Protégé relationship;

(5) Procedure for a protégé firm to notify the mentor in advance if it intends to terminate the mentor protégé relationship;

(6) A mutually agreed upon timeline to report the progress of the mentor Protégé relationship to the state agency.

(h) Each agency must notify its mentors and proteges that participation is voluntary. The notice must include written documentation that participation in the agency's Mentor Protégé Program is neither a guarantee for a contract opportunity nor a promise of business; but the Program's intent is to foster positive long-term business relationships.

(i) State agencies may demonstrate their good faith under this section by submitting a supplemental letter with documentation to the commission with their HUB Report or legislative appropriations request identifying the progress and testimonials of mentors and proteges that participate in the agency's Program. In accordance with §111.26 of this title (relating to HUB Coordinator Responsibilities) the agency's HUB Coordinator shall facilitate compliance by its agency.

(j) Each State Agency that sponsors a Mentor/Protégé Program must report that information to the commission upon completion of a signed agreement of both parties. A copy of the signed agreement of both parties should be forwarded to the commission, to be maintained on the approved list of Mentor/Protege. When an agency approves a Mentor/Protégé Agreement, that agreement is valid for all state agencies in the agreed upon scope of work for that Mentor/Protege Agreement.

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 November 16, 2001.

TRD-200107090
William J. Philbin
Legal Counsel
General Services Commission
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 463-3960

♦ ♦ ♦

CHAPTER 115. FACILITIES LEASING PROGRAM

SUBCHAPTER A. STATE LEASED PROPERTY

1 TAC §§115.1 - 115.10

(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 General Services Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The General Services Commission proposes the repeal of Title 1, TAC, Chapter 115, Subchapter A--State Leased Property, §§115.1 - 115.10. The repeal of Chapter 115 is being proposed in order to delete obsolete language as a result of the enactment of Senate Bill 311 (SB 311), Article 10, 77th Legislature (2001), The repeal of Chapter 115 will also allow for new rules to be proposed and published simultaneously in this publication of the *Texas Register*.

John Davenport, Director of Facilities Construction and Space Management, has determined for the first five year period the repeals are in effect. There will be no fiscal implication for the state or local governments as a result of enforcing or administering the repeals.

Mr. Davenport further determines that for each year of the first five-year period the repeals are in effect, the public benefit anticipated as a result of enforcing the repeals is the deletion of obsolete and cumbersome language, and the creation of more efficient rules relating to Facilities Leasing Program under the Texas Government Code, Chapter 2167 and SB 311, Article 10, 77th Legislature (2001). There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed.

Comments on the proposal may be submitted to Juliet U. King, General Counsel, General Services Commission, P.O. Box 13047, Austin, Texas 78711-3047. Comments must be received

no later than 30 days from the date of publication of the proposal in the *Texas Register*.

The repeal of Title 1, TAC, Chapter 115, is proposed under the authority of the Texas Government Code, Title 10, Subtitle D, §§2152.003, 2165.004, 2165.108 and 2167.008 which provides 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, Title 10, Subtitle D, Chapters 2165, §2165.004 ; and Subchapter E, §§2165.201 - 2165.215; and Chapter 2167; and SB 311, Article 10, 77th Legislature. (2001).

§115.1. Definitions.

§115.2. General.

§115.3. Receipt and Processing of Requisitions for Leased Space.

§115.4. Filling Requisitions from Nonprivate Public Sources.

§115.5. Leasing from a Private Source.

§115.6. Negotiation with a Private Source.

§115.7. Amendment of Lease.

§115.8. Transfer by Lessor.

§115.9. Bidders List.

§115.10. Delegation of Leasing Authority.

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 November 16, 2001.

TRD-200107109
Juliet King
Legal Counsel
General Services Commission
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 463-3960

♦ ♦ ♦

1 TAC §§115.1 - 115.11

The General Services Commission proposes new Title 1, TAC, Chapter 115, Subchapter A--State Leased Property, §§115.1 - 115.11, concerning the Facilities Leasing Program. The new rules are proposed in accordance with Senate Bill 311 (SB 311), Article 10, 77th Legislature (2001) which added language concerning the best value standard for lease space; use of private firms to obtain space; and reporting requirement on state agencies noncompliant with leasing requirements. The proposed new rules will also replace obsolete language found in the proposed repealed rules for Title 1, TAC, Chapter 115, §§115.1 - 115.10 that are being published simultaneously in this publication of the *Texas Register*.

John Davenport, Director of Facilities Construction and Space Management, has determined for the first five year period the new rules are in effect, there will be no fiscal implication for the state or local governments as a result of enforcing or administering these new rules.

Mr. Davenport has further determined that for each year of the first five-year period the new rules are in effect, the public benefit anticipated as a result of enforcing these rules will be reduced life cycle costs for leased space and on time delivery of space, which should also result in lower costs for space. 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 proposal may be submitted to Juliet U. King, Acting General Counsel, General Services Commission, P.O. Box 13047, Austin, Texas 78711-3047. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*.

New Title 1, Part 5, TAC, Chapter 115 is proposed under the authority of the Texas Government Code, Title 10, Subtitle D, §§2152.003, 2165.004, 2167.004 (amended by SB 311, §10.04, 77th Legislature (2001)), 2167.008, 2167.052 (amended by SB 311, §10.05, 77th Legislature (2001)), 2167.0541 (new by SB 311, §10.08, 77th Legislature (2001)), and 2167.105 (new by SB 311, §10.10, 77th Legislature (2001)) which provides the General Services Commission with the authority to promulgate rules necessary to implement the sections.

The following code is affected by these rules: Government Code, Title 10, Subtitle D, Chapters 2165, §2165.004; and Subchapter E, §§2165.201 - 2165.215; and Chapter 2167; and SB 311, Article 10, 77th Legislature (2001)

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

(1) Potential lessor list--A list of prospective potential lessors maintained by the Commission which sets out the names and addresses of building owners and agents who have shown an interest in leasing space to the state and from whom bids or proposals can be solicited for obtaining leased space for state use.

(2) Commission--The General Services Commission, or its successor agency, the Texas Building and Procurement Commission.

(3) Emergency Lease - A lease negotiated with a private source for a term not to exceed 24 months, as determined by the commission.

(4) State agency or agency--A board, a commission, or other authorized agency of the state government.

(5) Unduly restrictive specifications--Specifications that unnecessarily limit competition by setting requirements unrelated to the state's actual needs, which have the effect of favoring one or more prospective bidders over all the rest.

§115.2. General.

(a) The authority for obtaining leased space for state agencies or departments rests with the commission by virtue of Texas Government Code, Title 10, Subtitle D, Chapter 2167. In accordance with §2165.107, Government Code, the commission shall give preference to available state-owned space under its control.

(b) The commission shall lease space on the basis of determining the best value for the state. In determining the best value, the commission may consider:

(1) the cost of the lease contract;

(2) the condition and location of the lease space;

(3) utility costs;

(4) access to public transportation;

(5) parking availability;

(6) security;

(7) telephone service availability;

(8) indicators of probable lessor performance under the contract, such as the lessor's financial resources and the lessor's experience;

(9) compliance with the architectural barriers law, Article 9102, Revised Statutes; and

(10) other factors deemed relevant by the commission.

§115.3. Receipt and Processing of Requisitions for Leased Space.

(a) Requests for allocation, relinquishment, or modification of space in state-leased and owned facilities under the commission's control shall be made in writing to the commission's director of Facilities Construction and Space Management Division by the agency head or designee of the requesting agency in accordance with §122.2 of this title (relating to Requests for Allocation, Relinquishment, or Modification of Space in State-Leased or Owned Facilities Under the Commission's Control). Facilities Leasing will develop operating procedures defining all requirements related to requests for state space.

(b) In certain cases, the commission may enter into an emergency lease. In making this determination and in establishing a term of the emergency lease not to exceed 24 months, the commission shall consider the amount and type of space required, the market conditions of the area in which space is needed, the governmental responsibilities of the agency, and the potential impact on the public, and the best interest of the state.

(c) All requests for leased space must be submitted by the requisitioning agency and signed by the agency head or an authorized official, duly certifying the availability of funds for the payment of such leased space, and compliance with the square footage requirements based on the number of FTEs authorized for the agency.

(d) All requests for space must be submitted on a completed commission approved application and contain specifications for leased space which shall conform to the following:

(1) The term of the lease may not exceed a maximum of 10 years. (Please note that Texas Government Code, Title 10, Chapter 2167, §2167.055(c)) permits the consideration of an option to renew for additional terms not to exceed 10 years each, as may be considered by the commission in the state's best interests; and the requisition should note, in the area provided, the length of the initial occupancy period requested by the agency); as well as number and length of renewal periods requested (to be by mutual agreement between lessee and lessor unless otherwise requested).

(2) The commission may include in all specifications for space exceeding a two-year initial term, a provision requiring a separate bid price for utility and/or janitorial cost (if an Invitation for Bid establishes that payment for either utility costs and/or janitorial costs) and may allow an escalation clause to be included in the terms and conditions of the lease to cover periodic escalation of full rental costs of the lease, including utility and/or janitorial costs (if applicable) on account of increases in property values, tax and operating expenses, rental rates, labor or wage rates, and / or utility rates. (The rate of the allowable consumer price index escalation is based upon Lessor's responsibility to pay utility and/or janitorial cost, if any.); and

(3) If the commission considers it advisable, it may include an option for the commission to purchase the space subject to the legislature's appropriation of funds for the purchase, and such an option shall show the amount that would be accumulated by the state and credited toward the purchase at various periods during the term of the lease, if any, and the purchase price of the property at the beginning of each fiscal biennium during the term of the lease.

(4) Development of needed specifications for submission to the commission should be completed by the requesting agency with the guidance of the commission. In no event should the requesting agency allow a prospective bidder to develop or improperly influence the written specifications. Evidence of any such cooperative effort which has the effect of eliminating effective competition and which results in the bidder receiving a lease from the state shall be grounds for seeking to void the lease, removal of the bidder from the bidders' list, and any other remedy available to the state. The commission shall alter or reject any specification it considers unduly restrictive. (See §115.1 of this chapter (relating to Definitions).)

(5) The requesting agency shall estimate its anticipated moving costs from its present leased quarters, if any. Such an estimate shall include only the actual, out-of-pocket cost of moving, relocation of communication equipment and loss of time expenses.

§115.4. Filling Lease Space Requests from Nonprivate Public Sources.

If such state-owned space is not available,

(1) space may be leased from another state agency through an interagency contract;

(2) space may be obtained through transfer of leased space from another state agency or public source;

(3) space may be obtained from the federal government through a negotiated lease; or

(4) space may be obtained from a political subdivision of this state, including a county, a municipality, a school district, a water or irrigation district, a council of government, or a regional planning council, through a negotiated lease. It is contemplated for the purpose of this section that the political subdivision generally will own the property to be leased to the state; however, the state may sublease from political subdivisions leasing from non-public entities if the state pays not more than market price and where:

(A) political subdivisions occupy more than half of the primary leased space; or

(B) political subdivisions pay at least 10% of the primary lease cost of the space occupied by the state; or

(C) it is determined by the commission to be in the best interest of the state.

§115.5. Leasing from a Private Source.

(a) Space may be leased from a private source that provides the best value for the state through the following methods:

(1) Competitive Bidding;

(2) Competitive Sealed Proposals; and

(3) Direct Negotiations.

(b) The Facilities Leasing Program shall develop operating procedures to implement these rules and shall document best value determinations.

(c) When formal bids or offers are requested, bids or offers may not be taken or accepted by telephone or word of mouth. In evaluating bids, the commission shall give no credence to, nor make any allowances for, any comments to prospective lessors allegedly made

to them by employees of the requesting agency. No statements or promises made by such employees shall be binding upon the commission in making its award, or considered to be a term or condition of the resulting lease. (See §115.3(d)(9) of this chapter (relating to Receipt and Processing of Requisitions for Leased Space.))

(d) The commission may not enter into a lease if the space in question has been determined to be noncompliant with the provisions of Texas Government Code, Title 10, Subtitle D, Chapter 2167, §2167.006, concerning the elimination of barriers to handicapped persons, unless approved by the Texas Department of Licensing and Regulation.

(e) A Notice of Award shall be the means by which the successful bidder or offeror and the requesting agency are notified of the commission's determination of award of a lease contract. Notice of Award will be made in writing. The Notice of Award shall be a binding lease contract when served upon the successful bidder or offeror. Service shall be complete upon deposit of the Notice of Award, 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. The affidavit of any person showing service of the Notice of Award shall be prima facie evidence of the fact of service.

§115.6. Amendment of Lease.
Any lease entered into pursuant to the Texas Government Code, Title 10, Subtitle D, Chapter 2167, Subchapter B, and these sections may be amended during its term so long as the commission finds the amendment to be in the best interests of the state.

§115.7. Transfer by Lessor.
Lessor's sale, assignment, or transfer of lessor's right to receive payments for lessor's obligation to perform under the lease may be provided for in the terms and conditions of the lease, but lease payments to the new lessor shall be approved by the commission only if and when the transfer is sufficiently documented in the records of the commission. The Lessor shall comply with the rules and procedures of the commission to affect the change of lessor in order that lease payments can be made.

§115.8. Potential Lessors' List.
The Facilities Leasing Program shall develop operating procedures to ensure all prospective offerors may be considered for inclusion on any relevant solicitations by maintaining an offerors' list.

§115.9. Delegation of Leasing Authority.
The Facilities Leasing Program shall develop operating procedures to delegate the authority to enter into lease contracts for space to state agencies, including institutions of higher-education. The Facilities Leasing Program shall develop operating procedures to produce an annual report to the Commission regarding opportunities for delegating leasing authority to state agencies with statewide operations.

§115.10. Use of Private Firms to Obtain Space.
The Facilities Leasing Program shall develop operating procedures to solicit and manage private brokerage or real estate firms as consultants to assist in obtaining lease space on behalf of the Commission.

§115.11. Report on Noncompliance.
The Facilities Leasing Program shall develop operating procedures to determine and annually report to members of the state agency's governing body and to the governor, lieutenant governor, and speaker of the house of representatives the agencies' noncompliance with commission rules or other state laws related to leasing requirements. The report is to contain an estimate of the fiscal impact resulting from noncompliance.

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 November 16, 2001.

TRD-200107108
Juliet King
Legal Counsel
General Services Commission
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 463-3960

♦ ♦ ♦

CHAPTER 123. FACILITIES CONSTRUCTION AND SPACE MANAGEMENT DIVISION

The General Services Commission proposes the repeal of Title 1, T.A.C., Chapter 123, Subchapter A - General Matters,§123.1 and §123.2; Subchapter B - Real Property Acquisition,§123.12 and §123.13; Subchapter C - Construction Project Administration,§§123.23 through 123.33; and Subchapter D - Wage Rates, §123.43 and §123.44. The repeal is proposed in order to allow for the adoption of more efficient and streamlined new rules under Title 1, T.A.C., Chapter 123 that are being published simultaneously in this publication of the *Texas Register*. The new rules will also be compliant with the legislative requirements of S.B. 311, Art. 9, §14.05 and S.B. 1268, 77th Leg. (2001).

John Davenport, Director of Facilities Construction and Space Management, has determined for the first five year period the rules are in effect, there will be no will be no fiscal implication for the state or local governments as a result of enforcing or administering these new rules.

John Davenport, Director of Facilities Construction and Space Management, 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 the deletion of cumbersome and obsolete language. 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 Juliet King, Acting 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. GENERAL MATTERS

1 TAC §123.1, §123.2

(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 General Services Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The proposed repeal of Title 1, T.A.C., Chapter 123 is made under the Texas Government Code, Title 10, Subtitle D, §§2152.003, 2166.062, and 2166.202 which provides the General Services Commission with the authority to promulgate rules necessary to implement the sections.

The following code is affected by these rules: Government Code, Title 10, Subtitle D, Chapter 2166.

§123.1. Definitions.

§123.2. Delegation of Authority.

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 November 16, 2001.

TRD-200107104
Juliet King
Legal Counsel
General Services Commission
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 463-3960

♦ ♦ ♦

SUBCHAPTER B. REAL PROPERTY ACQUISITIONS

1 TAC §123.12, §123.13

(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 General Services Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The proposed repeal of Title 1, T.A.C., Chapter 123 is made under the Texas Government Code, Title 10, Subtitle D, §§ 2152.003, 2166.062, and 2166.202 which provides the General Services Commission with the authority to promulgate rules necessary to implement the sections.

The following code is affected by these rules: Government Code, Title 10, Subtitle D, Chapter 2166.

§123.12. Land and Real Property Acquisition, Negotiated.

§123.13. Land and Real Property Acquisition, Condemnation.

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 November 16, 2001.

TRD-200107105
Juliet King
Legal Counsel
General Services Commission
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 463-3960

♦ ♦ ♦

SUBCHAPTER C. CONSTRUCTION PROJECT ADMINISTRATION

1 TAC §§123.23 - 123.33

(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 General Services Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The proposed repeal of Title 1, T.A.C., Chapter 123 is made under the Texas Government Code, Title 10, Subtitle D,§§2152.003, 2166.062, and 2166.202 which provides the General Services Commission with the authority to promulgate rules necessary to implement the sections.

The following code is affected by these rules: Government Code, Title 10, Subtitle D, Chapter 2166.

§123.23. General Project Responsibility.

§123.24. Project Analysis Process.

§123.25. Construction Project Process.

§123.26. Exclusions from Commission Authority.

§123.27. Selection of Design Professionals for Construction Projects.

§123.28. Contractor Qualifications.

§123.29. Bidding Procedures.

§123.30. Construction Contract Award.

§123.31. Emergency Bidding and Award Procedures.

§123.32. Construction Contract Administration.

§123.33. Small Contractor Participation Assistance Program.

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 November 16, 2001.

TRD-200107106
Juliet King
Legal Counsel
General Services Commission
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 463-3960

♦ ♦ ♦

SUBCHAPTER D. WAGE RATES

1 TAC §123.43, §123.44

(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 General Services Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The proposed repeal of Title 1, T.A.C., Chapter 123 is made under the Texas Government Code, Title 10, Subtitle D, §§2152.003, 2166.062, and 2166.202 which provides the General Services Commission with the authority to promulgate rules necessary to implement the sections.

The following code is affected by these rules: Government Code, Title 10, Subtitle D, Chapter 2166.

§123.43. Wage Rate Surveys.

§123.44. Withholding of Penalties.

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 November 16, 2001.

TRD-200107107
Juliet King
Legal Counsel
General Services Commission
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 463-3960

♦ ♦ ♦

CHAPTER 123. FACILITIES CONSTRUCTION AND SPACE MANAGEMENT DIVISION

The General Services Commission proposes new Title 1, T.A.C., Chapter 123, Subchapter A - General Matters, §123.1 and §123.2; Subchapter B - Real Property Acquisition, §123.12 and §123.13; Subchapter C - Construction Project Administration, §§123.23 through 123.33; and Subchapter D - §123.43 and §123.44. The new rules are proposed due to the enactment of S.B. 311, Art. 9 and §14.05, 77th Leg. (2001) and S.B. 1268, 77th Leg. (2001) which contains new language relating to lowest and best bid method for awarding a contract, including design-build; the construction manager-at-risk and competitive sealed proposal methods for a project; surety technical assistance services for the benefit of small and historically underutilized businesses ; determination of the prevailing wage rate in counties bordering the United Mexican States, or a county adjacent to a county bordering the United Mexican States; and requirements that the commission establish procedures for the process to acquire property, for implementing the exclusion process from the commission's authority, for the selection of design professionals, and procedures for the management of the construction process. The proposed new rules will also replace obsolete and cumbersome language found in the proposed repeal for Title 1, T.A.C, Chapter 123 that is being published simultaneously in this publication of the Texas Register.

John Davenport, Director of Facilities Construction and Space Management, 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 or administering these new rules

John Davenport, Director of Facilities Construction and Space Management, 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 lower project costs and on time delivery of projects. The new rules will also be compliant with the requirements of S.B. 311, Art. 9 and §14.05, 77th Leg. (2001) and S.B. 1268, 77th Leg. (2001) 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 Ms. Juliet King, Acting 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. GENERAL MATTERS

1 TAC §123.1, §123.2

The new rules are proposed under the authority of the Texas Government Code, Title 10, Subtitle D, §§2152.003, 2166.062, 2166.202, 2166.2525 (new by S.B. 311, §9.02, 77th Leg. (2001)), 2166.2526 (new by S.B. 311, §9.03, 77th Leg. (2001)) which provides the General Services Commission with the authority to promulgate rules necessary to implement the sections.

The following code is affected by these rules: Government Code, Title 10, Subtitle D, Chapter 2166 and S.B. 311, Art. 9, 77th Leg. (2001)

§123.1. Definitions.

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

(1) Commission -- The six member board of the General Services Commission of the State of Texas, or its successor organization, the seven member board of the Texas Building and Procurement Commission.

(2) Contractor's Qualification Form -- The TBPC provided document which contractors must complete and return to TBPC in order to be considered for a construction contract award.

(3) Cost of Services -- The costs incurred by TBPC in providing construction project administration services, including project management, professional inspection, staff time, prior project analysis cost, travel expense, the estimated cost of minor and incidental materials used in pursuit of a project, and may include an overhead rate to cover employee benefit costs.

(4) Design Professional -- Persons licensed by the State of Texas to practice architecture in accordance with Texas Civil Statutes, Article 249a (relating to Architects) or engineering in accordance with Texas Civil Statutes, Article 3271a (relating to the Texas Engineering Practice Act).

(5) Facilities Construction and Space Management Division (FCSMD) -- The TBPC division responsible for administration of construction projects under the commission's jurisdiction, and such other projects that the commission has agreed to manage.

(6) TBPC -- The General Services Commission. or its successor agency, the Texas Building and Procurement Commission (herein referred to collectively as "TBPC"), for the State of Texas.

(7) Notice to Proceed -- A TBPC written order issued to a general contractor under contract on a project which establishes the start and completion dates for the contract and the project schedule.

(8) Planning Fund -- A fund administered by FCSMD from which authorized planning expenditures are initially paid.

(9) Project Analysis -- A study done before the legislative appropriation process for a project to develop a reliable estimate of the cost of the project to be used in the appropriations process, and as authorized by Texas Government Code, Title 10, Subtitle D, Chapter 2166, Subchapter D.

(10) Project -- A building construction project as defined in Texas Government Code, §2166.001(4) that is financed wholly or partly by a specific appropriation, a bond issue or federal money. The term includes the construction of:

(A) a building, structure or appurtenant facility or utility, including the acquisition and installation or original equipment and original furnishings; and

(B) an addition to, alteration, rehabilitation or repair of, an existing building, structure, or appurtenant facility or utility.

(11) Project Request Forms -- The TBPC provided document which using agencies must complete and return to TBPC in order to initiate a project for construction.

(12) Using Agency -- An instrumentality of the state that occupies and uses a state-owned or state-leased building, or the commission, with respect to a state-owned building maintained by the commission.

(13) Uniform General Conditions (UGC) -- The terms and conditions for state construction projects promulgated in accordance with Texas Government Code, Title 10, Subtitle D, Chapter 2166, Subchapter G.

(14) Wage Rates -- The schedule of the hourly rate of pay plus payments made to or on behalf of employees for benefits such as health insurance, pension plans, death benefits and vacation pay.

§123.2. Delegation of Authority.

(a) The commission may act to exercise any power or authority set out in Chapter 123 of this title (relating to the Facilities Construction and Space Management Division), or it may delegate such authority to the executive director. The executive director, in exercising delegated authority, may further delegate his authority to another member of the FCSMD staff.

(b) Operating Procedures for Chapter 123 of this title may be found in FCSMD's Internal Procedures 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 November 16, 2001.

TRD-200107100
Juliet King
Legal Counsel
General Services Commission
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 463-3960

♦ ♦ ♦

SUBCHAPTER B. REAL PROPERTY ACQUISITIONS

1 TAC §123.12, §123.13

The new rules are proposed under the authority of the Texas Government Code, Title 10, Subtitle D, §§2152.03, 2166.062, 2166.202, 2166.2525 (new by S.B. 311, §9.02, 77th Leg. (2001)), 2166.2526 (new by S.B. 311, §9.03, 77th Leg. (2001)) which provides the General Services Commission with the authority to promulgate rules necessary to implement the sections.

The following code is affected by these rules: Government Code, Title 10, Subtitle D, Chapter 2166 and S.B. 311, Art. 9, 77th Leg. (2001)

§123.12. Land and Real Property Acquisition, Negotiated.

(a) FCSMD shall establish procedures for the process to acquire property, per appropriate direction in legislation.

(b) Written responses to the Request for Offers to sell from property owners will be evaluated by TBPC staff. All final recommendations shall be presented to the commission or purchasing agency for acceptance. All appropriate studies, appraisals and title work shall accompany such recommendations.

(c) The TBPC or the purchasing agency, shall accept offers which are in the best interest of the State of Texas. The TBPC and the purchasing agency retain the right to reject any and all offers.

(d) The TBPC or the purchasing agency, after acceptance of a written offer to sell property, is authorized to complete the purchase as follows:

(1) A real estate contract will be executed by the seller and the TBPC stating all specific conditions of the transfer of property, including delivery of draft deeds, acquisition of title policies, conduct of surveys, environmental tests and other such matters, and other details of the individual transaction. A closing on the transaction shall be scheduled at the convenience of the parties.

(2) The terms and conditions under which the TBPC purchases the real property shall be designed to comply with applicable law to protect the interests of the State of Texas and shall be reasonable and prudent under normal business practices.

§123.13. Land and Real Property Acquisition, Condemnation.

(a) When no agreement on purchase price between the seller and the buyer is reached through negotiations, the TBPC may exercise its power of eminent domain.

(b) At least one appraisal as to fair market value shall be obtained from independent sources and a final offer presented to the seller based on an appraisal.

(c) The final offer to purchase shall contain a designated acceptance period stated in calendar days.

(d) If this final offer to purchase is not accepted by the seller within the designated time period, the commission may proceed to make a finding of public purpose for the taking and seek assistance from the office of the Attorney General to proceed with the condemnation action.

(e) Conduct of the condemnation proceedings shall be in accordance with state 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 November 16, 2001.

TRD-200107101
Juliet King
Legal Counsel
General Services Commission
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 463-3960

♦ ♦ ♦

SUBCHAPTER C. CONSTRUCTION PROJECT ADMINISTRATION

1 TAC §§123.23 - 123.33

new rules are proposed under the authority of the Texas Government Code, Title 10, Subtitle D, §§2152.03, 2166.062, 2166.202, 2166.2525 (new by S.B. 311, §9.02, 77th Leg. (2001)), 2166.2526 (new by S.B. 311, §9.03, 77th Leg. (2001)) and S.B. 1268 77th Leg. (2001) which provides the General Services Commission with the authority to promulgate rules necessary to implement the sections.

following code is affected by these rules: Government Code, Title 10, Subtitle D, Chapter 2166 and S.B. 311, Art. 9, 77th Leg. (2001) and S.B. 1268, 77th Leg. (2001)

§123.23. General Project Responsibility.

(a) The TBPC is responsible for the administration of project analyses and construction projects for all state agencies except as otherwise provided in Texas Government Code, §§2166.003 and 2166.004, and other statutes.

(b) The TBPC will act as the owner for the benefit of the using agency and shall provide timely and complete information to the using agency for any pending project for which it is responsible.

(c) The TBPC shall act in the best interests of the State of Texas in administering project contracts for which it is responsible.

(d) Each construction project administered by the TBPC shall bear the cost of services rendered thereon. At the start of a construction project, an estimate of the cost of services provided by the TBPC will be provided to the using agency. This estimate may be changed by agreement of the TBPC and the using agency.

(e) One-half of the cost of services shall be transferred to TBPC upon approval of the total project cost by the using agency. The remaining half of the cost of services fee shall be transferred to the TBPC upon award of the primary construction contract for each project or approval to begin construction on projects using alternate delivery procedures. TBPC shall use the fees collected to pay for the expenses of performing its services.

(f) FCSMD shall develop detailed operating procedures that outline the process for construction project management.

§123.24. Project Analysis Process.

(a) The using agency is responsible for initiating a project analysis. The using agency shall initiate a project analysis by submitting to the FCSMD a request that a project analysis of a proposed project be prepared. Standard request forms are provided by the FCSMD and are available on the FCSMD Computer Management System (CMS).

(b) To ensure results are available in a timely manner, requests for project analyses shall be made no later than January 1 of even-numbered years in order to ensure completion in time for submission with an using agency's budget prior to the regular session of the legislature.

(c) Project analyses shall be prepared based on FCSMD detailed operating procedures.

§123.25. Construction Project Process.

(a) Initiation of a construction project.

(1) The using agency is responsible for initiating a construction project. The using agency may commence the process by submitting a request on its letterhead to initiate work on the project or through the CMS. Project Request forms are provided by the FCSMD and are available on the CMS. The using agency must identify the source and amount of funds to be applied to the project. If the funds for the project are not directly appropriated to the GSC, the using agency must execute an interagency agreement with the GSC, which will govern the payment of all services and contracts necessary to accomplish the project.

(2) Projects should be initiated at the earliest opportunity after authorization by the Legislature, but not later than January 1 of even-numbered years. This timeframe is required for a contract award to be made within the fiscal year for which appropriated project funds are available.

(b) Selection of Construction Delivery Method: When a project has been requested by a using agency or appropriated to the TBPC, FCSMD shall assess which construction method provides the state with the best value:

(1) Lowest and Best Bid

(2) Design-Build

(3) Construction Manager at Risk

(4) Competitive Sealed Proposals

(c) FCSMD shall develop detailed operating procedures to manage the construction project process.

§123.26. Exclusions from Commission Authority.

(a) Pursuant to the Texas Government Code, §§2166.003 (a)(6) and (7), §§2166.004 and 2166.063, certain types of repair and rehabilitation projects are not subject to TBPC construction administration, or are otherwise excluded from TBPC's jurisdiction.

(b) Applications for a determination that a project is excluded shall be provided to the FCSMD in writing on or before June 1 of each fiscal year. The FCSMD shall advise using agencies that because an approval after the June 1 deadline may result in funds not be spent during that fiscal year, that TBPC assumes no liability thereof. Each application must provide the proposed changes, budget information, and method of construction intended by the using agency.

(c) FCSMD shall develop detailed operating procedures for implementing the exclusion process.

§123.27. Selection of Design Professionals for Construction Projects.

(a) Registration of Design Professionals.

(1) On or before May 1 of odd-numbered years, the FCSMD shall advertise in appropriate media, including the TBPC web site, the Texas Electronic State Business Daily and such other media generally available to the public, for all interested design professionals to register with the TBPC for the following biennium.

(2) Registration with the TBPC will be accomplished by filling out a questionnaire, either in writing or electronically, and submitting it on or before July 1 of odd numbered years, or anytime before or after that date.

(b) Selection process for construction project design professionals. FCSMD shall develop detailed operating procedures for selection of design professionals

(c) Non-prime design selections. The TBPC shall conduct selections of design professionals for non-prime design work in accordance with Texas Government Code, Chapter 2254, Subchapter A, for non-prime design professionals, and Chapter 2166, Subchapter D, for design professionals who may perform prime and non-prime design services. The TBPC reserves the authority to award multiple, indefinite quantity services agreements to design professionals in the disciplines needed by FCSMD.

§123.28. Contractor Qualifications.

(a) Interested contractors shall submit a contractor's qualification form to the FCSMD in a timely fashion and no later than the date established in the notice to bidders. Forms are available for pick up with bid documents. Incomplete forms shall be rejected.

(b) FCSMD shall develop detailed operating procedures for contractor selection.

§123.29. Bidding Procedures.

(a) All TBPC construction projects are competitively bid, except those using best value alternate delivery methods, and publicly opened in the office designated by the commission.

(b) FCSMD shall develop detailed operating instructions for the contractor selection and bidding process, including selection for best value alternate delivery methods.

§123.30. Construction Contract Award.

(a) Award of construction contracts will be made by the commission except in cases of emergency outlined in §123.31(c) of this chapter (relating to Emergency Bidding and Awards Procedures). Award will be based upon the best value to the state for bids and proposals received from a qualified bidder.

(b) FCSMD shall develop detailed operating procedures for construction contract award.

§123.31. Emergency Bidding and Award Procedures.

(a) Emergency Bidding. The FCSMD may issue an advertisement for a bid and let a bid for a period of time less than required by Texas Government Code, §2166.253, when an emergency condition requires expedient action.

(b) Emergency conditions. Emergency conditions include, but are not limited to:

(1) preventing undue additional cost to a state agency; or

(2) preventing or removing a hazard to life or property.

(c) Emergency award procedures. The executive director, or his designee, is authorized to award construction contracts when conditions as described in subsection (b) of this section are determined to exist. The award shall be reported to the commission at its next regularly scheduled meeting for ratification.

(d) Documenting emergency conditions. Each time an emergency is determined to exist, a written statement describing the emergency condition shall be prepared for approval by the executive director. Copies of the document shall be maintained in the project file.

§123.32. Construction Contract Administration.

FCSMD shall develop detailed operating procedures for management of the construction process, which shall focus on administrative procedures, and successful compliance with the project schedule and budget, and successful completion of the project.

§123.33. Small Contractor Participation Assistance Program.

The TBPC operates a Small Contractor Participation Assistance Program as set forth in Texas Government Code, §2166.258 (amended by S.B. 1268, 77th Legi. (2001)) and §2166.259 and this section. In accordance with Texas Government Code, §2166.258, this shall include the contracting with insurance company(ies), surety company(ies), agent(s) or broker(s) to provide surety technical assistance services for the benefit of small and historically underutilized businesses. FCSMD shall develop detailed operating procedures for implementation of this 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 November 16, 2001.

TRD-200107102
Juliet King
Legal Counsel
General Services Commission
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 463-3960

♦ ♦ ♦

SUBCHAPTER D. WAGE RATES

1 TAC §123.43, §123.44

new rules are proposed under the authority of the Texas Government Code, Title 10, Subtitle D, §§2152.03, 2166.062, 2166.202, 2166.2525 (new by S.B. 311, §9.02, 77th Leg. (2001)), 2166.2526 (new by S.B. 311, §9.03, 77th Leg. (2001)) which provides the General Services Commission with the authority to promulgate rules necessary to implement the sections.

following code is affected by these rules: Government Code, Title 10, Subtitle D, Chapter 2166 and S.B. 311, §14.05, 77th Leg. (2001).

§123.43. Wage Rate Surveys.

(a) The TBPC has adopted the prevailing wage rates for the locality as determined by the United States Department of Labor in accordance with the Davis-Bacon Act, if the survey was conducted within three years before the project in question is to be bid, or the wage determination of the Texas Workforce Commission, or other available sources. For counties designated in Section 14.05 of SB 311, 77th Leg'. (2001) the TBPC will use the "Davis-Bacon" rates and the wage rate determinations of the Texas Workforce Commission, or other available surveys, for the local and state average wage rate determinations.

(b) Affected workers and contractors and subcontractors are responsible for complying with Texas Government Code, Chapter 2258. The TBPC is not a party to arbitration under the Texas Government Code.

§123.44. Withholding of Penalties.

The TBPC shall retain the amounts authorized by Texas Government Code, Chapter 2258 upon a finding that prevailing wages have not been paid. The TBPC shall use any amounts retained to pay the affected worker in accordance with Texas Government Code, §2258.056.

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 November 16, 2001.

TRD-200107103
Juliet King
Legal Counsel
General Services Commission
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 463-3960

♦ ♦ ♦

PART 12. COMMISSION ON STATE EMERGENCY COMMUNICATIONS

CHAPTER 251. REGIONAL PLANS--STANDARDS

1 TAC §251.10

The Commission on State Emergency Communications (CSEC) proposes an amendment to §251.10, concerning proposed guidelines for implementing wireless E9-1-1 services with 9-1-1 funds deposited in the 9-1-1 Services Fee Fund.

The proposed rule would modify parts of the rule that have become outdated since the rule was last adopted and that would benefit from revision in light of modifications, clarifications, priorities, and rulings by the Federal Communications Commission in Docket number 94-102 related to wireless E9-1-1. It would also further clarify and incorporate the ad hoc process that has been used to determine reasonable costs for purposes of wireless service provider reimbursement and would recognize that the Commission may substitute the ad hoc process with a rule process in a separate rulemaking.

CSEC seeks comments on the following specific issues:

1. The proposed rule in subsection (a) adds a definition for ESRK. CSEC seeks comments on whether this definition is appropriate? Should any other definitions be added to the proposed rule?

2. The proposed rule adds in subsection (b)(4) a clarification to the current interoperability language by inserting "to the extent technically feasible." CSEC seeks comment on whether there are situations where solutions to the interoperability issues are not currently technically feasible?

3. In view of the recent Federal Communications Commission decision in Docket number 94-102 involving the City of Richardson, Texas, subsection (b)(3) of proposed rule includes a provision on making a timely request to the 9-1-1 Network Provider and/or ALI Host Database Provider, as applicable and necessary, for any upgrade necessary to transmit and deliver the wireless Phase II information. CSEC seeks comments on whether there are currently upgrades that may be necessary in these situations and the current due dates for such upgrades? CSEC seeks comments on whether the upgrades that have been implemented to date or that will be implemented to address Phase II service in the future will permit full migration from Phase I deployments that used NCAS, CAS, and/or Hybrid solutions? CSEC seeks comments on whether there are any known impediments to migrating from NCAS, CAS, and/or Hybrid Phase I solutions for purposes of delivering Phase II service? CSEC also seeks comments on whether these upgrades vary depending on whether a wireless carrier proposes a network or a handset Phase II solution?

4. CSEC seeks comments whether interested parties have suggested modifications to the proposed rule or suggested modifications to CSEC or COG processes that may further facilitate the implementation of Phase II service in the state program areas?

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 improved services in facilitating the delivery of a wireless emergency call through automatic number and location information data. 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.

Initial comments on the proposed rule 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 proposed rule is proposed pursuant to the Health and Safety Code, Chapter 771, §§771.051, 771.055, 771.057, 771.071, 771.0711, 771.072, 771.075, and 771.078 which authorize the Commission, among other things, to adopt policies, procedures, and minimum performance standards for providing 9-1-1 service and prescribing the use of the 9-1-1 funds for providing 9-1-1 service.

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

§251.10. Guidelines for Implementing Wireless E9-1-1 Service.

(a) Definitions. When used in this rule, the following words and terms shall have the meanings identified in this section, unless the context and use of the word or terms clearly indicates otherwise:

(1) 9-1-1 Database Record--A physical record, which includes the telephone subscriber information to include the caller's telephone number, related locational information, and class of service, and conforms to NENA adopted database standards.

(2) 9-1-1 Funds--Funds assessed and disbursed in accordance with the Texas Health and Safety Code, Chapter 771 but the term does not include wireless 9-1-1 emergency service fees not deposited in the 9-1-1 Services Fee Fund.

(3) 9-1-1 Equipment--Capital equipment acquired partially or in whole with 9-1-1 funds and designed to support and/or facilitate the delivery of an emergency 9-1-1 call to an appropriate emergency response agency.

(4) 9-1-1 Governmental Entity--An RPC or District, as defined in Texas Health and Safety Code Chapter 771.055, and Chapter 772, Subchapter B, C, [~~or~~] D, or F that administers the provisioning of 9-1-1 service.

(5) 9-1-1 Governmental Entity Jurisdiction--As defined in applicable law, Texas Health and Safety Code Chapters 771 and 772, the geographic coverage area in which a 9-1-1 Governmental Entity provides emergency 9-1-1 service.

(6) 9-1-1 Operator--The PSAP operator receiving 9-1-1 calls.

(7) 9-1-1 Network Provider--The current operator of the selective router/switching that provides the interface to the PSAP for 9-1-1 service.

(8) Automatic Location Identification (ALI) Database--A computer database used to update the Call Back Number information of wireless end users and the Cell Site/Sector information for Phase I call delivery, as well as the X, Y coordinates for longitude and latitude for Phase II call delivery.

(9) Call Associated Signaling (CAS)--A method for delivery of the mobile directory number (MDN) of the calling party plus the emergency service routing digits (ESRD) from the wireless network through the 9-1-1 selective router to the PSAP. The 20 digits of data delivered are sent either over Feature Group D (FG-D) or ISUP from the wireless switch to the 9-1-1 router. From the router to the PSAP, the 20-digit stream is delivered using either Enhanced Multi-Frequency (EMF) or ISDN connections.

(10) Call Back Number--The mobile directory number (MDN) of a Wireless End User who has made a 9-1-1 call, which usually can be used by the PSAP to call back the Wireless End User if a 9-1-1 call is disconnected. In certain situations, the MDN forwarded to the PSAPs may not provide the PSAP with information necessary to call back the Wireless End User making the 9-1-1 call, including, but not limited to, situations affected by illegal use of Service (such as fraud, cloning, and tumbling) and uninitialized handsets and non-authenticated handsets.

(11) Cell Site--A radio base station in the WSP Wireless Network that receives and transmits wireless communications initiated by or terminated to a wireless handset, and links such telecommunications to the WSP's network.

(12) Cell Sector--An area, geographically defined by WSP (according to WSP's own radio frequency coverage data), and consisting of a certain portion of all of the total coverage area of a Cell Site.

(13) Cell Site/Sector Information--Information that indicates, to the receiver of the information, the location of the Cell Site receiving a 9-1-1 call initiated by a Wireless End User, and which may also include additional information regarding a Cell Sector.

(14) Cell Sector Identifier--The unique numerical designation given to a particular Cell Sector that identifies that Cell Sector.

(15) Class of Service--A standard acronym, code or abbreviation of the classification of telephone service of the Wireless End User, such as WRLS (wireless), that is delivered to the PSAP CPE.

(16) Digital Map--A computer generated and stored data set based on a coordinate system, which includes geographical and attribute information pertaining to a defined location. A digital map includes street name and locational information, data sets related to emergency service provider boundaries, as well as other associated data.

(17) Emergency Communication District (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 Texas Health and Safety Code, Chapter 772, Subchapter B, C, [~~or~~] D, or F.

(18) Emergency Service Number (ESN)--A number stored by the selective router/switch used to route a call to a particular PSAP.

(19) Emergency Service Routing Digits (ESRD)--As defined in J-Std-034, an ESRD is a digit string that uniquely identifies a base station, cell sector, or sector. This number may also be a network routable number (but not necessarily a dialable number).

(20) ESRK--Emergency Service Routing Key--A temporary phone number that routes an emergency call to the correct Public Safety Answering Point and allows access to the information in Automatic Location Identification.

(21) [~~(20)~~] FCC--The Federal Communications Commission.

(22) [~~(21)~~] FCC Order--The Federal Communications Commission Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 94-102, released July 26, 1996, and as amended by subsequent decisions.

(23) [~~(22)~~] Host ALI Records--Templates from the ALI Database that identify the Cell Site location and the Call Back Number of the Wireless End User making a 9-1-1 call.

(24) [~~(23)~~] Hybrid CAS/NCAS--This method for wireless E9-1-1 call delivery uses a combination of CAS and NCAS techniques to deliver the location and call back numbers to a PSAP. The MSC sends the location and call back information to a selective router using the standard CAS interface defined in J-Std-034. The selective router then uses an NCAS approach to deliver the information to a PSAP. That is, the selective router sends the location and call back information to the wireline emergency services database and the caller's call back number, or MDN, to the PSAP. The MDN is then used as a key to retrieve the cell/tower information for PSAP display.

(25) [~~(24)~~] J-Std-034--A standard, jointly developed by the Telecommunications Industry Association (TIA) and the Alliance for Telecommunications Industry Solutions (ATIS), to provide the delta changes necessary to various existing standards to accommodate the Phase I requirements. This standard identifies that the interconnection between the mobile switching center (MSC) and the 9-1-1 selective router/switch is via:

(A) an adaptation of the Feature Group-D Multi Frequency (FG-D protocol), or

(B) the use of an enhancement to the Integrated Services Digital Network User Part (ISUP) Initial Address Message (IAM) protocol. In this protocol, the caller's location is provided as a ten-digit number referred to as the emergency services routing digits (ESRDs). The protocol NENA-03-002, Recommendation for the Implementation of Enhanced Multi Frequency (MF) Signaling, E9-1-1 Tandem to PSAP, is the corollary of J-Std-034 FG-D protocol.

(26) J-Std-036--A standard, jointly developed by the Telecommunications Industry Association (TIA) and the Alliance for Telecommunications Industry Solutions (ATIS), to make provision for introduction of location determination technology for Phase II delivery of wireless E9-1-1 calls.

(27) [~~(25)~~] Mobile Directory Number (MDN)--A 10-digit dialable directory number used to call a Wireless Handset.

(28) [~~(26)~~] Mobile Switching Center (MSC)--A switch that provides stored program control for wireless call processing.

(29) [~~(27)~~] National Emergency Number Association (NENA).

(30) [~~(28)~~] NENA 02-001--A standard set of formats and protocols for the Automatic Location Identification (ALI) data exchange between service providers and Enhanced 9-1-1 systems, developed by the NENA Data Standards Subcommittee (June 1998 revision).

(31) [~~(29)~~] NENA 03-002--A standard, or technical reference, developed by the NENA Network Technical Committee, to provide recommendations for the implementation of Enhanced Multi Frequency (MF) Signaling, E9-1-1 Tandem to PSAP. The J-Std-034 FG-D protocol, referenced in paragraph (25) [~~(24)~~] of this subsection, is the corollary protocol of NENA 03-002.

(32) [~~(30)~~] Non-Callpath Associated Signaling (NCAS)--This method for wireless E9-1-1 call delivery delivers routing digits over existing signaling protocol, including commonly applied CAMA trunking into and out of selective routers or SS7 into selective routers. The voice call is set up using the existing interconnection method that the wireline company uses from an end office to the router and from the router to the PSAP. The ANI delivered with the voice call is an emergency service routing digit (ESRD), not a MDN. All data, including the MDN and cell sector that receives the call, is delivered to the PSAP via the data path within the ALI record.

(33) [~~(31)~~] Phase I E9-1-1 Service--The service by which the WSP delivers to the designated PSAP the Wireless End User's call back number and Cell Site/Sector information when a wireless end user

has made a 9-1-1 call, as contracted by the 9-1-1 Governmental Entityagency.

(34) [~~(32)~~] Phase II E9-1-1 Service--The service by which the WSP delivers to the designated PSAP the Wireless End User's call back number, Cell Site/Sector information, as well as X, Y (longitude, latitude) coordinates to the accuracy standards set forth in the FCC Order.

(35) [~~(33)~~] Phase I E9-1-1 Service Area(s)--Those geographic portions of a 9-1-1 Governmental Entity Jurisdiction in which WSP is licensed to provide Service. Collectively, all such geographic portions of the 9-1-1 Governmental Entity's Jurisdiction subject to this rule shall be referred to herein as the "Phase I E9-1-1 Service Areas."

(36) [~~(34)~~] Regional Planning Commission--A commission established under Local Government Code, Chapter 391, also referred to as a council of governments (COG).

(37) [~~(35)~~] Regional Strategic Plans--Regional 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 five years into the future, beginning September 1, 1994. Within the context of Section 771.056(d), the [~~Advisory~~] Commission on State Emergency Communications (CSEC) [~~(ACSEC)~~] shall consider any revenue insufficiencies to represent need for equalization surcharge funding support.

(38) [~~(36)~~] Public Safety Answering Point (PSAP)--A 24-hour communications facility established as an answering location for 9-1-1 calls originating within a given service area, as further defined in applicable law Texas Health and Safety Code Chapters 771 and 772.

(39) [~~(37)~~] Service Control Point (SCP)--A centralized database system used for, among other things, wireless Phase I E9-1-1 Service applications. It specifies the routing of 9-1-1 calls from the Cell Site to the PSAP. This hardware device contains special software and data that includes all relevant Cell Site locations and Cell Sector Identifiers.

(40) [~~(38)~~] Selective Router--A switching office placed in front of a set of PSAPs that allows the networking of 9-1-1 calls based on the ESRD assigned to the call.

(41) Standard Wireless E9-1-1 Service Agreement--The standard Phase I and/or Phase II Wireless E9-1-1 Service Agreement, as applicable, provided by the Commission and available on the Commission's web site.

(42) [~~(39)~~] Uninitialized Call--Any wireless E9-1-1 call from a wireless handset which, for any reason, has either not had service initiated or authenticated with a legitimate WSP.

(43) [~~(40)~~] Vendor--A third party used by either the 9-1-1 Governmental Entity or WSP to provide services.

(44) [~~(41)~~] WSP--The named wireless service provider and all its affiliates (collectively referred to as "WSP").

(45) [~~(42)~~] WSP Subscribers--Wireless telephone customers who subscribe to the Service of WSP and have a billing address within a 9-1-1 Governmental Entity Jurisdiction.

(46) [~~(43)~~] Wireless 9-1-1 Call--A call made by a wireless end user utilizing a WSP wireless network, initiated by dialing "9-1-1" (and, as necessary, pressing the "Send" or analogous transmitting button) on a Wireless Handset.

(47) [~~(44)~~] Wireless End User--Any person or entity receiving service on a WSP Wireless System.

(48) [~~(45)~~] WSP Wireless System--Those mobile switching facilities, Cell Sites, and other facilities that are used to provide wireless Phase I & II E9-1-1 service.

(b) Policy and Procedures. As authorized by the Texas Health and Safety Code, Chapter 771.051, the [~~Advisory~~] Commission on State Emergency Communications (Commission) shall develop minimum performance standards for equipment and operation of 9-1-1 service to be followed in developing regional plans, and 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. The implementation of such service involves the procurement, installation and operation of equipment, database and network services and facilities designed to either support or facilitate the delivery of an emergency call to an appropriate emergency response agency. As mandated by FCC Order, and as authorized by Chapter 771, Section .0711, of the Texas Health and Safety Code, the CSEC [~~ACSEC~~] shall impose on each wireless telecommunications connection a 9-1-1 emergency service fee to provide for the automatic number identification and automatic location identification of wireless E9-1-1 calls. Furthermore, the Commission recognizes the rapidly changing telecommunications environment in wireline and wireless services and its impact on 9-1-1 emergency services. Automatic number and location information is crucial data in facilitating the delivery of an emergency call. It is the policy of the Commission that all 9-1-1 emergency calls for service be handled at the highest level of service available. In accordance with this policy, the following policies and procedures shall apply to the procurement, installation, and implementation of wireless E9-1-1 services funded in part or in whole by the 9-1-1 funds as that term is defined in this rule referenced above. Prior to the Commission considering allocation and expenditure of 9-1-1 funds for implementation of wireless Phase I and/or Phase II wireless E9-1-1 services, a COG or other 9-1-1 Governmental Entity requesting 9-1-1 equalization surcharge funds to provide wireless E9-1-1 service and/or other entity subject to the commission's jurisdiction according to the terms of Texas Health and Safety Code, Chapter 771 [~~and/or District receiving 9-1-1 fees and/or equalization surcharge funds from the Commission~~] shall meet the following applicable requirements listed in paragraphs (1)-(15) of this subsection:

(1) Commission Survey and Review--Prior to any wireless E9-1-1 Service implementation in any regional council (COG) area, the Commission shall solicit in writing from each all WSPs within the area State of Texas a detailed description of its technical approach to implementing Phase I and/or Phase II (where applicable); and, the proposed WSP reasonable cost associated with that implementation. The Commission will review and evaluate this information and consider its appropriateness for implementation. Upon completion of this process, the Commission will communicate these WSP evaluations to the regional councils (COGs), and notify the COGs that they may request and implement wireless E9-1-1 service as described in paragraphs (2) - (15) of this subsection.

(2) Phase I E9-1-1 Implementation. The provisioning for delivery of a caller's mobile directory number and the location of a cell site receiving a 9-1-1 call to the designated PSAP. Implementation of Phase I service must be accomplished within 6-months of written request according to the FCC Order. Prior to implementing Phase I wireless E9-1-1 service (but not prior to requesting the service from WSP), the following conditions must be satisfied and demonstrated to the Commission as described in paragraph (14) of this subsection:

(A) the COG9-1-1 entity requesting service has determined, based on reasonable investigation, that it currently has sufficient funds to cover its the costs of receiving and utilizing the wireless E9-1-1

Phase I information and to reimburse the WSP's reasonable costs [~~sufficient funding mechanism for the recovery of all reasonable costs relating to the provisioning of such service is in place~~];

(B) the PSAPs administered by the COG9-1-1 entity are capable of receiving and using the data associated with such service or has ordered the necessary equipment and has commitments from its supplier(s) that PSAPs will be capable within 6 months of the request to WSP;

(C) the COG9-1-1 entity, the Commission or Commission Staff on behalf of the COG9-1-1 entity, has requested [~~requests~~] such service in writing from the WSP service provider; and

(D) demonstrate, as applicable, that it has made a timely request to the 9-1-1 Network Provider and/or ALI Host Database Provider, as applicable and necessary, for any upgrades needed to transmit and deliver the wireless E9-1-1 Phase I information.

(E) and that the COG9-1-1 entity and WSP both accept the roles and responsibilities in the implementation of wireless E9-1-1 service as provided in Attachment 1 of the standard Wireless Phase I E9-1-1 Service Agreement.

[~~(D) an executed contract between 9-1-1 entity and WSP for such service, and which includes a wireless service work plan, fee schedule and standards.~~]

(3) Phase II E9-1-1 Implementation--provisioning for delivery of a caller's mobile directory number and the caller's location, within or exceeding 125 meters RMS the level of accuracy required by the FCC, to the designated PSAP. Implementation of Phase II service will be consistent with the FCC Order. Prior to implementing Phase II wireless E9-1-1 service (but not prior to requesting the service from WSP, if the COG's request for Phase II service has been approved by the Commission or approved in writing by Commission Staff), the following conditions, in addition to those listed in paragraph (2) of this subsection must be satisfied and demonstrated to the Commission as described in paragraph (14) of this subsection:

(A) the COG requesting service has determined, based on reasonable investigation, that it currently has sufficient funds to cover the costs of receiving and utilizing the wireless E9-1-1 Phase II information;

(B) [~~(A)~~] provision for digital base map and graphical display, in conjunction with approved Strategic Plan and Commission §251.7 of this title (relating to Guidelines for Implementing Integrated Services);

(C) [~~(B)~~] demonstrate, and provide in writing, that the [~~location determination technology and~~] digital base map and PSAP CPE are capable of displaying [~~identifying~~] the caller's location within a [~~125 meters in at least 67% of calls delivered, or the~~] degree of accuracy that meets or exceeds the requirements of the FCC or has ordered the necessary equipment and has commitments from its supplier(s) that the PSAPs will be capable within 6 months of the request to WSP Order; and [~~as required by FCC Order;~~]

(D) demonstrate, as applicable, that it has made a timely request to the 9-1-1 Network Provider and/or ALI Host Database Provider, as applicable and necessary, for any upgrades needed to transmit and deliver the wireless E9-1-1 Phase II information.

[~~(C) a revised executed contract between 9-1-1 entity and WSP for such service and which includes a wireless service work plan, fee schedule and standards.~~]

(4) Responsibilities. It shall be the responsibility of the 9-1-1 Government Entity, the WSP and any necessary third party (including, but not limited to, 9-1-1 Network Provider/Local Exchange Carrier, Host ALI Provider, SCP software developers and hardware providers, and other suppliers and manufacturers) to fully cooperate for the successful implementation and provision of Phase I and Phase II E9-1-1 service. These same parties are also responsible for ensuring that the deployment and implementation of their wireless E9-1-1 solution is, to the extent technically feasible, thoroughly interoperable with other wireless E9-1-1 solutions, including permitting the proper and seamless transfer of wireless E9-1-1 emergency call information to PSAPs between differing wireless E9-1-1 solutions. The Commission acknowledges that the successful and timely provision of such service is dependent upon the timely and effective performance and cooperative, good faith efforts of all of the parties listed in this section. All parties shall comply with the FCC Order, other FCC guidelines and requirements related to wireless E9-1-1 service, Texas laws, and Commission Rules.

(5) Deployment. Unless otherwise approved by the Commission or Commission Staff as an exception, the COG[~~,~~] 9-1-1 entity and the WSP will agree upon one, or a combination, of the following methods of wireless call delivery listed in subparagraphs (A) - (D) of this paragraph:

(A) Call Associated Signaling (CAS);

(B) Non-Call path Associated Signaling (NCAS);

(C) Hybrid CAS/NCAS Architecture; and

(D) Exceptions to CAS, NCAS, or Hybrid CAS/NCAS, as in the case of standalone ALI environments--specific solution should be illustrated and demonstrated prior to execution of contract.

(6) Data Delivery--Unless otherwise approved by the Commission, the COG 9-1-1 entity and the WSP will agree upon one of the following methods for the delivery of data elements necessary for Phase I E9-1-1 service. The COG 9-1-1 entity and WSP shall provision for redundancy within all methods.

(A) SS7/ISUP--WSP will deliver the twenty digits of information necessary for Phase I services by sending SS7 signaling messages in ISUP format to the 9-1-1 selective router;

(B) Feature Group D--WSP will deliver the twenty digits of information necessary for completion of Phase I services to the 9-1-1 selective router in the standard format required; and

(C) Service Control Point (SCP)-- WSP will route all necessary information directly to the COG 9-1-1 entity's ALI database through an independent service control point.

(7) Standards--Unless an exception is approved by the Commission, the COG 9-1-1 entity, the WSP and any third party/vendor, will ensure that all appropriate and applicable industry standards be adhered to in provisioning E9-1-1 wireless service. These standards shall include, but not be limited to:

(A) J-Std 34 and NENA 03-002 for CAS and Hybrid CAS/NCAS deployments;

(B) NENA 02-0101 as benchmark data standards. All parties shall cooperate fully in the development and maintenance of all wireless data, such as cell site locations, Emergency Service Routing Digits, selective routing databases, and timely updates of any such data;

(C) Any and all modifications to these standards, currently under development by appropriate standards bodies, for CAS, NCAS, Hybrid CAS/NCAS, and Phase II/LDT deployments. Any such pending standard should be adhered to upon adoption;

(D) The Commission hereby establishes a standard Class of Service (COS) to be used by the COG 9-1-1 entity's PSAPs and the WSPs to identify calls delivered to the PSAP as WRLS (wireless), or until a standard is established by NENA;

(E) Commission §251.4 of this title (relating to Guidelines for the Provisioning of Accessibility Equipment) for provisioning of TTY/TDD equal access consistent with FCC rules and orders;

(F) All applicable standards shall be agreed upon by both parties to the standard Wireless E9-1-1 Service Agreement contract; and[.]

(G) The Commission may approve exceptions to the standards listed in this section upon demonstration by the WSP and the COG PSAP of valid reasons and comparable efficiency and cost.

(8) Reasonable Cost Elements--The Commission will consider that the costs to be incurred by the COG9-1-1 entity, or RPC, will be reviewed and approved within the existing Strategic Planning process and provided within CSEC Rule 251.6, Guidelines for Strategic Plans, Amendments, and Revenue Allocation. The Commission will consider that the reasonable costs incurred by the WSP to be reimbursed by the 9-1-1 Governmental Entity may include the following listed in subparagraphs (A) - (F) of this paragraph:

(A) Trunking. To provide network connectivity between the necessary network elements, the following costs may [shall] be allowed:

(i) Dedicated transport from mobile switching center (MSC) to selective router, (including in that connectivity any port connection charges or other pre-LEC selective router charges) at a rate and quantity no higher than agreed to within the standard Wireless E9-1-1 Service Agreement and as approved as reasonable within the contract by the Commission, Commission Staff or Commission rule in that connectivity any port connection charges or other pre-LEC selective router charges;

[(ii) From selective router to PSAP;]

[(iii) From PSAP to ALI Database;]

(ii) [(iv)] From mobile switching center (MSC) to service control point (SCP) at a rate and quantity no higher than agreed to within the standard Wireless E9-1-1 Service Agreement and as approved as reasonable within the contract by the Commission, Commission Staff or Commission rule;

(iii) [(v)] From service control point (SCP) to ALI Database at a rate and quantity no higher than agreed to within the standard Wireless E9-1-1 Service Agreement and as approved as reasonable within the contract by the Commission, Commission Staff or Commission rule; and[;]

[(vi) From ALI Database to PSAP.]

[(B) Network--To provision the transference of necessary digits from the selective router to the PSAP in a CAS deployment, an upgrade or modification to the selective router will be necessary. The Commission will not consider this as an allowable cost.]

(B) [(C)] Database--To provision and deliver the necessary data through the network and to the PSAP for Phase I compliance, the following costs listed in clauses [in] (i)-(ii) of this subparagraph may [will] be allowed:

(i) Non-recurring costs associated with initial emergency service routing digits (ESRD) or emergency service routing keys (ESRK) load into selective router or SCP at a rate and quantity no higher than agreed to within the standard Wireless E9-1-1 Service Agreement and as approved as reasonable within the contract by the Commission, Commission Staff, or Commission rule; and

(ii) Monthly recurring costs associated with maintaining ESRD or ESRD or ESRKdata in the selective router or SCP at a rate and quantity no higher than agreed to within the standard Wireless E9-1-1 Service Agreement and as approved as reasonable within the contract by the Commission, Commission Staff, or Commission rule.

(C) Comparable Costs. In determining the reasonableness of costs, the Commission or Commission Staff may compare the costs being submitted for recovery by one provider to the costs of other, similarly situated providers. No single WSP shall be reimbursed for costs above the comparable costs of the other WSPs within the COG region.

[(D) CPE--To provision the 9-1-1 entity's PSAP equipment to have the capability to receive and display information necessary to comply with Phase I call delivery requirements, the Commission has previously funded software upgrades to CPE for 20-digit and two 10-digit capability. These costs should be accommodated within the regional council's currently, or previously, approved strategic plan.]

[(E) Map Display--The cost to provision the 9-1-1 entity's PSAP equipment to have the capability to receive and graphically display caller's cell site/sector location information, as well as the X, Y (longitude, latitude coordinates).]

[(F) Training--The cost to train COG and/or PSAP personnel to efficiently and effectively receive and process Phase I & Phase II wireless E9-1-1 calls. This training shall be conducted by the COG, WSP, local service provider, and/or third party, as necessary, upon initial deployment of wireless service and at regularly scheduled intervals. Training plans and any associated costs shall be proposed to COG within WSP written proposal of service, submitted to the Commission for approval via the strategic plan amendment review process as outlined in Rule 251.6, and included in an executed standardized contract for wireless E9-1-1 service.]

(9) Testing--The COG, WSP, local service provider and any third party shall conduct initial and regularly scheduled network, database and equipment testing to ensure the integrity of the existent and proposed wireline/wireless 9-1-1 system operated by the COG, for any Phase I and/or Phase II wireless E9-1-1 service deployment. These tests shall include, at a minimum:

(A) network connectivity;

[(B) call setup times;]

(B) [(C)] equipment capabilities of receiving and displaying callback number and cell site/sector information;

(C) [(D)] initial implementation field testing of each of a WSP's cell sites routing to the designated PSAP and delivery of accurate call data; and the routing and data delivery ability and accuracy of any new cell sites, or maintenance sites, that may be added by a WSP in any particular region. [ability to transfer the wireless E9-1-1 call.] The COG shall submit the initial testing documentation and findings to the Commission within the strategic plan amendment approval process [as referenced in paragraph (8) of this subsection, Reasonable Cost Elements.] , as provided in CSEC Rule 251.6, Guidelines for Strategic Plans, Amendments, and Revenue Allocation, and as established through Commission wireless testing policies and procedures that meet or exceed FCC guidelines. The COG shall maintain documentation of initial, maintenance, and regularly scheduled testing and notify the Commission of any on-going, negative outcomes.

(10) Fair and Equitable Provisioning of Wireless E9-1-1 Service--The COG, WSP, local service provider, and any relevant third

party shall provision E9-1-1 service to in the COG region as to achieve a consistent level of service to WSP End Users subscribers that is in compliance with applicable federal and state laws and rules and applicable industry standards. [~~The COG shall establish the level of wireless E9-1-1 service required within its region, and shall ensure that each WSP operating within its region provides comparable levels of wireless E9-1-1 service to all wireless subscribers within the region, within reasonable implementation parameters.~~] In determining the reasonableness of costs, the Commission may compare the costs being submitted for recovery by one provider to the costs of other, similarly situated providers. No single WSP shall be reimbursed for costs above the comparable costs of the other WSP within the COG region or at a rate and quantity higher than approved as reasonable within the contract by the Commission, Commission Staff, or Commission rule.

(11) Uninitialized Calls--Must be passed through the wireless 9-1-1 network, and uniformly identified to the PSAP, in accordance with rules and procedures established by the FCC.

(12) Third Party Contracts--Any and all subcontracts between WSP and third party vendors, for the deployment of Phase I & II wireless E9-1-1 service deployments, shall adhere to the primary contract as executed between COG and WSP, and/or the applicable FCC Orders, Guidelines, and Rules.

(13) Proposals for Wireless E9-1-1 Service--All proposals by WSPs for wireless 9-1-1 service should be presented to the COG in writing and shall include a complete description of network, database, equipment display requirements, training and accessibility elements. Such proposals should include detailed cost information, as well as technical solutions, network diagrams, documented wireless 9-1-1 call set-up times, deployment plans and timelines, specific work plans, WSP network contingency and disaster recovery plans, escalation lists, trouble call response times, as well as any other information required by the COG. Unless otherwise confidential by law, all information provided to the COG becomes a matter of public record and is subject to the Texas Public Information Act.

(14) Strategic Plan Amendment Review and Approval Process--Upon demonstration of compliance with paragraphs (2)(A) and (3)(A) of this subsection, and prior to executing a standardized contract for Wireless 9-1-1 Service Agreement, the COG shall submit such proposals, as described paragraph (13) of this subsection, to the Commission for approval, via the strategic plan review and/or amendment process described in §251.6 of this title. Strategic Plan amendment requests should include all of the information provided by WSP to COG, as well as complete information regarding the geographic areas as well as the tandems, exchanges and PSAPs affected [~~effected~~] by the proposed deployment.

(15) Execution of Standardized Wireless E9-1-1 Service Agreement Contract--Upon review and approval by the Commission, Commission Staff, or Commission rule, the [~~ACSEC~~] COG and WSP shall enter into a standardized Wireless E9-1-1 Service Agreement. The standard agreement contract shall be provided by the Commission, and shall include all of the information contained in the proposal and amendments reviewed and approved by the Commission. Commission staff shall review all such contracts before they are executed, amended, or renewed. COG shall provide the Commission a copy of all fully executed contracts.

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 November 19, 2001.

TRD-200107147
Paul Mallett
Executive Director
Commission on State Emergency Communications
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 305-6933

♦ ♦ ♦

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 29. ECONOMIC DEVELOPMENT SUBCHAPTER A. ECONOMIC DEVELOPMENT PROGRAM

4 TAC §§29.1 - 29.3

The Texas Department of Agriculture (department) proposes new Chapter 29, Subchapter A, §§29.1-29.3, concerning the department's Economic Development Program. The new sections are proposed to implement House Bill 746, as enacted by the 77th Legislature, 2001, to be codified as new Texas Agriculture Code, §12.027, which authorizes the department to maintain an economic development program to assist rural areas in the state of Texas. New §29.1 provides the authority for the Subchapter. New §29.2 sets out how the program will be administered. New §29.3 provides for the employment of staff and for cooperation with other agencies to carry out the program.

Robert Wood, assistant commissioner for rural economic development, has determined for the first five-year period that the proposed new sections are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the sections. The department's economic development program will be administered at current staffing level.

Mr. Wood has also determined that for the first five years that the proposal is in effect the anticipated public benefit resulting from enforcing and administering the sections will be the creation of additional jobs and capital investment in rural areas of Texas. There will be no economic costs to microbusinesses, small businesses and individuals required to comply with the new sections. It is anticipated that individuals, businesses and communities that are served by this program will benefit from the services provided by this program through additional economic activity in rural areas.

Comments may be submitted to Robert Wood, Assistant Commissioner for Rural Economic Development, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*.

The new sections are proposed under Senate Bill 746, codified as the Texas Agriculture Code (the Code), §12.027, which authorizes the department to establish a rural economic development program to assist rural areas in the state; §3 of Senate Bill 746, which authorizes the department to adopt rules to administer §12.027 and, the Code, §12.016, which authorizes the department to adopt rules to carry out its duties under the Code.

The code that will be affected by this proposal the Texas Agriculture Code, Chapter 12.

§29.1. Maintenance of Economic Development Program.

As required by Texas Agriculture Code, §12.207, the Texas Department of Agriculture (Department) shall maintain an economic development program for rural areas in this state.

§29.2. Administration of the Program.

In administering this program, the Department will:

(1) identify potential opportunities for business in rural areas of the state and assist rural communities in maximizing those opportunities;

(2) work with rural communities to identify economic development needs;

(3) advise rural communities of any financial assistance or grant programs for economic development run by the Department;

(4) direct communities with economic development needs to persons who can address and assist in meeting those needs;

(5) encourage communication between organizations, industries, and regions to improve economic and community development services to rural areas;

(6) coordinate meetings with public and private entities to distribute information beneficial to rural areas; and

(7) generally promote economic growth in rural areas.

§29.3. Staffing; Cooperation with other Agencies.

To implement the tasks set forth in §29.2 (relating to Administration of the Program), the Department will:

(1) designate one Department employee as the point of contact for each economic development program administered by the Department;

(2) cross-train its staff regarding economic development programs administered by the Texas Department of Economic Development;

(3) cooperate with the Texas Department of Economic Development (and any other state, federal, or local agencies engaged in economic development activities) in coordinating meetings with public and private entities to disseminate information beneficial to rural areas; and

(4) utilize economic development specialists in field offices throughout the state to identify potential opportunities in rural areas of the state and assist businesses and communities in maximizing their economic development.

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 November 16, 2001.

TRD-200107099
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 463-4075

♦ ♦ ♦

PART 2. TEXAS ANIMAL HEALTH COMMISSION

CHAPTER 49. EQUINE

4 TAC §49.1

The Texas Animal Health Commission (commission) proposes an amendment to Chapter 49, §49.1, concerning Equine. Section 49.1 provides for Equine Infectious Anemia (EIA): Identification and Handling of Infected Equine. This section is being amended to add an equine infectious anemia testing requirement for equine stabled, pastured or residing within two hundred yards of equine located on an adjacent premise.

On May 29, 2001, the commission received a petition, with 27 signatories, requesting modifications to agency regulations regarding equine infectious anemia requirements. The agency also received one e-mail supporting the petition. The Commission considered the petition at their August 22, 2001, meeting and requested that language be drafted to accomplish the objective of that petition.

The petition requested that "[e]quine animals stabled or pastured within 200 yards of equine belonging to another person shall be considered to be a congregation point, and required to be tested for equine infectious anemia if a neighboring owner requests it; providing that neighboring owner making the request has tested his or her animals. Proof of a negative EIA test shall be presented to the owner of neighboring equines upon request."

The commission believes in order to protect equine from EIA and in order to control the transmission and spread of EIA, it is necessary to adopt requirements for the testing of equine that are pastured or reside within two hundred yards of another equine. The commission believes that enacting such a requirement will be protective of the equine of this state by reducing the potential of transmission from any potentially infected equine by insuring that animals in a close enough proximity to other equine are tested.

The commission bases the two hundred yards criteria on the epidemiologically sound principle that the risk of exposure to a positive horse is minimal over a two hundred yard separation distance. The disease is spread through a partly engorged horsefly that has fed on an infected equine and immediately afterwards has fed on another equine. This two hundred yard standard is currently utilized by the commission in rules regarding quarantining of a positive animal.

Under Subsection (g) of §49.1, entitled Quarantine, "[a]ny equine animal found to be a reactor to the official test will be quarantined.... at least 200 yards away from equine on adjacent premises." This rule was established on the epidemiological principle that a distance of two hundred yards is protective of equine against the transmission of EIA. This proposed rule follows the principle to its next logical step in protecting equine by requiring that equine are tested if their contact with other equine is within two hundred yards. This rule is an effective method for reducing the spread of EIA by insuring that adjacent animals that have contact closer than two hundred yards are tested.

The requirement is applicable to any equine that is stabled, pastured or residing with an ability to come within two hundred yards of contact with equine located on an adjacent premise. An equine owner can demonstrate that the requirement is not applicable by providing verifiable information that the equine are managed or pastured in such a way as to never be in closer

contact than two hundred yards with an adjacent equine. Also, an equine owner can apply for a waiver to this requirement under Chapter 59, Title 4, Section 59.2 (c) for extenuating circumstances, provided such waiver is not in conflict with sound epidemiologic principles. Individual hardship will commonly mean unforeseen circumstances that affect the owner or the owner's operation and are beyond the owner's control. Any waiver or variance from agency rule will be documented and presented to the Commission at the next scheduled meeting.

The petition also requested that the rule be worded so that the testing be required "...for equine infectious anemia if a neighboring owner requests it; providing that neighboring owner making the request has tested his or her animals. Proof of a negative EIA test shall be presented to the owner of neighboring equines upon request." However, the commission feels that it is most fairly administered by making the requirement applicable to all equine that have contact within two hundred yards instead of limiting it to the request by a neighbor. Also, the commission believes in administering the EIA program and verification with commission requirements should be handled by agency personnel.

Mr. Bruce Hammond, Deputy Director of Administration and Finance, Texas Animal Health Commission, has determined for the first five-year period the rules are in effect, there will be no added fiscal implications for state or local government as a result of enforcing or administering the rules. Because the agency already has in place requirements regarding testing for equine, the changes proposed will not add additional requirements in administering the rule.

Mr. Hammond 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 enforcing the rules will be regulations as intended to protect equine in Texas from being exposed to EIA. The expense to the equine owner would be limited to paying a private veterinarian to conduct an EIA test. The result, if negative, will ensure the owner that the equine is not a carrier of the disease.

In accordance with Government Code, Section 2001.022, this agency has determined that the proposed rule will not impact local economies and, therefore, did not file a request for a local employment impact statement with the Texas Workforce Commission.

The agency has determined that the proposed governmental action will not affect private real property. These proposed rules are an activity related to the handling of animals, including requirements concerning testing, movement, inspection, identification, reporting of disease, and treatment, in accordance with 4 TAC §59.7, and are, therefore, compliant with the Private Real Property Preservation Act as provided in Government Code, Chapter 2007.

Comments regarding the proposed amendments may be submitted to Edith Smith, Texas Animal Health Commission, 2105 Kramer Lane, Austin, Texas 78758, by fax at (512) 719-0721, or by e-mail at "esmith@tahc.state.tx.us."

The amendment is proposed under the Texas Agriculture Code, Chapter 161, §161.041, entitled "Disease Control." The commission shall protect equine from equine infectious anemia. Subsection (b) provides that the commission may act to eradicate or control any disease or agent of transmission for any disease that affects livestock, exotic livestock, domestic animals, domestic fowl, exotic fowl, or canines regardless of whether the disease is communicable. The commission may adopt any rules necessary to carry out the purposes of this subsection, including rules concerning testing, movement, inspection, and treatment. Subsection (c) provides that a person commits an offense if the person knowingly fails to handle, in accordance with rules adopted by the commission, an animal infected with a disease listed in Subsection (a) of this section. Subsection (d) provides that a person commits an offense if the person knowingly fails to identify or refuses to permit an agent of the commission to identify, in accordance with rules adopted by the commission, an animal infected with a disease listed in Subsection (a) of this section.

Also the amendment is proposed under the authority of Section 161.057 entitled "Classification of Areas." Subsection (a) provides that the commission by rule may prescribe criteria for classifying areas in the state for disease control. The criteria must be based on sound epidemiological principles. The commission may prescribe different control measures and procedures for areas with different classifications.

§49.1. Equine Infectious Anemia (EIA): Identification and Handling of Infected Equine

(a) Official Test. The agar gel immunodiffusion (AGID) test, also known as the Coggins test, the Competitive Enzyme-Linked Immunosorbent Assay (CELISA) test, and other USDA-licensed tests approved by the commission, are the official tests for equine infectious anemia (EIA) in horses, asses, mules, ponies, zebras and any other equine in Texas.

(b) Authorization to conduct test. Only United States Department of Agriculture (USDA)-approved laboratories, including USDA approved off-site laboratories, are allowed to run the AGID and CELISA or other USDA licensed tests and all tests will be official. Only test samples from accredited veterinarians or other TAHC authorized personnel accompanied by a completed VS Form 10-11 can be accepted for official testing.

(c) Official Identification of Equine Tested for EIA. All official blood tests must be accompanied by a completed VS Form 10-11 (Equine Infectious Anemia Laboratory Test) listing the description of the equine to include the following: age, breed, color, sex, animal's name, and all distinctive markings (i.e., color patterns, brands, tattoos, scars, or blemishes). In the absence of any distinctive color markings or any form of visible permanent identification (brands, tattoos or scars), the animal must be identified by indicating the location of all hair whorls, vortices or cowlicks with an "X" on the illustration provided on the VS Form 10-11. It must list owner's name, address, the animal's home premise and county, the name and address of the authorized individual collecting the test sample, and laboratory and individual conducting the test. The EIA test document shall list one horse only.

(d) Reactor. A reactor is any equine which discloses a positive reaction to the official test. The individual collecting the test sample must notify the animal's owner of the quarantine within 48 hours after receiving the results.

(e) Retest of reactors. Equine which have been disclosed as reactors may be retested prior to branding provided:

(1) owners or their agents initiate a request to the TAHC Area Director of the area where the horse is located;

(2) retests are conducted within 30 days after the date of the original test;

(3) blood samples for retests are collected by the person who collected the sample for the first test or by TAHC personnel, and the blood samples are submitted to the Texas Veterinary Medical Diagnostic Laboratory (TVMDL) for testing;

(4) the individual collecting the retest sample is provided documentation that the animal being retested is the same as the one shown positive on the initial test and can verify the retested equine as being the same as shown on the original test document; and

(5) the positive animal is held under quarantine along with all other equine on the premise.

(f) Official identification of reactors. A reactor to the official test must be permanently identified using the National Uniform Tag Code number assigned by the USDA to the state in which the reactor was tested followed by the letter "A" (the code for Texas is 74A). The reactor identification must be permanently applied by a representative of the Texas Animal Health Commission who must use for the purpose of identification, a hot-iron brand or freeze-marking brand. The brand must be not less than two inches high and shall be applied to the left shoulder or left side of the neck of the reactor. Reactors must be branded within ten days of the date the laboratory completes the test unless the equine is destroyed. Any equine destroyed prior to branding must be described in a written statement by the accredited veterinarian or other authorized personnel certifying to the destruction. This certification must be submitted to the Texas Animal Health Commission promptly.

(g) Quarantine. Any equine animal found to be a reactor to the official test will be quarantined by a representative of the Texas Animal Health Commission to the premises of its home, farm, ranch or stable until natural death, disposition by euthanasia, slaughter, or disposition to a Texas Animal Health Commission approved, diagnostic or research facility. The quarantine shall restrict the infected equine, all other equine on the premise, and all equine epidemiologically determined to have been exposed to an EIA-positive animal to isolation at least 200 yards away from equine on adjacent premises.

(h) Movement of Reactors and Exposed Equine.

(1) Reactor equine. Following official identification, a reactor must be accompanied by a VS Form 1-27 permit issued by an accredited veterinarian or other authorized state or federal personnel when moved from its home premises either:

(A) Directly to a slaughter plant, slaughter-only market, or slaughter-only buying facility; or

(B) Directly to an approved diagnostic or research facility; or

(C) Directly to a livestock market to be sold for slaughter, provided that within 24 hours prior to entry, the equine is inspected by a TAHC veterinarian or a Texas USDA-accredited veterinarian to ensure the equine displays no clinical signs of EIA and has a normal temperature. The auction market must isolate the positive equine from other equine, pen the positive equine under a roof, and hold the positive equine on the premise for no longer than 24 hours.

(2) Exposed equine. Exposed equine must be identified with an "S" brand placed on the left shoulder or left side of the neck, and be accompanied by a VS Form 1-27 permit issued by an accredited veterinarian or other authorized state or federal personnel when moved either:

(A) Directly to a livestock market for sale directly to slaughter provided the exposed equine is quarantined at the market in isolation from other horses; or

(B) Directly to a slaughter plant, slaughter-only market, or slaughter-only buying facility; or

(C) Directly to an approved diagnostic or research facility.

(i) Requirements for testing equine on quarantined premises. All equine determined to have been on the same premise with an EIA-positive horse at the time the positive horse was bled shall be tested by an accredited veterinarian at owner's expense or by Commission personnel. Nursing foals are exempt from testing.

(j) Requirements for Testing Exposed Equine and High Risk Herds.

(1) Exposed equine. All equine epidemiologically determined to have been exposed to an EIA-positive animal shall be quarantined and tested by an Accredited Veterinarian at owner's expense or by Commission personnel. Nursing foals are exempt from testing.

(2) Whole herd testing. All equine except nursing foals that are part of a herd from which a reactor has been classified shall be tested by an Accredited Veterinarian at owner's expense or by Commission personnel. A herd is:

(A) All equine under common ownership or supervision that are on one premise; or

(B) All equine under common ownership or supervision on two or more premises that are geographically separated, but on which the equine have been interchanged or where there has been contact among the equine on the different premises. Contact between equine on the different premises will be assumed unless the owner establishes otherwise and the results of the epidemiologic investigation are consistent with the lack of contact between premises; or

(C) All equine on common premises, such as community pastures or grazing association units, but owned by different persons. Other equine owned by the persons involved which are located on other premises are considered to be part of this herd unless the epidemiologic investigation establishes that equine from the affected herd have not had the opportunity for direct or indirect contact with equine from that specific premise.

(3) High Risk Testing. Herds determined to be at high risk shall be tested by an accredited veterinarian at owner's expense or by commission personnel. High risk herds are those epidemiologically judged by a State-Federal veterinarian to have a high probability of having or developing equine infectious anemia. A high risk herd need not be located on the same premise as an infected or adjacent herd.

(k) Release of EIA quarantine. The EIA quarantine may be released by the Texas Animal Health Commission after all quarantined equine test negative at least 60 days following identification and removal of the last EIA-positive equine as set out in subsections (f) and (h) of this section. Epidemiological data may be considered in the release of the quarantine.

(l) Requirements for Change of Ownership. A negative EIA test within the previous 12 months is required for all equine, except zebras, which are eight months of age or older, changing ownership in Texas, except, if the animal is:

(1) sold to slaughter, to be tested at the slaughter facility at Commission expense; or

(2) a nursing foal that is transferred with its dam and the dam has tested negative for equine infectious anemia during the 12 months preceding the date of the transfer.

(m) Any equine sold to slaughter must be accompanied by a VS Form 1-27 permit issued by an accredited veterinarian or other authorized state or federal personnel when moved to a slaughter plant, slaughter-only market, or slaughter-only buying facility.

(n) Equine animals stabled, boarded or pastured within 200 yards of equine belonging to another person shall be considered to be a

congregation point. All equine must have a current Coggins test within the last twelve months.

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 November 19, 2001.

TRD-200107134
Gene Snelson
General Counsel
Texas Animal Health Commission
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 719-0714

♦ ♦ ♦

TITLE 7. BANKING AND SECURITIES

PART 4. TEXAS SAVINGS AND LOAN DEPARTMENT

CHAPTER 80. MORTGAGE BROKER AND LOAN OFFICER LICENSING

SUBCHAPTER I. INSPECTIONS AND INVESTIGATIONS

7 TAC §80.20

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 §80.20(i), providing for the Savings and Loan Department to be reimbursed for the costs it incurs in conducting inspections of licensees at out-of-state locations.

The Act became effective September 1, 1999. It requires that mortgage brokers and the loan officers who work for them meet certain requirements, obtain licenses, adhere to certain standards of conduct, and 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 amended §156.301 of the Act to provide for routine inspection of mortgage brokers and loan officers. These amendments to the Act became effective September 1, 2001.

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 amended section in the regulations.

The proposed amended section will require that when it is necessary for the Department to travel out of state to conduct inspections and review the records of licensees, each licensee will be required to reimburse the Department for the costs it incurs in connection with the out-of-state inspection of that licensee.

James L. Pledger, Savings and Loan Commissioner, has determined that for the first five year period the amended 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 amended section is in effect, the public will benefit from the inspection and investigation of licensees. No difference will exist between the cost of compliance for small business and the cost of compliance for the largest business affected by the amended section.

Comments on the proposed amended 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 amended 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, Section 156.301, is affected by the proposed new section.

§80.20. Inspections.

(a) The Commissioner, operating through the Department staff and such others as the Commissioner may, from time to time, designate will conduct periodic inspections of mortgage broker and loan officer licensees as the Commissioner deems necessary.

(b) The Department will give licensees advance notice of each inspection. Such notice will be sent to the licensee's address of record on file with the Department and will specify the date on which the Department's inspectors are scheduled to arrive at the licensee's office. Failure of the licensee to actually receive the notice will not be grounds for delay or postponement of the inspection. The notice will include a list of the documents and records the licensee should have available for the inspector to review.

(c) Inspections will be conducted to determine compliance with the Act and will specifically address whether:

(1) All persons conducting mortgage broker or loan officer activity are properly licensed;

(2) All locations at which such activities are conducted are properly licensed;

(3) All required books and records are being maintained in accordance with 7 TAC §80.13;

(4) Legal and regulatory requirements applicable to licensees or the licensee's mortgage broker business are being properly followed; and

(5) Such other matters as the Commissioner may deem necessary or advisable to carry out the purposes of the Act

(d) Inspections will be conducted at no additional cost to the licensees.

(e) The inspector will review a sample of Mortgage Loan Files identified by the inspector on the date of inspection and randomly selected from the licensee's Mortgage Transaction Log. The inspector may expand the number of files to be reviewed if, in his or her discretion, conditions warrant.

(f) The inspector may require a licensee, at its own cost, to make copies of loan files or such other books and records as the inspector deems appropriate for the preparation of or inclusion in the inspection report.

(g) The work papers, compilations, findings, reports, summaries, and other materials, in whatever form, relating to an inspection conducted under this section, shall be maintained as confidential except as required or expressly permitted by law.

(h) Failure of a licensee to cooperate with the inspection or failure to grant the inspector access to books, records, documents, operations, and facilities of the licensee will subject the licensee and any sponsoring broker (if applicable) to enforcement actions by the Commissioner, including, but not limited to, administrative penalties.

(i) Whenever the Department must travel out-of-state to conduct an inspection of a licensee because that licensee maintains required records at a location outside of the state, the licensee will be required to reimburse the Department for the actual cost the Department incurs in connection with such out-of-state travel including, but not limited to, transportation, lodging, meals, employee travel time, telephone and FAX communication, courier service and any other reasonably related costs.

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 November 16, 2001.

TRD-200107095
Timothy K. Irvine
General Counsel
Texas Savings and Loan Department
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 574-1350

♦ ♦ ♦

PART 6. CREDIT UNION DEPARTMENT

CHAPTER 91. CHARTERING, OPERATIONS, MERGERS, LIQUIDATIONS

SUBCHAPTER B. ORGANIZATION PROCEDURES

7 TAC §91.209

The Texas Credit Union Commission proposes to amend existing §91.209, concerning reports and charges for late filing. The amendment is correcting a Texas Administrative Code cite that changes as a result of the Credit Union Commission adopting certain amendments to §97.113.

Harold Feeney, Commissioner, has determined that for the first five-year period the amended 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. Feeney has determined that for each year of the first five years the rule is in effect, the public benefit anticipated will be that the statutory cite contained in the rule will be correct, therefore preventing future confusion on the part of those referencing the Commission's rules. There will be no effect on small businesses as a result of amending this section. There is no anticipated economic cost to entities that are currently required to comply with these sections as result of the proposed amendment's adoption.

Written comments on the proposed amendment must be submitted within 30 days after its publication in the *Texas Register* to Harold Feeney, Commissioner, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

The amendment is proposed under the provisions of Finance Code §15.402, which authorizes the commission to set, by rule, reasonable supervision fees, charges, and revenues required to be paid by credit unions authorized to do business under the Texas Credit Union Act.

The specific sections affected by the proposed amendment are §§15.402 and 122.101 of the Texas Finance Code.

§91.209. Reports and Charges for Late Filing.

(a) - (b) (No change.)

(c) If a credit union fails to file a report or provide the requested information within the specified time, the commissioner or any person designated by the commissioner may examine the books, accounts and records of the credit union, prepare the report or gather the information and charge the credit union a supplemental examination fee as prescribed in §97.113 [~~§97.113(c)~~] of this title (relating to Fees and Charges [~~supplemental examinations~~]). The credit union shall pay the fee to the department within thirty days of the assessment.

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 November 19, 2001.

TRD-200107144
Harold E. Feeney
Commissioner
Credit Union Department
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 837-9236

♦ ♦ ♦

TITLE 13. CULTURAL RESOURCES

PART 1. TEXAS STATE LIBRARY AND ARCHIVES COMMISSION

CHAPTER 2. GENERAL POLICIES AND PROCEDURES

SUBCHAPTER C. GRANT POLICIES

DIVISION 2. LIBRARY SERVICES AND TECHNOLOGY ACT, LIBRARY COOPERATION GRANTS--PART A, TECHNOLOGY, GUIDELINES FOR TEXSHARE LIBRARIES

13 TAC §§2.120 - 2.123

The Texas State Library and Archives Commission proposes to amend §§2.120 - 2.123 concerning Library Cooperation Grants-Part A, Technology. The purpose of this amendment is to expand Library Cooperation Grants to include all libraries that are members of the TexShare Library Consortium as eligible applicants.

This amendment reflects the interest of TexShare member libraries that are already eligible to participate as cooperative partners in grant-funded projects, by enabling them also to serve as lead libraries in grant projects. It opens the grant to more entities by permitting these libraries to apply under the same conditions as public libraries.

Deborah Littrell, Director of Library Development, has determined that for each year of the first five years the section is in effect there will be no fiscal implications for local government. There will be no fiscal implications for small businesses or individuals as a result of enforcing or administering the section.

Ms. Littrell also has determined that for each of the first five years the section is in effect the public benefits anticipated as a result of enforcing the section will be to qualify additional libraries for federal assistance to improve library services. The additional funding will improve the library services available to the public.

Comments may be submitted to Deborah Littrell, Director of the Library Development Division, Texas State Library and Archives Commission, P.O. Box 12927, Austin, Texas 78711-2927.

The amendment is proposed under the Government Code §441.006, §441.009, §441.0091, and §441.230 which provide the Commission with authority to govern the Texas State Library, initiate grant programs, and adopt administrative rules.

The proposed amendments affect Government Code §441.006, §441.009, §441.0091, and §441.230.

§2.120. Goals and Purposes.

(a) This grant program promotes access to learning and information resources in all types of libraries for individuals of all ages; and promotes library services that provide all users access to information through state, regional, national, and international electronic networks; and provides linkages among and between libraries.

(b) Programs may be in [~~one of~~] the following categories:

(1) Establish or enhance electronic linkages among or between libraries--to establish a new network or update the electronic technology in an existing one by providing better or enhanced access to library resources and materials in more than one TexShare [~~system~~] member [~~public~~] library or with multi-type libraries; or

(2) Encourage libraries in different areas, and encourage different types of libraries to establish consortia and share resources--to encourage [~~public~~] libraries to participate in single-type [~~public~~] library consortia or participate in multi-type library consortia that include a [~~public~~] library that is a member of TexShare[~~(which is a member of the Texas Library System)~~] and to share among themselves the technology-based resources of all libraries within the consortium.

§2.121. Eligible Applicants.

(a) Libraries that are members of the TexShare Library Consortium, [~~Texas Library System member public libraries,~~] Major Resource Systems, and regional library systems through their governing authority [~~(city, county, or corporation)~~] are eligible to apply for funds. These funds are awarded to TexShare member [~~public~~] libraries but may be used with all types of libraries as defined in the Library Services and Technology Act (LSTA), P.L. 104-208, and that are members of a consortium as defined by the LSTA.

(b) Successful applicants are eligible to apply for grant funds for the two years following the initial grant year. The second and third application will be evaluated with the same criteria as new applications. No applicant will be eligible for a fourth year of funding for the same project.

§2.122. Eligible Expenses.

(a) This grant program will fund costs for staff, equipment, capital expenditures, materials, and professional services needed to:

(1) create a new, or enhance an existing, network of TexShare [~~system~~] member [~~public~~] libraries;

(2) create a multi-type library network that includes a TexShare[~~system~~] member [~~public~~] library;

(3) create linkages between TexShare[~~system~~] member [~~public~~] libraries and educational, social, or cultural information services;

(4) create linkages between TexShare[~~system~~] member [~~public~~] libraries separated by geographical barriers.

(b) This grant program will not fund the following costs:

(1) building construction or renovation;

(2) food, beverages, or gifts;

(3) equipment or technology not specifically needed to carry out the goals of the grant;

(4) transportation/travel for participants or non-grant funded personnel;

(5) programs to enhance service within existing library structures, e.g., branch libraries;

(6) dumb terminals;

(7) American Standard Code for Information Interchange (ASCII) connections; or

(8) databases currently offered or similar to ones offered by the Texas State Library and Archives Commission (i.e., a magazine index database may not be purchased if a comparable[~~since~~] one is [~~already~~] provided by the Texas State [~~Electronic~~] Library).

§2.123. Criteria for Award.

The Library Services and Technology Act Advisory Council will score proposals on nine criteria. The maximum number of points for each category is as follows:

(1) Community Profile. (15 points) The applicant describes the greater community to be served by the grant. Identifies a service that might be used if it were available; and includes demographic statistics, library records, or surveys to support these statements. Attaches letters of cooperation showing their commitment to the project from agencies to be involved in the shared service. The applicant thoroughly describes services, programs, activities; describes the location where they will be offered; and explains how these services will attract shared library users.

(2) Shared Services. (15 points) The application should show details of the existing technology plans [~~plan~~] of the participating libraries [~~system member public library, Major Resources System, or regional library system,~~] and how the shared service is designed to mesh with technology purchased or to be purchased with other state or federal technology funding such as Telecommunications Infrastructure Fund (TIF) grants, the service provided by Universal Service Fund Education Rate discounts, and House Bill 2128.

(3) Personnel. (5 points) List who will administer the funds. List which positions will provide the services. List how much time will be spent in each position on assigned duties. List how the qualifications of each person relate to their job duties. Full job descriptions are required for new hires.

(4) Timetable. (5 points) The applicant presents a timetable for project activities within the fiscal year (i.e., a list of actions with a date by which they will be accomplished); provides verification that facilities will be available, equipment and materials delivered; and explains how the staff will be hired and trained in time to carry out the services as planned.

(5) Objectives. (10 points) The applicant sets achievable, measurable outcomes; describes how the outcomes will demonstrate expanded library services; and presents a reasonable method to collect data.

(6) Reaching a Shared Target Area. (10 points) The applicant submits a plan for introducing the shared library services to targeted users; the plan uses a variety of communication techniques and includes verbal communication.

(7) Expenses Justified. (15 points) The applicant fully justifies the budget by describing how budgeted items will contribute to the shared services; quotes a source for the stated costs (e.g., city pay classification for staff, catalog or city/county bid list for equipment); the costs are reasonable to achieve project objectives.

(8) Adequacy of Resources. (15 points) The applicant describes the joint resources which will be used to support this expansion of services during the grant year; submits estimated costs for continuing the expanded services next year, with a plan for how the library or group of libraries will assume those costs in the future. A written commitment of future support from governing bodies is desirable, but not required.

(9) Evaluation. (10 points) The applicant presents a method to count users of the shared services as well as the effectiveness of the service. Provides a method to identify any new library users.

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 November 19, 2001.

TRD-200107137
Edward Seidenberg
Assistant State Librarian
Texas State Library and Archives Commission
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 463-5459

♦ ♦ ♦

DIVISION 3. LIBRARY SERVICES AND TECHNOLOGY ACT, LIBRARY COOPERATION GRANTS--PART B, SERVICES, GUIDELINES FOR TEXSHARE LIBRARIES

13 TAC §2.130, §2.131

The Texas State Library and Archives Commission proposes to amend §2.130 and §2.131 concerning Library Cooperation Grants-Part B, Services. The purpose of this amendment is to expand Library Cooperation Grants to include all libraries that are members of the TexShare Library Consortium as eligible applicants.

This amendment reflects the interest of TexShare member libraries that are already eligible to participate as cooperative partners in grant-funded projects, by enabling them also to serve as lead libraries in grant projects. It opens the grant to more entities by permitting these libraries to apply under the same conditions as public libraries.

Deborah Littrell, Director of Library Development, has determined that for each year of the first five years the section is in effect there will be no fiscal implications for local government. There will be no fiscal implications for small businesses or individuals as a result of enforcing or administering the section.

Ms. Littrell also has determined that for each of the first five years the section is in effect the public benefits anticipated as a result of enforcing the section will be to qualify additional libraries for federal assistance to improve library services. The additional funding will improve the library services available to the public.

Comments may be submitted to Deborah Littrell, Director of the Library Development Division, Texas State Library and Archives Commission, P.O. Box 12927, Austin, Texas 78711-2927.

The amendment is proposed under the Government Code §441.006, §441.009, §441.0091, and §441.230 which provide the Commission with authority to govern the Texas State Library, initiate grant programs, and adopt administrative rules.

The proposed amendments affect Government Code §441.006, §441.009, §441.0091, and §441.230.

§2.130. Goals and Purposes.

(a) This grant program promotes access to learning and information resources in all types of libraries for individuals of all ages; and promotes library services that provide all users access to information through state, regional, national, and international electronic networks; and provides linkages among and between libraries.

(b) The grant encourages libraries in different areas, and encourages different types of libraries to establish consortia and share resources-- encourages [~~public~~] libraries to participate in single-type [~~public~~] library consortia or participate in multi-type library consortia that include a [~~public~~] library that is a member of TexShare [~~(which is a member of the Texas Library System)~~] and to share among themselves the technology-based resources of all libraries within the consortium.

§2.131. Eligible Applicants.

(a) Libraries that are members of the TexShare Library Consortium, [~~Texas Library System member public libraries,~~] Major Resource Systems, and regional library systems through their governing authority [~~(city, county, or corporation)~~] are eligible to apply for funds. These funds are awarded to TexShare member [~~public~~] libraries but may be used with all types of libraries as defined in the Library Services and Technology Act (LSTA), P.L. 104-208, and that are members of a consortium as defined by the LSTA.

(b) Successful applicants are eligible to apply for grant funds for the two years following the initial grant year. The second and third application will be evaluated with the same criteria as new applications. No applicant will be eligible for a fourth year of funding for the same project.

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 November 19, 2001.

TRD-200107136
Edward Seidenberg
Assistant State Librarian
Texas State Library and Archives Commission
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 463-5459

♦ ♦ ♦

PART 2. TEXAS HISTORICAL COMMISSION

CHAPTER 21. LOCAL HISTORY PROGRAMS

13 TAC §21.2

The Texas Historical Commission proposes an amendment to Chapter 21, §21.2 (related to the Grant Program for History Museums) concerning the grant application and award process. These amendments are proposed as a means of broadening the museum grant program process to include grants of more than $1,000 and for grants that may not need to include match money to qualify.

F. Lawerence Oaks, Executive Director, has determined that for the first five-year period during which these amendments are in effect there will only be fiscal implications to those local governments that may choose to participate in the grant program. Fiscal implications to State government will be minimal and will be dependent upon funds appropriated by the Legislature.

Mr. Oaks also anticipates that the public will benefit from these amendments through the creation of a broader range of educational museum programs at qualified institutions.

Comments on the proposed rules may be submitted to F. Lawerence Oaks, Executive Director, Texas Historical Commission, P.O. Box 12276, Austin, Texas 78711-2276 (512/463-6100). Comments will be accepted for 30 days after publication in the Texas Register.

These amendments are proposed under Texas Government Code, §Section 442.005(q) which authorizes the Texas Historical Commission to promulgate rules to carry out the intent of this chapter and associated legislative mandates.

§21.2. Grant Program for History Museums.

The grant program for history museums is administered by the commission for the purpose of improving museums across the state [~~commission's Local History Programs office~~].

(1) Eligibility of museums. To be considered eligible for grant assistance a museum shall:

(A) verify that it is an organized and permanent nonprofit institution, either public or private, mainly involved in education, research, or aesthetics;

(B) employ at least one person, paid or unpaid, who devotes full time to the acquisition, care, and exhibition of historical objects owned or used by the institution;

(C) own and utilize tangible historical objects, while maintaining adequate accession records on all collections:

(D) maintain exhibits which are open to the public on a regular schedule at least 20 hours per week, ten months a year; and

(E) be in compliance with the Architectural Barriers Act, Article 9102, Texas Civil Statutes, and the Americans with Disabilities Act of 1990.

(2) Eligibility of projects. Priority will be given to applications requesting funds for the conservation [~~and~~], preservation , and interpretation of collections. With the exception of some specifically designated grant programs, projects [~~Projects~~] involving construction of facilities or purchase of equipment are not eligible. Grant projects may include, but are not limited to:

(A) applying conservation methods;

(B) obtaining technical assistance;

(C) purchasing archival supplies;

(D) developing educational programs and interpretive exhibits; and

(E) cataloging, care, and use of historic photographs and taped oral history interviews.

(3) Criteria for evaluation. The following criteria will be considered in awarding grants:

(A) clarity of the project's objectives;

(B) quality of the museum's operations;

(C) appropriateness of the project's size and scope;

(D) historical significance of the collection; and

(E) strength of community support as indicated by matching funds raised at the local level.

(4) Filing applications. Copies [~~A copy~~] of the application forms for each of the categories of museum grants available and the associated restrictions and criteria for those grant categories [~~form~~] may be obtained from the Texas Historical Commission, P.O. Box 12276, Austin, Texas 78711. All information about application filing procedures will be contained therein.

(5) Determination of awards. Upon review of the grant applications, the staff of the commission will forward their recommendations to the appropriate committee(s) of the commission for their review and recommendations to the full commission concerning [~~by staff of the Local History Programs office, the History Programs Committee evaluates grant applications and recommends~~] funding allocations for those projects deemed most worthy. Grants are awarded by vote of the commission [~~Texas Historical Commission~~] at large at the first quarterly meeting after the application deadline, or at other meetings designated as appropriate by vote of the commission. Grant project start dates become effective on the date of notification of the award by the Executive Director [~~Local History Programs office~~]. Reallocation of returned funds shall be made by the Executive Committee [~~of the commission~~] upon the recommendation of the staff [~~Local History Programs office~~].

(6) Amount of award and matching funds. With the exception of some specifically designated funds, funds [~~Funds~~] for up to 50% of a project's cost may be awarded by the commission, but may not exceed $1,000. When matching funds are required, the applying [~~Applying~~] museums shall provide the remaining 50% either in funds or as services in kind. Services in kind, such as volunteer time and institutional services, shall be documented and shall not exceed half a museum's matching contribution to the project. The commission [~~Texas Historical Commission~~] favors projects supported by locally raised matching funds. Federal grants, however, may also be used as matching funds.

(7) Designated or Legislatively Directed Grants. Grants that are directed by the Legislature to a specific grantee or group of grantees may be administered in accordance with this section and shall be directed to the grantees in accordance with the terms of the legislation authorizing the grant.

(8) [~~(7)~~] Commencement of projects. Approved project work shall commence with 90 [~~45~~] days of the award date. No expenditures of project funds shall be made prior to that date.

(9) [~~(8)~~] Payment procedures. With the exception of some specifically designated or legislatively appropriated grant programs, all [~~All~~] payments of grant funds shall be on a reimbursement basis, and may be in installments. Reimbursement will be made upon submission of proof of incurred allowable expenses. The last installment payment will not be made until final reports have been submitted by the grant recipient and accepted by the commission [~~Texas Historical Commission~~].

(10) [~~(9)~~] Completion of project and final report. Grant recipients shall submit to the commission [~~Texas Historical Commission~~] a narrative report, photographic documentation, and a complete financial report of expenditures no later than 120 [~~45~~] days following the completion of the project. All projects shall be completed within a period of time considered to be appropriate by the commission and specified in the grant contract [~~one year of the grant's award date~~]. Any exception to this rule is to be approved by the commission [~~History Programs Committee~~].

(11) [~~(10)~~] Forfeiture of grant allocation. Failure to comply with the deadline for starting or completing [~~project work or to complete~~] the project [~~within a year of the award date~~], shall result in forfeiture of the full grant amount and its reallocation to another museum project by the commission.

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 November 16, 2001.

TRD-200107089
F. Lawrence Oaks
Executive Director
Texas Historical Commission
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 463-5711

♦ ♦ ♦

TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 61. SCHOOL DISTRICTS
SUBCHAPTER CC. COMMISSIONER'S RULES CONCERNING SCHOOL FACILITIES

19 TAC §61.1032

The Texas Education Agency (TEA) proposes an amendment to §61.1032, concerning administration of the instructional facilities allotment (IFA) program. The section specifies provisions relating to definitions, the application process, district and debt eligibility, the payment process, deadlines, and prioritization and notice of award. The proposed amendment clarifies refinancing issues and tax collections applicable to the IFA pursuant to the Texas Education Code (TEC), §46.003(h) and §46.012, in conformance with changes enacted in House Bill (HB) 2879, 77th Texas Legislature, 2001.

Prior law allowed districts to meet local share obligations for the IFA from taxes for bonded indebtedness collected in the prior year. The 77th Texas Legislature, 2001, expanded this provision to allow local share requirements for the IFA to also be met with prior year bonded debt or Maintenance and Operations taxes that were not equalized by state aid formulas in the year of collection. The proposed amendment adds new language to clarify refinancing issues, tax collections, and fixed-rate bonds with respect to the IFA. The proposed amendment also modifies existing provisions relating to the timing of authorization of bond issuance with respect to the IFA, finality of awards, data sources, deadlines, taxes eligible for funding, and payment requirements for variable rate bonds.

Joe Wisnoski, assistant commissioner for school finance and fiscal analysis, has determined that for the first five-year period the amendment is in effect there will be no direct fiscal implications for state or local government as a result of enforcing or administering the amendment; however, the new law itself, enacted in HB 2879, will increase state aid to local districts for the IFA.

Mr. Wisnoski has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment will be the clarification of changes enacted by HB 2879, 77th Texas Legislature, 2001, related to refunding of debt and tax collections for state funding of the IFA and the facilitation of the administration of the IFA program. There will not be an effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

Comments on the proposal may be submitted to Criss Cloudt, Accountability Reporting and Research, 1701 North Congress Avenue, Austin, Texas 78701, (512) 463-9701. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 475-3499. All requests for a public hearing on the proposed amendment submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register*.

The amendment is proposed under the Texas Education Code (TEC), §46.002, which authorizes the commissioner of education to adopt rules for the administration of TEC, Chapter 46, Assistance with Instructional Facilities and Payment of Existing Debt, Subchapter A, Instructional Facilities Allotment.

The amendment implements the Texas Education Code, §46.002.

§61.1032. Instructional Facilities Allotment.

(a) Definitions. The following definitions apply to the instructional facilities allotment governed by this section:

(1) Instructional facility--real property, an improvement to real property, or a necessary fixture of an improvement to real property that is used predominantly for teaching the curriculum required by Texas Education Code (TEC), §28.002.

(2) Noninstructional facility--a facility that may occasionally be used for instruction, but the predominant use is for purposes other than teaching the curriculum required by TEC, §28.002.

(3) Necessary fixture--equipment necessary to the use of a facility for its intended purposes, but which is permanently attached to the facility such as lighting and plumbing.

(4) Debt service--as used in this section, debt service shall include payments of principal and interest on bonded debt or the amount of a payment under an eligible lease-purchase arrangement.

(5) Allotment--represents the amount of eligible debt service that can be considered for state aid. The total allotment is comprised of a combination of state aid and local funds. The state share and local share are adjusted annually based on changes in average daily attendance, property values, and debt service.

(b) Application process. A school district must complete an application requesting funding under the Instructional Facilities Allotment (IFA). The commissioner of education may require supplemental information to be submitted at an appropriate time after the application is filed to reflect changes in amounts and conditions related to the debt. The application shall contain at a minimum the following:

(1) a description of the needs and projects to be funded with the debt issue or other financing, with an estimate of cost of each project and a categorization of projects according to instructional and noninstructional facilities or other uses of funds;

(2) a description of the debt issuance or other financing proposed for funding, including a projected schedule of payments covering the life of the debt;

(3) an estimate of the weighted average maturity of bonded debt; and

(4) drafts of official statements or contracts that fully describe the debt, as soon as available.

(c) District eligibility. All school districts legally authorized to enter into eligible debt arrangements as defined in subsection (d) of this section are eligible to apply for an IFA [~~Instructional Facilities Allotment~~].

(d) Debt eligibility. In order to be eligible for state funding under this section, a debt service requirement must meet all of the criteria of this subsection.

(1) The debt service must be an obligation of the school district which is entered into pursuant to the issuance of bonded debt under TEC, Chapter 45, Subchapter A; an obligation for refunding bonds as defined in TEC, §46.007; or an obligation under a lease-purchase arrangement authorized by Local Government Code, §271.004.

(2) Application for funding of bonded debt service must be received at the Texas Education Agency (TEA) [~~made~~] prior to the passage of an order by the school district board of trustees authorizing the bond issuance.

(3) Application for funding of lease-purchase payments must be received at TEA [~~made~~] prior to the passage of an order by the school district board of trustees authorizing the lease- purchase arrangement.

(4) Eligible bonded debt must have a weighted average maturity of at least eight years. The term of a lease-purchase agreement must be for at least eight years. For purposes of this section, a weighted average maturity shall be calculated by dividing bond years by the issue price, where "bond years" is defined as the product of the dollar amount of bonds divided by 1,000 and the number of years from the dated date to the stated maturity, and "issue price" is defined as the par value of the issue plus accrued interest, less original issue discount or plus premium.

(5) Funds raised by the district through the issuance of bonded debt must be used for an instructional facility purpose as defined by TEC, §46.001. The facility acquired by entering into a lease- purchase agreement must be an instructional facility as defined by TEC, §46.001.

(6) If the bonded debt is for a refunding or a combination of refunding and new debt, the refunding portion must meet the same eligibility criteria with respect to dates of first debt service as a new issue as defined by TEC, §46.003(d)(1).

(7) An amended application is required for any eligible refunding bonds, regardless of whether a complete or partial refunding is accomplished. Refunding bonds must also meet the following three criteria as defined by TEC, §46.007:

(A) Refunding bonds may not be called for redemption earlier than the earliest call date of the bonds being refunded.

(B) Refunding bonds must not have a maturity date later than the final maturity date of the bonds being refunded.

(C) The refunding of bonds must result in a present value savings, which is determined by computing the net present value of the difference between each scheduled payment on the original bonds and each scheduled payment on the refunding bonds. Present value savings shall be computed at the true interest cost of the refunding bonds.

(8) Certain other refinanced debt may be eligible for the funding under this subsection.

(A) If a lease purchase in the IFA program is refinanced with a general obligation bond at a present value savings and without extension of the original term of the lease- purchase agreement, the debt shall remain part of the IFA program.

(B) Any portion of a bond issue that refinances a portion of a lease-purchase arrangement that was not originally qualified for IFA funding shall remain ineligible.

(C) Any portion of a bond issue that refinances a portion of an original lease- purchase arrangement that was eligible for IFA consideration but exceeded the IFA limit shall not be eligible for consideration in future funding cycles.

(D) If a lease purchase that is not in the IFA program is refinanced with a general obligation bonded debt, the bonded debt shall gain eligibility for the IFA by the terms of that program. Any Interest and Sinking (I&S) fund tax effort associated with the bonded debt payments may be counted for purposes of computing the IFA. To be considered for IFA funding, the district shall be required to apply to the program as a new debt.

(E) If any portion of a maturity of an IFA bonded debt is refunded at a present value cost or with an extension of the term, that portion of the debt shall be removed from eligibility for further IFA tax effort equalization.

(F) When a district issues a general obligation bond to acquire a facility that is the subject of an existing lease-purchase arrangement of the district, the transaction is considered a refinancing of the lease purchase for purposes of continued participation in the IFA program.

(G) Debt that is refinanced in a manner that disqualifies it for eligibility for funding within the IFA program shall be treated as new bonded debt at the time of issuance for the purpose of funding consideration pursuant to the Existing Debt Allotment (EDA).

(9) In addition to I&S fund taxes collected in the current school year, other district funds budgeted for the payment of bonds may be eligible for the IFA program for the purpose of meeting local share requirements pursuant to Texas Education Code, Chapter 46.

(A) Funds budgeted by a district for payment of eligible bonds may include I&S fund taxes collected in the 1999-2000 school year or a later school year in excess of the amount necessary to pay the district's local share of debt service on bonds in that year, provided that the taxes were not used to generate other state aid.

(B) Funds budgeted by a district for payment of eligible bonds may include Maintenance and Operations (M&O) taxes collected in the 1999-2000 school year or a later school year that are in excess of amounts used to generate other state aid.

(C) The commissioner will provide each district with information about what tax collections were not equalized by state assistance in the preceding school year and worksheets to enable districts to calculate tax collections that will not receive state assistance in a current school year.

(D) Districts must inform the commissioner of amounts, if any, to be applied to the IFA local share requirement, if such contributions are derived from current or preceding year tax collections not equalized by state assistance.

(10) If a district issues debt that requires the deposit of payments into a mandatory I&S fund or debt service reserve fund, the deposits will be considered debt payments for the purpose of the IFA if the district's bond covenant calls for the deposit of payments into a mandatory and irrevocable fund for the sole purpose of defeasing the bonds or if the final statement stipulates the requirements of the I&S fund and the bond covenant.

(11) I&S fund taxes will be attributed first to satisfy the local share requirement of eligible EDA debts, second to satisfy the local share requirements of any IFA debts, and lastly to excess taxes that may raise the limit for the EDA program in a subsequent biennium if collected in the second year of a state fiscal biennium.

(12) When considering application for funding, a debt which meets the eligibility requirements of the EDA will be removed from consideration under the IFA program to the extent that the debt may be funded by the EDA up to the limits that apply for that program during the biennium in which EDA funding would first be available.

(e) Biennial limitation on access to allotment. The cumulative amount of new debt service for which a district may receive approvals for funding within a biennium shall be the greater of $100,000 per year or $250 per student in average daily attendance per year. A district may submit multiple applications for approval during the same biennium. Timely application before executing the bond order for bonds or authorizing the order for a lease-purchase agreement must be made to ensure eligibility of the debt for program participation. The calculation of the limitation on assistance shall be based on the highest annual amount of debt service that occurs within the state fiscal biennium in which payment of state assistance begins.

(f) Additional applications. For previously awarded debt, increases in a district's debt allotment to pay for increases in debt service payment requirements in subsequent biennia must receive approval through one or more additional application(s). The portion of any increase in eligible, qualified debt service that may be funded in subsequent biennia is the amount that exceeds any previously awarded and approved allotments, within the biennial limitation on funding as calculated at the time of approval of the additional applications.

(g) Finality of award. Awards of assistance under TEC, Chapter 46, will be made based on the information available to TEA at the deadline for receipt of applications for that [~~close of the~~] application cycle. Changes in the terms of the issuance of debt, either in the length of the payment schedule or the applicable interest rate, that occur after the time of the award of assistance will not result in an increase in the debt service considered for award. Any reduction in debt service requirements resulting from changes in the terms of issuance of debt shall result in a reduction in the amount of the award of assistance.

(h) Data sources.

(1) For purposes of determining the limitation on assistance and prioritization, the projected average daily attendance as adopted by [~~submitted to~~] the legislature for appropriations purposes [~~by the Texas Education Agency (TEA) in March of an odd-numbered year, as required by TEC, §42.254,~~] shall be used.

(2) For purposes of prioritization, the final property values certified by the Comptroller of Public Accounts for the tax year preceding the year in which assistance is to begin shall be used. If final property values are unavailable, the most recent projection of property values shall be used.

(3) For purposes of both the calculation of the limitation on assistance and prioritization, the commissioner may consider, prior to the deadline for receipt of applications for [~~close of an~~] that application cycle, adjustments to data values determined to be erroneous.

(4) For purposes of prioritization, enrollment increases over the previous five years shall be determined using Public Education Information Management System (PEIMS) submission data available at the time of application.

(5) For purposes of prioritization, outstanding debt is defined as [~~considered~~] voter- approved bonded debt or lease-purchase debt outstanding at the time of the application deadline.

(6) All final calculations of assistance earned shall be based on property values as certified by the Comptroller for the preceding school year, and the final average daily attendance for the current school year.

(i) Allocation of debt service between qualified and nonqualified projects. Debt service shall be allocated among qualified and nonqualified purposes and among eligible and ineligible categories of debt. The method used for allocation among qualified and nonqualified purposes shall be on the basis of pro rata value of the instructional facility versus the noninstructional purposes over the life of the debt service, unless a different basis is indicated in the bond order. The method of allocation of debt service between eligible and ineligible categories must be the same method selected for approval by the Attorney General.

(j) Payments and deposits.

(1) Payment of state assistance shall be made as soon as practicable after September 1 of each year. No payments shall be made until the execution of the bond order or the authorization of the lease-purchase agreement, whichever is applicable, has occurred.

(2) Funds received from the state for bonded debt must be deposited to the interest and sinking fund of the school district and must be considered in setting the tax rate necessary to service the debt.

(3) Funds received from the state for lease-purchase agreements must be deposited to the general fund of the district and used for lease-purchase payments.

(4) A final determination of state assistance for a school year will be made using final attendance data and property value information as may be affected by TEC, §42.257. Additional amounts

owed to districts shall be paid along with assistance in the subsequent school year, and any reductions in payments shall be subtracted from payments in the subsequent school year.

(5) As an alternative method of adjustment of payments, the commissioner may increase or decrease allocations of state aid under TEC, Chapter 42, to reflect appropriate increases or decreases in assistance under TEC, Chapter 46.

(k) Approval of Attorney General required. All bond issues and all lease-purchase arrangements must receive approval from the Attorney General before a deposit of state funds will be made in the accounts of the school district.

(l) Deadlines.

(1) The commissioner of education shall conduct an annual application cycle with a deadline of June 15 or the next working day after June 15 every year based on the availability of appropriations for the purpose of awarding new allotments. If no funding is available, the commissioner shall cancel the June 15 deadline. The commissioner may conduct more than one application cycle to allocate funding appropriated for a fiscal year.

(2) If funds are still available after conducting the June 15 annual cycle, the commissioner shall announce the TEA's intention to have an additional application cycle no less than 90 days prior to the application deadline.

(3) The commissioner shall establish the relevant limit on the date of first debt service payment from property taxes for eligible bonded debt that will be considered for funding in the announced application cycle.

(4) An application received after the deadline shall be considered a valid application for the subsequent period unless withdrawn by the submitting district before the end of the subsequent period.

(5) If the execution of the bond order or the authorizing of a lease-purchase agreement has not taken place within 180 days of the deadline for the current application cycle, the TEA shall consider the application withdrawn.

(6) The school district may not submit an application for bonded debt prior to the successful passage of an authorizing proposition. The election to authorize the debt must be held prior to the close of the application cycle. An application for a lease-purchase agreement may not be submitted prior to the end of the 60-day waiting period in which voters may petition for a referendum, or until the results of the referendum, if called, approve the agreement.

(m) Prioritization and notice of award. Upon close of the application cycle, all eligible applications shall be ranked in order of property wealth per student in average daily attendance. State assistance will be awarded beginning with the district with the lowest property wealth and continue until all available funds have been utilized. Each district shall be notified of the amount of assistance awarded and its position in the rank order for the application cycle. A district's wealth per student may be reduced if any or all of the following criteria are met.

(1) A district's wealth per student is first reduced by 10% if the district does not have any outstanding debt at the time the district applies for assistance.

(2) A district's wealth per student is next reduced if a district has had substantial student enrollment growth in the preceding five-year period. For this purpose, the district's wealth per student is reduced:

(A) by 5.0%, if the district has an enrollment growth rate in that period that is 10% or more but less than 15%;

(B) by 10%, if the district has an enrollment growth rate in that period that is 15% or more but less than 30%; or

(C) by 15%, if the district has an enrollment growth rate in that period that is 30% or more.

(3) If a district has submitted an application with eligible debt and has not previously received any assistance due to a lack of appropriated funds, its property wealth for prioritization shall be reduced by 10% for each biennium in which assistance was not provided. The reduction is calculated after reductions for outstanding debt and enrollment are completed, if applicable. This reduction in property wealth for prioritization purposes is only effective if the district actually entered the proposed debt without state assistance prior to the deadline for a subsequent cycle for which funds are available.

(n) Bond taxes. A school district that receives state assistance must levy and collect sufficient eligible [~~interest and sinking fund~~] taxes to meet its local share of the debt service requirement for which state assistance is granted. Failure to levy and collect sufficient eligible taxes shall result in pro rata reduction of state assistance. The requirement to levy and collect eligible [~~interest and sinking fund~~] taxes specified in this subsection may be waived at the discretion of the commissioner for a school district that must maintain local maintenance tax effort in order to continue receiving federal impact aid.

(o) Exclusion from taxes. The taxes collected for bonded debt service for which funding under TEC, Chapter 46, is granted shall be excluded from the tax collections used to determine the amount of state aid under TEC, Chapter 42. For a district operating with a waiver as described in subsection (n) of this section, the amount of the local share of the allotment shall be subtracted from the total tax collections used to determine state aid under TEC, Chapter 42.

(p) Calculation of bond tax rate (BTR) for lease-purchase arrangements. The value of BTR in the formula for state assistance for a lease-purchase arrangement shall be calculated based on the lease-purchase payment requirement, not to exceed the relevant limitations described in this section. The lease-purchase payment shall be divided by the guaranteed level (FYL), then by average daily attendance (ADA), then by 100. The value of BTR shall be subtracted from the value of district tax rate (DTR) as computed in TEC, §42.302, prior to limitation imposed by TEC, §42.303.

(q) Continued treatment of taxes and lease-purchase payments. Taxes associated with bonded debt may not be considered for state aid under TEC, Chapter 42. Bonded debt service or lease-purchase payments that were excluded from consideration for state assistance due to prioritization or due to the limitation on assistance may be considered for state assistance in subsequent biennia through additional applications. A modified application may be provided for previously rejected debt service or lease-purchase payments.

(r) Variable rate bonds. Variable rate bonds are eligible for state assistance under the IFA [~~Instructional Facilities Allotment~~]. For purposes of calculating the biennial limitation on access to the allotment, the payment requirement for a variable rate bond shall be valued at [~~the interest rate specified in the official statement (or draft) as the rate to be used in calculating~~] the minimum amount a district must budget for payment of interest cost and the scheduled minimum mandatory redemption amount, if applicable. For purposes of calculating state assistance under TEC, Chapter 46, the lesser of the actual payment or [~~the actual interest rate or that used for the calculation of~~] the limitation on [~~access to~~] the allotment shall be used. A district may exercise its ability to make payments in amounts in excess of the minimum, but

the excess amount shall not be used in determining the value of BTR or in the calculation of state assistance under TEC, Chapter 46, in that year.

(s) Fixed-rate bonds. Computation for fixed-rate bonds shall be based on published debt service schedules as contained in the official statement. Prepayment of a bond, either through an early call provision or some other mechanism, shall not increase the state's obligation or the computed state aid pursuant to the IFA. To the extent that prepayments reduce future debt service requirements, the computation of state aid shall also be appropriately adjusted.

(t) [~~(s)~~] Reports required. The commissioner shall require such information and reports as are necessary to assure compliance with applicable laws. The commissioner shall require immediate notification by the district of relevant financing activities such as refunding or refinancing of bond issues, renegotiation of lease-purchase terms, change in use of bond proceeds, or other actions taken by the district that might affect state funding 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 November 19, 2001.

TRD-200107116
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 463-9701

♦ ♦ ♦

19 TAC §61.1035

The Texas Education Agency (TEA) proposes an amendment to §61.1035, concerning assistance with payment of existing school district debt. The section specifies provisions relating to eligibility, qualifying debt service, limits on assistance, data and payment cycles, deposits and uses of funds, and refinancing of eligible debt. The proposed amendment clarifies refinancing issues and tax collections applicable to the Existing Debt Allotment (EDA) pursuant to the Texas Education Code (TEC), §46.032(c) and §46.036, in conformance with changes enacted in House Bill (HB) 2879, 77th Texas Legislature, 2001.

Prior law allowed districts to meet local share obligations for the EDA from taxes for bonded indebtedness collected in the prior year. The 77th Texas Legislature, 2001, expanded this provision to allow local share requirements for the EDA to also be met with prior year bonded debt or Maintenance and Operations taxes that were not equalized by state aid formulas in the year of collection. The proposed amendment adds new language to clarify refinancing issues and qualifying debt service for meeting local share requirements. The proposed amendment also modifies existing provisions relating to existing debt tax rate (EDTR) calculations.

Joe Wisnoski, assistant commissioner for school finance and fiscal analysis, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state and local government as a result of enforcing or administering the amendment; however, the new law itself, enacted in HB 2879, will increase state aid to local school districts for the EDA.

Mr. Wisnoski has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment will be the clarification of changes enacted by HB 2879, 77th Texas Legislature, 2001, related to refunding of debt and tax collections for state funding of the EDA and the facilitation of the EDA program. There will not be an effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

Comments on the proposal may be submitted to Criss Cloudt, Accountability Reporting and Research, 1701 North Congress Avenue, Austin, Texas 78701, (512) 463-9701. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 475-3499. All requests for a public hearing on the proposed amendment submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register*.

The amendment is proposed under the Texas Education Code (TEC), §46.031, which authorizes the commissioner of education to adopt rules for the administration of TEC, Chapter 46, Assistance with Instructional Facilities and Payment of Existing Debt, Subchapter B, Assistance with Payment of Existing Debt.

The amendment implements the Texas Education Code, §46.031.

§61.1035. Assistance with Payment of Existing Debt.

(a) Eligibility. Certain restrictions apply to debt and to school districts eligible for the existing debt allotment (EDA).

(1) Debt eligible for the EDA is an existing obligation of a school district made through the issuance of a bond for instructional or non-instructional purposes pursuant to Texas Education Code (TEC), Chapter 45, Subchapter A, or through the refunding of bonds as defined in TEC, §46.007. Lease-purchase arrangements authorized by Local Government Code, §271.004, are not eligible. [~~Taxes must have been levied for payment of the principal and/or interest on eligible debt in the 1998-1999 school year.~~]

(2) Eligible debt does not include any portion of an existing obligation that has been approved for financial assistance with the Instructional Facilities Allotment [~~instructional facilities allotment~~] (IFA) as defined in §61.1032 of this title (relating to Instructional Facilities Allotment), in accordance with TEC, Chapter 46.

(3) Certain other refinanced debt may be eligible for funding under this subsection.

(A) A lease purchase refunded with a general obligation bond shall be eligible for consideration for the EDA in future years based on the date of payment on the new bond and the limits on tax rates that apply.

(B) Any portion of a bond issue that refinances a portion of an original lease- purchase arrangement that was eligible for IFA consideration but exceeded the IFA limit shall be eligible for consideration in future years pursuant to this subsection based on the date of first payment on the new bond and the limits on tax rates that apply.

(C) If a lease purchase that is not funded in the IFA program is refinanced with a general obligation bonded debt, the bonded debt shall gain eligibility for the EDA by the terms of the EDA program. Any Interest and Sinking (I&S) fund tax effort associated with the bonded debt payments may be counted for purposes of computing the EDA. Qualification pursuant to this subsection shall be according

to the terms of the program, including the date of first payment on the bond and the relevant tax rate limitation.

(D) Debt that is refinanced in a manner that disqualifies it for eligibility for funding within the IFA program shall be treated as new bonded debt at the time of issuance for the purpose of funding consideration pursuant to the EDA.

[~~(3) A district must collect its share of the EDA to be eligible for state assistance.~~]

(b) Qualifying debt service. Certain district revenues may qualify to meet the local share requirement of the EDA when computing state assistance amounts.

(1) I&S fund taxes collected in the current school year may qualify toward meeting the local share requirement of the EDA. In addition, other district funds budgeted for the payment of bonds may qualify to meet the EDA local share requirements.

(A) Funds budgeted by a district for payment of eligible bonds may include I&S fund taxes collected in the 1999-2000 school year or later school year in excess of the amount necessary to pay the district's local share of debt service on bonds in that year, provided that the taxes were not used to generate other state aid.

(B) Funds budgeted by a district for payment of eligible bonds may include Maintenance and Operations (M&O) taxes collected in the current or previous school year that are in excess of amounts used to generate other state aid.

(C) The commissioner of education will provide each district with information about what tax collections were not equalized by state assistance in the preceding school year and worksheets to enable districts to calculate tax collections that will not receive state assistance in a current school year.

(D) Districts must inform the commissioner of education of amounts, if any, to be applied to the EDA local share requirement, if such contributions are derived from current or preceding year tax collections not equalized by state assistance.

(2) If a district issues debt that requires the deposit of payments into a mandatory I&S fund or debt service reserve fund, the deposits will be considered debt payments for the purpose of the EDA if the district's bond covenant calls for the deposit of payments into a mandatory and irrevocable fund for the sole purpose of defeasing the bonds or if the final statement stipulates the requirements of the I&S fund and the bond covenant.

(3) I&S fund taxes will be attributed first to satisfy the local share requirement of eligible EDA debts, second to satisfy the local share requirements of any IFA debts, and lastly to excess taxes that may raise the limit for the EDA program in a subsequent biennium if collected in the second year of a state fiscal biennium.

(4) Computation of state aid in the EDA program for a variable rate bond shall be based on the minimum payment requirement. A district may receive such state aid for payment on a variable rate bond in excess of the minimum payment requirement as long as the additional amount meets certain conditions.

(A) The payment is necessary to meet the computed interest costs for the year.

(B) The amount shall not exceed the applicable limit for debt established pursuant to TEC, §46.034(b).

(C) The district shall notify the commissioner of education of its intent prior to the adoption of the district's tax rate for debt service for the applicable year.

(D) A district may exercise its ability to make payments in excess of the minimum payment required but the excess amount shall not be used in determining the limit on the existing debt tax rate (EDTR) or in the calculation of state assistance in that year.

(5) Computation for fixed-rate bonds shall be based on published debt service schedules as contained in the official statement. Prepayment of a bond, either through an early call provision or some other mechanism, shall not increase the state's obligation or the computed state aid pursuant to the EDA. To the extent that prepayments reduce future debt service requirements, the computation of state aid shall also be appropriately adjusted.

(c) [~~(b)~~] Limits on assistance. The amount of state assistance is limited by the lesser of a calculated EDTR [~~existing debt tax rate (EDTR)~~] for eligible debt or an appropriated debt tax limit.

(1) The calculated EDTR is a rate determined with the debt limit resulting from the lesser of calculations specified in subparagraphs (A) or (B) of this paragraph [~~, as appropriate, multiplied by $100. The product is then divided by an estimate of current average daily attendance (ADA) multiplied by either a $35 yield or a greater amount provided by legislative appropriations~~].

(A) EDTR may be calculated as the I&S fund taxes for eligible bonds for the last fiscal year of the preceding state fiscal biennium divided by the property value used for state funding purposes in that year, then multiplied by 100.

[~~(A) For the 1999-2000 and 2000-2001 school years, the debt limit on the calculated EDTR is based on the lesser of 1998-1999 or current year debt service.~~]

[~~*(i)* For this purpose, 1998-1999 debt service is the greater of either:~~]

[~~*(I)* the actual 1998-1999 debt service payment for bonded debt minus any 1998-1999 state and local shares of the IFA; or~~]

[~~*(II)* the 1998-1999 interest and sinking fund collection amount minus the 1998-1999 local share of the IFA.~~]

[~~*(ii)* For this purpose, the current year debt service payment excludes the state and local shares of an IFA for bonded debt for which state aid was paid in 1998- 1999.~~]

(B) EDTR may be calculated as the current year debt service payment divided by the product of the current year average daily attendance (ADA) multiplied by $35, then divided by $100.

[~~(B) Beginning with the 2001-2002 school year, the debt limit on the calculated EDTR is based on the lesser of the current year debt service payment or the interest and sinking fund tax collection amount for eligible bonds for the final year of the preceding fiscal biennium.~~]

[~~*(i)* For this purpose, the interest and sinking fund tax collection amount excludes any local share of the IFA for the final year of the preceding fiscal biennium.~~]

[~~*(ii)* For this purpose, the current year debt service payment excludes the state and local shares of an IFA for bonded debt for which state aid was paid in the last year of the preceding biennium.~~]

(2) The EDTR used in the funding formula cannot exceed the appropriated limit ($.29). [~~($.12 for 1999-2000 and 2000-2001) or a greater rate as provided by TEC, §46.034(d).~~]

(3) For purposes of computing EDTR, tax collections or payment amounts associated with bonded debt in the IFA program shall be excluded from the calculation.

(d) [~~(c)~~] Data and payment cycles. The necessary data elements to calculate state assistance for existing debt and the associated payment cycle are determined by the commissioner of education.

(1) An initial, preliminary payment of state assistance will be made as soon as practicable after September 1 of each year. This payment will be based on an estimate of ADA; the taxable value of property certified by the Comptroller of Public Accounts for the preceding school year as determined in accordance with Government Code, Chapter 403, Subchapter M; and the amount of taxes budgeted to be collected for payment of eligible bonds. Districts will supply information about budgeted taxes in July on a data collection survey.

(2) A final determination of assistance for a school year will be made at the close of business for the current school year when final counts of ADA and collection amounts for eligible debt are available. This determination will also take into account, if applicable, a reduced property value that reflects either a rapid decline pursuant to TEC, §42.2521, or a grade level adjustment pursuant to TEC, §42.106.

(A) Any additional amounts owed will be paid as soon as practicable after the final determination is made.

(B) Any overpayment will be subtracted from the EDA in the subsequent year. If no such assistance is due in the subsequent school year, the Foundation School Fund will be reduced accordingly. If no payments are due from the Foundation School Fund, the district will be notified about the overpayment and must remit that amount to the Texas Education Agency (TEA) no later than three weeks after notification.

(e) [~~(d)~~] Deposit and uses of funds.

(1) Funds received from the state for assistance with existing debt must be deposited in the district's I&S [~~interest and sinking~~] fund and must be taken into account before setting the I&S [~~interest and sinking~~] fund tax rate.

(2) State and local shares of the EDA [~~existing debt allotment~~] must be used for the exclusive purpose of making principal and interest payments on eligible debt.

(f) [~~(e)~~] Refinancing of eligible debt.

(1) A district that refinances eligible debt in part or in full must inform the TEA's division responsible for state funding in writing and must provide appropriate documentation related to the refinancing.

(2) The portion of the debt eligible for state assistance on refunded bonds is subject to the same limits as eligible debt that has not been refinanced.

(3) If a refunding action of a district decreases the current year bond payment requirement, the reduced payment amount shall be the basis of determining the limit on funding.

(4) If a refunding action of a district increases the bond payment requirement, the amount of increase shall not be used to determine state aid unless the action took place prior to January 1 of the last fiscal year of the preceding state fiscal biennium.

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 November 19, 2001.

TRD-200107117

Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 463-9701

♦ ♦ ♦

CHAPTER 66. STATE ADOPTION AND DISTRIBUTION OF INSTRUCTIONAL MATERIALS

The Texas Education Agency (TEA) proposes amendments to 19 TAC §§66.10, 66.28, 66.78, 66.101, 66.104, and 66.107, concerning state adoption and distribution of instructional materials. The sections specify requirements and procedures related to administrative penalties, state adoption of instructional materials, and local operations.

House Bill (HB) 992 and HB 623, 77th Texas Legislature, 2001, both affect the textbook purchase and distribution process. HB 992 pertains to circumstances under which a publisher or manufacturer of textbooks must maintain or arrange for a textbook depository in this state. HB 623 pertains to the selection, distribution, and use of state-adopted textbooks and provides for administrative and criminal penalties for specific violations of the law. A number of amendments to 19 TAC Chapter 66 are needed to implement the changes required by HB 992 and HB 623. Several other changes to 19 TAC Chapter 66, not related to the passage of HB 992 and HB 623, are also necessary.

The proposed amendment to §66.10 adds a provision for penalizing a company that sells sample textbooks that contain factual errors. The proposed amendment to §66.28 adds language that adopts by reference the content requirements in Proclamation 2001 and deletes language related to Proclamation 1999. The proposed amendment to §66.78 implements HB 992 pertaining to the use of textbook depositories in Texas. The proposed amendment to §66.78 also requires publishers to guarantee that textbooks are delivered at least ten days prior to the opening day of school if the textbooks are ordered by a date specified in the sales contract.

Under existing rules, publishers of electronic, visual, or auditory media may choose to provide school districts with representative samples of their programs instead of the complete program. The proposed amendment to §66.101 adds learning systems to the list of programs for which representative rather than complete samples may be provided to schools. Additionally, the proposed amendment to §66.104 allows a school district or open-enrollment charter school to order conforming or nonconforming textbooks for grades above the grade level in which a student is enrolled. The proposed amendment to §66.104 also provides options for school districts that do not receive back-ordered textbooks on a timely basis and allows school districts to order replacement copies of textbooks directly from a publisher's depository or directly from a publisher if the publisher does not maintain a depository in Texas. The proposed amendment to §66.107 adds language related to the requirement that students cover textbooks under the direction of the teacher and the requirement that all textbooks be turned in at the end of the school year or when the student withdraws from school.

Ann Smisko, associate commissioner for curriculum, assessment, and technology, has determined that for the first five-year

period the amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Ms. Smisko has determined that for each year of the first five years the amendments are in effect the public benefit anticipated as a result of enforcing the amendments will be the provision of more up-to-date rules with changes that can improve the textbook adoption and distribution process. There will be no effect on small businesses. There is no anticipated economic cost to persons required to comply with the amendments as proposed.

Comments on the proposal may be submitted to Criss Cloudt, Accountability Reporting and Research, 1701 North Congress Avenue, Austin, Texas 78701, (512) 463-9701. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 475-3499. All requests for a public hearing on the proposed amendments submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register*.

SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §66.10

The amendment is proposed under the Texas Education Code, §31.003, which authorizes the SBOE to adopt rules for the adoption, requisition, distribution, care, use, and disposal of textbooks.

The amendment implements the Texas Education Code, §31.003.

§66.10. Procedures Governing Violations of Statutes -- Administrative Penalties.

(a) Complaints. An official complaint alleging a violation of the Texas Education Code, §31.151, must be filed with the commissioner of education. The commissioner may hold a formal or informal hearing in the case of an apparent violation of statute. Upon determining that a violation has occurred, the commissioner shall report his or her findings to the State Board of Education (SBOE).

(b) Administrative penalties. Under the Texas Education Code, §31.151(b), the SBOE may impose a reasonable administrative penalty against a publisher or manufacturer found in violation of a provision of §31.151(a). An administrative penalty shall be assessed only after the SBOE has granted the publisher or manufacturer a hearing in accordance with the Texas Education Code, §31.151, and the Administrative Procedure Act.

(c) Penalties for failure to correct factual errors.

(1) A factual error shall be defined as a verified error of fact or any error that would interfere with student learning. The context, including the intended student audience and grade level appropriateness, shall be considered.

(2) A factual error repeated in a single item or contained in both the student and teacher components of instructional material shall be counted once for the purpose of determining penalties.

(3) A penalty may be assessed for failure to correct a factual error identified in the list of editorial corrections submitted by a publisher under §66.54(g) of this title (relating to Samples) or for failure to correct a factual error identified in the report of the commissioner of education under §66.63(d) of this title (relating to Report of the Commissioner of Education) and required by the SBOE. The publisher shall provide an errata sheet approved by the commissioner of education with each teacher component of an adopted title.

(4) A penalty not to exceed $3,000 may be assessed for each factual error identified after the deadline established in the proclamation by which publishers must have submitted corrected samples of adopted instructional materials.

(d) Categories of factual errors.

(1) Category 1. A factual error in a student component that interferes with student learning.

(2) Category 2. A factual error in a teacher component only.

(3) Category 3. A factual error in either a student or teacher component that reviewers do not consider serious.

(e) First-year penalties. The base and per-book penalties shall be assessed as follows for failure to correct factual errors described in subsections (c) and (d) of this section.

(1) Category 1 error. $25,000 base plus 1% of sales.

(2) Category 2 error. $15,000 base plus 1% of sales.

(3) Category 3 error. $5,000 base plus 1% of sales.

(f) Second-year penalties. The base and per-book penalties shall be assessed as follows if a publisher, after being penalized for failure to correct factual errors described in subsections (c) and (d) of this section, repeats the violation in the subsequent adoption.

(1) Category 1 error. $30,000 base plus 1% of sales.

(2) Category 2 error. $20,000 base plus 1% of sales.

(3) Category 3 error. $10,000 base plus 1% of sales.

(g) Penalties for failure to deliver adopted instructional materials in a timely manner. The SBOE may assess administrative penalties against publishers who fail to deliver adopted instructional materials in accordance with provisions in the contracts.

(h) Penalties for selling textbooks with factual errors. The SBOE may assess administrative penalties in accordance with the Texas Education Code, §31.151, against a seller of textbooks who knowingly sells textbooks with factual errors.

(i) [~~(h)~~] State Board of Education discretion regarding penalties. The SBOE may, if circumstances warrant, waive or vary penalties contained in this section for first or subsequent violations based on the seriousness of the violation, any history of a previous violation or violations, the amount necessary to deter a future violation, any effort to correct the violation, and any other matter justice requires.

(j) [~~(i)~~] Payment of fines. Each affected publisher shall issue credit to the Texas Education Agency (TEA) in the amount of any penalty imposed under the provisions of this section. When circumstances warrant it, TEA is authorized to require payment of penalties in cash within ten days. Each affected publisher who pays a fine for failure to deliver adopted instructional materials in a timely manner will not be subject to the liquidated damages provision in the publisher's contract for the same failure to deliver adopted instructional materials in a timely manner.

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 November 19, 2001.

TRD-200107118

Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 463-9701

♦ ♦ ♦

SUBCHAPTER B. STATE ADOPTION OF INSTRUCTIONAL MATERIALS

19 TAC §66.28, §66.78

The amendments are proposed under the Texas Education Code, §31.003, which authorizes the SBOE to adopt rules for the adoption, requisition, distribution, care, use, and disposal of textbooks.

The amendments implement the Texas Education Code, §31.003.

§66.28. Adoption by Reference.

~~[(a) The sections titled "Content Requirements" in the 1999 Proclamation of the State Board of Education Advertising for Bids on Instructional Materials are adopted by this reference as the State Board of Education's official rule governing essential knowledge and skills that shall be used to evaluate instructional materials submitted for consideration under Proclamation 1999. A copy of the 1999 Proclamation of the State Board of Education Advertising for Bids on Instructional Materials is available for examination during regular office hours, 8:00 a.m. to 5:00 p.m., except holidays, Saturdays, and Sundays, at the Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701.]~~

(a) [~~(b)~~] The sections titled "Content Requirements" in the 2000 Proclamation of the State Board of Education Advertising for Bids on Instructional Materials are adopted by this reference as the State Board of Education's official rule governing essential knowledge and skills that shall be used to evaluate instructional materials submitted for consideration under Proclamation 2000. A copy of the 2000 Proclamation of the State Board of Education Advertising for Bids on Instructional Materials is available for examination during regular office hours, 8:00 a.m. to 5:00 p.m., except holidays, Saturdays, and Sundays, at the Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701.

(b) The sections titled "Content Requirements" in the 2001 Proclamation of the State Board of Education Advertising for Bids on Instructional Materials are adopted by this reference as the State Board of Education's official rule governing essential knowledge and skills that shall be used to evaluate instructional materials submitted for consideration under Proclamation 2001. A copy of the 2001 Proclamation of the State Board of Education Advertising for Bids on Instructional Materials is available for examination during regular office hours, 8:00 a.m. to 5:00 p.m., except holidays, Saturdays, and Sundays, at the Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701.

§66.78. Delivery of Adopted Instructional Materials.

(a) Under the Texas Education Code (TEC), §31.151, each publisher of adopted instructional materials is required to maintain a depository in this state or arrange with a depository in this state to receive and fill orders for textbooks. Publishers whose products are delivered on-line or are warehoused and shipped from a facility less than 300 miles from the Texas border are not required to maintain a depository in Texas. Publishers who do not maintain a depository in Texas in accordance with TEC, §31.151, must deliver textbooks to a school district or open-enrollment charter school without a delivery charge to the school district, open-enrollment charter school, or state.

~~[(a) Under the Texas Education Code, §31.151, each publisher of adopted instructional materials shall designate one of the depositories approved by the commissioner of education in which a stock of the publisher's adopted instructional materials shall be kept and from which all shipments of the adopted instructional materials to school districts shall be made.]~~

(b) Each publisher is required to have adopted instructional materials in stock and available for distribution to school districts throughout the entire adoption period. A back order is defined as adopted instructional material not in stock when ordered and not available for delivery to school districts or open-enrollment charter schools on the specified shipment date. The commissioner of education shall report the number of back-ordered materials by publisher to the State Board of Education (SBOE).

(c) Each publisher shall guarantee delivery of textbooks at least ten business days before the opening day of school of the year for which the textbooks are ordered if the textbooks have been ordered by a date specified in the sales contract.

(d) [~~(c)~~] Each publisher with instructional materials on back order shall notify affected school districts of the expected ship dates for each title on back order.

(e) [~~(d)~~] Payments from the Texas Education Agency (TEA) for adopted instructional materials shall be made directly to the publisher or to any agent or trustee designated in writing by the publisher.

(f) [~~(e)~~] Any publisher, at its discretion and at least 30 days after notifying the TEA in writing, may change from one depository to another approved depository.

(g) [~~(f)~~] Any request to establish a new depository shall be submitted to the commissioner of education by September 1. The effective date for any new depository shall be April 1 of the year following approval. Each party requesting authority to establish a new depository shall:

(1) present evidence of financial viability adequate to ensure performance of obligations under all contracts on an annual basis;

(2) provide specifications for the warehouse; equipment; as appropriate, evidence of a climate- controlled environment for storage of electronic media; plans for staffing of the proposed depository; and computer capability to receive and process orders and communicate in the automated format specified by the TEA;

(3) submit assurances that a proper stock of instructional materials is available; and

(4) submit a list of publishers under contract with the request.

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 November 19, 2001.

TRD-200107119
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 463-9701

♦ ♦ ♦

SUBCHAPTER C. LOCAL OPERATIONS

19 TAC §§66.101, 66.104, 66.107

The amendments are proposed under the Texas Education Code, §31.003, which authorizes the SBOE to adopt rules for the adoption, requisition, distribution, care, use, and disposal of textbooks.

The amendments implement the Texas Education Code, §31.003.

§66.101. Sample Copies of Instructional Materials for School Districts.

(a) A publisher shall provide each school district and open-enrollment charter school with information that fully describes adopted instructional material. Descriptive information provided to each school district or open-enrollment charter school shall be identical.

(b) Upon request by the textbook coordinator of a school district or open-enrollment charter school, a publisher shall provide one complete sample of adopted instructional materials. Samples of learning systems and electronic, visual, or auditory media may be provided in demonstration or representative format, provided that identical samples are provided to each school district or open-enrollment charter school. Samples of instructional materials provided to school districts shall be labeled, "Sample Copy - Not for Classroom Use."

(c) Samples supplied to school districts shall be provided and distributed at the expense of the publisher. No state or local funds shall be expended to purchase, distribute, or ship sample materials. Publishers may make arrangements with school districts or open-enrollment charter schools to retrieve samples after local selections are completed, but the state does not guarantee return of sample instructional materials.

§66.104. Selection of Instructional Materials by School Districts.

(a) Each local board of trustees of a school district or governing body of an open-enrollment charter school shall adopt a policy for selecting instructional materials. Final selections must be recorded in the minutes of the board of trustees or governing body.

(b) If instructional materials priced above the maximum cost to the state established in the proclamation are selected by a school district or open-enrollment charter school, the school district or open-enrollment charter school is responsible for paying to the publisher the portion of the cost above the state maximum.

(c) If instructional materials for subjects in the enrichment curriculum that are not on the conforming or nonconforming lists adopted by the State Board of Education (SBOE) are selected by a school district or open-enrollment charter school, the state shall be responsible for paying the district an amount equal to the lesser of:

(1) 70% of the cost to the district of the instructional materials. The applicable quota for adopted materials in the subject shall be the basis for determining instructional materials needed by the district; or

(2) 70% of the maximum cost to the state established for the subject. The applicable quota for adopted materials in the subject shall be the basis for determining instructional materials needed by the district.

(d) A school district or open-enrollment charter school that selects non-adopted instructional materials for enrichment subjects is responsible for the portion of the cost of the materials not eligible for payment by the state under subsection (c) of this section. The minutes of the board of trustees or governing body meeting at which such a selection is ratified shall reflect the agreement of the school district or open- enrollment charter school to bear responsibility for the portion of the cost not eligible for payment by the state. A school district or open-enrollment charter school that selects non-adopted instructional materials for enrichment subjects also bears responsibility for providing braille and/or large type versions of the non- adopted instructional materials.

(e) Funds paid by the state under subsection (c) of this section shall be used only for purchasing the non- adopted instructional materials selected and ratified by the board of trustees or governing body.

(f) Non-adopted instructional materials selected and purchased under subsection (c) of this section shall be used by the school district or open-enrollment charter school during the contract period for conforming and nonconforming instructional materials adopted by the SBOE in the subject area.

(g) A report listing instructional materials selected for use in a school district or open-enrollment charter school shall be transmitted to the Texas Education Agency (TEA) no later than April 1 each year.

(h) Only instructional materials ratified by the board of trustees or governing body shall be furnished by the state for use in any school district or open-enrollment charter school. Selections certified to the TEA shall be final and, therefore, shall not be subject to reconsideration during the original contract period or readoption contract periods covering the instructional materials selected.

(i) Except as otherwise provided by statute, requisitions submitted before the first day of school shall be approved based on the maximum number of students enrolled in the district or open-enrollment charter school during the previous school year and/or registered to attend the district during the next school year. Requisitions submitted after the first day of school shall be approved based on the actual number of students enrolled in the district when the requisition is submitted. If two or more titles are selected in a subject, requisitions may be made for a combined total of the selected titles.

(j) Instructional materials requisitioned by, and delivered to, a school district or an open-enrollment charter school shall be continued in use during the contract period or periods of the materials. A school district may not return copies of one title to secure copies of another title in the same subject.

(k) If a school district or open-enrollment charter school does not have a sufficient number of copies of a textbook used by the district or school for use during the following school year, and a sufficient number of additional copies will not be available from the publisher's depository or the publisher within ten business days prior to the opening day of school, the school district or school is entitled to:

(1) be reimbursed from the state textbook fund at a rate not to exceed the actual cost of the used textbooks, or the state maximum cost, whichever is less, for the purchase of a sufficient number of used adopted textbooks; or

(2) return currently used textbooks to the commissioner of education in exchange for sufficient copies, if available from the state textbook depository, of other textbooks on the conforming or nonconforming list to be used during the following school year.

~~[(k) High school instructional materials may be distributed to middle school or junior high school pupils enrolled in high school classes.]~~

(l) In making a requisition, a school district or open-enrollment charter school may requisition textbooks on the conforming and nonconforming list for grades above the grade level in which the student is

enrolled, except that the total quantity of textbooks requisitioned may not exceed a school district's eligibility quota for that subject.

(m) [~~(l)~~] Adopted instructional materials shall be supplied to a pupil in special education classes as appropriate to the level of the pupil's ability and without regard to the grade for which the instructional material is adopted or the grade in which the pupil is enrolled.

(n) A school district or open-enrollment charter school may order replacements for textbooks that have been lost or damaged directly from the textbook depository or the textbook publisher or manufacturer if the textbook publisher or manufacturer does not have a designated textbook depository in this state, in accordance with §66.78(a) of this title (relating to Delivery of Adopted Instructional Materials).

(o) [~~(m)~~] School districts or open-enrollment charter schools shall not be reimbursed from state funds for expenses incurred in local handling of textbooks.

(p) [~~(n)~~] Selection and use of ancillary materials provided by publishers under §66.69 of this title (relating to Ancillary Materials) is at the discretion of each local board of trustees or governing body.

§66.107. Local Accountability.

(a) Each school district or open-enrollment charter school shall conduct an annual physical inventory of all currently adopted instructional materials that have been requisitioned by, and delivered to, the district. The results of the inventory shall be recorded in the district's files. Reimbursement and/or replacement shall be made for all instructional materials determined to be lost.

(b) Each textbook, other than an electronic textbook, must be covered by the student under the direction of the teacher.

(c) [~~(b)~~] After the beginning of every school year, each school district or open-enrollment charter school shall determine if it has surplus instructional materials for any subject area/grade level, based on its current enrollment for the subject area/grade level. Instructional materials determined by the school district or open-enrollment charter school to be surplus-to-quota shall be returned to the State Textbook Depository in accordance with instructions provided by the Texas Education Agency. A school district or open- enrollment charter school is entitled to retain surplus-to-quota instructional materials only when data approved by the Texas Education Agency indicate that students will be enrolled in the subject and a need for the surplus-to-quota instructional materials exists.

(d) [~~(c)~~] When placing orders for instructional materials, school districts and open-enrollment charter schools shall report enrollments as follows:

(1) Annual orders for instructional materials. Enrollments shall be reported based on the maximum number of students enrolled in the district or open-enrollment charter school during the previous school year and/or registered to attend the district during the next school year; and

(2) Supplemental orders for instructional materials. Enrollments shall be reported based on the actual number of students enrolled in the district when the order is submitted.

(e) [~~(d)~~] The Texas Education Agency assumes that enrollments reported by a school district or open-enrollment charter school at the time an order for instructional materials is placed are accurate.

(f) [~~(e)~~] A school district or open-enrollment charter school that orders instructional materials in excess of its eligibility by reporting enrollments above enrollments described in subsection (c)(1) and (2) of this section enters into a contract with the state to purchase the instructional materials supplied that exceed the school district or open-enrollment charter school's eligibility for the subject area/grade level. A school district or open-enrollment charter school may cancel the contract to purchase instructional materials supplied in excess of its eligibility by immediately returning the excess instructional materials to the State Textbook Depository. If prior approval is received, excess instructional materials may also be returned to the publisher's approved depository. A school district or open-enrollment charter school that retains excess instructional materials for more than six months after the beginning of the school year shall reimburse the state at the full price for the excess instructional materials.

(g) All textbooks must be turned in at the end of the school year or when the student withdraws from school.

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 November 19, 2001.

TRD-200107120
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 463-9701

♦ ♦ ♦

PART 7. STATE BOARD FOR EDUCATOR CERTIFICATION

CHAPTER 229. ACCOUNTABILITY SYSTEM FOR EDUCATOR PREPARATION

The State Board for Educator Certification proposes the repeal of §§229.1-229.5 and new §§229.1-229.12, concerning Accountability System for Educator Preparation.

The proposed repeal and new sections will alter some of the procedures for issuing annual accreditation ratings under ASEP, beginning with ratings issued in September 2002. In addition to making adjustments for state accountability purposes, the repeal and replacement will result in a closer alignment of ASEP with federal accountability required under Title II of the Higher Education Act Amendments of 1998 (20 U.S.C. §§1021, *et. seq.*).

In January 2001, SBEC established the ASEP Advisory Committee to make recommendations to the SBEC Board and staff. The advisory committee comprised representatives of a variety of educator preparation programs: public and private university and college programs; traditional and alternative certification programs; and small to large programs. Teachers, administrators, education service centers, business, TEA, and the Coordinating Board were also represented on the advisory committee. The committee meetings were posted on SBEC's website and open to the public. The public also had the opportunity to testify before or to submit written comments to SBEC about the committee's work.

The advisory committee considered, among others, the following major issues and topics: (1) the clarity and continued applicability of current rules and policies; and (2) a review of ASEP in light of its alignment with federal accountability requirements under Title II of the Higher Education Act.

The advisory committee received input from stakeholders through two surveys and other means. In addition, the committee was briefed on the discussions held by the Board at its March and May 2001 meetings, when the Board discussed the committee's draft ideas. SBEC heard no objections when it proposed the new rules at its August 2001 meeting.

Generally, the proposed rules would significantly revise the accountability system beginning with the 2003-2004 ASEP ratings, as described below

(1) (§229.2 and §229.3.) "Program completers" would replace "test takers" as the basis of the accountability ratings. That is, a preparation program's accreditation status would be determined by looking at the certification (ExCET) exam performance of persons who have completed program requirements, but for passing their ExCET exams (e.g., obtained a degree from a college or university program or finished required training at an alternative certification program). Now, programs are held accountable for the test performance of their candidates regardless of whether they have completed the program.

(2) (§229.3 and §229.6.) To coincide with federal Title II reporting, annual accountability ratings would be issued in the spring (April/May) rather than in the fall (September/October). Ratings issued in Spring 2003 would determine programs' accreditation status for the 2003-2004 school year. Coupled with the change to using completer data, the shift from fall to spring reporting of ratings will give programs more notice and opportunity to make improvements before the next reporting cycle ends.

(3) (§229.3.) Use of data for small groups will change. As required by Section 21.045(a) of the Education Code, ASEP data are disaggregated according to ethnicity and gender. Each group (all candidates, and ethnic and gender groups) is required to perform acceptably on either the first-year or final pass rate. Data representing the performance of a small group of individuals or tests, however, must be used with caution for evaluating an educational program. Consequently, the advisory committee extensively discussed the use of such data in ASEP and SBEC agreed with the advisory committee's recommendations, which are represented in the proposed rules.

Under current rules, a "small" group consists of fewer than 30 candidates. Under the proposed rules for Spring 2003 ratings and beyond, a small group would consist of 15 or fewer candidates. If the current pass rate for an ethnic or gender group were acceptable, that performance would be used for accreditation purposes, regardless of the number of candidates in the group. If the group's current pass rate were unacceptable and represented more than 15 candidates, the program would be rated Accredited-Under Review based on the group's low performance. If the group's current pass rate were unacceptable but represented 15 or fewer candidates, the program would be rated Accredited-Under Review only if the previous year's performance for the group was also unacceptable. The program, however, could appeal to the SBEC executive director and Board for reconsideration of that status because of the small number of candidates considered.

Additionally, the proposed amendments would make limited revisions for the 2002-2003 accountability ratings. These changes include the following:

(1) (§§229.1, 229.8-229.12.) Effective Date. Ratings issued in September 2002 would determine programs' accreditation status for the 2002-2003 school year.

(2) (§229.9) Use of Data for Small Groups. For ratings issued only in September 2002, a small group would continue to be fewer than 30 candidates (i.e., "test takers"). In the proposed rules for 2002-2003, data for a small ethnic or gender group (fewer than 30 test takers) will be combined with data from previous year(s) only if the group's performance is unacceptable.

Further, for ratings to be issued for 2002 and 2003 and beyond, the proposed amendments clarify the requirement that an administrator must be appointed by the executive director if the entity is rated Accredited-Under Review for a third consecutive academic year. (§§ 229.6 and 229.11.)

Note on the Text of the Proposed Rules. The sections proposed for amendment may be divided into four major divisions, as shown below:

(1) Section 229.1 contains the general provisions that would become effective February 1, 2002, for both the 2002-2003 ratings as well as those in 2003-2004 and beyond.

(2) Sections 229.2-7 are the ASEP rules that would become effective as of September 1, 2002, and would be used for issuing accreditation ratings in Spring 2003 and later (i.e., for 2003-2004 and beyond).

(3) Sections 229.8-12 are the ASEP rules that would be in effect February 1 through August 31, 2002, and would be used for issuing accreditation ratings only in September 2002 (i.e., for 2002-2003 only).

(4) Following Section 229.12 are the current Chapter 229 rules in their entirety, shown with strikethroughs to indicate their repeal as of January 31, 2002. The current rules will not be used for issuing ratings after September 2001 (i.e., for 2001-2002 only).

Dan Junell, General Counsel has determined that for the first five years the repeal and new rules are in effect, the public would benefit from the amendments to the ASEP rules by ensuring that public school educators are adequately prepared without discouraging preparation programs from admitting candidates who have been historically underrepresented in the profession. The public should incur no additional costs as a result of the implementation of the proposed rules.

Barry Alaimo, Director of Accounting and Financial Operations, has determined that there will be no fiscal implications for state or local governments as a result of enforcing the repeal and new rules.

Interested persons wishing to comment on the proposed rules must submit their comments in writing to Dan Junell, General Counsel, State Board for Educator Certification, 1001 Trinity, Austin, TX 78701-2603, within the 30-day comment period, which begins on the date of publication of this issue of the *Texas Register*. The comments should contain the following title or reference: "Comments on the proposed amendments to ASEP, 19 TAC Ch. 229."

19 TAC §§229.1 -229.5

(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 State Board for Educator Certification or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Education Code (TEC) §21.045, which requires the State Board for Educator Certification (SBEC) to propose rules establishing performance

standards for the Accountability System for Educator Preparation (ASEP). The Board is required to establish rules for the annual review of the accreditation status of each educator preparation program and for the sanction of educator preparation programs. The executive director is required to appoint an oversight team of educators or an administrator, if necessary, to make recommendations and provide assistance to programs that do not meet accreditation standards.

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

§229.1. General Provisions and Purpose of Accountability System.

§229.2. Definitions.

§229.3. The Accreditation Process.

§229.4. Reporting Requirements.

§229.5. Implementation of Accountability System for Educator Preparation.

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 November 19, 2001.

TRD-200107124
Dan Junell
Interim Executive Director
State Board for Educator Certification
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 469-3011

♦ ♦ ♦

19 TAC §§229.1 - 229.12

The new sections are proposed under the Texas Education Code (TEC) §21.045, which requires the State Board for Educator Certification (SBEC) to propose rules establishing performance standards for the Accountability System for Educator Preparation (ASEP). The Board is required to establish rules for the annual review of the accreditation status of each educator preparation program and for the sanction of educator preparation programs. The executive director is required to appoint an oversight team of educators or an administrator, if necessary, to make recommendations and provide assistance to programs that do not meet accreditation standards.

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

§229.1. General Provisions and Purpose of Accountability System.

(a) The State Board for Educator Certification (SBEC) is responsible for establishing standards to govern the continuing accountability of all educator preparation programs. This chapter governs the accreditation of entities that prepare individuals for educator certification.

(b) The purpose of the accountability system for educator preparation is to assure that entities are held accountable for the readiness for certification of individuals completing the programs. An educator preparation program is defined as an entity approved by the State Board for Educator Certification to recommend candidates for certification in one or more certification fields. At a minimum, accreditation is based on the performance of candidates for certification on examinations prescribed under Texas Education Code (TEC) §21.048(a) and beginning educators' performance on the appraisal system for beginning teachers adopted by the Board under TEC §21.045(a). The Board may adopt additional measures. Each entity is required to file an annual report of performance indicators. An entity will receive commendations for success in areas identified by the Board.

(c) The ASEP Advisory Committee is established under TEC §21.040(3) (relating to general powers and duties of Board), §21.041(a) (relating to rules and fees), and §21.045 (relating to accountability system for educator preparation programs) and Government Code Chapter 2110 (relating to advisory committees) for the purpose of providing advice to the Board and executive director and to fulfill duties specified in this chapter.

(1) The advisory committee shall be appointed by the Board and comprise a balanced representation of educator preparation entities, other organizations, and the public, as appropriate.

(2) The executive director shall convene the advisory committee, or a subcommittee thereof, as necessary to complete assigned tasks and to provide ongoing advice concerning accountability and related issues. Members of a subcommittee formed to fulfill duties specified in this chapter shall be appointed by the advisory committee by vote of the committee. After completing an assigned task, the committee shall report to the Board and the executive director within a reasonable time but in no case later than the next regularly scheduled meeting of the Board, unless the executive director grants an extension.

(3) The executive director or a designee shall annually evaluate the advisory committee's work, usefulness, and costs and appropriately report the findings of the evaluation under Government Code Chapter 2110 (relating to advisory committees).

(4) The advisory committee shall be abolished on January 1, 2006, unless continued by amendment providing a different abolishment date.

(d) The standard procedures by which the executive director may sanction an educator preparation program that fails to comply with the provisions of the chapter, up to and including a reduction in the accreditation rating, are described in the "ASEP User's Manual," published May 2000 by the agency, and "Texas Title II Reporting Manual," published May 2001 by the agency.

(e) The following effective dates apply to the implementation of this chapter. Section 229.1 is effective beginning February 1, 2002. Sections 229.2-7 are effective beginning September 1, 2002. Sections 229.8-12 are effective beginning February 1, 2002, and expire August 31, 2002.

§229.2. Definitions.

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

(1) Academic year--September 1 through August 31.

(2) Acceptable--A minimum criterion set by the Board.

(3) Beginning teacher--A person employed in a public school district within two academic years of completion of educator preparation program requirements in an initial teaching field, and who was assigned in his or her field of preparation.

(4) Certification field or area--Professional development (elementary and secondary) and delivery system fields, academic or career and technology content fields, special education fields, specializations, or professional fields in which an entity is approved to offer certification.

(5) Completer cohort--A cohort of candidates who complete an educator preparation program during an academic year. "Completing a program" means the individual satisfied, within that academic

year, the entity requirements for certification in that field. A candidate is designated a "program completer" in a field regardless of whether the individual has taken or passed the certification tests required for that field or the person was recommended by the entity for certification in that field.

(6) Educator preparation program--An entity approved by the Board to recommend candidates in one or more certification fields. For the purposes of this chapter, "program" and "entity" are used interchangeably.

(7) Final pass rate--The percent of tests passed by a completer cohort through the second December 31 following the academic year of completion. The pass rate is based solely on tests required to obtain certification in the field(s) in which the person completed a program during that academic year. The rate reflects a candidate's success on the last attempt made on the test by the second December 31 following the year of completion. Formula: The number of successful (i.e., passing) last attempts made by the cohort divided by the total number of last attempts made by the cohort.

(8) Initial pass rate--The percent of tests passed by a completer cohort through December 31 following the academic year of completion. The pass rate is based solely on tests required to obtain certification in the field(s) in which the person completed a program during that academic year. The rate reflects a candidate's success on the last attempt made on the test by December 31 following the year of completion. Formula: The number of successful (i.e., passing) last attempts made by the cohort divided by the total number of last attempts made by the cohort.

(9) Program data--Data elements reported to meet requirements under TEC §21.045(b) (relating to Annual Performance Reports by Educator Preparation Programs).

§229.3. The Accreditation Process.

(a) Annually, beginning September 1, 1998, an entity must meet the accreditation standards at acceptable levels of performance set by the Board.

(b) An entity shall be rated "Accredited," "Accredited-Under Review," "Not Accredited," or "Accredited-Preliminary Status."

(c) Accreditation ratings shall be based on an entity's performance over the appropriate period under TEC §21.045(d) (Relating to Oversight of Educator Preparation Programs) and shall be issued in the spring of each year to be in effect during the following academic year.

(d) Upon initial approval by the Board of an entity applying to prepare educators for certification, an entity will be rated Accredited-Preliminary Status. Program completers may be recommended for certification while an entity is rated Accredited-Preliminary Status. New entities shall be rated Accredited-Preliminary Status until the first accreditation ratings are issued following the academic year in which one or more of the entity's candidates completes the program; at that point, based on the performance of the completer(s), the entity will be held accountable and shall be rated Accredited or Accredited-Under Review.

(e) An entity is accountable for the performance of all program completers. A candidate is designated a program completer in a field according to whether the entity's requirements for certification have been satisfied, regardless of whether the individual attempted, passed, or failed the certification test(s) required for that field; for identifying candidates as program completers under this chapter, entities are prohibited from considering whether the candidate has taken the appropriate test(s) for certification or the candidate's success or failure on the certification test(s). The pass rates of program completers on examinations and the performance of beginning teachers determine the accreditation rating. The performance on a content-area assessment taken for the first time by a degreed candidate who earned a baccalaureate degree from another entity shall be included in an entity's ASEP performance only if the candidate has taken related college-level coursework and/or other comprehensive pre-service training at the current entity prior to attempting the test; the executive director shall identify the specific content-area assessments applicable to this rule.

(f) Accreditation relating to test performance is based upon initial and final pass rates. The Board shall set the acceptable pass rates and timely advise entities accordingly. In setting the levels for acceptable pass rates, the Board shall consider relevant information including, but not limited to, impact data, the recommendation of the ASEP Advisory Committee, and input received from other sources.

(g) Accreditation of entity

(1) For an entity to be rated Accredited to prepare educators, performance prior to issuance of the rating must be as follows for each demographic group (all students, African American, Hispanic, white, other, male, female):

(A) acceptable initial pass rates or acceptable final pass rates; and

(B) effective following approval by the Board of an appraisal of beginning teachers as required by TEC §21.045(a), acceptable performance on an appraisal of beginning teachers.

(2) Based upon performance required by paragraph (1)(A) of this subsection, an entity rated Accredited-Under Review may request reconsideration of that status by the executive director if the status is based upon ten or fewer completers in the "all students" demographic group. In evaluating the reconsideration request, the executive director shall consider the advice of a subcommittee of members of the ASEP Advisory Committee. The executive director may award the status of Accredited. If the executive director does not award the Accredited status, the entity may request reconsideration by the Board. The Board's decision shall be final.

(3) If the executive director or Board awards the Accredited status under paragraph (2) of this subsection, the executive director shall send a letter to the entity's chief executive officer concerning the low performance and directing the entity to develop an action plan for addressing program deficiencies and improving the performance of candidates in the program. The executive director may prescribe information to be included in the action plan. The action plan must be sent by the chief executive officer of the entity to the executive director no later than 45 calendar days following the entity's receipt of the letter from the executive director.

(4) Based upon performance required by paragraph (1)(A) of this subsection, the performance of a small gender or ethnic group (i.e., a group comprising 15 or fewer completers) shall be used in ASEP according to subparagraphs (A) and (B) of this paragraph.

(A) If the performance of a small gender or ethnic group is acceptable, that performance shall be used in determining the accreditation rating for the entity.

(B) If the performance of a small gender or ethnic group is unacceptable, clauses (i) and (ii) of this subparagraph shall apply based on the performance (initial and final pass rates) of that same gender or ethnic group from the previous completer cohort:

(i) If either the initial or final pass rate of the previous cohort was acceptable, the current cohort's low performance shall not cause the entity to be rated Accredited-Under Review. If the entity

will be rated Accredited, the executive director shall send a letter to the entity's chief executive officer concerning the group's low performance and directing the entity to develop an action plan for addressing program deficiencies and improving the performance of candidates in that group. The action plan must be sent by the chief executive officer of the entity to the executive director no later than 45 calendar days following the entity's receipt of the letter from the executive director.

(ii) Impact of data from small groups:

(I) If both the initial and final pass rates of the previous cohort were unacceptable, the current group's performance shall cause the entity to be rated Accredited-Under Review. However, the entity may request reconsideration of that status by the executive director. In evaluating the reconsideration request, the executive director shall consider the advice of a subcommittee of members of the ASEP Advisory Committee. The executive director may award the status of Accredited. If the executive director does not award the Accredited status, the entity may request reconsideration from the Board. The Board's decision shall be final.

(II) If the executive director or Board awards the entity Accredited status, the executive director shall send a letter to the entity's chief executive officer concerning the group's low performance and directing the entity to develop an action plan for addressing program deficiencies and improving the performance of candidates in that group. The executive director may prescribe information to be included in the action plan. The action plan must be sent by the chief executive officer to the executive director no later than 45 calendar days following the entity's receipt of the letter from the executive director.

(5) The agency shall evaluate the accuracy of an entity's ASEP data and data submitted for the purpose of meeting reporting requirements under Title II of the Higher Education Act, Amendments of 1998, 20 U.S.C. §1021, et. seq. If there are reasonable grounds to believe that the information provided by the entity has been inaccurately or fraudulently reported, the executive director is authorized to conduct an investigation. The entity shall cooperate with the investigation and provide the information and documentation requested by the executive director.

(A) If the entity does not cooperate in the investigation, the executive director may determine the entity's annual accreditation status based on available, accurate data, as determined by the executive director by a preponderance of the evidence.

(B) If, upon investigation, it is determined that ASEP or Title II data submitted by the entity are inaccurate and are not corrected by the entity within the time and in the form set by the executive director, or the data have been fraudulently submitted by the entity, the executive director may sanction the educator preparation program, up to and including a reduction in the accreditation rating.

(h) An entity not meeting ASEP performance standards shall receive the rating of Accredited-Under Review. An entity receiving the rating of Accredited-Under Review for three consecutive years, and which does not meet ASEP standards for a fourth consecutive year, shall be rated Not Accredited for the fourth consecutive and subsequent years, except as provided by subsections (i) and (j) of this section.

(i) If an entity disagrees with its accreditation status, the entity may appeal the accreditation status to the executive director. If the entity does not agree with the executive director's decision, the entity may appeal the decision to the Board. The Board's decision shall be final.

(j) An entity that is rated Not Accredited because of failure to meet ASEP standards shall be rated Not Accredited for at least one academic year. During or subsequent to the year of being rated Not Accredited, the program may apply for reinstatement and the Board may reinstate the program as Accredited-Preliminary Status for the following academic year. If reinstated, the entity shall continue to be rated Accredited-Preliminary Status until the first accreditation rating is issued following the academic year in which one or more of the program's new candidates (i.e., candidates admitted to the program subsequent to the program's reinstatement) completes the program; at that point, based on the performance of the new candidates under ASEP, the program shall be rated Accredited or Accredited-Under Review.

(k) An entity must notify persons enrolled in an educator preparation program of any change of accreditation status. Candidates enrolled in an entity that is rated Accredited-Under Review but then becomes Not Accredited may complete their program and be recommended for certification.

§229.4. Continuing Approval of Certification Field.

(a) This section becomes effective with accreditation ratings issued in spring 2007.

(b) If the performance of the group of "all students" within a certification field represents low performance as demonstrated through both unacceptable initial pass rates and unacceptable final pass rates for three consecutive academic years, and each unacceptable pass rate represents the performance of more than 10 completers, the entity may no longer admit persons for preparation in that field. Candidates already admitted to the program for preparation in that field may continue in the program and be recommended by the entity for certification in that field. An entity may request reconsideration for continuing approval to offer that field from the executive director based on relevant factors if a field is no longer approved.

(c) If the performance of the group of "all students" within a certification field represents low performance as demonstrated through both unacceptable initial pass rates and unacceptable final pass rates for three consecutive academic years, and at least one of the unacceptable initial or final pass rates during the three consecutive academic years represents the performance of 10 or fewer completers, the entity may request reconsideration for continuing approval to offer that field from the executive director.

(d) In evaluating a reconsideration request, the executive director shall consider the advice of a subcommittee of members of the ASEP Advisory Committee. The executive director may reinstate the field. If the executive director does not reinstate the field, the entity may apply to offer certification in that field during or subsequent to the year of loss of approval. The executive director shall consider the entity's overall accreditation status when evaluating the request to reinstate a field or to offer preparation in new fields. The executive director's decision under this section shall be final.

§229.5. Commendations for Success.

An entity may receive commendations for success in identified areas if the entity is rated Accredited. The Board will establish standards for the following areas in which an entity may be commended.

(1) Preparation of persons for high need teaching fields. Based upon the Board's determination of fields of statewide and regional need, a commendation shall be awarded to an entity that successfully prepares a significant proportion of its candidates for certification in the fields of highest need. Areas of need will be established by the Board for periods of five years with the first period beginning September 1, 1997 through September 1, 2002.

(2) Diversity of candidates recommended for certification by an entity. A commendation shall be awarded to an entity meeting either of the following:

(A) The entity recommends for certification a percent of ethnic minority candidates that is commendable based on a comparison with the distribution of the respective groups in the public school student population. The diversity of the student population of either the state or the education service center region in which the entity is located is the basis for the comparison; or

(B) The entity recommends for certification a percent or number of ethnic minority candidates that, when compared to the percent or number of minority candidates recommended by the entity in the one or two academic previous years, shows growth that is commendable.

(3) Certification pass rate. A commendation shall be awarded to an entity that demonstrates success through meeting a designated certification pass rate. Based on the most recent completer cohort, the certification pass rate is the percent of the candidates who completed a program for an initial (base) teacher certification during the academic year that passed all tests required for at least one initial (base) teacher certification. Test performances through December 31 following the year of completion of the program for the initial (base) certificate are used in calculating the certification pass rate.

§229.6. Oversight of Entity Rated Accredited-Under Review.

(a) The executive director of the Board shall appoint an oversight team to make recommendations and provide assistance to an entity that is rated Accredited - Under Review.

(1) The executive director shall notify in writing the chief executive officer of the entity of the appointment of an oversight team.

(2) Members of the oversight team, including the chair, are appointed by the executive director. The entity under review shall be responsible for the reasonable and necessary expenses of the oversight team and, when appropriate, for the expenses of any person assigned to administer and manage the educator preparation program.

(3) With the cooperation of the entity, the oversight team shall collect information about the program and develop strategies for improvement. All recommendations and reports of the progress of the program toward improvement must be provided in writing to the entity and to the executive director. The executive director shall verify whether the entity is attempting to implement the recommendations of the oversight team.

(4) No later than 30 calendar days after receiving the recommendations of an oversight team, the entity shall submit to the executive director an action plan for addressing the recommendations.

(5) No later than May 31 of each year that an entity is Accredited-Under Review, the entity must submit to the executive director a progress report related to the recommendations of the oversight team.

(6) The executive director shall notify Texas public school districts of the change in accreditation status of a certification program.

(b) If, after one year, the executive director determines that an entity rated Accredited-Under Review has not fulfilled the recommendations of the oversight team, the executive director shall appoint a person to administer and manage the operations of the program.

(c) The executive director shall appoint a person to administer and manage the operations of a program that has been rated Accredited-Under Review for two consecutive academic years and will be rated Accredited-Under Review for a third consecutive year.

(d) The executive director shall, based upon the type and severity of the problems of the preparation program, inform the chief executive officer of the entity of the powers and duties a person assigned to administer and manage the program shall have. The powers and duties of the person appointed to administer and manage the program may include overseeing daily programmatic decisions, supervising staff or budget, and making curriculum-related decisions. The administrator may disapprove actions proposed by the program staff.

(e) An entity must achieve acceptable performance, as set by the Board, on standards required for accreditation no later than December 31 during the third academic year of being rated Accredited-Under Review.

(f) Considering input of the oversight team, the executive director may at any time, prior to revocation of an entity's accreditation, request that the Board limit the entity to only preparing candidates for certification in specified fields and collaborate with another entity to fully manage the program.

§229.7. Reporting Requirements.

(a) Each entity must file an annual performance report of its educator preparation program with the Board no later than October 15 following each academic year. The performance report shall comply with statutory requirements.

(b) The annual performance report provides program data that demonstrate the entity's level of attainment on the data elements required or authorized by TEC §21.045(b) (relating to Annual Performance Reports by Educator Preparation Programs). These elements do not affect accreditation status unless adopted by the Board as performance measures.

(c) Program data shall be disaggregated by gender and ethnicity (male, female, African American, Hispanic, white, and other). Program data to be reported by an educator preparation program to the Board for an academic year include information for:

(1) the number of candidates who apply: the number of persons who apply to enter the program, as documented through evidence such as, but not limited to, the candidate's enrollment in professional development courses and other relevant academic coursework or preservice training undertaken to meet program admission requirements;

(2) the number of candidates admitted: the numbers of and identifying information for persons who met all minimum admission criteria of the preparation program and those criteria established by the Board during an academic year;

(3) the number of candidates retained: the numbers of and identifying information for persons who have been admitted and who, during the academic year, were enrolled in coursework, field-based experiences, or other activities undertaken to make progress towards meeting program requirements;

(4) the number of candidates completing the program: the numbers of and identifying information for persons who became program completers during an academic year;

(5) the number of candidates employed in the profession after completing the program: the numbers of and identifying information for persons employed in a public school district in Texas within two academic years of completing a program, who may or may not be assigned in an area in which they completed their program. A person may be assigned in any role requiring a certificate in a Texas public school (both teaching and non-teaching roles).

(6) the number of candidates retained in the profession: the numbers of and identifying information for persons employed in a public school district in Texas within two academic years of completing a program and also employed at five years after completion, who may or may not be assigned in an area in which they completed their program.

A person may be assigned in any role requiring a certificate in a Texas public school (both teaching and non-teaching roles).

§229.8. Definitions.

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

(1) Academic year--September 1 through August 31.

(2) Acceptable--A minimum criterion set by the Board.

(3) Beginning teacher--A person employed in a public school district within two academic years of completion of educator preparation program requirements in an initial teaching field, and who was assigned in his or her field of preparation.

(4) Certification field or area--Professional development (elementary and secondary) and delivery system fields, academic or career and technology content fields, special education fields, specializations, or professional fields in which an entity is approved to offer certification.

(5) Combined pass rate--The combined success of the first-year or cumulative test takers from two or three consecutive academic years. Formula: The sum of the dividends used in calculating each individual academic year's pass rate divided by the sum of the divisors used in calculating each individual academic year's pass rate.

(6) Cumulative (two-year) pass rate--The success of the previous academic year's initial test takers over the two-year period. The rate reflects a candidate's success on the last attempt on that test within the two academic years. Formula: For tests initially attempted during the previous academic year, the number of successful (i.e., passing) last attempts within the two-year academic period divided by the total number of last attempts within the two-year academic period.

(7) Educator preparation program--An entity approved by the Board to recommend candidates in one or more certification fields. For the purposes of this chapter, "program" and "entity" are used interchangeably.

(8) First-year pass rate--Candidates' success on tests during the academic year in which those tests are initially attempted. The rate reflects a candidate's success on the last attempt on that test within the academic year in which the test was taken for the first time. Formula: For tests initially attempted during the current academic year, the number of successful (i.e., passing) last attempts within the year divided by the total number of last attempts.

(9) Program data--Data elements reported to meet requirements under TEC §21.045(b) (relating to Annual Performance Reports by Educator Preparation Programs).

§229.9. The Accreditation Process.

(a) Annually, beginning September 1, 1998, an entity must meet the accreditation standards at acceptable levels of performance set by the Board.

(b) An entity shall be rated "Accredited," "Accredited-Under Review," "Not Accredited," or "Accredited-Preliminary Status."

(c) Accreditation ratings shall be based on an entity's performance over the appropriate period under TEC §21.045(d) (Relating to Oversight of Educator Preparation Programs) and shall be issued in the fall of each year to be in effect during the current academic year.

(d) Upon initial approval by the Board of an entity desiring to prepare educators for certification, an entity will be rated Accredited-Preliminary Status. Program completers may be recommended for certification while an entity is rated Accredited-Preliminary Status. New entities shall be rated Accredited-Preliminary Status until the first accreditation ratings are issued following the academic year in which one or more of the entity's candidates completes the program; at that point, based on the performance of the candidates who completed the program and candidates in the program, the entity will be held accountable and shall be rated Accredited or Accredited-Under Review.

(e) An entity is accountable for the performance of all candidates for certification. Performance on a content-area assessment taken for the first time by a degreed candidate who earned a baccalaureate degree from another entity shall be excluded from an entity's ASEP performance. This exclusion applies only to an individual's first attempt on the content-area assessment for the certificate being sought; subsequent attempts will be used for evaluating an entity's accreditation status under this chapter. For purposes of calculating the first-year pass rate, these individuals' second attempt on the content-area test will be considered their first attempt. The executive director shall identify the specific assessments subject to exclusion under this subsection. Pass rates on examinations and the performance of beginning teachers determine the accreditation rating.

(f) Accreditation relating to test performance will be based upon first-year and cumulative pass rates. In no event shall the first-year or cumulative pass rates provided for in this section be less than 66 2/3%.

(g) Accreditation of entity

(1) For an entity to be rated Accredited to prepare educators, performance for each demographic group (all students, African American, Hispanic, white, other, male, female) must be as follows:

(A) acceptable first-year pass rates or acceptable cumulative pass rates; and

(B) effective following approval by the Board of an appraisal of beginning teachers as required by TEC §21.045(a), acceptable performance on an appraisal of beginning teachers.

(2) Based upon performance required by paragraph (1)(A) of this subsection, an entity rated Accredited-Under Review may request reconsideration of that status by the executive director if the status is based upon less than ten candidates in the "all students" demographic group. In evaluating the reconsideration request, the executive director shall consider the advice of a subcommittee of members of the ASEP Advisory Committee. The executive director may award the status of Accredited. If the executive director does not award the Accredited status, the entity may request reconsideration from the Board. The Board's decision shall be final.

(3) Based upon performance required by paragraph (1)(A) of this subsection, if an ethnic or gender group's current performance is acceptable, the group's current performance shall be used for determining the ASEP rating, regardless of the number of candidates in that group. If the group's current performance is unacceptable and the pass rate represents the performance of 30 or more candidates, the group's current performance shall be used for determining the ASEP rating. If the group's current performance is unacceptable and the pass rate represents the performance of fewer than 30 candidates, the group's current performance shall be combined with data for that same demographic group from one or two prior reporting periods as follows:

(A) The group's current performance shall be combined with the performance of the same group from the previous ASEP report. If the combined performance is acceptable, the combined performance shall be used for determining the ASEP rating, regardless of the number of candidates represented in the combined performance.

(B) If the combined performance is unacceptable and represents the performance of 30 or more candidates, the combined

performance shall be used for determining the ASEP rating. If the combined performance is unacceptable and represents the performance of fewer than 30 candidates, the combined performance shall be combined with data from the second previous ASEP report.

(C) If that resulting combined performance (current performance combined with data from the two previous ASEP reports) is acceptable, then that combined performance shall be used for determining the ASEP rating, regardless of the number of candidates represented in that combined performance. If that resulting combined performance is unacceptable and represents more than 30 candidates, that combined performance shall be used for determining the ASEP rating. If that resulting combined performance is unacceptable, represents fewer than 30 candidates, and would potentially cause the entity to be rated Accredited-Under Review, the entity may request reconsideration of that status by the executive director. In evaluating the reconsideration request, the executive director shall consider the advice of a subcommittee of members of the ASEP Advisory Committee. The executive director may award the status of Accredited. If the executive director does not award the Accredited status, the entity may request reconsideration from the Board. The Board's decision shall be final.

(4) The agency shall evaluate the accuracy of an entity's ASEP data and data submitted for the purpose of meeting reporting requirements under Title II of the Higher Education Act, Amendments of 1998, 20 U.S.C. §1021, *et. seq*. If there are reasonable grounds to believe that the information provided by the entity has been inaccurately or fraudulently reported, the executive director is authorized to conduct an investigation. The entity shall cooperate with the investigation and provide the information and documentation requested by the executive director.

(A) If the entity does not cooperate in the investigation, the executive director may take action against the entity's annual accreditation status based on available, accurate data, as determined by the executive director by a preponderance of the evidence.

(B) If, upon investigation, it is determined that ASEP or Title II data submitted by the entity are inaccurate and are not corrected by the entity within the time and in the form set by the executive director, or the data have been fraudulently submitted by the entity, the executive director may sanction the educator preparation program, up to and including a reduction in the accreditation rating.

(h) An entity not meeting ASEP performance standards shall receive the rating of Accredited-Under Review. An entity receiving the rating of Accredited-Under Review for three consecutive years, and which does not meet ASEP standards for a fourth consecutive year, shall be rated Not Accredited for the fourth consecutive and subsequent years, except as provided by subsections (i) and (j) of this section.

(i) If an entity disagrees with its accreditation status, the entity may appeal the accreditation status to the executive director. If the entity does not agree with the executive director's decision, the entity may appeal the decision to the Board. The Board's decision shall be final.

(j) An entity that is rated Not Accredited because of failure to meet ASEP standards shall be rated Not Accredited for at least one academic year. During or subsequent to the year of being rated Not Accredited, the program may apply for reinstatement and the Board may reinstate the program as Accredited-Preliminary Status for the following academic year. If reinstated, the entity shall continue to be rated Accredited-Preliminary Status until the first accreditation rating is issued following the academic year in which one or more of the program's new candidates (i.e., candidates admitted to the program subsequent to the program's reinstatement) completes the program; at that point, based on the performance of the new candidates under ASEP, the program shall be rated Accredited or Accredited-Under Review.

(k) An entity must notify persons enrolled in an educator preparation program of any change of accreditation status. Candidates admitted to a program rated Accredited-Under Review which becomes Not Accredited may complete their program and be recommended for certification. Any candidate admitted into the certification program during the period that the entity is rated Not Accredited the candidate can not be recommended for certification by that program.

§229.10. Commendations for Success.

An entity may receive commendations for success in identified areas if the entity is rated Accredited. The Board will establish standards for the following areas in which an entity may be commended.

(1) Preparation of persons for high need teaching fields. Based upon the Board's determination of fields of statewide and regional need, the entity successfully prepares a significant proportion, as established by the Board, of its candidates for certification in the fields of highest need. Areas of need will be established by the Board for periods of five years with the first period beginning September 1, 1997 through September 1, 2002.

(2) Diversity of candidates recommended for certification by an entity. A commendation will be awarded to entities meeting either of the following:

(A) The entity recommends for certification a percent of ethnic minority candidates that is commendable based on a comparison with the distribution of the respective groups in the public school student population. The diversity of the student population of either the state or the education service center region in which the entity is located is the basis for the comparison; or

(B) The entity recommends for certification a percent or number of ethnic minority candidates that, when compared to the percent or number of minority candidates recommended by the entity in the one or two previous years, shows growth that is commendable.

§229.11. Oversight of Entity Rated Accredited-Under Review.

(a) The executive director of the Board shall appoint an oversight team to make recommendations and provide assistance to an entity that is rated Accredited-Under Review.

(1) The executive director shall notify in writing the chief executive officer of the entity of the appointment of an oversight team.

(2) Members of the oversight team, including the chair, are appointed by the executive director. The entity under review shall be responsible for the reasonable and necessary expenses of the oversight team and, when appropriate, for the expenses of any person assigned to administer and manage the educator preparation program.

(3) With the cooperation of the entity, the oversight team shall collect information about the program and develop strategies for improvement. All recommendations and reports of the progress of the program toward improvement must be provided in writing to the entity and to the executive director. The executive director shall verify if the entity is attempting to implement the recommendations of the oversight team.

(4) No later than 30 calendar days after receiving the recommendations of an oversight team, the entity shall submit to the executive director an action plan for addressing the recommendations.

(5) No later than May 31 of each year that an entity is Accredited-Under Review, the entity must submit to the executive director a progress report related to the recommendations of the oversight team.

(6) The executive director shall notify Texas public school districts of the change in accreditation status of a certification program.

(b) If, after one year, the executive director determines that an entity rated Accredited-Under Review has not fulfilled the recommendations of the oversight team, the executive director shall appoint a person to administer and manage the operations of the program.

(c) The executive director shall appoint a person to administer and manage the operations of a program that has been rated Accredited-Under Review for two consecutive academic years and will be rated Accredited-Under Review for a third consecutive year.

(d) The executive director shall, based upon the type and severity of the problems of the preparation program, inform the chief executive officer of the entity of the powers and duties a person assigned to administer and manage the program shall have. The powers and duties of the person appointed to administer and manage the program may include overseeing daily programmatic decisions, supervising staff or budget, and making curriculum-related decisions. The administrator may disapprove actions proposed by the program staff.

(e) An entity must achieve acceptable performance, as set by the Board, on standards required for accreditation no later than August 31 of the third year of being rated Accredited-Under Review.

(f) Considering input of the oversight team, the executive director may at any time, prior to revocation of an entity's accreditation, request that the Board limit the entity to only preparing candidates for certification in specified fields and collaborate with another entity to fully manage the program.

§229.12. Reporting Requirements.

(a) Each entity must file an annual performance report of its educator preparation program with the Board no later than October 15 following each academic year. The performance report shall comply with statutory requirements.

(b) The annual performance report provides program data which includes the level of attainment on the data elements required or authorized by TEC §21.045(b) (relating to Annual Performance Reports by Educator Preparation Programs). These indicators do not affect accreditation status unless adopted by the Board as performance measures.

(c) Program data shall be disaggregated by gender and ethnicity (male, female, African American, Hispanic, white, and other). Program data to be reported by an educator preparation program to the Board for an academic year include information for:

(1) the number of candidates who apply: the number of persons who apply to enter the program, as documented through evidence such as, but not limited to, the candidate's enrollment in professional development courses and other relevant academic coursework or pre-service training undertaken to meet program admission requirements;

(2) the number of candidates admitted: the numbers of and identifying information for persons who met all minimum admission criteria of the preparation program and those criteria established by the Board during an academic year;

(3) the number of candidates retained: the numbers of and identifying information for persons who have been admitted and who, during the academic year, were enrolled in coursework, field-based experiences, or other activities undertaken to make progress towards meeting program requirements;

(4) the number of candidates completing the program: the numbers of and identifying information for persons who became program completers during an academic year;

(5) the number of candidates employed in the profession after completing the program: the numbers of and identifying information for persons employed in a public school district in Texas within two academic years of completing a program, who may or may not be assigned in an area in which they completed their program. A person may be assigned in any role requiring a certificate in a Texas public school (both teaching and non-teaching roles).

(6) the number of candidates retained in the profession: the numbers of and identifying information for persons employed in a public school district in Texas within two years of completing a program and also employed at five years after completion, who may or may not be assigned in an area in which they completed their program. A person may be assigned in any role requiring a certificate in a Texas public school (both teaching and non-teaching roles).

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 November 19, 2001.

TRD-200107125
Dan Junell
Interim Executive Director
State Board for Educator Certification
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 469-3011

♦ ♦ ♦

CHAPTER 230. PROFESSIONAL EDUCATOR PREPARATION AND CERTIFICATION SUBCHAPTER J. CERTIFICATION REQUIREMENTS FOR EDUCATORS OTHER THAN CLASSROOM TEACHERS AND EDUCATIONAL AIDES

On August 3, 2001, the State Board for Educator Certification (SBEC) proposed the conforming amendments to repeal the old school administrator certificate rules in 19 TAC Chapter 230, Subchapter J, §§230.304, 230.306, 230.308, 230.313, and 230.314, concerning certification requirements for educators other than classroom teachers and educational aides, that have been superseded by the new principal rules in 19 TAC Chapter 241 and the new superintendent rules in 19 TAC Chapter 242.

SBEC also proposed the repeal of rules in 19 TAC Chapter 230, Subchapter J related to credentials no longer issued, including supervisor, visiting teacher, special education supervisor and visiting teacher, and vocational supervisor. By their own terms, these rules are due to expire on September 1, 2001, and SBEC has decided not to readopt them.

Further, SBEC proposed an amendment to 19 TAC § 232.510(b) creating a new class of certificate for instructional educators other than classroom teachers. The reading specialist certificate would be the only member of this class for now.

19 TAC, Chapter 230, Subchapter J:

Section 230.304 (proposed repeal), relating to professional administrators' certificates (superintendent, principal, and assistant principal).

Superseded by new 19 TAC Chapters 241 and 242, relating to the principal and superintendent certificates, respectively.

Section 230.306 (proposed repeal), relating to the supervisor certificate.

No longer issued. SBEC has already eliminated the assignment criteria for supervisors-districts are not required under SBEC's rules to employ a certified educator to fill this position.

Districts may require whatever certification they deem appropriate for the assignment.

Section 230.308 (proposed repeal), relating to the visiting teacher certificate.

No longer issued. SBEC has already eliminated the assignment criteria for visiting teachers-districts are not required under SBEC's rules to employ a certified educator to fill this position.

Districts may require whatever certification they deem appropriate for the assignment.

Section 230.313 (proposed repeal), relating to the special education supervisor certificate.

No longer issued. SBEC has already eliminated the assignment criteria for special education supervisors-districts are not required under SBEC's rules to employ a certified educator to fill this position.

SBEC's remaining special education teacher certification and other credentials could accommodate any certificate requirements for a special education supervisor under TEA or federal rules (see, e.g., 19 TAC §89.1131, relating to qualifications of special education, related service, and paraprofessional personnel).

Section 230.314 (proposed repeal), relating to the special education visiting teacher certificate.

No longer issued. SBEC has already eliminated the assignment criteria for special education visiting teachers-districts are not required under SBEC's rules to employ a certified educator to fill this position.

SBEC's remaining special education teacher certification and other credentials could accommodate any certificate requirements for a special education visiting teacher under TEA or federal rules (see, e.g., 19 TAC §89.1131, relating to qualifications of special education, related service, and paraprofessional personnel).

Section 230.319(b) (proposed deletion), relating to the vocational supervisor (administrator) certificate.

No longer issued. SBEC has already eliminated the assignment criteria for vocational supervisors-districts are not required under SBEC's rules to employ a certified educator to fill this position.

Districts may require whatever certification they deem appropriate for the assignment.

19 TAC § 232.510(b) (addition), relating to classes of certificates.

Adds to the classes of certificates "instructional educator other than classroom teacher, including reading specialist."

The reading specialist certificate is still issued but is not included in the current list of certificate classes.

By using phrase "instructional educator other than classroom teacher," other certificates like reading specialist will be covered by the listing without having to amend the rule again.

Barry Alaimo, Director of Accounting and Financial Operations, has determined that there will be no fiscal implications for state or local governments as a result of enforcing the repeals and amendment.

Dan Junell, General Counsel has determined that for the first five years the repeals and amendment are in effect, the public would benefit from the sections because they would clarify: (1) what educator certificates are no longer offered; and (2) the nature of the reading specialist certificate. As a result, public schools will be provided clarity as well as flexibility in making educator assignments. The public should incur no additional costs as a result of the implementation of the proposed rules.

Interested persons wishing to comment on the proposed rules must submit their comments in writing to Dan Junell, General Counsel, State Board for Educator Certification, 1001 Trinity, Austin, Texas 78701-2603, within the 30-day comment period, which begins on the date of publication of this issue of the *Texas Register*. The comments should contain the following title or reference: "Comments on the proposed conforming amendments to Certificates for Educators Other Than Classroom Teachers, 19 TAC Chapters 230, Subchapter J and 232, Subchapter M."

19 TAC §§230.304, 230.306, 230.308, 230.313, 230.314

(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 State Board for Educator Certification or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under Texas Education Code (TEC) §21.041(a), which requires SBEC to propose rules for the general administration of TEC Chapter 21, Subchapter B; §21.041(b)(2), which requires SBEC to propose rules that specify the classes of educator certificates to be issued; and §21.041(b)(4), which requires SBEC to specify the requirements for the issuance and renewal of an educator certificate.

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

§230.304. Professional Administrator's Certificates.

§230.306. Supervisor.

§230.308. Visiting Teacher.

§230.313. Special Education Supervisor.

§230.314. Special Education Visiting Teacher.

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 November 19, 2001.

TRD-200107129
Dan Junell
Interim Executive Director
State Board for Educator Certification
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 469-3011

♦ ♦ ♦

19 TAC §230.319

The amendment is proposed under Texas Education Code (TEC) §21.041(a), which requires SBEC to propose rules for the general administration of TEC Chapter 21, Subchapter B; §21.041(b)(2), which requires SBEC to propose rules that specify the classes of educator certificates to be issued; and §21.041(b)(4), which requires SBEC to specify the requirements for the issuance and renewal of an educator certificate.

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

§230.319. Certification Standards for Vocational Education Supportive Professional Personnel.

[~~(a)~~] Vocational counselor certificate. An applicant for a vocational counselor certificate must:

(1) hold a valid Texas counselor certificate;

(2) have completed 12 semester hours of specified vocational guidance courses; and

(3) have satisfied one of the following requirements:

(A) have three years of experience in occupations for which vocational education is being conducted in Texas public secondary schools [~~(may include up to two creditable years of teaching experience, as defined in Subchapter Y of this Chapter (relating to Definitions))~~]; or

(B) have two creditable years of teaching experience in an approved vocational education program adopted by the State Board of Education (SBOE) under the Texas Education Code (TEC), §28.002(b).

[~~(b) Vocational supervisor (administrator) certificate.~~]

[~~(1) An applicant for a vocational supervisor (administrator) certificate must:~~]

[~~(A) hold a bachelor's degree;~~]

[~~(B) hold a valid Texas teacher certificate appropriate for the grade level of the teachers or programs in the supervisory assignment;~~]

[~~(C) have satisfied one or a combination of the following requirements:~~]

[~~(i)~~ ~~have three creditable years of teaching experience, as defined in Subchapter Y of this Chapter, in an approved vocational education program adopted by the SBOE; or~~]

[~~(ii)~~ ~~have three creditable years of public school experience as a certified vocational counselor; and~~]

[~~(D) have completed 30 semester hours in an approved program that includes 18 semester hours in approved vocational supervision courses and 12 semester hours in general supervision or courses designed to support the supervisory role.~~]

[~~(2) An individual who holds a master's degree and was approved on an emergency basis before September 1, 1974, must complete only that part of the program specified in paragraph (1)(D) of this subsection requiring 18 semester hours of approved vocational supervision courses.~~]

[~~(3) An individual approved on an emergency basis after September 1, 1974, must complete the full 30 semester hours in an approved program specified in paragraph (1)(D) of this subsection.~~]

[~~(4) The provisions of this subsection expire on September 1, 2001.~~]

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 November 19, 2001.

TRD-200107130
Dan Junell
Interim Executive Director
State Board for Educator Certification
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 469-3011

SUBCHAPTER N. CERTIFICATE ISSUANCE PROCEDURES

19 TAC §230.436

The State Board for Educator Certification proposes an amendment to §230.436, concerning Schedule of Fees for Certification Services.

On August 3, 2001, SBEC proposed amendments adjusting fees for services to fund the comparability study of other jurisdiction's certification tests under House Bill 1721 (77th Legislature) and the related contingent appropriations rider in the General Appropriations Act for the 2002-2003 biennium. The following rule is proposed for amendment:19 Tex. Admin. Code §230.436, relating to the schedule of fees for certification services.

House Bill 1721 (77th Legislature) will allow SBEC to certify certain educators from other states or countries without requiring them to pass the ExCET tests. Educators from other jurisdictions will not have to take the ExCET tests if they passed credentialing exams that are "similar to" and at least "as rigorous as" the corresponding ExCET exams.

To determine which jurisdictions give tests that will qualify their educators for an ExCET test exemption, SBEC must conduct a comparability study of other jurisdictions' certification exams. To pay for the comparability study and to cover other costs related to implementing H.B. 1721 SBEC must raise additional fee revenue.

Contingent on sufficiently increased fee revenue, the Legislature appropriated $761,688 over the biennium to SBEC for the implementation of H.B. 1721. In the related contingent appropriations rider, the Legislature expressed its intent that SBEC increase fees for out-of-state educators to recover costs and lost revenue from implementing this legislation. By increasing the credential review fee for out-of-state educators from $75 to $175, sufficient revenue will be generated to complete the comparability study of other jurisdictions' credentialing exams and to otherwise cover the cost of implementing H.B. 1721.

The increased fee will apply to all out-of-state applicants. Imposing an increase only on those who would benefit from a test exemption under H.B. 1721 would require imposing a fee of $550 on each out-of-state educator exempted. SBEC believed such a high fee would create an unreasonable barrier for out-of-state educators most likely to be eligible for immediate Texas certification and would violate the intent of the legislation.

Dan Junell, General Counsel, has determined that for the first five year period the amendment is in effect, the public would

benefit from the proposed amendments because the changes would allow SBEC to implement legislation designed to encourage more qualified educators from out-of-state to obtain Texas certification, without imposing an unreasonable financial barrier on those who would be exempted from Texas testing requirements. The public should incur no additional costs as a result of the implementation of the proposed rules.

Barry Alaimo, Director of Accounting and Financial Operations has determined the following fiscal implications: The credential review fee for out-of-state educators from $75 to $175. Excluding certification exam fees, the total cost of certification services to an out-of-state educator who is not exempted from the testing requirement will increase from $200 to $300. The total cost of certification services to an out-of-state educator who is exempted from the testing requirement will be $250. (Because out-of-state educators have not previously been exempted from the testing requirement, there is no similar fee base to compare.)

Interested persons wishing to comment on the proposed rules must submit their comments in writing to Dan Junell, General Counsel, State Board for Educator Certification, 1001 Trinity, Austin, TX 78701-2603, within the 30-day comment period, which begins on the date of publication of this issue of the *Texas Register*. The comments should contain the following title or reference: "Comments on the proposed amendments to Certification Fees, 19 TAC Sec. 230.436."

The amendment is proposed under Texas Education Code (TEC) §21.041(c), which requires the State Board for Educator Certification (SBEC) to propose a rule adopting a fee for the issuance and maintenance of an educator certificate that is adequate to cover the cost of administration of TEC Ch. 21, Subch. B; TEC §21.052(a)(3) (as amended by House Bill 1721, 77th Legislature), which authorizes SBEC to certify educators from other jurisdictions who have passed a certification exam that is similar to and at least as rigorous as the comparable Texas exam; and the General Appropriations Act (77th Legislature), Rider IX-99, §10.60, which requires SBEC to increase certification fees on out-of-state educators to pay for the implementation of House Bill 1721 (77th Legislature).

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

§230.436. Schedule of Fees for Certification Services.

An applicant for a certificate or a school district requesting a permit shall pay the applicable fee from the following list.

(1) [~~Paraprofessional and~~] Standard Educational Aide certificate - $30.

(2) Standard [~~provisional, and professional~~] certificate [~~certificates~~], additional specialization, teaching field, or endorsement/delivery system, based on recommendation by an approved teacher preparation entity or State Board for Educator Certification authorization; or extension or conversion of certificate - $75.

(3) Probationary certificate based on recommendation by an approved teacher preparation entity or Texas public school district - $50.

(4) Duplicate of certificate or change of name on certificate - $45.

(5) [~~Review of credentials requiring analysis and research of college transcripts and/or out-of-state certificate programs (nonrefundable) - $75.~~]

[~~(6)~~] Addition of certification based on completion of appropriate examination - $75.

(6) [~~(7)~~] Review of a credential issued by a jurisdiction other than Texas (nonrefundable) - $175. [~~Initial certificate based on certificate issued by another state department of education (includes the nonrefundable credential review fee of $75) - $125.~~]

(7) Temporary credential based on a credential issued by a jurisdiction other than Texas - $50.

(8) Initial permit reassignment on permit with a change in assignment or school district, renewal is for nonconsecutive years, or renewal of permit on a hardship basis (nonrefundable) - $75.

(9) Renewal in the school district of a permit at the same target certificate level and initial activation, or renewal in the same school district of a temporary classroom assignment permit - no fee.

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 November 19, 2001.

TRD-200107127
Dan Junell
Interim Executive Director
State Board for Educator Certification
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 469-3011

♦ ♦ ♦

CHAPTER 232. GENERAL REQUIREMENTS APPLICABLE TO ALL CERTIFICATES ISSUED

SUBCHAPTER M. TYPES AND CLASSES OF CERTIFICATES ISSUED

19 TAC §232.510

On August 3, 2001, the State Board for Educator Certification (SBEC) proposed an amendment to §232.510(b), concerning types and classes of certificates issued, creating a new class of certificate for instructional educators other than classroom teachers. The reading specialist certificate would be the only member of this class for now.

19 TAC § 232.510(b) (addition), relating to classes of certificates.

Adds to the classes of certificates "instructional educator other than classroom teacher, including reading specialist."

The reading specialist certificate is still issued but is not included in the current list of certificate classes.

By using phrase "instructional educator other than classroom teacher," other certificates like reading specialist will be covered by the listing without having to amend the rule again.

Barry Alaimo, Director of Accounting and Financial Operations, has determined that there will be no fiscal implications for state or local governments as a result of enforcing the amendment.

Dan Junell, General Counsel has determined that for the first five years the amendment is in effect, the public would benefit from the sections because it would clarify: (1) what educator certificates are no longer offered; and (2) the nature of the reading specialist certificate. As a result, public schools will be provided clarity as well as flexibility in making educator assignments. The

public should incur no additional costs as a result of the implementation of the proposed rules.

Interested persons wishing to comment on the proposed rules must submit their comments in writing to Dan Junell, General Counsel, State Board for Educator Certification, 1001 Trinity, Austin, Texas 78701-2603, within the 30-day comment period, which begins on the date of publication of this issue of the *Texas Register*. The comments should contain the following title or reference: "Comments on the proposed conforming amendments to Certificates for Educators Other Than Classroom Teachers, 19 TAC Chapters 230, Subchapter J and 232, Subchapter M."

The amendment is proposed under Texas Education Code (TEC) §21.041(a), which requires SBEC to propose rules for the general administration of TEC Chapter 21, Subchapter B; §21.041(b)(2), which requires SBEC to propose rules that specify the classes of educator certificates to be issued; and §21.041(b)(4), which requires SBEC to specify the requirements for the issuance and renewal of an educator certificate.

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

§232.510. Classes of Certificates.

(a) "Class of certificates" means a certificate with the following characteristics:

(1) specific job duties or functions are associated with the certificate;

(2) standards are established by the board for the issuance of the certificate; and

(3) a comprehensive examination is prescribed by the board for the certificate.

(b) Classes of certificates include the following:

(1) superintendent;

(2) principal;

(3) classroom teacher;

(4) instructional educator other than classroom teacher, including reading specialist;

(5) [~~(4)~~] master teacher, including master reading teacher;

(6) [~~(5)~~] school librarian;

(7) [~~(6)~~] school counselor;

(8) [~~(7)~~] educational diagnostician; and

(9) [~~(8)~~] educational aide.

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 November 19, 2001.

TRD-200107131
Dan Junell
Interim Executive Director
State Board for Educator Certification
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 469-3011

♦ ♦ ♦

TITLE 22. EXAMINING BOARDS

PART 5. STATE BOARD OF DENTAL EXAMINERS

CHAPTER 110. ENTERAL CONSCIOUS SEDATION

22 TAC §110.2

The State Board of Dental Examiners proposes amendments to §110.2, Permit. New subsection (b) (1) and (2) was added to comply with the provisions of SB 539, Section 258.157, 77th Legislature, 2001, dealing with enteral administration of anesthesia, providing that a dentist may request an on-site office inspection and advisory opinion.

Jeffry R. Hill, Executive Director, State Board of Dental Examiners, has determined for the first five-year period the amended rule is in effect there will be no fiscal implications for local government as a result of enforcing or administering the rule, but state government will be impacted. The agency estimated the cost to perform office inspections to be $10,000 for the biennium and such funds have been appropriated and licensing fees have been increased to cover that amount.

Mr. Hill also has determined that for each year of the first five years the amended rule is in effect the public benefit anticipated as a result of amending the rule is that a procedure to implement statutory provisions allowing a dentist to request an on-site office inspection and an advisory opinion will be in effect.

The fiscal implications for small or large businesses will be minimal or none at all. Therefore the SBDE has determined that compliance with the proposed amended rule will not have an adverse economic impact on small businesses when compared to large businesses.

Comments on the proposal may be submitted to Mei Ling Clendennen, Assistant Executive Director, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512-463-6400). To be considered, all written comments must be received by the State Board of Dental Examiners on or before December 30, 2001.

The amended rule is proposed under Texas Government Code §2001.021 et.seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry and Senate Bill 539, 77th Legislature, 2001, which requires the Board to adopt rules for the administration of enteral conscious sedation.

The proposed amended rule does not affect other statutes, articles, or codes.

§110.2. Permit.

(a) A dentist licensed to practice in Texas who desires to use enteral conscious sedation either, must have a parenteral conscious sedation anesthesia permit or a deep/general sedation anesthesia permit issued pursuant to board rule or must obtain an enteral conscious sedation permit from the State Board of Dental Examiners. A permit is not required for administration of Schedule II drugs prescribed for pain control.

(1) A permit may be obtained by completing an application form approved by the State Board of Dental Examiners, a copy of which may be obtained from the SBDE.

(2) The application form must be filled out completely and appropriate fees paid.

(3) Prior to issuance of a sedation/anesthesia permit the Board may require that the applicant undergo a facility inspection or further review of credentials. The SBDE may direct an Anesthesia Consultant, appointed pursuant to board rule to assist in this inspection or review. The applicant will be notified in writing if an inspection is required and provided with the name of an Anesthesia Consultant who will coordinate the inspection. The applicant must make arrangements for completion of the inspection within 180 days of the date the notice is mailed. An extension of no more than 90 days may be granted if the designated Anesthesia Consultant requests one.

(4) An applicant for a sedation/anesthesia permit must be licensed and in good standing with the State Board of Dental Examiners. For purposes of these rules "good standing" means that a licensee is not suspended, whether or not the suspension is probated. Applications from licensees who are not in good standing will not be approved.

(b) The Board may consider a request by a dentist for an on-site inspection. The Board may, in its discretion and on payment of a fee in an amount established by the Board, conduct the inspection and issue an advisory opinion.

(1) An advisory opinion issued by the Board under this section is not binding on the Board, and the Board, except as provided by paragraph (2) may take any action in relation to the situation addressed by the advisory opinion that the Board considers appropriate.

(2) A dentist who requests and relies on an advisory opinion of the Board may use the opinion as mitigating evidence in an action or proceeding to impose an administrative penalty. The Board, as appropriate, shall take proof of reliance on an advisory opinion into consideration and mitigate the imposition of administrative penalties accordingly.

(c) [~~(b)~~] Once a permit is issued, the State Board of Dental Examiners upon payment of required fees shall automatically renew the permit annually unless after notice and opportunity for hearing the Board finds the permit holder has, or is likely to provide anesthesia/sedation services in a manner that does not meet the minimum standard of care. At such hearing the Board shall consider factors including patient complaints, morbidity, mortality, and anesthesia consultant recommendations.

(d) [~~(c)~~] Annual dental license renewal certificates shall include the annual permit renewal, except as provided for in subsection (c) [~~(b)~~] of this section and shall be assessed an annual renewal fee of $5.00 payable with the license renewal. New permit fees are $28.75 payable with the application for permit.

(e) [~~(d)~~] Permit Restrictions: the Board may elect to issue a temporary enteral conscious sedation permit which will expire on a date certain. A full sedation/anesthesia permit may be issued after the dentist has complied with requests of the Board which may include, but shall not be limited to, review of the dentist's anesthetic technique, facility inspection and/or review of patient records to ascertain that the minimum standard of care is being met. If a full permit is not issued, the temporary permit will expire on the stated date, and no further action by the State Board of Dental Examiners will be required, and no hearing will be conducted.

(f) [~~(e)~~] Educational/Professional Requirements:

(1) To become permitted to administer enteral conscious sedation, the dentist must satisfy one of the following criteria:

(A) must have completed training consistent with that described in Part I or Part III of the American Dental Association (ADA) Guidelines for Teaching the Comprehensive Control of Pain and Anxiety in Dentistry, and have documented administration of enteral conscious anesthesia/sedation in a minimum of five cases;

(B) must have completed an ADA accredited post-doctoral training program which affords comprehensive and appropriate training necessary to administer and manage enteral conscious sedation;

(C) must have completed the two-day conscious sedation course in Pediatric Dentistry approved and developed by the American Academy of Pediatric Dentistry; or

(D) must have completed a two day enteral conscious sedation course approved by the SBDE.

(2) The following shall apply to the administration of enteral conscious sedation in the dental office:

(A) the operating dentist must complete at least every three years appropriate Continuing Education in enteral conscious sedation.

(B) the operating dentist and his/her clinical staff must maintain current certification in basic cardiopulmonary resuscitation given by the American Heart Association or the American Red Cross.

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 November 16, 2001.

TRD-200107085
Jeffry Hill
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 463-6400

22 TAC §110.4

The State Board of Dental Examiners proposes amendments to §110.4, Effective Date. The rule is amended by adding new subsection (a) and (b) to provide that dentists who wish to enteral conscious sedation must obtain a permit from the Board not later than September 1, 2002. The date is extended from December 31, 2001 to September 1, 2002.

Jeffry R. Hill, Executive Director, State Board of Dental Examiners, has determined for the first five-year period the amended rule is in effect there will be no fiscal implications for local or state government as a result of enforcing or administering the rule.

Mr. Hill also has determined that for each year of the first five years the amended rule is in effect the public benefit anticipated as a result of amending the rule is that a procedure to implement statutory provisions requiring that a dentist who administers enteral conscious sedation must be permitted to do so not later than September 1, 2002 will be in effect.

The fiscal implications for small or large businesses will be minimal or none at all. Therefore the SBDE has determined that

compliance with the proposed amended rule will not have an adverse economic impact on small businesses when compared to large businesses.

Comments on the proposal may be submitted to Mei Ling Clendennen, Assistant Executive Director, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512-463-6400). To be considered, all written comments must be received by the State Board of Dental Examiners on or before December 30, 2001.

The amended rule is proposed under Texas Government Code §2001.021 et.seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry and Senate Bill 539, 77th Legislature, 2001, which requires the Board to adopt rules for the administration of enteral conscious sedation.

The proposed amended rule does not affect other statutes, articles, or codes.

§110.4. Effective Date.

(a) As provided by this section, each dentist who administers enteral conscious sedation or performs a procedure for which anesthesia is enterally administered under the provisions of rules 110.1, 110.2 and 110.3 of this title (relating to Enteral Conscious Sedation), must be authorized by permit from the Board no later than September 1, 2002.[~~Unless specifically provided otherwise, the provisions of rules 110.1, 110.2 and 110.3 of this title (relating to Enteral Conscious Sedation) will become effective December 31, 2001.~~]

(b) A dentist not satisfying the requirements established by rules 110.1, 110.2 and 110.3 of this title (relating to Enteral Conscious Sedation) and not eligible for issuance of a permit by the Board by September 1, 2002, shall not administer enteral conscious sedation or perform a procedure by which anesthesia is enterally administered until he or she has satisfied the requirements of this section and authorized by permit from the Board to do so.

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 November 16, 2001.

TRD-200107086
Jeffry Hill
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 463-6400

♦ ♦ ♦

PART 22. TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY

CHAPTER 501. RULES OF PROFESSIONAL CONDUCT

SUBCHAPTER A. GENERAL PROVISIONS

22 TAC §501.53

The Texas State Board of Public Accountancy (Board) proposes an amendment to §501.53, concerning Applicability of Rules of Professional Conduct.

The amendment to §501.53 will remove language that is no longer referenced by the Public Accountancy Act, due to amendments to the Act.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendment will be zero because the change to the rule has no substantive effect.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendment will be zero because the change to the rule has no substantive effect.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be zero because the change to the rule has no substantive effect.

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be increased rule administrative efficiency due to the removal of incorrect language from the rule.

The probable economic cost to persons required to comply with the amendment will be zero because the change to the rule has no substantive effect.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

The Board requests comments on the substance and effect of the proposed amendment from any interested person. Comments must be received at the Board no later than noon on December 10, 2001. Comments should be addressed to Amanda G. Birrell, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701 or faxed to her attention at (512) 305-7854.

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses because the rule will have no substantive effect.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small business; if the amendment is believed to have such an effect, then how may the Board legally and feasibly reduce that effect considering the purpose of the statute under which the amendment is to be adopted; and if the amendment is believed to have such an effect, how the cost of compliance for a small business compares with the cost of compliance for the largest business affected by the amendment under any of the following standards: (a) cost per employee; (b) cost for each hour of labor; or (c) cost for each $100 of sales. See Texas Government Code, §2006.002(c).

The amendment is proposed under the Public Accountancy Act, Texas Occupations Code, §901.151 (Vernon 2001) which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

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

§501.53. Applicability of Rules of Professional Conduct

(a) (No change.)

(b) No certificate or registration holder [~~A licensee employed exclusively in the industry or government practice of public accountancy~~] shall [~~not~~] issue, or [~~nor~~] otherwise be associated with, financial statements that do not conform to the accounting principles described in Section 501.61 of this title (relating to Accounting Principles).

(c) The following rules of professional conduct shall apply to and be required to be observed by certificate or registration holders when not employed [~~exclusively~~] in the client [~~industry or government~~] practice of public accountancy[~~, and to certificate or registration holders not engaged in the practice of public accountancy~~]:

(1) - (8) (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 November 16, 2001.

TRD-200107079
William Treacy
Executive Director
Texas State Board of Public Accountancy
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 305-7848

♦ ♦ ♦

SUBCHAPTER E. RESPONSIBILITIES TO THE BOARD/PROFESSION

22 TAC §501.93

The Texas State Board of Public Accountancy (Board) proposes an amendment to §501.93, concerning Responses.

The amendment to §501.93 will make explicit the Board's authority to depose a party to a contested case at the Board's offices in Austin, Texas as set out in the Texas Rules of Civil Procedure for civil cases.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendment will be decreased because the costs of deposing a party in Austin, Texas are less than traveling to another city.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendment will be decreased because the costs of deposing a party in Austin, Texas are less than traveling to another city.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be zero because this rule amendment has no effect on state revenue.

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be decreased costs to the state by holding depositions in Austin, Texas of parties to contested cases.

The probable economic cost to persons required to comply with the amendment will not be increased because the Texas Rules of Civil Procedure for civil cases are currently applied to a contested case. The Board is unable to quantify the total dollar amount because of the many variables associated with travel and sources of complaints.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

The Board requests comments on the substance and effect of the proposed amendment from any interested person. Comments must be received at the Board no later than noon on December 10, 2001. Comments should be addressed to Amanda G. Birrell, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701 or faxed to her attention at (512) 305-7854.

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses because the rule mirrors the Texas Rules of Civil Procedure, which are already used in contested administrative cases.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small business; if the amendment is believed to have such an effect, then how may the Board legally and feasibly reduce that effect considering the purpose of the statute under which the amendment is to be adopted; and if the amendment is believed to have such an effect, how the cost of compliance for a small business compares with the cost of compliance for the largest business affected by the amendment under any of the following standards: (a) cost per employee; (b) cost for each hour of labor; or (c) cost for each $100 of sales. See Texas Government Code, §2006.002(c).

The amendment is proposed under the Public Accountancy Act, Texas Occupations Code, §901.151 (Vernon 2001) which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

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

§501.93. Responses.

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

(d) An applicant, certificate or registration holder who is a party to a contested case in a disciplinary action brought by the board may be deposed at the board's offices in 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 November 16, 2001.

TRD-200107080
William Treacy
Executive Director
Texas State Board of Public Accountancy
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 305-7848

♦ ♦ ♦

TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 31. LIQUIDATION

SUBCHAPTER C. AUDIT COVERAGES REQUIRED FOR GUARANTY ASSOCIATIONS

28 TAC §§31.201 - 31.207

The Texas Department of Insurance proposes new §§31.201--31.207 concerning the requirements for, and audit coverages applicable to, each guaranty association established under Insurance Code Articles 9.48, 21.28-C and 21.28-D. The sections are required by Insurance Code Article 21.28 §12(j) which directs the commissioner to adopt rules prescribing the audit coverage required for each guaranty association established under Insurance Code Articles 9.48, 21.28C and 21.28D. The sections are necessary to provide guidance to the guaranty associations on the types and scope of audits, as well as their frequency, and to enhance the oversight of the guaranty fund associations by the Commissioner of Insurance. Proposed §31.201 and §31.202 state the purpose and applicability of the subchapter. Proposed §31.203 requires competitive bidding for auditors and periodic rotation of auditors. Proposed §31.204 prescribes the nature of the audits to be performed. Proposed §31.205 provides for the scope and frequency of the audits. Proposed §31.206 contains the audit reporting requirements, and proposed §31.207 determines the manner of reimbursing audit costs.

Betty Patterson, CPA, AFE, Senior Associate Commissioner, Financial Program, has determined that, for the first five-year period the proposed sections will be in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering these sections. There will be no effect on local employment or local economy.

Ms. Patterson also has determined that, for each year of the first five years the proposed sections are in effect, the public benefit anticipated as a result of enforcing the sections will be more effective audits and oversight of the guaranty associations. Because the proposed sections are required by Insurance Code Article 21.28, §12(j), any costs of compliance with the rule are a result of the statute, and not as a result of the enforcement or administration of the rule. The costs of audits required by the provisions of these proposed sections are to be assessed against the audited entity. However, any costs related to the audits will be nominal in relationship to the benefits to taxpayers because the performance of routine audits promotes effectiveness and efficiency, and also may result in further anticipated cost savings. Based on information furnished by the guaranty associations, the cost of financial audits performed recently have ranged from $2,500 to $13,000. The cost of the annual financial audit of the Title Insurance Guaranty Association was approximately $2,500. The cost of the annual financial audit of the Life, Accident, Health and Hospital Service Insurance Guaranty Association was approximately $9,500. The cost of the annual financial audit of the Property and Casualty Insurance Guaranty Association was approximately $13,000. Audits of receivership estates ranged from $9,000 to $13,000. The cost of other audits will vary. Generally, auditing firms charge from $75 an hour to $120 an hour for work performed, depending on the experience of the personnel performing the audit. The guaranty associations, which are not-for-profit entities, are not small or micro businesses, therefore, there is no requirement that a small business economic analysis be performed.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on December 31, 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 Betty Patterson, CPA, AFE, Senior Associate Commissioner, Financial Program, MC 305-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. A request for a public hearing on the proposal should be submitted separately to the Office of the Chief Clerk.

These sections are proposed under the Insurance Code Article 21.28 and §36.001. Article 21.28 §12(j) authorizes the commissioner to adopt rules related to the scope, frequency, reporting requirements and costs of audits for each guaranty association established under Articles 9.48, 21.28-C, or 21.28-D of the Insurance Code. Section 36.001 provides the commissioner with the authority to adopt rules for the conduct and execution of the duties and functions of the department only as authorized by statute.

The following are the articles of the Insurance Code that are affected by these sections: Articles 9.48, 21.28, 21.28-C, and 21.28-D.

§31.201. Purpose.

The purpose of this subchapter is to prescribe the audit requirements for, and audit coverages applicable to, the Title Insurance Guaranty Association established under the Insurance Code Article 9.48; the Property and Casualty Insurance Guaranty Association established under the Insurance Code Article 21.28-C; and the Life, Accident, Health and Hospital Service Insurance Guaranty Association established under the Insurance Code Article 21.28-D.

§31.202. Applicability.

The provisions of this subchapter apply to any guaranty association established under the Insurance Code, Articles 9.48, 21.28-C and 21.28-D.

§31.203. Qualification of Accountant.

The independent certified public accountant for the financial audit required by §31.204(1) of this title (relating to the Nature of Audits) must be selected by a competitive process. An independent certified public accountant may not perform the financial audit required by §31.204(1) for more than seven consecutive years. An independent certified public accountant responsible for performing the financial audit for seven consecutive years may not perform the financial audit during the two years following the seventh year.

§31.204. Nature of Audits.

Audits applicable to the guaranty associations subject to the provisions of this subchapter shall take the form of financial, performance or operational audits, and may include, but not be limited to, the types of audits which are described in paragraphs (1)-(5) of this section.

(1) Financial audits. The financial audit shall be undertaken annually by an independent certified public accountant to determine whether the financial statements of the audited entity present fairly the financial position and the results of financial operations in accordance with generally accepted accounting principles. The financial audits shall be conducted in accordance with generally accepted auditing standards.

(2) Compliance audit. A compliance audit may be undertaken to determine whether the following objectives are being met:

(A) the audited entity has obligated, expended, received, and used funds in accordance with the purpose for which those funds have been authorized by law;

(B) the audited entity has obligated, expended, received, and used funds in accordance with any limitations, restrictions, conditions, or mandatory directions imposed by law on those obligations, expenditures, receipts, or uses;

(C) the audited entity has maintained its books, records, and accounts in a manner which accurately reflects its financial and fiscal operations relating to the obligation, receipt, expenditure, and use of funds including, but not limited to, funds collected for a public purpose;

(D) the audited entity has collected all revenues and receipts in accordance with the applicable laws and regulations of this state; and

(E) the audited entity has properly and legally handled or administered any money, negotiable securities, or similar assets received in accordance with the entity's governing statute.

(3) Economy and efficiency audit. An economy and efficiency audit may be undertaken to determine whether the objectives set out in subparagraphs (A) and (B) of this paragraph are being met and such audit shall make the identifications set out in subparagraph (C) of this paragraph, as follows:

(A) the audited entity is managing or utilizing its resources, including funds, personnel, contractors and subcontractors, consultants, procurement of professional services, property, equipment, and space, in an economical and efficient manner;

(B) the audited entity has presented financial, program, and statistical reports in a fair manner, and such reports contain useful data; and

(C) the causes of inefficiencies or uneconomical practices, including inadequacies in management information systems, internal and administrative policies and procedures, purchasing, procurement and contracting practices, organizational structure, use of personnel, contractors, equipment and other resources, have been identified.

(4) Effectiveness audit. An effectiveness audit may be undertaken to determine whether the following objectives are being met:

(A) the audited entity is attaining program objectives established pursuant to statutes and regulations, or by program criteria or program evaluation standards applicable to it, in an efficient and effective manner;

(B) the audited entity is contributing to achievement of those benefits intended by program design in an efficient and effective manner;

(C) the audited entity is discharging its duties and responsibilities under statutes and regulations or according to program performance criteria or program evaluation standards applicable to it in an efficient and effective manner; and

(D) the audited entity is performing its duties and responsibilities in connection with a program which does not duplicate, overlap, or conflict with the duties, functions, and responsibilities of another entity with respect to the same program, or with another program designed and intended to be applied to the same persons served by the audited entity.

(5) Other audits. Nothing in these sections shall preclude the commissioner from ordering any entity subject to the provisions of this subchapter to submit to a special audit upon a determination that facts and circumstances warrant such audit.

§31.205. Scope and Frequency of Audits.

(a) Annual audit required. Each guaranty association subject to the provisions of this subchapter shall undergo an annual financial audit at the end of each calendar year as required by §31.204(1) of this title (relating to Nature of Audits).

(b) Audit plan. The boards of directors of each guaranty association subject to the provisions of this subchapter shall annually adopt an audit plan. In developing the plan, the boards shall consider utilizing the audits described in §31.204(2) - (4). The plan may be modified at the discretion of the boards. The plan and any modifications of the plan shall be filed with the commissioner.

(c) Commissioner may order audit. No provision of this subchapter prohibits or precludes the commissioner from ordering any entity subject to the provisions of this subchapter to submit to one or more of the types of audits, as set out in §31.204 at a frequency determined by the commissioner, based upon facts and circumstances.

§31.206. Audit Reporting Requirements.

(a) Report required. A written report shall be prepared in connection with any audit authorized or required pursuant to this subchapter.

(b) Contents of report. The written report must include a management letter containing the following items, as applicable:

(1) the criteria selected to measure effectiveness and efficiency;

(2) internal controls;

(3) compliance with state or federal laws;

(4) conditions found by auditors and the effects of such conditions; and

(5) any recommendations for improving operations or program effectiveness.

(c) The report also must include an opinion on fair presentation of financial statements when included as part of the scope of the audit.

(d) Supplemental items to be reported. The auditing entity's report should also include, to the extent necessary, each of the following items:

(1) an analysis of the overall performance of the entity being audited;

(2) an analysis of the audited entity's financial operations and condition; and

(3) an analysis of receipts and expenditures made by each audited entity.

(e) Filing requirements for audits. Copies of the auditing entity's report shall be filed with the Commissioner of Insurance no later than 30 days after the audits are presented to the board of directors of the audited guaranty association. Any response to the report by the board of directors must be simultaneously submitted to the commissioner.

(f) This subchapter shall not apply to audits made by the Office of the State Auditor.

§31.207. Cost of Audits.

The cost of audits required by this subchapter shall be paid by the audited 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 November 19, 2001.

TRD-200107135
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 463-6327

♦ ♦ ♦

PART 2. TEXAS WORKERS' COMPENSATION COMMISSION

CHAPTER 120. COMPENSATION PROCEDURE-EMPLOYERS

28 TAC §120.4

The Texas Workers' Compensation Commission (commission) proposes new §120.4 concerning Employer's Wage Statement. This new rule is proposed concurrently with amendments to §128.2 of this title, concerning Carrier Presumption of Employee's Wage; Employer Wage Statement Required (proposed to be retitled "Carrier Presumption of Employee's Average Weekly Wage").

House Bill 2600 (HB-2600), passed by the 77th Texas Legislature, amended Texas Labor Code Chapter 408 by adding §408.0446 which establishes special criteria for determining the amount of income benefits due a school district employee injured on the job and amended §408.042 to address employees with multiple employment. Employees can now report wages from other jobs they held at the time of injury to influence the average weekly wage (AWW). The commission is required to specify by rule how this other wage information is to be collected and distributed.

Existing §128.2 includes the current requirements for an employer's reporting of wage information. However, these requirements are included with carrier responsibilities for determining the AWW in the absence of a properly completed wage statement. The fact that it mixes concepts makes the rule confusing.

To improve the clarity of the rules, the Commission proposes removing language in existing §128.2 and placing those duties in proposed new §120.4. The idea of relocating the Employer's Wage Statement requirements to this chapter will assist employers in easily locating the information regarding their responsibilities as established by the Workers' Compensation Rules. A reference in §128.2(a) to new §120.4 is proposed.

The Commission is proposing new §122.5 of this title (relating to Employee's Multiple Employment Wage Statement) that will describe how the employee can report wages from multiple employment to the commission and carrier. This rule is proposed to be placed in chapter 122 because this is the chapter that outlines the employee's reporting duties.

Additionally, §120.4 incorporates into rule, long-standing commission policies regarding the wage statement.

Proposed New §120.4 - Employer's Wage Statement.

Proposed subsection (a) specifies that an employer is required to timely file a complete wage statement rather than just a signed wage statement. This amendment clarifies a long-standing policy of the agency that filing an incomplete or incorrect wage statement does not constitute timely filing.

Proposed subsection (a) also specifies that "filed" means "received." The employer may determine the most appropriate means of delivering the wage statement to the employee and the insurance carrier and is responsible for ensuring and documenting timely delivery.

Proposed subsection (a) specifies the circumstances that require the filing of a Wage Statement, the time to file, and the parties to receive it. The circumstances, time frames, and parties are identical to those in the current rule with one exception. Under the current rule, filing the wage statement on claims with little or no disability but where there is impairment has presented problems. The current rule says that employers are to file a wage statement within 30 days of the employee accruing benefits. For cases where the employee accrues temporary income benefits (TIBs) this is relatively easy because employers can count the days off of work and assume they represent days of disability. In claims where the employee does not accrue TIBs but does accrue impairment income benefits (IIBs), an employer may not be aware of the duty to file a Wage Statement. IIBs accrue on the day after the employee reaches maximum medical improvement (MMI) with an impairment rating greater than 0% (which is generally not reported to the employer). Thus an employee can become entitled to IIBs (necessitating the filing of the Wage Statement) without the employer knowing. To resolve this issue, the proposed rule specifies that the employer is to file the Wage Statement within 30 days of being notified that the employee is entitled to IIBs.

Proposed subsection (b) addresses issues associated with filing the report. The subsection provides carriers and employers the option of agreeing to allow the employer to verbally file the Wage Statement with the carrier. The carrier can also agree to send the written copy of the required report to other parties for the employer (as they often do now). However, the employer remains responsible for ensuring timely delivery of the report and has the burden of proof in establishing that the report was timely filed. Therefore, the rule suggests (but does not require) that employers file their reports by a verifiable means of delivery and that they maintain documentation relating to the filing.

Proposed subsection (c) is a listing of the information required on the Wage Statement. The list is largely the same as under the current rule with a minor change. Because under the proposed rule the wage statement can be filed verbally, the requirement that the statement be signed has been removed. The proposed rule requires certification that the information is accurate and complete as well as the name of the person submitting the information.

Proposed subsection (d) lists the wage-information required on a wage statement. Wage information needed is different for school district employees than it is for non-school district employees and this is set out in the rule. The requirements here match those in the statute and the other proposed AWW rules in chapter 128.

Brent Hatch, Director of Customer Services, has determined that for the first five-year period the proposed rule is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the rule except for school

districts which will have to make changes to their wage reporting processes and benefit calculation and payment processes. However, any economic costs to school districts or any other persons who are required to comply with the rule as proposed are the result of the legislative changes made by HB-2600 and not the rule which is implementing the statutory changes. The Commission has worked with several system participants to minimize any adverse economic impact that these changes may have on system participants.

Local government and state government as a covered regulated entity will be impacted in the same manner as described later in this preamble for persons required to comply with the rule as proposed

Mr. Hatch has evaluated the public benefits and anticipated costs 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 rule will be compliance with and implementation of legislative directives and consistency in the rules under which all Texas Workers' Compensation system participants function.

Employees should benefit through a more accurate and immediate determination of the true AWW.

Employers will benefit as well. The proposed rule more clearly specifies filing requirements for employers at an easier to find location in the rules. Furthermore, employers will now be allowed to verbally file wage information with the carrier if both parties agree.

Insurance Carriers should benefit by more timely receipt of accurate wage information. This should help prevent overpayments.

Any economic costs to persons who are required to comply with the rule as proposed are minimal and are due to the legislative changes made by HB-2600 and not the rule which is implementing the statutory changes. There will be no adverse economic impact on small businesses or micro-businesses. There will be no difference in the cost of compliance for small businesses as compared to large businesses because the same basic processes and procedures apply to all entities regardless of size.

Comments on the proposal must be received by 5:00 p.m., December 31, 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 emailing 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 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.

A public hearing on this proposal will be held on January 16, 2002, 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) 440-5690 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.* The new rule is proposed under: the Texas Labor Code, §402.061, which authorizes the commission to adopt rules necessary to administer the Act; the Texas Labor Code, §401.011 which contains definition 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 §406.010, that authorizes the commission to adopt rules regarding claims service; the Texas Labor Code §§408.041 through 408.047 which govern calculation of the average weekly wage Including §408.0446, as adopted by the 77th Texas Legislature, which allows the commission to adopt rules as necessary regarding the calculation of average weekly wage for school district employees and §408.042, amended by the 77th Texas Legislature, which authorizes the commission to determine, by rule, the manner by which wage information for multiple employment is collected and distributed); the Texas Labor Code §408.063 which requires wage statements to be filed and that it is a violation to fail to timely file wage statement; the Texas Labor Code §409.005 which specifies that the commission may specify what subsequent reports employers have to file by rule; and the Texas Labor Code §415.021 that establishes that the commission may issue penalties for repeated administrative violations.

The new rule is proposed under: the Texas Labor Code, §402.061, §401.011 §401.024, §402.042, §406.010, §408.041 through §408.047, §408.063, §409.005, and §415.021.

No other statutes, articles or codes are affected.

§120.4. Employer's Wage Statement.

(a) The employer is required to timely file a complete wage statement in the form and manner prescribed by the commission. As used in this section, the term "filed" means "received."

(1) The wage statement shall be filed with the carrier, the injured employee (employee), and the employee's representative (if any) within 30 days of the earliest of:

(A) the employee's eighth day of disability;

(B) the date the employer is notified that the employee is entitled to impairment income benefits;

(C) the date of the employee's death as a result of a compensable injury.

(2) A subsequent wage statement shall be filed with the carrier, employee, and the employee's representative (if any) within seven days of a change in any wage information provided on the previous wage statement.

(3) The wage statement shall be filed with the commission within seven days of receiving a request from the commission.

(b) The employer shall ensure timely delivery of the written wage statement, however, if agreed upon by the employer and the carrier, the wage statement filed with the carrier may be filed verbally. The carrier may also agree to provide the wage statement to the employee. However, the employer remains responsible for ensuring timely delivery of the wage statement to the employee. The employer has the burden of proving that the wage statement was timely filed. Therefore, employers should file the wage statement by verifiable means and maintain a record of the:

(1) information provided;

(2) date filed; and

(3) means of filing with each recipient required to receive the report.

(c) The wage statement shall include:

(1) the employee's name, address, and social security number;

(2) the date of the employer's hire of the employee;

(3) the date of injury;

(4) the employer's name, address, and federal tax identification number;

(5) an identification of the employment status (e.g. if the employee works full-time, part-time, etc.);

(6) the name of the person submitting the report;

(7) the wage information required by subsection (d) of this section; and

(8) a certification that the wage information provided includes all wage information required by subsection (e) of this section and that the information is complete and accurate.

(d) The wage information required to be provided in a wage statement is as follows.

(1) For an employee of an employer other than a school district, the employer shall provide:

(A) the employee's wage, as defined in §128.1 of this title (relating to Average Weekly Wage: General Provisions), paid to the employee for the 13 weeks immediately preceding the date of injury. If the employee was not employed for 13 continuous weeks before the date of injury, the employer shall identify a similar employee performing similar services, as those terms are defined in §128.3 of this title (relating to Average Weekly Wage Calculation For Full-Time Employees, and For Temporary Income Benefits For All Employees), and list the wages of that similar employee for the 13 weeks immediately preceding the date of the injury; and

(B) the number of hours worked to receive the wages.

(2) For an employee of a school district under Chapter 504 of the Texas Labor Code the employer shall provide:

(A) the pecuniary wages earned by the employee in the 12 months immediately preceding the injury;

(B) if the employee:

(i) is on a contract, the full value of the contract that would be paid if the employee were to fully complete the terms of the contract and the number of days that the employee was required to work under that contract; or

(ii) is not on a contract, the pecuniary wages earned by the employee during the 13 weeks immediately preceding the injury as well as the hours the employee worked; and

(C) any other amounts not reported that the employee could have reasonably been expected to earn after the date of injury had the employee not been injured.

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 November 19, 2001.

TRD-200107153
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 804-4287

♦ ♦ ♦

CHAPTER 122. COMPENSATION PROCEDURE-CLAIMANTS

SUBCHAPTER A. CLAIMS PROCEDURE FOR INJURED EMPLOYEES

28 TAC §122.5

The Texas Workers' Compensation Commission (commission) proposes new §122.5 concerning Employee's Multiple Employment Wage Statement. This new rule is proposed concurrently with amendments to §128.2 of this title concerning Carrier Presumption of Employee's Wage; Employer Wage Statement Required (proposed to be retitled "Carrier Presumption of Employee's Average Weekly Wage") and new §120.4 of this title concerning Employer's Wage Statement.

House Bill 2600 (HB-2600), passed by the 77th Texas Legislature, amended Texas Labor Code Chapter 408 by adding §408.0446 which establishes special criteria for determining the amount of income benefits due a school district employee injured on the job and amended §408.042 to address employees with multiple employment. Employees can now report wages from other jobs they held at the time of the injury to influence the average weekly wage (AWW). The commission is required to specify by rule how this other wage information is to be collected and distributed.

Existing §128.2 includes the current requirements for an employer's reporting of wage information. However, these provisions are included with carrier requirements for determining the AWW in the absence of a properly completed wage statement. The fact that it mixes concepts makes the rule confusing.

To avoid any undue confusion and to improve the clarity of the rules, the Commission proposes new §122.5 to address wages from multiple employers. The language in existing §128.2 (relating to the employer's duty to file the wage statement) would be moved to proposed new rule §120.4 (relating to Employer's Wage Statement) published elsewhere in this issue of the Texas Register.

Proposed subsection (a) provides several important definitions to simplify the comprehension of the rule. The definitions were

necessary to differentiate between the "Claim Employer" who is the employer for whom the employee worked at the time of the injury and the "Non-Claim Employers" who are other employers where the employee may additionally have been employed at the time of the injury. This rule provides for the reporting of wages from the Non-Claim Employers. In addition, the definition of "School District Employee" is included.

Proposed subsections (b) and (c) are applicability subsections that specify which employees are permitted to file Multiple Employment Wage Statements. The applicability dates are based upon the effective dates established in HB-2600.

Proposed subsection (d) requires an employee who is electing to report multiple employment wages to file the information with both the carrier and the commission.

Proposed subsection (e) is a listing of the information required on the Employee's Multiple Employment Wage Statement regardless of whether the information is for an employee of a school district or not. The required information is largely the same as that required on the Employer's Wage Statement under proposed §120.4.

Proposed subsection (f) lists the wage-information required on a wage statement for both non-school district employees and school district employees. The actual wage information reported for this subsection is different for school district employees than it is for non-school district employees. The requirements here match those in the statute and the other AWW rules in chapter 128.

Brent Hatch, Director of Customer Services, has determined that for the first five-year period the proposed rule is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the rule except for school districts which will have to make changes to their wage reporting processes and benefit calculation and payment processes. However, any economic costs to school districts or any other persons who are required to comply with the rule as proposed are the result of the legislative changes made by HB-2600 and not the rule which is implementing the statutory changes. The Commission has worked with several system participants to minimize any adverse economic impact that these changes may have on system participants.

Local government and state government as a covered regulated entity will be impacted in the same manner as described later in this preamble for persons required to comply with the rule as proposed

Mr. Hatch has evaluated the public benefits and anticipated costs 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 rule will be compliance with and implementation of legislative directives and consistency in the rules under which all Texas Workers' Compensation system participants function.

Employees should benefit through a more accurate and immediate determination of their true AWW.

Employers will benefit as well. The proposed rules more clearly specify filing requirements for employers at an easier to find location in the rules. Furthermore, employers will now be allowed to verbally file wage information with the carrier if both parties agree.

Insurance Carriers should benefit by more timely receipt of accurate wage information. This should help prevent overpayments.

Any economic costs to persons who are required to comply with the rule as proposed are minimal and are due to the legislative changes made by HB-2600 and not the rule which is implementing the statutory changes. There will be no adverse economic impact on small businesses or micro-businesses. There will be no difference in the cost of compliance for small businesses as compared to large businesses because the same basic processes and procedures apply to all entities regardless of size.

Comments on the proposal must be received by 5:00 p.m., December 31, 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 emailing 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 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.

A public hearing on this proposal will be held on January 16, 2002, 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*.

The new rule is proposed under: the Texas Labor Code, §402.061, which authorizes the commission to adopt rules necessary to administer the Act; the Texas Labor Code, §401.011 which contains definition 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 §406.010, that authorizes the commission to adopt rules regarding claims service; the Texas Labor Code §§408.041 through 408.047 which govern calculation of the average weekly wage (including §408.0446, as adopted by the 77th Texas Legislature, which allows the commission to adopt rules as necessary regarding the calculation of average weekly wage for school district employees and §408.042, amended by the 77th Texas Legislature, which authorizes the commission to determine, by rule, the manner by which wage information for multiple employment is collected and distributed}; and the Texas

Labor Code §415.021 that establishes that the commission may issue penalties for repeated administrative violations.

The new rule is proposed under: the Texas Labor Code, §402.061, §401.011, § 401.024, §402.042, §406.010, §§408.041 through 408.047, and §415.021 .

No other statutes, articles or codes are affected by the proposed new rule.

§122.5. Employee's Multiple Employment Wage Statement.

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

(1) Claim Employer -- Employer with whom the injured employee (employee) filed a claim for workers' compensation benefits and for whom the injured employee was working at the time of the on-the-job injury.

(2) Non-Claim Employers -- Employers other than the claim employer by whom the injured employee was employed at the time of the on-the-job injury.

(3) School District Employee -- An employee whose claim employer was a school district under Chapter 504 of the Texas Labor Code.

(b) A School District Employee whose date of injury is on or after December 1, 2001 may file a Multiple Employment Wage Statement for each Non-Claim Employer the employee was employed with during the 12 months prior to the date of injury.

(c) A Non-School District Employee whose date of injury is on or after July 1, 2002 may file a Multiple Employment Wage Statement for each employer for whom the employee was working on the date of injury.

(d) An employee who chooses to file a Multiple Employment Wage Statement and who is permitted by subsections (b) or (c) of this section to do so, shall file it with both the Commission and the insurance carrier.

(e) The Multiple Employment Wage Statement shall include:

(1) the employee's name, address, and social security number;

(2) the date of the non-claim employer's hire of the employee;

(3) the date of injury;

(4) the Non-Claim Employer's name, address, and federal tax identification number;

(5) an identification of the employment status (e.g. if the employee worked full-time, part-time, etc.);

(6) the name of a person at the Non-Claim Employer who can be contacted to verify the wage information;

(7) the wage information required by subsection (f) of this section with documentation that supports the wage information being reported; and

(8) a certification that the wage information provided includes all wage information required by subsection (f) of this section and that the information is complete and accurate.

(f) The wage information required to be provided in a Multiple Employment Wage Statement is as follows:

(1) for a School District Employee:

(A) the pecuniary wages earned by the employee in the 12 months immediately preceding the injury; and

(B) the number of hours worked to receive the pecuniary wages.

(2) for a Non-School District Employee:

(A) the wages paid to the employee for the 13 weeks immediately preceding the date of injury that are reportable for federal income tax purposes. If the employee was not employed for 13 continuous weeks before the date of injury, then the non-claim employer shall identify a similar employee performing similar services, as those terms are defined in §128.3 of this title (relating to Average Weekly Wage Calculation For Full-Time Employees, and For Temporary Income Benefits For All Employees), and list the wages of that similar employee for the 13 weeks immediately preceding the date of the injury; and

(B) the number of hours worked to receive the wages.

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 November 19, 2001.

TRD-200107152
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 804-4287

♦ ♦ ♦

CHAPTER 128. BENEFITS -- CALCULATION OF AVERAGE WEEKLY WAGE

28 TAC §§128.1, 128.2, 128.7

The Texas Workers' Compensation Commission (commission) proposes amendments to §128.1 concerning Average Weekly Wage: General Provisions and §128.2 concerning Carrier Presumption of Employee's Average Weekly Wage and new §128.7 concerning Average Weekly Wage for School District Employees.

House Bill 2600 (HB-2600), passed by the 77th Texas Legislature, amended Texas Labor Code Chapter 408 by adding §408.0446 which establishes special criteria for determining the amount of income benefits due a school district employee injured on the job. In response to this amendment, new §128.7 is proposed. Amendments are proposed to §128.1 and §128.2 to make them consistent with other commission rules, to clarify the process and timing of adjusting the average weekly wage and to incorporate into rules, long-standing commission policies regarding use of incomplete wage statements.

Proposed Amendments to §128.1 - Average Weekly Wage: General Provisions.

Proposed amendments to §128.1(a) add school district employees and employees with multiple employment in the general provision for the calculation of average weekly wage (AWW) and allow for adjustments to the AWW for school district employees.

Proposed amendments to subsections (b) and (c), designed to provide clarification, include reference to the definition of and examples of pecuniary and nonpecuniary wages in §126.1. The amendments also appropriately exclude school district employees from this subsection as provided by HB-2600.

Proposed new subsection (d) clarifies that AWW calculations are based on gross wages.

The addition of subsection (e) is proposed to establish guidelines for adjusting the AWW. The proposed amendment clarifies that carriers are required to adjust an employee's AWW and begin payment of benefits based upon the adjustment within seven days following the receipt of new information. This represents the incorporation into the rule of long-standing policy. However, the subsection includes new provisions as well. Under this proposal, an insurance carrier (carrier) will be allowed to recover an overpayment of income benefits caused by a change in the AWW. This recovery would be on a weekly basis up to 10% of the employee's new AWW. A higher percentage of weekly recoupment will be possible upon written agreement between the injured employee and insurance carrier.

Proposed amendments to §128.2 - Carrier Presumption of Employee's Wage; Employer Wage Statement Required. - (Proposed new title: Carrier Presumption of Employee's Average Weekly Wage)

There are a number of changes to §128.2. The biggest change is that the commission proposes removing the portions of the rule that relate to the employer's requirements to file the Wage Statement. The Commission proposes deleting the language in subsections (b) and (c) of the existing rule and moving these provisions to new §120.4 (relating to Employer's Wage Statement) which is proposed concurrently with these rules. Separating carrier duties and employer duties will make the rule easier to follow and most employer filing duties are located in the chapter 120 rules. By moving the Employer's Wage Statement requirements to chapter 120, it is believed that employers will more easily find their responsibilities. In addition, §128.2 contains a reference in subsection (a) to new §120.4.

The other amendments to this rule incorporate long-standing commission policies regarding use of incomplete wage statements. Much of this guidance has previously been given via advisory and through the commission's audit and enforcement efforts.

Proposed amendments to subsection (a) are mostly clarifying in nature and draw attention to the fact that carriers are to use either the last paycheck or other available evidence in the absence of a complete wage statement. Proposed amendments to subsection (a) also include reference to the new Employee's Multiple Employment Wage Statement as well as new §122.5 of this title (relating to Employee's Multiple Employment Wage Statement) that is proposed concurrently with these rules.

As noted in subsection (b), the commission proposes deletion of the current language regarding employer requirements to file a wage statement. In its place, additional direction to carriers regarding how to calculate the correct wage in the absence of a properly completed wage statement is proposed.

As noted in subsection (c), the commission proposes the deletion of the current language regarding employer requirements to file a wage statement when the information on a prior wage statement changes. In its place, examples of methods for calculation of the correct AWW using evidence other than a complete wage statement are provided. The intention of this list is not to address every possible scenario a carrier may encounter, but rather to provide assistance and ideas in calculating a correct AWW from evidence other than a complete wage statement.

Amendments proposed to subsections (d) and (e) remove specific language regarding enforcement and violations. Removal of the enforcement language is not intended to limit the commission's authority to take enforcement action for violations of this or any other rule. Rather, the existing language does not address all of the methods of enforcement that the commission has at its disposal for these violations. The commission's authority to enforce the statute and rules is granted in multiple provisions of the statute and duplicate language in rules is unnecessary.

In proposed subsection (d) the carrier is required to recalculate the AWW upon receipt of a properly completed wage statement.

In proposed subsection (e) the commission proposes requiring carriers to notify employers when an employee becomes entitled to impairment income benefits (IIBs) if the employee was not entitled to temporary income benefits (TIBs). Under the current rule, filing the wage statement on claims with little or no disability but where there is impairment is difficult. The current rule requires employers to file the report within 30 days of the employee accruing benefits. For cases where the employee accrues TIBs this is relatively easy because employers can count the days off of work and assume they represent days of disability.

Where the difficulty arises is in claims where the employee does not accrue TIBs but does accrue IIBs. IIBs accrue on the day after the employee reaches maximum medical improvement (MMI) with an impairment rating greater than 0% (which is generally not reported to the employer). Thus an employee can become entitled to IIBs (necessitating the filing of the Wage Statement) without the employer knowing. To resolve this issue, the proposed amendment requires the carrier to notify the employer.

Finally, proposed subsection (f) reminds carriers and employees that if either believes that the AWW calculated by following the rule does not reflect the true AWW, they may enter into a written agreement or, if unable to reach an agreement, request a benefit review conference (BRC).

Proposed New §128.7 - Average Weekly Wage for School District Employees

New §128.7, Average Weekly Wage for School District Employees, establishes guidelines for determining the AWW for school district employees. New §128.7 considers the employment variations unique to school district employees and provides language addressing the calculation of AWW for each variation.

Proposed subsection (a) indicates that the rule only applies to school district employees injured on or after December 1, 2001 in accordance with HB-2600.

Proposed subsection (b) defines "wages earned in a week" as wages equal to the amount that would be deducted from an employee's salary if the employee were absent from work for one week and the employee did not have personal leave available to compensate the employee for lost wages for that week. This means that "wages" in the calculation of AWW for school district employees only includes pecuniary wages.

Proposed subsection (c) provides methodology for calculating the amount of temporary income benefits (TIBs) for school district employees. For this subsection, school district employees are classified under types: employees working under a written

contract or employees working on an hourly, daily, salaried or other basis. For contract employees the calculations are very simple because the "wages the employee could have been expected to earn" are very predictable. For other employees, the calculations require taking an average to level out the fluctuations in the employee's earnings.

Prior to the employee reaching maximum medical improvement, proposed subsection (d) allows the AWW to be adjusted to more accurately reflect wages the employee could reasonably expect to earn during the period for which TIBs are paid. Injured employees are allowed to submit evidence of all earnings outside of their school district employment for consideration in the accurate adjustment of their AWW for determining the amount of TIBs. For periods an employee would not have earned wages had the on-the-job injury not occurred, insurance carriers may potentially adjust the AWW to zero and no minimum benefit payment may be required.

Proposed subsection (e) establishes the methodology for calculating income benefits other than temporary income benefits. Injured employees may provide wage information from other employers whom the employee worked for in the 12 months immediately preceding the injury for inclusion in the calculation of AWW. Again, additional earnings, such as through a stipend, will be prorated and included in the calculation of the AWW for TIBs (as it will be for other types of benefits).

Proposed subsection (f) allows the injured employee and insurance carrier to enter into a written agreement or request a BRC over the issue of AWW if either believes that the calculations resulting from this rule do not reflect the true AWW.

Brent Hatch, Director of Customer Services, has determined that for the first five-year period the proposed rule is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the rule except for school districts which will have to make changes to their wage reporting processes and benefit calculation and payment processes. However, any economic costs to school districts or any other persons who are required to comply with the rule as proposed are the result of the legislative changes made by HB-2600 and not the rule which is implementing the statutory changes. The Commission has worked with several system participants to minimize any adverse economic impact that these changes may have on system participants.

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 rule as proposed

Mr. Hatch has evaluated the public benefits and anticipated costs 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 rule will be compliance and implementation of legislative directives and consistency in the rules under which all Texas Workers' Compensation system participants function.

Employees should benefit through a more accurate and immediate determination of the true AWW. Furthermore, guidelines are established to ensure ninety percent of their weekly income benefit amount due will continue should an adjustment of the AWW result in a carrier overpayment and the carrier seeks recovery of the overpaid amount. Compensation will now be provided for wages lost from employment other than from the claim employer. Employees of school districts will now receive income benefits based on their total income from all employment.

Employers will benefit as well. The proposed rules more clearly specify filing requirements for employers at an easier to find location in the rules. Furthermore, employers will now be allowed to verbally file wage information with the carrier if both parties agree (as provided in proposed §120.4).

Insurance Carriers should benefit in a number of ways. The proposed rules will allow carriers to recoup overpayments during the period injured employees are receiving temporary income benefits. Although the amount of recoupment is set at no more than 10% of the employee's new average weekly wage, upon agreement of the parties, the proposed rules will allow a higher weekly recovery rate. In addition, a clear deadline for adjusting the average weekly wage based on the receipt of new information is established by the proposed rules. Methodologies to assist carriers with the calculation of AWW using evidence other than a complete wage statement are also provided through the proposed rules. The requirement that employers timely file a complete wage statement and the language added to further define accrual dates should assist insurance carriers in promptly establishing an accurate AWW which, in turn, may prevent over and under payments to injured employees receiving income benefits.

Carriers who are required to comply with this rule will experience some economic impact as a result of initial outlay of funds for payments made to employees based on wages earned while in the employ of non-claim employers. Although carriers will be required to include wages from multiple employment in the AWW for the calculation of income benefits for injured employees holding more than one position, they may be eligible for reimbursement of at least a portion of this expense through the Subsequent Injury Fund. Though the exact amount cannot be determined, a fiscal impact to the Subsequent Injury Fund as a result of this reimbursement eligibility to carriers is anticipated. The commission will also experience increased education and training costs in conjunction with the implementation of the proposed rules.

Any economic costs to persons who are required to comply with the rule as proposed are minimal and are due to the legislative changes made by HB-2600 and not the rules which are implementing the statutory changes. There will be no adverse economic impact on small businesses or micro-businesses. There will be no difference in the cost of compliance for small businesses as compared to large businesses because the same basic processes and procedures apply to all entities regardless of size.

Comments on the proposal must be received by 5:00 p.m., December 31, 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 emailing 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 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.

A public hearing on this proposal will be held on January 12, 2002, 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.*

The amendments and new rule are proposed under: the Texas Labor Code, §402.061, which authorizes the commission to adopt rules necessary to administer the Act; the Texas Labor Code, §401.011 which contains definition 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 §406.010, that authorizes the commission to adopt rules regarding claims service; the Texas Labor Code §§408.041 through 408.047 which govern calculation of the average weekly wage; (including §408.0446, as adopted by the 77th Texas Legislature, which allows the commission to adopt rules as necessary regarding the calculation of average weekly wage for school district employees and §408.042, as amended by the 77th Texas Legislature, which authorizes the commission to determine, by rule, the manner by which wage information for multiple employment is collected and distributed); the Texas Labor Code §408.063 which provides for wage presumptions; the Texas Labor Code §408.121 which specifies when an employee becomes entitled to impairment income benefits; the Texas Labor Code §409.023 which requires carriers to pay benefits as and when they accrue; and the Texas Labor Code §415.0035 that establishes administrative violations for repeated administrative violations.

The amendments and new rule are proposed under: the Texas Labor Code, §402.061, §401.011 §401.024, §402.042, §406.010, §§408.041 through 408.047, §408.063, §408.121, §409.023, and §415.0035.

No other statutes, articles, or codes are affected.

§128.1. Average Weekly Wage: General Provisions.

(a) The basic average weekly wage (AWW) calculation for an injured employee (employee) shall be made depending on whether the employee was employed in one of five [three] courses of employment: full-time (see §128.3 of this title (relating to Average Weekly Wage Calculation for Full-Time Employees, and for Temporary Income Benefits for all Employees)), part-time (see §128.4 of this title (relating to Average Weekly Wage Calculation for Part-Time Employees)), [and] seasonal (see §128.5 of this title (relating to Average Weekly Wage Calculation for Seasonal Employees)), school district employed (see §128.7 of this title (relating to Average Weekly Wage for School District Employees)), and multiple employment (see Texas Labor Code §408.042). Certain additional adjustments to the average weekly wage may be made in specific circumstances for seasonal employees and school district employees (see §128.5 and §128.7 of this title, respectively [(relating to Average Weekly Wage Calculation For Seasonal Employees)]), and for employees who are also minors, apprentices, trainees, or students on the date of injury (see §128.6 of this title (relating to Average Weekly Wage Adjustment For Certain Employees Who Are Also Minors, Apprentices, Trainees, or Students)).

(b) Except as provided by §128.7 of this title, [An] an employee's wage, for the purpose of calculating the AWW [average weekly wage] shall include [every form of remuneration paid for the period of computation of average weekly wage to the employee for personal services. An employee's wage includes, but is not limited to]:

(1) all pecuniary wages (as defined by §126.1 of this title (relating to Definitions Applicable to All Benefits)) paid by the employer to the employee even if the employer has continued to provide the wages after the date of injury (in which case these wages could be considered post-injury earnings under §129.2 of this title (relating to Entitlement to Temporary Income Benefits)); and [amounts paid to the employee by the employer for time off such as holidays, vacation, and sick leave;]

(2) all nonpecuniary wages (as defined by §126.1 of this title) paid by the employer to the employee prior to the compensable injury but not continued by the employer after the injury (though only during a period in which the employer has discontinued providing the wages). [the market value of any other advantage provided by an employer as remuneration for the employee's services that the employer does not continue to provide, including but not limited to meals, lodging, clothing, laundry, and fuel; and]

[(3) health care premiums paid by the employer.]

(c) An employee's wage, for the purpose of calculating the AWW [average weekly wage], shall not include:

(1) payments made by an employer to reimburse the employee for the use of the employee's equipment or for paying helpers; or

(2) any nonpecuniary wages continued by the employer after the compensable injury. However, except as provided by §128.7 of this title, if the employer discontinues providing nonpecuniary wages, the AWW shall be recalculated and these discontinued nonpecuniary wages shall be included. [the market value of any non-pecuniary advantage that the employer continues to provide after the date of injury]

(d) The AWW shall be calculated using gross wages.

(e) If a carrier determines or is notified that the employee's AWW is different than what the carrier had previously determined (either as a result of subsection (c)(2) of this section, receipt of an updated wage statement, or by operation of other adjustments permitted/required under this title), the carrier shall adjust the AWW and begin payment of benefits based upon the adjusted AWW no later than the first payment due after the seven days following the date the carrier receives the new information regarding the AWW.

(1) If, as a result of the change, the carrier owes additional benefits to the employee for prior pay periods, the carrier shall make payment in this amount within seven days of the date the carrier received the new information.

(2) If, as a result of the change, the carrier finds that it has overpaid benefits to the employee, the carrier may recoup the overpayment on a weekly basis not to exceed 10% of the employee's new AWW per week. If the carrier elects to recoup the overpayment, the carrier shall notify the employee in writing of the amount that was overpaid and inform the employee what amount the carrier will start recouping

beginning with the first payment due at least 14 days after the date the notice was sent to the employee. If the carrier wishes to recoup the overpayment in an amount greater than that permitted by this subsection, the carrier may attempt to enter into a written agreement with the employee or, if unable to do so, request a Benefit Review Conference.

§128.2. Carrier Presumption of Employee's Average Weekly Wage[; Employer Wage Statement Required.]

(a) An insurance carrier (carrier) [A carrier] shall promptly initiate the payment of income benefits as required by the Workers' Compensation Act (Act). To expedite payment, the carrier shall presume that the employer's last payment to the employee for personal services based on a full week's work (apartial work week shall be prorated for a full week) accurately reflects the employee's (AWW) [average weekly wage] until:

(1) the employer files a complete [the] wage statement required by §120.4 of this title (relating to Employer's Wage Statement) [subsection (b) of this section]; or

(2) the correct AWW [wage] is determined by other evidence (such as that described in subsections (b) and (c) of this section), if the employer does not file a complete [the] wage statement or if the employee files an Employee's Multiple Employment Wage Statement in accordance with §122.5 of this title (relating to Employee's Multiple Employment Wage Statement).

(b) In the absence of a properly completed wage statement, the carrier shall calculate the correct wage by using available wage information in a manner which is fair, just, and reasonable, and which involves a methodology that allows the closest approximation of a calculation based upon a 13 week average as required by this chapter (for example, pecuniary wages would be included regardless of whether the employer continues them and earnings after the date of injury would not be included). Subsection (c) of this section provides examples of how to do this. [An employer shall file a signed wage statement with the carrier and the injured employee or injured employee's representative within 30 days of the date benefits begin to accrue and with the commission within seven days of receiving a request from the commission. The wage statement shall be on a form TWCC 3, be signed and dated by the person filing the wage statement for the employer, and contain the following information:]

[(1) the employee's name, address, and social security number;]

[(2) the dates of employee's employment with the employer;]

[(3) the date of injury;]

[(4) the employee's wage, as defined in §128.1 of this title (relating to Average Weekly Wage: General Provisions), paid to the employee for the previous 13 weeks before the date of injury. If the employee was not employed for 13 continuous weeks before the date of injury, the employer shall identify a similar employee performing similar services, as those terms are defined in §128.3 of this title (relating to Average Weekly Wage Calculation For Full-Time Employees, and For Temporary Income Benefits For All Employees), and list the wages of that similar employee for the 13 weeks prior to the date of the injury;]

[(5) the employer's name, address, and federal tax identification number;]

[(6) a certification that the wage listed includes the fair market value of non-pecuniary remuneration not provided after the date of injury, and that the statement is complete, accurate, and complies with this rule; and]

[(7) an identification of the employee's status as full-time, part time or seasonal worker, including the number of hours worked during the previous 13 weeks, and whether the employee was also a student, apprentice or trainee.]

(c) This subsection provides a non-inclusive list of methods that carriers can use to calculate the correct AWW using evidence other than a complete wage statement. There may be other, similar but unlisted methods that are also appropriate in a given situation. [An employer shall file a subsequent wage statement within seven days if any information contained on the previous wage statement changes.]

(1) For a salaried employee, paid on monthly or semi-monthly basis, whose salary has not changed in the 13 weeks prior to the compensable injury, the carrier may presume that the AWW is equal to 3 months of wages divided by 13.

(2) For an employee on whom the carrier receives 14 weeks of wage information but is unable to identify the amount of the wages paid in the 14th week (thus leaving 13 usable weeks), the carrier may presume that the AWW is equal to the 14 weeks of wages divided by 14.

(3) For an employee on whom the carrier receives less than 13 weeks of wage information, the carrier may presume that the AWW is equal to the amount of wages paid divided by the number of weeks for which the wages were earned.

(d) Upon receipt of a properly completed wage statement the carrier shall recalculate the AWW in accordance with the applicable rule. [A carrier that fails to promptly begin payment of compensation may be assessed an administrative penalty under the Act, §5.22.]

(e) If an employee is certified to be at maximum medical improvement with an impairment rating of greater than 0% and the employee never accrued temporary income benefits, the carrier shall notify the employer that the employee has accrued entitlement to impairment income benefits and that a wage statement is due. [An employer that fails to file a complete wage statement as required by this rule without good cause may be assessed an administrative penalty, not to exceed $500, under the Act, §4.10(f).]

(f) In the event that the employee or the carrier believes that the AWW computed by following the calculations in this rule does not reflect the true AWW, the employee and carrier may enter into a written agreement on the AWW or request a benefit review conference.

§128.7. Average Weekly Wage for School District Employees.

(a) This rule applies only to school district employees injured on or after December 1, 2001. The average weekly wage (AWW) of a school district employee injured before December 1, 2001 is computed using the law and commission rules in effect on the date of the injury.

(b) For determining the amount of income benefits of school district employees under Texas Labor Code Chapter 504, the AWW is computed on the basis of wages earned in a week. "Wages earned in a week" are equal to the amount that would be deducted from an employee's salary if the employee were absent from work for one week and the employee did not have personal leave available to compensate the employee for lost wages for that week. For this calculation "wages" includes only pecuniary wages.

(c) For determining the amount of temporary income benefits of a school district employee, the AWW shall be computed as follows.

(1) For a school district employee working under a written contract with the school district, the AWW shall be computed by multiplying the daily rate of the contract by five. The daily rate is equal to the amount the employee would have been paid had the employee

fully completed the terms of the contract (including any stipend the employee was scheduled to receive) divided by the number of days that the employee was required to work under that contract.

(2) For a school district employee employed on a non-contract basis (ie. hourly, daily, salaried, or other basis) the AWW shall be computed by dividing the total gross wages earned in the previous 13-week period immediately preceding the date of injury by 13.

(d) The AWW for computing temporary income benefits may be increased or decreased to more accurately reflect wages the school district employee reasonably could expect to earn during the period for which temporary income benefits are paid.

(1) An insurance carrier (carrier) may adjust the AWW based on evidence of earnings

(2) A school district employee may request adjustments by submitting evidence of earnings to the carrier.

(3) For a period a school district employee would not have earned wages, the AWW may be adjusted to zero and no minimum benefit payment may be required.

(e) For determining the amount of impairment income benefits, lifetime income benefits, supplemental income benefits, or death benefits, the AWW shall be computed in accordance with this subsection.

(1) The carrier shall add together the total wages (as defined in subsection (b) of this section) earned by the school district employee during the 12 months immediately preceding the injury and dividing the result by 50.

(2) If the school district employee provides wage information from other employers for whom the employee worked in the 12 months immediately preceding the injury, these wages shall be included in the calculation of the AWW.

(f) In the event the school district employee and/or carrier believes that the AWW computed based on the calculations in this rule does not reflect the true AWW, the employee and carrier may enter into a written agreement regarding the AWW or request a benefit review conference.

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 November 19, 2001.

TRD-200107151
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 804-4287

♦ ♦ ♦

TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 1. EXECUTIVE ADMINISTRATION
SUBCHAPTER A. VACANCIES

31 TAC §1.3

(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 General Land Office or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The General Land Office proposes the repeal of Chapter 1, Subchapter A, §1.3 relating to Fees. A proposed new §3.31 relating to Fees is simultaneously being proposed under Chapter 3 relating to General Provisions. The proposed new rule §3.31 lists new services and activities provided by the agency and addresses all agency services and activities with more detail and accuracy. This proposed new rule informs the public of the services and activities that the agency presently offers and, by including all fees related to agency services and activities, provides the public with easier access to this information. In addition, the proposed new §3.31 adjusts various fees to reflect the costs associated with the agency's services and activities and the value of those services and activities.

Larry Soward, Chief Clerk, has determined that during the first five-year period this repeal is in effect there will be no negative fiscal implications for state or local government. All fees charged by the General Land Office will be reflected in the proposed new §3.31 relating to Fees. The fees charged in §1.3 for services provided by the GLO will remain in effect until the effective date of the proposed repeal and the adoption of §3.31. Any increases in fees in the proposed new §3.31 result from cost recovery studies performed by the GLO and were not mandated by the Legislature.

Mr. Soward has also determined that, during the first five-year period the repeal is in effect and the proposed new rule has been adopted, the public will benefit because the new rule will yield a clearer picture of the agency's services and activities, more fairly compensate the state for the cost of providing such services and permitting such activities, and enable the agency to continue to provide services and products of a consistently high quality.

The *Texas Register* does not publish the text of repealed rules. A redlined version of the changes from the current §1.3 to the proposed new §3.31 can be made available by contacting Ms. Melinda Tracy, Texas Register Liaison, General Land Office, 1700 North Congress, Room 626, Austin, Texas 78701, (512) 305-9129. Comments on the proposed repeal of §1.3 may also be submitted to Ms. Tracy no later than 30 days from publication.

The repeal is proposed under Texas Natural Resources Code, §§31.051, 51.174 and 52.324, which provide the GLO with the authority to set and collect certain fees and to make and enforce rules consistent with the law.

Texas Government Code, Chapter 552, and Texas Natural Resources Code, Chapters 31, 32, 51, and 52 are affected by the proposed repeal.

§1.3. 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 November 16, 2001.

TRD-200107096

Larry Soward
Chief Clerk
General Land Office
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 305-9129

♦ ♦ ♦

CHAPTER 3. GENERAL PROVISIONS
SUBCHAPTER C. SERVICES AND PRODUCTS

31 TAC §3.31

The General Land Office (GLO) proposes a new Chapter 3, Subchapter C, §3.31, relating to Fees. The repeal of Chapter 1, Subchapter A, §1.3, relating to Fees is simultaneously being proposed. The proposed new rule §3.31 lists new services and activities provided by the agency and addresses all agency services and activities with more detail and accuracy. The proposed new Subchapter C, relating to Services and Products, is being proposed to contain any rules that relate to the services provided to the public by the GLO.

This proposed new §3.31 informs the public of the services and activities that the agency presently offers and, by including all fees related to agency services and activities, provides the public with easier access to this information. In addition, the proposed new §3.31 adjusts various fees to reflect the costs associated with the agency's services and activities and the value of those services and activities. The rule is also being amended to clarify language that was in the currently proposed repeal of §1.3, add new services available, and to remove fees that are already covered in other areas of the Texas Administrative Code or are no longer provided by the GLO. The proposed new rule reflects a fair and reasonable schedule of fees and increases fees in the current §1.3 only when staff has evaluated the costs of a particular service and determined the need for an increase in recovery costs. Some procedures for collecting fees have also been reevaluated and fees reduced when staff has determined that the lower fee can accomplish recovery of costs. The fees charged in §1.3 for services provided by the GLO will remain in effect until the effective date of the proposed repeal and the adoption of §3.31. Any increases in fees in the proposed new §3.31 result from cost recovery studies performed by the GLO and were not mandated by the Legislature.

Larry Soward, Chief Clerk, has determined that during the first five-year period the proposed new rule is in effect there will be no negative fiscal implications for state or local government. Mr. Soward has determined that there may be minimal fiscal implications for small businesses and individuals as a result of fee increases in the new rule.

Mr. Soward has also determined that, during the first five-year period the rule is in effect, the public will benefit because the new rule will provide a clearer picture of the agency's services and activities, more fairly compensate the state for the cost of providing such services and permitting such activities, and enable the agency to continue to provide services and products of a consistently high quality.

The Texas Register does not publish the text of repealed rules. A redlined version of the changes from the current §1.3 to the proposed new §3.31 can be made available by contacting Ms. Melinda Tracy, Texas Register Liaison, General Land Office, 1700 North Congress, Room 626, Austin, Texas 78701, (512) 305-9129. Comments on the proposed new rule may also be submitted to Ms. Tracy by no later than 30 days from publication.

The new rule is proposed under Texas Natural Resources Code, §§31.051, 51.174 and 52.324 which provides the GLO with the authority to set and collect certain fees and to make and enforce rules consistent with the law.

Texas Government Code, Chapter 552, and Texas Natural Resources Code, Chapters 31, 32, 51, and 52 are affected by the proposed new rule.

§3.31. Fees.

(a) General.

(1) Form of payment. Fees may be paid by cash, check, or other legal means acceptable to the General Land Office. Payment by means of electronic funds transfer may be required by Texas Government Code §404.095, §9.51 of this title (relating to Royalty and Reporting Obligations to the State), or by other chapters of this title.

(2) Time for payment. Payment is generally required in advance of issuance of permits, leases and other documents and/or delivery of services and/or materials by the General Land Office.

(3) Dishonor or nonpayment by other means. In the event a fee is not paid due to dishonor, nonpayment, or otherwise, the General Land Office shall have no further obligation to issue permits, leases and other documents and/or provide services and/or materials to the permittee, lessee, or applicant.

(b) General Land Office fees. The commissioner is authorized and required to collect the following fees where applicable.

(1) Cost of land title documents.

(A) Preparation of each patent or deed of acquittance: $50.

(B) Filing fee, original field notes: $25.

(C) Filing fee, corrected field notes: no charge.

(D) Filing fee, other instruments required by law to be filed with the General Land Office or accepted for filing by the General Land Office: $25 per instrument.

(E) recording fee per document, per county: the greater of $10 or the actual amount charged by the county clerk.

(2) Certificates of facts:

(A) Narrative certificates of fact consisting of all data from the inception of chain of title to the date of perfection of title and mineral history in paragraph form, short form certificate of fact (consisting of original award date, patent, deeds of acquittance, classification, current mineral history) and supplemental or limited certificates of fact (consisting of specific information or start date for history of a specific tract land):

(i) mineral classified land:

(I) first file: $100;

(II) each additional file: $10;

(ii) non-mineral classified land:

(I) first file: $75;

(II) each additional file: $10.

(B) Spanish documents: $50 per document, in addition to fees due under §1.3(b)(2)(A)(i) and (ii).

(3) Certified and non-certified classification letters:

(A) Certified classification letter:

(i) first file: $20;

(ii) each additional file: $10;

(B) Non-certified classification letter: no charge.

(4) Maps and sketches:

(A) Official maps: $15 per map.

(B) Sketches (blueline and large format copies); per linear foot: $2.00.

(C) Working sketch, per hour ($50 minimum): $20.

(D) Digitizally reproduced archival map collection up to 36 inches (large format copies): $15 per map.

(E) Digitizally reproduced archival map collection on special printer paper.

(i) 48 inches or less: $20 per map plus $8.00 shipping and handling;

(ii) greater than 48 inches: $40 per map plus $8.00 shipping and handling.

(5) Digital mapping (GIS):

(A) GIS maps printed on special printer paper:

(i) 8.5 inch by 11 inch: $7.00;

(ii) 30 inch by 36 inch: $19;

(iii) 36 inch by 48 inch: $27.

(B) Computer charges for GIS data placed on CD-ROM:

(i) cost of disk: $11;

(ii) programming personnel charge: $26 per hour;

(iii) computer resource charge: $1.50 per minute.

(C) Postage and handling: $15 per package.

(6) Spanish translations:

(A) Original translations: $.15 per word.

(B) Copies of previously translated Spanish or Mexican titles: $2.00 per page.

(7) Vacancies:

(A) Application fee: $100.

(B) Filing fee for original field notes: $25.

(C) Affidavit filing fee: $25.

(D) Each deed, title opinion, or other piece of evidence needed to satisfy the commissioner of claimant's status, other than those filed in a contested case administrative proceeding: $25.

(8) Appraisal fees. Appraisal fees are charged for appraisals required by applications for deeds of acquittance and vacancies:

(A) First tract: $500.

(B) Each additional tract, same vicinity, same characteristics, and same owner: $50.

(C) If not listed above, or if 10 or more tracts are to be appraised at the same time, the fee may be negotiated by the General Land Office.

(9) Duplication fees--For purposes of this section the term Archival Records is defined as records maintained in the Archives and Records Division of the Texas General Land Office. The Archives and Records Division reserves the right to deny duplication of any document or map considered too fragile or brittle to safely copy. In addition, the Archives and Records Division reserves the right to specify with method(s) or reproduction may be used. Archival records for all original records affecting land titles, including original land grant files, Spanish Collection materials, school land and scrap files:

(A) Black and white photocopies and microfilm copies, per page:

(i) 8.5 inch by 11 inch: $1.00;

(ii) 8.5 inch by 14 inch: $1.00;

(iii) 8.5 inch by 17 inch: $2.00.

(B) Color photocopies, per page:

(i) 8.5 inch by 11 inch: $2.00;

(ii) 8.5 inch by 14 inch: $2.00;

(iii) 8.5 inch by 17 inch: $3.00.

(C) Blueline and large format copies: $15.

(D) Recorded media:

(i) VCR tapes, each: $15;

(ii) Audio cassettes, each: $7.50;

(iii) Raw field videos (VCR tape provided by requesting party, minimum one minute):

(I) First minute: $25;

(II) Each additional minute: $15.

(E) Photo processing (black and white only):

(i) 10 inch by 10 inch internegative: $6.00;

(ii) 10 inch by 10 inch contact print: $5.00;

(iii) 11 inch by 14 inch enlargement: $8.00;

(iv) 16 inch by 20 inch enlargement: $12.

(10) Genealogy search:

(A) Per name: $5.00.

(B) Field notes research, per quarter hour (minimum $10): $10.

(C) Other research of the official records of the General Land Office, per hour (minimum 1/2 hour): $25.

(11) Mailing fees:

(A) Mailing tubes, each: $1.75.

(B) Registered mail, each item: $5.50.

(C) Handling and preparation for mailing, each item: $1.00.

(12) Certification:

(A) Individual instruments or maps: $2.00.

(B) Contents of complete files, each file: $25.

(C) Copy of official Spanish translations, each: $25.

(13) Publications:

(A) Abstract volume (on microfiche): $12.50.

(B) Abstract volume supplement (hard copy and on microfiche): $10.

(14) Submerged lease data:

(A) Annual subscription rate: $300.

(B) Monthly rate: $25.

(C) Single copy, subscriber: $37.50.

(D) Single copy, non-subscriber: $75.

(E) Energy information service, per year: $180.

(F) Magnetic tape, per tape: $165.

(15) Geophysical and geochemical exploration:

(A) Non-Relinquishment Act lands:

(i) permit application filing fee: $100.

(ii) exploration and surface/bottom damage fees for unleased tracts in bays, other tideland areas, and the Gulf of Mexico.

(I) high velocity energy sources:

(-a-) $5.00 per acre in bays and other tideland areas;

(-b-) $2.00 per acre in the Gulf of Mexico;

(II) low velocity energy sources:

(-a-) $2.50 per acre in bays and other tideland areas;

(-b-) $1.00 per acre in the Gulf of Mexico;

(III) other exploration techniques: negotiable;

(iii) surface damage fees for unleased uplands:

(I) vibroseis: $2.50 per acre;

(II) high velocity energy sources: $5.00 per acre;

(III) gravity meter and/or magnetometer: fair market value, but not less than $2.50 per acre;

(IV) other exploration techniques: negotiable.

(B) Relinquishment Act lands:

(i) permit application filing fee: $100;

(ii) all fees for actual surface damages to personal property, improvements, livestock, and crops on unleased Relinquishment Act lands, if any, are to be negotiated with the surface owner. Any fees in excess of those attributable to the types of surface damages listed in this paragraph must be shared equally with the state.

(16) Miscellaneous services and fees:

(A) In-kind contract maintenance fee. Processing and accounting for in-kind oil, gas, and other related product contracts, from purchaser of state-owned products: per barrel delivered: $.05; per MMBTU delivered: $.03.

(B) Relinquishment Act lease processing fee: $100.

(C) highway right-of-way lease processing fee, including preparation of lease: $100.

(D) pooling application processing fee, including preparation and filing of pooling agreements: $100.

(E) oil, gas, and mineral lease application and filing fee, including processing, lease preparation, and filing of any oil, gas, or mineral lease not subject to other processing or nomination fees: $100.

(F) tract nomination fee, oil, gas, or mineral sealed bid lease sale fee: $100.

(G) prospect permit filing fee: $50.

(H) insufficient check fee (for each check returned): $25.

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 November 16, 2001.

TRD-200107091
Larry Soward
Chief Clerk
General Land Office
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 305-9129

♦ ♦ ♦

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 353. INTRODUCTORY PROVISIONS

SUBCHAPTER G. TEXAS NATURAL RESOURCES INFORMATION SYSTEM PARTNERSHIPS

31 TAC §353.100, §353.101

The Texas Water Development Board (board) proposes new 31 TAC §353.100 and §353.101 concerning Introductory Provisions. These new sections are proposed in response to Senate Bill 312, 77th Texas Legislature, Regular Session, 2001.

First, the board proposes to add these new sections into a new subchapter, Subchapter G, relating to Texas Natural Resources Information System Partnerships. This is to properly organize these new rules in the chapter.

The board proposes new §353.100 to comply with Texas Water Code §16.021(b), which was amended by Senate Bill 312 to authorize the executive administrator to enter partnerships with private entities to provide additional funding for improved access to Texas Natural Resources Information System (TNRIS) information. Proposed §353.100 authorizes the executive administrator to enter partnerships with private entities that provide services related to TNRIS goals and responsibilities. These partnerships would allow the entities to have their information and a hyperlink to their web site posted on the TNRIS web site. TNRIS is a division of the board that serves as the state's centralized clearinghouse and referral center for natural resource, census, and other socioeconomic data. As such, it is the starting place for citizens wanting natural resource data. There are several private entities that provide services that add value to the data maintained by TNRIS. Providing links to and information on these entities to TNRIS customers, through the TNRIS web site, would enable customers to obtain all of the data and services they desire. It would also raise funds for TNRIS by charging each entity a fee for having its information and link posted on the TNRIS web site.

Senate Bill 312 amended Texas Water Code §16.021(b) to allow the executive administrator to enter partnerships specifically designed to raise more funds for TNRIS, which will be used to improve access to TNRIS information. These partnerships would only be entered with entities that have been determined to provide services that are related to TNRIS goals and responsibilities. The partnerships will be created through a written agreement that lasts one year but which can be renewed upon request. The charge for posting a partner's information and hyperlink on the TNRIS web site will be determined by the executive administrator, upon board approval.

The board proposes new §353.101, which is also intended to comply with Texas Water Code §16.021(b). This proposed new section allows the executive administrator, with board authorization, to enter partnerships with private entities that wish to form a relationship with the board to pass donations from donors to TNRIS. Some nonprofit corporations accept donations on behalf of other organizations and provide some tax benefits to the donors. Senate Bill 312 amended Texas Water Code §16.021(b) specifically to allow the executive administrator to enter partnerships with private entities in order to raise additional funds for TNRIS, which will be used to improve access to TNRIS information for the public. By making it easier for donors to present gifts and grants to TNRIS, the board will be following the instructions of Senate Bill 312.

All gifts and grants will be accepted pursuant to Subchapter F of Chapter 353, relating to The Relationship Between the Board and Donors. Proposed new §353.101 also allows the executive administrator, with board authorization, to enter a partnership with a private entity in order to accept volunteer workers who will perform labor for TNRIS. This is intended to comply with Texas Water Code §16.021(b). This will allow private entities to lend workers to TNRIS at no charge to the board. This will enable TNRIS to accomplish more work without additional state resources, which will improve access to TNRIS information for the public.

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 cost to state and local government as a result of enforcement and administration of the sections. There will be additional revenues as a result of these changes, but because the programs are voluntary, there is no way to adequately estimate what those revenues will be.

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 improve and enhance public access to TNRIS information. Ms. Callahan has determined there will be no increased economic cost to small businesses or individuals because the proposed new provisions do not require any actions by small businesses or individuals. Any costs incurred by small businesses will be entirely voluntary.

Comments on the proposed new sections will be accepted for 30 days following publication and may be submitted to Ron Pigott, Attorney, (512) 936-2414, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711-3231, by email at Ron.Pigott@twdb.state.tx.us, or by fax at (512) 463-5580.

The new sections are proposed under the authority of Texas Water Code §6.101 and §16.021.

The statutory provision affected by the proposed new sections is Texas Water Code, Chapter 16, §16.021.

§353.100. Partnerships with Value-Added Service Providers.

(a) The executive administrator shall identify value-added services that relate to the goals and responsibilities of the Texas Natural Resources Information System (TNRIS). For those services identified, the executive administrator may enter partnerships with service providers to post their contact information on the TNRIS web site.

(b) Entities that provide services identified by the executive administrator shall request the partnership in writing. The written request shall include:

(1) the name and address of the entity and a contact person;

(2) the services performed by the entity;

(3) the number of years the entity has performed those services; and

(4) the internet address the entity would like the board to use as a hyperlink.

(c) The executive administrator shall determine if the entity submitting a written request to form a partnership is an entity that provides services identified in subsection (a) of this section. If so, the executive administrator shall enter a written agreement with the entity to post its name, contact information, and hyperlink on the TNRIS web site. The written agreement shall only be for one year but is renewable upon request.

(d) The executive administrator shall develop and implement, with board approval, a charge schedule for entities entering partnerships with the executive administrator to post their information on the TNRIS web site. At least once every two years, the executive administrator shall review and obtain board approval of the charge schedule. Monies collected from entities entering partnerships with the executive administrator shall be used to improve access to TNRIS information.

§353.101. Other Partnerships.

The board may authorize the executive administrator to enter other partnerships, on behalf of TNRIS in order to:

(1) accept gifts and grants for TNRIS through a nonprofit corporation. The acceptance of any gift or grant will be in compliance with Subchapter F of this chapter, (relating to The Relationship Between the Board and Donors); and

(2) accept volunteer labor.

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 November 15, 2001.

TRD-200107030
Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: January 16, 2002
For further information, please call: (512) 463-7981

♦ ♦ ♦

CHAPTER 377. HYDROGRAPHIC SURVEY PROGRAM

31 TAC §377.3, §377.4

The Texas Water Development Board (board) proposes amendments to 31 TAC §377.3 and §377.4 concerning the Hydrographic Survey Program. These amendments are proposed in response to Senate Bill 312, 77th Legislature, Regular Session, 2001 and pursuant to the four-year rule review requirement of Texas Government Code §2001.039.

The board proposes amendments to §377.3(a) to comply with the new language of Texas Water Code §15.804, which was amended by Senate Bill 312. This statute originally authorized the board to conduct hydrographic surveys on the request of political subdivisions of the state. Senate Bill 312 amended the law to authorize the board to also conduct hydrographic surveys on the request of political subdivisions and agencies of neighboring states and agencies of the federal government and the State of Texas. The law was also amended to authorize the board to conduct hydrographic surveys in Texas and outside Texas if the information collected will benefit Texas. The board proposes to amend §377.3 to reflect these changes in the law. The proposed amendments describe which entities can request a hydrographic survey and state that the survey can be performed in Texas or out of Texas if the information collected will benefit Texas.

Senate Bill 312 also amended Texas Water Code §15.804 to state that hydrographic surveys may be performed to collect information relating to water-bearing formations. The board proposes to amend §377.3(c) to include this new statutory provision. Specifically, the board proposes to add the collection of geohydrologic information to the list of activities that a hydrographic survey may include. This proposal will enable the board to perform studies of water-bearing formations of all types, as encouraged by Senate Bill 312.

Due to the proposed changes that arise from Senate Bill 312, the board also proposes to amend §377.4. Currently, the hydrographic surveys performed by the board are done on surface water. The proposed addition of the collection of geohydrologic information for other water-bearing formations will allow the board to use processes like drilling to survey formations. The costs and charges involved with surveying surface water are different than those for surveying groundwater. Therefore, the board proposes to amend §377.4 to state that the executive administrator shall develop and implement, with board approval, as many user charge schedules as necessary. This will allow the executive administrator to develop charge schedules that accurately reflect the charges for specific work being performed.

Lastly, the board proposes to amend §377.3(b) to handle the proposed amendments in §377.4. By having different charge schedules for different work, it is desirable to use separate subaccounts within the hydrographic survey account to track the money coming into and going out of the accounts. Separate accounts will enable the board to accurately and more easily track costs and collections for the various work being performed.

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. Any governmental entities that request hydrographic surveys do so voluntarily. No costs are imposed on state or local government as a result of these proposed changes.

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 improve and enhance information on surface water and groundwater that benefits the State of Texas. Ms. Callahan has determined there will be no increased economic cost to small businesses or individuals because the proposed new provisions do not require any actions by small businesses or individuals.

Comments on the proposed amendments will be accepted for 30 days following publication and may be submitted to Ron Pigott, Attorney, (512) 936-2414, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711-3231, by email at Ron.Pigott@twdb.state.tx.us, or by fax at (512) 463-5580.

The amendments are proposed under the authority of Texas Water Code §6.101 and §15.804.

The statutory provision affected by the proposed amendments is Texas Water Code, Chapter 15, §§15.802 through 15.804.

§377.3. Studies.

(a) The executive administrator may negotiate and execute receivable contracts to perform hydrographic surveys in this state or outside of this state if the information collected will benefit this state with:

(1) political subdivisions or agencies of this state;

(2) political subdivisions or agencies of a neighboring state; or

(3) a federal agency.

(b) Fees collected for the studies will be deposited into and costs of conducting the studies will be paid from the hydrographic survey account of the water assistance fund.

(c) Hydrographic [~~to conduct hydrographic~~] surveys may include[~~and deliver reports thereon, including~~], but are not limited to, the following:

(1) determining and delineating the form and position of a body of water;

(2) evaluating the profiles and capacities of a water body;

(3) evaluating available water supplies;

(4) evaluating levels, rates, and quality of sediment levels;

(5) mapping of bathymetric contours, obstructions to navigation, or other specialized hydrographic mapping;

(6) processing, archiving, retrieving, and providing hydrographic data; [~~and~~]

(7) potential mitigative measures; and

(8) collecting geohydrologic information from water-bearing formations.

(d) [~~(b)~~] The executive administrator may determine priorities when scheduling conflicts exist between competing applications for hydrographic services.

§377.4. Charges for Services.

The executive administrator shall develop and implement, with board approval, [~~a~~]user charge schedules[~~schedule~~], as necessary, for conducting hydrographic surveys, which shall recover the board's costs to conduct the surveying program, including capital equipment and personnel. The charges for services shall be based upon reasonable and equitable cost-recovery principles. At least once every two years, the executive administrator shall review and obtain board approval of the user charge schedule.

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 November 15, 2001.

TRD-200107029
Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: January 16, 2002
For further information, please call: (512) 463-7981

♦ ♦ ♦

TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION
SUBCHAPTER B. NATURAL GAS PRODUCTION TAX

34 TAC §3.21

The Comptroller of Public Accounts proposes an amendment to §3.21, concerning exemption or tax reduction for high-cost natural gas. This section is being amended to change the definition of the "date of first production" in coordination with the recent amendment to the Texas Railroad Commission Statewide Rule 16 TAC §3.101.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant fiscal impact on the state or units of local government.

Mr. LeBas also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be in providing taxpayers with additional information regarding their tax responsibilities. This rule is adopted under the Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed 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 the Tax Code, Title 2.

The amendment implements Tax Code, §201.057.

§3.21. Exemption or Tax Reduction for High-Cost Natural Gas.

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

(1) Commission--The Railroad Commission of Texas.

(2) Recompletion--The performance of work within an existing wellbore for the purpose of drilling to a deeper producing formation or plugging back to a more shallow producing formation.

(3) High-cost gas--

(A) High-cost natural gas as described by Natural Gas Policy Act of 1978, §107, as that section exists on January 1, 1989, without regard to whether that section is in effect or whether a determination has been made that the gas is high-cost natural gas for purposes of that Act; or

(B) All gas produced from oil wells or gas wells within a Commission approved co-production project.

(4) Commission approved co-production project--A reservoir development project in which the Commission has recognized that water withdrawals from an oil or gas reservoir in excess of specified minimum volumes will result in recovery of additional oil and/or gas from the reservoir that would not be produced by conventional production methods and where operators of wells completed in the reservoir have begun to implement Commission requirements to withdraw such volumes of water and dispose of such water outside the subject reservoir. Reservoirs potentially eligible for this designation shall be limited to those reservoirs in which oil and/or gas has been bypassed by water encroachment caused by production from the reservoir and such bypassed oil and/or gas may be produced as a result of reservoir-wide high-volume water withdrawals of natural formation water.

(5) Date of first production--For [~~purposes of the reduced tax rate available for~~] high-cost natural gas wells spudded or completed after August 31, 1996, [~~shall mean~~] the first day of the month [~~following the earlier of the month~~] of the deliverability test as reported on the appropriate Commission form, or the production month as indicated on the first production report filed with the Commission that shows [~~showing~~] a gas disposition code other than "lease or field fuel use" or "vented or flared", whichever month is earlier.

(6) Consecutive months--Months in consecutive order, regardless of whether or not a well produces oil or gas during any or all such months.

(7) Amount of tax reduction for a well--The product of the full tax rate times the ratio of drilling and completion costs for the well to twice the median drilling and completion costs for high-costs wells for which an application for the exemption or tax reduction was made during the previous state fiscal year. Drilling and completion costs for a recompletion shall only include current and contemporaneous costs associated with the recompletion.

(8) Reduced tax rate--The tax rate obtained when the amount of tax reduction is subtracted from the full tax rate, except that the effective rate of the tax shall never be less than zero.

(b) Producers. Producers producing gas or gas products extracted from the gas from a gas completion certified by the Commission as qualifying for the high-cost gas tax exemption or reduced tax rate or from an oil or gas well within a Commission approved co-production project may file with the comptroller an application for tax exemption or the reduced tax rate. Except as provided by subsection (k) of this section, tax must be paid on gas and gas products at the full rate until the date the comptroller approves the application.

(c) Condensate. Condensate, as defined under the Tax Code, §201.001(2), produced with the high-cost gas is not exempt from the tax.

(d) Gas produced. Gas produced along with oil is not exempt from the tax unless the gas is from an oil well within a Commission approved co-production project.

(e) Application form. The operator shall make application on forms prescribed by the comptroller for the exemption or tax reduction on gas produced and sold or used by the operator or by any other interest owner in the property. The operator shall provide a copy of the

approved application to any interest owner taking gas in-kind. The operator shall also be responsible for advising the comptroller whenever the status of an exemption or tax reduction changes.

(f) Application supporting documents. The application for exemption or reduced tax rate shall include:

(1) a copy of the Commission High-cost Gas State Severance Tax Exemption Certificate Application;

(2) a copy of the letter of tax exemption certificate issued by the Commission;

(3) the date the Commission approves the exemption or reduced tax rate;

(4) the date of first production;

(5) a statement as to whether or not tax has been paid on the gas for periods after the effective date of the exemption, and the name of the party paying the tax; and

(6) a report of drilling and completion costs incurred for each well on a form and in the detail as determined by the comptroller.

(g) Application due date. The application for exemption or tax reduction must be filed with the comptroller on or before the later of the 180th day after the date of first production or the 45th day after the date of approval by the Commission, except when:

(1) the application is received after August 31, 1995, and before September 1, 1997, for wells spudded or completed and producing prior to September 1, 1995, and qualifying for the exemption created by the Tax Code, §201.057(b), where the application for the exemption must be made within 180 days of September 1, 1995, or

(2) an application is filed for the exemption created by the Tax Code, §201.057(a)(2)(B) and may not be filed before January 1, 1990, or after December 31, 1998.

(h) Applications that miss the due date. Any application that is not filed by the application due date is subject to a 10% reduction of the tax exemption or tax reduction. The 10% reduction will begin on the first of the month after the 180th day after the date of first production and end on the first of the month prior to the received date by the comptroller of the tax exemption or tax reduction application. Applicants who were denied prior to September 1, 1997, for missing the application due date may reapply for the exemption after September 1, 1997, but will be subject to the 10% reduction of the tax exemption or tax reduction.

(i) Time limitation for refunds. When an application for exemption or reduced tax rate has been approved by the comptroller, a producer or purchaser may file amended reports to recover the tax paid by the producer or purchaser on the high-cost gas for periods after the date of first production and prior to the comptroller's approval of exemption. In order to obtain a refund, the amended reports must be filed within one year after the date the comptroller approves the application for exemption or reduced tax rate.

(j) Notification to non-producers. Producers obtaining an approval for exemption from the comptroller shall furnish to any first purchaser required to report a purchase of high-cost gas a copy of the comptroller's approval. Any first purchaser paying tax on high-cost gas for periods after the date of first production and prior to the comptroller's approval of exemption shall file amended reports to recover the tax paid. In order to obtain a refund, the amended reports must be filed within one year after the date the comptroller approves the application for exemption or reduced tax rate.

(k) Reporting requirements. Producers and purchasers must use the following designations when reporting gas that qualifies for the temporary exemption or tax reduction.

(1) Producers and purchasers reporting high-cost gas from a well spudded or completed before September 1, 1996, shall, after the comptroller approves the exemption, designate the gas as being exempt from tax by reporting lease type "6," which shall mean "Approved High-Cost Gas Well Gas--Temporary Exemption."

(2) Producers and purchasers reporting high-cost gas from a well spudded or completed on or after September 1, 1996, shall, after the comptroller approves the reduced tax rate, designate the gas as being exempt from tax by reporting lease type "5," which shall mean "Approved High-Cost Gas Well Gas--Reduced Tax Rate."

(3) Producers and purchasers reporting high-cost gas from an oil or gas well as defined by subsection (a)(3)(B) of this section shall, after the comptroller approves the exemption, designate the gas as being exempt from tax by reporting lease type "8," which shall mean "High-Cost Gas Exemption--Co-Production Project."

(4) Gas qualifying for the temporary exemption, the reduced tax rate or the exemption for gas from a co-production project must be reported separately from any non-exempt production, if any, on the same lease.

(5) Producers or purchasers reporting exempt gas and non-exempt gas through the use of a commingling permit issued by the Commission must allocate the gas production between exempt and non-exempt gas by use of a method approved by the comptroller.

(6) Except as provided by paragraph (5) of this subsection, producers or purchasers reporting exempt gas or non-exempt gas must report the gas by using as a part of the comptroller's lease identification number the completion number assigned by the Commission.

(l) Reduced tax rate. Tax must be paid at the full rate on all gas as defined in subsection (a) (2) (A) of this section for wells spudded or completed between September 1, 1996, and August 31, 1997. On or after September 1, 1997, the party paying the tax at the full rate may apply to the comptroller for a refund of tax equal to the difference between the tax paid at the full rate and the tax that would be due if calculated at the reduced tax rate as defined in subsection (a)(7) of this section.

(m) Limitation of tax reduction. Once the comptroller approves an application for the reduced tax rate, tax will be due at the reduced tax rate for the first 120 consecutive months beginning with the date of first production or until the cumulative value of the tax reduction equals 50% of the drilling and completion costs incurred for the well, whichever occurs first. The operator shall provide to any interest owner taking gas in-kind the amount of tax reduction calculated according to subsection (a)(7) 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 November 15, 2001.

TRD-200107058
Martin Cherry
Deputy General Counsel for Taxation
Comptroller of Public Accounts
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 463-3699

♦ ♦ ♦

SUBCHAPTER O. STATE SALES AND USE TAX

34 TAC §3.305

The Comptroller of Public Accounts proposes a new §3.305, concerning criminal offenses and penalties. This section is being proposed to implement Senate Bill 1123, 77th Legislature, 2001. Effective September 1, 2001, Senate Bill 1123 amended Tax Code, Chapter 151, to create new offenses and impose penalties and to increase penalties for other criminal offenses. This section will provide information to taxpayers concerning sales and use tax criminal offenses and penalties.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. LeBas also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be in (providing new information regarding tax responsibilities). This rule is adopted under the Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

The new section is proposed 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 the Tax Code, Title 2.

The new section implements the Tax Code, Chapter 151.

§3.305. Criminal Offenses and Penalties.

(a) General. Tax Code, Chapter 151, prohibits certain activities and provides criminal penalties for violations.

(b) Criminal offenses provided in Tax Code, Chapter 151, include, but are not limited to the following:

(1) A seller commits an offense if the seller directly or indirectly advertises or holds out to the public that the seller will assume, absorb, or refund any portion of the tax, or that the seller will not add the tax to the sales price of taxable items. This offense is a misdemeanor punishable by a fine of not more than $500 for each occurrence.

(2) A person commits an offense if the person intentionally or knowingly makes a false entry in, or a fraudulent alteration of, an exemption or resale certificate, or if the person makes, presents, or uses an exemption or resale certificate with knowledge that it is false and with intent that the certificate be accepted as valid. An offense is:

(A) a Class C misdemeanor if the tax evaded by the invalid certificate is less than $20;

(B) a Class B misdemeanor if the tax evaded by the invalid certificate is $20 or more but less than $200;

(C) a Class A misdemeanor if the tax evaded by the invalid certificate is $200 or more but less than $750;

(D) a felony of the third degree if the tax evaded by the invalid certificate is $750 or more but less than $20,000; and

(E) a felony of the second degree if the tax evaded by the invalid certificate is $20,000 or more.

(3) A person or officer of a corporation commits an offense if the person or the corporation engages in business as a seller in this state without a permit or with a suspended permit. A separate offense is committed each day a person operates a business without a permit or with a suspended permit. An offense is:

(A) a Class C misdemeanor for a first offense;

(B) a Class B misdemeanor punishable by a fine not to exceed $2,000 for a second conviction;

(C) a Class A misdemeanor punishable by a fine not to exceed $4,000 for a third conviction; and

(D) a Class A misdemeanor punishable by a fine not to exceed $4,000, confinement in jail for a term not to exceed a year, or both the fine and confinement for a fourth or subsequent conviction.

(4) A person commits an offense if the person intentionally or knowingly fails to pay to the comptroller the tax collected by that person. An offense is:

(A) a Class C misdemeanor if the amount of the tax collected and not paid is less than $10,000;

(B) a state jail felony if the amount of the tax collected and not paid is $10,000 or more but less than $20,000;

(C) a felony of the third degree if the amount of the tax collected and not paid is $20,000 or more but less than $100,000; and

(D) a felony of the second degree if the amount of the tax collected and not paid is $100,000 or more.

(5) A person commits an offense if the person refuses to furnish a report as required by Tax Code, Chapter 151, or by the comptroller. An offense is:

(A) a Class C misdemeanor for a first offense;

(B) a Class B misdemeanor punishable by a fine not to exceed $2,000 for a second conviction; and

(C) a Class A misdemeanor punishable by a fine not to exceed $4,000 for a third or subsequent conviction.

(6) A person commits an offense if the person intentionally or knowingly conceals, destroys, makes a false entry in, or fails to make an entry in records that are required to be made or kept under Tax Code, Chapter 151. An offense is a felony of the third degree.

(7) A person commits an offense if the person fails to produce or allow inspection of a record that is required to be kept under Tax Code, Chapter 151, within an allowed period time after a person who is authorized by the comptroller requests the record. An offense is a Class C misdemeanor. A separate offense is committed each day the person fails to allow inspection of records or fails to produce records after the allowed time period is expired. See subsection (c) of this section for certain restrictions.

(c) Inspection and Demand for Production. Tax Code, §151.0223 permits the comptroller to inspect business premises where a taxable event has occurred and to issue a written demand notice to a taxpayer or to an employee, an authorized representative, or agent of the taxpayer for the production of documents within 10 business days of delivery of the notice. This authority will be exercised within the parameters outlined in subsection (f) of §3.281 of this title (relating to Records Required; Information Required). The Comptroller may file criminal charges with appropriate authorities for violations of Tax Code, §151.023, if the taxpayer fails to permit inspection or fails to

produce documents in response to a demand by the comptroller's Enforcement Division or Criminal Investigation Division.

(d) Venue. Travis County or the county in which any element of the offense occurs is the venue for prosecution for any offense incurred under Tax Code, Chapter 151.

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 November 16, 2001.

TRD-200107092
Martin Cherry
Deputy General Counsel for Taxation
Comptroller of Public Accounts
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 305-9881

♦ ♦ ♦

TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 3. TRAFFIC LAW ENFORCEMENT

SUBCHAPTER D. TRAFFIC SUPERVISION

37 TAC §3.62

The Texas Department of Public Safety proposes amendments to §3.62, concerning Regulations Governing Transportation Safety. Amendments to the section are necessary in order to implement changes resulting from the passage of Senate Bill 220, Acts 2001, 77th Texas Legislature, R.S., Chapter 1227, §II.

Section 3.62 is amended to implement the provisions of Senate Bill 220 directing the department to establish procedures, including training, for the certification of certain sheriffs and deputy sheriffs to enforce the provisions of Texas Transportation Code, Chapter 644.

A second amendment is needed in order to provide clarifying language to existing provisions of §3.62 concerning the Safety Audit Program.

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 to ensure to the public greater compliance by motor carriers with all of the statutes and regulations pertaining to the safe operation of commercial vehicles in the state. The cost of compliance for small businesses, large businesses, and micro-businesses will be the same. There is no anticipated cost to individuals.

Comments on the proposal may be submitted to Coy Clanton, Major, Traffic Law Enforcement Division, Texas Department of Public Safety, Box 4087, Austin, Texas 78773-0520, (512) 424-2116.

The amendments are proposed pursuant to Texas Transportation Code, §644.051, and Texas Government Code, §411.018, which authorizes the director of the Texas Department of Public Safety with the authority to adopt rules regulating the safe operation of commercial motor vehicles and the safe transportation of hazardous materials.

Texas Transportation Code, §644.051, and Texas Government Code, §411.018 are affected by this proposal.

§3.62. Regulations Governing Transportation Safety.

(a) General. The director of the Texas Department of Public Safety incorporates, by reference, the Federal Motor Carrier Safety Regulations, Title 49, Code of Federal Regulations, Parts 382, 385, 386, 390-393, and 395-397 including amendments and interpretations thereto. The rules adopted herein are to ensure that:

(1) a commercial motor vehicle is safely maintained, equipped, loaded, and operated;

(2) the responsibilities imposed on a commercial motor vehicle's operator do not impair the operator's ability to operate the vehicle safely; and,

(3) the physical condition of a commercial motor vehicle's operator enables the operator to operate the vehicle safely.

(b) Terms. Certain terms, when used in the federal regulations as adopted in subsection (a) of this section, will be defined as follows:

(1) the definition of motor carrier will be the same as that given in Texas Transportation Code, §643.001(6);

(2) hazardous material shipper means a consignor, consignee, or beneficial owner of a shipment of hazardous materials;

(3) interstate or foreign commerce will include all movements by motor vehicle, both interstate and intrastate, over the streets and highways of this state;

(4) department means the Texas Department of Public Safety;

(5) director means the director of the Texas Department of Public Safety or the designee of the director;

(6) regional highway administrator means the director of the Texas Department of Public Safety;

(7) farm vehicle means any vehicle or combination of vehicles controlled and/or operated by a farmer or rancher being used to transport agriculture products, farm machinery, and farm supplies to or from a farm or ranch;

(8) commercial motor vehicle has the meaning assigned by Texas Transportation Code, §548.001(1);

(9) foreign commercial motor vehicle has the meaning assigned by Texas Transportation Code, §648.001;

(10) agricultural commodity is defined as an agricultural, horticultural, viticultural, silvicultural, or vegetable product, bees and honey, planting seed, cottonseed, rice, livestock or a livestock product, or poultry or a poultry product that is produced in this state, either in its natural form or as processed by the producer, including wood chips. The term does not include a product which has been stored in a facility not owned by its producer;

(11) planting and harvesting seasons are defined as January 1 to December 31; and,

(12) producer is defined as a person engaged in the business of producing or causing to be produced for commercial purposes

an agricultural commodity. The term includes the owner of a farm on which the commodity is produced and the owner's tenant or sharecropper.

(c) Applicability.

(1) The regulations shall be applicable to the following vehicles:

(A) a vehicle with an actual gross weight, a registered gross weight, or a gross weight rating in excess of 26,000 pounds when operating intrastate;

(B) a farm vehicle with an actual gross weight, a registered gross weight, or a gross weight rating in excess of 48,000 pounds when operating intrastate;

(C) a vehicle designed to transport more than 15 passengers, including the driver; and,

(D) a vehicle transporting hazardous material requiring a placard.

(2) a motor carrier transporting household goods for compensation in intrastate commerce in a vehicle not defined in Texas Transportation Code, §548.001(1) is subject to the record keeping requirements in 49 Code of Federal Regulations, Part 395 and the hours of service requirements specified in this subchapter.

(3) a foreign commercial motor vehicle that is owned or controlled by a person or entity that is domiciled in or a citizen of a country other than the United States.

(4) a contract carrier transporting the operating employees of a railroad on a road or highway of this state in a vehicle designed to carry 15 or fewer passengers.

(5) All regulations contained in Title 49, Code of Federal Regulations, Parts 382, 385, 386, 390-393 and 395-397, and all amendments thereto pertaining to interstate drivers and vehicles are also adopted except as otherwise excluded.

(6) Nothing in this section shall be construed to prohibit an employer from requiring and enforcing more stringent requirements relating to safety of operation and employee health and safety.

(d) Exemptions. Exemptions to the adoption in subsection (a) of this section were made pursuant to Texas Transportation Code, §§644.052-644.054, and are adopted as follows:

(1) Such regulations shall not apply to the following vehicles when operated intrastate:

(A) a vehicle used in oil or water well servicing or drilling which is constructed as a machine consisting in general of a mast, an engine for power, a draw works, and a chassis permanently constructed or assembled for such purpose or purposes;

(B) a mobile crane which is an unladen, self-propelled vehicle constructed as a machine used to raise, shift, or lower weights;

(C) a vehicle transporting a seed cotton module; or,

(D) concrete pumps.

(2) Drivers in intrastate commerce will be permitted to drive 12 hours following eight consecutive hours off duty.

(3) Drivers in intrastate commerce who are not transporting hazardous materials and were regularly employed in Texas as commercial vehicle drivers prior to August 28, 1989, are not required to meet the medical standards contained in the federal regulations.

(A) For the purpose of enforcement of this regulation, those drivers who reached their 18th birthday on or after August 28, 1989, shall be required to meet all medical standards.

(B) The exceptions contained in this paragraph shall not be deemed as an exemption from drug testing requirements contained in Title 49, Code of Federal Regulations, Part 382.

(4) The maintenance of any type of government form, separate company form, driver's record of duty status, or a driver's daily log is not required if the vehicle is operated within a 150 air- mile radius of the driver's normal work reporting location if;

(A) the owner has another method by which he keeps, as a business record, the date, time and location of the delivery of product or service so that a general record of the driver's hours of service may be compiled; or

(B) another law requires or specifies the maintenance of delivery tickets, sales invoices, or other documents which show the date of delivery and quantity of merchandise delivered, so that a general record of the driver's hours of service may be compiled; and

(C) the business records generally include the following information:

(i) the time the driver reports for duty each day;

(ii) the total number of hours the driver is on duty each day;

(iii) the time the driver is released from duty each day; and

(iv) the total time on duty for the preceding seven days in accordance with Title 49, Code of Federal Regulations, Part 395.8(j)(2) for drivers used for the first time or intermittently.

(5) The provisions of Title 49, Code of Federal Regulations, §395.3 shall not apply to drivers transporting agricultural commodities in intrastate commerce for agricultural purposes within a 150 air-mile radius from the source of the commodities or the distribution point for the farm supplies during planting and harvesting seasons.

(6) Unless otherwise specified, a motor carrier transporting household goods for compensation in intrastate commerce in a vehicle not defined in Texas Transportation Code, §548.001(1) is subject to the record keeping requirements in Title 49, Code of Federal Regulations, Part 395 and the hours of service requirements specified in this subchapter.

(7) Unless otherwise specified, a contract carrier is subject only to Title 49, Code of Federal Regulations, Part 391, except 391.11(b)(4) and Subpart E, Parts 393, 395, and 396, except §396.17.

(e) Exceptions. Exceptions adopted by the director of the Texas Department of Public Safety not specified in Texas Transportation Code, §644.053, are as follows:

(1) Title 49, Code of Federal Regulations, Part 393.86, requiring rear-end protection shall not be applicable provided the vehicle was manufactured prior to September 1, 1991 and is used solely in intrastate commerce.

(2) Drivers of vehicles under this section operating in intrastate transportation shall not be permitted to drive after having worked and/or driven for 70 hours in any consecutive seven- day period.

(3) Drivers of vehicles operating in intrastate transportation claiming the 150 mile radius exemption in subsection(d)(4) of this section must return to the work reporting location and be released from work within 12 consecutive hours.

(4) Title 49, Code of Federal Regulations, Part 391.11b(l), is not adopted for intrastate drivers. The minimum age for an intrastate driver shall be 18 years of age.

(5) Title 49, Code of Federal Regulations, Part 391.11b(2), is not adopted for intrastate drivers. An intrastate driver must have successfully passed the examination for a Texas Commercial Driver's License and be a minimum age of 18 years old.

(6) The Alcohol Testing Regulations of Title 49, Code of Federal Regulations, Part 382 will become effective January 1, 1996, for intrastate drivers.

(7) The Drug Testing Regulations of Title 49, Code of Federal Regulations, Part 382, as in effect on December 21, 1990, under Part 391.81, remain in effect under this adoption of Part 382.

(8) Texas Transportation Code, §547.401 and §547.404, concerning brakes on trailers weighing 15,000 pounds gross weight or less take precedence over the brake requirements in the federal regulations for trailers of this gross weight specification unless the vehicle is required to meet the requirements of Federal Motor Vehicle Safety Standard No. 121 (49 Code of Federal Regulations 571.121) applicable to the vehicle at the time it was manufactured.

(9) Texas Transportation Code, Chapter 642, concerning identifying markings on commercial motor vehicles shall take precedence over Title 49, Code of Federal Regulations, Part 390.21, for vehicles operated in intrastate commerce.

(10) Title 49, Code of Federal Regulations, Part 390.23 (Relief from Regulations), is adopted for intrastate motor carriers with the following exceptions:

(A) Title 49, Code of Federal Regulations, Part 390.23(a)(2) is not applicable to intrastate motor carriers making residential deliveries of heating fuels, public utilities as defined in the Public Utility Regulatory Act, the Gas Utility Regulatory Act, and the Texas Water Code and charged with the responsibility for maintaining essential services to the public to protect health and safety provided the carrier:

(i) documents the type of emergency, the duration of the emergency, and the drivers utilized; and

(ii) maintains the documentation on file for a minimum of six months.

(B) The requirements of Title 49, Code of Federal Regulations, Parts 390.23(c)(1) and (2), for intrastate motor carriers shall be:

(i) the driver has met the requirements of Texas Transportation Code, §644; and

(ii) the driver has had at least eight consecutive hours off-duty when the driver has been on duty for 15 or more consecutive hours, or the driver has been on duty for more than 70 hours in seven days.

(f) Vision Waiver. Under this section the Texas Department of Public Safety may provide a waiver for a person who is otherwise disqualified under Title 49, Code of Federal Regulations, Part 391.41(b)(10) provided that intrastate drivers meet the vision standards specified in §16.9 of this title (relating to Qualifications to Drive in Intrastate Commerce).

(1) Applications for a waiver shall be accepted by the Texas Department of Public Safety's License Issuance Bureau.

(2) Waivers will be approved by the director or his designee and issued in conjunction with the medical examiner's certificate required by Title 49, Code of Federal Regulations, Part 391.43.

(3) Waivers granted under this paragraph are valid for a period not to exceed two years after the date of the medical examiner's physical examination of the vision waiver applicant.

(4) Applications for renewals will be granted provided the applicant continues to meet the vision standards adopted by the Texas Department of Public Safety (intrastate drivers must meet vision standards specified in §16.9 of this title, relating to Qualifications to Drive in Intrastate Commerce) and all other requirements of Title 49, Code of Federal Regulations, Part 391.43.

(5) Applicants denied a waiver may appeal the decision of the department by contacting the director, in writing, within 20 days after receiving notification of the denial. The request for an appeal must contain the name, address and driver's license number of the applicant, the reasons why the waiver should be granted, and include all pertinent documents which support the reasons why the waiver should be granted. The denial is stayed pending the review of the director. The decision of the director is final.

(g) Authority to Enforce.

(1) An officer of the department may enter or detain on a highway or at a port of entry a motor vehicle that is subject to Texas Transportation Code, §644.

(2) A non-commissioned employee of the department that is trained and certified to enforce the federal safety regulations may enter or detain at a fixed-site facility, or at a port of entry, a motor vehicle that is subject to Texas Transportation Code, §644.

(3) An officer of the department or a non-commissioned employee of the department that is trained and certified to enforce the federal safety regulations may prohibit the further operation of a vehicle on a highway or at a port of entry if the vehicle or operator of the vehicle is in violation of Texas Transportation Code, §522, or a federal safety regulation or rule adopted under Texas Transportation Code, §644, by declaring the vehicle or operator out-of-service using the North American Standard Uniform Out-of-Service Criteria as a guideline.

(4) Municipal police [~~Police~~] officers from any of the following Texas cities meeting the training and certification requirements contained in subsection (h) of this section and certified by the department may enter or detain on a highway or at a port of entry within the municipality a motor vehicle subject to Texas Transportation Code, §644:

(A) a municipality with a population of 100,000 or more;

(B) a municipality with a population of 25,000 or more, any part of which is located in a county with a population of two [~~2.4~~]million or more;

(C) a municipality any part of which is located in a county bordering the United Mexican States; or,

(D) a municipality with a population of less than 25,000, any part of which is located in a county with a population of 2.4 million and that contains or is adjacent to an international port.

(5) A sheriff, or deputy sheriff from any of the following Texas counties meeting the training and certification requirements contained in subsection (h) of this section and certified by the department

may enter or detain on a highway or at a port of entry within the county a motor vehicle subject to Texas Transportation Code, §644:

(A) a county bordering the United Mexican States, or

(B) a county with a population of 2.2 million or more.

(6) [~~(5)~~] A certified peace[~~police~~] officer from an authorized municipality or county may prohibit the further operation of a vehicle on a highway or at a port of entry within the municipality or county if the vehicle or operator of the vehicle is in violation of Texas Transportation Code, §522, or a federal safety regulation or rule adopted under Texas Transportation Code, §644, by declaring the vehicle or operator out-of-service using the North American Standard Uniform Out-of-Service Criteria as a guideline.

(h) Municipal and County Certification Requirements.

(1) Certain peace[~~Police~~] officers from an authorized municipality or county may be trained and certified to enforce the federal safety regulations provided the municipality or county:

(A) executes a Memorandum of Understanding with the department concerning the working policies and procedures of the inspection program whereby the resources of all agencies will be maximized, duplication of efforts will be minimized, and uniformity in the inspection program will be maintained;

(B) implements a program that ensures their officers are conducting the inspections following the guidelines approved by the department;

(C) implements a program that ensures their officers perform the required number of inspections annually and successfully complete the required annual certification training to maintain the officers' certification;

(D) agrees to suspend immediately any officer that fails to maintain their certification or that fails to perform the inspections following the guidelines approved by the department;

(E) provides a list to the department by January 31st of each year of the officers that have been suspended and are no longer certified;

(F) provides all roadside inspection data to the department through electronic systems that are compatible with the department's system within 15 [~~30~~]days of the inspection.

(2) Substantial non compliance [~~Failure to comply~~]with the provisions of the Memorandum of Understanding or the training, officer certification, or data-sharing requirements by the municipality or county, will [~~may~~]constitute grounds to decertify the municipality's or county's authority to enforce the federal safety regulations.

(3) The failure of a municipality or county to show activity to the Department within a twelve (12) month period will constitute grounds to decertify the municipality or county.

(4) Upon amendment of subsections (g) - (j) of this title, the Department will, if necessary, renew the agreement within a reasonable period of time.

(i) Training and Certification Requirements.

(1) Minimum standards. Certain peace [~~Police~~] officers from the municipalities and counties specified in subsection (g) of this title before being [~~and~~] certified to enforce this article must meet the following standards:

(A) successfully complete the North American Standard Roadside Inspection Course;

(B) participate in an on-the-job training program following each course with a certified officer and perform a minimum of 30 level one inspections.

(2) Hazardous materials. Certain peace[~~Police~~] officers from the municipalities and counties specified in subsection (g) of this title and eligible [~~desiring~~]to enforce the Hazardous Materials Regulations must:

(A) successfully complete the North American Standard Roadside Inspection Course;

(B) successfully complete a Basic Hazardous Materials Course;

(C) participate in an on-the-job training program following each course with a certified officer and perform a minimum of 16 level one inspections.

(3) Cargo Tank Specification. Certain peace[~~Police~~] officers from the municipalities and counties specified in subsection (g) of this title and eligible [~~desiring~~] to enforce the Cargo Tank Specification requirements must:

(A) successfully complete the North American Standard Roadside Inspection Course;

(B) successfully complete a Basic Hazardous Materials Course;

(C) successfully complete a Cargo Tank Inspection Course:,

(D) participate in an on-the-job training program following each course with a certified officer and perform a minimum of 16 level one inspections.

(4) Motor Coach. Certain peace[~~Police~~] officers from the municipalities and counties specified in subsection (g) of this title and eligible [~~desiring~~] to enforce motor coach requirements must:

(A) successfully complete the North American Standard Roadside Inspection Course;

(B) successfully complete a Motor Coach Inspection Course;

(C) participate in an on-the-job training program following each course with a certified officer and perform a minimum of 24 level one inspections.

(5) Training provided by the department. When the training is provided by the Texas Department of Public Safety, the department shall collect fees in an amount sufficient to recover from municipalities and counties the cost of certifying its peace[~~police~~] officers. The fees shall include:

(A) the per diem costs of the instructors established in accordance with the Appropriations Act regarding in-state travel;

(B) the travel costs of the instructors to and from the training site;

(C) all course fees charged to the department;

(D) all costs of supplies; and

(E) the cost of the training facility, if applicable.

(6) Training provided by other training entities. A public or private entity desiring to train police officers in the enforcement of the Federal Motor Carrier Safety Regulations must:

(A) submit a schedule of the courses to be instructed;

(B) submit an outline of the subject matter in each course;

(C) submit a list of the instructors and their qualifications to be used in the training course;

(D) submit a copy of the examination;

(E) submit an estimate of the cost of the course;

(F) receive approval from the director prior to providing the training course;

(G) provide a list of all peace[~~police~~] officers attending the training course, including the peace [~~police~~]officer's name, rank, agency, social security number, dates of the course, and the examination score; and

(H) receive from each peace[~~police~~] officer[~~, or~~] municipality, or county the cost of providing the training course(s).

(j) Maintaining Certification.

(1) To maintain certification to conduct inspections and enforce the federal safety regulations, a peace[~~municipal~~] officer must:

(A) Successfully complete the required annual certification training.

(B) [~~(A)~~] Perform a minimum of 32 Level I or Level V inspections per calendar year.

(C) [~~(B)~~] If the officer is certified to perform hazardous materials inspections, at least eight inspections (Levels I or II) shall be conducted on vehicles containing non- bulk quantities of hazardous materials.

(D) [~~(C)~~] If the officer is certified to perform cargo tank/bulk packaging inspections, at least eight inspections (Levels I or II) shall be conducted on vehicles transporting hazardous materials in cargo tanks.

(E) [~~(D)~~] If the officer is certified to perform motorcoach/bus inspections, at least eight of the inspections (Levels I or V) shall be conducted on motorcoaches/buses.

~~[(2) To maintain certification, an officer must attend minimum refresher training approved by the department once each year.]~~

(2) [~~(3)~~] In the event an officer does not meet the requirements of subsection (j)(1) of this section,[~~perform the minimum number of inspections within a calendar year,~~] his or her certification shall be suspended.

(3) [~~(4)~~] To be recertified, after suspension, an officer shall pass the applicable examinations which may include the North American Standard Inspection, the General Hazardous Materials Inspection Course, the Cargo Tank/Bulk Packaging Inspection Course, and/or the Motorcoach/Bus Inspection Course and repeat the specified number of inspections with a certified officer.

(4) [~~(5)~~] any officer failing any examination, or failing to successfully demonstrate proficiency in conducting inspections after allowing any certification to lapse will be required to repeat the entire training process as outlined in subsection (i) of this section.

(k) Safety Audit Program. The rules in this subsection, as authorized by Texas Transportation Code, §644.155, establish procedures to determine the safety fitness of motor carriers, assign safety ratings, take remedial actions when necessary, assess administrative penalties when required, and prohibit motor carriers receiving a safety rating of "unsatisfactory" from operating a commercial motor vehicle. The department will use the Compliance Review Audit to determine the safety fitness of motor carriers and to assign safety ratings. The safety fitness determination will be assessed on intrastate motor carriers and the intrastate operations of interstate motor carriers based in Texas.

(1) Definitions specific to the Safety Audit Program are as follows:

(A) Compliance Review means an on-site examination of motor carrier operations to determine whether a motor carrier meets the safety fitness standard.

(B) Culpability means an evaluation of the blame worthiness of the violator's conduct or actions.

(C) Imminent Hazard means any condition of vehicle, employees, or commercial vehicle operations which is likely to result in serious injury or death if not discontinued immediately.

(D) Satisfactory Safety Rating means that a motor carrier has in place and functioning adequate safety management controls to meet the safety fitness standard prescribed in Title 49, Code of Federal Regulation, Part 385.5. Safety management controls are adequate if they are appropriate for the size and type of operation of the particular motor carrier.

(E) Conditional Safety Rating means a motor carrier does not have adequate safety management controls in place to ensure compliance with the safety fitness standard that could result in the occurrences listed in Title 49, Code of Federal Regulations, Part 385.5(a) through (k).

(F) Unsatisfactory Safety Rating means a motor carrier does not have adequate safety management controls in place to ensure compliance with the safety fitness standard which has resulted in occurrences listed in Title 49, Code of Federal Regulations, Part 385.5(a) through (k).

(G) For the purposes of collection of the administrative penalty, Final Departmental Decision [~~Action~~] is defined as:

(i) the most recent claim letter issued to a motor carrier [~~carrier's~~] who fails[~~failure~~] to pay or becomes delinquent in the payment of an administrative penalty as outlined in this subchapter;

(ii) the most recent claim letter issued to a motor carrier [~~carrier's~~] who fails[~~failure~~] to request an informal hearing or an administrative hearing within 20 days of receipt of the Notice of Claim; or

(iii) [~~a motor carrier's failure to appeal~~] a Final Order issued from an administrative hearing as outlined in this subchapter.

(2) Inspection of Premises.

(A) Authority to Inspect. An officer or a non-commissioned employee of the department who has been certified by the director may enter a motor carrier's premises to inspect lands, buildings, and equipment and copy or verify the correctness of any records, reports or other documents required to be kept or made pursuant to the regulations adopted by the director in accordance with Texas Transportation Code, §644.155.

(B) Entry of Premises. The officer or employee of the department may conduct the inspection:

(i) at a reasonable time;

(ii) on stating the purpose of the inspection; and

(iii) by presenting to the motor carrier;

(I) appropriate credentials; and

(II) a written statement from the department to the motor carrier indicating the officer's or employee's authority to inspect.

(C) Civil and Criminal Penalties for Refusal to Allow Inspection.

(i) A person who does not permit an inspection authorized under Texas Transportation Code, §644.104, is liable to the state for a civil penalty not to exceed $1,000. The director may request that the attorney general sue to collect the penalty in the county in which the violation is alleged to have occurred or in Travis County.

(ii) The civil penalty is in addition to the criminal penalty provided by Texas Transportation Code, §644.151.

(iii) Each day a person refuses to permit an inspection constitutes a separate violation for purposes of imposing a penalty.

(3) Compliance Review Audits. A Compliance Review will be conducted based upon the following criteria:

(A) unsatisfactory safety assessment factor evaluations;

(B) written complaints concerning unsafe operation of commercial motor vehicles which are substantiated by valid documentation. Complaints for the purpose of this criterion include involvement in a fatality accident;

(C) follow-up investigations of motor carriers that have been the subject of an enforcement action, an administrative penalty, or the assessment of an Unsatisfactory Safety Rating from the immediately previous Compliance Review;

(D) requests from the Legislature and state or federal agencies; and,

(E) request for a safety rating determination.

(4) Safety Fitness Rating.

(A) A safety fitness rating is based on the degree of compliance with the safety fitness standard for motor carriers.

(B) A safety rating will be determined following a compliance review using the factors prescribed in Title 49, Code of Federal Regulations, Part 385.7. The following safety ratings will be assigned:

(i) Satisfactory Safety Rating;

(ii) Conditional Safety Rating;

(iii) Unsatisfactory Safety Rating.

(C) The provisions of Title 49, Code of Federal Regulations, Part 385.13 relating to "Unsatisfactory safety rating - Prohibition on transportation of hazardous materials and passengers" is hereby adopted by the department and is applicable to intrastate motor carriers.

(D) The department will provide written notification to the motor carrier of the assigned safety rating within 15 days of the completion of the compliance review.

(i) Notification of a "conditional" or "unsatisfactory" rating will include a list of those items for which immediate corrective action must be taken.

(ii) A notification of an "unsatisfactory" safety rating will also include a notice that the motor carrier will be subject to the provisions of Title 49, Code of Federal Regulations, Part 385.13 which prohibit motor carriers rated "unsatisfactory" from operating a commercial motor vehicle to transport:

(I) hazardous materials requiring placarding under Part 172, Subpart F, of Title 49, Code of Federal Regulations; or

(II) more than 15 passengers, including the driver.

(E) In addition to any criminal penalties provided by statute, a motor carrier assessed an unsatisfactory safety rating who continues to operate in violation of the notifications to cease operations under Title 49, Code of Federal Regulations, Part 385.13 will be subject to a civil suit filed by the Attorney General from a request from the director of the Texas Department of Public Safety. Each day of operation constitutes a separate violation.

(F) Request for a change in a safety rating. A request for a change in a safety rating must be submitted to the Manager of the Motor Carrier Bureau within the time schedule provided in Parts 385.15 and 385.17 of Title 49, Code of Federal Regulations.

(G) The safety rating assigned to a motor carrier will be made available to the public upon request.

(H) Requests should be addressed to the Texas Department of Public Safety, Motor Carrier Bureau, Box 4087, Austin, Texas 78773-0521. All requests for disclosure of safety rating must be made in writing and will be processed under the Texas Public Information Act.

(l) Administrative Penalties.

(1) The compliance review may result in the initiation of an enforcement action based upon the number and degree of seriousness of the violations discovered during the review as well as those factors listed in Title 49, Code of Federal Regulations, Part 385.7. As a result of the enforcement action, the department may impose an administrative penalty against a motor carrier who violates a provision of the Texas Transportation Code Title 7, Subtitle B, Chapter 522 (relating to Commercial Driver's License), Subtitle C, Chapters 541 - 600 (relating to the Rules of the Road), and Subtitle F, Chapter 644 (relating to Commercial Motor Vehicles), including any amendments not codified in the Texas Transportation Code. Each of these provisions relates to the safe operation of a commercial motor vehicle under Texas Transportation Code, §644.153(b).

(2) The department shall have discretion in determining the appropriate amount of the administrative penalty assessed for each violation. A penalty under this section may not exceed the maximum penalty provided for violations of a similar federal safety regulation as provided under 49 United States Code, §521(b), §5123, and the Transportation Equity Act for the 21st Century (Public Law 105-178).

(3) The amount of the administrative penalty shall be determined by taking into account the following factors:

(A) nature of the violation;

(B) circumstances of the violation;

(C) extent of the violation;

(D) gravity of the violation;

(E) degree of culpability;

(F) history of prior offenses;

(G) any hazard to the health or safety of the public caused by the violation or violations;

(H) the economic benefit gained by the violation(s);

(I) ability to pay;

(J) the amount necessary to deter future violations;

(K) effect on ability to continue to do business;

(L) economic harm to property or the environment caused by the violation;

(M) efforts to correct the violation; and

(N) such other matters as justice and public safety may require.

(m) Notification.

(1) The department will notify a motor carrier of an enforcement action by the issuance of a claim letter.

(2) The notification may be submitted to the motor carrier's last known address as reflected in the records of the Department[~~principal place of business~~] by certified mail, return receipt requested, [~~first class mail,~~]or personal service[~~delivery~~]. A notification sent by mail shall be presumed to have been received by the motor carrier five days after the date of the mailing.

(3) The motor carrier shall respond within 20 days of receipt of the claim letter with one of the following options:

(A) Payment of the claim in the full amount as outlined in the claim letter; or

(B) Request, in writing, an informal hearing; or

(C) Request, in writing, an administrative hearing.

(4) A request under paragraph (3)(B) or (C) of this subsection must contain the following:

(A) A concise statement of the issues to be presented at the hearing, including the occurrence of the violations, the amount of the penalty, or both; and,

(B) defenses the carrier asserts to the department's claim.

(5) Failure to respond within 20 days as outlined in paragraph (3)(A), (B), or (C) of this subsection will deem the claim letter[~~is deemed~~] as a Final Departmental Decision[~~Action~~].

(n) Informal hearing.

(1) If requested, the department will hold an informal hearing to discuss a penalty recommended under this section. Such hearing will be scheduled and conducted by the manager of the Motor Carrier Bureau or the director's designee.

(2) An informal hearing shall not be subject to rules of evidence and civil procedure except to the extent necessary for the orderly conduct of the hearing. The department will summarize the nature of the violation and the penalty, and discuss the factual basis for such. The motor carrier will be afforded an opportunity to respond to the allegations verbally and/or in writing.

(3) After the conclusion of the informal hearing, the hearing officer will issue a Memorandum of Decision, which will be provided to the motor carrier. The Memorandum of Decision will contain the following:

(A) a statement of findings by the hearing officer, including a statement of dismissal of charges, modification of penalties, or affirmation of penalties; and

(B) if the penalties are modified or affirmed, the Memorandum of Decision will be accompanied by a revised[~~new~~] claim letter requiring the motor carrier to respond within 20 days of receipt of claim letter with one of the following options:

(i) Payment of the claim in the full amount as outlined in the claim letter; or

(ii) Request an administrative hearing before the State Office of Administrative Hearings.

(4) Failure to respond as outlined in paragraph (3)(B)(i) or (ii) of this subsection will deem the revised claim letter[~~is deemed~~] as a Final Departmental Decision[~~Action~~].

(o) Administrative Hearing.

(1) If the motor carrier requests an administrative hearing, as required by subsection (m)(3)(C) or (n)(3)(B)(ii) of this section, the department shall request an administrative hearing before the State Office of Administrative Hearings. The department will provide written notice by certified mail, return receipt requested, or by personal service of such action to the motor carrier.

(2) A contested case under this subsection will be governed by Texas Government Code, Chapter 2001, subchapters C and D, and Chapter 29 of this title (relating to General Rules of Practice and Procedure), and not by Title 49, Code of Federal Regulations, Part 386, Subparts D and E.

(p) Payment, Collection and Settlement of Administrative Penalty.

(1) Payment. A person who is subject to an administrative penalty imposed by the Department as authorized by §644.153(d) is required to pay the administrative penalty. The administrative penalty may be paid through one of the following options:

(A) Full Payment. Full payment of the administrative penalty in the form of a check, cashier's check, or money order made payable to the Department of Public Safety shall be submitted to the Texas Department of Public Safety, Attn: Motor Carrier Bureau, MSC 0522, 6200 Guadalupe, Building P, Austin, Texas 78752- 4019[~~78752-0522~~].

(B) Installment Payments.

(i) A person(s), firm, or business may, upon approval of the director or the director's designee, be allowed to make installment payments of an administrative penalty, costs, fees, expenses, and reasonable and necessary attorney's fees incurred by the state upon submission of adequate proof of inability to pay the full amount of the claim. An application shall be submitted on a form approved by the department.

(ii) The person(s), firm, or business requesting the installment agreement must submit adequate documentation to support the request and make all relevant financial records of the person(s), firm, or business available to the department for inspection and verification.

(iii) In the event of a default of the installment agreement by the person(s), firm, or business, then the remaining balance of the installment agreement will be due immediately.

(iv) Upon default the person(s), firm, or business will be sent a Notice of Claim as outlined in paragraph (2)(B) of this subsection. Once there is default under an installment agreement, the person(s), firm, or business is no longer eligible for installment payments.

(2) Non-Payment of Administrative Penalty. A person who fails to pay, or becomes delinquent in the payment of the administrative penalty imposed by the department as authorized by Texas Transportation Code, §644.153(d) shall not operate or direct the operation of a commercial motor vehicle on the highways of this state until such time

as the administrative penalty has been remitted to the department. The department will make every effort to collect an administrative penalty once an enforcement action has been deemed as a Final Departmental Decision[~~Action~~] through the following options:

(A) Issuance of an Impoundment Order. Pursuant to Texas Transportation Code, §644.153(d) - (h), the department will issue an impoundment order for the impoundment of any commercial motor vehicle that is operated or directed by the person(s), firm, or business that fails to pay an administrative penalty issued under this subchapter.

(B) Prior to issuing the impoundment order, the department will send a Notice of Claim to the person(s), firm, or business in violation of this subchapter by certified mail return receipt requested, or by personal service requiring a response within 20 days. The notice will contain the following language in bold, large face type: "FAILURE TO PAY THIS CLAIM OR RESPOND, AS SPECIFIED IN THE NOTICE OF CLAIM, WITHIN 20 DAYS WILL RESULT IN THIS NOTICE OF CLAIM BEING DEEMED A "FINAL DEPARTMENT DECISION [~~ACTION~~]." "A PERSON WHO IS SUBJECT TO AN ADMINISTRATIVE PENALTY IMPOSED BY THE DEPARTMENT UNDER THIS SUBCHAPTER IS REQUIRED TO PAY THE ADMINISTRATIVE PENALTIES OR RESPOND TO THE DEPARTMENT'S NOTICE OF CLAIM. A PERSON WHO FAILS TO PAY, OR BECOMES DELINQUENT IN THE PAYMENT OF THE ADMINISTRATIVE PENALTIES IMPOSED BY THE DEPARTMENT UNDER THIS SUBCHAPTER SHALL NOT OPERATE OR DIRECT THE OPERATION OF A COMMERCIAL MOTOR VEHICLE ON THE HIGHWAYS OF THIS STATE UNTIL SUCH TIME AS THE ADMINISTRATIVE PENALTIES HAVE BEEN REMITTED TO THE DEPARTMENT."

(C) The Department shall issue an Impoundment Order if the person(s), firm, or business fail to respond as specified to the Notice of Claim within 20 days. The Impoundment Order will contain the following information:

(i) Motor carrier's name, address, city, zip code and telephone number;

(ii) The motor carrier's Texas Department of Transportation, United States Department of Transportation, or Motor Carrier number, if any;

(iii) The amount of delinquent penalty assessment;

(iv) The date the Impoundment Order was issued;

(v) A contact number for the Motor Carrier Bureau;

(vi) Notice that impoundment will be lifted upon receipt of full payment of the administrative penalty at the Motor Carrier Bureau or the designated License and Weight employee as described in paragraph (5)(C)(i) or (ii) of this subsection; and,

(vii) In bold, conspicuous letters, notice that the carrier is responsible for all costs of storage of the vehicle and its cargo, and towing.

(3) Prior to impounding any vehicle the trooper shall verify the Impoundment Order is still valid. Verification can only be made by the Manager, Assistant Manager, or the Motor Carrier Compliance Audit Section Supervisor of the Motor Carrier Bureau. If a trooper is unable to verify the Impoundment Order is in force, then the vehicle shall not be impounded.

(4) Once a vehicle is impounded, the trooper impounding the vehicle shall immediately ensure the motor carrier is notified of impoundment of the vehicle. The trooper will inform the motor carrier of the name, location, and telephone number of the vehicle storage facility where the vehicle is impounded, notice the vehicle will not be released until the administrative penalty has been paid, and a contact number for the Motor Carrier Bureau.

(5) Release of Impounded Vehicles.

(A) To cancel the Impoundment Order and to release a vehicle from impoundment, the motor carrier shall pay the administrative penalty in full.

(B) The payment of the administrative penalty must be for the full amount. The payment must be made by cashier's[~~cashier~~] check or money order payable to the Texas Department of Public Safety.

(C) The payment can be made in one of two ways only:

(i) by sending it to the following address as indicated: Texas Department of Public Safety, Motor Carrier Bureau, MSC 0522, 6200 Guadalupe, Bldg. P, Austin, Texas 78752- 4019,[~~78752-0522~~] Attn: Negotiators, Impoundment Notice; or

(ii) directly to the trooper at the time of the actual impoundment or to any License and Weight employee at any department regional, district or sub-district office.

(D) The impounded vehicle will be released and the impoundment order will be cancelled only[~~Only~~] upon receipt of payment as specified under paragraph (5)(C)(i) or (ii) of this subsection or if the department refers the case to the attorney general for collection of the amount of the penalty.[~~will the impounded vehicle be released and Impoundment Order cancelled, and/or;~~]

[~~(E) Referral of the case to the attorney general for collection of the amount of the penalty;~~]

(q) Suspension and revocation by the Texas Department of Transportation.

(1) The director will determine whether the department will request the Texas Department of Transportation to suspend or revoke a registration issued by the Texas Department of Transportation based upon the department's compliance review.

(2) This determination may be based upon the following:

(A) an unsatisfactory safety rating under Title 49, Code of Federal Regulations, Part 385;

(B) multiple violations of Texas Transportation Code, §644;

(C) multiple violations of one of these rules; and/or,

(D) multiple violations of the Uniform Traffic Act or Transportation Code.

(3) Once the determination has been made the director will forward a letter to the executive director of the Texas Department of Transportation requesting said department initiate a suspension/revocation proceeding against the motor carrier.

(4) Any suspension/revocation action initiated by the Texas Department of Transportation, pursuant to this section, shall be administered in the manner specified by the rules of the Texas Department of Transportation.

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 November 15, 2001.

TRD-200107057
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 424-2135

♦ ♦ ♦

CHAPTER 23. VEHICLE INSPECTION SUBCHAPTER I. VEHICLE EMISSIONS INSPECTION AND MAINTENANCE ADVISORY COMMITTEE

37 TAC §§23.201 - 23.214

The Texas Department of Public Safety proposes new Subchapter I, §§23.201-23.214, concerning Vehicle Emissions Inspection and Maintenance Advisory Committee. §23.201, Purpose; §23.202, Definitions; §23.203, Creation and Duration of Vehicle Emissions Inspection and Maintenance Advisory Committee; §23.204, Purpose and Duties of Vehicle Emissions Inspection and maintenance Advisory Committee; §23.205, Composition of Vehicle Emissions Inspection and Maintenance Advisory Committee; §23.206, Membership Terms; §23.207, Membership; §23.208, Attendance; §23.209, Reimbursement; §23.210, Presiding Officer; §23.211, Manner of Reporting; §23.212, Subcommittees; §23.213, Meetings; and §23.214, Records, relating to Committee Activities. The main purpose of the rulemaking is to establish the Vehicle Emissions Inspection and Maintenance Advisory Committee as provided in Transportation Code, §548.006 as amended by House Bill 2134, Acts 2001, 77th Leg., R.S., ch. 1075.

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 to state or local government, 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 more public participation in the rulemaking concerning the Motor Vehicle Emissions Inspection and Maintenance Program. There is no anticipated adverse economic effect on individuals, small businesses, or micro-businesses.

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, Texas 78773- 0543; or by fax at (512) 424-2774. All comments must be received within 30 days after publication of the proposed new sections in the *Texas Register* and should make reference to "Proposed Rules for Vehicle Emissions I/M Advisory Committee" in the subject line or in the beginning of the text.

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 the provisions of §7 of House Bill 2134, Acts 2001, 77th Leg., R.S., ch. 1075.

Texas Government Code, §411.004(3) and Texas Transportation Code, §548.006 are affected by this proposal.

§23.201. Purpose.

This subchapter governs procedures applicable to the Vehicle Emissions Inspection and Maintenance Advisory Committee created to advise the department on the rules relating to the operation of the Motor Vehicle Emissions Inspection and Maintenance Program established under Chapter 548, Subchapter F of the Transportation Code.

§23.202. Definitions.

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

(1) Advisory committee -- Vehicle Emissions Inspection and Maintenance Advisory Committee created by or under, Subchapter A, Chapter 548, Transportation Code, §548.006, that has as its primary function the provision of advice to the department.

(2) Department -- Department of Public Safety.

(3) Director -- Director of the Department of Public Safety.

§23.203. Creation and Duration of Vehicle Emissions Inspection and Maintenance Advisory Committee.

(a) The Vehicle Emissions Inspection and Maintenance Advisory Committee is created as provided in Texas Transportation Code, §548.006.

(b) Not later than January 1, 2002, the members of the Public Safety Commission shall appoint to the advisory committee, as follows:

(1) a representative of inspection station owners and operators to serve a one-year term;

(2) a representative of manufacturers of motor vehicle emissions inspection devices to serve a two-year term; and

(3) a representative of the public interest to serve a three-year term.

(4) After the initial term all appointments will be for a period of three years.

(c) Not later than January 1, 2002, the members of the Texas Natural Resource Conservation Commission shall appoint members to the advisory committee, as follows:

(1) the presiding officer of the commission shall appoint a member to a three-year term;

(2) one member other than the presiding officer shall appoint a member to a one-year term; and

(3) one member other than the presiding officer shall appoint a member to a two-year term.

(4) After the initial term all appointments will be for a period of three years.

(d) In accordance with Texas Government Code, Chapter 2110, the advisory committee shall be abolished on the fourth anniversary of the date of its creation (January 1, 2002) unless the Public Safety Commission affirmatively votes to continue the advisory committee.

§23.204. Purpose and Duties of Vehicle Emissions Inspection and Maintenance Advisory Committee.

The purpose of advisory committee shall be to give the department's Vehicle Inspection Service employees the benefit of the members' collective business, environmental, and technical expertise and experience with respect to the department's rules relating to the operation of the emissions testing program and at the department's request make recommendations relating to the content of rules involving the operation of the emissions testing program. Recommendations and advice of the

committee are not binding on the department. The committee will have no supervision or control over public business or policy. The advisory committee's sole duty is to advise the department on the state's vehicle emission inspection and maintenance program. This advice shall consist of review and comment on rules considered for adoption under Subchapter F of the Transportation Code. The Vehicle Emissions Inspection and Maintenance Advisory Committee has no executive or administrative powers or duties with respect to the operation of the department, and all such powers and duties rest solely with the department. Any other specific purposes and tasks of the advisory committee shall be identified by the Director.

§23.205. Composition of Vehicle Emissions Inspection and Maintenance Advisory Committee.

The composition of the Vehicle Emissions Inspection and Maintenance Advisory Committee shall consist of six members. The Public Safety Commission shall appoint three members of the committee as follows: one person to represent inspection station owners and operators; one person to represent manufacturers of motor vehicle emissions inspection devices; and one person to represent the public interest. Each member of the Natural Resource Conservation Commission shall appoint one member of the committee.

§23.206. Membership Terms.

Vehicle Emissions Inspection and Maintenance Advisory Committee serve staggered three-year terms. A vacancy on the advisory committee is filled in the same manner as other appointments to the committee.

§23.207. Membership.

All members of the advisory committee are appointed by and serve at the pleasure of the respective commission that appoints them. If a member resigns, dies, becomes incapacitated, is removed by the respective commission, or otherwise vacates his or her position prior to the end of his or her term, that commission shall appoint a replacement who shall serve the remainder of the unexpired term.

§23.208. Attendance.

A record of attendance at each meeting of the advisory committee shall be made. Except as otherwise provided by law, if a member of an advisory committee misses three consecutive regularly scheduled meetings or more than half of all the regularly scheduled meetings in a one-year period, that member automatically vacates his or her position on the advisory committee.

§23.209. Reimbursement.

A member of the advisory committee is not entitled to compensation, but is entitled to reimbursement of the member's travel expenses as provided in the General Appropriations Act for state employees.

§23.210. Presiding Officer.

The member appointed by the presiding officer of the Natural Resource Conservation Commission shall serve as the presiding officer of the committee. The presiding officer shall report the committee's advice and attendance to the Director. The committee may elect an assistant presiding officer and a secretary from among its members and may adopt rules for the conduct of its own activities.

§23.211. Manner of Reporting.

The advisory committee shall provide a written report to the department a minimum of once per year, unless otherwise directed by the Director. The report provided by the advisory committee shall be sufficient to allow the department to properly evaluate the committee's work, usefulness, and the costs related to the committee's existence, including the cost of agency staff in support of the committee's activities.

§23.212. Subcommittees.

The advisory committee may organize themselves into subcommittees. One member of each subcommittee shall serve as the chairperson of that subcommittee. Subcommittee chairs shall make written reports regarding their subcommittee's work to the presiding officer of the advisory committee.

§23.213. Meetings.

The advisory committee shall meet at least on a quarterly basis or at the call of the presiding officer. All advisory committee meetings shall be open to the public.

§23.214. Records.

Department staff shall record and maintain the minutes of each advisory committee and subcommittee meeting. The staff shall maintain a record of actions taken and shall distribute copies of approved minutes and other committee documents to the Director, respective commissions, and to the advisory committee members.

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 November 15, 2001.

TRD-200107056
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 424-2135

♦ ♦ ♦

PART 6. TEXAS DEPARTMENT OF CRIMINAL JUSTICE

CHAPTER 151. GENERAL PROVISIONS

37 TAC §151.52

The Texas Department of Criminal Justice proposes new §151.52, concerning the TDCJ Sick Leave Pool. The purpose of this new section is to provide procedures relating to the operation of the Texas Department of Criminal Justice (TDCJ) sick leave pool.

Brad Livingston, Chief Financial Officer for the Department of Criminal Justice, has determined that for each year of the first five-year period the new section will be in effect there will be no fiscal implications for state or local government and no local employment impact as a result of enforcing or administering the section as proposed.

Mr. Livingston also has determined that for each year of the first five year period the new section is in effect, the public benefit anticipated as a result of enforcing the section as proposed will be a better understanding of the policies and procedures for the Texas Department of Criminal Justice Sick Leave Pool. There will be no effect on small businesses or micro-businesses. There is no anticipated economic cost to persons required to comply with the section as proposed.

Comments should be directed to Carl Reynolds, General Counsel, Texas Department of Criminal Justice, P.O. Box 13084, Austin, Texas 78711, carl.reynolds@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this proposal.

The new section is proposed under Texas Government Code, §492.013, which grants general rulemaking authority to the Board and Texas Government Code, §661.002, which specifically authorizes this section.

Cross Reference to Statute: Texas Government Code, §661.002.

§151.52. Sick Leave Pool.

(a) Definitions. Sick Leave Pool Administrator - The Director for the Human Resources Division or designee.

(b) Procedures.

(1) All contributions to the TDCJ sick leave pool are voluntary. Employees who contribute accrued sick leave hours to the TDCJ sick leave pool may not designate the contributed hours for use by a specific employee. An employee who contributes accrued sick leave hours to the sick leave pool may not withdraw the contributed hours of sick leave unless the employee meets the eligibility criteria for sick leave pool withdrawals.

(2) An employee may not withdraw time from the sick leave pool except in the case of catastrophic illness or injury of the employee or the employee's immediate family. The pool administrator shall determine the amount of time that an employee may withdraw from the sick leave pool. An employee absent on time withdrawn from the sick leave pool shall be treated for all purposes as if the employee were absent on earned sick leave.

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 November 15, 2001.

TRD-200107031
Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 463-9693

♦ ♦ ♦

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. TEXAS DEPARTMENT OF HUMAN SERVICES

CHAPTER 19. NURSING FACILITY REQUIREMENTS FOR LICENSURE AND MEDICAID CERTIFICATION

The Texas Department of Human Services (DHS) proposes to amend §19.210, concerning change of ownership, and §19.2308, concerning change of ownership, in its Nursing Facility Requirements for Licensure and Medicaid Certification chapter. The purpose of the amendments is to incorporate changes made by the 77th Legislature, which provide for a temporary change of ownership license and an expedited change of ownership license for nursing facilities.

Senate Bill 37 provides for a temporary change of ownership license for nursing facilities. The 90-day license will be issued within 30 days after a completed application is submitted and a background check is conducted on the owning entities. During the 90- day period, DHS survey staff will conduct an on-site inspection at the facility.

Senate Bill 772 provides for an expedited change of ownership license to be issued if a new owner submits a completed application, passes a background check, and appears on the excellent performing operator list. This license will be issued within 14 days after a completed application is submitted and a background check is conducted. The expedited change of ownership license expires on the 91st day. An on-site inspection will be conducted within the 90-day period.

James R. Hine, Commissioner, has determined that for the first five-year period the proposed sections will be in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the sections.

Mr. Hine also has determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of adoption of the proposed rules will be a smooth transition when ownership changes. DHS will not place a facility's vendor payments on hold during the duration of the temporary license. If the facility is in compliance with the regulations, a regular two-year license will be issued before the 91st day. There will be no effect on small or micro businesses as a result of enforcing or administering the sections, because the amendment will allow new owners to begin operating nursing facilities without an interruption to the flow of vendor payments. There is no anticipated economic cost to persons who are required to comply with the proposed sections. There also is no probable effect on local employment in geographic areas affected by these sections.

Questions about the content of this proposal may be directed to Jeanoyce Wilson at (512) 438-2353 in DHS's Long Term Care Policy section. Written comments on the proposal may be submitted to Supervisor, Rules and Handbooks Unit-017, Texas Department of Human Services E-205, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

Under §2007.003(b) of the Texas Government Code, the department has determined that Chapter 2007 of the Government Code does not apply to these rules. Accordingly, the department is not required to complete a takings impact assessment regarding these rules.

SUBCHAPTER C. NURSING FACILITY LICENSURE APPLICATION PROCESS

40 TAC §19.210

The amendments are proposed under the Health and Safety Code, Chapter 242, which authorizes the department to license and regulate nursing facilities.

The amendment implements the Health and Safety Code, §242.001-242.268.

§19.210. Temporary Change of Ownership.

(a) A temporary change of ownership license is a temporary license issued to an applicant who proposes to become the new operator of a nursing facility that exists on the date the application is filed. Upon receipt of a complete application and fee, the Texas Department of Human Services (DHS) issues a temporary license to the prospective new owner if DHS finds that the prospective new owner and any other persons listed in §19.201(f) of this title (relating to Criteria for

Licensing) meet the requirements in §19.201(e)(2) of this title (relating to Criteria for Licensing) and §19.201(g) of this title (relating to Criteria for Licensing).

(1) All applications must be made on forms prescribed by and available from DHS. Each application must be completed in accordance with DHS instructions, signed, and notarized, and must contain all forms required by DHS.

(2) If an applicant and any other persons listed in §19.201(f) of this title (relating to Criteria for Licensing) meet the requirements of §19.201(e)(2) of this title (relating to Criteria for Licensing) and §19.201(g) of this title (relating to Criteria for Licensing), DHS issues or denies a temporary license not later than the 30th day after the date of receipt of the complete application and fee. The effective date of the license is the date requested in the application. However, that date cannot precede the date the application is received in Facility Enrollment.

(3) After DHS issues a temporary change of ownership license, an on-site inspection is conducted to verify compliance with the requirements.

(4) If the applicant meets the requirements of §19.201 of this title (relating to Criteria for Licensing) and passes an initial inspection or a subsequent inspection before the temporary license expires, a regular two-year license is issued. The effective date of the regular two-year license is the date requested in the application. However, that date cannot precede the date the application is received in Facility Enrollment.

(5) When an applicant has not previously held a license in Texas, a probationary license is issued following the temporary change of ownership license. The effective date of the probationary one-year license is the date requested in the application. However, that date cannot precede the date the application is received in Facility Enrollment.

(6) A temporary change of ownership license expires on the 91st day after the date the temporary change of ownership license was issued.

(b) A nursing facility license holder with an excellent operating record may be eligible to acquire a license on an expedited basis to operate another existing nursing facility. A license holder that appears on the expedited change of ownership list may be granted expedited approval in obtaining a temporary change of ownership license to operate another existing nursing facility in Texas.

(1) DHS maintains and keeps current a list of excellent performing nursing facility license holders that operate an institution in Texas and that have excellent operating records, according to the information available to DHS.

(2) In order to establish and maintain the excellent performing nursing facility license holder list, DHS uses the criteria found in §19.2322(d) of this title (relating to Allocation, Reallocation, and Decertification Requirements). An excellent performing nursing facility license holder meeting these criteria appears on the list and is eligible for an expedited change of ownership license to operate another existing institution in Texas.

(3) An excellent performing nursing facility license holder appearing on the list must submit an affidavit that demonstrates the license holder continues to meet the criteria established for being listed on the excellent performing nursing facility license holder list, and continues to meet the requirements in §19.201(e)(2) of this title (relating to Criteria for Licensing) and §19.201(f) of this title (relating to Criteria for Licensing).

(4) DHS issues an expedited change of ownership license to an excellent performing nursing facility license holder on the list if DHS finds that the license holder and any other persons listed in §19.201(f) of this title (relating to Criteria for Licensing) meet the requirements in §19.201(e)(2) of this title (relating to Criteria for Licensing).

(5) DHS issues the expedited change of ownership license within 14 workdays after submission to Facility Enrollment of a complete application, fee, and required affidavit from the applicant.

(6) An expedited change of ownership license is a temporary change of ownership license that expires on the 91st day after the date the temporary change of ownership license was issued.

(7) An applicant for an expedited change of ownership license must meet all applicable requirements that an applicant for renewal of a license must meet. Any requirement relating to inspections or to an accreditation review applies only to institutions operated by the license holder at the time the application is made for the temporary change of ownership license.

(8) If the applicant meets the requirements of §19.201 of this title (relating to Criteria for Licensing) and passes an initial inspection or a subsequent inspection before the temporary license expires, a regular two-year license is issued. The effective date of the regular two-year license is the date requested in the application. However, the date cannot precede the date the application is received in Facility Enrollment.

(9) A temporary change of ownership license expires on the 91st day after the date the temporary change of ownership license was issued.

(c) [~~(a)~~] During the license term, a license holder may not transfer the license as a part of the sale or other transfer of ownership of the facility. Prior to the sale or other transfer of ownership of the facility, the license holder must notify the Texas Department of Human Services (DHS) that a change of ownership is about to take place. A change of ownership is a:

(1) change of 50% or more in the ownership of the business organization or sole proprietorship that is licensed to operate the facility;

(2) change in the federal taxpayer [~~tax payer~~] identification number; or

(3) relinquishment by the license holder of the management of the facility.

(d) [~~(b)~~] If a license holder changes its name, but does not undergo a change of ownership, the license holder must notify DHS and submit a copy of a certificate of amendment from the Secretary of State's office. On receipt of the certificate of amendment, the current license will be re-issued in the license holder's new name.

(e) [~~(c)~~] To avoid a gap in the license because of a change in ownership of the facility, the prospective new owner must submit to DHS a complete application for a temporary change of ownership license under §19.201 of this title (relating to Criteria for Licensing) at least 30 days before the anticipated date of sale or other transfer of ownership. [~~The applicant must meet all requirements for a license.~~] If the applicant has filed a timely and sufficient application for a temporary change of ownership license and otherwise meets all requirements for a license, DHS will issue the applicant a temporary change of ownership license effective on the date requested by the applicant on the completed application [~~of transfer of ownership~~]. DHS considers an individual has filed a timely and sufficient application for a temporary change of ownership license if the individual submits:

(1) a complete application to DHS, and DHS receives the complete application at least 30 days before the anticipated date of sale or other transfer of ownership;

(2) an incomplete application to DHS with a letter explaining the circumstances that [which] prevented the inclusion of the missing information, and DHS receives the incomplete application and letter at least 30 days before the anticipated date of sale or other transfer of ownership;

(3) a complete application to DHS, DHS receives the application during the 30-day period ending on the anticipated date of sale or other transfer of ownership, and the individual pays a $500 administrative penalty; or

(4) an application to DHS, DHS receives the application by the date of sale or other transfer of ownership, and the individual proves to DHS's satisfaction that the health and safety of the facility residents required an emergency change of ownership.

(f) [(d)] If the application is postmarked by the filing deadline, the application will be considered to be timely filed if received in the Facility Enrollment [Licensing] Section of the state office of Long-Term Care-Regulatory, Texas Department of Human Services, within 15 days of the postmark.

(g) DHS considers an individual has filed a timely and sufficient application for a temporary change of ownership license if the individual submits a complete application within 30 days after submission of an incomplete application. An application must be complete within 30 days after submission to Facility Enrollment. DHS denies an application that remains incomplete 30 days after the date an incomplete application is submitted to Facility Enrollment.

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 November 15, 2001.

TRD-200107045
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 438-3734

♦ ♦ ♦

SUBCHAPTER X. REQUIREMENTS FOR MEDICAID-CERTIFIED FACILITIES

40 TAC §19.2308

The amendment is proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department to administer public and medical assistance programs and under Texas Government Code §531.021, which provides the Health and Human Services Commission with the authority to administer federal medical assistance funds.

The amendment implements the Human Resources Code, §§22.001-22.030 and §§32.001-32.042.

§19.2308. Change of Ownership.

An ownership change is defined in §19.210(c) of this title (relating to Temporary Change of Ownership)[any change in the business organization that changes the identity of the legal entity licensed to operate the facility]. For purposes of this section, prior owner is defined as the legal entity licensed to operate the facility before the change of ownership. The new owner is the legal entity licensed to operate the facility after the change. The Texas Department of Human Services (DHS) will recognize the ownership change [ownership changes effective as of the date of the legally effective transfer of ownership] subject to the following conditions:

(1) DHS [The Texas Department of Human Services (DHS)] will recognize an ownership change effective as the date of transfer of ownership agreed to between the prior owner and the new owner (agreed change date) if DHS receives written notice of the change at least 30 days before the effective date of the temporary change of ownership date. If written notice of the change is not received 30 days before the agreed change date, DHS is not responsible for payments made to the prior owner or new owner that do not reflect the established change date. DHS will not make a duplicate payment. [on or before the agreed change date. If written notice is received after the agreed change date, DHS will recognize the change effective on the date that DHS receives written notice of the change. In no case will DHS recognize a change date that would cause DHS to make double payments for the same services. If written notice of the change is not received by DHS at least 30 days before the agreed change date, DHS is not responsible for payments made to the prior owner or new owner that do not reflect the agreed change date. DHS will not request repayment of such payments on behalf of either entity nor will DHS issue a duplicate payment.] It is the responsibility of the prior and new owner to make arrangements between themselves for such contingencies.

(2) When DHS receives information about a proposed or actual change of ownership, DHS may [has the option to] place vendor payments to the prior owner [and/or the new owner] on hold until all of the following conditions are met [completion of a billing and claims reconciliation, or up to 12 months, whichever is sooner. Money owed to DHS will be recouped from the funds placed on hold. Vendor payments may be released prior to the reconciliation if]:

(A) completion of a billing and claims reconciliation, or up to 12 months after submittal of the final bill, whichever is sooner. Money owed to DHS will be recouped from the funds placed on hold;

(B) [(A)] DHS receives information sufficient to verify the ownership change, if DHS requests such information;

(C) [(B)] the prior owner meets the DHS final reporting requirements [provides DHS with an acceptable final cost report]; and

(D) [(C)] the prior owner provides, at DHS's option, one of the following documents in a format acceptable to DHS to cover possible liabilities of the prior owner:

(i) a surety bond or an irrevocable letter of credit as described in §19.2312 of this title (relating to Surety Bonds or Letters of Credit);

(ii) the new owner's nontransferable written agreement that the new owner has agreed to pay DHS for any liabilities that exist or may be found to exist during the period of the prior owner's contract with DHS; or

(iii) written authority by the prior owner to withhold and retain funds normally due the prior owner from other Medicaid contracts the prior owner may have with DHS.

(3) During the period between the issuance of the temporary change of ownership license and the inspection or survey of the nursing facility, DHS may not place a hold on vendor payments to the temporary license holder.

(4) If the nursing facility fails to pass the inspection or survey or fails to meet the requirements in §19.201 of this title (relating to Criteria for Licensing), DHS may place a hold on vendor payments to the temporary license holder.

(5) [~~(3)~~] When a change in ownership occurs, DHS assigns the agreement to the new owner by issuing a new contract to the new owner effective on the later of: the agreed change date; the date DHS received written notice of the change; or the date necessary to avoid double payments. By signing the contract, the new owner is representing to DHS that the new owner meets the requirements of the contract and the requirements for participation in the Medicaid program. The new owner's contract is subject to the prior owner's contract terms and conditions that were in effect at the time of transfer of ownership, including, but not limited to, the following:

(A) any plan of correction;

(B) compliance with health and safety standards;

(C) compliance with the ownership and financial interest disclosure requirements of 42 Code of Federal Regulations, §§455.104, 455.105, and 1002.3;

(D) compliance with civil rights requirements in 45 Code of Federal Regulations, Parts 80, 84, and 90;

(E) compliance with additional requirements imposed by DHS; and

(F) any sanctions as specified in this chapter relating to remedies for violations of Title XIX nursing facility provider agreements, including deficiencies, vendor holds, compliance periods, accountability periods, monetary penalties, notification for correction of contract violations, probationary contracts, and history of deficiencies.

(6) [~~(4)~~] Neither medical assistance nor amounts payable to vendors out of public assistance funds are transferable or assignable at law or in equity. DHS will not allow non-split agreements in the case of ownership changes. Non-split arrangements are arrangements where DHS does not interrupt payments to old and new owners but continues reimbursements as though no ownership change has occurred. A split in pay agreement ensures that payments to the prior owner stop on a certain date and payments for services thereafter go to the new owner.

(7) [~~(5)~~] The new owner and the prior owner of a nursing facility may reach any agreement they wish, but DHS will not participate in a non-split procedure which would allow the new owner to receive the prior owner's accrued vendor payments.

(8) [~~(6)~~] The prior owner of the facility may remove the financial records pertaining to his period of ownership from the facility, but must maintain them for the time period prescribed by law or until such time as all audit exceptions are reconciled, whichever period is the longer. The original copies of the trust fund records, including ledger cards, may be removed by the prior owner if an exact duplicate of the trust fund records, including ledger cards, remain with the new owner.

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 November 15, 2001.

TRD-200107044

Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 438-3734

♦ ♦ ♦

PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 815. UNEMPLOYMENT INSURANCE

SUBCHAPTER C. TAX PROVISIONS

The Texas Workforce Commission (Commission) proposes the repeal of and new §815.107 Reports Required and Their Due Dates and amendments to §815.109 Payments of Contributions and Reimbursements relating to Chapter 815 Unemployment Insurance, Subchapter C. Tax Provisions.

Purpose. The purposes of the rule changes are to (1) implement provisions relating to the election by certain employers of domestic workers to report wage information and pay tax contributions pursuant to Texas Labor Code § 201.027; (2) add a requirement that service agents filing reports on a cumulative total of 250 or more employees are also required to make the filings electronically in the same manner as a single employer reporting on a total of 250 or more employees; and (3) reorganize and clarify the provisions relating to how and when to file required reports.

Regarding the first change, the 77th Legislature and the Governor approved House Bill 1109, now codified in §201.027 of the Texas Labor Code, which allows certain employers to report information regarding wages paid to employees yearly instead of quarterly. New subsection 815.107(g) is added to include provisions specifically addressing the annual reporting requirements and the method of making the election. Minor amendments to §815.109 are made to address the new statutory provisions relating to contributions due by employers of domestic service workers that have made elections.

Regarding the second change found in §815.107(a)(3)(A), a requirement is added that service agents filing reports on a cumulative total of 250 or more employees are also required to make the filings electronically in the same manner as a single employer reporting on a total of 250 or more employees. The purpose of this requirement is to expedite and simplify the filing process. Although traditionally service agents have been filing electronically when filing reports covering a cumulative total of 250 or more employees, the rule is changed to make the electronic filing requirement clear in the rule.

For filing of elections due by December 31, 2001, an employer of domestic workers as specified in §201.027 of the Texas Labor Code, may submit a request to make the election on a form that is available on the Commission web site at www.texasworkforce.org. If an employer is unable to access the Internet, the form may be requested from and submitted by mail to the following address: Tax Department, Texas Workforce Commission, 101 East 15th Street, Room 570, Austin, Texas 78778-0001 or by fax to (512) 463-9111. If an eligible employer is unable to obtain the form in time to make the filing, a letter requesting the election should be submitted to the Commission by December 31st by mail, or fax to the number indicated in the preceding sentence,

or E-mailed to statussection@twc.state.tx.us. Although the request will be considered timely, the employer may be requested to fill out an election form, if a form was not used to request the election.

Background/History: The Commission, as the entity responsible for the administration and implementation of Texas Unemployment Compensation Act (the Act), Texas Labor Code §201.001 et seq., and related statutes, endeavors to provide streamlined processes, including opportunities for employers to save time while meeting their statutory responsibilities. The Commission now maintains an online tax system that was launched in FY 1999, and gives employers 24-hour access to tax forms and information, as well as secure access to current information about their accounts. Employers without Internet access may call a toll-free number to register their businesses, determine their tax rates and calculate the taxes they owe. They also can access information any time through an automated voice response system. In FY 2000, the Commission launched a pilot Internet project that employers use to file their quarterly tax reports online. Administrative tax hearings are now resolved in a more timely manner because of the online reporting. Efforts to enhance tax services have been so successful that in FY 2000, the Commission received a regional award for performance from the U.S. Department of Labor. The Commission envisions that the streamlining of the reporting requirements for Domestic Service Employers and service agents will add another step forward in creating further efficiencies for the benefit of the employer.

Randy Townsend, Chief Financial Officer, has determined that for the first five years the rules are in effect, the following statements will apply:

there are no additional estimated costs to the state and to local governments expected as a result of enforcing or administering the rules;

there are no estimated reductions in costs to the state or to local governments expected as a result of enforcing or administering the rules;

there are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rules;

there are no foreseeable implications relating to costs or revenues to the state or to local governments as a result of enforcing or administering the rules; and

there are no anticipated costs to persons who are required to comply with the rules as proposed.

Mr. Townsend, Chief Financial Officer, has determined that there is no anticipated adverse impact on small businesses as a result of enforcing or administering these rules because of the following reasons.

Regarding the election, any regulatory burdens or impact on small businesses (including micro-businesses) as well as foreseeable adverse economic effects or costs, if any, would be a result of the state statutory change, or more efficient methods of filing that would reduce costs to any small businesses. For the election, as far as can be determined, small businesses (including micro-businesses) are not required to do anything as a result of these rules regarding the election to report yearly instead of quarterly because the election is voluntary. In the event that an employer is required to expend funds as a result of applying for the election, the expense would be minimal. The expenses would be related to postage and the time to fill out the form and mail it. Likewise, the expenses may be larger for larger entities and smaller for smaller entities but proportionate to the amount of employees for which the employer is required to report wages.

Regarding the reorganization, no added costs are required as a result of the rule changes, the filing requirements do present a cost to small businesses but are authorized by statute.

Regarding the service agent filing, any costs to service agents that report for small businesses would be equal to or less than the costs of submitting separate written filings by mail. Any regulatory burdens or impact on small businesses (including micro-businesses) as well as foreseeable adverse economic effects or costs, if any, would be a result of more efficient methods of filing that would reduce costs to any small businesses that are service agents reporting on 250 or more employees. Likewise, the expenses may be larger for larger entities and smaller for smaller entities but proportionate to the amount of employees for which the employer is required to report wages.

Regarding the existing requirements that have not changed, following are the cost estimates. The use of the term manual filing refers to handwritten or typed completion of a form by the person filing the form. The use of the term computer filing refers to the person filing the information using the Quickfile software available on the TWC webpage to create a document and transfer the document electronically or by mail. The use of the term Internet filing refers to the person filling in the TWC C3 form that is created online, in which some of the employer's data may automatically be filled in, and which is filed through the Internet.

Status Report:

$20.00 calculated as 1 hour preparing and reviewing at $20.00 per hour, and one of the following:

$12.00 calculated as 1 hour drafting and filing manually at $12.00 per hour; or

$4.00 calculated as 20 minutes drafting and filing via the computer at $12.00 per hour.

Quarterly Report:

$20.00 calculated as 1 hour preparing and reviewing at $20.00 per hour; and one of the following:

$6.00 - $24.00 calculated as 30 minutes to 2 hours drafting and filing manually at $12.00 per hour;

$6.00 - $9.00 calculated as 30 - 45 minutes drafting and filing via computer at $12.00 per hour; or

$3.00 - $9.00 as 15-45 minutes preparation and Internet filing at $12.00 per hour (limited to employers of 100 or less employees.

Additional costs:

Additional costs will depend upon the amount of the additional information requested, including document retrieval, which requires the same additional time and possible retrieval expense as referenced in this section or that cannot be estimated but could be substantial.

Request to extend the filing deadline:

$20.00 calculated as 1 hour preparing and reviewing at $20.00 per hour and either

$6.00 calculated as 30 minutes drafting and filing manually at $12.00 per hour; or

$3.00 calculated as 15 minutes drafting and filing via computer at $12.00 per hour.

LaSha Lenzy, Director of Unemployment Insurance and Regulation Division, has determined that for each year of the first five years that the rules will be in effect the public benefit anticipated as a result of the adoption of the proposed rules will be to improve and simplify for domestic employers the methods and frequency of reporting wages paid to employees.

James Barnes, Director of Labor Market Information, has determined that there is no foreseeable negative impact upon employment conditions in this state as a result of these proposed rules.

Comments on the proposed sections may be submitted to John Moore, Texas Workforce Commission, 101 East 15th Street, Room 608, Austin, Texas 78778; Fax Number 512-463-1426; or E-mail to john.moore@twc.state.tx.us. Comments must be received by the Agency no later than thirty (30) days from the date this proposal is published in the *Texas Register*.

For more information about the Commission and services available see www.texasworkforce.org.

40 TAC §815.107

(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 Workforce Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under Texas Labor Code §301.061 and §302.002, which provides the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed repeal affects the Texas Labor Code, Title 4.

§815.107. Reports Required and Their Due Dates.

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 November 15, 2001.

TRD-200107047
John Moore
Assistant General Counsel
Texas Workforce Commission
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 463-2573

♦ ♦ ♦

40 TAC §815.107, §815.109

The new rule and amendments are proposed under Texas Labor Code §301.061 and §302.002, which provides the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed new rule and amendments affect the Texas Labor Code, Title 4.

§815.107. Reports Required and Their Due Dates.

(a) All Reports and Forms required by the Agency or the Act shall be filed with the Agency in one of the following formats unless a different format is approved in writing by the Agency or specified in this Chapter.

(1) General Format of Reports and Forms and Methods of Submission. The reports and forms referenced in this section shall be filed by using:

(A) forms printed by the Agency;

(B) magnetic or electronic media in a format prescribed by this Agency; or

(C) any other manner approved and prescribed by the Agency in writing.

(2) Content. The reports and forms shall contain all facts and information necessary to a determination of the amounts due by the employing unit. The Agency may require the furnishing of additional information as it deems necessary for the proper administration of the Act.

(3) Magnetic and Electronic Media reporting.

(A) Required Magnetic or Electronic Media. Regarding filing of quarterly benefit wage credit reports as required by §207.004 of the Act, the following shall file benefit wage credit reports on magnetic or electronic media using a format prescribed by the Agency:

(i) Employers who have to file a report on 250 or more employees in any one calendar quarter; and

(ii) other entities, including agents reporting on behalf of multiple employers, who have to file reports on a cumulative total of 250 or more employees in any one calendar quarter.

(B) Voluntary Use of Magnetic or Electronic Media. Employers, including agents reporting on behalf of multiple employers, who file a benefit wage credit report on a cumulative total of less than 250 employees in any one calendar quarter, as defined §207.004 of the Act, may voluntarily elect to use magnetic or electronic media reporting.

(C) A magnetic or electronic media wage report may contain information from more than one employer.

(b) General Deadlines for Filing Reports and Forms.

(1) Unless otherwise provided in this subchapter, any report or form shall be completed and filed with the Agency within ten days after the requested report or form is either:

(A) mailed to the individual or employing unit at the address on record with the Agency, or

(B) personally delivered to the individual or employing unit by an Agency representative.

(2) Failure to receive notice regarding the reports shall not relieve the individual or employing unit of the responsibility of filing the reports the date the reports are due.

(3) Good Cause for Extending Deadlines. When good cause is shown, the Agency may extend the due date for filing of a report required under this section; however, the extension shall only be effective if authorized in writing by an Agency representative.

(c) Status Reports.

(1) Status Reports In General. Each employing unit shall file with the Agency a status report within ten days from the date upon which the employing unit becomes subject to the Act.

(2) Status Reports for New Acquisitions. Any employing unit in the State of Texas, which acquires another business or substantially all the assets of another business shall file a new status report to the Agency within ten days of the date on which the employing unit made the acquisition.

(3) Status Reports for Additional Information. Each employing unit shall file additional status reports at any time upon the request of the Agency.

(4) Evidence in Support of Status Reports. Employing units filing status reports to the Agency shall:

(A) file with the Agency all facts necessary to a determination of the taxable status of the employing unit, and

(B) if requested, file with the Agency evidence to establish the correctness of information contained in the employing unit's status reports.

(d) Quarterly Reports from Taxed Employers. Each taxed employer, other than a domestic employer who has elected to report and pay annually under §201.027(b) of the Act, shall file with the Agency, within the month during which contributions for any period become due, and not later than the date on which contributions are required to be paid to the Agency, an employer's quarterly report showing for the preceding calendar quarter:

(1) the total amount of remuneration paid for employment (or showing that no remuneration was paid during the quarter);

(2) the total amount of wages paid for employment (as defined in the Act, §201.081 and §201.082);

(3) the amount of wages for benefit wage credits (as defined in the Act, §207.004) paid to each individual employee;

(4) the name and social security number of each individual to whom the wages were paid; and

(5) any other information requested on the employer's quarterly report, including all facts and information necessary to make a determination of the amount of contributions due.

(e) Quarterly Reports from Reimbursing Employers and Group Representatives of a Group Account. Each reimbursing employer and the group representative of a group account shall file an employer's quarterly report, by the end of the month following each calendar quarter, that furnishes the following information for the preceding calendar quarter, information specified in subsection (d)(1)-(4) of this section and any other information necessary to make a determination of the amount of reimbursements due.

(f) Benefits Financed by the Federal Government. Each employer which has employees whose benefits are to be financed by the federal government shall file a separate quarterly report furnishing the names of the employees, their social security numbers, and the wages paid to each. The report shall be filed by the end of the month following each calendar quarter.

(g) Annual Reports from Domestic Employers.

(1) Making the Election. An election to report wages paid and pay contributions on an annual basis must be made in a format or on a form authorized by the Agency by the deadline specified in §201.027 of the Act.

(2) Each Domestic Employer that qualifies under the Act and who has made an election as referenced in paragraph (1) of this subsection (g), shall file with the Agency, by January 31 of the year after the wages were paid, in a format consistent with subsection (a) of this section, a domestic employer's annual report showing for the preceding calendar year in which wages were paid the following:

(A) the information specified in paragraphs (d)(1)-(4) of this section subtotaled for each quarter; and

(B) other information called for on the domestic employer's annual report including all facts and information necessary to make a determination of the amount of contributions due.

(3) Penalties and interest incurred under this section shall be the same as applicable to other employer reporting requirements as provided in Chapter 213 of the Act and this Subchapter C. relating to Tax Provisions.

§815.109. Payment of Contributions and Reimbursements.

(a) When, in any calendar year, an individual or employing unit becomes an employer (other than a reimbursing employer) subject to this Act, the employer shall, on or before the last day of the month [~~next~~] following the month during which the employer became a subject employer, file [~~makes~~] a report as specified in §815.107 and pay contributions with respect to all completed calendar quarters in the calendar year. Contributions for the quarter during which the employer becomes a subject employer shall be due on the first day of the month immediately following the quarter and shall be paid on or before the last day of the month. Contributions shall accrue quarterly and shall become due on the first day of the month immediately following the calendar quarter. They shall be paid to the Agency on or before the last day of the month. The provisions in this subsection (a) shall apply unless otherwise provided in §201.027 of the Act.

(b) Reimbursements shall become due on the last day of the month following the end of each quarter and shall be paid to the Agency on or before the last day of the next month.

(c) When the last day for payment of contributions or reimbursements falls on a Saturday, Sunday, or a legal holiday on which the Agency office is closed, the payment may be made on the next regular business day.

(d) An employer or other entity, including agents paying on behalf of multiple employers, which paid contributions in the preceding state fiscal year of $250,000 or more, and which is reasonably anticipated to do the same in the current fiscal year, is required to transfer payment amounts of contributions by electronic funds transfer on or before the date the contributions are due, unless the Agency in writing has approved another method or form of payment. Except as otherwise provided in this subsection, employers, including agents may voluntarily transfer payment of contributions by electronic funds transfer on or before the date the contributions are due, unless the Agency in writing has approved another method or form of payment. The transfers, when applicable, shall be subject to the provisions of the Texas Government Code, §404.095, and to rules adopted by the state comptroller pursuant to that section.

(e) When good cause is shown, the Agency may extend the due date for the payment of contributions or reimbursements, however, the extension may not exceed 60 days and shall not be effective unless the extension is authorized in writing by the Agency. In the event the Agency for good cause shown extends the due date for payment of contributions or reimbursements the payments shall be made to the Agency on or before the 30th day following the extended due date.

(f) An agent or other entity making a payment on behalf of 20 or more employers shall furnish an allocation list on magnetic or electronic media using a format prescribed by this Agency, unless the Agency has approved another format and method in writing. This list

shall be furnished with the remittance, and the remittance shall be allocated to the credit of the employers according to the order in which the employers appear on the list.

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 November 15, 2001.

TRD-200107046
John Moore
Assistant General Counsel
Texas Workforce Commission
Earliest possible date of adoption: December 30, 2001
For further information, please call: (512) 463-2573

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 1. ADMINISTRATION

PART 12. COMMISSION ON STATE EMERGENCY COMMUNICATIONS

CHAPTER 251. REGIONAL PLANS--STANDARDS

1 TAC §251.10

The Commission on State Emergency Communications has withdrawn from consideration the proposed amendment to §251.10, concerning Regional Plans--Standards, which appeared in the July 13, 2001, issue of the *Texas Register* (26 TexReg 5169).

Filed with the Office of the Secretary of State on November 21, 2001.

TRD-200107195
Paul Mallet
Executive Director
Commission on State Emergency Communications
Effective date: November 21, 2001
For further information, please call: (512) 305-6933

♦ ♦ ♦

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 daysafter the agency files the correct document with the ***Texas Register***, unless a later date is specified or unless a federalstatute or regula tion 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 1. OFFICE OF THE GOVERNOR

CHAPTER 3. CRIMINAL JUSTICE DIVISION

The Office of the Governor reviewed the rules affecting the Criminal Justice Division grant processes and procedures with the goal of increasing efficiency and updating the rules to address changes in the administration process. The review disclosed that a number of the rules required further clarification and simplification. Therefore, the Office of the Governor amends these sections of the Texas Administrative Code identified below.

The Office of the Governor adopts amendments to Title 1, Part 1, Chapter 3, Subchapter A, §3.9; Subchapter C, §3.803; and Subchapter E, §3.2519 without changes as published in the October 12, 2001, issue of the *Texas Register* (26 TexReg 7965). The revisions clarify existing provisions and add new general and fund-specific requirements.

The adopted amendments provide processes and procedures relating to grants made through the Criminal Justice Division and include, but are not limited to, general grant program provisions, fund-specific policies relating to criminal justice grants, and administering grants. Subchapter A concerns General Grant Program Provisions. Subchapter C concerns Fund-Specific Grant Policies. Subchapter E concerns Administering Grants.

Public comment was received regarding the proposed amendment for §3.9 General Grant Program Provisions. The comment addresses §3.9, subsection (d) which states: "CJD makes no commitment that a grant, once funded, will receive priority consideration for subsequent funding." The comment received "recommends that the language of this subsection be amended to state that preference will be given to previously-funded projects based on continued documentation of need and quality of performance." The Office of the Governor responds that the proposed action relates only to §3.9, subsection (b); therefore, the change recommended within the comment extends beyond the scope of the amendment proposed by the Office of the Governor.

SUBCHAPTER A. GENERAL GRANT PROGRAM PROVISIONS

1 TAC §3.9

The amendment of these rules are adopted under the Texas Government Code, Title 7, §772.006 (a) (11), which provides the Office of the Governor, Criminal Justice Division, the authority to adopt rules and procedures as necessary.

The amended rules implement the Texas Government Code, Title 7, §772.066 (a), which requires the Office of the Governor, Criminal Justice Division, to advise and assist the governor in developing policies, plans, programs, and proposed legislation for improving the coordination, administration, and effectiveness of the criminal justice system.

No other statutes, articles or codes are affected by the adoption of these amendments.

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 November 15, 2001.

TRD-200107060
David Zimmerman
Assistant General Counsel
Office of the Governor
Effective date: December 5, 2001
Proposal publication date: October 12, 2001
For further information, please call: (512) 463-1919

♦ ♦ ♦

SUBCHAPTER C. FUND-SPECIFIC GRANT POLICIES

DIVISION 8. LOCAL LAW ENFORCEMENT BLOCK GRANT PROGRAM

1 TAC §3.803

The adoption of these rules is under the Texas Government Code, Title 7, §772.006 (a) (11), which provides the Office of the Governor, Criminal Justice Division, the authority to adopt rules and procedures as necessary.

The amended rules implement the Texas Government Code, Title 7, §772.066 (a), which requires the Office of the Governor, Criminal Justice Division, to advise and assist the governor in developing policies, plans, programs, and proposed legislation for improving the coordination, administration, and effectiveness of the criminal justice system.

No other statutes, articles or codes are affected by the adoption of these amended rules.

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 November 15, 2001.

TRD-200107059
David Zimmerman
Assistant General Counsel
Office of the Governor
Effective date: December 5, 2001
Proposal publication date: October 12, 2001
For further information, please call: (512) 463-1919

♦ ♦ ♦

SUBCHAPTER E. ADMINISTERING GRANTS

1 TAC §3.2519

The adoption of these rules is under the Texas Government Code, Title 7, §772.006 (a) (11), which provides the Office of the Governor, Criminal Justice Division, the authority to adopt rules and procedures as necessary.

The amended rules implement the Texas Government Code, Title 7, §772.066 (a), which requires the Office of the Governor, Criminal Justice Division, to advise and assist the governor in developing policies, plans, programs, and proposed legislation for improving the coordination, administration, and effectiveness of the criminal justice system.

No other statutes, articles or codes are affected by the adoption of these amended rules.

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 November 15, 2001.

TRD-200107061
David Zimmerman
Assistant General Counsel
Office of the Governor
Effective date: December 5, 2001
Proposal publication date: October 12, 2001
For further information, please call: (512) 463-1919

♦ ♦ ♦

PART 4. OFFICE OF THE SECRETARY OF STATE

CHAPTER 71. GENERAL POLICIES AND PROCEDURES

SUBCHAPTER B. SERVICE OF PROCESS

1 TAC §71.21

The Office of the Secretary of State adopts an amendment to §71.21, concerning service of process on the Secretary of State without changes to the proposed text as published in the October 12, 2001, issue of the *Texas Register* (26 TexReg 7967). The purpose of the amendment is to correct the statutory cite pertaining to the fees that the Office of the Secretary of State must charge for performing service of process duties.

No comments were received concerning the proposed amendment.

The amendment is adopted under the Texas Government Code, §2001.004 (1) which provides the Secretary of State with the authority to prescribe and adopt rules. The amendment does not affect any other statutes or Codes.

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 November 19, 2001.

TRD-200107140
Geoffrey S. Connor
Assistant Secretary of State
Office of the Secretary of State
Effective date: December 9, 2001
Proposal publication date: October 12, 2001
For further information, please call: (512) 475-0775

♦ ♦ ♦

PART 5. GENERAL SERVICES COMMISSION

CHAPTER 113. CENTRAL PURCHASING DIVISION

SUBCHAPTER J. ELECTRONIC STATE BUSINESS DAILY

1 TAC §§113.201 - 113.216

By Act of Senate Bill 311, Article 7, §7.08, the 77th Legislature transferred rules relating to the business daily pursuant to Government Code, §2155.083, from the Texas Department of Economic Development to the General Services Commission (or its successor agency, the Texas Building and Procurement Commission). In order to comply with the Bill, the Texas Register is moving Title 10, Part 5, Chapter 199, §§199.101-199.116 to Title 1, Part 5, Chapter 113, Subchapter J, §§113.201-113.216. The transfer became effective September 1, 2001.

A complete conversion chart is published in the Tables and Graphics section of the print Texas Register.

Figure: 1 TAC Chapter 113

§113.201. Authority.
§113.202. Purpose.
§113.203. Definitions.
§113.204. General Provisions.
§113.205. Internet Access.
§113.206. Fees.
§113.207. General Posting Requirements.
§113.208. Posting Time Requirements.
§113.209. Emergency Procurements.
§113.210. Registered Agent Requirements.
§113.211. Procurement Opportunity Posting Procedures.

§113.212. Posting Follow-up and Record Keeping.

§113.213. Contract Award.

§113.214. Award Notification.

§113.215. Verification of Compliance.

§113.216. Exceptions and Exclusions.

Filed with the Office of the Secretary of State on November 8, 2001.

TRD-200107009
Effective date: September 1, 2001

♦ ♦ ♦

TITLE 7. BANKING AND SECURITIES

PART 6. CREDIT UNION DEPARTMENT

CHAPTER 97. COMMISSION POLICIES AND ADMINISTRATIVE RULES

SUBCHAPTER A. GENERAL PROVISIONS

7 TAC §97.101

The Texas Credit Union Commission adopts amendments to rule §97.101 relating to meetings, without changes to the text as published in the July 6, 2001, issue of the *Texas Register* (26 TexReg 4951).

The amendments expand the rule to also address meetings of the Commission's committees and provides that the minutes of the meetings of the Commission and its committees are available to any person to examine during the Credit Union Department's regular office hours.

The amendments are the result of the Commission's four-year rule review as mandated by the Government Code.

No comments were received on the proposal.

The amendments are adopted under the provisions of Finance Code §15.209. The Commission interprets this section as authorizing it to adopt rules governing meetings, including the time and place and the form of the minutes.

The specific section affected by the amended rule is Finance Code §15.209 pertaining to meetings of the Commission.

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 November 19, 2001.

TRD-200107123
Harold E. Feeney
Commissioner
Credit Union Department
Effective date: December 9, 2001
Proposal publication date: July 6, 2001
For further information, please call: (512) 837-9236

♦ ♦ ♦

7 TAC §97.105

The Texas Credit Union Commission adopts amendments to §97.105 relating to frequency of examination, without changes to the text as published in the July 6, 2001, issue of the *Texas Register* (26 TexReg 4952).

The amendment authorizes the Commissioner to accept examinations conducted by other credit union supervisory agencies or insuring organizations in lieu of conducting an examination required by this rule.

The amendments are the result of the Commission's four-year rule review as mandated by the Government Code.

No comments were received on the proposal.

The amendment is adopted under the provisions of Finance Code §15.402. The Commission interprets this section as authorizing it to adopt rules necessary for administering Subtitle D, Title 3, of the Finance Code, which includes §126.051 pertaining to the examination of credit unions.

The specific section affected by the amended rule is Finance Code §126.051 pertaining to examinations.

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 November 19, 2001.

TRD-200107122
Harold E. Feeney
Commissioner
Credit Union Department
Effective date: December 9, 2001
Proposal publication date: July 6, 2001
For further information, please call: (512) 837-9236

♦ ♦ ♦

SUBCHAPTER B. FEES

7 TAC §97.113

The Texas Credit Union Commission adopts amendments to §97.113 relating to fees and charges, without changes to the text as published in the July 6, 2001, issue of the *Texas Register* (26 TexReg 4952).

The amendments authorize the Commissioner to bill the annual operating fee in semi-annual installments and to modify the amount paid in the second installment so that the amount of revenues collected will more closely match the Department's actual expenses incurred. In addition, the operating fee for credit unions with total assets under $200,000 is increased from $0 to $200 and the supplemental examination fee increases from $36 to $40 to reflect cost increases experienced by the Department. Further, three amendments affect the Texas operations of foreign credit union offices, specifically: (1) the increase of the annual operating fee for foreign credit union branches from $200 to $500; (2) a new subsection allowing the Department to charge a foreign credit union a $200 fee per field of membership expansion application filed; and (3) an new subsection authorizing the Department to charge foreign credit unions an hourly examination fee of $40 plus actual travel

expenses incurred in connection with the examination of the foreign credit union's Texas office operations. The travel fee reimbursement may be waived by the Commissioner at his discretion.

The amendments also authorize the Commission to approve a special assessment and to pass on to a credit union, as applicable, the actual cost incurred by the Department for examination services or operational reviews performed by third parties.

The amendments are the result of the Commission's four-year rule review as mandated by the Government Code.

No comments were received on the proposal.

The amendments are adopted under the provisions of Finance Code §15.402. The Commission interprets this section as authorizing it to set, by rule, reasonable fees, charges and revenues required to be paid by a credit union. Finance Code §122.013 also states that a foreign credit union doing business in this state is subject to rules adopted by the Commission and any additional requirement, which is construed by the Commission to include fees and charges necessary to cover regulatory and supervisory costs for foreign credit unions.

The specific sections affected by the amended rule are Finance Code §15.402 pertaining to adoption of rules and Finance Code §122.013 pertaining to foreign credit unions.

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 November 19, 2001.

TRD-200107133
Harold E. Feeney
Commissioner
Credit Union Department
Effective date: December 9, 2001
Proposal publication date: July 6, 2001
For further information, please call: (512) 837-9236

♦ ♦ ♦

7 TAC §97.114

The Texas Credit Union Commission adopts amendments to rule §97.114 relating to charges for public records, without changes to the text as published in the July 6, 2001, issue of the *Texas Register* (26 TexReg 4954).

The amendments authorize the following: (1) tie the rates to those allowed under the rules of the General Services Commission; (2) reduce the per-page charge for local facsimile transmissions and establish per-page charges for long distance transmissions; (3) allow the Department to charge a service fee for personnel time spent locating, copying, preparing, and/or certifying documents of more than 50 pages; and (4) allow the Department to collect for delivery charges. The amendments also establish guidelines for complying with records requested under the Public Information Act.

The amendments are the result of the Commission's four-year rule review as mandated by the Government Code.

No comments were received on the proposal.

The amendments are adopted under the provisions of Finance Code §15.402. The Commission interprets this section as authorizing it to adopt rules necessary for administering Chapter 15, Title 2, including §15.409 which requires the Commissioner to make certain information available to the public.

The specific section affected by the amended rule is Finance Code §15.409 pertaining to consumer information and complaints.

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 November 19, 2001.

TRD-200107132
Harold E. Feeney
Commissioner
Credit Union Department
Effective date: December 9, 2001
Proposal publication date: July 6, 2001
For further information, please call: (512) 837-9236

♦ ♦ ♦

TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 49. 2000 LOW INCOME HOUSING TAX CREDIT PROGRAM QUALIFIED ALLOCATION PLAN AND RULES

10 TAC §§49.1 - 49.16

The Texas Department of Housing and Community Affairs (the Department) adopts the repeal of §§49.1 - 49.16, without changes, as published in the October 5, 2001 issue of the *Texas Register* (26 TexReg 7682) concerning the Low Income Tax Credit Rules.

The sections are repealed to enact new sections conforming to the requirements of regulations enacted under the Internal Revenue Code of 1986, §42 as amended (26 U.S.C.A.), which provides for credits against federal income taxes for owners of qualified low income rental housing. The repeal of these rules is contingent upon the Governor's approval, rejection or modification and approval pursuant to §2306.6724(c) of the Texas Government Code, Title 10.

No comments have been received regarding the adoption of the repeals.

The repeals are adopted pursuant the authority of the Texas Government Code, Chapter 2306; Chapter 2001 and 2002, Texas Government Code, V.T.C.A., and Section 42 of the Internal Revenue Code of 1986, as amended, (26 U.S.C.A.) which provides the Department with the authority to adopt rules governing the administration of the Department and its programs; and Executive Order AWR-91-4 (June 17, 1991), which provides this Department with the authority to make housing tax credit allocations in the State of Texas.

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 November 16, 2001.

TRD-200107097
Ruth Cedillo
Acting Executive Director
Texas Department of Housing and Community Affairs
Effective date: December 6, 2001
Proposal publication date: October 5, 2001
For further information, please call: (512) 475-3726

♦ ♦ ♦

CHAPTER 49. 2002 LOW INCOME HOUSING TAX CREDIT PROGRAM QUALIFIED ALLOCATION PLAN AND RULES

10 TAC §§49.1 - 49.18

The Texas Department of Housing and Community Affairs adopts new §§49.1 - 49.18, concerning the Qualified Allocation Plan and Rules (the Rules), with changes to the proposed text as published in the October 5, 2001 issue of the *Texas Register* (26 TexReg 7682). The adoption of these rules is contingent upon the Governor's approval, rejection or modification and approval pursuant to §2306.6724(c) of the Texas Government Code, Title 10.

These rules are being adopted to provide procedures for the allocation, by the Department, of low income housing tax credits available under federal income tax laws to owners of qualified low income rental housing projects.

On October 5, 2001, the proposed 2001 Low Income Housing Tax Credit Program Qualified Allocation Plan and Rules (QAP) was published in the *Texas Register*. The Comment period commenced on October 5, 2001, and ended on November 5, 2001. In addition to publishing the document in the *Texas Register*, a copy of the QAP was published on the Department's web site and made available to the public upon request. The Department held public hearings in Laredo, El Paso, Seguin, Denton, Wichita Falls, Odessa, Mt. Pleasant, Brookshire, Orange, Austin, Lubbock and Edinburg. In addition to the Comments received at the public hearings, the Department received a number of written Comments.

The scope of public Comment concerning the QAP pertains to the following sections:

SUMMARY OF COMMENTS RECEIVED UPON PUBLICATION OF THE PROPOSED RULES IN THE *TEXAS REGISTER* AND COMMENTS PROVIDED AT PUBLIC HEARINGS HELD BY THE DEPARTMENT ON ITEMS THAT RELATE DIRECTLY TO THE QAP

§49.1(c) Allocation Goals

Comment: Deletion of the final sentence of this subsection was suggested in order to provide for a more clear, objective, score-based process for allocations as required by SB 322.

Department Response: Staff agrees that this clarification will allow the QAP to be more consistent with the intent of SB 322. Change is reflected below.

(c) Allocation Goals. It shall be the goal of this Department and the Board, through these provisions, to encourage diversity through broad geographic allocation of tax credits within the state and to promote maximum utilization of the available tax credit amount. The criteria utilized to realize this goal is described in §49.7 (a) - (f) of this title.

Board Response: Department's response accepted.

§49.2 Definitions

Comment: Because the term "Town Home" was reinstated into the QAP in §40.7(e)(3)(E), the definition for that term, which had been deleted, should be restored. Comment was also received indicating that without the definition it was unclear what style and type of Townhome is permitted.

Department Response: Staff agrees that these clarifications are needed for consistency throughout the document and to clarify what the Department means by Town Home. The proposed definition for Town Home is identical to the definition used in the 2001 QAP. Because the term Minority Owned Business was added in §49.7(e)(3)(D), a definition for it has been generated based directly on the language in §2306.6734(c) of SB 322. Likewise, the term Prison Community was added in §49.6 so a definition has been generated based on the 2001 QAP definition.

Minority Owned Business--A business entity at least 51% of which is owned by members of a minority group or, in the case of a corporation, at least 51% of the shares of which are owned by members of a minority group, and that is managed and controlled by members of a minority group in its daily operations. Minority group includes women, African Americans, American Indians, Asian Americans, and Mexican Americans and other Americans of Hispanic origin.

Prison Community--A city or town which is located outside of a Metropolitan Statistical Area (MSA) or Primary Metropolitan Statistical Area (PMSA) and was awarded a state prison as set forth in the Reference Manual.

Town Home--Each Town Home living unit is one of a group of no less than four units that are adjoined by common walls. Town Homes shall not have more than two walls in common with adjacent units. Town Homes shall not have other units above or below another unit. Town Homes shall not share a common back wall. Town Homes shall have individual exterior entries.

Board Response: Department's response accepted.

§49.2(7) Definition of Applicant

Comment: The phrase "member of the Development Team" should be added to the definition of "applicant" to prevent former employees from fully participating in the tax credit program upon leaving the Department, and to eliminate a perceived loophole in conflict of interest and revolving door provisions.

Department Response: §2306.6702(1) of SB 322 provides a clear definition of Applicant, which is included in the original draft language. The definition in the bill does not include members of the development team. Staff does not recommend any further changes.

Board Response: Department's response accepted.

§49.2(14) Definition of At-Risk Development

Comment: At-Risk Developments should include Section 538 of the Housing Act of 1949 as it is considered to be in the statewide preservation portfolio, and include Section 221(d)(4)

transactions since they also have expiring Section 8 HAP contracts which will lose their affordability. Comment was also received suggesting that subparagraph (B) relating to the eligibility for the set-aside should be broadened to include projects redeveloped for the preservation of affordable housing units, but for reasons other than the two currently listed. The primary category missed is "replacement units," which are units that replace other substandard units being demolished, but which are not being replaced on the same site and are not necessarily having funding expire. The specific proposed solution is to add a third category to the definition of At-Risk Development that adds a project developed as part of a replacement housing plan.

Department Response: Staff supports the addition of the additional proposed programs that will expand the Department's ability to preserve affordable housing through the At-Risk Development set aside. The two stipulations relating to eligibility for the set-aside were specifically stated in 2306.6702(5) of SB 322, and did not address replacement housing. No changes on that item are proposed.

(14) At-Risk Development--A development that:

(A) receives the benefit of a subsidy in the form of a below-market interest rate loan, interest rate reduction, rental subsidy, Section 8 housing assistance payment, rental supplement payment, or rental assistance payment under the following federal laws, as applicable:

(i) Sections 221(d)(3), (4) and (5), National Housing Act (12 U.S.C. Section 1715l);

(ii) Section 236, National Housing Act (12 U.S.C. Section 1715z-1);

(iii) Section 202, Housing Act of 1959 (12 U.S.C. Section 1701q);

(iv) Section 101, Housing and Urban Development Act of 1965 (12 U.S.C. Section 1701s);

(v) any project-based assistance authority pursuant to Section 8 of the U.S. Housing Act of 1937; or

(vi) Sections 514, 515, 516, and 538 Housing Act of 1949 (42 U.S.C. Sections 1484, 1485, and 1486); and

(B) is subject to the following conditions:

(i) the stipulation to maintain affordability in the contract granting the subsidy is nearing expiration (expiration will occur within two calendar years); or

(ii) the federally insured mortgage on the development is eligible for prepayment or is nearing the end of its mortgage term (the term will end within two calendar years).

Board Response: Department's response accepted.

§49.2(30) Definition of Development Consultant

Comment: The definition of Development Consultant should explicitly state that the consultant is a member of the Development Team to ensure that perceived loopholes regarding conflict of interest and revolving door provisions are eliminated.

Department Response: §49.2(32), which defines Development Team, already states that a consultant is a member of the Development Team. Staff does not recommend any changes.

Board Response: Department's response accepted.

§49.2(42) Definition of Historic Development

Comment: Comment noted that the definition of Historic Development does not include historic properties designated by local government entities, even though this is not consistent with federal regulations or with Exhibit 208 of the QAP which states that evidence for the selection criteria can include local government entities. A suggestion was also made that an Application should have the ability to show that a historic designation has been applied for at the time of application, but should not require approval until the time of allocation.

Department Response: Staff accepts the change relating to local entities to ensure consistency in the document. However, staff does not recommend that changes be made to allow the designation to be approved up until the time of the awards. The reason for this recommendation is that the QAP and SB 322 are clear about sending applications to underwriting, and subsequently recommending applications to the Board, based on score. The six points from this designation may be instrumental in determining whether an application should or should not be underwritten, and potentially recommended. To process an application under the assumption that the site will get the designation, and then have it fall through, will be to the detriment of another application that could have been underwritten and recommended. The competitive nature of the program dictates that all documentation must be received no later than the date that the application cycle closes to qualify for points.

(42) Historic Development--A residential Development that has received a historic property designation by a federal, state or local government entity.

Board Response: Department's response accepted.

§49.2(49) Definition of Ineligible Building Types

Comment: It was widely recommended that the language in clause (i) that prohibits developments on contiguous property or within an existing subdivision should be deleted because it discourages single family dispersion for the applications that are eligible for single family developments. Comment was also made that the local funding contribution addressed in subclause (II) should be reduced to 7% of hard costs to prevent the triggering of other cumbersome federal regulations; and that the documentation requirements for this exhibit should only involve proof of application for local funding at the time of tax credit application, and proof of firm commitment at the time of allocation, because local funding cycles are not synchronized with the tax credit cycle. Another comment indicated that the language "less than four or fewer" was unclear and that there is inconsistency with whether the minimum is four units or 36 units.

Department Response: Staff concurs with the suggested comments regarding contiguous property and 7% of hard costs. To accommodate staff processing, the time frame for evidence of a commitment was altered from the suggested "day of allocation" to June 1, 2001, which will be several weeks before the first allocation meeting. Clarification regarding the number of units was remedied by removing "or fewer" and by clarifying between buildings and developments.

(49) Ineligible Building Types--Those buildings or facilities which are ineligible, pursuant to this QAP, for funding under the tax credit program as follows:

(A) Hospitals, nursing homes, trailer parks and dormitories (or other buildings that will be predominantly occupied by Students) or other facilities which are usually classified as transient housing (other than certain specific types of transitional housing for the

homeless and single room occupancy units, as provided in the Code, §42(i)(3)(B)(iii) and (iv) are not eligible. However, structures formerly used as hospitals, nursing homes or dormitories are eligible for credits if the Development involves the conversion of the building to a non-transient multifamily residential development.

(B) Single family detached housing, duplexes, and triplexes shall not be included in tax credit developments. The only exceptions to this definition are:

(i) Any Development Building comprised of less than four or fewer residential Units, regardless of employee or owner occupied Units, located on contiguous property under common ownership, management and Control or dispersed within an existing residential subdivision and satisfying either of the requirements listed in subclauses (I) and (II) of this clause shall not be considered to include an Ineligible Building Type.

(I) Developments with 36 units or less that are located within a city or county with a population of not more than 20,000 or 50,000, respectively; or

(II) Developments receiving a financial contribution from the local governing entity in an amount equal to or exceeding seven percent of the construction hard costs. The financial contribution can be either a capital contribution, in-kind services to the Development, or a combination of capital contribution and in-kind services. The in-kind services must be above and beyond services typically provided to similar developments and must be fully documented in the form of proof of application at the time of Application, and proof of firm commitment by June 1, 2002.

(ii) An existing Rural Development that is federally assisted within the meaning of the Code, §42(d)(6)(B) and is under common ownership, management and Control shall not be considered to include an Ineligible Building Type. For qualifying federally assisted Rural Developments, construction cannot include the construction of new residential units. Rural Developments purchased from HUD will qualify as federally assisted.

(C) Any Qualified Elderly Development of two stories or more that does not include elevator service for any Units or living space above the first floor.

Board Response: Department's response accepted.

§49.2(63) Definition of Qualified Elderly Development

Comment: Comment suggested that subparagraph (A), relating to developments solely occupied by persons over 62 years of age, seems unnecessary because it is covered in subparagraph (B) relating to developments with 80% of the Units occupied by persons over 55 years of age.

Department Response: This definition is generated to capture the two exceptions within the Fair Housing Act that allow developments for the elderly. The two classifications are quite different. No changes are proposed.

Board Response: Department's response accepted.

§49.2(65) Definition of Qualified Nonprofit Organization

Comment: Because the QAP currently says a Qualified Nonprofit may compete in any set-aside, it is unclear whether the Qualified Nonprofit has to select a set-aside, or if, once the nonprofit set-aside is exhausted, the application would be moved into another set-aside to compete. There was support for redrafting the language to make sure that a Qualified Nonprofit Organization could be considered in any set-aside, and not have to select one set-aside, because the current definition did not fully reflect the language in SB 322.

Department Response: §2306.6729 of SB 322 states, "A qualified nonprofit organization may compete in any low income housing tax credit allocation pool, including: 1) the nonprofit allocation pool, 2) the rural projects/prison communities allocation pool, and 3) the general projects allocation pool." The bill does not indicate in any way that the nonprofit organization should be allowed to simultaneously apply in all of those set-asides. However, staff concurred that the definition needed clarification to indicate that a specific set-aside must be selected and that an application will only compete within the selected set-aside. The references to the specific set-asides in the last sentence were also revised to make sure each set-aside consistently uses the same name throughout the QAP. The administration of trying to "roll" applications to other set-asides once they are found to be non-competitive in their initial set-aside selection, or of allowing them to compete universally, would be difficult to administer, and would lead to a level of subjectivity that staff, via SB 322, is seeking to avoid.

(65) Qualified Nonprofit Organization--An organization that is described in the Code, §501(c)(3) or (4), as these cited provisions may be amended from time to time, that is exempt from federal income taxation under the Code, §501(a), that is not Affiliated with or Controlled by a for profit organization, and includes as one of its exempt purposes the fostering of low income housing within the meaning of the Code, §42(h)(5)(C). A Qualified Nonprofit Organization may select to compete in any one of the set-asides, including, but not limited to, the nonprofit set-aside, the rural developments set-aside, the At-Risk Developments set-aside and the general set-aside.

Board Response: Department's response accepted.

§49.2(77) Definition of Special Housing Development

Comment: Multiple comments were received indicating that the provision for Special Housing Developments should be removed from the QAP because it encourages the segregation of disabled persons. It was noted that the Department, in its State Low Income Housing Plan, has a stated goal of discouraging segregation such as this.

Department Response: In an effort to ensure that the QAP is consistent with the Department goals in the SLIHP, all references to Special Housing Developments have been removed from the QAP, including the definition at §49.2(77).

Board Response: Department's response accepted.

§49.2(84) Definition of TxRD-USDA

Comment: To avoid confusion with the new State Rural Development Agency, the initials for TxRD-USDA should be changed.

Department Response: As the new State Rural Development Agency has now been named the Office of Rural Community Affairs, with the acronym ORCA, confusion should now be alleviated. No changes are proposed to the QAP.

Board Response: Department's response accepted.

§49.4(a) Application Submission

Comment: As drafted, it is unclear whether an Applicant can submit an entire application during the Pre-Application phase or whether they may only submit the documents associated with a Pre-Application.

Department Response: Staff is always pleased to accept a submission of an entire application at any time during the cycle. However, due to the limitations on staff time from the day Pre-Applications are due to the time Pre-Application results must be released, staff will not have time to review the entire application at once. The application would be reviewed for its Pre-Application criteria, and once the results were released, staff would then be able to process the remainder of the application. This approach is helpful to staff, who can do the rest of the review in the "gap" of time after Pre-Application results are released but before other Applications are submitted. The language has been changed to make this clear.

(a) Application Submission. Any Applicant requesting a Housing Credit Allocation or a Determination Notice must submit an Application to the Department during the Application Acceptance Period. A complete Application may be submitted at any time during the Application Acceptance Period, and is not limited to submission after the close of the Pre-Application Cycle. However, a complete Application received during the Pre-Application Cycle will initially only be reviewed for Pre-Application Criteria. The remainder of the Application will be reviewed once the results of the Pre-Application Cycle have been announced. Only one Application may be submitted for each site. While the Application Acceptance Period is open, Applicants may withdraw their Application and subsequently file a new Application along with the required Application fee. The Department is authorized to request the Applicant to provide additional information it deems relevant to clarify information contained in the Application or to submit documentation for items it considers to be an Administrative Deficiency. An Applicant may not change or supplement an Application in any manner after the filing deadline, except as it relates to a direct request from the Department to remedy an Administrative Deficiency as further described in §49.2(2) of this title or to the amendment of an application after an allocation of tax credits as further described in §49.7(k) of this title.

Board Response: Department's response accepted.

§49.4(d) Availability of Pre-Application and Application

Comment: Language in this subsection should be revised to ensure that all exhibits will be available for public disclosure immediately after the Pre-Application and Application periods close, respectively. All personal financial statements and any other confidential information allowed to be kept from disclosure by the Texas Public Information Act should be required to be placed in a single exhibit. Only this exhibit should be kept concealed and may still be disclosed if the Texas Public Information Act does not protect the information from disclosure.

Department Response: To satisfy the requirements of SB 322, and to strive to allow our program to be as transparent as possible, staff suggests making the requested changes.

(d) Availability of Pre-Application and Application. Pre-Applications and Applications for tax credits are public information and are available upon request after the Pre-Application and Application Acceptance Periods close, respectively. All Pre-Applications and Applications, including all exhibits and other supporting materials, except Exhibit 109, will be made available for public disclosure immediately after the Pre-Application and Application periods close, respectively. The content of Exhibit 109 may still be made available for public disclosure upon request if the Attorney General's office deems it is not protected from disclosure by the Texas Public Information Act.

Board Response: Department's response accepted.

§49.4(e) Confidential Information

Comment: It was suggested that the first sentence of this section relating to an Applicant marking any exhibit they wish not to be seen, should be deleted for consistency with changes made in §49.4(d).

Department Response: Staff concurs with this suggestion.

(e) Confidential Information. The Department may treat the financial statements of any Applicant as confidential and may elect not to disclose those statements to the public. A request for such information shall be processed in accordance with §552.305 of the Government Code.

Board Response: Department's response accepted.

§49.4(f)(3)(A) Required Application Notifications--Submission Log

Comment: The reference to the application submission log should list all of what the log will include and it should additionally include full contact information for all members of the development team.

Department Response: The details of the Application Log are already included elsewhere in the QAP. Staff is adding a reference to the other section of the QAP for referential integrity. Staff also suggests that all of the details on what is included in the log should be moved to the other section of the QAP so that the information is kept together in one easily referenced location. Staff supports the addition of the Development Team information.

(A) publish an Application submission log, as further described in §49.12(b) of this title, on its web site.

Board Response: Department's response accepted.

§49.4(f)(8)(B) Required Application Notifications

Comment: The words "if feasible" should be deleted from paragraph (8)(B) relating to the Department's web posting of any documents relating to the Application process.

Department Response: SB 322, at §2306.6717 states, "Subject to Section 2306.67041, the department shall make the following items available on the department's web site," and the second item under this list states, "before the 30th day preceding the date of the relevant board allocation decision, except as provided by Subdivision (3), the entire application, including all supporting documents and exhibits, the application log, a scoring sheet providing details of the application score, and any other document relating to the processing of the application." In referring back to the referenced §2306.67041, the Department is tasked with researching the feasibility of an on-line application for the tax credit program. In subsection (e) of that section it states, "Before the implementation of the on-line application system, the department may implement the requirements of §2306.6717 in any manner the department considers appropriate."

The Department is undertaking the feasibility study at this time and until further solutions are determined regarding the best approach for posting all of these documents, it is not feasible for the Department to post all four volumes of each application (averaging 350 pages each) on our web site for the 2002 cycle. The LIHTC Program is striving to achieve as much of the requirement of §2306.6717 (although it is not required at this time) for the 2002 cycle by posting to the web all of Volume 1 of each Application, the application log, scoring sheets and other relevant processing documents. The Department will meet its obligations under

§49.4(d) by providing the documents for viewing here at the Department during business hours. No changes are proposed.

Board Response: Department's response accepted.

§49.4(g) Board Recommendations

Comment: Comment suggested that the phrase "without good cause" is unclear, as it relates to when the Board may make an allocation decision that conflicts with the recommendations of staff. Under paragraph (1) it was suggested that the Department unfairly penalizes border area applications by giving the Department the ability to adjust credit amounts downward if the Department believes the costs are too high. Historically the Department has underestimated costs in border areas.

Department Response: The sentence with the clause "without good cause" was taken verbatim from §2306.6731 of SB 322. No changes are proposed. The clause relating to the Department's ability to adjust credits is intended to prevent more credits being issued to a development than is actually necessary and ensure the most efficient use of tax credit dollars. It is not intended to penalize any applicant or development and the Department, through its underwriting division, is continually working to improve our methodology so that those type of effects are minimized.

Board Response: Department's response accepted.

§49.4(n) Cost Certification or Carryover Filings

Comment: The Department should extend the Carryover deadline to the maximum time provided by §42 of the Internal Revenue Code, or at least extend it to December 1 of each year. The current timeframe serves no useful purpose, and Congress made a strong policy decision by extending the time for Carryover. A comment was also made suggesting that the Department consider providing deadlines for review and approval of Carryover and placement in service documents including the issuance of IRS Forms 8609. It has caused some developers to lose proceeds from sales of credits, be charged additional interest, and incur other costs caused by delays. These reviews are equally important for the Applicant, and by placing deadlines that the Department must meet in the QAP, the Department will be forced to allocate sufficient staff to review these documents.

Department Response: As advised by our legal counsel specializing in federal issues relating to tax credits, the Department is free to adopt more stringent tests for carryover allocations than is permitted under the Code. Given the demand for credits in Texas and the need for housing, the Department is committed to getting projects started as quickly as possible. No changes are proposed for that comment. The inclusion of carryover and 8609 timeframes for the Department will better allow the Developer to coordinate and plan with lenders and syndicators to reduce any potential losses.

(n) Cost Certification or Carryover Filings. Developments that will be placed in service and request IRS Forms 8609 in the year the Commitment Notice was issued must submit the required Cost Certification documentation and the compliance and monitoring fee to the Department by the second Friday in November of that same year. All other Developments which received a Commitment Notice, must submit the Carryover documentation to the Department no later than the second Friday in October of the year in which the Commitment Notice is issued. The Carryover Allocation must be properly completed and delivered to the Department as prescribed by the Carryover Allocation Procedures Manual. All complete Carryover filings will be reviewed and executed by the Department no later than 90 days from the date of receipt of the Carryover documentation. The Department will issue IRS Forms 8609 no later than 90 days from the date of receipt of the Cost Certification documentation, so long as all subsequent documentation requested by the Department related to the processing of the Cost Certification documentation has been provided on or before the seventy-fifth day from the date of receipt of the original Cost Certification documentation. Any deficiency letters issued to the Owner pertaining to the Cost Certification documentation will also be copied to the syndicator.

Board Response: Department's response accepted.

§49.5 Representation by Former Board Member or Other Person

Comment: Specific language from SB 322 was proposed to be integrated into the QAP to more thoroughly address concerns relating to conflict of interest and revolving door issues.

Department Response: The Department agrees that the additional detail regarding the revolving door policy from §2306.6733 of SB 322 will alleviate uncertainty by being more clear and enforceable. To include the language, a new subsection (d) has been added to §49.5

(d) Representation by Former Board Member or Other Person

(1) A former board member or a former director, deputy director, director of housing programs, director of compliance, director of underwriting, or Low Income Housing Tax Credit Program Manager employed by the Department may not:

(A) for compensation, represent an Applicant for an allocation of tax credits or a Related Party before the second anniversary of the date that the Board member's, director's, or manager's service in office or employment with the Department ceases;

(B) represent any Applicant or Related Party or receive compensation for services rendered on behalf of any Applicant or Related Party regarding the consideration of an Application in which the former board member, director, or manager participated during the period of service in office or employment with the Department, either through personal involvement or because the matter was within the scope of the board member's, director's, or manager's official responsibility; or for compensation, communicate directly with a member of the legislative branch to influence legislation on behalf of an Applicant or Related Party before the second anniversary of the date that the board member's, director's, or manager's service in office or employment with the Department ceases.

(2) A person commits an offense if the person violates this section. An offense under this section is a Class A misdemeanor.

Board Response: Department's response accepted.

§49.5(b)(2) Debarment from Program Participation

Comment: To additionally curb conflict of interest issues, members of the Development Team should be added to this paragraph to prevent former employees from fully participating in the tax credit program upon leaving the Department.

Department Response: Because §2306.6703 of SB 322 did not include the Development Team in this criteria for ineligibility, the Department feels that the requirements of the bill are met by the existing definition. No changes are proposed.

Board Response: Department's response accepted.

§49.6(b)(1) Regional Allocation

Comment: It was suggested that the tax credit program should employ a metropolitan/nonmetropolitan subregional allocation formula, using the same formula used in the existing regional allocation. The QAP should apply this allocation ratio to each of the regional allocations, to prevent the low income targeting points from driving all tax credits into metropolitan areas. This subregional allocation would recognize the economic differences between various regions across the state, adjust for the lower AMFI's and rents in nonmetropolitan areas, and ensure that those areas are not unduly penalized.

Department Response: The Department feels that the concept of a metropolitan/nonmetropolitan allocation is already being addressed in two ways. First, the existence of the rural set-aside commits funds to the nonmetropolitan areas, even when scores in those areas are lower. Second, the Uniform Housing Needs Scoring Component does use the same needs figures from the regional allocation formula and applies them on a county by county basis within each region to determine where the greatest need is intraregionally. Because these two factors already account for issues within a region, the Department believes the concept of a subregional allocation by metropolitan/nonmetropolitan should be further studied and explored, and would need more substantial exposure to public comment before integration into the QAP.

Board Response: Department's response accepted.

§49.6(b)(1) Nonprofit Set-Aside

Comment: It was suggested that the nonprofit set-aside be increased to 15% to promote housing provided by qualified nonprofits that are mission driven.

Department Response: The Department believes that the current percentage for the nonprofit set-aside is sufficient to meet the goals of the Program and the nonprofit set-aside requirement established by Code. Traditionally, the Department exceeds the 10% requirement. Also, nonprofits not competing in the set-aside may still receive allocations, thereby increasing the number of nonprofits receiving awards. No changes are proposed.

Board Response: Department's response accepted.

§49.6(b)(2) Rural Development Set-Aside

Comment: Many comments were received asking that the Department return to the language in the 2001 QAP which reserved 25% of the 15% rural development set-aside for projects financed through Rural Development (TxRD-USDA). This language is essential for preservation purposes, transfers, and rehabilitation needed for the projects financed by TxRD-USDA in rural areas of Texas. Although a new "At-Risk Development" set-aside has been established, it would be difficult for existing TxRD projects in rural areas to score high enough to receive an allocation. One comment was also received asking that Prison Communities be reinstated into the QAP and that they should be treated as Economically Distressed Areas and receive a 30% increase to eligible basis.

Department Response: The Department had initially removed this sub-set-aside based on the idea that the Applications that were previously funded under this sub-set-aside would be served in 2002 by the At-Risk Development set-aside. The many comments we have received indicate that this may not be the case. Staff recommends returning to the sub-set-aside and has proposed language that is taken directly from the 2001 QAP. Prison Communities have not been treated as Economically Distressed Areas in the recent past, nor were they ever issued a 30% increase in eligible basis (which is not authorized by Code) however they were included as part of the rural set-aside, and it is proposed that they be reinstated. To accompany this change, the definition for Prison Community has been included in §49.2.

(2) At least 15% of the State Housing Credit Ceiling for each calendar year shall be allocated to Developments which meet the Rural Development definition or are located in Prison Communities. Rural Developments applying for greater than 76 Units will be ineligible for the Rural Set-Aside. Of this 15% allocation, 25% will be set-aside for projects financed through Rural Development (TxRD-USDA). Projects financed through TxRD-USDA's 538 Guaranteed Rural Rental Housing Program will not be considered under the 25% portion. Should there not be sufficient qualified applications submitted for the TxRD-USDA set-aside, then the credits would revert to projects that meet the Rural Project definition or are located in Prison Communities.

Board Response: Department's response accepted.

§49.6(b)(4) General Set-Aside

Comment: The Department should pick the best projects first, and then make sure that the nonprofit set-aside has been met. The use of mutually exclusive set-asides causes the department to consider only qualified nonprofits in the nonprofit set-aside and not consider them for the remaining 90% of credits. This section should be deleted to eliminate this mutually exclusive set-aside. It was also stated that SB 322 requires the nonprofit projects to be allowed to compete in any set-aside which implies that the set-aside categories are not mutually exclusive.

Department Response: In compliance with SB 322, the Department does not limit nonprofits to participating in the nonprofit set-aside; a nonprofit may elect to compete in any one of the set-asides. The Department does not agree that this implies that the set-asides must be mutually exclusive. While staff sees the merits of allowing projects to "roll" into other set-asides, the administration of trying to "roll" applications to other set-asides once they are found to be non-competitive in their initial set-aside selection would be difficult and unclear, and would lead to a level of subjectivity that staff, in compliance with SB 322, is seeking to avoid.

Board Response: Department's response accepted.

§49.6(b)(5) Elderly Set-Aside

Comment: Comments asked that the elderly overlay set aside be increased to 15% to better reflect demographic trends in the elderly population.

Department Response: The Department's Housing Resource Center also confirmed the demographic basis for increasing this overlay set aside to 15%.

(5) At least 15% of the State Housing Credit Ceiling for each calendar year shall be allocated to Qualified Elderly Developments. Qualified Elderly Developments will not constitute an additional exclusive set-aside; however at least 15% of Developments allocated through the set-asides identified in paragraphs (1) - (4) of this subsection will also be Qualified Elderly Developments. Prior to making recommendations to the Board with respect to Applications which, if funded in accordance with such recommendations, would total, taking into account all Commitment Notices previously issued during the calendar year, at least 85% of the State Housing Credit Ceiling for such year, the Committee shall advise the Board as to the percentage of Qualified Elderly

Developments which have received commitments or are recommended to receive commitments for the year.

Board Response: Department's response accepted.

§49.7(a) Pre-Application

Comment: It was suggested that Developments that have TxRD funding should be exempt from the Pre-Application process. Several other comments more specifically requested that new TxRD funding should be exempt from the Pre-Application, but that Developments without new TxRD funding should still be eligible to go through the Pre-Application process. This difference is because developments with new TxRD funds have already been underwritten by Farmers Home and/or RD and had their loan approved. The other TxRD applications, without new funding, rely primarily on tax credit equity and therefore are more likely to benefit from the pre-application process.

It was suggested that the experience requirement under Exhibit 105E should be moved to the Pre-Application evaluation process, in lieu of obtaining a pre-certification, so that Applicants would know if they had met the requirement at the same time they find out if their score is competitive. Further, the applicant should not be required to have site control for the Pre-Application because it causes a cost burden on the applicant to carry the land that long and will reduce the availability of suitable parcels because land sellers will be unwilling to wait that long. The requirement for support letters at Pre-Application should also be removed because many people who would draft support letters will be on holiday.

Department Response: Staff concurs with the suggestion regarding TxRD developments. The Department strives to increase efficiency and minimize redundancy in our joint projects with TxRD and this revision will continue to promote that goal. To ensure that exemption is comprehensive and does not enable any one party to submit a Pre-Application and therefore garner the extra points, the exemption from the Pre-Application Evaluation also specifies that an Applicant with new TxRD funding is not eligible for the points associated with the Pre-Application.

To have the experience documentation submitted with each Pre-Application will not serve the primary purpose of the pre-certification for experience which is to reduce the amount of paperwork submitted in each application. With this proposal every Pre-Application would have to have all of the necessary documentation. It should also be noted that an Applicant may request a certification until seven days before the Applicant Acceptance Period opens. While the Department is aware of the costs associated with keeping a site under control for a longer period of time, the only successful way to have a meaningful Pre-Application process is to ensure that the proposed development being evaluated is under control; otherwise the results of the Pre-Application would not be substantive enough for applicants to base a decision to move forward. Likewise, for the selection criteria results from Pre-Application to be meaningful all of the selection criteria must be submitted including support letters.

(a) Pre-Application Evaluation Process and Criteria. Eligible Pre-Applications will be evaluated for Pre-Application Threshold Criteria, Pre-Application Selection Criteria, and as requested, adherence to the §49.9(b) of this title, in accordance with this section of the QAP and the Rules. Applications that have new TxRD-USDA financing for either new construction or rehabilitation, as evidenced by confirmation from the state office of TxRD, are exempted from the Pre-Application Evaluation Process and are not eligible to receive points for submission of a Pre-Application. Applications for rehabilitation of TxRD properties that do not have new financing from TxRD-USDA are not exempt from the Pre-Application Evaluation Process and are eligible to receive points for submission of a Pre-Application.

Board Response: Department's response accepted.

§49.7(a)(1)(D) Pre-Application Notification to Public Officials

Comment: The requirement to notify officials at the Pre-Application stage should be removed because it unduly burdens the applicants and the public officials and also interjects the appearance of politics into the pre-application review.

Department Response: Sending notification letters is a simple requirement that involves minimal time on the part of the applicant. It is unclear how early notification would unduly burden a public official, as it only allows them more time to take interest in the development. The requirement was integrated into Pre-Application specifically to ensure openness with public officials, and thereby their constituents; not to add politics to the Pre-Application process. The Pre-Application review strictly involves reviewing a minimal threshold and then reviewing selection criteria. Any political feedback garnered during the application process is only considered once the entire application is under review. No changes are proposed.

Board Response: Department's response accepted.

§49.7(b)(2) Selection Criteria Review

Comment: Comment was received indicating that the sentence "The Department may not award points for a scoring criterion that is disproportionate to the degree to which a proposed Development complied with that criteria," is not applicable to the QAP because all of the points are fixed and determinable numbers, not ranges.

Department Response: The referenced sentence was taken verbatim from §2306.6725(d) of SB 322. No changes are proposed.

Board Response: Department's response accepted.

§49.7(b)(3)(C) Underwriting Evaluation by Third Party

Comment: The language relating to a third party performing the underwriting analysis has two problems. The first is that it does not ensure that the same underwriting criteria would be used and would be consistent with TDHCA underwriting. The second is that the open-ended cost of this would not be budgeted ahead of time, and may be unexpectedly incurred.

Department Response: To ensure that the same underwriting standards will be applied in the event of third party underwriting, language has been added to that extent. In regards to the cost, the QAP already states in §49.13(d) that "the fees paid by the Development Owner to the Department for third party underwriting will be credited against the commitment fee..." This ensures that this unexpected cost will not be detrimental to the budget created by the Applicant.

(C) The Department may have an outside third party perform the underwriting evaluation to the extent it determines appropriate, consistent with the guidelines outlined in §49.8 of this title. The expense of any third party underwriting evaluation shall be paid by the Applicant prior to the commencement of the aforementioned evaluation.

Board Response: Department's response accepted.

§49.7(b)(4) Site Evaluation

Comment: Comment was received asking to revise the evaluation factors identified in §49.7(c). To facilitate revisions of that section, details relating to the evaluation of sites were removed from that section.

Department Response: Details relating to how sites are evaluated were moved to this section from §49.7(c) to streamline that exhibit and place the discussion relating to evaluations in one location.

§49.7(b)(4) Site Evaluation. Site conditions shall be evaluated through a physical site inspection by Department staff. Such inspection will evaluate the site based on the Site Evaluation form provided in the Application and provide a site evaluation of "Excellent," "Acceptable," "Poor" or "Unacceptable". The evaluations shall be based on condition of the surrounding neighborhood and proximity to retail, medical, recreational, and educational facilities, and employment centers. The site's visibility to prospective tenants and accessibility of the site via the existing transportation infrastructure and public transportation systems shall be considered. "Unacceptable" sites would include a non-mitigable environmental factor that would impact the health and safety of the residents.

Board Response: Department's response accepted.

§49.7(c) Evaluation Factors

Comment: To truly create a clear objective score-based process for selecting applications, the QAP must move away from the existing broad subjective evaluation factors that are permitted by staff. The specific suggestion was to revise subsection (c) to a very succinct statement (provided in the comment) giving responsibility for any subjective evaluation factor issues specifically to the Board and identifying what those items are.

Department Response: Reference to the Board making these evaluation factor decisions is noted, however the Committee has also been included to provide the Committee the opportunity to make recommendations to the Board that denote concerns relating to these evaluation factors. Several of the proposed deletions need to be maintained either in this section or elsewhere in the QAP. The clause relating to the allocation to multiple entities is required by the Texas General Appropriations Act. Geographic dispersion is already addressed by the regional allocation formula, the exhibit 201 points and the concentration policy so its deletion is acceptable. The housing type evaluation factor was seldom utilized. Several of the proposed factors relating to satisfying set-asides, regional allocation and concentration limitations, are already identified elsewhere in the QAP as being a required factor in recommending developments.

(c) Evaluation Factors. The Committee and Board may choose to evaluate the recommendations of credits for factors other than scoring for one or more of the following reasons:

(1) to serve a greater number of lower income families for fewer credits;

(2) to serve a greater number of lower income families for a longer period of time;

(3) to ensure the Development's consistency with local needs or its impact as part of a revitalization or preservation plan.

(4) to ensure the allocation of credits among as many different entities as practicable without diminishing the quality of the housing that is built as required under the Texas General Appropriations Act applicable to the Department.

Board Response: Department's response accepted.

§49.7(d) Tie Breaker Criteria Relating to Special Housing Development

Comment: The language at the end of subsection (d) should be grammatically corrected. Another comment asked that paragraph (8) relating to integrated housing include the word "accessible," or that a separate tie breaker be added that awards points for construction of units in conformance with Section 504, but in excess of the percentage required by Section 504. Multiple comments were received asking that paragraph (4) relating to Special Housing Developments be removed as a Tie Breaker Criteria as it encourages segregation of the disabled community, as opposed to supporting integrated housing as indicated in the SLIHP.

Department Response: The Department is eager to increase consistency between the SLIHP and the QAP, and agrees that the Special Housing Development criteria may encourage segregation and should therefore be removed. The idea of awarding points for Developments that go above and beyond the requirements of §504 will be further researched and contemplated for the 2003 QAP. With the many other changes being made to the 2002 QAP it would be imprudent to hastily make these point changes without further discussion with both the advocacy groups and the development representatives. Staff proposes the grammatical change, adding the word accessible in previous paragraph (8), and removing paragraph (4).

(d) Tie Breaker Criteria. In the event that two or more Applications receive the same number of points in any given set-aside category and region and compare equally under the factors described in subsection (c) of this section, the Department will utilize the factors in paragraphs (1) - (9) of this subsection, in the order they are presented, to determine which Development will receive a preference in consideration for a tax credit commitment. As described by these paragraphs, preference in recommending credits for allocation will be given to Developments which are practicable and economically feasible, and which:

(1) serve persons with the lowest percentage of area median family income;

(2) serve low income tenants for the longest period of time, in the form of a longer Compliance Period and/or extended low income use period (as set forth in the LURA);

(3) is located in a Qualified Census Tract, the development of which contributes to a concerted community revitalization plan;

(4) has substantial community support as evidenced by the commitment of local public funds toward the construction, rehabilitation and acquisition and subsequent rehabilitation of the Development or use other funding sources to minimize the amount of subsidy needed to complete the Development;

(5) provides for the most efficient usage of the low income housing tax credit on a per Unit basis;

(6) has a Unit composition that provides the highest percentage of three bedrooms or greater sized Units;

(7) provides integrated, affordable accessible housing for individuals and families with different levels of income;

(8) provides the greatest number of quality residential units;

(9) in the case of Applications involving preservation, support or approval by an association of residents of the multifamily housing development will be considered.

Board Response: Department's response accepted.

§49.7(e) Proposed Threshold Criteria

Comment: A threshold criteria should be adopted that all applications must guarantee that rents are at least ten percent less than comparable private market rents. For this to occur, the market study must be prepared by an independent third party having no identify of interest, and should demonstrate that each unit type within the subject property will be at least 10% below the same unit type in the weighted average of the three comparable rental properties. It was suggested that this threshold could be waived by the Executive Review Committee in unusual circumstances.

Department Response: Because this issue would be highly debated, the Department does not feel that adding it to the 2002 QAP at this points would allow for adequate public input, and will consider its inclusion in the 2003 QAP.

Board Response: Department's response accepted.

§49.7(e)(3)(A) Amenity Threshold

Comment: It was suggested that Developments receiving any type of financing from TxRD should be included with those properties only needing to have two of the amenities. Due to the smaller nature of the projects as well as the limited funds, they will more closely resemble the 36 unit or less developments and preservation developments. Several comments were also made asking that washer/dryer hook-ups in the units, or the installation of washer/dryers in the unit, should satisfy the laundry room amenity.

Department Response: Staff agrees that TxRD developments, which are traditionally smaller and more spartan than the larger metropolitan developments, should be permitted to have only two amenity requirements. For consistency with the other changes made relating to the removal of Special Housing Developments, the phrase Special Housing Developments is being removed from this exhibit. The initial intent of removing the "and/or" clauses relating to washer/dryer hook-ups and the laundry rooms was to preclude developers from building a development that only had washer /dryer hook-ups in the units and no laundry room, thereby placing a burden on the tenant to either buy or rent a washer/dryer to have the opportunity to do laundry on the premises. While staff still has this concern, based on public comment as well as feedback from the Compliance Division, it is suggested that the "and/or" feature be reinstated because to remove it may act as a disincentive for developers to provide the hook-ups, thereby hurting the tenants that do have their own washer/dryer or utilize the space for storage. The Compliance Division has indicated that some developers have been charging tenants a "hook-up" fee for using a washer/dryer that is not directly rented from the complex, thereby financially penalizing a tenant for having their own equipment. The Compliance Manual is currently being updated to prohibit this practice, and to affirm this policy, that language has also been added to the QAP.

(A) A description of the type of amenities proposed for the development. If fees in addition to rent are charged for amenities reserved for an individual tenant's use (i.e. covered parking, storage, etc.), then the amenity may not be included among those provided to complete this exhibit. Developments with more than 36 units must provide at least four of the amenities provided in clauses (i) - (viii) of this subparagraph. Developments with 36 Units or less, Developments receiving funding from TxRD-USDA, and Preservation Developments must provide at least two of the amenities provided in clauses (i) - (viii) of this subparagraph. Any future changes in these amenities, or substitution of these amenities, may result in a decrease in awarded credits if the substitution or change includes a decrease in cost or in a cancellation of a Commitment Notice or Carryover Allocation if the Threshold Criteria are no longer met.

(i) full perimeter fencing with controlled gate access;

(ii) designated playground and equipment;

(iii) community laundry room and/or laundry hook-ups in Units (no hook-up fees of any kind may be charged to a tenant for use of the hook-ups);

(iv) furnished community room;

(v) recreation facilities;

(vi) public telephone(s) available to tenants 24 hours a day;

(vii) on-site day care, senior center, or community meals room;

(viii) computer facilities.

Board Response: Department's response accepted.

§49.7(e)(3)(B) Code Certification

Comment: The Director of the Southern Building Code Congress International, Inc. (SBCCI) wrote to provide clarification regarding the code language currently being utilized by the Department. The current reference to the Southern Building Code or National Building Code is outdated and should instead state the "International Building Code," which is a universally accepted standard for building.

Department Response: The Department concurs that bringing the QAP language up to date with current building code standards is prudent.

(B) A certification that the Development will adhere to the Texas Property Code relating to security devices and other applicable requirements for residential tenancies, and will adhere at a minimum to the International Building Code as it relates to access, lighting and life safety issues.

Board Response: Department's response accepted.

§49.7(e)(3)(C) Federal Law Certification

Comment: There is a difference between §2606.6722 of SB 322 which says that any development supported by tax credits must comply with Section 504, and Section 2306.257 which states that the applicant must be in compliance with specific federal regulations including ADA. The comment emphasized the difference between a Development (which now must be built in compliance with Section 504) and an Applicant (who is prohibited from receiving tax credits if they have a history of violating the specific list of civil rights or accessibility standards). This difference is important because ADA does not apply to multifamily housing. The proposed resolution to this disparity is to include the exact language of the bill into this subparagraph (C). It was also suggested that the language "to the extent applicable" be included since various types of entities may have previously been required to comply with different standards.

Department Response: The split between the federal regulation certification and the §504 certification is already integrated by splitting these two items into subparagraph (C) and subparagraph (E). To ensure that the meaning of the bill is captured in

the QAP, and that we are referring to an Applicant being in compliance with laws as an existing entity, the clarification was made below in consistency with §2306.257 of SB 322. However, the language "to the extent applicable" is not in SB 322, and allows a measure of flexibility that the legislature may not have intended. The inclusion of that phrase is not suggested by staff.

(C) A certification that the Applicant is in compliance with state and federal laws, including but not limited to, fair housing laws, including Chapter 301, Property Code, Title VIII of the Civil Rights Act of 1968 (42 U.S.C. Section 3601 et seq.), and the Fair Housing Amendments Act of 1988 (42 U.S.C. Section 3601 et seq.); the Civil Rights Act of 1964 (42 U.S.C. Section 2000a et seq.); the Americans with Disabilities Act of 1990 (42 U.S.C. Section 12101 et seq.); and the Rehabilitation Act of 1973 (29 U.S.C. Section 701 et seq.)

Board Response: Department's response accepted.

§49.7(e)(3)(D) Historically Underutilized Businesses/Minority Businesses

Comment: This issue is one of the more controversial items in the QAP. First, there is concern that HUB reporting every 90 days is excessively burdensome. We also received several comments that this requirement is particularly burdensome on developments in rural areas where the subcontractors are often small family-owned businesses that have never applied for HUB certification. For those areas, there may need to be a best effort escape clause if HUB subcontractors cannot be found. It was also suggested that this requirement should be passed on as a burden to the general contractor since the contractor is the one who will be hiring the construction subcontractors. However, there was some support for using the HUB certification because it is a standardized process.

Another recommendation emphasizing that §2306.6734 of SB 322 does not require proof of HUB certification at application, and that applicants should attempt to ensure that at least 30% of construction and management business is contracted to minority owned businesses, not HUBs. Because at the time of application subcontractor agreements will not have been formalized, the Department should merely certify that they will attempt to ensure minority participation. This comment provided a reworking of the first sentence of this exhibit and suggested the use of an Agency prescribed form. Regarding the management component, there is only one management company so how will that be accounted for?

Many concerns were voiced regarding how the Department would define "attempting to ensure," how this requirement would be enforced, and if the provision was even constitutional.

Department Response: The Department is recommending that the exhibit be revised to remove the reference to HUBs and replace it with Minority Owned Businesses. A definition for Minority Owned Business is also added to §49.2 to accommodate this change.

(D) A certification that the Applicant will attempt to ensure that at least 30% of the construction and management businesses with which the Applicant contracts in connection with the Development are Minority Owned Businesses, and that the Applicant will submit at least once in each 90-day period following the date of the Commitment Notice a report, in a format proscribed by the Department and provided at the time a Commitment Notice is received, on the percentage of businesses with which the Applicant has contracted that qualify as Minority Owned Businesses.

Board Response: Department's response accepted.

§49.7(e)(3)(E) Accessibility Features in Townhome Units

Comment: This exhibit reflects a debate regarding visitibility versus livability. The advocacy community has been outspoken in their comprehensive support of §504 and the requirement to have one bedroom and one bathroom downstairs in all Townhome Units, which allows a disabled tenant to actually live in the unit.

The counter-argument, also well supported, is that visitibility should be the goal, which would require only one bathroom downstairs for visiting disabled guests, and remove any language relating to a bedroom downstairs on any Units. The main purpose for this counter-argument is that developers find it infeasible to develop any type of two bedroom townhome unit, because the footprint and layout is not sensible or efficient, and is more costly. This ruling will in effect eradicate the town home design in tax credit developments. Last year there was a discrepancy between the actual language of the QAP and its interpretation. So while the QAP said all units, it was interpreted to mean 5% of all tax credit units. Several comments asked that we clarify that for this year we specifically did mean only 5% of tax credit units; and one commenter was "willing" to increase this to 10% as long as it was not all units. One compromise suggestion was to require that each developer ensure that at least 25% of its units are adaptable and visitable.

The two groups have met and at this point, are unable to agree on a compromise. Another comment was made that we should specify "two-story dwelling units" which would be more specific.

Department Response: While there are cogent points made by each constituency, staff concur with the disabled community in placing an emphasis on improving livability options in tax credit developments. The advocacy community fought for this requirement in the 2001 QAP and the Department should not step back from this previous level of commitment. A clarification regarding two-story dwelling Units is a good revision that provides further clarification; that change is proposed by staff.

(E) A certification that the Development will comply with the accessibility standards that are required under Section 504, Rehabilitation Act of 1973 (29 U.S.C. Section 794), and specified under 24 C.F.R. Part 8, Subpart C. This includes that for all Developments, a minimum of five percent of the total dwelling Units or at least one Unit, whichever is greater, shall be made accessible for persons with mobility impairments. A Unit that is on an accessible route and is adaptable and otherwise compliant with sections 3-8 of the Uniform Federal Accessibility Standards (UFAS), meets this requirement. An additional two percent of the total dwelling Units, or at least one Unit, whichever is greater, shall be accessible for persons with hearing or visions impairments. Additionally, for Developments designed as Townhomes or other two-story dwelling Units, the Applicant must include one bedroom and one bathroom on the ground level of all Units (this includes market rate and tax credit Units), and meet Fair Housing standards. At the construction loan closing a certification from an accredited architect will be required stating that the Development was designed in conformance with these standards and that all features have been or will be installed to make the Unit accessible for persons with mobility impairments or persons with hearing or vision impairments. A similar certification will also be required after the Development is completed.

Board Response: The Board decided on a compromise that would increase the feasibility of constructing a townhome design

development, while still satisfying a level of livability in some of the Units. The Board's compromise is depicted below.

(E) A certification that the Development will comply with the accessibility standards that are required under Section 504, Rehabilitation Act of 1973 (29 U.S.C. Section 794), and specified under 24 C.F.R. Part 8, Subpart C. This includes that for all Developments, a minimum of five percent of the total dwelling Units or at least one Unit, whichever is greater, shall be made accessible for persons with mobility impairments. A Unit that is on an accessible route and is adaptable and otherwise compliant with sections 3-8 of the Uniform Federal Accessibility Standards (UFAS), meets this requirement. An additional two percent of the total dwelling Units, or at least one Unit, whichever is greater, shall be accessible for persons with hearing or visions impairments. Additionally, for Developments designed as Townhomes or other two-story dwelling Units, the Applicant must include one bedroom and one bathroom on the ground level of 20% of all Units for each Unit type, include a bathroom with at least a toilet and a sink on the ground level of all Units, and meet Fair Housing standards. At the construction loan closing a certification from an accredited architect will be required stating that the Development was designed in conformance with these standards and that all features have been or will be installed to make the Unit accessible for persons with mobility impairments or persons with hearing or vision impairments. A similar certification will also be required after the Development is completed.

§49.7(e)(3)(F) Minimum Standard Energy Saving Devices

Comment: The Department was praised for including new energy efficiency minimum standards into the tax credit program. Multiple comments were made regarding ways to improve the Minimum Standard Energy Saving Devices language and make it more realistic and feasible. One comment asked that we clarify that the roof decking is to have a radiant barrier and several indicated that "if recessed lighting is used," then it must be either compact fluorescent of fluorescent tube lights. One comment was also made that R-15 insulation is difficult and expensive to squeeze into a 2x4 wall and will actually have less energy efficiency that a properly installed R-13 insulation; and that R insulation and R rated wall construction are two different things. Conversely, many developers did not indicate the insulation to be problem. Also, most heat loss is through the ceilings and so R-36 ceiling insulation is suggested for extra points. Comments also pointed out that these minimum standards may be difficult if not impossible for certain rehabilitation or preservation developments to accomplish. For example, it is difficult to locate original plans and the applicant may not be able to determine if the water pipes in the slab have been insulated. One comment suggested that all water pipes, whether in slab or not, shall be insulated. Several others suggested that the insulated water pipes in slab be removed altogether because it is unclear, and the insulation of water pipes is not necessarily a considerable energy savings device. Comment was also made that the Energy Star Heating and cooling systems are not typical of the El Paso area and that evaporative coolers are the standard there because of their energy efficiency and the dry climate.

Department Response: This year was the first year the Department integrated a minimum energy efficiency standard into the QAP rules. We had been eager to receive comment on this item so that the exhibit would be both energy efficient and fair, while not being excessively costly. Based on the comments above, staff concurs with the clarification regarding roof decking and recessed lighting. Because only one comment was made regarding the insulation, staff felt that overall the development community did not feel that this was infeasible or excessive. No change on that feature is suggested. The comment regarding points for extra ceiling insulation is noted; the Department intends to integrate the basic proposed energy efficiency threshold with the 2002 QAP, and strive for the 2003 QAP to develop "extra" point based efficiency items. Because of the varying comments regarding the insulated pipes, staff suggests removing that item and researching it further for possible inclusion in the 2003 QAP. In light of that removal, there do not seem to be any other items on this list that would be a conflict for rehabilitation or preservation developments; no specific exceptions are proposed for those developments. Staff concur with the option of using evaporative cooling systems in dry climate areas.

(F) A certification that the Development will adhere to the Department's Minimum Standard Energy Saving Devices in the construction of each tax credit Unit identified in clauses (i) - (vi) of this subparagraph, and that all Units must be air-conditioned. The devices must be certified by the Development architect as being included in the design of each tax credit Unit prior to the closing of the construction loan and in actual construction upon Cost Certification.

(i) Wall insulation at a minimum of R-15. Ceiling insulation at a minimum of R-30. Roof decking to have Radiant barriers;

(ii) Energy Star rated heating and cooling systems, or in dry climates an evaporative cooling system may replace the Energy Star cooling system;

(iii) All appliances installed, including water heaters, to be Energy Star rated;

(iv) Maximum 2.5 gallon/minute showerheads and maximum 1.5 gallon/minute faucet aerators;

(v) If used, natural gas heating systems must have a minimum energy factor of 0.85; and

(vi) If recessed lighting is used, it must use either compact fluorescent lights or fluorescent tube lights.

Board Response: Department's response accepted.

§49.7(e)(4)(C) Exhibit 102C--Cost of Syndication

Comment: Because the documentation requested on the exhibit form is, at best, a good estimate at the time of application, it is unnecessary. Furthermore, many housing authorities must issue public Requests for Proposals in order to choose investors and with a public RFP process you can be fairly sure that the winning proposal will be based upon industry-standard syndication load, so the form should not be required.

Department Response: SB 322 requires in §2306.6705 that specific information relating to syndication must be obtained in an application. That required information is included in this exhibit and form. No changes are proposed.

Board Response: Department's response accepted.

§49.7(e)(5)(B) Exhibit 103B--Zoning

Comment: The question was asked why it is required that the Applicant agree to release the city if zoning is denied? If zoning is denied for reasons that violate federal or state law, the city should not be released. This issue is covered by other laws and should not be the subject of the QAP.

Department Response: The sentence with the "hold harmless" clause was taken verbatim from §2306.6705(5) of SB 322. No changes are proposed.

Board Response: Department's response accepted.

§49.7(e)(5)(D) Exhibit 103D--Interim and Permanent Financing

Comment: The first paragraph reads that the Total Development Costs must be covered by the permanent financing and the credits, but that is not always the case. It was observed that the application asks for proof of application for other TDHCA sources of funds, but that Department then needs to be certain that the application cycles for those programs are synchronized.

Department Response: Clarification to the language is provided relating to Total Development Costs. Regarding the application for other funds, the exhibit already addresses this concern. It states in Exhibit 103D(iii) that, "While evidence of application for funding from another TDHCA program is not required (as these funds will be presented to the Board concurrently with the recommendation for tax credits), the Applicant must clearly indicate that such an application has been filed as required by the Application Submission Procedures Manual."

(D) Exhibit 103D. Evidence of interim and permanent financing sufficient to fund the proposed Total Housing Development Cost less any other funds requested from the Department and any other sources documented in the Application. Such evidence must be consistent with the sources and uses of funds represented in the Application and shall be provided in one or more of the following forms described in clauses (i) - (iv) of this subparagraph:

Board Response: Department's response accepted.

§49.7(e)(6)(B) Exhibit 104B--Notice to Local Officials

Comment: Because the notices to officials are part of the Pre-Application requirements, it was suggested that we clarify the age requirement of the document as it relates to the Pre-Application deadline.

Department Response: The language already clearly states that the "Proof of notification should not be older than three months from the first day of the Application Acceptance Period." As the first day of the Pre-Application Acceptance Period is the same as the first day of the Application Acceptance Period (December 4), the existing language is appropriate. No changes are proposed.

Board Response: Department's response accepted.

§49.7(e)(6)(D) Exhibit 104D--Public Housing Waiting List

Comment: The notification to public housing authorities is unnecessary because the person making the comment had never yet placed an applicant off of the public housing wait list, and that the public housing authority contacts don't want to work with the development owners.

Department Response: The Department is committed to sharing information about our developments and their potential as a housing resource for low income members of communities. While some applicants may feel that this is an unnecessary task that does not result in any tenants, the notification letters are a simple requirement that place no undue burden on an applicant. If they result in even a few referrals that allow a low income person to learn about the tax credit program, then it was worth this simple requirement.

Board Response: Department's response accepted.

§49.7(e)(7)(B) Exhibit 105B--Documentation of Good Standing

Comment: The requirement for a Good Standing Certificate should be revised. Many entities are formed without ever having requested a name reservation certificate. The provision should be revised to state that for entities formed within five months of the date of application, a Good Standing Certificate is not required. If an Applicant or GP has been formed for more than five months from the date of filing the application, then either a Certificate of Good Standing for corporations or a Certificate of Existence must be obtained from the Secretary of State.

Department Response: The requirements of this section were already simplified from the 2001 QAP. As only one comment was made regarding this item, it seems the majority of the development community did not have a problem with this requirement. The Department feels that these are very basic requirements that do not ask too much from an Applicant. No changes are proposed.

Board Response: Department's response accepted.

§49.7(e)(9) Exhibit 107--Nonprofit Threshold Requirements

Comment: Regarding clause (vii), a comment was made that Section 42 does not require that nonprofit entities applying as Qualified Nonprofit Organizations for the federal set-aside be local (having a majority of their board within a certain radius of the site), and that this therefore discriminates against out-of-state nonprofit entities with substantial experience. Another comment also suggested that clause (vii) be deleted in its entirety. It was suggested that this rule may violate the interstate commerce clause of the US Constitution. It was also requested that under clause (vi), eligibility should not be contingent on the nonprofit being the managing partner of the LP or LLC, but that the partnership need only be controlled by the nonprofit. Another comment asked that the phrase "home addresses" be removed from clause (v). The requirements relating to documentation for nonprofits not applying in the set-aside should be minimized or eliminated.

Department Response: The requirements for nonprofit documentation are generated from SB 322. Clause (vii) was taken verbatim from §2306.6706(9) of SB 322. The only addition was the term "in the form of a certification" which is the means by which the Department has determined to gather this information. In clause (v) the requirement for home addresses also comes from §2306.6706(7) of SB 322. The requirement that the nonprofit organization must be the managing general partner if the organization is filed on behalf of a limited partnership is also taken from §2306.6706(b). Based on the requirements of the legislation no changes are proposed.

Board Response: Department's response accepted.

§49.7(e)(11)(A) Financial Statements

Comment: The Department should require, via the Financial Statements, that Applicants, members of a GP, or managing members of an LLC, must show a combined net worth and cash requirement as determined by a financial statement prepared by a CPA. The minimum net worth and asset/cash requirements were in ranges based on the number of units in the development. The low end for developments with 1 to 76 units was $50,000 in net worth and $10,000 in cash/ assets, and the high end for over 200 units was $500,000 in net worth and $50,000 in cash/assets.

Department Response: The establishment of net worth and cash requirements by the tax credit program is not suggested by staff

for two reasons. First, a tax credit deal is a business deal in which syndicators and lenders are also involved. If a syndicator and/or lender think an entity's net worth and cash requirements are substantial enough, the Department should not determine otherwise. Second, this requirement would unduly burden nonprofits and smaller developers/applicants who either have limited assets/net worth and/or who are currently not required to submit a CPA-prepared statement. No changes are proposed.

Board Response: Department's response accepted.

§49.7(e)(12)(D)(ii) Filing of Market Studies and Environmental Studies

Comment: There is confusion that the due date of the reports is March 29, 2002, but that March 29 is also the Application due date. Another comment was also made indicating that the time frame from the release of pre-application results to the application due date is too short to generate professional reports and that the time should be extended.

Department Response: Both comments are addressed already in the existing language. The due date for the applications is March 1. The reports being due March 29 allows approximately one extra month from the application due date (and therefore almost two months from the release of pre-application information) for the professional reports to be generated. Under the time frames this was the longest amount of time the Department was able to identify. No changes are proposed.

Board Response: Department's response accepted.

§49.7(f) Selection Criteria (General)

Comment: Several comments were made suggesting the addition of new selection criteria that were not previously included in this section. One comment suggested awarding points for site features and amenities. Examples of site scoring items included giving points for a site where at least 80% of the site would have slopes less than 12%, for proximity to amenities distinguishing between family and elderly, and for utilities provided at the site. Another suggestion was that developers should be competing on the basis of their cost efficiency, measured possibly in credits per unit. One proposed exhibit would award points for excellent compliance records with the Department. Another comment pointed out that on some of the exhibits, an exhibit number is listed, but there is not a documentation requirement to go along with it and therefore does not need an exhibit number, and that there may be places where documentation is required, but no exhibit number is provided. With the QAP moving increasingly to being strictly point-based, it seems that allocations will all end up going to developments in qualified census tracts. To prevent that it was suggested that an application receiving points for QCTs should not be eligible for mixed income points.

Department Response: The concept of awarding points for site features and amenities has been discussed over the years and while it may have certain merits, it remains a very subjective criteria. The variations in sites and in the reviewer's judgement about the sites would be hard to re-duplicate and may unduly penalize sites involving urban infill or revitalization, as well as penalizing rural developments not located near amenities. The emphasis of SB 322, and the Department, is to see the tax credit program become less subjective. At this time, adding a point structure for something like site, may work against that goal.

The issue of scoring based on cost efficiency has also been heavily debated. While on the one hand, it rewards those developments for minimizing costs and maximizing credits, on the other hand it discourages the inclusion of amenities and features that the tax credit program has been encouraging. Because this issue would be highly debated, the Department does not feel that adding it to the 2002 QAP at this points would allow for adequate public input. The concept of awarding points for excellent compliance records was also debated. While no consensus on this was reached, the Department will revisit this suggestion for the 2003 QAP. Staff did not feel that QCT points should be mutually exclusive of mixed income points. If the evaluation of the 2002 cycle indicates that a predominance of allocations are going to QCTs, the Department will consider the impact of that in developing the 2003 QAP. Finally, regarding the proper location of exhibits and their numbers, staff is making those necessary changes as the QAP is finalized.

Board Response: Department's response accepted.

§49.7(f)(1)(F) Location Ratios

Comment: Several comments were made that the ratios should not be applied city-wide, but should be applied by comparable type of unit. The ratio should not include units more than 10 years old as comparable. If a city or county has an eight year old elderly development, and has strong need for family units, it would be a disservice to the city or county that the development would not receive the full points.

Department Response: In general, the Department supports the line of reasoning behind these comments. Unfortunately, at this time, the data is not available in a manner that would allow the running of these ratios by development type. Therefore, the option is to either maintain it as drafted or delete the selection. Staff suggests maintaining the exhibit as drafted because the Department relies on this exhibit to do two things. The first is to make sure that areas that have never received a tax credit since the inception of the program (of any type), have a slight advantage (2 points) over another city where tax credits have been awarded (even if it is of a different type). A city or town with only one eight-year old tax credit is typically not going to have a ratio that precludes it from receiving two to four points for this exhibit. The second purpose of this exhibit is to make sure that cities with a disproportionate amount of credits per capita are penalized to some degree for having been awarded an overwhelming number of tax credit units. Regardless of type, the Department questions continuing to distribute credits to a city with a high ratio, when there are some cities in the state with absolutely no credits. With the state's limited resources, this exhibit rewards an applicant for going to an area where very few or no tax credits have been awarded and spreading the allocation across the state. To remove the exhibit altogether would remove a very valuable scoring tool. No changes are proposed.

Board Response: Department's response accepted.

§49.7(f)(3) Community Support

Comment: Many members of the House and Senate do not take a position on tax credit developments and will not send letters of support. The suggestion was to treat the receipt of support letters, or no letter, neutrally; and deduct one point if legislative letters are submitted in opposition to a project. The current proposal implies that allocations are a political decision. It was also suggested by several persons that the points awarded should be removed altogether because it may cause problems with civil rights laws by effectively giving neighborhoods and neighborhood organizations the power to exclude low income housing from their community and use the "not in my back yard" tactic. One comment asked that the term "the area" be specified

as it relates to the geographic area served by the civic organizations and another suggested that three letters was an excessive quantity since many neighborhoods only have one organization, if that. Another comment merely suggested integrating the neighborhood/civic points into the previous paragraph so that all of the support points are together. Another item suggested that the language for the points should be worded to match the point language in subparagraph (B). One comment also asked for clarification on the points for subparagraph (B)(ii) because it implies that you could get less than 2 points, in some way, with partial documentation.

Department Response: Under §2306.6710, SB 322 clearly states, "...the department shall score and rank the application using a points system based on criteria that area adapted to regional market conditions and adopted by the department, including criteria regarding...the level of community support for the application, evaluated on the basis of written statements of support from local and state elected officials representing constituents in areas that include the location of the development..." Under §2306.6725, SB 322 states, "In allocating low income housing tax credits, the department shall score each application using a point system based on criteria adopted by the department that are consistent with the department's housing goals, including criteria addressing the ability of the proposed project to...demonstrate community and neighborhood support as defined by the qualified allocation plan..." Based on these excerpts from the bill, it is clear that the Department has to give points for each of these categories.

Staff does not feel that a specific definition for "area" is needed because to limit the area of support by a radius of miles, or some similar method, may disqualify letters of support from civic organizations that are city-wide, but do not office nearby, or may negatively affect rural areas. Staff does not recommend integrating these points into the prior paragraph--each of the types of support letters stand alone as a sub-exhibit of exhibit 202. Staff recommends reducing the number of letters to two to better accommodate areas where there is limited civic involvement/neighborhood organization. The revision was made for the language regarding points to better match the verbiage for the points in subparagraphs (A) and (B). Staff also recommends the revision to the point language on subparagraph (B)(ii).

(B)(ii) from the Mayor, County Judge, City Council Member, or County Commissioner indicating support; or a resolution from the local governing entity indicating support of the Development (2 points)

(C) Points will be awarded based on the written statements of support from neighborhood and/or community civic organizations for areas that encompass the location of the Development. Letters of support must identify the specific Development and must specifically state the organization's support of the Development at the proposed location. This documentation must be provided as part of the Application. Letters of support from organizations that are not active in the area including the location of the Development will not qualify for points under this Exhibit. Letters of support received after the close of the Application Acceptance Period will not be accepted for this Exhibit. (1 point each, maximum of 2 points.)

Board Response: Department's response accepted.

§49.7(f)(4)(A) Unit Size

Comment: It was requested that the unit sizes be adjusted. Comments on revising the square footage tended to be based on developer's researching the average dwelling unit sizes in their existing developments or in the market. Comments also indicated that because rehabilitation unit sizes are already determined, and that those primarily will be below these requirements, rehabilitation deals will be ineligible for all of the points in subparagraphs (D) - (H), which would be a devastating impact for those applicants. Furthermore, these square footages would have a similarly detrimental effect on preservation, rural and senior deals. If these minimums are kept, senior deals would definitely need an adjustment, since in multi-story elderly developments more space is put into community spaces and corridors. For TxRD funded projects there is a conflict because Farmer Home maximums are less than our minimums, making all TxRD deals ineligible for the subsequent points. There was considerable support for the deletion of the minimum unit sizes entirely because there are too many factors involved in housing to have a basic universal minimum, and increasing sizes will only drive up costs. From those persons not suggesting deletion, the sentiment was to make the minimum sizes applicable only to new construction, with a factor for elderly. One comment was received in support of the proposed unit sizes, arguing that we should not confine people in spaces that are inappropriate just because they are poor. Two comments also asked that we identify square footage for studio/efficiency units (400 square feet was proposed).

Department Response: The Department is cognitive of the many factors influencing different developments. However, §2306.6710(b) of SB 322 states that, "if an application satisfies the threshold criteria, the department shall score and rank the application using a point system based on criteria that are adapted to regional market conditions and adopted by the department, including criteria regarding...the size, quality and amenities of the units." The directive to create a scoring component relating to unit size is clear. Staff does suggest, based on comments provided, to draft the language to accommodate for the many valid concerns relating to unit size concerns for elderly, rehabilitation and TxRD developments. The unit sizes for new construction are not excessive and provide a livable space for tenants, and therefore are not being proposed for change. An additional category was added for efficiencies, however the Department thought 400 square feet was too small for a comfortable living space and included a 500 square foot minimum.

(4) Development Characteristics. Developments may receive points under as many of the following subparagraphs as are applicable. This minimum requirement does not apply to Developments involving rehabilitation or Developments receiving funding from TxRD-USDA. To qualify for points under subparagraphs (D) - (H) of this paragraph, the Development must first meet the minimum requirements identified under subparagraph (A) of this paragraph.

(A) Unit Size. The square feet of all of the units in the Development, for each type of unit, must be at minimum:

(i) 500 square feet for an efficiency unit;

(ii) 750 square feet for a non-elderly one bedroom unit; 650 square feet for an elderly one bedroom Unit;

(iii) 900 square feet for a two bedroom unit;

(iv) 1,000 square feet for a three bedroom unit; and

(v) 1,100 square feet for a four bedroom unit.

Board Response: Based on additional comments received at the Board meeting on November 14, the Board reduced the unit square foot requirement for one-bedroom elderly units, and added a unit square foot requirement for two-bedroom elderly units.

(4) Development Characteristics. Developments may receive points under as many of the following subparagraphs as are applicable. This minimum requirement does not apply to Developments involving rehabilitation or Developments receiving funding from TxRD-USDA. To qualify for points under subparagraphs (D) - (H) of this paragraph, the Development must first meet the minimum requirements identified under subparagraph (A) of this paragraph.

(A) Unit Size. The square feet of all of the units in the Development, for each type of unit, must be at minimum:

(i) 500 square feet for an efficiency unit;

(ii) 750 square feet for a non-elderly one bedroom unit; 550 square feet for an elderly one bedroom Unit;

(iii) 900 square feet for a two bedroom unit; 750 square feet for an elderly two bedroom Unit;

(iv) 1,000 square feet for a three bedroom unit; and

(v) 1,100 square feet for a four bedroom unit.

§49.7(f)(4)(D) Exhibit 205--Units for Families

Comment: Comment was made that the restrictions on units for families should be exempt for TxRD deals because a number of the properties in their portfolio needing rehabilitation have less square footage. It was also noted that studio and one-bedroom units should be permitted, and that the square footage on the 4-bedroom Units exceed the minimums in subparagraph (A).

Department Response: The Department does not wish to discourage preservation and rehabilitation developments by including criteria items that are infeasible for the rehabilitation of TxRD developments. However, any new funding should not be exempt from these minimum requirements to receive the points. The intent of these points is to create an incentive for developments designed specifically to cater to families. With that in mind, the points do not apply to smaller units not serving families. To include the smaller units in the calculation for the points would defeat the concept of the exhibit. Likewise, the higher square footage on the four bedroom unit is set to ensure that a family unit is slightly larger than the program minimum. No changes on the smaller units or square footages are suggested. Drafted language follows.

(D) Development provides Units for housing individuals with children. To qualify for these points, these Units must have at least 2 bathrooms and no fewer than three bedrooms and at least 1000 square feet of net rentable area for three bedroom Units or 1200 square feet of net rentable area for four bedroom Units; these Unit size and bathroom requirements are not required for Developments involving rehabilitation to be eligible for the points below . Unless the building is served by an elevator, 3 or 4 bedroom Units located above the building's second floor will not qualify for these points. If the Development is a mixed-income development, only tax credit Units will be used in computing the percentage of qualified Units for this selection item.

(i) 15% of the Units in the Development are three or four bedrooms (5 points); and

(ii) an additional point will be awarded for each additional 5% increment of Units that are three or four bedrooms up to 30% of the Units (a maximum of three points) (3 points).

Board Response: Department's response accepted.

§49.7(f)(4)(E) Costs per Square Foot for New Construction Only

Comment: It was strongly recommended that this entire requirement be deleted because measuring cost per square foot is a deterrent to the production of quality affordable housing and is difficult to track since final bids are a year or more after the application. Many of those suggesting this deletion also supported a credit cap per unit, which is proposed elsewhere. Any Applicant could receive the maximum points by using tactical methods such as the use of inferior building materials or unnecessarily increasing bedroom sizes. Also when leasing a mixed income development, you need to make sure that the entire development meets market rate standards. If this exhibit is maintained the ranges need to be widened. It was suggested that the QAP (in the definitions) specify what New Construction is for the purposes of this exhibit. The rationale is that a development undergoing major conversion or renovations would also be competitive and eligible for these points since their costs do fall within these ranges.

It was also pointed out that by making these points eligible for only new construction, it places rehabilitation, preservation and historic preservation deals at a distinct point disadvantage. A counter-balance should be provided to equalize this. The sentence regarding 5% increments does not make sense with the rest of the exhibit. Finally, it was noted that in multi-story elderly developments, corridors are not accounted for and that perhaps those figures need to be integrated into the unit calculation. It was pointed out that the initial paragraph indicates six points, but the subcategories below are at 4 points and lower.

Department Response: The Department integrated this item to comply with §2306.6710(b)(1) which states "if an application satisfies the threshold criteria, the department shall score and rank the application using a point system based on criteria that are adapted to regional market conditions and adopted by the department, including criteria regarding...the cost by square foot of the development." However, the many detrimental impacts this may have on developments is noted. Therefore, staff recommends the following which make this exhibit broad enough to minimize any negative repercussions it may have.

(E) Cost per Square Foot. For this exhibit hard costs shall be defined as construction costs, including contractor profit, overhead and general requirements. The calculation will be hard costs per square foot of net rentable area (NRA). The calculations will be based on the hard cost listed in Exhibit 102B and NRA shown in the Rent Schedule of the Application. Developments do not exceed $60 per square foot (1 point).

Board Response: Department's response accepted.

§49.7(f)(4)(F) Unit Amenities and Quality

Comment: Comments on specific amenity changes included removing crown moulding, ceramic tile floors (which may also increase liability in elderly developments) and nine-foot ceilings as they are costly and do not address any component of affordable housing. The higher ceilings also will increase utility bills, so the amenity may not be "affordable" for the tenant at all. One comment did support points for ceramic floors. It was suggested that these items should be replaced by adding laundry connections,

storage area and covered parking which are in the realm of affordable housing need. The need for cabinetry depends on the number of occupants in a unit and the type of housing: elderly may need less, while families need more. The cabinetry requirement may negatively affect the accessibility of the unit and the linear measurement may not adequately reflect pantry space or areas where there is cabinetry above but not below (or vice versa). Therefore, it was suggested that this item be deleted. Clarification was requested regarding whether the phone line needed to be a separate second line or not. There were also requests that cementious board products also be classified as masonry. Finally, it was suggested that the amenities need to be in all units and that there can be no additional charge.

Comment was received that pointed out the disparity between new construction and rehabilitation or rural projects in providing many of these unit features. To meet the legislative goal of providing the most housing for the least credits, there needs to be parity in scoring features. It was suggested that the standards for one bedroom and four bedroom units be different. Several comments also pointed out that this section conflicts with the requirement that the construction will be underwritten using the Average quality standards from Marshall and Swift, because the items mentioned are frequently in the Very Good category of Marshall and Swift. Either the Agency should use a higher quality standard in underwriting or each applicant should be looked at individually to determine what Marshall and Swift category to use. Because of this disparity, it is suggested that the section be deleted entirely.

Department Response: The Department concurs with many of the comments and was pleased to get informative constructive feedback on what amenities work in an affordable housing development. All of the requested changes listed in the first paragraph above have been made, except the language relating to there being no charge because that language already existed in the exhibit. With the removal of some of the more costly items on the amenity list, rehabilitation deals should be able to satisfy at least some of these amenity selection criteria. However, to increase parity between new construction and rehabilitation, language is proposed that adjusts points for rehabilitation developments. The QAP will address the issue of the Marshall and Swift rating categories under §49.8. The Department feels that to get points for the amenities they must be applied to all units regardless of unit size, therefore no adjustment has been that treats one bedroom units differently than four bedroom units.

(F) Exhibit 205. Unit Amenities and Quality. Developments providing specific amenity and quality features in every Unit at no extra charge to the tenant will be awarded points based on the point structure provided in clauses (i) - (xiv) of this subparagraph, not to exceed 10 points in total. Developments involving rehabilitation will double the points listed for each item, not to exceed 10 points in total.

(i) Lighting Package: Includes heat light and vent fans in all bathrooms and all rooms have ceiling fixtures with accessible wall switches (1 point);

(ii) Kitchen Amenity Package: Includes microwave, disposal, dish washer, range/oven, fan/hood, and refrigerator (1 point);

(iii) Covered entries (1 point);

(iv) Computer line/phone jack available in all bedrooms (only one phone line needed) (1 point);

(v) Mini blinds or window coverings for all windows (1 point);

(vi) laundry connections (1 point);

(vii) storage area (1 point);

(viii) Laundry equipment (washers and dryers) in units (3 point);

(ix) Twenty-five year architectural shingle roofing (1 point);

(x) Covered patios or balconies (1 point);

(xi) Covered parking (2 points)

(xii) Garages (3 points);

(xiii) Greater than 75% masonry (including cementious board products) on exterior (3 points).

Board Response: Department's response accepted with two changes. The Board removed the parenthetical clause that allowed points for cementious board as a masonry product, and reinstated the points for ceramic tile flooring.

§49.7(f)(4)(G) Density Points

Comment: There was support to return the density per acre to the standards used in the 2001 QAP. Comment was also received indicating that a separate factor should be used for multistory elderly developments. The scoring criteria favors low-density one story housing developments for the elderly and/or families, in lieu of a multi-story elderly housing facility. Multi-story structures for the elderly can easily provide for densities of more than 28 units per acre and should not be compared to family projects with densities of 24 units/acre or less. Additionally, high density urban infill or elderly projects will provide for decreased maintenance costs, more desirable site location, convenience to tenants, tighter security, and improved emergency care. Another comment supported not having separate density points for multistory elderly developments or urban infill. It was additionally proposed that the points add a category for 2 points with one more range of density, and that there be even more categories (General Family, General Elderly, High Rise Urban Infill Family, and High Rise Urban Infill Elderly).

Department Response: Staff sees no difficulty with returning to the 2001 QAP density figures and is suggesting that change below. Staff also concurs that one additional density category may be beneficial. The reason for the original change was that with the deletion of the Town Home points, there was concern that there would be less of an interest in doing lower density deals. However sentiment clearly indicates otherwise. To complement the reduced density points, and make sure that multistory elderly or infill developments are not penalized, revisions are proposed to accommodate those type of developments.

(G) The proposed Development provides housing density of no more than 42 Units per acre for multi-story elderly or urban infill developments and no more than 24 Units per acre for all other developments, as follows:

(i) 34 Units per acre or less for multi-story elderly or urban infill developments, or 16 Units or less per acre for all other Developments (6 points); or

(ii) 35 to 38 Units per acre for multi-story elderly or urban infill developments, or 17 to 20 Units per acre for all other Developments (4 points); or

(iii)39 to 42 Units per acres for multi-story elderly or urban infill developments, 21 to 24 Units per acre for all other Developments (2 points).

Board Response: Department's response accepted.

§49.7(f)(4)(I) Mixed Income Developments

Comment: It was suggested by many that the language originally in the 2001 QAP regarding the calculation of the comparable rents via the Market Study information be reinstated. It had originally been removed and integrated into item (J), however, based on overwhelming public comment, item (J) was deleted. It was widely suggested that the referenced language be relocated to this exhibit. The only alteration to the 2001 language is an exception relating to 4-bedroom units, as there is no way to measure comparable units in most submarkets. It was also separately suggested that the 95% category should be removed, and that a component should be added that allows for the "mixed income" to be a mix not with market rate units, but units at 80% of median income. This change would allow nonprofits whose mission statements preclude them from having market rate units to obtain mixed income points. One comment was also made that the original range of mixed income percentages should be reinstated.

Department Response: The Department, based on the overwhelming feedback regarding this item and item (J) following, concurs with the proposed changes for this exhibit. As there was little support for removing the 95% category, this language will remain, to continue the Department's commitment to integrated housing. Regarding the mixed income points for nonprofits, the intent of the QAP is not to find a way for every type of development to get points under each selection criteria. A nonprofit is eligible for points in other areas where a for profit is not eligible, and not all nonprofits have limitations on doing market rate Units. Staff does not suggest a revision for that comment. The reinstatement of the original percentages is not supported by staff; the reason for the original change in the percentages was based on input during round tables with a diverse group of program participants. No other comments came in supporting the reversion to the original.

(I) The Development is a mixed-income development comprised of both market rate Units and qualified tax credit Units. To qualify for these points, the project must be located in a submarket where the average rents based on the number of bedrooms for comparable market rate units are at least 10% higher on a per net rentable square foot basis than the maximum allowable rents under the Program. Additionally, excluding 4-bedroom Units, the proposed rents for the market rate units in the project must be at least 5% higher on a per net rentable square foot basis than the maximum allowable rents under the Program. The Market Study required by subsection (e)(12)(B) of this section must provide an analysis of these requirements for each bedroom type shown in proposed unit mix. Points will be awarded to Development's with a Unit based Applicable Fraction which is no greater than

(i) 80% (8 points); or,

(ii) 85% (6 points); or,

(iii) 90% (4 points); or

(iv) 95% (2 points).

Board Response: Department's response accepted.

§49.7(f)(4)(J) Points for Mixed Income--Rents below Tax Credit Limits

Comment: There was wide support for the deletion of this exhibit because it is confusing. The language throughout the exhibit is contradictory--at one point referring to higher rents and elsewhere referring to lower rents. The submarket is undefined which would make the exhibit too hard to evaluate. The requirement that maximum rents be maintained throughout the compliance period is difficult to fulfill since market conditions vary over time, and would be difficult for accountant and auditors to maintain for compliance. One suggestion was that the rents below the maximum tax credit limits should correspond to regional median incomes and have medians for each region. If the exhibit is retained, it is suggested that the percentages used for reducing the rents be reduced. Another comment suggested giving points for Applicants who set the rents at the Section 8 fair market rents.

Department Response: Based on the public comment this exhibit has been deleted to reduce confusion.

Board Response: Department's response accepted.

§49.7(f)(4)(K) Historic Property Designation

Comment: Comment was received requesting the removal of points for a property which is located in a historic district. No reason was given.

Department Response: As there were no other comments supporting the deletion of this item, and no rationale was provided, staff suggests leaving this item as is. No changes are proposed.

Board Response: Department's response accepted.

§49.7(f)(4)(L) Deferred Development Fees

Comment: There was almost unanimous agreement among all public comments received that this item should be deleted. Awarding points for deferring fees reduces project financial feasibility and security, and should therefore be an underwriting issue, not a scoring issue. While every deal has substantial deferred fees, these fees act as the contingency and security for construction, rental achievement, interest overruns, and permanent loan conversion, so to encourage this fee to be smaller will only hurt the long-term success of the development, and may turn away syndicators who feel that the deal is too risky. Additionally, this would be difficult to accurately monitor, as the depiction of what fees are deferred at application may not be truly representative of what occurs. So almost all developers would claim these points, when they may not actually be following through. This leads to the question of how will adherence to this selection criteria be monitored? One comment did suggest that if this exhibit remains, it needs to restructure the percentages and allow for points for having a developer fee below the existing low end of the range. It was suggested that in lieu of this exhibit, a developer could receive points for setting aside a percentage of their paid (as opposed to deferred) developer fees into a replacement reserve for future maintenance.

Department Response: Based on these very cogent arguments, staff concurs with the deletion of this exhibit. The suggestion regarding replacement reserve is noted and will be considered in the drafting of the 2003 QAP to ensure that it is exposed to adequate public comment.

Board Response: Department's response accepted.

§49.7(f)(4)(M) Other Funding--HOPE VI and Section 202/811

Comment: It should be noted that HOPE VI funds were originally removed as an independent selection item, because they had been integrated into the low income targeting exhibit (215). With the simplification of exhibit 215, HOPE VI funds are no longer addressed anywhere in the QAP and comment supported that the points be reinstated. Comment was also received suggesting that points be awarded for Section 202 and Section 811 HUD

grants which are highly competitive. Generally only 5 to 6 Section 202 developments are awarded in the State of Texas and it is an excellent source of leveraging. The Section 811 program enables the Department to better meet its goal of integrated housing because the concept of combining tax credits with a Section 811 grant is to ensure disabled units within a non-disabled population group. Like HOPE VI grants, these developments would be better able to reach the 30% of AMGI tenants that the Department is striving to serve, because the Section 202 and 811 programs also include a rental assistance agreement.

Department Response: Staff suggests reintegrating the HOPE VI points and integrating the inclusion of Section 202 and Section 811 into this exhibit.

(M) Exhibit 208. Evidence that the proposed Development is partially funded by a HOPE VI, Section 202 or Section 811 grant from HUD. The Project must have already received the commitment from HUD. Submission of a HOPE VI, Section 202 or Section 811 grant application to HUD does not qualify a Development for these points. Evidence shall include a copy of the commitment letter from HUD indicating the HOPE VI, Section 202 or Section 811 grant terms and grant award amount (5 points).

Board Response: Department's response accepted.

§49.7(f)(5)(A) and (B)--HUBs and Joint Ventures

Comment: It was suggested that points for HUBs should be removed now that the 30% requirement for minority owned businesses is in the Threshold Criteria. With SB 322's emphasis on quality work, it seems inconsistent to award points for who one is, rather than what one can accomplish. It was requested that the QAP clarify that to qualify for HUB points, the HUB does not need to be a 51% owner of the partnership. This clarification is made for nonprofit's, but not for HUBs.

Relating to joint ventures with nonprofits, one comment indicated that the language stating that developments without control will not be eligible for the nonprofit set aside, should be altered to reflect that control for a nonprofit is a must for any set-aside per the IRS guidelines. Two comments also suggested that joint venture points be deleted altogether, since the nonprofits can freely participate in any category, and they can get points under experience by partnering with an experienced general contractor. Again, with SB 322's emphasis on quality work, it seems inconsistent to award points for who one is, rather than what one can accomplish. Conversely, comment was received in support of keeping the nonprofit joint venture points.

Many comments also supported that qualified stand-alone nonprofits, under any set-aside, should be eligible for these points, and that they are being unduly penalized.

Department Response: While the arguments for the removal of HUB points and joint venture points may have merit, each of these factors has been a successful, well-used discriminating selection criteria.

To remove these points without adequate public discussion would be detrimental, as staff believes many parties would make comment recommending that the points stay. Staff suggests that this issue be discussed in greater detail as an option for the 2003 QAP. The QAP already indicates that a HUB does not specifically have to be a 51% owner, by stating that the HUB only needs to have, "an ownership interest in and materially participate in the Development..." No changes for comments made regarding HUBs are suggested.

Staff does not recommend that this effort at capacity building through joint ventures be deleted. Staff also disagrees with the idea that a nonprofit must have control to compete in any set-aside. In compliance with Code, any nonprofit wishing to compete in the nonprofit set-aside must be in control, but as the other set-asides are not governed by the Code, they should not preclude partnerships in which a smaller nonprofit takes a non-controlling interest in a project to gain exposure to the program. In that vein, the points for joint ventures were created specifically to enhance capacity building for nonprofits that are not experienced enough to venture into tax credit development unassisted. As with the HUB points, the points were never designed to be a nonprofit "given" and should not be altered for that purpose.

Board Response: Department's response accepted.

§49.7(f)(5)(C) Exhibit 211 and §49.7(e)(7)(E) Exhibit 105E and-Experience of the Owner's or General Contractor's Experience

Comment: Comment pointed out that the definition for "successful" is more stringent than in the past under the selection criteria and that the language does not provide for certification of experience as handled in the past. The question was also asked if a certificate of experience could be issued by the state to be used in all the applications of one developer, as was the case in the threshold requirement for the 2001 QAP. One suggestion was that the threshold experience should be lowered and that points should be adjusted into point ranges relative to the amount of experience based on number of units, thereby raising the level of experience to a higher degree. To emphasize this exhibit for points rewards those developers who have successfully completed developments. It was also suggested that the Development experience had to be in Texas so that out of state developers would not gain an advantage over local developers, and that the general contractor should be included for these points to be more consistent with the threshold requirement.

Department Response: There seems to have been quite a bit of confusion on these two exhibits as one exhibit requires a minimum threshold for Development Team experience and the other goes beyond that to award points for a more stringent level of experience specifically for the owner or general partner. Through many discussions and the comments received, staff feels that this new selection criteria exhibit is not in the best interest of the program. The Department is concerned with ensuring that all of the developers receiving an allocation meet a threshold standard. The Department should not be arbitrarily determining that after a given number of Units, someone's experience is immediately placed in a new realm that warrants a certain number of points. Therefore, staff recommends that to alleviate confusion, simplify the process, and ensure that the basic goal of only utilizing experienced developers is met, this selection criteria should be deleted. The threshold requirement for experience should remain with a revision to increase the experience requirement to the Unit levels that were proposed in the selection criteria. The threshold standards, even increased, are not excessive and are met regularly by our applicants. To lower the standard, as suggested, would serve no purpose. Staff also disagrees with the suggestion that experience for the threshold requirement needs to be in Texas. Experience with development of residential units is universal and does not vary substantially across states and should not be eliminated from consideration.

(E) Exhibit 105E. Evidence that the Development Owner's general partner, partner (or if Applicant is to be a limited liability company, the managing member) General Contractor or their principals have a record of successfully constructing or developing

residential units or comparable commercial property (i.e. dormitory and hotel/motel) in the capacity of owner, general partner, managing member or General Contractor. If the General Contractor's experience is being claimed for this exhibit, then the Development Owner must request the Department's approval prior to replacing the General Contractor. If rehabilitation experience is being claimed to qualify for an Application involving new construction, then the rehabilitation must have been substantial and involved at least $6,000 of direct hard cost per unit.

(i) The term "successfully" is defined as acting in a capacity as the general contractor or developer of:

(I) at least 150 residential units or comparable commercial property; or

(II) at least 75 residential units or comparable commercial property if the Development applying for credits is a Rural Development.

(ii) Evidence must be one of the following documents:

(I) A certification from the Department that the Person with the experience satisfies this exhibit. Applicants who have previously applied for a Tax Credit Allocation must request this certification at least seven days prior to the beginning of the Application Acceptance Period. Applicants should ensure that the individual whose name is on the certification appears in the organizational chart provided in Exhibit 105A. If the certification is for the General Contractor, then this should be clearly indicated on the document.

(II) If the Department has not previously certified that the experience of the Development Owner, general partner, managing member or General Contractor qualifies for this exhibit, then one of the following documents must be submitted: American Institute of Architects (AIA) Document A111--Standard Form of Agreement Between Owner & Contractor, AIA Document G704--Certificate of Substantial Completion, IRS Form 8609, HUD Form 9822, development agreements, partnership agreements, or other appropriate documentation verifying that the general partner, General Contractor or their principals have the required experience. If submitting the IRS Form 8609, only one form per Development is required. The evidence must clearly indicate:

(-a-) that the Development has been completed (i.e. Development Agreements, Partnership Agreements, etc. must be accompanied by certificates of completion.);

(-b-) that the names on the forms and agreements tie back to the ownership entity, general partner, general contractor and their respective principals as listed in the Application; and

(-c-) the number of units completed or substantially completed.

Board Response: The Board concurred with streamlining these exhibits back to only a threshold exhibit as proposed by the Department, however they maintained the experience criteria at the original unit amounts of 100 units, or 36 units for rural developments.

§49.7(f)(6) Supportive Services

Comment: The requirement that the owner must pay for services to get one of the points for this criteria is not necessary. Developments often partner with nonprofits that get their funding from other sources and intend to serve the residents as part of their mission and at no cost to the owner. Another comment indicated that we should not include the point under item (vi) for coordination with state services because the state agencies are typically not willing to sign letters, but do tend to provide the services that they are mandated to provide. This additional point does not create new supportive services for tenants since the state is already obligated to provide those services. A question was presented as to whether the state would provide a list of the organizations and programs under item (vi). It was also stated that the five points for services are "token services." The items that we give points for should become a minimum threshold before points would even be considered, and then points would be awarded for the provision of substantive supportive services.

Department Response: The purpose for the Department requiring that the Applicant must pay for the services to get a point, was that the Department wanted to make sure that the expense associated with the services was not passed on to the tenant. However, the fact that nonprofits may be providing those services with funds from other entities is a valid issue. Language has been included to address this concern, while continuing to ensure that tenants will not bear the costs. Section (iv) has been revised to integrate a certification regarding coordination with state workforce development programs in lieu of requiring letters of documentation. The Department will provide a list of these workforce programs in its Reference Manual. While the Department fully supports the proposal to totally revamp this criteria and make the supportive services more meaningful, this revision would need to involve more public comment as there will be many voices eager to give input and suggestions. The Department will ensure that this proposal is integrated into the 2003 QAP where it will get adequate public exposure.

(6) Exhibit 212. Development Provides Supportive Services to Tenants. Evidence that the Development Owner has an executed agreement with a for profit organization or a tax-exempt entity for the provision of special supportive services for the tenants. The service provider must be an existing organization qualified by the Internal Revenue Service or other governmental entity. The provision of supportive services will be included in the LURA (up to 7 points, depending upon the services committed in accordance with subparagraph (B) of this paragraph, plus two additional points pursuant to clause (vi) of subparagraph (B) of this paragraph). Acceptable services are described in subparagraphs (C) - (E) of this paragraph.

(A) Both documents described in clauses (i) and (ii) of this subparagraph must be submitted for the service provider to be considered under this exhibit.

(i) A fully executed contract, not more than 6 months old from the first day of the Application Acceptance Period between the service provider and the Applicant that establishes that the services offered provide a benefit that would not be readily available to the tenants if they were not residing in the Development.

(ii) A copy of the service provider's Articles of Incorporation or comparable chartering document.

(B) The supportive services contract will be evaluated using the criteria described in clauses (i) - (vi) of this subparagraph. The contract must clearly state the:

(i) Cost of Services to the Development Owner. The cost shown in the contract must also be included in the Development's operating budget and proforma. The costs must be reasonable for the benefit derived by the tenants. Services for which the Development Owner does not pay, will not receive a point for this item, except in the event that a supportive service provider is able to provide services with funds they receive from other sources.

Evidence of the provider's other funding source(s) enabling the provision of service to the tenants of the proposed Development must be provided (1 point).

(ii) Availability of Services--The services must be provided on site or with transportation provided to offsite locations. (1 point).

(iii) Duration of Contract--A commitment to provide the services for not less than five years or an option to renew the contract annually for not less than five years must be provided (1 point).

(iv) Experience of Service Provider--The Department will evaluate the experience of the organization as well as the professional and educational qualifications of the individuals delivering the services (1 point).

(v) Appropriateness--Services must be appropriate and provide a tangible benefit in enhancing the standard of living of a majority of low-income tenants (1 point).

(vi) Coordination with tenant services provided through housing programs--An extra two points will be awarded for services that are provided through state workforce development and welfare programs as evidenced by execution of a Tenant Supportive Services Certification (2 points).

(C) the services must be in one of the following categories: child care, transportation, basic adult education, legal assistance, counseling services, GED preparation, English as a second language classes, vocational training, home buyer education, credit counseling, financial planning assistance or courses, health screening services, health and nutritional courses, youth programs, scholastic tutoring, social events and activities, community gardens or computer facilities; or\

(D) any other program described under Title IV-A of the Social Security Act (42 U.S.C. §§ 601 et seq.) which enables children to be cared for in their homes or the homes of relatives; ends the dependence of needy families on government benefits by promoting job preparation, work and marriage; prevents and reduces the incidence of out-of wedlock pregnancies; and encourages the formation and maintenance of two-parent families, or\

(E) any other services approved in writing by the Department.

Board Response: Department's response accepted.

§49.7(f)(7)(A) and (B)--Special Needs Housing

Comment: It was suggested that the points for elderly projects and the points for transitional housing should be reduced to no more than the points available for supportive services or HOPE VI financing. It was also suggested that applicants be eligible for a portion of points for doing only a portion of the development for transitional housing, instead of requiring 100% transitional.

Department Response: The Department, through the State Low Income Housing Plan, is committed to making an effort to serve its aging and homeless populations. Each of these types of developments tend to be unable to score points in some of the other more traditional areas. These points allow those developments to score competitively in the process. Unfortunately, Section 42(j)(3)(B)(iii) of the Tax Code precludes a tax credit development from having partial transitional housing. No changes are proposed.

Board Response: Department's response accepted.

§49.7(f)(7)(C) Exhibit 215, Low-Income Targeting Points

Comment: Comments were received suggesting deletion of the entire exhibit as proposed. One of the main objectives of the Sunset Commission and the legislature was to make programs more understandable. This exhibit adds confusion to the program. A more simplified exhibit was proposed in its place representing the input of many people and entities involved in the program. Other comments emphasized the language in sections 2306.6702, 2306.6710, and 2306.6725 of SB 322 that indicates that the most weight should go to criteria that will result in an allocation serving the lowest income tenants. Another comment suggested that the median income levels in 8B should not be lower than the median income levels for Brownsville or McAllen MSAs. One suggestion was that in some high median income areas 30% units can be done without subsidy and therefore a subsidy should not be required to receive the points. Comment also asked that if we keep the exhibit as drafted, the Department reevaluate the math calculation involved and be clear whether percentages are used as whole numbers or as decimals. One comment thought that we should remove any exhibit relating to low income targeting.

Section (iv) also has restrictions on how to handle units with tenants exceeding limits that should be changed. A comment was made requesting the Department to limit deep targeting (below 60% of AMFI) to 30% of the LIHTC units to avoid concentrations of poverty and the inability to lease market rate units. However, several comments specifically refuted this and indicated that there should be no limit placed on the number of units at the targeted incomes nor should there be required subsidy, because the state should strive to generate as many units at 30% as possible. If maintained in the language, funding assistance, as referred to in clause (iii), should be applied for at application with the commitment coming before the awards are announced. Also the requirements for funding assistance need to involve a firm commitment and be more specific. It was proposed that different types of units must have a subsidy of a minimum amount per unit. The proposal delineated how to determine the types of funding and what the unit costs would be in determining "enough" subsidy for the points.

Comment was received representing the rural viewpoint on this exhibit. The Department should clarify that we will accept a firm Section 8 contract or rental assistance contract from USDA as evidence of meeting the 30% of AMFI documentation criteria, even though those documents may not specify the level of AMFI. USDA's regulations state that the priority for the rental assistance is the individuals with the lowest incomes. One comment seriously questioned the need for subsection (iv) which restricts the rents to the level claimed for points. This would allow only urban properties in high income areas to garner these points. The restriction should instead be on the amount the tenant will pay, not the total subsidy being received by the property, because ultimately the Department should care about the tenants not having to pay too much. In rural Texas, where incomes are low, it is impossible to restrict rents. Likewise, properties receiving USDA assistance are prohibited form having different rent schedules for similar size units.

Several different structures were proposed to replace the existing exhibit. One awarded points for a development serving different proportions of families at 30%, 35%, 40%, 45%, 50% and 55% of AMFI. This sample had particularly high points to ensure adherence to the SB 322 requirements and had the points contingent on a 55 year extended use period. The other proposal was more simple and gave moderate points for serving different percentages of tax credit units for families at 30% and 50% only.

Department Response: In generating the draft QAP staff was extremely challenged on this exhibit. Staff hoped that substantial feedback and comments would come in on this exhibit and was pleased by the response. Public comment definitely supports a simpler approach to this exhibit . The language below is based on a hybrid of the different structures proposed. Staff removed any factors for double counting, while increasing the number of points for serving Units at 30% or less of AMFI for compliance with SB 322. Comments regarding weighting calculations and median incomes are not applicable to this revised language. Language from previous section (iv) has been integrated, but revised, to ensure that the Department will have compliance monitoring ability on the representations made. The Department does not support a limit on the number of units that can be at 30%, nor does it support a subsidy requirement. It should be noted that HOPE VI funds were originally removed as an independent selection item because that item had been integrated into this low income targeting language. With the simplification of this exhibit, HOPE VI funds are no longer addressed and are being suggested for reintegration at Section 49.7(f)(4)(M). Language relating to length of compliance period has been integrated into §49.7(f)(8).

(C) Low Income Targeting Points. Applications are eligible to receive points under clauses (i),(ii) and (iii) of this paragraph. For purposes of calculating percentages of units, all figures should be rounded down to the nearest whole number. To qualify for these points, the rents for the rent-restricted Units must not be higher than the allowable tax credit rents at the rent-restricted AMFI level. For Section 8 residents, or other rental assistance tenants, the tenant paid rent plus the utility allowance is compared to the rent limit to determine compliance. The Development Owner, upon making selections for this exhibit will set aside Units at the rent-restricted levels of AMFI and will maintain the percentage of such Units continuously over the compliance and extended use period as specified in the LURA. For the purposes of this subparagraph (maintaining the promised percentage of Units at the selected levels of AMFI), if at re-certification the tenant's household income exceeds the specified limit, then the Unit remains as a Unit restricted at the specified level of AMFI until the next available Unit of comparable or smaller size is designated to replace this Unit. Once the Unit exceeding the specified AMFI level is replaced, then the rent for the previously qualified Unit at the specified level of AMFI may be increased over the LIHTC requirements. Rent increases, if any, should comply with lease provisions and local tenant-landlord laws.

(i) Development owners selecting to set aside units for individuals and families earning less than 50% of AMFI shall receive the corresponding points listed below:

(I) 0% to 9% of tax credit Units set aside for 50% or less of AMFI (4 points)

(II) 10% to 19% of tax credit Units set aside for 50% or less of AMFI (8 points)

(III) 20% to 29% of tax credit Units set aside for 50% or less AMFI (12 points)

(IV) 30% to 39% of tax credit Units set aside for 50% or less AMFI (16 points)

(V) 40% or more of tax credit Units set aside for 50% of less AMFI(20 points)

(ii) Development owners selecting to set aside units for individuals and families earning less than 40% of AMFI shall receive the corresponding points listed below:

(I) 0% to 9% of tax credit Units set aside for 40% or less of AMFI (6 points)

(II) 10% to 19% of tax credit Units set aside for 40% or less of AMFI (10 points)

(III) 20% to 29% of tax credit Units set aside for 40% or less AMFI (14 points)

(IV) 30% to 39% of tax credit Units set aside for 40% or less AMFI (18 points)

(V) 40% or more of tax credit Units set aside for 40% or less AMFI (22 points)

(iii) Development owners selecting to set aside units for individuals and families earning less than 30% of AMFI shall receive the corresponding points listed below:

(I) 0% to 9% of tax credit Units set aside for 30% or less of AMFI (8 points)

(II) 10% to 19% of tax credit Units set aside for 30% or less of AMFI (12 points)

(III) 20% to 29% of tax credit Units set aside for 30% or less AMFI (16 points)

(IV) 30% to 39% of tax credit Units set aside for 30% or less AMFI (20 points)

(V) 40% or more of tax credit Units set aside for 30% or less AMFI (24 points)

Board Response: Based on many public comments made at the Board meeting on November 14, the Board worked with staff and the public in attendance to revise the Department's response into a response amenable to all parties. The primary changes, reflected below, added a subsidy requirement for targeting units at 30% of AMGI, limited the amount of deferred developer fee associated with this exhibit, eliminated double-counting, and gave more time for HOME award recipients to have evidence of a commitment.

(C) Low Income Targeting Points. Applications are eligible to receive points under subclauses (I),(II) and (III) of clause (iv) of this subparagraph. To qualify for these points, the rents for the rent-restricted Units must not be higher than the allowable tax credit rents at the rent-restricted AMGI level. For Section 8 residents, or other rental assistance tenants, the tenant paid rent plus the utility allowance is compared to the rent limit to determine compliance. The Development Owner, upon making selections for this exhibit will set aside Units at the rent-restricted levels of AMGI and will maintain the percentage of such Units continuously over the compliance and extended use period as specified in the LURA. For the purposes of this subparagraph (maintaining the promised percentage of Units at the selected levels of AMGI), if at re-certification the tenant's household income exceeds the specified limit, then the Unit remains as a Unit restricted at the specified level of AMGI until the next available Unit of comparable or smaller size is designated to replace this Unit. Once the Unit exceeding the specified AMGI level is replaced, then the rent for the previously qualified Unit at the specified level of AMGI may be increased over the LIHTC requirements. Rent increases, if any, should comply with lease provisions and local tenant-landlord laws.

(i) To qualify for points for Units set aside for tenants at or below 30% of AMGI, an Applicant must provide evidence of a commitment of funds that specifies the amount of funds committed, terms of the commitment and the number of Units targeted at the AMGI level.

(ii) Notwithstanding anything to the contrary contained herein, Applicants may not elect to set aside Units at 30%, 40% or 50% of AMGI for points hereunder to the extent the deferred developers fee as determined by staff at underwriting exceeds 50% of the entire developer fee.

(iii) If local HOME funds are to be used for Units set aside for tenants at 30%, 40% or 50% of AMGI, the Applicant shall have proof of application for these local funds to receive the points; however, if a firm commitment for local HOME funds is not received by the Department prior to 30 days preceding the meeting where allocation recommendations will be made, the points shall be deducted.

(iv) For purposes of calculating percentages of units, all figures should be rounded down to the nearest whole number. No Unit may be counted twice in determining point eligibility.

(I) Development owners selecting to set aside units for individuals and families earning less than 50% of AMGI shall receive the corresponding points listed below:

(-a-) 1% to 9% of tax credit Units set aside for 50% or less of AMGI (4 points)

(-b-) 10% to 19% of tax credit Units set aside for 50% or less of AMGI (8 points)

(-c-) 20% to 29% of tax credit Units set aside for 50% or less AMGI (12 points)

(-d-) 30% to 39% of tax credit Units set aside for 50% or less AMGI (16 points)

(-e-) 40% or more of tax credit Units set aside for 50% of less AMGI(20 points)

(II) Development owners selecting to set aside units for individuals and families earning less than 40% of AMGI shall receive the corresponding points listed below:

(-a-) 1% to 9% of tax credit Units set aside for 40% or less of AMGI (6 points)

(-b-) 10% to 19% of tax credit Units set aside for 40% or less of AMGI (10 points)

(-c-) 20% to 29% of tax credit Units set aside for 40% or less AMGI (14 points)

(-d-) 30% to 39% of tax credit Units set aside for 40% or less AMGI (18 points)

(-e-) 40% or more of tax credit Units set aside for 40% or less AMGI (22 points)

(III) Development owners selecting to set aside units for individuals and families earning less than 30% of AMGI shall receive the corresponding points listed below:

(-a-) 1% to 9% of tax credit Units set aside for 30% or less of AMGI (8 points)

(-b-) 10% to 19% of tax credit Units set aside for 30% or less of AMGI (12 points)

(-c-) 20% to 29% of tax credit Units set aside for 30% or less AMGI (16 points)

(-d-) 30% to 39% of tax credit Units set aside for 30% or less AMGI (20 points)

(-e-) 40% or more of tax credit Units set aside for 30% or less AMGI (24 points)

§49.7(f)(8) Length of Compliance Period

Comment: One comment emphasized the language in 2306.6711 of SB 322 that indicates that the most weight should go to criteria that will produce the greatest number of high quality units committed to remaining affordable to qualified tenants for extended periods. Comment also mentioned that the compliance period wording is confusing as it refers to adding ten years which results in forty years. Another comment asked that the period be extended to 55 years.

Department Response: In an effort to ensure that proper weight is given to length of affordability, and to allow an Applicant the choice of varying compliance period terms, an increase in points and length of compliance is proposed. The language was also redrafted to clarify the time frames. Furthermore, to simplify this exhibit the shorter time period for rehabilitation developments was removed.

(8) Length of Compliance Period. The initial compliance period for a development is fifteen years. In accordance with Code, developments are required to adhere to an extended low income use period for an additional 15 years. To receive points the Development Owner elects, in the Application, to extend the compliance period beyond the extended low income use period. The period commences with the first year of the Credit Period.

(A) Extend the compliance period for an additional 10 years, with an Extended Use Period of 40 years (8 points);

(B) Extend the compliance period for an additional 15 years, with an Extended Use Period of 45 years (10 points);

(C) Extend the compliance period for an additional 20 years, with an Extended Use Period of 50 years (12 points); or

(D) Extend the compliance period for an additional 25 years, with an Extended Use Period of 55 years (14 points);

Board Response: Department's response accepted.

§49.7(f)(10) Pre-Application Points

Comment: Several comments was made asking that the 15 points for filing the pre-application not be lost in the event that the selected set-aside is changed from pre-application to application, because this would be more beneficial to applicants filing in the rural and preservation set-asides. It was also recommended that the points be reduced to 5 points because this is new territory and reducing the points will minimize any negative outcomes due to tight timeframes. Conversely, support was given to the current point structure because they are well justified.

Department Response: The key to the success of the pre-application process is for the results to be informative enough that an applicant can make an educated decision about their chances at success if they were to proceed with a full application. Their decision needs to be based on substantive information relating to their competitors scoring within their set-aside and their region. For an applicant to change set-asides makes their information unreliable and jeopardizes other participants ability to make decisions based on the knowledge that specific developments with specific scores are in particular set-asides. The high points associated with the pre-application are designed to ensure that the

key information needed for the educated choices will not be altered and therefore make it more valuable. If points were reduced from 15 to 5 it would essentially negate the strength and validity of the pre-application results because there would be minimal penalty for making changes to a "better" set-aside or to increase points in other areas. Staff does not suggest allowing the points to be awarded for entities that alter their set-aside or for decreasing the points. Because clarification on the set-aside was not originally integrated into the QAP, language for that has been added.

(10) Pre-Application Points. Developments which submit a Pre-Application during the Pre-Application Acceptance Period and meet the requirements of this paragraph shall receive 15 points. To be eligible for these points, the proposed development in the Pre-Application must:

(A) be for the identical site and unit mix as the proposed development in the Application;

(B) have met the Pre-Application Threshold Criteria;

(C) be serving the same target population in the Application in the same set-aside; and

(D) not have altered the documentation for the Pre-Application Selection Criteria.

Board Response: Department's response accepted.

§49.7(f)(11) Point Reductions

Comment: Multiple comments were received in opposition to this new exhibit. For items outside the control of the developer, or actions that may be geared towards increasing the stability of the project, they should not be unduly penalized as this is the nature of the market. This policy may drive away developers. Furthermore, for developments where the applicant is returning for more credits and cannot meet their deadlines until new credits are awarded, there is no exception for extenuating circumstances. A revised structure was provided that allowed the $2,500 extension fee to count as the penalty for the first extension request, and then added more charges and point deductions for subsequent extensions. Comments were made requesting clarification of the base year for point reductions for extension requests. One comment was also received that suggested that the intent behind SB 322 was that the penalty should be increased to 15 points so that the penalty was severe enough that applicants with projects that had requested extensions would be non-competitive in the new cycle so that they could concentrate their efforts on the original development. A complementary suggestion was that penalty points should not apply at all to developers who are taking over a development which had a previously requested extensions.

Department Response: 2306.6710.(b)(2) of SB 322 states that "if an application satisfies the threshold criteria, the department shall score and rank the application using a point system based on criteria that are adapted to regional market conditions and adopted by the department, including criteria...imposing penalties on the applicants or affiliates who have requested extensions of department deadlines relating to developments supported by housing tax credit allocations made in the application round preceding the current round." The wording of this indicates that the penalty is expected to be part of the point system criteria and therefore can not be deleted entirely and does need to involve points. Proposed language that was submitted had the first extension only involving a fee, but the Department felt that the two point penalty is more in keeping with the interest of the Board. The draft QAP clearly states that the penalty is for Applicants or Affiliates on their current year application score if they requested extensions of Department deadlines in the preceding round. While the suggestion that the bill intended this particular criteria to be a severe penalty may be the case, there is nothing in the bill itself that reflects that intent.

(11) Point Reductions. Penalties will be imposed on Applicants or Affiliates who have requested extensions of Department deadlines, relating to developments receiving a housing tax credit allocation made in the application round preceding the current round. Extensions that will receive penalties include all types of extensions identified in Section 49.13 of this title, including Projects whose extensions were authorized by the Board. The schedule of penalties to Applicants or Affiliates requesting extensions is as follows:

(A) First extension request--$2,500 extension penalty fee plus 2 point deduction;

(B) Second extension request--$25//Unit plus 2 point deduction; and

(C) Third extension request--$35/Unit plus 2 point deduction.

Board Response: Department's response accepted; however clarification was added that merely requesting a deadline does not cause a point penalty, but the Applicant must actually have been late in the submission. This ensures that applicants filing an extension as a precaution are not unduly penalized if they actually meet the deadline.

(11) Point Reductions. Penalties will be imposed on Applicants or Affiliates who have requested extensions of Department deadlines, and did not meet the original submission deadlines, relating to developments receiving a housing tax credit allocation made in the application round preceding the current round. Extensions that will receive penalties include all types of extensions identified in Section 49.13 of this title, including Projects whose extensions were authorized by the Board. The schedule of penalties to Applicants or Affiliates requesting extensions is as follows:

(A) First extension request--$2,500 extension penalty fee plus 2 point deduction;

(B) Second extension request--$25//Unit plus 2 point deduction; and

(C) Third extension request--$35/Unit plus 2 point deduction.

§49.7(g) Credit Amount

Comment: Well-supported comment was received suggesting that a credit cap per unit (varied by location in a QCT or not) be integrated into the program to further strive to meet the goal of SB 322 of maximizing credits spent. An additional comment was received supporting a credit cap universally of $6,500 regardless of QCT status (also provided as a SF figure of $65/SF) and a cap of $1.2 million in developer fees. These fees would not apply to tax exempt bond developments. Overall these suggestions are supported because they will increase the productivity of the program without any measurable change in quality, and complies with the mandate of SB 322 to maximize the number of suitable affordable units.

Department Response: Staff is supportive of a credit cap per Unit that will further support the implementation of SB 322. However, based on a cost evaluation of QCTs, and bearing in mind the many other areas of the QAP where QCTs receive advantages, the Department does not recommend having a separate

cap for QCTs. The average cost per unit in 2001 was $5,730, which makes the proposal of $6,500 quite realistic and feasible.

(g) Credit Amount. The Department shall issue tax credits only in the amount needed for the financial feasibility and viability of a Development throughout the Compliance Period. The issuance of tax credits or the determination of any allocation amount in no way represents or purports to warrant the feasibility or viability of the Development by the Department. The Department will limit the allocation of tax credits to no more than $1.2 million per Development. The allocation of tax credits shall also be limited to not more than $1.6 million per Applicant per year. The Department will limit the allocation of tax credits to not more than $6,500 per Unit. These limitations will apply to any Applicant or Related Party unless otherwise provided for by the Board. Tax Exempt Bond Development Applications are not subject to the per Development and per Applicant or Related Party credit limitations, and Tax Exempt Bond Developments will not count towards the total limit on tax credits per Applicant.

Board Response: Department's response was not accepted because there is potential for a credit cap to reduce quality and limit ability to target lower income tenants.

§49.7(k)(4) Material Alteration relating to Amendments of Applications

Comment: The definitions for Material Alteration were not specific enough, and because of the significant implications of this section the definitions need to be as precise as possible.

Department Response: The entire section relating to Application Amendments was taken verbatim from §2306.6712 of SB 322. Staff feels that the language of the bill is sufficient in addressing this issue. No changes are proposed.

Board Response: Department's response accepted.

§49.8 Underwriting Guidelines

Comment: As mentioned under §49.7(f)(4)(F) relating to Unit amenities, it was noted by several persons that the underwriting guidelines in subsection (b) indicate that underwriting will be done using the Average quality as defined by Marshall & Swift, but that in the amenity exhibit the amenities that the Department is giving points for fall under the Very Good category of Marshall & Swift. There needs to be consistency between these two items for the applications to be underwritten properly.

It was also requested that the fee limits in subsection (g) be revised for rural deals. The MOU with RD reduces the allowable builder fees to a level that is lower than the fees allowed by either agency (TDHCA is 6%+2%+6%=14% and RD is 3%+3%+8%=14%. Because of the MOU, RD uses the lower of each of the three line items and cuts the fees to 11% (3%+2%+6%), which is lower than what each of the Agency's has determined to be realistic. This could be solved by addressing this issue in the MOU revisions and by revising the QAP to state, "The combination of builder's general requirements, builders overhead, and builder's profit should not exceed the lower of TDHCA or RD requirements." Another comment on subsection (g) was that the last sentence of that paragraph relating to developer fees is unclear and does not make sense. Several comments, relating to the underwriting of CHDOs were also provided. One indicated that CHDOs should be required to irrevocably choose whether they will or will not claim local property tax exemption and then they should be underwritten accordingly. Another thought that all CHDO applications should be underwritten with the assumption that the entity will be paying property taxes, ensuring that credits will not be reduced, particularly if legislation is removed giving these exemptions.

Comment was also received asking that the state adjust its underwriting criteria to account for varying degrees of environmental differences that affect construction costs. Underwriting should consider multipliers offered by Marshall & Swift on a regional basis, because the multipliers allow for exceptional conditions, particularly prevalent in the Rio Grande Valley. Further the Valley has higher construction costs due to limited interstate highway service to the area, high local standards, and lack of skilled labor in the area. It was also suggested that there should be a comment period for developers to talk with underwriting before a recommendation is made to the Board.

Department Response: Relating to the Marshall & Swift standards, the Department has traditionally adopted a policy of costing particular amenities on an individual basis as they are designed into the development. Language relating to this procedure has been added into this section to provide this clarification to the public. Staff also agrees with the change to preclude the Department from unduly penalizing Rural Development projects. A change is recommended addressing the concerns relating to CHDOs. Relating to the regional issue, the Department already uses the regional and local multipliers provided by Marshall & Swift. Furthermore, the underwriting department does talk with applicants as needed while it performs its analysis.

(b) Construction Standards. The cost basis is defined using Average quality as defined by Marshall & Swift Residential Cost Handbook. If the Development contains amenities not included in the Average quality standard, the Department will take into account the costs of the amenities as designed in the Development. If the Development will contain single family buildings as permitted under the "Ineligible Building Type" definition in §49.2(48) of this title, then the cost basis should be consistent with single family Average quality as defined by Marshall & Swift Residential Cost Handbook.

(g) Fee Limits. The development cost associated with general requirements cannot exceed 6% of the eligible basis associated with onsite site work and construction hard costs. The development cost associated with contractor overhead cannot exceed 2% of the eligible basis associated with onsite site work and construction hard costs. The development cost associated with contractor profit cannot exceed 6% of the eligible basis associated with onsite site work and construction hard costs. For Developments also receiving financing from TxRD-USDA, the combination of builder's general requirements, builder's overhead, and builder's profit should not exceed the lower of TDHCA or TxRD-USDA requirements. The development cost associated with developer's Fees cannot exceed 15% of the project's Total Eligible Basis (adjusted for the reduction of federal grants, below market rate loans, historic credits, etc.), as defined in §49.2(34), not inclusive of the developer fees themselves. The 15% can be divided between overhead and fee as desired but the sum of both items must not exceed 15%. The Developer Fee may be earned on non-eligible basis activities, but only 15% of eligible basis items may be included in basis for the purpose of calculating a project's credit amount.

(h)(4) Expenses: Applicants should provide an estimate of their expected expenses based on their own research (internal historical operating data, IREM, etc.) For new developments, the expenses must include at least $200 per unit in reserve for replacement. For rehabilitation developments, the expenses must include at least $300 per unit in reserve for replacement. CHDOs

must identify if they will be obtaining a property tax exemption or not. If they indicate that they will have an exemption, they must provide reasonable proof that the exemption can be attained. If no reasonable proof is provided, the Development will be underwritten under the assumption that property taxes must be paid. The Applicant's expenses will be compared against the most current information contained in the Department's database and expenses submitted by other comparable projects. The underwriter will analyze the development based on the current TDHCA operating database, the project's existing historical performance, if any, the application proforma, the market study and any additional documentation provided for consideration. A line by line review by expense category will on a project-by-project basis determine the appropriate anticipated operating expense for each project.

Board Response: Department's response accepted.

§49.9(a) Market Study Requirements

Comment: Comment was received recommending the exclusion of all unnecessary information in the Market Study to lower the report's production cost. Specifically requested was the deletion of the development cost analysis because the requested information is typically beyond the expertise of a market analyst, and operating expense analysis because TDHCA already maintains an operating database that it works from so the requested information is not utilized. The level of detail in the market study is viewed as unnecessary because there is no concern relating to loan foreclosure for tax credits, as with other programs.

Department Response: Underwriting staff, the primary reviewers of the market study components, agree that each of these sections are seldom utilized, and that the Department relies on its own data. Therefore, staff recommends removing these market study requirements from §49.9(a)(5)(C) to allow for reduced market study fees.

Board Response: Department's response accepted.

§49.9(b) Concentration

Comment: Affordable housing which replaces previously existing substandard public housing within the same sub-market on a unit-for-unit basis, and which gives the displaced tenants of the previously existing public housing a leasing preference, should be an exception to the concentration restrictions established.

Department Response: This is an excellent point. Staff suggests reflecting this consideration in the policy, however it will be limited not only to substandard public housing, but any substandard affordable housing.

(b) Concentration. The Department intends to limit the approval of funds to new multifamily housing projects requesting funds where the anticipated capture rate is in excess of 25% for the primary or sub-market unless the market is a rural market. In rural markets, the Department intends to limit the approval of funds to new multifamily housing projects requesting funds from the Department where the anticipated capture rate is in excess of 100% of the qualified demand. Affordable housing which replaces previously existing substandard affordable housing within the same sub-market on a Unit for Unit basis, and which gives the displaced tenants of the previously existing affordable housing a leasing preference, is excepted from these concentration restrictions. The documentation needed to support decisions relating to concentration are identified in subsection (a) of this section.

Board Response: Department's response accepted.

§49.10(b) Compliance of Construction Phase

Comment: Several comments suggested that properties receiving Rural Development (RD) financing not utilize the third party construction inspectors, but that the Department accept the inspection reports prepared by RD. RD deals are typically inspected every month by the inspecting architect and the RD local office representative, and then inspected by the State RD architect at substantial completion and at 100% completion. The RD inspectors are more thorough, have a better knowledge base, and are more consistent and reliable in their inspections. Furthermore, the fee for the third party inspectors is exorbitant.

Department Response: Staff is eager to streamline and reduce inefficiencies. The proposal in this comments is very logical.

(b) The Department, through the division with responsibility for compliance matters, shall monitor for compliance with all applicable requirements the entire construction phase associated with any Development under this title. The monitoring level for each Development must be based on the amount of risk associated with the Development. The Department shall use the division responsible for credit underwriting matters and the division responsible for compliance matters to determine the amount of risk associated with each Development. After completion of a Development's construction phase, the Department shall periodically review the performance of the Development to confirm the accuracy of the Department's initial compliance evaluation during the construction phase. Developments having financing from TxRD-USDA will be exempt from these inspections, provided that the Applicant provides the Department with copies of all inspections made by TxRD-USDA throughout the construction of the Development within fifteen days of the date the inspection occurred.

Board Response: Department's response accepted.

§49.10(h) Section 8 Acceptance Requirements

Comment: Praise was noted for the Department's commitment to not allowing discrimination against §8 voucher holders. Comment was also made that sometimes a Development's management practices make it more difficult for Section 8 voucher holders to reside there, such as requiring a first partial month payment at move in, which is not covered by Section 8 until the following month, making renting infeasible.

Department Response: Management policies do not tend to prohibit Section 8 tenants. The issue noted in the public comment is an issue of the local PHA's payment policy and lack of coordination with the owner on the tenants needs.

Board Response: Department's response accepted.

§49.10(r) Material Non-Compliance

Comment: Comment suggested that the QAP add, "Units not available for occupancy due to natural disaster or hazard due to no fault of the Owner should not disqualify the Owner or cause the Owner to be cited for noncompliance."

Department Response: The Department proposed similar, but alternative language, to meet this request, to ensure that Owners are not harshly penalized for hazards outside their control. A new item under 49.10(r)(4)(B) was added.

(x) Units not available for occupancy due to natural disaster or hazard due to no fault of the Owner. This carries no point value.

Board Response: Department's response accepted.

§49.11(d)(3) Fair Housing Training

Comment: It was suggested that the fair housing training only be required for the Owner and not the architect, and that the training, once attended, will cover the Applicant for the ensuing four years.

Department Response: The Department has only recently initiated this policy. To date, most casual comments to tax credit staff have indicated support for the training policy. Before reducing the applicability of the requirement to the Owner, the Department suggests maintaining the requirement for the Owner and the Architect through the 2002 cycle to determine its success. Also, because the Department can not predict what changes may occur in federal laws in the future relating to fair housing, it would be imprudent to exempt someone for four years into the future. No changes are proposed.

Board Response: Department's response accepted.

§49.11(f) Housing Credit Allocations

Comment: It was suggested that the Department increase its monitoring efforts for compliance with accessibility by integrating a self-evaluation into the application process, which would include any offices, model units or other facilities to be used by the development to provide tenant services.

Department Response: Staff supports the inclusion of a self-evaluation form for the Applicant as this emphasizes compliance to the owner, without placing any additional burden on the compliance division staff. However, it seems that it would be more useful to have the applicant do the self-evaluation once the development is constructed, not beforehand where boxes can easily be checked while there is nothing concrete to compare the form to. Staff suggests integrating this self-evaluation as a requirement of Cost Certification.

(f) The Department shall make a Housing Credit Allocation, either in the form of IRS Form 8609, with respect to current year allocations for buildings placed in service, or in the Carryover Allocation Document, for buildings not yet placed in service, to any Development Owner who holds a Commitment Notice which has not expired, and for which all fees as specified in §49.13 of this title, have been received by the Department. For Tax Exempt Bond Developments, the Housing Credit Allocation shall be made in the form of a Determination Notice. For an IRS Form 8609 to be issued with respect to a building in a Development with a Housing Credit Allocation, satisfactory evidence must be received by the Department that such building is completed and has been placed in service in accordance with the provisions of the Department's Cost Certification Procedures Manual. The manual will require, in addition to other items, that a self-evaluation form for compliance with Americans with Disabilities Act, Fair Housing Act and Section 504 of the Rehabilitation Act has been completed by the Owner. The Department shall mail or deliver IRS Form 8609 (or any successor form adopted by the Internal Revenue Service) to the Development Owner, with Part I thereof completed in all respects and signed by an authorized official of the Department. The delivery of the IRS Form 8609 will occur only after the Development Owner has complied with all procedures and requirements listed within the Cost Certification Procedures Manual. Regardless of the year of Application to the Department for low income housing tax credits, the current year's Cost Certification Procedures Manual must be utilized when filing all cost certification requests. A separate housing credit allocation shall be made with respect to each building within a Development which is eligible for a housing credit; provided, however, that where an allocation is made pursuant to a Carryover Allocation Document on a Development basis in accordance with the Code, §42(h)(1)(F), a housing credit dollar amount shall not be assigned to particular buildings in the Development until the issuance of IRS Form 8609s with respect to such buildings.

Board Response: Department's response accepted.

§49.12(b) Application Log

Comment: A comment was made suggesting that the QAP reference to the application submission log should list all of what the log will include and that it should additionally include full contact information for all members of the Development Team. (Discussed at §49.4(f) also.)

Department Response: The details of the application log that were previously located at §40.4(f) have been integrated into this section so that the information is kept together in one easily referenced location. Staff supports the addition of the Development Team information.

(b) The Department shall maintain for each Application an Application Log that tracks the Application from the date of its submission. The Application Log will contain, at a minimum, the information identified in paragraphs (1) - (9) of this subsection.

(1) the names of the Applicant and Related Parties, the owner contact name and phone number, and full contact information for all members of the Development Team;

(2) the name, physical location, and address of the Development, including the relevant region of the state;

(3) the number of units and the amount of housing tax credits requested for allocation by the Department to the Applicant;

(4) any set-aside category under which the Application is filed;

(5) the requested and awarded score of the Application in each scoring category adopted by the Department under the Qualified Allocation Plan;

(6) any decision made by the Department or Board regarding the Application, including the Department's decision regarding whether to underwrite the Application and the Board's decision regarding whether to allocate housing tax credits to the Development;

(7) the names of persons making the decisions described by paragraph (6) of this subsection, including the names of Department staff scoring and underwriting the Application, to be recorded next to the description of the applicable decision;

(8) the amount of housing tax credits allocated to the Development; and

(9) a dated record and summary of any contact between the Department staff, the Board, and the Applicant or any Related Parties.

Board Response: Department's response accepted.

§49.13(a) and (b) Pre-Application and Application Fees

Comment: It was emphasized that the requirement in SB 322 under §2306.6716 states that the Department fees must reflect actual processing costs. The comment concluded that it does not allow for the overcharging of fees to non-CHDO applicants to counter-balance the reductions that are required to be made for CHDOs.

Department Response: The Department's proposed fee structure, which is provided in the QAP, is based on actual processing. The fee reduction to CHDOs is not balanced by overcharging other Applicants. No changes are proposed.

Board Response: Department's response accepted.

SUMMARY OF COMMENTS RECEIVED UPON PUBLICATION OF THE PROPOSED RULES IN THE TEXAS REGISTER AND COMMENTS PROVIDED AT PUBLIC HEARINGS HELD BY THE DEPARTMENT ON GENERAL TAX CREDIT ISSUES NOT RELATED SPECIFICALLY TO THE QAP

Advisory Committee

Comment: Several comments were received requesting that the Department establish an advisory committee that would report to the Board to focus on addressing the needs of persons with disabilities.

Department Response: The Department is committed to the establishment of this advisory committee and is currently working with the advocacy community on establishing the membership.

Board Response: Department's response accepted.

Appraisal Guidelines

Comment: Comment suggested that the Appraisal Guidelines, which require addressing "any potential violations of ADA," is drafted incorrectly because ADA does not apply to residential housing. By using the term, the Department is confusing the proper standard for residential housing with non-residential structures.

Department Response: The Department is currently undertaking a revision of the Appraisal Guidelines and this comment will definitely be integrated into that revision to ensure reference to the proper regulations.

Board Response: Department's response accepted.

Barrier Removal

Comment: Comment was received suggesting that the Department should initiate a barrier removal program.

Department Response: The tax credit program, at this time, does not have a formal program for barrier removal, however the threshold requirement that all developments adhere to §504 will increase barrier removal in rehabilitation developments.

Board Response: Department's response accepted.

Department's Deference to the Business Deal

Comment: Several comments were made indicating that the Department needs to establish a core philosophy of what the important factors are in providing housing, and not get bogged down in confirming details that are essentially the matter of the business deal, which is handled by lenders and syndicators. The market will determine the success of a deal. The Department does need to be creating artificial guidelines.

Department Response: The Department strives to always be conscious of the business deal and has gathered the comments of syndicators and lenders, in addition to the comments of developers and housing advocates, to ensure that all facets of the development are considered.

Board Response: Department's response accepted.

Entire Overhaul of QAP

Comment: Comment was made suggesting that for 2003 the entire QAP needs to be deleted and rewritten as a clean, understandable, organized mission-driven document that involves the collaboration of the industry.

Department Response: The Department is supportive of a re-creation of the QAP that will be more user-friendly, and will take steps to work with program advocates and participants in this endeavor.

Board Response: Department's response accepted.

Handling of Forward Commitments

Comment: One comment indicated that there was confusion on how forward commitments are handled from year to year in determining credit availability, within the confines of the regional allocation. It seems logical that the 2002 forward commitments made in 2001 would be back out after the ceiling is divided into regions, not before the regional allocation as one lump sum.

Department Response: The Department handles the forward commitments under this QAP in the following way: the regional allocation formula is applied to the entire tax credit ceiling, approximately $37.9 million for 2002. At that point, the forward commitments made in 2001 are individually subtracted from the region where they were awarded. The remaining dollars in the region will reflect the allocation for that region.

Board Response: Department's response accepted.

Handling of Public Input

Comment: It was suggested that TDHCA reviewers need to be fair and should try to identify NIMBYism at hearings and not let this have any consideration in a development's award, and that the local government should have more weight in its opinion that the public.

Department Response: The Board has historically taken NIMBYism with caution and tends not to disregard a project for only that reason. They will continue to utilize this approach in making allocation decisions.

Board Response: Department's response accepted.

MOU with TxRD

Comment: Comments were received asking that the Department promptly initiate revisions to the MOU with TxRD to improve and update several issues. One issue included adjusting the builder fees as further described in the discussion on §49.8(g).

Department Response: Rural Development and the Department are both committed to the revision of this document and meetings between the two agencies are already taking place.

Board Response: Department's response accepted.

Pre-Application Deadline

Comment: One comment was received asking that the Department consider extending the due date of the Pre-Application to at least January 11 because the current deadline adversely affects the holiday season for Applicants. They suggested moving all the dates back by one week to make this work.

Department Response: The Department is sympathetic that the development community will have to do much of their preparation through the holiday season. Unfortunately, SB 322 requires that the Application deadline is March 1 and that a Pre-Application process be established. Already the time frame is very tight. With Pre-Applications being submitted on January 4, staff will

have roughly 3 weeks to evaluate and post the results by January 31, giving developers only one month to complete the remainder of their applications.

Board Response: Department's response accepted.

Program Inventory

Comment: It was suggested that the Department maintain and publish a comprehensive listing of all properties that have been awarded tax credits and that have been placed in service. The list should include all properties ever having received credits, not merely those currently in compliance.

Department Response: The Department currently maintains two separate lists. One is a list of all tax credit developments since the inception of the program that are still in compliance. The primary purpose of this list is to aid individuals looking for affordable housing in their area. To add developments that are not in compliance to this list would be adding misleading information for persons seeking units. The other list the Department maintains is a list of developments that were awarded credits, but for whatever reason, are no longer in compliance and therefore are not available inventory units. This list is also available upon request.

Board Response: Department's response accepted.

Single Family Emphasis

Comment: Comment suggested that with the increase in Section 8 homeownership vouchers and other home ownership initiatives, there should be more of an emphasis in the 2003 QAP on permitting single family developments.

Department Response: The Department is more than willing to explore the feasibility of removing many of the restrictions on single family development currently existing in the tax credit program.

Board Response: Department's response accepted.

MINOR TECHNICAL CHANGES FOR QAP CONSISTENCY

General Services Commission Name

Explanation of Change: Because the name of the General Services Commission was changed, all references to the GSC in the QAP have been changed to read: "Texas Building and Procurement Commission (formerly General Services Commission)."

Board Response: Department's explanation accepted.

§49.2(15) Definition of Carryover Allocation Document

Explanation of Change: The definition for Carryover Allocation Document found at 50.2(15) references another section of the QAP. That reference was not correct. The corrected reference is proposed.

(15) Carryover Allocation Document--A document issued by the Department to a Project Owner pursuant to §49.4(n) of this title.

Board Response: Department's response accepted.

§49.2(38)--Definition for General Development

Explanation of Change: The definition needs to be revised to update references to the other program set-asides.

(38) General Developments--Any Development which is not a Qualified Nonprofit Development or is not under consideration in the Rural, At-Risk Development or Elderly set-asides as such terms are defined by the Department.

Board Response: Department's response accepted.

§49.7(e)(9)(A)(i) Exhibit 107--Nonprofit Threshold Requirements

Explanation of Change: The exhibit erroneously refers to section 491(c)(3) status for a nonprofit instead of 501(c)(3).

(i) an IRS determination letter which states that the Qualified Nonprofit Organization is a 501 (c)(3) or (4) entity;

Board Response: Department's response accepted.

§49.7(e)(10)(D) Exhibit 108 (C) and (D)

Explanation of Change: The grammar needed to be corrected so that the "and" is in the right place.

(C) clear identification of the selling Persons or entities, and details of any relationship between the seller and the Applicant or any Affiliation with the Development Team, Qualified Market Analyst or any other professional or other consultant performing services with respect to the Development. If any such relationship exists, complete disclosure and documentation of the related party's original acquisition and holding costs since acquisition to justify the proposed sales price must also be provided; and

(D) "Exhibit 108D, Acquisition of Existing Buildings Form."

Board Response: Department's response accepted.

The new sections are adopted pursuant the authority of the Texas Government Code, Chapter 2306; Chapter 2001 and 2002, Texas Government Code, V.T.C.A., and Section 42 of Internal Revenue Code of 1986, as amended, (26 U.S.C.A.) which provides the Department with the authority to adopt rules governing the administration of the Department and its programs; and Executive Order AWR-91-4 (June 17, 1991), which provides the Department with the authority to make housing credit allocations in the state of Texas.

Section 42 of Internal Revenue Code of 1986, as amended, (26 U.S.C.A), provides for credits against federal income taxes for owners of qualified low income rental housing projects. That section provides for the allocation of available tax credit amount by state housing credit agencies. As required by the Internal Revenue Code, Section 42 (m)(1), the Department developed a Qualified Allocation Plan which was adopted by the governing board of the Department and submitted to the Governor in accordance with Texas Government Code Section 2306.6724 and is contingent upon the Governor's approval in accordance with Texas Government Code Section 2306.6724(c).

§49.1. Scope.

(a) Purpose. The Rules in this chapter apply to the allocation by the Texas Department of Housing and Community Affairs (the Department) of certain low income housing tax credits authorized by applicable federal income tax laws. The Internal Revenue Code of 1986, §42, as amended, provides for credits against federal income taxes for owners of qualified low income rental housing Developments. That section provides for the allocation of the available tax credit amount by state housing credit agencies. Pursuant to Executive Order AWR-91-4 (June 17, 1991), the Department was authorized to make housing credit allocations for the State of Texas. As required by the Internal Revenue Code, §42(m)(1), the Department developed a Qualified Allocation Plan (QAP) which is set forth in §§49.1 - 49.18 of this title. Sections in this chapter establish procedures for applying for and obtaining an allocation of the low income housing tax credit, along with ensuring that the proper threshold criteria, selection criteria, priorities and preferences are followed in making such allocations.

(b) Program Statement. The Department shall administer the program to encourage the development and preservation of appropriate types of rental housing for households that have difficulty finding suitable, affordable rental housing in the private marketplace; maximize the number of suitable, affordable residential rental units added to the state's housing supply; prevent losses for any reason to the state's supply of suitable, affordable residential rental units by enabling the rehabilitation of rental housing or by providing other preventive financial support; and provide for the participation of for-profit organizations and provide for and encourage the participation of nonprofit organizations in the acquisition, development and operation of affordable housing developments in rural and urban communities.

(c) Allocation Goals. It shall be the goal of this Department and the Board, through these provisions, to encourage diversity through broad geographic allocation of tax credits within the state and to promote maximum utilization of the available tax credit amount. The criteria utilized to realize this goal is described in §49.7(a) - (f) of this title.

(d) Utilization of Historically Underutilized Businesses. It is the policy of the Department to encourage the use of Historically Underutilized Businesses (HUBs) in the tax credit program as developers, general partners and members of a development team. In response to this policy, all Applicants are required to make a good faith effort to ensure maximum HUB participation in the program. The Department will require the Applicant to identify the HUBs that will be used in the development and/or continuous operation of the Development. The Department will also request information pertaining to the use of HUBs in the actual development of the Development at the time of final allocation of tax credits, pursuant to §49.11(f) of this title.

(e) Coordination with Rural Agencies. To assure maximum utilization and optimum geographic distribution of tax credits in rural areas, and to achieve increased sharing of information, reduction of processing procedures, and fulfillment of Development compliance requirements in rural areas, the Department:

(1) has entered into a Memorandum of Understanding (MOU) with the Rural Development services of the United States Department of Agriculture serving the State of Texas (TxRD-USDA) to coordinate on existing, rehabilitated, and new construction housing Developments financed by TxRD-USDA; and

(2) will jointly administer the Rural Set-Aside with the Texas Office of Rural Community Affairs (ORCA). Upon its creation, and once it has become operational, ORCA will assist in developing all Threshold, Selection and Underwriting Criteria applied to Applications eligible for the Rural Set-Aside. The Criteria will be approved by that Agency. To ensure that the Rural Set-Aside receives a sufficient volume of eligible Applications, the Department and ORCA shall jointly implement outreach, training, and rural area capacity building efforts.

(f) Memorandum of Understanding (MOU) with the United States Department of Housing and Urban Development (HUD) regarding the 911 Subsidy Layering Review. The Department and HUD shall enter into a MOU regarding the Subsidy Layering Review of the sources and uses of funds in Developments receiving tax credits and HUD Housing Assistance.

§49.2. Definitions.

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

(1) Adaptive Reuse Development--A Development such as a hotel or dormitory that is proposed for conversion as permanent housing under the tax credit program.

(2) Administrative Deficiencies--The absence of information or documents from the Application which are essential to a thorough review and scoring of the Development. If an Application contains deficiencies which, in the determination of the Department staff, represent the need for clarification of information submitted at the time of the Application, the Department staff shall request correction of such Administrative Deficiencies. The Department staff shall provide this request in the form of a facsimile and a telephone call to the Applicant advising that such a request has been transmitted. Potential Administrative Deficiencies which may be corrected include, but are not limited to, incorrect calculation of the Development's unit mix, gross and net rentable areas, or the submission of exhibits that contain incomplete or conflicting information. If such Administrative Deficiencies are not corrected to the satisfaction of the Department within three business days of the deficiency notice date, then five points shall be deducted from the Selection Criteria score for each additional day the deficiency remains uncorrected. If such deficiencies are not corrected within five business days from the deficiency notice date, then the Application shall be terminated. The time period for responding to a deficiency notice begins at the start of the business day following the deficiency notice date. Deficiency notices may be sent to an Applicant prior to or after the end of the Application Acceptance Period. The correction of Administrative Deficiencies may not include changes in the Development Team, the Development configuration, or any other matters affecting the evaluation of the Application under §49.7(e) of this title.

(3) Affiliate--An individual, corporation, partnership, joint venture, limited liability company, trust, estate, association, cooperative or other organization or entity of any nature whatsoever that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with any other Person, and specifically shall include parents or subsidiaries.

(4) Agreement and Election Statement--A document in which the Development Owner elects, irrevocably, to fix the applicable credit percentage with respect to a building or buildings, as that in effect for the month in which the Department and the Development Owner enter into a binding agreement as to the housing credit dollar amount to be allocated to such building or buildings.

(5) Applicable Fraction--The fraction used to determine the Qualified Basis of the qualified low income building, which is the smaller of the Unit fraction or the floor space fraction, all determined as provided in the Code, §42(c)(1).

(6) Applicable Percentage--The percentage used to determine the amount of the low income housing tax credit, as defined more fully in the Code, §42(b). For purposes of the Application, the Applicable Percentage will be projected at 10 basis points above the greater of:

(A) the current applicable percentage, or

(B) the trailing 1-year , 2-year or 3-year average rate in effect during the month in which the Application is submitted to the Department.

(7) Applicant--Any Person or Affiliate of a Person who files a Pre-Application or an Application with the Department requesting a housing tax credit allocation. For purposes hereof, the Applicant is sometimes referred to as the "housing sponsor."

(8) Application--An application, in the form prescribed by the Department, filed with the Department by an Applicant, including any exhibits or other supporting material.

(9) Application Acceptance Period--That period of time during which Applications for either a Housing Credit Allocation from the State Housing Credit Ceiling or a Determination Notice for

Tax Exempt Bond Developments may be submitted to the Department as more fully described in §49.14 of this title.

(10) Application Log--A form containing at least the information required by §49.12(b) of this title.

(11) Application Round--The period beginning on the date the Department begins accepting applications and continuing until all available credits from the State Housing Credit Ceiling (as stipulated by the Department) are allocated, but not extending past the last day of the calendar year.

(12) Application Submission Procedures Manual--The manual produced and amended from time to time by the Department which sets forth procedures, forms, and guidelines for the filing of Pre-Applications and Applications for low income housing tax credits.

(13) Area Median Gross Income (AMGI)--Area median gross household income, as determined for all purposes under and in accordance with the requirements of the Code, §42.

(14) At-Risk Development--A development that:

(A) receives the benefit of a subsidy in the form of a below-market interest rate loan, interest rate reduction, rental subsidy, Section 8 housing assistance payment, rental supplement payment, or rental assistance payment under the following federal laws, as applicable:

(i) Sections 221(d)(3), (4) and (5), National Housing Act (12 U.S.C. Section 1715l);

(ii) Section 236, National Housing Act (12 U.S.C. Section 1715z-1);

(iii) Section 202, Housing Act of 1959 (12 U.S.C. Section 1701q);

(iv) Section 101, Housing and Urban Development Act of 1965 (12 U.S.C. Section 1701s);

(v) any project-based assistance authority pursuant to Section 8 of the U.S. Housing Act of 1937; or

(vi) Sections 514, 515, 516, and 538 Housing Act of 1949 (42 U.S.C. Sections 1484, 1485, and 1486); and

(B) is subject to the following conditions:

(i) the stipulation to maintain affordability in the contract granting the subsidy is nearing expiration (expiration will occur within two calendar years); or

(ii) the federally insured mortgage on the development is eligible for prepayment or is nearing the end of its mortgage term (the term will end within two calendar years).

(15) Beneficial Owner--A "Beneficial Owner" means:

(A) Any Person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise has or shares;

(i) voting power which includes the power to vote, or to direct the voting as any other Person or the securities thereof; and/or

(ii) investment power which includes the power to dispose, or direct the disposition of, any Person or the securities thereof.

(B) Any Person who, directly or indirectly, creates or uses a trust, proxy, power of attorney, pooling arrangement or any other contract, arrangement or device with the purpose or effect of divesting such Person of Beneficial Ownership (as defined herein) of a security or preventing the vesting of such Beneficial Ownership as part of a plan or scheme to evade inclusion within the definitional terms contained herein; and

(C) Any Person who has the right to acquire Beneficial Ownership during the Compliance Period, including but not limited to any right to acquire any such Beneficial Ownership:

(i) through the exercise of any option warrant or right,

(ii) through the conversion of a security,

(iii) pursuant to the power to revoke a trust, discretionary account or similar arrangement, or

(iv) pursuant to the automatic termination of a trust, discretionary account, or similar arrangement.

(D) Provided, however, that any Person who acquires a security or power specified in clauses (i), (ii) or (iii) of subparagraph (C) of this paragraph, with the purpose or effect of changing or influencing the control of any other Person, or in connection with or as a participant in any transaction having such purpose or effect, immediately upon such acquisition is deemed to be the Beneficial Owner of the securities which may be acquired through the exercise or conversion of such security or power. Any securities not outstanding which are subject to options, warrants, rights or conversion privileges as deemed to be outstanding for the purpose of computing the percentage of outstanding securities of the class owned by such Person but are not deemed to be outstanding for the purpose of computing the percentage of the class by any other Person.

(16) Board--The governing Board of Directors of the Department.

(17) Carryover Allocation--An allocation of current year tax credit authority by the Department pursuant to the provisions of the Code, §42(h)(1)(E) and Treasury Regulations, §1.42-6.

(18) Carryover Allocation Document--A document issued by the Department to a Development Owner pursuant to §49.4(n) of this title.

(19) Carryover Allocation Procedures Manual--The manual produced and amended from time to time by the Department which sets forth procedures, forms, and guidelines for filing Carryover Allocation requests.

(20) Code--The Internal Revenue Code of 1986, as amended from time to time, together with any applicable regulations, rules, rulings, revenue procedures, information statements or other official pronouncements issued thereunder by the United States Department of the Treasury or the Internal Revenue Service.

(21) Colonia -An unincorporated community located within 150 miles of the Texas-Mexico border, or a city or town within said 150 mile region with a population of less than 10,000 according to the latest U.S. Census, that has a majority population composed of individuals and families of low and very low income, who lack safe, sanitary and sound housing, together with basic services such as potable water, adequate sewage systems, drainage, streets and utilities, all as determined by the Department.

(22) Commitment Notice--A notice issued by the Department to a Development Owner pursuant to §49.4(i) of this title and also referred to as the "commitment."

(23) Compliance Period--With respect to a building, the period of 15 taxable years, beginning with the first taxable year of the Credit Period pursuant to the Code, §42(i)(1).

(24) Control--(including the terms "controlling," "controlled by", and/or "under common control with") the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of any Person, whether through the ownership of voting securities, by contract or otherwise, including specifically ownership of more than 50% of the general partner interest in a limited partnership, or designation as a managing general partner or the managing member of a limited liability company.

(25) Cost Certification Procedures Manual--The manual produced and amended from time to time by the Department which sets forth procedures, forms, and guidelines for filing requests for IRS Form(s) 8609 for Developments placed in service under the Low Income Housing Tax Credit Program.

(26) Credit Period--With respect to a building within a Development, the period of ten taxable years beginning with the taxable year the building is placed in service or, at the election of the Development Owner, the succeeding taxable year, as more fully defined in the Code, §42(f)(1).

(27) Department--The Texas Department of Housing and Community Affairs, a public and official governmental Department of the State of Texas created and organized under the Texas Department of Housing and Community Affairs Act, Texas Government Code, Chapter 2306 and Texas Civil Statutes, Article 4413(501) as amended by the 73rd Legislature, Chapter 725 and 141.

(28) Determination Notice--A notice issued by the Department to the Owner of a Tax Exempt Bond Development which states that the Development may be eligible to claim low income housing tax credits without receiving an allocation of credits from the State Housing Credit Ceiling because it satisfies the requirements of this QAP; sets forth conditions which must be met by the Development before the Department will issue the IRS Form(s) 8609 to the Development Owner; and specifies the amount of tax credits necessary for the financial feasibility of the Development and its viability as a qualified low income housing Development throughout the Credit Period.

(29) Development--A proposed qualified low income housing Development, for purposes of the Code, §42(g), that consists of one or more buildings containing multiple Units, and that, if the Development shall consist of multiple buildings, is financed under a common plan and is owned by the same Person for federal tax purposes, and the buildings of which are either:

(A) located on a single site or contiguous site; or

(B) located on scattered sites and contain only rent-restricted units.

(30) Development Consultant--Any Person (with or without ownership interest in the Development) who provides professional services relating to the filing of an Application, Carryover Allocation Document, and/or cost certification documents.

(31) Development Owner--Any Person or Affiliate of a Person who owns or proposes a Development or expects to acquire control of a Development under a purchase contract approved by the Department.

(32) Development Team--All Persons or Affiliates thereof which play(s) a material role in the development, construction, rehabilitation, management and/or continuing operation of the subject Property, which will include any consultant(s) hired by the Applicant for the purpose of the filing of an Application for low income housing tax credits with the Department.

(33) Economically Distressed Area--An area in which the water supply or wastewater systems are inadequate to meet minimal state standards; the financial resources are inadequate to provide services to meet those needs; and there was an established residential subdivision on June 1, 1989, as defined by the Texas Water Development Board.

(34) Eligible Basis--With respect to a building within a Development, the building's Eligible Basis as defined in the Code, §42(d).

(35) Executive Award and Review Advisory Committee ("The Committee")--A Departmental committee that will make funding and allocation recommendations to the Board based upon the evaluation of an Application in accordance with the housing priorities as set forth in §2306 of the Texas Government Code, and as set forth herein, and the ability of an Applicant to meet those priorities. The Committee will be composed of the executive director, the administrator of each of the Department's programs, and one representative from each of the Department's planning, underwriting, and compliance functions.

(36) Extended Low Income Housing Commitment--An agreement between the Department, the Development Owner and all successors in interest to the Development Owner concerning the extended low income housing use of buildings within the Development throughout the extended use period as provided in the Code, §42(h)(6). The Extended Low Income Housing Commitment with respect to a Development is expressed in the LURA applicable to the Development.

(37) General Contractor--One who contracts for the construction, or rehabilitation of an entire building or Development, rather than a portion of the work. The General Contractor hires subcontractors, such as plumbing contractors, electrical contractors, etc., coordinates all work, and is responsible for payment to the said subcontractors. This party may also be referred to as the "contractor."

(38) General Developments--Any Development which is not a Qualified Nonprofit Development or is not under consideration in the Rural, At-Risk Development or Elderly set-asides as such terms are defined by the Department.

(39) General Pool--The pool of credits that have been returned or recovered from prior years' allocations or the current year's Commitment Notices after the Board has made its initial allocation of the current year's available credit ceiling. General pool credits will be used to fund Applications on the waiting list without regard to set-aside except for the 10% Nonprofit Set-Aside allocation required under §42(h)(5) of the Code.

(40) Governmental Entity--Includes federal or state agencies, departments, boards, bureaus, commissions, authorities, and political subdivisions, special districts and other similar entities.

(41) Highrise Urban Infill Development--a Development comprised of three or more stories that is located within a central business district or its immediate environs or in inner-city neighborhoods characterized by documented higher than average land costs and higher density. For a building or buildings with more than three stories, an elevator must be included in the construction of any building within such Development.

(42) Historic Development--A residential Development that has received a historic property designation by a federal, state or local government entity.

(43) Historically Underutilized Businesses (HUB)--Any entity defined as an historically underutilized business with its principal place of business in the State of Texas in accordance with Chapter 2161, Texas Government Code.

(44) Housing Credit Agency--A Governmental Entity charged with the responsibility of allocating low income housing tax credits pursuant to the Code, §42. For the purposes of this title, the Department is the sole "Housing Credit Agency" of the State of Texas.

(45) Housing Credit Allocation--An allocation by the Department to a Development Owner of low income housing tax credit in accordance with §49.11 of this title.

(46) Housing Credit Allocation Amount--With respect to a Development or a building within a Development, that amount the Department determines to be necessary for the financial feasibility of the Development and its viability as a qualified low income housing Development throughout the Compliance Period and allocates to the Development.

(47) Housing Tax Credit ("tax credits")--A tax credit allocated, or for which a Development may qualify, under the low income housing tax credit program, pursuant to the Code, §42.

(48) HUD--The United States Department of Housing and Urban Development, or its successor.

(49) Ineligible Building Types--Those buildings or facilities which are ineligible, pursuant to this QAP, for funding under the tax credit program as follows:

(A) Hospitals, nursing homes, trailer parks and dormitories (or other buildings that will be predominantly occupied by Students) or other facilities which are usually classified as transient housing (other than certain specific types of transitional housing for the homeless and single room occupancy units, as provided in the Code, §42(i)(3)(B)(iii) and (iv) are not eligible. However, structures formerly used as hospitals, nursing homes or dormitories are eligible for credits if the Development involves the conversion of the building to a non-transient multifamily residential development.

(B) Single family detached housing, duplexes, and triplexes shall not be included in tax credit developments. The only exceptions to this definition are:

(i) Any Building comprised of less than four residential Units, regardless of employee or owner occupied Units and satisfying either of the requirements listed in subclauses (I) and (II) of this clause shall not be considered to include an Ineligible Building Type.

(I) Developments with 36 units or less that are located within a city or county with a population of not more than 20,000 or 50,000, respectively; or

(II) Developments receiving a financial contribution from the local governing entity in an amount equal to or exceeding seven percent of the construction hard costs. The financial contribution can be either a capital contribution, in-kind services to the Development, or a combination of capital contribution and in-kind services. The in-kind services must be above and beyond services typically provided to similar developments and must be fully documented in the form of proof of application at the time of Application, and proof of firm commitment by June 1, 2002.

(ii) An existing Rural Development that is federally assisted within the meaning of the Code, §42(d)(6)(B) and is under common ownership, management and Control shall not be considered to include an Ineligible Building Type. For qualifying federally assisted Rural Developments, construction cannot include the construction of new residential units. Rural Developments purchased from HUD will qualify as federally assisted.

(C) Any Qualified Elderly Development of two stories or more that does not include elevator service for any Units or living space above the first floor.

(50) IRS--The Internal Revenue Service, or its successor.

(51) Land Use Restriction Agreement (LURA)--An agreement between the Department and the Development Owner which is binding upon the Development Owner's successors in interest, that encumbers the Development with respect to the requirements of this title and the requirements of the Code, §42.

(52) Material Deficiencies--Deficiencies that are not eligible to be remedied pursuant to paragraph (2) of this subsection. Deficiencies caused by the omission of Threshold Criteria documentation specifically required by §49.7(e) of this title shall automatically be considered Material Deficiencies and shall be cause for termination.

(53) Material Non-Compliance--A property will be classified by the Department as being in material non-compliance status if the non-compliance score for such property is equal to or exceeds 30 points in accordance with the provisions of §49.5(b)(6) and under the methodology and point system set forth in §49.10 of this title.

(54) Minority Owned Business--A business entity at least 51% of which is owned by members of a minority group or, in the case of a corporation, at least 51% of the shares of which are owned by members of a minority group, and that is managed and controlled by members of a minority group in its daily operations. Minority group includes women, African Americans, American Indians, Asian Americans, and Mexican Americans and other Americans of Hispanic origin.

(55) Office of Rural Community Affairs (ORCA)--The state agency designated by the legislature as primarily responsible for rural area development in the state.

(56) Person--Means, without limitation, any natural person, corporation, partnership, limited partnership, joint venture, limited liability company, trust, estate, association, cooperative, government, political subdivision, agency or instrumentality or other organization of any nature whatsoever and shall include any group of Persons acting in concert toward a common goal.

(57) Persons with Disabilities--A person who:

(A) has a physical, mental or emotional impairment that:

(i) is expected to be of a long, continued and indefinite duration,

(ii) substantially impedes his or her ability to live independently, and

(iii) is of such a nature that the ability could be improved by more suitable housing conditions, or

(B) has a developmental disability, as defined in Section 102(7) of the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. 6001-6007).

(58) Pre-Application--A preliminary application, in a form prescribed by the Department, filed with the Department by an Applicant prior to submission of the Application, including any required exhibits or other supporting material, as more fully described in §49.7(a) of this title.

(59) Pre-Application Acceptance Period--That period of time during which Pre-Applications for a Housing Credit Allocation from the State Housing Credit Ceiling may be submitted to the Department.

(60) Prison Community--A city or town which is located outside of a Metropolitan Statistical Area (MSA) or Primary Metropolitan Statistical Area (PMSA) and was awarded a state prison as set forth in the Reference Manual.

(61) Property--The real estate and all improvements thereon which are the subject of the Application (including all items of personal property affixed or related thereto), whether currently existing or proposed to be built thereon in connection with the Application.

(62) Qualified Allocation Plan (QAP)--A plan adopted by the Board, and approved by the Governor, under this title, and as provided in the Code, Section 42(m)(1) (specifically including preference for Developments located in Qualified Census Tracts and the development of which contributes to a concerted community revitalization plan) and as further provided in §§49.1 - 49.18 of this title, that:

(A) provides the threshold, scoring, and underwriting criteria based on housing priorities of the department that are appropriate to local conditions;

(B) gives preference in housing tax credit allocations to Developments that, as compared to other developments:

(i) when practicable and feasible based on available funding sources, serve the lowest income tenants; and

(ii) are affordable to qualified tenants for the longest economically feasible period.

(C) provides a procedure for the Department, the Department's agent, or another private contractor of the Department to use in monitoring compliance with the Qualified Allocation Plan and this title.

(63) Qualified Basis--With respect to a building within a Development, the building's Eligible Basis multiplied by the Applicable Fraction, within the meaning of the Code, §42(c)(1).

(64) Qualified Census Tract--Any census tract which is so designated by the Secretary of HUD and, for the most recent year for which census data are available on household income in such tract, either in which 50% or more of the households have an income which is less than 60% of the area median family income for such year or which has a poverty rate of at least 25%.

(65) Qualified Elderly Development--A Development which meets the requirements of the federal Fair Housing Act and:

(A) is intended for, and solely occupied by, Persons 62 years of age or older; or

(B) is intended and operated for occupancy by at least one person 55 years of age or older per Unit, where at least 80% of the total housing Units are occupied by at least one person who is 55 years of age or older; and where the Development Owner publishes and adheres to policies and procedures which demonstrate an intent by the owner and manager to provide housing for persons 55 years of age or older.

(66) Qualified Market Analyst--A real estate appraiser certified or licensed by the Texas Appraiser or Licensing and Certification Board or a real estate consultant or other professional currently active in the subject property's market area who demonstrates competency, expertise, and the ability to render a high quality written report. The individual's experience and educational background will provide the general basis for determining competency as a Market Analyst. Such determination will be at the sole discretion of the Department. The Qualified Market Analyst must not be related to or an Affiliate of the Development Owner, Development Consultant, or the CPA which provides documentation required for the Carryover Allocation Procedures Manual or Cost Certification Procedures Manual.

(67) Qualified Nonprofit Organization--An organization that is described in the Code, §501(c)(3) or (4), as these cited provisions may be amended from time to time, that is exempt from federal income taxation under the Code, §501(a), that is not Affiliated with or Controlled by a for profit organization, and includes as one of its exempt purposes the fostering of low income housing within the meaning of the Code, §42(h)(5)(C). A Qualified Nonprofit Organization may select to compete in any one of the set-asides, including, but not limited to, the nonprofit set-aside, the rural developments set-aside, the At-Risk Developments set-aside and the general set-aside.

(68) Qualified Nonprofit Development--A Development in which a Qualified Nonprofit Organization (directly or through a partnership or wholly-owned subsidiary) holds a controlling interest, materially participates (within the meaning of the Code, §469(h), as may be amended from time to time) in its development and operation throughout the Compliance Period, and otherwise meets the requirements of the Code, §42(h)(5).

(69) Real Estate Owned (REO) Developments--Any existing Residential Development that is owned or that is being sold by an insured depository institution in default, or by a receiver or conservator of such an institution, or is a property owned by HUD, Federal National Mortgage Association (Fannie Mae), Federal Home Loan Mortgage Corporation (Freddie Mac), federally chartered bank, savings bank, savings and loan association, Federal Home Loan Bank or a federally approved mortgage company or any other federal agency.

(70) Reference Manual--That certain manual, and any amendments thereto, produced by the Department which sets forth reference material pertaining to the Low Income Housing Tax Credit Program.

(71) Related Party--As defined,

(A) The following individuals or entities:

(i) the brothers, sisters, spouse, ancestors, and descendants of a person within the third degree of consanguinity, as determined by Chapter 573 of the Texas Government Code;

(ii) a person and a corporation, if the person owns more than 50 percent of the outstanding stock of the corporation;

(iii) two or more corporations that are connected through stock ownership with a common parent possessing more than 50 percent of:

(I) the total combined voting power of all classes of stock of each of the corporations that can vote;

(II) the total value of shares of all classes of stock of each of the corporations; or

(III) the total value of shares of all classes of stock of at least one of the corporations, excluding, in computing that voting power or value, stock owned directly by the other corporation;

(iv) a grantor and fiduciary of any trust;

(v) a fiduciary of one trust and a fiduciary of another trust, if the same person is a grantor of both trusts;

(vi) a fiduciary of a trust and a beneficiary of the trust;

(vii) a fiduciary of a trust and a corporation if more than 50 percent of the outstanding stock of the corporation is owned by or for:

(I) the trust; or

(II) a person who is a grantor of the trust;

(viii) a person or organization and an organization that is tax-exempt under the Code, Section 501(a), and that is controlled by that person or the person's family members or by that organization;

(ix) a corporation and a partnership or joint venture if the same persons own more than:

(I) 50 percent of the outstanding stock of the corporation; and

(II) 50 percent of the capital interest or the profits' interest in the partnership or joint venture;

(x) an S corporation and another S corporation if the same persons own more than 50 percent of the outstanding stock of each corporation;

(xi) an S corporation and a C corporation if the same persons own more than 50 percent of the outstanding stock of each corporation;

(xii) a partnership and a person or organization owning more than 50 percent of the capital interest or the profits' interest in that partnership; or

(xiii) two partnerships, if the same person or organization owns more than 50 percent of the capital interests or profits' interests.

(B) As a note to Applicants, nothing in this definition is intended to constitute the Department's determination as to what relationship might cause entities to be considered "related" for various purposes under the Code.

(72) Residential Development--Any Development that is comprised of at least one "Unit" as such term is defined in paragraph (85) of this subsection.

(73) Rules--The Department's low income housing tax credit Rules as presented in this title.

(74) Rural Area--An area that is located:

(A) outside the boundaries of a primary metropolitan statistical area or a metropolitan statistical area;

(B) within the boundaries of a primary metropolitan statistical area or a metropolitan statistical area, if the statistical area has a population of 20,000 or less and does not share a boundary with an urban area; or

(C) in an area that is eligible for funding by TxRD-USDA.

(75) Rural Development Agency--the state agency designated by the Legislature as primarily responsible for rural area development in the state. Such agency is currently ORCA.

(76) Rural Development--A Development located within a Rural Area and for which the Applicant applies for tax credits under the Rural Set Aside.

(77) Selection Criteria--Criteria used to determine housing priorities of the State under the Low Income Housing Tax Credit Program as specifically defined in §49.7(f) of this title.

(78) Set Aside--A reservation of a portion of the available Housing Tax Credits to provide financial support for specific types of housing or geographic locations or serve specific types of Applicants on a priority basis as permitted by the Qualified Allocation Plan.

(79) State Housing Credit Ceiling--The limitation imposed by the Code, §42(h), on the aggregate amount of housing credit allocations that may be made by the Department during any calendar year, as determined from time to time by the Department in accordance with the Code, §42(h)(3).

(80) Student Eligibility--Per the Code, §42(I)(3)(D), "A unit shall not fail to be treated as a low-income unit merely because it is occupied:

(A) by an individual who is:

(i) a student and receiving assistance under title IV of the Social Security Act (42 U.S.C. §§601 et seq.), or

(ii) enrolled in a job training program receiving assistance under the Job Training Partnership Act (29 USCS §§1501 et seq., generally; for full classification, consult USCS Tables volumes) or under other similar Federal, State, or local laws, or

(B) entirely by full-time students if such students are:

(i) single parents and their children and such parents and children are not dependents (as defined in section 152) of another individual, or

(ii) married and file a joint return."

(81) Sustaining Occupancy--The figure at which occupancy income is equal to all operating expenses and mandatory debt service requirements for a Development.

(82) Tax Exempt Bond Development--A Development which receives a portion of its financing from the proceeds of tax exempt bonds which are subject to the state volume cap as described in the Code, §42(h)(4)(B).

(83) Threshold Criteria--Criteria used to determine whether the Development satisfies the minimum level of acceptability for consideration established in this title.

(84) Total Housing Development Cost--The total of all costs incurred or to be incurred by the Development Owner in acquiring, constructing, rehabilitating and financing a Development, as determined by the Department based on the information contained in the Applicant's Application. Such costs include reserves and any expenses attributable to commercial areas. Costs associated with the sale or use of tax credits to raise equity capital shall also be included in the Total Housing Development Cost. Such costs include but are not limited to syndication and partnership organization costs and fees, filing fees, broker commissions, related attorney and accounting fees, appraisal, engineering, and the environmental site assessment.

(85) Town Home--Each Town Home living unit is one of a group of no less than four units that are adjoined by common walls. Town Homes shall not have more than two walls in common with adjacent units. Town Homes shall not have other units above or below another unit. Town Homes shall not share a common back wall. Town Homes shall have individual exterior entries.

(86) TxRD-USDA--The Rural Development (RD) services of the United States Department of Agriculture (USDA) serving the State of Texas (formerly known as TxFmHA) or its successor.

(87) Unit--Any residential rental unit in a Development consisting of an accommodation including a single room used as an accommodation on a non-transient basis, that contains separate and

complete physical facilities and fixtures for living, sleeping, eating, cooking and sanitation.

§49.3. State Housing Credit Ceiling.

(a) The Department shall determine the State Housing Credit Ceiling for each calendar year as provided in the Code, §42(h)(3)(C).

(b) The Department shall publish each such determination in the Texas Register within 30 days after notification by the Internal Revenue Service.

(c) The aggregate amount of Housing Credit Allocations made by the Department during any calendar year shall not exceed the State Housing Credit Ceiling for such year as provided in the Code, §42. Housing Credit Allocations made to Tax Exempt Bond Developments are not included in the State Housing Credit Ceiling.

§49.4. Application Submission; Pre-Application Submission; Unacceptable Applications; Availability of Pre-Application and Application; Confidential Information; Required Application Notifications and Receipt of Public Comment; Board Recommendations; Board Decisions; Commitment Notices and Determination Notices; Board Reevaluation; Appeals Process; Waiting List; Agreements and Election Statement; Cost Certification and Carryover Filings; LURA.

(a) Application Submission. Any Applicant requesting a Housing Credit Allocation or a Determination Notice must submit an Application to the Department during the Application Acceptance Period. A complete Application may be submitted at any time during the Application Acceptance Period, and is not limited to submission after the close of the Pre-Application Cycle. However, a complete Application received during the Pre-Application Cycle will initially only be reviewed for Pre-Application Criteria. The remainder of the Application will be reviewed once the results of the Pre-Application Cycle have been announced. Only one Application may be submitted for each site. While the Application Acceptance Period is open, Applicants may withdraw their Application and subsequently file a new Application along with the required Application fee. The Department is authorized to request the Applicant to provide additional information it deems relevant to clarify information contained in the Application or to submit documentation for items it considers to be an Administrative Deficiency. An Applicant may not change or supplement an Application in any manner after the filing deadline, except as it relates to a direct request from the Department to remedy an Administrative Deficiency as further described in §49.2(2) of this title or to the amendment of an application after an allocation of tax credits as further described in §49.7(k) of this title.

(b) Pre-Application Submission. Any Applicant requesting a Housing Credit Allocation may submit a Pre-Application to the Department during the Pre-Application Acceptance Period. A complete Application may be submitted at any time during the Application Acceptance Period, and is not limited to submission after the close of the Pre-Application Cycle. However, a complete Application received during the Pre-Application Cycle will initially only be reviewed for Pre-Application Criteria. The remainder of the Application will be reviewed once the results of the Pre-Application Cycle have been announced. Only one Pre-Application may be submitted by an Applicant for each site. The Pre-Application submission is a voluntary process. While the Pre-Application Acceptance Period is open, Applicants may withdraw their Pre-Application and subsequently file a new Pre-Application along with the required Pre-Application Fee. The Department is authorized to request the Applicant to provide additional information it deems relevant to clarify information contained in the Pre-Application or to submit documentation for items it considers to be an Administrative Deficiency. The Department shall reject and return to the Applicant any Pre-Application assessed by the Department that fails to satisfy the Pre-Application Threshold Criteria required by the Board in the Qualified Allocation Plan. The rejection of a Pre-Application shall not preclude an Applicant from submitting an Application with respect to a particular Development or site at the appropriate time.

(c) Unacceptable Applications. Applications involving Ineligible Building Types will not be considered for allocation of tax credits under this QAP and the Rules. Applications that show Material Deficiencies (which are not corrected within the applicable correction period) will be terminated, and the Applicant may only re-apply if the Application Acceptance Period is still open. An Application that does not fulfill the requirements of this Qualified Allocation Plan and Rules and the current Application Submission Procedures Manual will be deemed not to have been timely filed and the Department shall not be deemed to have accepted the Application.

(d) Availability of Pre-Application and Application. Pre-Applications and Applications for tax credits are public information and are available upon request after the Pre-Application and Application Acceptance Periods close, respectively. All Pre-Applications and Applications, including all exhibits and other supporting materials, except Exhibit 109, will be made available for public disclosure immediately after the Pre-Application and Application periods close, respectively. The content of Exhibit 109 may still be made available for public disclosure upon request if the Attorney General's office deems it is not protected from disclosure by the Texas Public Information Act.

(e) Confidential Information. The Department may treat the financial statements of any Applicant as confidential and may elect not to disclose those statements to the public. A request for such information shall be processed in accordance with §552.305 of the Government Code.

(f) Required Application Notifications, Receipt of Public Comment, and Meetings with Applicants.

(1) Within approximately seven business days of the close of the Pre-Application Acceptance Period, the Department shall publish a Pre-Application Submission Log on its web site. Such log shall contain the Development name, address, set-aside, number of units, requested credits, owner contact name and phone number.

(2) Approximately 30 days before the close of the Application Acceptance Period, the Department will release the evaluation and assessment of the Pre-Applications on its web site.

(3) Within approximately 15 business days of the close of the Application Acceptance Period, the Department shall:

(A) publish an Application submission log, as further described in §49.12(b) of this title, on its web site.

(B) give notice of a proposed Development in writing to the:

(i) mayor or other equivalent chief executive officer of the municipality, if the Development or a part thereof is located in a municipality; otherwise the Department shall notify the chief executive officer of the county in which the Development or a part thereof is located, to advise such individual that the Development or a part thereof will be located in his/her jurisdiction and request any comments which such individual may have concerning such Development. If the local municipal authority expresses opposition to the Development, the Department will give consideration to the objections raised and will visit the proposed site or Development within 30 days of notification to conduct a physical inspection of the Development site and consult with the mayor or county judge before the Application is scored, if opposition is received prior to scoring being completed; and

(ii) state representative and state senator representing the area where a Development would be located. The state representative or senator may hold a community meeting at which the Department shall provide appropriate representation.

(C) The elected officials identified in clauses (i) and (ii) of subparagraph (B) of this paragraph will be provided an opportunity to comment on the Application during the Application evaluation process.

(4) The Department shall hold at least three public hearings in different regions of the state to receive comment on the submitted Applications and on other issues relating to the Low Income Housing Tax Credit Program.

(5) The Department shall provide notice of and information regarding public hearings, board meetings and application opening and closing dates relative to housing tax credits to local housing departments, to appropriate newspapers of general or limited circulation that serve the community in which a proposed Development is to be located, to nonprofit organizations, to on-site property managers of occupied developments that are the subject of Applications for posting in prominent locations at those Developments, and to any other interested persons including community groups, who request the information and shall post all such information to its web site.

(6) Approximately forty days prior to the date of the Board Meeting at which the issuance of Commitment Notices or Determination Notices shall be discussed, the Department will notify each Applicant of the receipt of any opposition received by the Department relating to his or her Development at that time.

(7) Not later than the third working day after the date of the relevant determinations, the results of each stage of the Application process, including the results of the application scoring and underwriting phases and the allocation phase, will be posted to the Department's web site.

(8) At least thirty days prior to the date of the Board meeting at which the issuance of Commitment Notices or Determination Notices shall be discussed, the Department will:

(A) provide the application scores to the Board;

(B) if feasible, post to the Department's web site the entire Application, including all supporting documents and exhibits, the Application Log, a scoring sheet providing details of the Application score, and any other documents relating to the processing of the Application.

(9) A summary of comments received by the Department on specific Applications shall be part of the documents required to be reviewed by the Board under this subsection if it is received 30 business days prior to the date of the Board Meeting at which the issuance of Commitment Notices or Determination Notices shall be discussed. Comments received after this deadline will not be part of the documentation submitted to the Board. However, a public comment period will be available prior to the Board's decision, at the Board meeting where tax credit allocation decisions will be made.

(10) Notice of Selection Criteria Scoring. When all Applications have been scored, the Department shall publish the results of the scoring on its web site.

(11) Not later than the 120th day after the date of the initial issuance of Commitment Notices for housing tax credits, the Department shall provide an Applicant who did not receive a commitment for housing tax credits with an opportunity to meet and discuss with the Department the Application's deficiencies, scoring and underwriting.

(g) Board Recommendations. After eligible Applications have been evaluated, ranked and underwritten in accordance with the QAP and the Rules, the Department staff shall make its recommendations to the Executive Award and Review Advisory Committee. This Committee will develop funding priorities and shall make allocation recommendations to the Board. Such recommendation and supporting documentation shall be made in advance of the meeting at which the issuance of Commitment Notices or Determination Notices shall be discussed. The Committee will provide written, documented recommendations to the Board which will include at a minimum the financial or programmatic viability of each Application and a list of all submitted Applications which enumerates the reason(s) for the Development's proposed selection or denial, including all evaluation factors provided in §49.7(c) of this title that were used in making this determination. The Board shall issue commitments for available housing tax credits based on the application evaluation process identified in §49.7 of this title. Concurrently with the initial issuance of commitments for housing tax credits, the Board shall establish a waiting list of additional Applications ranked by score in descending order of priority based on Set Aside categories and regional allocation goals. On awarding tax credit allocations, the Board shall document the reasons for each Development's selection, including an explanation of all discretionary factors used in making its determination, and the reasons for any decision that conflicts with the recommendations made by Department staff. The Board may not make, without good cause, an allocation decision that conflicts with the recommendations of Department staff.

(1) A Commitment Notice shall not be issued with respect to any Development for an unnecessary amount or where the cost for the total development, acquisition, construction or rehabilitation exceeds the limitations established from time to time by the Department and the Board, unless the Department staff make a recommendation to the Board based on the need to fulfill the goals of the Program as expressed in this QAP and Rules, and the Board accepts the recommendation. The Department's recommendation to the Board shall be clearly documented.

(2) A Commitment Notice shall not be issued with respect to any Development in violation of subsection §49.9(b) of this title, unless the Committee makes a recommendation to the Board based on the need to fulfill the goals of the Program as expressed in this QAP and Rules, and the Board accepts the recommendation. The Department's recommendation to the Board shall be clearly documented.

(3) The Department will reduce the Applicant's estimate of Developer's and/or Contractor fees in instances where these exceed the fee limits determined by the Department. In the instance where the Contractor is an Affiliate of the Development Owner and both parties are claiming fees, Contractor's overhead, profit, and general requirements, the Department will reduce the total fees estimated to an acceptable level. Further, the Department shall deny or reduce the amount of low income housing tax credits on any portion of costs which it deems excessive or unreasonable. The Department also may require bids or third party estimates in support of the costs proposed by any Applicant.

(h) Board Decisions. The Board's decisions shall be based upon its evaluation of the Development's consistency with the criteria and requirements set forth in the QAP and the Rules.

(1) In making a determination to allocate tax credits, the Department staff and Board shall be authorized not to rely solely on the number of points scored by an Applicant. They shall in addition, be entitled to take into account, as appropriate, the factors described in §49.7(b) - (d) of this title. If the Board disapproves or fails to act upon the Application, the Department shall issue to the Development Owner a written notice stating the reason(s) for the Board's disapproval or failure to act.

(2) Before the Board approves any Development Application, the Department shall assess the compliance history of the Applicant and any Affiliate of the Applicant with respect to all applicable requirements; and the compliance issues associated with the proposed Development. The Committee shall provide to the Board a written report regarding the results of the assessments. The written report will be included in the appropriate Development file for Board and Department review. The Board shall fully document and disclose any instances in which the Board approves a Development Application despite any noncompliance associated with the Development, Applicant or Affiliate.

(i) Commitment Notices and Determination Notices. If the Board approves the Application, the Department will:

(1) if the Application is for a Housing Credit Allocation, issue a Commitment Notice to the Development Owner which shall:

(A) confirm that the Board has approved the Application; and

(B) state the Department's commitment to make a Housing Credit Allocation to the Applicant in a specified amount, subject to the feasibility determination described at §49.11(b) of this title, compliance by the Development Owner with the remaining requirements of this chapter, and any other conditions set forth therein by the Department. This commitment shall expire on the date specified therein unless the Development Owner indicates acceptance of the commitment by executing the Commitment Notice or Determination Notice, pays the required fee specified in §49.13 of this title, and satisfies any other conditions set forth therein by the Department. A Development Owner may request an extension of the Commitment Notice expiration date by submitting extension request and associated extension fee as described in §49.13(j) of this title. In no event shall the expiration date of a Commitment Notice be extended beyond the last business day of the applicable calendar year.

(2) if the Application is with respect to a Tax Exempt Bond Development, issue a Determination Notice to the Development Owner which shall:

(A) confirm the Board's determination that the Development satisfies the requirements of this QAP; and

(B) state the Department's commitment to issue IRS Form(s) 8609 to the Applicant in a specified amount, subject to the requirements set forth at §49.7(i) of this title, compliance by the Development Owner with all applicable requirements of this title, and any other conditions set forth therein by the Department. The Determination Notice shall expire on the date specified therein unless the Development Owner indicates acceptance by executing the Determination Notice and paying the required fee specified in §49.13 of this title. The Determination Notice shall also expire unless the Development Owner satisfies any conditions set forth therein by the Department within the applicable time period.

(3) notify, in writing, the mayor or other equivalent chief executive officer of the municipality in which the Property is located informing him/her of the Board's issuance of a Commitment Notice or Determination Notice, as applicable.

(j) Board Reevaluation. Regardless of project stage, the Board must reevaluate a Development that undergoes a substantial change between the time of initial Board approval of the Development and the time of issuance of a Commitment Notice or Determination Notice for the Development. For the meaning of this subsection, substantial change shall be those items identified in §49.7(k)(4) of this title. The Board may revoke any Commitment Notice or Determination Notice issued for a Development that has been unfavorably reevaluated by the Board.

(k) Appeals Process. An Applicant may appeal decisions made by the Department.

(1) The decisions that may be appealed are identified in subparagraphs (A) - (C) of this paragraph.

(A) a determination regarding the Application's satisfaction of:

(i) Pre-Application or Application Threshold Criteria;

(ii) Underwriting Criteria;

(B) the scoring of the Application under the Pre-Application or Application Selection Criteria; and

(C) a recommendation as to the amount of housing tax credits to be allocated to the Application.

(2) An Applicant may not appeal a decision made regarding an Application filed by another Applicant.

(3) An Applicant must file its appeal in writing, with the Department not later than the seventh day after the date the Department publishes the results of the Application evaluation process identified in §49.7 of this title. In the appeal, the Applicant must specifically identify the Applicant's grounds for appeal, based on the original Application and additional documentation filed with the original Application. If the appeal relates to the amount of housing tax credits recommended to be allocated, the Department will provide the Applicant with the underwriting report upon request.

(4) The Executive Director of the Department shall respond in writing to the appeal not later than the 14th day after the date of receipt of the appeal. If the Applicant is not satisfied with the Executive Director's response to the appeal, the Applicant may appeal directly in writing to the Board, provided that an appeal filed with the Board under this subsection must be received by the Board before:

(A) the seventh day preceding the date of the board meeting at which the relevant allocation decision is expected to be made; or

(B) the third day preceding the date of the board meeting described by subparagraph (A) of this paragraph, if the Executive Director does not respond to the appeal before the date described by subparagraph (A) of this paragraph.

(5) Board review of an appeal under paragraph (4) of this subsection is based on the original Application and additional documentation filed with the original Application. The Board may not review any information not contained in or filed with the original Application. The decision of the Board regarding the appeal is final.

(6) The Department will post to its web site an appeal filed with the Department or Board and any other document relating to the processing of the appeal.

(l) Waiting List. If the entire State Housing Credit Ceiling for the applicable calendar year has been committed or allocated in accordance with this chapter, the Board shall generate a waiting list. All such waiting list Applications will be weighed one against the other and a priority list shall be developed by the Board. If at any time prior to the end of the Application Round, one or more Commitment Notices expire and a sufficient amount of the State Housing Credit Ceiling becomes available, the Board shall issue a Commitment Notice to Applications on the waiting list in order of priority subject to the amount of returned credits, the regional allocation goals and the Set Aside categories, including the 10% Nonprofit Set-Aside allocation required under the Code, §42(h)(5). In the event that the Department makes a

Commitment Notice or offers a commitment within the last month of the calendar year, it will require immediate action by the Applicant to assure that an allocation or Carryover Allocation can be issued before the end of that same calendar year. At the end of each calendar year, all Applications which have not received a Commitment Notice shall be deemed terminated, unless the Department shall determine to retain or act upon such Applications as provided in §49.17 of this title. The Applicant may re-apply to the Department during the next Application Acceptance Period.

(m) Agreement and Election Statement. Together with or following the Development Owner's acceptance of the commitment or determination, the Development Owner may execute an Agreement and Election Statement, in the form prescribed by the Department, for the purpose of fixing the applicable credit percentage for the Development as that for the month in which the commitment was accepted (or the month the bonds were issued for Tax Exempt Bond Developments), as provided in the Code, §42(b)(2). For non Tax Exempt Bond Developments, the Agreement and Election Statement shall be executed by the Development Owner no later than five days after the end of the month in which the offer of commitment was accepted. Current Treasury Regulations, §1.42-8(a)(1)(v), suggest that in order to permit a Development Owner to make an effective election to fix the applicable credit percentage for a Development, the Commitment Notice must be executed by the Department and the Development Owner in the same month. The Department staff will cooperate with a Development Owner, as needed, to assure that the Commitment Notice can be so executed.

(n) Cost Certification or Carryover Filings. Developments that will be placed in service and request IRS Forms 8609 in the year the Commitment Notice was issued must submit the required Cost Certification documentation and the compliance and monitoring fee to the Department by the second Friday in November of that same year. All other Developments which received a Commitment Notice, must submit the Carryover documentation to the Department no later than the second Friday in October of the year in which the Commitment Notice is issued. The Carryover Allocation must be properly completed and delivered to the Department as prescribed by the Carryover Allocation Procedures Manual. All complete Carryover filings will be reviewed and executed by the Department no later than 90 days from the date of receipt of the Carryover documentation. The Department will issue IRS Forms 8609 no later than 90 days from the date of receipt of the Cost Certification documentation, so long as all subsequent documentation requested by the Department related to the processing of the Cost Certification documentation has been provided on or before the seventy-fifth day from the date of receipt of the original Cost Certification documentation. Any deficiency letters issued to the Owner pertaining to the Cost Certification documentation will also be copied to the syndicator.

(o) Land Use Restriction Agreement (LURA). Prior to the Department's issuance of the IRS Form 8609 declaring that the Development has been placed in service for purposes of the Code, §42, Development Owners must date, sign and acknowledge before a notary public a LURA and send the original to the Department for execution. The Development Owner shall then record said LURA, along with any and all exhibits attached thereto, in the real property records of the county where the Development is located and return the original document, duly certified as to recordation by the appropriate county official, to the Department. If any liens (other than mechanics' or materialmen's liens) shall have been recorded against the Development and/or the Property prior to the recording of the LURA, the Development Owner shall obtain the subordination of the rights of any such lienholder, or other effective consent, to the survival of certain obligations contained in the LURA following the foreclosure of any such lien. Receipt of such certified recorded original LURA by the Department is required prior to issuance of IRS Form 8609. A representative of the Department shall physically inspect the Development for compliance with the Application and the representatives, warranties, covenants, agreements and undertakings contained therein before the IRS Form 8609 is issued, but in no event later than the end of the second calendar year following the year the last building in the Development is placed in service. The Development Owner for Tax Exempt Bond Developments shall obtain a subordination agreement wherein the lien of the mortgage is subordinated to the LURA.

§49.5. Ineligible and Disqualified Applications; Debarment from Program Participation.

(a) An Application will be ineligible if a member of the Development Team has been or is:

(1) Barred, suspended, or terminated from procurement in a state or federal program or listed in the List of Parties Excluded from Federal Procurement or Non-Procurement Programs; or,

(2) convicted of, under indictment for, or on probation for a state or federal crime involving fraud, bribery, theft, misrepresentations of material facts, misappropriation of funds, or other similar criminal offenses; or,

(3) subject to enforcement action under state or federal securities law, or is the subject of an enforcement proceeding with any Governmental Entity unless such action has been concluded and no adverse action or finding (or entry into a consent order) has been taken with respect to such member.

(b) Additionally, the Department will disqualify, and may disbar, an Application if it is determined by the Department that those issues identified in paragraphs (1) - (9) of this subsection exist. A person debarred by the Department from participation in the program may appeal the person's debarment to the Board. The Department shall debar a person for the longer of, one year from the date of debarment, or until the violation causing the debarment has been remedied.

(1) fraudulent information, knowingly false documentation or other material misrepresentation has been provided in the Application or other information submitted to the Department. The aforementioned policy will apply at any stage of the evaluation or approval process; or,

(2) at the time of application or at any time during the two-year period preceding the date the application round begins, the Applicant or a Related Party is or has been:

(A) a member of the Board; or

(B) the executive director, a deputy director, the director of housing programs, the director of compliance, the director of underwriting, or the Low Income Housing Tax Credit Program manager employed by the Department.

(3) the Applicant or any Person, general partner, general contractor and their respective principals or Affiliates active in the ownership or control of other low income housing tax credit property in the state of Texas who received an allocation of tax credits in the 2001 Application Round but did not close the construction loan as required under the Carryover Allocation (including any extension period granted by the Board) except for reasons beyond the control of the Applicant as determined by the Department; or,

(4) the Applicant proposes to replace in less than 15 years any private activity bond financing of the development described by the Application, unless:

(A) the applicant proposes to maintain for a period of 30 years or more 100 percent of the development units supported by

low income housing tax credits as rent-restricted and exclusively for occupancy by individuals and families earning not more than 50 percent of the area median income, adjusted for family size; and

(B) at least one-third of all the units in the development are public housing units or Section 8 Development-based units; or,

(5) the Applicant or any Person, general partner, general contractor and their respective principals or Affiliates active in the ownership or control of other low income housing tax credit property has failed to place in service buildings or removed from service buildings for which credits were allocated (either Carryover Allocation or issuance of 8609s). The Department may consider the facts and circumstances on a case-by-case basis, including whether the credits were returned prior to the expiration date for re-issuance of the credits, in its sole determination of Applicant eligibility; or,

(6) the Applicant or any Person, general partner, general contractor and their respective principals or Affiliates active in the ownership or control of other low income rental housing property in the state of Texas funded by the Department that is in Material Non-Compliance with the LURA (or any other document containing an Extended Low Income Housing Commitment) or the program rules in effect for such property on the date the Pre-Application Acceptance Period opens or upon the date of filing Volume I of the Application for a Tax Exempt Bond Development. Any corrective action documentation affecting the Material Non-Compliance status score for Applicant's competing in the 2002 Application Round must be received by the Department no later than November 15, 2001. The Department may take into consideration the representations of the Applicant regarding compliance violations described in §49.7(e)(7)(C) and (D) of this title; however, the records of the Department are controlling; or,

(7) the Applicant or any Person, general partner, general contractor and their respective principals or Affiliates active in the ownership or control of other low income rental housing tax credit property outside of the state of Texas has incidence of non-compliance with the LURA or the program rules in effect for such tax credit property as reported on Exhibits 105C and 105D and/or as determined by the state regulatory authority for such state and such non-compliance is determined to be Material Non-Compliance by the Department; or,

(8) the Development is located on a site that has been determined to be "unacceptable" by the Department staff; or

(9) the Applicant or a Related Party, or any person who is active in the construction, rehabilitation, ownership, or control of the Development including a general partner or general contractor and their respective principals or affiliates, or person employed as a lobbyist or in another capacity on behalf of the Development, communicates with any Board member or member of the Committee with respect to the Development during the period of time starting with the time an Application is submitted until the time the Board makes a final decision with respect to any approval of that Application, unless the communication takes place at any board meeting or public hearing held with respect to that Application.

(c) Notwithstanding any other provision of this section, the Department may not allocate tax credits to a Development proposed by an Applicant unless the Department first determines that:

(1) the housing development is necessary to provide needed decent, safe, and sanitary housing at rentals or prices that individuals or families of low and very low income or families of moderate income can afford;

(2) the housing sponsor undertaking the proposed housing development will supply well-planned and well-designed housing for individuals or families of low and very low income or families of moderate income;

(3) the housing sponsor is financially responsible;

(4) the housing sponsor is not, or will not enter into a contract for the proposed housing development with, a housing developer that:

(A) is on the Department's debarred list, including any parts of that list that are derived from the debarred list of the United States Department of Housing and Urban Development;

(B) breached a contract with a public agency; or

(C) misrepresented to a subcontractor the extent to which the developer has benefited from contracts or financial assistance that has been awarded by a public agency, including the scope of the developer's participation in contracts with the agency and the amount of financial assistance awarded to the developer by the agency;

(5) the financing of the housing development is a public purpose and will provide a public benefit; and

(6) the housing development will be undertaken within the authority granted by this chapter to the housing finance division and the housing sponsor.

(d) Representation by Former Board Member or Other Person.

(1) A former board member or a former director, deputy director, director of housing programs, director of compliance, director of underwriting, or Low Income Housing Tax Credit Program Manager employed by the Department may not:

(A) for compensation, represent an Applicant for an allocation of tax credits or a Related Party before the second anniversary of the date that the Board member's, director's, or manager's service in office or employment with the Department ceases;

(B) represent any Applicant or Related Party or receive compensation for services rendered on behalf of any Applicant or Related Party regarding the consideration of an Application in which the former board member, director, or manager participated during the period of service in office or employment with the Department, either through personal involvement or because the matter was within the scope of the board member's, director's, or manager's official responsibility; or for compensation, communicate directly with a member of the legislative branch to influence legislation on behalf of an Applicant or Related Party before the second anniversary of the date that the board member's, director's, or manager's service in office or employment with the Department ceases.

(2) A person commits an offense if the person violates this section. An offense under this section is a Class A misdemeanor.

§49.6. Regional Allocation Formula and Set-Asides.

(a) Regional Allocation Formula. As required by §2306.111 of the Texas Government Code, the Department will use a regional distribution formula developed by the Department to distribute credits from the State Housing Credit Ceiling. The formula will be based on the need for housing assistance, and the availability of housing resources, and the Department will use the information contained in the Department's annual state low income housing plan and other appropriate data to develop the formula. This formula will establish targeted tax credit amounts for each of the state service regions. Each region's targeted tax credit amount will be published in the Texas Register and on the Department's web site concurrently with the publication of the QAP.

(b) Set-Asides. The regional credit distribution amounts are additionally subject to the factors presented in paragraphs (1) - (5) of this subsection:

(1) At least 10% of the State Housing Credit Ceiling for each calendar year shall be allocated to Qualified Nonprofit Developments which meet the requirements of the Code, §42(h)(5). Qualified Nonprofit Organizations must have a controlling interest in the Qualified Nonprofit Development applying for this set-aside. If the organization's Application is filed on behalf of a limited partnership, the Qualified Nonprofit Organization must be the managing General Partner. If the organization's Application is filed on behalf of a limited liability company, the Qualified Nonprofit Organization must be the Managing Member.

(2) At least 15% of the State Housing Credit Ceiling for each calendar year shall be allocated to Developments which meet the Rural Development definition or are located in Prison Communities. Rural Developments applying for greater than 76 Units will be ineligible for the Rural Set-Aside. Of this 15% allocation, 25% will be set-aside for projects financed through Rural Development (TxRD-USDA). Projects financed through TxRD-USDA's 538 Guaranteed Rural Rental Housing Program will not be considered under the 25% portion. Should there not be sufficient qualified applications submitted for the TxRD-USDA set-aside, then the credits would revert to projects that meet the Rural Project definition or are located in Prison Communities.

(3) At least 15% of the State Housing Credit Ceiling will be allocated to the At-Risk Development Set-Aside. Through this set-aside, the Department, to the extent possible, shall allocate credits to Applications involving the preservation of developments designated as At-Risk Developments as defined in §49.2(14) of this title and in both urban and rural communities in approximate proportion to the housing needs of each uniform state service region.

(4) At least 60% of the State Housing Credit Ceiling will be allocated to General Set-Aside.

(5) At least 15% of the State Housing Credit Ceiling for each calendar year shall be allocated to Qualified Elderly Developments. Qualified Elderly Developments will not constitute an additional exclusive set-aside; however at least 15% of Developments allocated through the set-asides identified in paragraphs (1) - (4) of this subsection will also be Qualified Elderly Developments. Prior to making recommendations to the Board with respect to Applications which, if funded in accordance with such recommendations, would total, taking into account all Commitment Notices previously issued during the calendar year, at least 85% of the State Housing Credit Ceiling for such year, the Committee shall advise the Board as to the percentage of Qualified Elderly Developments which have received commitments or are recommended to receive commitments for the year.

(c) If any amount of housing tax credits remain after the initial allocation of housing tax credits among the regions and set-asides, the Department may redistribute the credits amongst the different regions and set asides depending on the quality of Applications submitted as evaluated under the factors described in §49.7(c) and (d) of this title and the level of demand exhibited in the regions during the Allocation Round. However as described in paragraph (1) of this subsection, no more than 90% of the State's Housing Credit Ceiling for the calendar year may go to Developments which are not Qualified Nonprofit Developments. If credits will be transferred from a region which does not have enough qualified applications to meet its regional credit distribution amount, then those credits will be apportioned to the other regions based on oversubscription in the other regions and the quality of the Applications. If forward commitments are approved by the Board, they shall be distributed with regard to the relative regional percentages established by the regional distribution formula. The Department will provide for the reallocation of tax credits as described in this subsection if any Commitment Notice is terminated.

§49.7. Pre-Application Evaluation Process and Criteria; Application Evaluation Process; Evaluation Factors; Tie Breaker Criteria; Threshold Criteria; Selection Criteria; Credit Amount; Limitations on the Size of Developments; Tax Exempt Bond Financed Developments; Adherence to Obligations; Amendment of Applications; Housing Tax Credit and Ownership Transfers.

(a) Pre-Application Evaluation Process and Criteria. Eligible Pre-Applications will be evaluated for Pre-Application Threshold Criteria, Pre-Application Selection Criteria, and as requested, adherence to the Subsection §49.9(b) of this title, in accordance with this section of the QAP and the Rules. Applications that have new TxRD-USDA financing for either new construction or rehabilitation, as evidenced by confirmation from the state office of TxRD, are exempted from the Pre-Application Evaluation Process and are not eligible to receive points for submission of a Pre-Application. Applications for rehabilitation of TxRD properties that do not have new financing from TxRD-USDA are not exempt from the Pre-Application Evaluation Process and are eligible to receive points for submission of a Pre-Application.

(1) Pre-Application Threshold Criteria and Review. Applicants submitting a Pre-Application will be required to submit information demonstrating their satisfaction of the Pre-Application Threshold Criteria. The Pre-Applications not meeting the Pre-Application Threshold Criteria will be returned to the Applicant without further review and with a written notice to the effect that the Pre-Application Threshold Criteria have not been met. The Department shall not be responsible for the Applicant's failure to meet the Pre-Application Threshold Criteria and any failure of the Department's staff to notify the Applicant of such inability to satisfy the Pre-Application Threshold Criteria shall not confer upon the Applicant any rights to which it would not other wise be entitled. The Pre-Application Threshold Criteria include:

(A) Submission of the Uniform Application and any other supporting forms required by the Department;

(B) Evidence of site control and site depiction as evidenced by the documentation required under subsection (e)(5)(A) and (3)(H)(i) of this section;

(C) Evidence of appropriate zoning or steps toward zoning as evidenced by the documentation required under subsection (e)(5)(B) of this section; and

(D) Evidence of notification to public officials as evidenced by the documentation required under subsection (e)(6)(B) of this section.

(2) Pre-Application Selection Criteria and Review. Only Pre-Applications which have satisfied all of the Pre-Application Threshold Criteria requirements set forth in paragraph (1) of this subsection and for which the Applicant has been found to be in compliance, will be reviewed according to the points scored under the Pre-Application Selection Criteria, which include all of the Selection Criteria, and supporting documentation to justify that Criteria, identified in subsection (f) of this section.

(3) While not required, an Applicant submitting a Pre-Application may also submit a Market Study, in accordance with subsection (e)(12)(B) of this section, if they would like the Department to review the Development as it relates to §49.9(b) of this title.

(4) Pre-Application Results and Rules. After the Pre-Applications have been reviewed for Pre-Application Threshold Criteria

and Pre-Application Selection Criteria, the Developments having satisfied the requirements of the Pre-Application Threshold Criteria will be released with their Pre-Application Selection Criteria scores, sorted by region. The order and scores of those Developments released on the Pre-Application log do not represent a commitment on the part of the Department or the Board to allocate tax credits to any Development and the Department bears no liability for decisions made by Applicants based on the results of the Pre-Application Log. Inclusion of a Development on the Pre-Application Log does not ensure that an Applicant will receive Bonus Points for a Pre-Application. To receive Bonus Points an Applicant must meet the requirements of subsection (f)(10) of this section.

(b) Application Evaluation Process. After eligible Applications have been evaluated, ranked and underwritten in accordance with this section of the QAP and the Rules, an application may be eligible for a recommendation to the Board as described in §49.4(g) of this title.

(1) Threshold Criteria Review. Applications will be initially evaluated against the Threshold Criteria. Applications not meeting Threshold Criteria will be terminated, unless the Department determines that the failure to meet the Threshold Criteria is the result of correctable deficiencies, in which event the Applicant shall be given an opportunity to correct such deficiencies. Applications not meeting Threshold Criteria will be rejected and will be returned to the Applicant without further review with a written notice to the effect that the Threshold Criteria have not been met. The Department shall not be responsible for the Applicant's failure to meet the Threshold Criteria, and any failure of the Department's staff to notify the Applicant of such inability to satisfy the Threshold Criteria shall not confer upon the Applicant any rights to which it would not otherwise be entitled. Applications will also be reviewed to ensure that they are not in violation of §49.9(b) of this title, relating to concentration.

(2) Selection Criteria Review. For an Application to be considered under the Selection Criteria, the Applicant must demonstrate that the Development meets all of the Threshold Criteria requirements set forth in subsection (e) of this section. Applications that satisfy the Threshold Criteria will then be scored and ranked according to the Selection Criteria listed in subsection (f) of this section. The Department may not award points for a scoring criterion that is disproportionate to the degree to which a proposed Development complied with that criterion. Applications not scored by the Department's staff shall be deemed to have the points allocated through self-scoring by the Applicants until actually scored. This shall apply only for ranking purposes.

(3) Underwriting Evaluation and Criteria. After the Application is scored under the Selection Criteria, the Department will assign the Development for evaluation of compliance status by the Department's compliance division and financial feasibility by the Department's credit underwriting division.

(A) The Department will evaluate compliance status and underwrite the Applications ranked under paragraph (2) of this subsection beginning with the Applications with the highest scores in each region and in each Set Aside identified in §49.6 of this title. Based on Application rankings, the Department shall continue to underwrite Applications until the Department has processed enough Applications satisfying the Department's underwriting criteria to enable the allocation of all available housing tax credits according to regional allocation goals and Set Aside categories. To enable the Board to establish a Waiting List, the Department shall underwrite as many additional Applications as the Committee and Board consider necessary to ensure that all available housing tax credits are allocated within the period required by law.

(B) Underwriting of the Development will include a determination by the Department, pursuant to the Code, §42, that the amount of credits recommended for allocation to a Development is necessary for the financial feasibility of the Development and its long-term viability as a qualified low income housing property. In making this determination, the Department will use the guidelines identified in §49.8 of this title and take into account:

(i) the Development's total development costs;

(ii) actual or Development's operating expenses and reserves for replacement;

(iii) Development's sources of financing;

(iv) proceeds from the syndication of the tax credits;

(v) the Development's debt coverage ratio; and

(vi) the Development's overall conformance with the Department's underwriting guidelines as described in §49.8 of this title.

(C) The Department may have an outside third party perform the underwriting evaluation to the extent it determines appropriate, consistent with the guidelines outlined in §49.8 of this title. The expense of any third party underwriting evaluation shall be paid by the Applicant prior to the commencement of the aforementioned evaluation.

(4) Site Evaluation. Site conditions shall be evaluated through a physical site inspection by Department staff. Such inspection will evaluate the site based on the Site Evaluation form provided in the Application and provide a site evaluation of "Excellent," "Acceptable," "Poor" or "Unacceptable". The evaluations shall be based on condition of the surrounding neighborhood and proximity to retail, medical, recreational, and educational facilities, and employment centers. The site's visibility to prospective tenants and accessibility of the site via the existing transportation infrastructure and public transportation systems shall be considered. "Unacceptable" sites would include a non-mitigable environmental factor that would impact the health and safety of the residents.

(c) Evaluation Factors. The Committee and Board may choose to evaluate the recommendations of credits for factors other than scoring for one or more of the following reasons:

(1) to serve a greater number of lower income families for fewer credits;

(2) to serve a greater number of lower income families for a longer period of time;

(3) to ensure the Development's consistency with local needs or its impact as part of a revitalization or preservation plan.

(4) to ensure the allocation of credits among as many different entities as practicable without diminishing the quality of the housing that is built as required under the Texas General Appropriations Act applicable to the Department.

(d) Tie Breaker Criteria. In the event that two or more Applications receive the same number of points in any given set-aside category and region and compare equally under the factors described in subsection (c) of this section, the Department will utilize the factors in paragraphs (1) - (9) of this subsection, in the order they are presented, to determine which Development will receive a preference in consideration for a tax credit commitment. As described by these paragraphs, preference in recommending credits for allocation will be given to Developments which are practicable and economically feasible, and which:

(1) serve persons with the lowest percentage of area median family income;

(2) serve low income tenants for the longest period of time, in the form of a longer Compliance Period and/or extended low income use period (as set forth in the LURA);

(3) is located in a Qualified Census Tract, the development of which contributes to a concerted community revitalization plan;

(4) has substantial community support as evidenced by the commitment of local public funds toward the construction, rehabilitation and acquisition and subsequent rehabilitation of the Development or use other funding sources to minimize the amount of subsidy needed to complete the Development;

(5) provides for the most efficient usage of the low income housing tax credit on a per Unit basis;

(6) has a Unit composition that provides the highest percentage of three bedrooms or greater sized Units;

(7) provides integrated, affordable accessible housing for individuals and families with different levels of income;

(8) provides the greatest number of quality residential units; or

(9) in the case of Applications involving preservation, support or approval by an association of residents of the multifamily housing development will be considered.

(e) Threshold Criteria. The following Threshold Criteria listed in paragraphs (1) - (12) of this subsection are mandatory requirements at the time of Application submission:

(1) Completion and submission of the Application provided in the Application Submission Procedures Manual, which includes the Uniform Application and any other supplemental forms which may be required by the Department. The Application, at a minimum, will include the names, company names, company contact persons, address and telephone number of any Persons, including Affiliates of those Persons and Related Parties, providing developmental or operations services to the Development including a Development Owner, an architect, an attorney, a tax professional, a property management company, a consultant, a market analyst, a tenant service provider, a syndicator, a real estate broker or agent or a person receiving a fee in connection with services usually provided by a real estate broker or agent, the owners of the property on which the Development is located at the time the Application is submitted, a developer, and a builder or general contractor.

(2) Completion and submission of the Site Packet as provided in the Application Submission Procedures Manual.

(3) Exhibit 101. Certifications and Design Items. The "Certification Form" provided in the Application Submission Procedures Manual and supporting documents. This exhibit will provide:

(A) A description of the type of amenities proposed for the development. If fees in addition to rent are charged for amenities reserved for an individual tenant's use (i.e. covered parking, storage, etc.), then the amenity may not be included among those provided to complete this exhibit. Developments with more than 36 units must provide at least four of the amenities provided in clauses (i) - (viii) of this subparagraph. Developments with 36 Units or less, Developments receiving funding from TxRD-USDA, and Preservation Developments must provide at least two of the amenities provided in clauses (i) - (viii) of this subparagraph. Any future changes in these amenities, or substitution of these amenities, may result in a decrease in awarded credits if the substitution or change includes a decrease in cost or in a cancellation of a Commitment Notice or Carryover Allocation if the Threshold Criteria are no longer met.

(i) Full perimeter fencing with controlled gate access;

(ii) designated playground and equipment;

(iii) community laundry room and/or laundry hook-ups in Units (no hook-up fees of any kind may be charged to a tenant for use of the hook-ups);

(iv) furnished community room;

(v) recreation facilities;

(vi) public telephone(s) available to tenants 24 hours a day;

(vii) on-site day care, senior center, or community meals room; or

(viii) computer facilities.

(B) A certification that the Development will adhere to the Texas Property Code relating to security devices and other applicable requirements for residential tenancies, and will adhere at a minimum to the International Building Code as it relates to access, lighting and life safety issues.

(C) A certification that the Applicant is in compliance with state and federal laws, including but not limited to, fair housing laws, including Chapter 301, Property Code, Title VIII of the Civil Rights Act of 1968 (42 U.S.C. Section 3601 et seq.), and the Fair Housing Amendments Act of 1988 (42 U.S.C. Section 3601 et seq.); the Civil Rights Act of 1964 (42 U.S.C. Section 2000a et seq.); the Americans with Disabilities Act of 1990 (42 U.S.C. Section 12101 et seq.); and the Rehabilitation Act of 1973 (29 U.S.C. Section 701 et seq.)

(D) A certification that the Applicant will attempt to ensure that at least 30% of the construction and management businesses with which the Applicant contracts in connection with the Development are Minority Owned Businesses, and that the Applicant will submit at least once in each 90-day period following the date of the Commitment Notice a report, in a format proscribed by the Department and provided at the time a Commitment Notice is received, on the percentage of businesses with which the Applicant has contracted that qualify as Minority Owned Businesses.

(E) A certification that the Development will comply with the accessibility standards that are required under Section 504, Rehabilitation Act of 1973 (29 U.S.C. Section 794), and specified under 24 C.F.R. Part 8, Subpart C. This includes that for all Developments, a minimum of five percent of the total dwelling Units or at least one Unit, whichever is greater, shall be made accessible for persons with mobility impairments. A Unit that is on an accessible route and is adaptable and otherwise compliant with sections 3-8 of the Uniform Federal Accessibility Standards (UFAS), meets this requirement. An additional two percent of the total dwelling Units, or at least one Unit, whichever is greater, shall be accessible for persons with hearing or visions impairments. Additionally, for Developments designed as Townhomes or other two-story dwelling Units, the Applicant must include one bedroom and one bathroom on the ground level of 20% of all Units for each Unit type, include a bathroom with at least a toilet and a sink on the ground level of all Units, and meet Fair Housing standards. At the construction loan closing a certification from an accredited architect will be required stating that the Development was designed in conformance with these standards and that all features have been or will be

installed to make the Unit accessible for persons with mobility impairments or persons with hearing or vision impairments. A similar certification will also be required after the Development is completed.

(F) A certification that the Development will adhere to the Department's Minimum Standard Energy Saving Devices in the construction of each tax credit Unit identified in clauses (i) - (vi) of this subparagraph, and that all Units must be air-conditioned. The devices must be certified by the Development architect as being included in the design of each tax credit Unit prior to the closing of the construction loan and in actual construction upon Cost Certification.

(i) Wall insulation at a minimum of R-15. Ceiling insulation at a minimum of R-30. Roof decking to have radiant barriers;

(ii) Energy Star rated heating and cooling systems, or in dry climates an evaporative cooling system may replace the Energy Star cooling system;

(iii) All appliances installed, including water heaters, to be Energy Star rated;

(iv) Maximum 2.5 gallon/minute showerheads and maximum 1.5 gallon/minute faucet aerators;

(v) If used, natural gas heating systems must have a minimum energy factor of 0.85; and

(vi) If recessed lighting is used, it must use either compact fluorescent lights or fluorescent tube lights.

(G) A certification that the Development will be built by a General Contractor that satisfies the requirements of the General Appropriation Act, Article VII, Rider 11(c) applicable to the Department which requires that the General Contractor hired by the Development Owner or the Applicant, if the Applicant serves as General Contractor, must demonstrate a history of constructing similar types of housing without the use of federal tax credits.

(H) All of the architectural drawings identified in clauses (i) - (vi) of this subparagraph. If documentation for clause (i) of this subparagraph was already submitted as part of a Pre-Application, and no alterations have been made to the document, then the Applicant is not required to submit this documentation in the Application. While full size design or construction documents are not required, the drawings must have an accurate and legible scale and show the dimensions:

(i) a drawing of the entire property that is under the control the prospective ownership entity, which must be a professionally generated (e.g. computer-generated or architectural draft; not a sketch) plat drawn to scale from a metes and bounds description;

(ii) a site plan which:

(I) is consistent with the number of Units and Unit mix specified in the "Rent Schedule" provided in the Application;

(II) identifies all residential, common buildings and proposed amenities; and

(III) clearly delineates the flood plain boundary lines and other easements shown in the site survey;

(iii) floor plans and elevations for each type of residential building;

(iv) floor plans and elevations for each type of common area building;

(v) unit floor plans for each type of Unit. The use of each room must be labeled. The net rentable areas these unit floor plans represent should be consistent with those shown in the "Rent Schedule" provided in the application; and

(vi) elevations of residential and common area buildings which include a percentage estimate of the exterior composition, i.e. 50% brick, 50% siding.

(I) Rehabilitation Developments must submit photographs of the existing signage, typical building elevations and interiors, existing Development amenities, and site work. These photos should clearly document the typical areas and building components which exemplify the need for rehabilitation.

(4) Exhibit 102. Evidence of the Development's development costs and corresponding credit request and syndication information as described in subparagraphs (A) - (G) of this paragraph.

(A) Exhibit 102A. A written narrative describing the financing plan for the Development, including any non-traditional financing arrangements; the use of funds with respect to the Development; the funding sources for the Development including construction, permanent and bridge loans, and rents, operating subsidies, and replacement reserves; and the commitment status of the funding sources for the Development. This information must be consistent with the information provided throughout the Application.

(B) Exhibit 102B. All Developments must submit the "Development Cost Schedule" provided in the Application Submission Procedures Manual. This exhibit must have been prepared and executed not more than 90 days prior to the close of the Application Acceptance Period.

(C) Exhibit 102C. "Cost of Syndication" Worksheet. A syndicator or financial consultant of the Applicant must provide an estimate of the amount of equity dollars expected to be raised for the Development in conjunction with the amount of housing tax credits requested for allocation to the applicant, including pay-in schedules, syndicator consulting fees and other syndication costs. If syndication costs are included in the eligible basis, a justification of the syndication costs for each cost category by an attorney or accountant specializing in tax matters must also be provided.

(D) Exhibit 102D. For Developments located in a Qualified Census Tract (QCT) as determined by the Secretary of HUD and qualifying for a 30% increase in Eligible Basis, pursuant to the Code, §42(d)(5)(C), Applicants must submit a copy of the census map clearly showing that the proposed Development is located within a QCT. Census tract numbers must be clearly marked on the map, and must be identical to the QCT number stated in the Department's Reference Manual.

(E) Exhibit 102E. Rehabilitation Developments must also submit the "Proposed Work Write Up for Rehabilitation Developments" provided in the Application Submission Procedures Manual. This form must be prepared and certified by a third party registered architect, professional engineer or general Contractor. Rehabilitation Developments must establish that the rehabilitation will be substantial and will involve at least $6,000 per unit in direct hard costs.

(F) Exhibit 102F. If offsite costs are included in the budget as a line item, or embedded in the site acquisition contract, or referenced in the utility provider letters, then the supplemental form "Off Site Cost Breakdown" must be provided.

(G) Exhibit 102G. If projected site work costs include unusual or extraordinary items or exceed $6,500 per unit, then the Applicant must provide a detailed cost breakdown prepared by a third party engineer or architect, and a letter from a certified public accountant allocating which portions of those site costs should be included in eligible basis and which ones are ineligible.

(5) Exhibit 103. Evidence of readiness to proceed as evidenced by at least one of the items under each of subparagraphs (A) - (E) of this paragraph:

(A) Exhibit 103A. Evidence of site control in the name of the ownership entity, or entities which comprise the Applicant. If the evidence is not in the name of the Development Owner, then the documentation should reflect an expressed ability to transfer the rights to the Development Owner. If this documentation was already submitted as part of a Pre-Application, and no alterations have been made to the documents, then the Applicant is not required to submit this documentation in the Application. One of the following items described in clauses (i) - (iii) of this subparagraph must be provided:

(i) a recorded warranty deed; or

(ii) a contract for sale or lease (the minimum term of the lease must be at least 45 years) which is valid through July 31, 2002 or at least 90 days, whichever is greater; or

(iii) an exclusive option to purchase which is valid for the entire period the Development is under consideration for tax credits or at least 90 days, whichever is greater.

(B) Exhibit 103B. Evidence from the appropriate local municipal authority that satisfies one of clauses (i) - (iii) of this subparagraph. Documentation must have been prepared and executed not more than 90 days prior to the close of the Application Acceptance Period. If this documentation was already submitted as part of a Pre-Application, and no alterations have been made to the documents, then the Applicant is not required to submit this documentation in the Application.

(i) a letter from the chief executive officer of the political subdivision or another local official with appropriate jurisdiction stating that the Development is located within the boundaries of a political subdivision which does not have a zoning ordinance;

(ii) a letter from the chief executive officer of the political subdivision or another local official with appropriate jurisdiction stating that:

(I) the Development is permitted under the provisions of the ordinance that apply to the location of the Development; or

(II) the Applicant is in the process of seeking the appropriate zoning and has signed and provided to the political subdivision a release agreeing to hold the political subdivision and all other parties harmless in the event that the appropriate zoning is denied.

(iii) In the case of a rehabilitation Development, if the property is currently a non-conforming use as presently zoned, a letter which discuss the items in subclauses (I) - (IV) of this clause:

(I) a detailed narrative of the nature of non-conformance;

(II) the applicable destruction threshold;

(III) owner's rights to reconstruct in the event of damage; and

(IV) penalties for noncompliance.

(C) Exhibit 103C. This Exhibit is required for New Construction only. Evidence of the availability of all necessary utilities/services to the development site. Necessary utilities include natural gas (if it will be utilized by the Development), electric, trash, water, and sewer. Such evidence must be a letter or a monthly utility bill from the appropriate municipal/local service provider. If utilities are not already accessible, then the letter must clearly state: an estimated time frame for provision of the utilities, an estimate of the infrastructure cost, and an estimate of any portion of that cost that will be borne by the developer. Letters must be from an authorized individual representing the organization which actually provides the services. Such documentation should clearly indicate the address of the proposed site If utilities are not already accessible (undeveloped areas), then the letter should not be older than three months from the first day of the Application Acceptance Period.

(D) Exhibit 103D. Evidence of interim and permanent financing sufficient to fund the proposed Total Housing Development Cost less any other funds requested from the Department and any other sources documented in the Application. Such evidence must be consistent with the sources and uses of funds represented in the Application and shall be provided in one or more of the following forms described in clauses (i) - (iv) of this subparagraph:

(i) bona fide financing in place as evidenced by a valid and binding loan agreement and a deed(s) of trust in the name of the ownership entity which identifies the mortgagor as the Applicant or entities which comprise the general partner and/or expressly allows the transfer to the Proposed Development Owner; or,

(ii) bona fide commitment or term sheet issued by a lending institution or mortgage company that is actively and regularly engaged in the business of lending money which is addressed to the ownership entity, or entities which comprise the Applicant and which has been executed and accepted by both parties (the term of the loan must be for a minimum of 15 years with at least a 30 year amortization). The commitment must state an expiration date. Such a commitment may be conditional upon the completion of due diligence by the lender and upon the award of tax credits; or,

(iii) any Federal, State or locally subsidized gap financing of soft debt must be identified at the time of application. At a minimum, evidence from the lending agency that an application for funding has been made and a term sheet which clearly describes the amount and terms of the funding must be submitted. While evidence of application for funding from another TDHCA program is not required (as these funds will be presented to the Board concurrently with the recommendation for tax credits), the Applicant must clearly indicate that such an application has been filed as required by the Application Submission Procedures Manual. If the necessary financing has not been committed by the applicable lending agency, the Commitment Notice, Housing Credit Allocation or Determination Notice, as the case may be, will be conditioned upon Applicant obtaining a commitment for the required financing by a date certain; or

(iv) if the Development will be financed through Development Owner contributions, provide a letter from an independent CPA verifying the capacity of the Applicant to provide the proposed financing with funds that are not otherwise committed together with a letter from the Applicant's bank or banks confirming that sufficient funds are available to the Applicant. Documentation must have been prepared and executed not more than 90 days prior to the close of the Application Acceptance Period.

(E) Exhibit 103E. A copy of the full legal description and either of the documents described in clauses (i) and (ii) of this subparagraph, and satisfying the requirements of clause (iii), if applicable:

(i) a copy of the current title policy which shows that the ownership (or leasehold) of the land/Development is vested in the exact name of the Applicant, or entities which comprise the Applicant; or

(ii) a copy of a current title commitment with the proposed insured matching exactly the name of the Applicant or entities which comprise the Applicant and the title of the land/Development

vested in the name of the exact name of the seller or lessor as indicated on the sales contract or lease.

(iii) if the title policy or title commitment is more than six months old as of the day the Application Acceptance Period closes, than a letter from the title company indicating that nothing further has transpired on the policy or commitment.

(6) Exhibit 104. Evidence of all of the notifications described in subparagraphs (A) - (D) of this paragraph. Such notices must be prepared in accordance with "Exhibit 104, Pre-Application Public Notifications" provided in the Application Submission Procedures Manual.

(A) Exhibit 104A. A copy of the public notice published in a widely circulated newspaper in the area in which the proposed Development will be located. Such notice must run at least twice within a thirty day period. The notice should not run on holidays or weekends. Such notice must be published prior to the submission of the Application to the Department and can not be older than three months from the first day of the Application Acceptance Period. In communities located in close proximity to a larger metropolitan area and whose citizens may subscribe to a local newspaper as well as a widely circulated metropolitan newspaper, the notice should be published in both newspapers.

(B) Exhibit 104B. Evidence of notification of the local chief executive officer(s) (i.e., mayor and county judge), state senator, and state representative of the locality of the Development. Evidence of such notification shall include a letter which at a minimum contains a copy of the public notice sent to the official and proof of delivery in the form of a certified mail receipt, overnight mail receipt, or confirmation letter from said official. Proof of notification should not be older than three months from the first day of the Application Acceptance Period. If this documentation was already submitted as part of a Pre-Application, and no alterations have been made to the documents, then the Applicant is not required to submit this documentation in the Application.

(C) Exhibit 104C. If any of the units in the Development are occupied at the time of application, then the Applicant must post a copy of the public notice in a prominent location at the Development throughout the period of time the Application is under review by the Department. A picture of this posted notice must be provided with this exhibit. When the Department's public hearing schedule for comment on submitted applications becomes available, a copy of the schedule must also be posted until such hearings are completed. Compliance with these requirements shall be confirmed during the Department's site inspection.

(D) Exhibit 104D. Public Housing Waiting List. Evidence that the Development Owner has committed in writing to the local public housing authority (PHA) the availability of Units and that the Development Owner agrees to consider households on the PHA's waiting list as potential tenants and that the Property is available to Section 8 certificate or voucher holders. Evidence of this commitment must include a copy of the Development Owner's letter to the PHA and proof of delivery in the form of a certified mail receipt, overnight mail receipt, or confirmation letter from said PHA. Proof of notification should not be older than three months from the first day of the Application Acceptance Period. If no PHA is within the locality of the Development, the Development Owner must utilize the nearest authority or office responsible for administering Section 8 programs.

(7) Exhibit 105. Evidence of the Development's ownership structure and the Applicant's previous experience as described in subparagraphs (A) - (E) of this paragraph. The 2002 versions of these forms must be submitted.

(A) Exhibit 105A. A chart which clearly illustrates the complete organizational structure of the Development Owner. This chart should provide the names and ownership percentages of Persons with an ownership interest in the Development. The percentage ownership of all Persons in Control of these entities and sub-entities must also be clearly defined.

(B) Exhibit 105B. The Applicant, General Partner (or Managing Member) and all Persons with an ownership interest in the General Partner (or the Managing Member) of these entities and sub-entities must also provide documentation of standing to include the following documentation as applicable under clauses (i) - (iii) of this subclause.

(i) For entities that are not yet formed:

(I) a certificate of reservation of the entity name from the Texas Secretary of State; and

(II) an executed letter of intent to organize, statement of partnership or partnership agreement.

(ii) For existing entities:

(I) if the entity has been formed for three months or longer, a copy of the Certificate of Good Standing from the State Comptroller showing good standing; if the entity has been formed for less than three months, a certificate of reservation of the entity name from the Texas Secretary of State,

(II) a copy of the Articles of Incorporation, Organization or Partnership.

(iii) the Applicant must provide evidence that the signer(s) of the Application have the authority to sign on behalf of the Applicant in the form of a corporate resolution or by-laws which indicate same from the sub-entity in Control of the Applicant, and that those persons constitute all persons required to sign or submit such documents.

(C) Exhibit 105C. A copy of the completed and executed "Exhibit 105C, Previous Participation and Background Certification Form," which is provided in the Application Submission Procedures Manual must be submitted for each Person owning an interest in the general partner (or, if Applicant is to be a limited liability company, the managing member) of the Applicant. If the developer of the Development is receiving more than 10% of the developer fee, he/she will also be required to submit documents for this exhibit.

(D) Exhibit 105D. Evidence that each Person owning an interest in the general partner (or if Applicant is to be a limited liability company, the managing member) of the Applicant has sent "Exhibit 105D, National Previous Participation and Background Certification Form," to the appropriate Housing Credit Agency for each state in which they have developed or operated affordable housing. This form is only necessary when the Developments involved are outside of the state of Texas. An original form is not required. Evidence of such notification shall be a copy of the form sent to the agency and proof of delivery in the form of a certified mail receipt, overnight mail receipt, or confirmation letter from said agency.

(E) Exhibit 105E. Evidence that the Development Owner's general partner, partner (or if Applicant is to be a limited liability company, the managing member) General Contractor or their principals have a record of successfully constructing or developing residential units or comparable commercial property (i.e. dormitory and hotel/motel) in the capacity of owner, general partner, managing member or General Contractor. If the General Contractor's experience is being claimed for this exhibit, then the Development Owner must request the Department's approval prior to replacing the General

Contractor. If rehabilitation experience is being claimed to qualify for an Application involving new construction, then the rehabilitation must have been substantial and involved at least $6,000 of direct hard cost per unit.

(i) The term "successfully" is defined as acting in a capacity as the general contractor or developer of:

(I) at least 100 residential units or comparable commercial property; or

(II) at least 36 residential units or comparable commercial property if the Development applying for credits is a Rural Development.

(ii) Evidence must be one of the following documents:

(I) A certification from the Department that the Person with the experience satisfies this exhibit. Applicants who have previously applied for a Tax Credit Allocation must request this certification at least seven days prior to the beginning of the Application Acceptance Period. Applicants should ensure that the individual whose name is on the certification appears in the organizational chart provided in Exhibit 105A. If the certification is for the General Contractor, then this should be clearly indicated on the document.

(II) If the Department has not previously certified that the experience of the Development Owner, general partner, managing member or General Contractor qualifies for this exhibit, then one of the following documents must be submitted: American Institute of Architects (AIA) Document A111--Standard Form of Agreement Between Owner & Contractor, AIA Document G704--Certificate of Substantial Completion, IRS Form 8609, HUD Form 9822, development agreements, partnership agreements, or other appropriate documentation verifying that the general partner, General Contractor or their principals have the required experience. If submitting the IRS Form 8609, only one form per Development is required. The evidence must clearly indicate:

(-a-) that the Development has been completed (i.e. Development Agreements, Partnership Agreements, etc. must be accompanied by certificates of completion.);

(-b-) that the names on the forms and agreements tie back to the ownership entity, general partner, general contractor and their respective principals as listed in the Application; and

(-c-) the number of units completed or substantially completed.

(8) Exhibit 106. Evidence of the Development's projected income and operating expenses as described in subparagraphs (A) - (D) of this paragraph:

(A) All Developments must provide a 15-year proforma estimate of operating expenses and supporting documentation used to generate projections (excerpts from the market study, operating statements from comparable properties, etc).

(B) If rental assistance, an operating subsidy, an annuity, or an interest rate reduction payment is proposed to exist or continue for the Development, any related contract or other agreement securing those funds must be provided, which at a minimum identifies the source and annual amount of the funds, the number of Units receiving the funds, and the term and expiration date of the contract or other agreement.

(C) Applicant must provide documentation from the source of the "Utility Allowance" estimate used in completing the Rent Schedule provided in the Application. This exhibit must clearly indicate which utility costs are included in the estimate. If there is more than one entity (Section 8 administrator, public housing authority) responsible for setting the utility allowance(s) in the area of the Development location, then the Utility Allowance selected must be the one which most closely reflects the actual utility costs in that Development area. In this case, documentation from the local utility provider supporting the selection must be provided.

(D) Occupied Developments undergoing rehabilitation must also submit the items described in clauses (i) - (iv) of the subparagraph.

(i) If the current property owner is unwilling to provide the required documentation, then a signed statement as to their unwillingness to do so is required.

(I) historical monthly operating statements of the subject Development for 12 consecutive months ending not more than 45 days prior to the first day of the Application Acceptance Period. In lieu of the monthly operating statements, two annual operating statement summaries may be provided. If 12 months of operating statements or two annual operating summaries can not be obtained, then the monthly operating statements since the date of acquisition of the Development and any other supporting documentation used to generate projections may be provided; and

(II) a rent roll not more than 90 days old as of the day the Application Acceptance Period closes, that discloses the terms and rate of the lease, rental rates offered at the date of the rent roll, Unit mix, tenant names or vacancy, and dates of first occupancy and expiration of lease.

(ii) a written explanation of the process used to notify and consult with the tenants in preparing the application;

(iii) a relocation plan outlining relocation requirements and a budget with an identified funding source; and

(iv) if applicable, evidence that the relocation plan has been submitted to the appropriate legal agency.

(9) Exhibit 107. Applications involving Nonprofit General Partners and Qualified Nonprofit Developments.

(A) All Applicants involving a nonprofit general partner (or Managing Member), regardless of the set-aside applied under, must submit all of the documents described in clauses (i) - (iii) of this subparagraph which confirm that the Applicant is a Qualified Nonprofit Organization pursuant to Code, §42(h)(5)(C):

(i) an IRS determination letter which states that the Qualified Nonprofit Organization is a 501(c)(3) or (4) entity;

(ii) a copy of the articles of incorporation of the nonprofit organization which specifically states that the fostering of affordable housing is one of the entity's exempt purposes;

(iii) "Exhibit 107A, Nonprofit Participation Exhibit"; and

(B) Additionally, all Applicants applying under the Nonprofit Set-Aside, as defined by the Code, §42(h)(5), must also provide the following information with respect to each Development Owner and each general partner of a Development Owner, as described in clauses (i) - (vii) of this subparagraph.

(i) evidence that one of the exempt purposes of the nonprofit organization is to provide low income housing;

(ii) evidence that the nonprofit organization prohibits a member of its board of directors, other than a chief staff member serving concurrently as a member of the board, from receiving material compensation for service on the board;

(iii) a third-party legal opinion stating that the nonprofit organization is not affiliated with or controlled by a for-profit organization and the basis for that opinion;

(iv) a copy of the nonprofit organization's most recent audited financial statement;

(v) a list of the names and home addresses of members of the board of directors of the nonprofit organization;

(vi) a third-party legal opinion stating that the nonprofit organization is eligible, as further described, for a housing tax credit allocation from the nonprofit set-aside and the basis for that opinion. Eligibility is contingent upon the non-profit organization controlling a majority of the Development, or if the organization's Application is filed on behalf of a limited partnership, or limited liability company, be the managing partner (or Managing Member); and otherwise meet the requirements of the Code, §42(h)(5); and

(vii) evidence, in the form of a certification, that a majority of the members of the nonprofit organization's board of directors principally reside:

(I) in this state, if the Development is located in a rural area; or

(II) not more than 90 miles from the Development in the community in which the Development is located, if the Development is not located in a rural area.

(10) Exhibit 108. Applicants applying for acquisition credits or affiliated with the seller must provide all of the documentation described in subparagraphs (A) - (C) of this paragraph. Applicants applying for acquisition credits must also provide the items described in subparagraph (D) of this paragraph and as provided in the Application Submission Procedures Manual.

(A) an appraisal, not more than 6 months old as of the day the Application Acceptance Period closes, which complies with the Uniform Standards of Professional Appraisal Practice and the Department's Market Analysis and Appraisal Policy. This appraisal of the Property must separately state the as-is, pre-acquisition or transfer value of the land and the improvements where applicable;

(B) a valuation report from the county tax appraisal district;

(C) clear identification of the selling Persons or entities, and details of any relationship between the seller and the Applicant or any Affiliation with the Development Team, Qualified Market Analyst or any other professional or other consultant performing services with respect to the Development. If any such relationship exists, complete disclosure and documentation of the related party's original acquisition and holding costs since acquisition to justify the proposed sales price must also be provided; and

(D) "Exhibit 108D, Acquisition of Existing Buildings Form."

(11) Exhibit 109. Evidence of the Applicant's, or any person with an ownership interest in the General Partner (or Managing Member), financial status as provided by both documents described in subparagraphs (A) and (B) of this paragraph and as provided in the Application Submission Procedures Manual. If the developer of the Development is receiving a development fee of 10% or more of total development costs, he/she will also be required to submit documents for this exhibit. Such evidence must be filed separately from the volume containing the Threshold Criteria and placed in a large envelope labeled as Exhibit 109, as instructed in the Application Submission Procedures Manual.

(A) Exhibit 109A. A Personal Financial and Credit Statement completed and signed by each Person with a general partner (or if Applicant is to be a Limited Liability Company, managing member) interest in the Applicant. Applicant's statement must not be older than 90 days from the first day of the Application Acceptance Period. If submitting partnership and corporate financials in addition to the individual statements, the certified financial statements should not be older than 12 months. This document is required for an entity even if the entity is wholly-owned by a person who has submitted this document as an individual.

(B) Exhibit 109B. Authorization to Release Credit Information must be completed by all Persons with an ownership interest in the Applicant.

(12) Supplemental Threshold Reports. Documents under subparagraphs (A) and (B) must be submitted as further clarified in subparagraphs (C) and (D) of this paragraph and §49.9 of this title.

(A) Exhibit 110. A Phase I Environmental Site Assessment (ESA) on the subject Property, dated not more than 12 months prior to the first day of the Application Acceptance Period. In the event that a Phase I Environmental Site Assessment on the Development is older than 12 months as of the day the Application Acceptance Period closes, the Development Owner must supply the Department with an update letter from the Person or organization which prepared the initial assessment; provided however, that the Department will not accept any Phase I Environmental Site Assessment which is more than 24 months old as of the day the Application Acceptance Period closes. The ESA must be prepared in accordance with the policies provided in §49.9 of this title. The ESA must contain a FEMA panel with the site precisely superimposed on the map and a copy of the cover of the FEMA map panel, showing the panel number. If the Development is identified as being in a flood plain, the Applicant must also provide a written explanation of what portion of the Development will be located in the flood plain (i.e., filled, used as parking, used as green space).

(B) Exhibit 111. A comprehensive Market Study prepared at the developer's expense by a disinterested Qualified Market Analyst in accordance with the Market Analysis and Appraisal Policy provided in §49.9 of this title. In the event that a Market Study on the Development is older than 6 months as of the day the Application Acceptance Period closes, the Development Owner must supply the Department with an updated Market Study from the Person or organization which prepared the initial report; provided however, that the Department will not accept any Market Study which is more than 12 months old as of the day the Application Acceptance Period closes . The Market Study should be prepared for and addressed to the Department.

(i) The Department may determine from time to time that information not requested in the Third Party Market Study Standards will be relevant to the Department's evaluation of the need for the Development and the allocation of the requested Housing Credit Allocation Amount. The Department may request additional information from the Qualified Market Analyst to meet this need.

(ii) All Applicants shall acknowledge by virtue of filing an Application that the Department shall not be bound by any such opinion or the Market Study itself, and may substitute its own analysis and underwriting conclusions for those submitted by the Qualified Market Analyst.

(C) Inserted at the front of each of these reports must be a transmission letter from the person preparing the report that states that the Department is granted full authority to rely on the findings and conclusions of the report.

(D) The requirements for each of the reports identified in subparagraphs (A) and (B) of this paragraph can be satisfied in either of the methods identified in clauses (i) or (ii) of this subparagraph.

(i) Upon Application submission, the documentation for each of these exhibits may be submitted in its entirety as described in subparagraphs (A) and (B) of this paragraph; or

(ii) Upon Application submission, the Applicant may provide evidence in the form of an executed engagement letter with the party performing each of the individual reports that the required exhibit has been commissioned to be performed and that the delivery date will be no later than March 29, 2002. Subsequently, the entire exhibit must be submitted on or before 5:00 p.m. CST, March 29, 2002. If the entire exhibit is not received by that time, the Application will be terminated for a Material Deficiency and will be removed from consideration.

(f) Selection Criteria. All Applications will be ranked according to the Selection Criteria listed in paragraphs (1) - (11) of this subsection. If this documentation was already submitted as part of a Pre-Application, and no alterations have been made to the documents, then the Applicant is not required to submit this documentation in the Application.

(1) Exhibit 201, Development Location Characteristics. Evidence, not more than 90 days old from the date of the Application Acceptance Period, that the subject Property is located within one of the geographical areas described in subparagraphs (A) - (E) of this paragraph. Areas qualifying under any one of the subparagraphs (A) - (E) of this paragraph will receive 5 points. A Development may only receive points under one of the subparagraphs (A) - (E) of this paragraph. A Development may receive points pursuant to subparagraph (F) of this paragraph in addition to any points awarded in subparagraphs (A) - (E).

(A) A geographical area which is:

(i) a Targeted Texas County (TTC) or Economically Distressed Area; or

(ii) a Colonia.

(B) a designated state or federal empowerment/enterprise zone, urban enterprise community, or urban enhanced enterprise community. Such Developments must submit a letter and a map from a city/county official verifying that the proposed Development is located within such a designated zone. Letter should be no older than 90 days from the first day of Application Acceptance Period; or

(C) a city-sponsored Tax Increment Financing Zone (TIF), Public Improvement District (PIDs), or other area or zone where a city or county has, through a local government initiative, specifically encouraged or channeled growth, neighborhood preservation or redevelopment. Significant incentives or benefits must be received from the local government which amount to at least 5% of the Total Development Costs. Such Developments must submit all of the following documentation: a letter from a city/county official verifying that the proposed Development is located within the city sponsored zone or district; a map from the city/county official which clearly delineates the boundaries of the district; and a certified copy of the appropriate resolution or documentation from the mayor, local city council, county judge, or county commissioners court which documents that the designated area was:

(i) created by the local city council/county commission,

(ii) targets a specific geographic area which was not created solely for the benefit of the Applicant, and

(iii) offers tangible and significant area-specific incentives or benefit over and above those normally provided by the city or county.

(D) a Development which is located in a QCT or a "Difficult Development Area" as specifically designated by the Secretary of HUD, and contributes to a concerted community revitalization plan. To qualify for these points, the Development Owner, in addition to submitting Exhibit 102 (B), must also submit a letter from a city/county official which verifies that the Development is located in a Qualified Census Tract as defined by HUD, effective January 1, 2002, or a DDA, and provides a detailed description of the revitalization plan under way in the community, including how the Development contributes to such concerted revitalization efforts.

(E) a non-impacted Census Block pursuant to the Young vs. Martinez judgement. Such Developments must submit evidence in the form of a certification from HUD that the Development is located in such an area.

(F) a Development which is located in a city or county with a relatively low ratio of awarded tax credits (in dollars) to its population. If the Development is located in an incorporated city, the city ratio will be used and if the Development is located outside of an incorporated city, then the county ratio will be used. Such ratios shall be calculated by the Department based on its inventory of tax credit developments and the 2000 Census Data. In the event that census data does not have a figure for a specific place, the Department will rely on the Texas State Data Center's place population estimates, or as a final source the Department will rely on the local municipality's most recent population estimate to calculate the ratio. The ratios will be published in the Reference Manual. Geographic area will be eligible for points as described in clauses (i) - (iv) of this subparagraph.

(i) A city or county with no LIHTC developments will receive six points.

(ii) A city or county with a ratio greater than zero and less than one will receive four points.

(iii) A city or county with a ratio equal to or greater than one, but less than two, will receive two points.

(iv) A city or county with a ratio greater than four, will have four points deducted from its score.

(2) Housing Needs Characteristics. Each Development, dependent on the city or county where it is located, will yield a score based on the Uniform Housing Needs Scoring Component. If a Development is in an incorporated city, the city score will be used. If a Development is outside the boundaries of an incorporated city, then the county score will be used. The listing of those scores by city and county will be published in the Reference Manual (20 points maximum).

(3) Exhibit 202. Support and Consistency with Local Planning. All documents must not be older than 90 days from the first day of the Application Acceptance Period.

(A) Evidence from the local municipal authority stating that the Development fulfills a need for additional affordable rental housing as evidenced in a local consolidated plan, comprehensive plan, or other local planning document. If the municipality does not have such a planning document, then a letter from the local municipal authority stating that there is no local plan and that the city supports the Development must be submitted (6 points).

(B) Community Support. Points will be awarded based on the written statements of support from local and state elected officials representing constituents in areas that include the location of the

Development. Letters of support must identify the specific Development and must specifically state the officials support of the Development at the proposed location. This documentation must be provided as part of the Application. Letters of support from state officials that do not represent constituents in areas that include the location of the Development will not qualify for points under this Exhibit. Letters of support received after the close of the Application Acceptance Period will not be accepted for this Exhibit. Points can be awarded for letters of support as identified in clauses (i) and (ii) of this subparagraph (maximum 4 points):

(i) from State of Texas Representative or Senate Member (1 point each, maximum of 2 points); and

(ii) from the Mayor, County Judge, City Council Member, or County Commissioner indicating support; or a resolution from the local governing entity indicating support of the Development (2 points)

(C) Points will be awarded based on the written statements of support from neighborhood and/or community civic organizations for areas that encompass the location of the Development. Letters of support must identify the specific Development and must specifically state the organization's support of the Development at the proposed location. This documentation must be provided as part of the Application. Letters of support from organizations that are not active in the area including the location of the Development will not qualify for points under this Exhibit. Letters of support received after the close of the Application Acceptance Period will not be accepted for this Exhibit. (1 point each, maximum of 2 points.)

(4) Development Characteristics. Developments may receive points under as many of the following subparagraphs as are applicable. This minimum requirement does not apply to Developments involving rehabilitation or Developments receiving funding from TxRD-USDA. To qualify for points under subparagraphs (D) - (H) of this paragraph, the Development must first meet the minimum requirements identified under subparagraph (A) of this paragraph.

(A) Unit Size. The square feet of all of the units in the Development, for each type of unit, must be at minimum:

(i) 500 square feet for an efficiency unit;

(ii) 750 square feet for a non-elderly one bedroom unit; 550 square feet for an elderly one bedroom unit;

(iii) 900 square feet for a two bedroom unit; 750 square feet for an elderly two bedroom unit;

(iv) 1,000 square feet for a three bedroom unit; and

(v) 1,100 square feet for a four bedroom unit.

(B) Exhibit 203. Evidence that the Development to be purchased qualifies as a federally assisted building within the meaning of the Code, §42(d)(6)(B), and is in danger of having the mortgage assigned to HUD, TxRD-USDA, or creating a claim on a federal mortgage insurance fund (such evidence must be a letter from the institution to which the Development is in danger of being assigned); OR evidence that the Applicant is purchasing(ed) a Property owned by HUD, an insured depository institution in default, or a receiver or conservator of such an institution, or is an REO Property or other existing Property which is being rehabilitated as part of a community revitalization plan. Such evidence must be in the form of a binding contract to purchase from such federal or other entity as described in this subparagraph, closing statements, or recorded warranty deed, not more than 6 months old from the first day of the Application Acceptance Period. For an existing Development which is part of a community revitalization plan, documentation must include a letter from the city/county which verifies that the Development is part of a community revitalization plan and provides a detailed description of the contribution to the revitalization plan (5 points).

(C) Exhibit 204. Evidence that the Development is an At-Risk Development. Applicant shall also provide a statement as to its willingness to maintain low-income use restrictions for the period applicable to the type of HUD assistance involved, and the actions taken or required by it in order to assure that the HUD assistance will continue to be provided to the Development (8 points).

(D) Development provides Units for housing individuals with children. To qualify for these points, these Units must have at least 2 bathrooms and no fewer than three bedrooms and at least 1000 square feet of net rentable area for three bedroom Units or 1200 square feet of net rentable area for four bedroom Units; these Unit size and bathroom requirements are not required for Developments involving rehabilitation to be eligible for the points below. Unless the building is served by an elevator, 3 or 4 bedroom Units located above the building's second floor will not qualify for these points. If the Development is a mixed-income development, only tax credit Units will be used in computing the percentage of qualified Units for this selection item.

(i) 15% of the Units in the Development are three or four bedrooms (5 points); and

(ii) an additional point will be awarded for each additional 5% increment of Units that are three or four bedrooms up to 30% of the Units (a maximum of three points) (3 points).

(E) Cost per Square Foot. For this exhibit hard costs shall be defined as construction costs, including contractor profit, overhead and general requirements. The calculation will be hard costs per square foot of net rentable area (NRA). The calculations will be based on the hard cost listed in Exhibit 102B and NRA shown in the Rent Schedule of the Application. Developments do not exceed $60 per square foot. (1 point).

(F) Exhibit 205. Unit Amenities and Quality. Developments providing specific amenity and quality features in every Unit at no extra charge to the tenant will be awarded points based on the point structure provided in clauses (i) - (xiv) of this subparagraph, not to exceed 10 points in total. Developments involving rehabilitation will double the points listed for each item, not to exceed 10 points in total.

(i) Lighting Package: Includes heat light and vent fans in all bathrooms and all rooms have ceiling fixtures with accessible wall switches (1 point);

(ii) Kitchen Amenity Package: Includes microwave, disposal, dish washer, range/oven, fan/hood, and refrigerator (1 point);

(iii) Covered entries (1 point);

(iv) Computer line/phone jack available in all bedrooms (only one phone line needed) (1 point);

(v) Mini blinds or window coverings for all windows (1 point);

(vi) Ceramic tile floors in entry, kitchen and bathrooms (2 point);

(vii) laundry connections (1 point);

(viii) storage area (1 point);

(ix) Laundry equipment (washers and dryers) in units (3 point);

(x) Twenty-five year architectural shingle roofing (1 point);

(xi) Covered patios or balconies (1 point);

(xii) Covered parking (2 points);

(xiii) Garages (3 points);

(xiv) Greater than 75% masonry on exterior (3 points);

(G) The proposed Development provides housing density of no more than 42 Units per acre for multi-story elderly or urban infill Developments and no more than 24 Units per acre for all other Developments, as follows:

(i) 34 Units per acre or less for multi-story elderly or urban infill developments, or 16 Units or less per acre for all other Developments (6 points); or

(ii) 35 to 38 Units per acre for multi-story elderly or urban infill developments, or 17 to 20 Units per acre for all other Developments (4 points); or

(iii) 39 to 42 Units per acres for multi-story elderly or urban infill developments, 21 to 24 Units per acre for all other Developments (2 points).

(H) Exhibit 206. The Development is an existing Residential Development without maximum rent limitations or set-asides for affordable housing. If maximum rent limitations had existed previously, then the restrictions must have expired at least one year prior to the date of Application to the Department (4 points).

(I) The Development is a mixed-income development comprised of both market rate Units and qualified tax credit Units. To qualify for these points, the project must be located in a submarket where the average rents based on the number of bedrooms for comparable market rate units are at least 10% higher on a per net rentable square foot basis than the maximum allowable rents under the Program. Additionally, excluding 4-bedroom Units, the proposed rents for the market rate units in the project must be at least 5% higher on a per net rentable square foot basis than the maximum allowable rents under the Program. The Market Study required by subsection (e)(12)(B) of this section must provide an analysis of these requirements for each bedroom type shown in proposed unit mix. Points will be awarded to Development's with a Unit based Applicable Fraction which is no greater than:

(i) 80% (8 points); or,

(ii) 85% (6 points); or,

(iii) 90% (4 points); or

(iv) 95% (2 points).

(J) Exhibit 207. Evidence that the proposed historic Residential Development has received an historic property designation by a federal, state or local Governmental Entity. Such evidence must be in the form of a letter from the designating entity identifying the Development by name and address and stating that the Development is:

(i) listed in the National Register of Historic Places under the United States Department of the Interior in accordance with the National Historic Preservation Act of 1966;

(ii) located in a registered historic district and certified by the United States Department of the Interior as being of historic significance to that district;

(iii) identified in a city, county, or state historic preservation list; or

(iv) designated as a state landmark (6 points).

(K) The Development consists of not more than 36 Units and is not a part of, or contiguous to, a larger Development (5 points).

(L) Exhibit 208. Evidence that the proposed Development is partially funded by a HOPE VI, Section 202 or Section 811 grant from HUD. The Project must have already received the commitment from HUD. Submission of a HOPE VI, Section 202 or Section 811 grant application to HUD does not qualify a Development for these points. Evidence shall include a copy of the commitment letter from HUD indicating the HOPE VI, Section 202 or Section 811 grant terms and grant award amount (5 points).

(5) Sponsor Characteristics. Developments may only receive points for one of the two criteria listed in subparagraphs (A) and (B) of this paragraph. To satisfy the requirements of subparagraphs (A) or (B) of this paragraph, a copy of an agreement between the two partnering entities must be provided which shows that the nonprofit organization or HUB will hold an ownership interest in and materially participate (within the meaning of the Code §469(h)) in the development and operation of the Development throughout the Compliance Period and clearly identifies the ownership percentages of all parties (3 points maximum for subparagraphs (A) and (B) of this subparagraph).

(A) Exhibit 209. Evidence that a HUB, as certified by the Texas Building and Procurement Commission (formerly General Services Commission), has an ownership interest in and materially participates in the development and operation of the Development throughout the Compliance Period. To qualify for these points, the Applicant must submit a certification from the Texas Building and Procurement Commission (formerly General Services Commission) that the Person is a HUB and is valid through July 31, 2002 and renewable after that date.

(B) Exhibit 210. Joint Ventures with Qualified Nonprofit Organizations. Evidence that the Development involves a joint venture between a for profit organization and a Qualified Nonprofit Organization. The Qualified Nonprofit Organization must be materially participating in the Development as one of the General Partners (or Managing Members), but is not required to have Control, to receive these points. However, Developments without Control will not be eligible for the nonprofit set-aside.

(6) Exhibit 211. Development Provides Supportive Services to Tenants. Evidence that the Development Owner has an executed agreement with a for profit organization or a tax-exempt entity for the provision of special supportive services for the tenants. The service provider must be an existing organization qualified by the Internal Revenue Service or other governmental entity. The provision of supportive services will be included in the LURA (up to 7 points, depending upon the services committed in accordance with subparagraph (B) of this paragraph, plus two additional points pursuant to clause (vi) of subparagraph (B) of this paragraph). Acceptable services are described in subparagraphs (C) - (E) of this paragraph.

(A) Both documents described in clauses (i) and (ii) of this subparagraph must be submitted for the service provider to be considered under this exhibit.

(i) A fully executed contract, not more than 6 months old from the first day of the Application Acceptance Period between the service provider and the Applicant that establishes that the services offered provide a benefit that would not be readily available to the tenants if they were not residing in the Development.

(ii) A copy of the service provider's Articles of Incorporation or comparable chartering document.

(B) The supportive services contract will be evaluated using the criteria described in clauses (i) - (vi) of this subparagraph. The contract must clearly state the:

(i) Cost of Services to the Development Owner. The cost shown in the contract must also be included in the Development's operating budget and proforma. The costs must be reasonable for the benefit derived by the tenants. Services for which the Development Owner does not pay, will not receive a point for this item, except in the event that a supportive service provider is able to provide services with funds they receive from other sources. Evidence of the provider's other funding source(s) enabling the provision of service to the tenants of the proposed Development must be provided (1 point).

(ii) Availability of Services--The services must be provided on site or with transportation provided to offsite locations (1 point).

(iii) Duration of Contract--A commitment to provide the services for not less than five years or an option to renew the contract annually for not less than five years must be provided (1 point).

(iv) Experience of Service Provider--The Department will evaluate the experience of the organization as well as the professional and educational qualifications of the individuals delivering the services (1 point).

(v) Appropriateness--Services must be appropriate and provide a tangible benefit in enhancing the standard of living of a majority of low-income tenants (1 point).

(vi) Coordination with tenant services provided through housing programs--An extra two points will be awarded for services that are provided through state workforce development and welfare programs as evidenced by execution of a Tenant Supportive Services Certification (2 points).

(C) the services must be in one of the following categories: child care, transportation, basic adult education, legal assistance, counseling services, GED preparation, English as a second language classes, vocational training, home buyer education, credit counseling, financial planning assistance or courses, health screening services, health and nutritional courses, youth programs, scholastic tutoring, social events and activities, community gardens or computer facilities; or

(D) any other program described under Title IV-A of the Social Security Act (42 U.S.C. §§ 601 et seq.) which enables children to be cared for in their homes or the homes of relatives; ends the dependence of needy families on government benefits by promoting job preparation, work and marriage; prevents and reduces the incidence of out-of wedlock pregnancies; and encourages the formation and maintenance of two-parent families, or

(E) any other services approved in writing by the Department.

(7) Tenant Characteristics--Populations with Special Needs Housing & Rent and Income Levels. Developments may receive points under as many of the subparagraphs as apply, in accordance with the terms of those subparagraphs.

(A) This criterion applies to elderly Developments which provide significant facilities and services specifically designed to meet the physical and social needs of the residents. Significant services may include congregate dining facilities, social and recreation programs, continuing education, welfare information and counseling, referral services, transportation and recreation. Other attributes of such Developments include providing hand rails along steps and interior hallways, grab bars in bathrooms, routes that allow for barrier-free travel, lever type doorknobs and single lever faucets. All multistory buildings (two or more floors) must be served by an elevator. Individual Units shall not be multistory. Elderly Developments must not contain any Units with three or more bedrooms. Such a Development must conform to the Federal Fair Housing Act and must be a Development which meets the definition of Qualified Elderly Development (8 points).

(B) Exhibit 212. Evidence that the Development is designed solely for transitional housing for homeless persons on a non-transient basis, with supportive services designed to assist tenants in locating and retaining permanent housing. For the purpose of this exhibit, homeless persons are individuals or families that lack a fixed, regular, and adequate nighttime residence as more fully defined in 24 Code of Federal Regulations, §91.5, and as may be amended from time to time. All of the items described in clauses (i) - (v) of this subparagraph must be submitted:

(i) a detailed narrative describing the type of proposed housing;

(ii) a referral agreement, not more than 12 months old from the first day of the Application Acceptance Period, with an established organization which provides services to the homeless;

(iii) a marketing plan designed to attract qualified tenants and housing providers;

(iv) a list of supportive services; and

(v) adequate additional income source and executed guarantee to supplement any anticipated operating and funding gaps (15 points).

(C) Low Income Targeting Points. Applications are eligible to receive points under subclauses (I), (II) and (III) of clause (iv) of this subparagraph. To qualify for these points, the rents for the rent-restricted Units must not be higher than the allowable tax credit rents at the rent-restricted AMGI level. For Section 8 residents, or other rental assistance tenants, the tenant paid rent plus the utility allowance is compared to the rent limit to determine compliance. The Development Owner, upon making selections for this exhibit will set aside Units at the rent-restricted levels of AMGI and will maintain the percentage of such Units continuously over the compliance and extended use period as specified in the LURA. For the purposes of this subparagraph (maintaining the promised percentage of Units at the selected levels of AMGI), if at re-certification the tenant's household income exceeds the specified limit, then the Unit remains as a Unit restricted at the specified level of AMGI until the next available Unit of comparable or smaller size is designated to replace this Unit. Once the Unit exceeding the specified AMGI level is replaced, then the rent for the previously qualified Unit at the specified level of AMGI may be increased over the LIHTC requirements. Rent increases, if any, should comply with lease provisions and local tenant-landlord laws.

(i) To qualify for points for Units set aside for tenants at or below 30% of AMGI, an Applicant must provide evidence of a commitment of funds that specifies the amount of funds committed, terms of the commitment and the number of Units targeted at the AMGI level.

(ii) Notwithstanding anything to the contrary contained herein, Applicants may not elect to set aside Units at 30%, 40%

or 50% of AMGI for points hereunder to the extent the deferred developers fee as determined by staff at underwriting exceeds 50% of the entire developer fee.

(iii) If local HOME funds are to be used for Units set aside for tenants at 30%, 40% or 50% of AMGI, the Applicant shall have proof of application for these local funds to receive the points; however,if a firm commitment for local HOME funds is not received by the Department prior to 30 days preceding the meeting where allocation recommendations will be made, the points shall be deducted.

(iv) For purposes of calculating percentages of units, all figures should be rounded down to the nearest whole number. No Unit may be counted twice in determining point eligibility.

(I) Development owners selecting to set aside units for individuals and families earning less than 50% of AMGI shall receive the corresponding points:

(-a-) 1% to 9% of tax credit Units set aside for 50% or less of AMGI (4 points)

(-b-) 10% to 19% of tax credit Units set aside for 50% or less of AMGI (8 points)

(-c-) 20% to 29% of tax credit Units set aside for 50% or less AMGI (12 points)

(-d-) 30% to 39% of tax credit Units set aside for 50% or less AMGI (16 points)

(-e-) 40% or more of tax credit Units set aside for 50% of less AMGI (20 points)

(II) Development owners selecting to set aside units for individuals and families earning less than 40% of AMGI shall receive the corresponding points listed below:

(-a-) 1% to 9% of tax credit Units set aside for 40% or less of AMGI (6 points)

(-b-) 10% to 19% of tax credit Units set aside for 40% or less of AMGI (10 points)

(-c-) 20% to 29% of tax credit Units set aside for 40% or less AMGI (14 points)

(-d-) 30% to 39% of tax credit Units set aside for 40% or less AMGI (18 points)

(-e-) 40% or more of tax credit Units set aside for 40% or less AMGI (22 points)

(III) Development owners selecting to set aside units for individuals and families earning less than 30% of AMGI shall receive the corresponding points listed below:

(-a-) 1% to 9% of tax credit Units set aside for 30% or less of AMGI (8 points)

(-b-) 10% to 19% of tax credit Units set aside for 30% or less of AMGI (12 points)

(-c-) 20% to 29% of tax credit Units set aside for 30% or less AMGI (16 points)

(-d-) 30% to 39% of tax credit Units set aside for 30% or less AMGI (20 points)

(-e-) 40% or more of tax credit Units set aside for 30% or less AMGI (24 points).

(8) Exhibit 213. Length of Compliance Period. The initial compliance period for a development is fifteen years. In accordance with Code, developments are required to adhere to an extended low income use period for an additional 15 years. To receive points the Development Owner elects, in the Application, to extend the compliance period beyond the extended low income use period. The period commences with the first year of the Credit Period.

(A) Extend the compliance period for an additional 10 years, with an Extended Use Period of 40 years (8 points);

(B) Extend the compliance period for an additional 15 years, with an Extended Use Period of 45 years (10 points);

(C) Extend the compliance period for an additional 20 years, with an Extended Use Period of 50 years (12 points); or

(D) Extend the compliance period for an additional 25 years, with an Extended Use Period of 55 years (14 points);

(9) Exhibit 214. Evidence that Development Owner agrees to provide a right of first refusal to purchase the Development upon or following the end of the Compliance Period for the minimum purchase price provided in, and in accordance with the requirements of, §42(i)(7) of the Code (the "Minimum Purchase Price"), to a Qualified Nonprofit Organization, the Department; and either an individual tenant with respect to a single family building; or a tenant cooperative, a resident management corporation in the Development or other association of tenants in the Development with respect to multifamily developments (together, in all such cases, including the tenants of a single family building, a "Tenant Organization"). Development Owner may qualify for these points by providing the right of first refusal in the following terms (5 points).

(A) Upon the earlier to occur of:

(i) the Development Owner's determination to sell the Development, or

(ii) the Development Owner's request to the Department, pursuant to §42(h)(6)(I) of the Code, to find a buyer who will purchase the Development pursuant to a "qualified contract" within the meaning of §42(h)(6)(F) of the Code, the Development Owner shall provide a notice of intent to sell the Development ("Notice of Intent") to the Department and to such other parties as the Department may direct at that time. If the Development Owner determines that it will sell the Development at the end of the Compliance Period, the Notice of Intent shall be given no later than two years prior to expiration of the Compliance Period. If the Development Owner determines that it will sell the Development at some point later than the end of the Compliance Period, the Notice of Intent shall be given no later than two years prior to date upon which the Development Owner intends to sell the Development.

(B) During the two years following the giving of Notice of Intent, the Sponsor may enter into an agreement to sell the Development only in accordance with a right of first refusal for sale at the Minimum Purchase Price with parties in the following order of priority:

(i) during the first six-month period after the Notice of Intent, only with a Qualified Nonprofit Organization that is also a community housing development organization, as defined for purposes of the federal HOME Investment Partnerships Program at 24 C.F.R. § 92.1 (a "CHDO") and is approved by the Department,

(ii) during the second six-month period after the Notice of Intent, only with a Qualified Nonprofit Organization or a Tenant Organization; and

(iii) during the second year after the Notice of Intent, only with the Department or with a Qualified Nonprofit Organization approved by the Department or a Tenant Organization approved by the Department.

(iv) If, during such two-year period, the Development Owner shall receive an offer to purchase the Development at the Minimum Purchase Price from one of the organizations designated in clauses (i), (ii), and (iii) of this subparagraph (within the period(s) appropriate to such organization), the Development Owner shall sell the Development at the Minimum Purchase Price to such organization. If,

during such period, the Development Owner shall receive more than one offer to purchase the Development at the Minimum Purchase Price from one or more of the organizations designated in clauses (i), (ii), and (iii) of this subparagraph (within the period(s) appropriate to such organizations), the Development Owner shall sell the Development at the Minimum Purchase Price to whichever of such organizations it shall choose.

(C) After the later to occur of:

(i) the end of the Compliance Period; or

(ii) two years from delivery of a Notice of Intent, the Development Owner may sell the Development without regard to any right of first refusal established by the LURA if no offer to purchase the Development at or above the Minimum Purchase Price has been made by a Qualified Nonprofit Organization, a Tenant Organization or the Department, or a period of 120 days has expired from the date of acceptance of all such offers as shall have been received without the sale having occurred, provided that the failure(s) to close within any such 120-day period shall not have been caused by the Development Owner or matters related to the title for the Development.

(D) At any time prior to the giving of the Notice of Intent, the Development Owner may enter into an agreement with one or more specific Qualified Nonprofit Organizations and/or Tenant Organizations to provide a right of first refusal to purchase the Development for the Minimum Purchase Price, but any such agreement shall only permit purchase of the Development by such organization in accordance with and subject to the priorities set forth in subparagraph (B) of this paragraph.

(E) The Department shall, at the request of the Development Owner, identify in the LURA a Qualified Nonprofit Organization or Tenant Organization which shall hold a limited priority in exercising a right of first refusal to purchase the Development at the Minimum Purchase Price, in accordance with and subject to the priorities set forth in subparagraph (B) of this paragraph.

(F) The Department shall have the right to enforce the Development Owner's obligation to sell the Development as herein contemplated by obtaining a power-of-attorney from the Development Owner to execute such a sale or by obtaining an order for specific performance of such obligation or by such other means or remedy as shall be, in the Department's discretion, appropriate.

(10) Pre-Application Points. Developments which submit a Pre-Application during the Pre-Application Acceptance Period and meet the requirements of this paragraph shall receive 15 points. To be eligible for these points, the proposed development in the Pre-Application must:

(A) be for the identical site and unit mix as the proposed development in the Application;

(B) have met the Pre-Application Threshold Criteria;

(C) be serving the same target population in the Application in the same set-aside; and

(D) not have altered the documentation for the Pre-Application Selection Criteria.

(11) Point Reductions. Penalties will be imposed on Applicants or Affiliates who have requested extensions of Department deadlines, and did not meet the original submission deadlines, relating to developments receiving a housing tax credit allocation made in the application round preceding the current round. Extensions that will receive penalties include all types of extensions identified in §49.13 of this title, including Projects whose extensions were authorized by the Board. The schedule of penalties to Applicants or Affiliates requesting extensions is as follows:

(A) First extension request--$2,500 extension penalty fee plus 2 point deduction;

(B) Second extension request--$25//Unit plus 2 point deduction; and

(C) Third extension request--$35/Unit plus 2 point deduction.

(g) Credit Amount. The Department shall issue tax credits only in the amount needed for the financial feasibility and viability of a Development throughout the Compliance Period. The issuance of tax credits or the determination of any allocation amount in no way represents or purports to warrant the feasibility or viability of the Development by the Department. The Department will limit the allocation of tax credits to no more than $1.2 million per Development. The allocation of tax credits shall also be limited to not more than $1.6 million per Applicant per year. These limitations will apply to any Applicant or Related Party unless otherwise provided for by the Board. Tax Exempt Bond Development Applications are not subject to the per Development and per Applicant or Related Party credit limitations, and Tax Exempt Bond Developments will not count towards the total limit on tax credits per Applicant. The limitation does not apply:

(1) to an entity which raises or provides equity for one or more Developments, solely with respect to its actions in raising or providing equity for such Developments (including syndication related activities as agent on behalf of investors);

(2) to the provision by an entity of "qualified commercial financing" within the meaning of the Code, §49(a)(1)(D)(ii) (without regard to the 80% limitation thereof);

(3) to a Qualified Nonprofit Organization or other not-for-profit entity, to the extent that the participation in a Development by such organization consists only of the provision of loan funds or grants; and

(4) to a Development Consultant with respect to the provision of consulting services.

(h) Limitations on the Size of Developments.

(1) The minimum Development size will be limited to 16 units unless otherwise provided for under the Ineligible Building Types definition.

(2) Rural Developments involving new construction will be limited to 76 Units unless the Market Study clearly documents that larger developments are consistent with the comparables in the community and that there is a significant demand for additional units. Rural Developments exceeding 76 Units based on the Market Study will be ineligible for the Rural Set-Aside. All other Developments involving new construction will be limited to 250 units. These maximum unit limitations also apply to those Developments which involve a combination of rehabilitation and new construction. Developments that consist solely of acquisition/rehabilitation or rehabilitation only may exceed the maximum unit restrictions. For those developments which are a second phase or are otherwise adjacent to an existing tax credit development unless such proposed development is being constructed to replace previously existing affordable multifamily units on its site, the combined Unit total for the developments may not exceed the maximum allowable Development size, unless the first phase has been completed and stabilized for at least six months.

(3) Tax Exempt Bond Developments will be limited to 280 Units.

(i) Tax Exempt Bond Financed Developments.

(1) Tax Exempt Bond Development Applications are also subject to evaluation under the QAP and Rules and the requirements and underwriting review criteria described in the Application Submission Procedures Manual. Such Developments requesting a Determination Notice in the current calendar year must meet all Threshold Criteria requirements stipulated in subsection (e) of this section. Such Developments which received a Determination Notice in a prior calendar year must meet all Threshold Criteria requirements stipulated in the QAP and Rules in effect for the calendar year in which the Determination Notice was issued; provided, however, that such Developments shall comply with all procedural requirements for obtaining Department action in the current QAP and Rules; and such other requirements of the QAP and Rules as the Department determines applicable. Tax Exempt Bond Financed Developments are not subject to the Selection Criteria set forth in subsection (f) of this section and are not required to submit documentation relating thereto.

(2) Tax Exempt Bond Development Applications will be evaluated under the factors set forth at paragraphs (2) and (4) of subsection (c) of this section. With respect to paragraph (3) of subsection (b) of this section, Developments determined to be infeasible by the Department will not receive a Determination Notice. With respect to paragraph (3) of §49.9(b) of this title, Developments determined by the Department to result in an excessive concentration of affordable housing developments within a particular market area will not receive a Determination Notice. With respect to paragraph (2) of subsection (c) of this section, Developments determined by the Department to be located on an "Unacceptable" site will not receive a Determination Notice. For purposes of paragraph (4) of subsection (c) of this section, Developments must demonstrate the Development's consistency with the bond issuer's consolidated plan or other similar planning document. Consistency with the local municipality's consolidated plan or similar planning document must also be demonstrated in those instances where the city or county has a consolidated plan.

(3) Tax Exempt Bond Developments may not include Ineligible Building Types unless the Department determines that it is in the best interests of the particular Development, its market area and the tax credit program to permit a particular building type to be included in the Development.

(4) Tax Exempt Bond Developments are subject to the requirements and restrictions set forth in §49.5 of this title.

(5) Tax Exempt Bond Development Applications are not subject to the limitations on amount of tax credits per Applicant or per Development set forth in subsection (g) of this section.

(6) Tax Exempt Bond Development Applications must provide an executed agreement with a qualified service provider for the provision of special supportive services that would otherwise not be available for the tenants. The provision of these services will be included in the LURA. Acceptable services as described in subparagraphs (A) - (C) of this paragraph include:

(A) the services must be in one of the following categories: child care, transportation, basic adult education, legal assistance, counseling services, GED preparation, English as a second language classes, vocational training, home buyer education, credit counseling, financial planning assistance or courses, health screening services, health and nutritional courses, youth programs, scholastic tutoring, social events and activities, community gardens or computer facilities; or

(B) any other program described under Title IV-A of the Social Security Act (42 U.S.C. §§ 601 et seq.) which enables children to be cared for in their homes or the homes of relatives; ends the dependence of needy families on government benefits by promoting job preparation, work and marriage; prevents and reduces the incidence of out-of wedlock pregnancies; and encourages the formation and maintenance of two-parent families, or

(C) any other services approved in writing by the Issuer. The plan for tenant supportive services submitted for review and approval of the Issuer must contain a plan for coordination of services with state workforce development and welfare programs. The coordinated effort will vary depending upon the needs of the tenant profile at any given time as outlined in the plan.

(7) Code §42(m)(2)(D) required the bond issuer (if other than the Department) to make sure that a Tax Exempt Bond Development does not receive more tax credits than the amount needed for the financial feasibility and viability of a Development throughout the Compliance Period. Treasury Regulations prescribe the occasions upon which this determination must be made. In light of the requirement, issuers may either elect to underwrite the Development for this purpose in accordance with the QAP and the Department's underwriting guidelines; or delegate, by agreement, that function to the Department. If the issuer underwrites the Development, the Department will, nonetheless, review the underwriting report and may make such changes in the amount of credits which the Development may be allowed as are appropriate under the Department's guidelines. The Determination Notice issued by the Department and any subsequent IRS Form(s) 8609 will reflect the amount of tax credits for which the Development is determined to be eligible in accordance with this paragraph, and the amount of tax credits reflected in the IRS Form 8609 may be greater or less than the amount set forth in the Determination Notice, based upon the Department's and the bond issuer's determination as of each building's placement in service.

(8) If the Department staff determines that all requirements of subsection (i) of this section have been met, the Board, shall authorize the Department to issue a Determination Notice to the Applicant that the Development satisfies the requirements of the QAP and Rules in accordance with the Code, §42(m)(1)(D).

(j) Adherence to Obligations. All representations, undertakings and commitments made by an Applicant in the applications process for a Development, whether with respect to Threshold Criteria, Selection Criteria or otherwise, shall be deemed to be a condition to any Commitment Notice, Determination Notice, or Carryover Allocation for such Development, the violation of which shall be cause for cancellation of such Commitment Notice, Determination Notice, or Carryover Allocation by the Department, and if concerning the ongoing features or operation of the Development, shall be reflected in the LURA. All such representations are enforceable by the Department and the tenants of the Development, including enforcement by administrative penalties for failure to perform as stated in the representation and enforcement by inclusion in deed restrictions to which the Department is a party.

(k) Amendment of Application Subsequent to Allocation by Board.

(1) If a proposed modification would materially alter a Development approved for an allocation of a housing tax credit, the Department shall require the Applicant to file a formal, written amendment to the Application on a form prescribed by the Department.

(2) The Executive Director of the Department shall require the Department staff assigned to underwrite Applications to evaluate the amendment and provide an analysis and written recommendation to the Board. The appropriate party monitoring compliance during construction in accordance with §49.10 of this title shall also provide to the

Board an analysis and written recommendation regarding the amendment.

(3) The Board must vote on whether to approve the amendment. The Board by vote may reject an amendment and, if appropriate, rescind a Commitment Notice or terminate the allocation of housing tax credits and reallocate the credits to other Applicants on the Waiting List if the Board determines that the modification proposed in the amendment:

(A) would materially alter the Development in a negative manner; or

(B) would have adversely affected the selection of the Application in the Application Round.

(4) Material alteration of a Development includes, but is not limited to:

(A) a significant modification of the site plan;

(B) a modification of the number of units or bedroom mix of units;

(C) a substantive modification of the scope of tenant services;

(D) a reduction of three percent or more in the square footage of the units or common areas;

(E) a significant modification of the architectural design of the Development;

(F) a modification of the residential density of the Development of at least five percent; and

(G) any other modification considered significant by the Board.

(5) In evaluating the amendment under this subsection, the Department staff shall consider whether the need for the modification proposed in the amendment was:

(A) reasonably foreseeable by the Applicant at the time the Application was submitted; or

(B) preventable by the Applicant.

(6) This section shall be administered in a manner that is consistent with the Code, §42.

(7) Before the 15th day preceding the date of Board action on the amendment, notice of an amendment and the recommendation of the Executive Director and monitor regarding the amendment will be posted to the Department's web site.

(l) Housing Tax Credit and Ownership Transfers. An Applicant may not transfer an allocation of housing tax credits or ownership of a Development supported with an allocation of housing tax credits to any person other than an Affiliate unless the Applicant obtains the Executive Director's prior, written approval of the transfer. The Executive Director may not unreasonably withhold approval of the transfer. An Applicant seeking Executive Director approval of a transfer and the proposed transferee must provide to the Department a copy of any applicable agreement between the parties to the transfer, including any third-party agreement with the Department. On request, an Applicant seeking Executive Director approval of a transfer must provide to the Department a list of the names of transferees and Related Parties; and detailed information describing the experience and financial capacity of transferees and related parties. The Development Owner shall certify to the Executive Director that the tenants in the Development have been notified in writing of the transfer before the 30th day preceding the date of submission of the transfer request to the Department. Not later than the fifth working day after the date the Department receives all necessary information under this section, the Department shall conduct a qualifications review of a transferee to determine the transferee's past compliance with all aspects of the low income housing tax credit program, LURAs; and the sufficiency of the transferee's experience with Developments supported with housing tax credit allocations.

§49.8. Underwriting Guidelines.

(a) The Department will award, as computed during the underwriting review, the lesser amount calculated by the eligible basis method, equity gap method, or the amount requested by the Applicant as further described in paragraphs (1) - (3) of this subsection.

(1) Eligible Basis Method. Based upon calculation of eligible basis after applying all cost containment measures and limits on profit, overhead, general requirements and developer fees. The Applicable Percentage will be used in the Eligible Basis Method as defined in §49.2(6) of this title.

(2) Equity Gap Method. The amount of credits needed to fill the gap created by total Development cost less total debt. In making this determination, the Department will consider the percentage of the total Development that will be financed by proceeds of the tax credits and reserve the right to adjust the permanent loan amount as necessary.

(3) The amount requested by the Applicant will be used if it is lower than the Department's determination of eligible basis except as related to adjustments made to the applicable percentage.

(b) Construction Standards. The cost basis is defined using Average quality as defined by Marshall & Swift Residential Cost Handbook. If the Development contains amenities not included in the Average quality standard, the Department will take into account the costs of the amenities as designed in the Development If the Development will contain single family buildings as permitted under the "Ineligible Building Type" definition in §49.2(49) of this title, then the cost basis should be consistent with single family Average quality as defined by Marshall & Swift Residential Cost Handbook.

(c) Development Costs. The Department's estimate of the Development's cost will be based on the use of Marshall and Swift cost evaluation data. Total Housing Development Costs include all costs associated with the construction of the Development including common space, and as defined under §49.2(84) of this title. The Applicant's cost estimate will be compared against the Department's and the Total Housing Development Cost and corresponding credit allocation will be adjusted accordingly. Exceptions may be made at the Department's discretion but only if they are well documented by the Applicant at the time of Application submission. The underwriting staff will evaluate rehabilitation Developments for comprehensiveness of the third party work write-up and will determine if additional information is needed. The Applicant must provide their best estimate of how much it would cost to develop the Development. Adjustments will be made with respect to assisted living, congregate care, or elderly projects which may require larger common areas. The Department is also aware that differences in land costs may account for significant cost variations among Developments. Hard construction costs include contractor profit, overhead and general requirements.

(d) For Acquisition Developments. The proposed acquisition price verified in the site control document will be compared to the unsubsidized as-is market value conclusion of the Appraiser whose appraisal is consistent with the Department's Market analysis and Appraisal Policy and USPAP Guidelines. For Developments where an identity of interest exists between the buyer and seller the original acquisition cost of the Development to the seller along with holding costs and capitalized improvements will also be considered. Holding costs

may include a rate of return consistent with the historical return of similar risk on any equity position in the Development. The Department will also consider exit taxes that may be required as a result of the transfer of ownership if they are detailed and well documented and certified to by the owners CPA. The ultimate credit amount may be reduced to meet the rehabilitation need after all available reserves have been expended.

(e) Site Work. If Project site work costs exceed $6,500 per Unit, the Applicant must submit a detailed cost breakdown prepared by a third party engineer or architect, and a letter from a certified public accountant properly allocating which portions of those site costs should be included in eligible basis and which ones are ineligible, in keeping with the holding of the Internal Revenue Service Technical Advice Memoranda.

(f) Operating Reserves. The Department will utilize the terms proposed by the syndicator or lender or 4 to 6 months of operating expenses plus debt service. These reserves must be included in Exhibit 102B, Project Cost Schedule, of the application.

(g) Fee Limits. The development cost associated with general requirements cannot exceed 6% of the eligible basis associated with onsite sitework and construction hard costs. The development cost associated with contractor overhead cannot exceed 2% of the eligible basis associated with onsite sitework and construction hard costs. For Developments also receiving financing from TxRD-USDA, the combination of builder's general requirements, builder's overhead, and builder's profit should not exceed the lower of TDHCA or TxRD-USDA requirements. The development cost associated with contractor profit cannot exceed 6% of the eligible basis associated with onsite sitework and construction hard costs. The development cost associated with developer's Fees cannot exceed 15% of the project's Total Eligible Basis (adjusted for the reduction of federal grants, below market rate loans, historic credits, etc.), as defined in §49.2(34), not inclusive of the developer fees themselves. The 15% can be divided between overhead and fee as desired but the sum of both items must not exceed 15%. The Developer Fee may be earned on non-eligible basis activities, but only 15% of eligible basis items may be included in basis for the purpose of calculating a project's credit amount.

(h) Income and Expenses. Financial feasibility will be tested by adding rental income to miscellaneous income, and subtracting vacancy and expenses to achieve a net operating income. The net operating income will be divided by the yearly debt service to achieve the debt coverage ratio. These figures will be calculated using the methods identified in paragraphs (1) - (5) of this subsection.

(1) Rental Income. LIHTC rent restricted rates less utility allowances and market rent rates (if the project is not 100% LIHTC) will be utilized in calculating the rental income. If the market rate rents are lower than the net LIHTC program rents, then the market rents will be utilized. The Department will always use the HUD Rental and Income Limits that are most current.

(2) Miscellaneous Income. A range of $5 to $15 per unit which will encompass any and all income from application fees, late fees, laundry, storage, garage rentals, or any other ancillary income. Exceptions may be made for special uses, such as congregate care, elderly and child care facilities or where comparables within the submarket are realizing higher miscellaneous income. The exemptions will be evaluated on a case by case basis. Applicants must submit documentation that explains their projected miscellaneous income.

(3) Vacancy: Typically the greater of the market vacancy rate or 7.5% (5% vacancy plus 2.5% for collection loss) will be utilized by the Department to underwrite the development.

(4) Expenses: Applicants should provide an estimate of their expected expenses based on their own research (internal historical operating data, IREM, etc.) For new developments, the expenses must include at least $200 per unit in reserve for replacement. For rehabilitation developments, the expenses must include at least $300 per unit in reserve for replacement. CHDOs must identify if they will be obtaining a property tax exemption or not. If they indicate that they will have an exemption, they must provide reasonable proof that the exemption can be attained. If no reasonable proof is provided, the Development will be underwritten under the assumption that property taxes must be paid. The Applicant's expenses will be compared against the most current information contained in the Department's database and expenses submitted by other comparable projects. The underwriter will analyze the development based on the current TDHCA operating database, the project's existing historical performance, if any, the application proforma, the market study and any additional documentation provided for consideration. A line by line review by expense category will on a project-by-project basis determine the appropriate anticipated operating expense for each project.

(5) Debt Coverage Ratio (DCR). The DCR will be sized at a minimum of 1.10 by the first year of stabilized rents and be restricted to not more than 1.25. The projects DCR should remain above 1.10 over the life of the project estimated in the proforma using a 3% income growth factor and a 4% expense growth factor. Projects in rural areas and projects which fulfill special needs may be allowed a DCR below this level but must maintain a positive net cash flow once stabilized occupancy levels have been reached. A recommendation for increasing or decreasing the development's serviceable debt may be made by the Department should the DCR exceed or fall below the above stated range.

§49.9. Market Study Requirements; Concentration; and Environmental Site Assessment Guidelines.

(a) Market Study Requirements.

(1) Market Analyst Qualifications. The qualifications of each Report Provider are determined and approved on a case-by-case basis by the chief underwriter or the review appraiser, based upon the quality of the report, itself and the experience and educational background of the report provider as a market analyst, as set forth in a Statement of Qualifications appended to the Report. The Department will maintain a list of approved Market Analysts. Such determination will be at the discretion of the Department. Generally, a qualified Market Analyst will be:

(A) a real estate appraiser certified or licensed by the Texas Appraiser Licensing and Certification Board; or,

(B) a real estate consultant or other professional currently active in the subject property's market area who demonstrates competency, expertise, and the ability to render a high quality, written report.

(2) A market study prepared for the Department must evaluate the need for decent, safe, and sanitary housing at rental rates or sales prices that eligible tenants can afford. The study must determine the feasibility of the subject property and state conclusions as to the impact of the property with respect to the determined housing needs. The market study should be self-contained and must describe in sufficient detail and with adequate data, such conclusions. Any third party reports relied upon in the market study must be verified directly by the market analyst as to the validity of the data and the conclusions.

(3) The market study must contain sufficient data and analysis to allow the reader to understand the market data presented, the analysis of the data, and the conclusion(s) of such analysis and its relationship to the subject property. The complexity of this requirement

will vary in direct proportion with the complexity of the real estate and the real estate market being analyzed. The study should lead the reader to the same or similar conclusion(s) reached by the market analyst.

(4) The primary market or submarket will be defined on a case-by-case basis by the market analyst engaged by the Applicant to provide a market study for the Development. The market study should contain a map defining the market and submarket and a narrative of the salient features that helped the analyst make such a determination. As a general guide for the market analyst, the Department encourages the use of natural political/geographical boundaries whenever possible. Furthermore, the primary or submarket for a project chosen by the market analyst will generally be most informative if it contains between 50,000 and 250,000 persons, though a sub-market with fewer or more residents may be indicated at the discretion of the market analyst where political/geographic boundaries indicate doing so.

(5) An acceptable market study must also include at the minimum in quantitative as well as narrative form the information required under subparagraphs (A) - (C) of this paragraph. The Department reserves the right to require the Report Provider to address such other issues as may be relevant to the Department's evaluation of the need for the subject property and the provisions of the particular program guidelines. All Applicants shall acknowledge by virtue of filing an Application that the Department shall not be bound by any such opinion or market study, and may substitute its own analysis and underwriting conclusions for those submitted by the report provider.

(A) a comprehensive evaluation of the existing supply of comparable multifamily or single family subdivision property(ies) as appropriate in the same market and submarket area as the Development. The study should include census data documenting the amount and condition of local housing stock as well as information on building permits since the census data was collected. The study should evaluate existing market rate housing as well as existing subsidized housing to include local housing authority units and any and all other rent or income restricted units with respect to:

(i) rental rates including an attribute adjustment matrix for the most comparable Units to the Units proposed in the Development;

(ii) affordability analysis of the comparable unrestricted units;

(iii) current physical condition of the comparable property based upon a cursory exterior inspection evidenced by photographs;

(iv) occupancy rates of each of the comparable properties and occupancy trends by property class;

(v) annual turnover rates of each of the comparable properties and turnover trends by property class;

(vi) historic, current and anticipated absorption rates taking into account all other new or proposed development and the availability of other comparable sites;

(vii) an analysis of the number of existing or proposed units being set-aside or constructed for persons with disabilities; and

(viii) an itemization of all LIHTC Program Units within the defined submarket.

(B) a comprehensive evaluation of the demand for the housing the subject is proposed to provide. The study must include an analysis of the need for market and affordable housing within the Development's market and submarket area using the most current census and demographic data available, with copies of such source data included in the report or in the report addenda. The demand for housing should be quantified, well reasoned and should be segmented to include only relevant income and age eligible targets of the subject. Each segment should be addressed independently and overlapping segments should be minimized and clearly identified when required. The final quantified demand calculation may include demand due to:

(i) documented population and household growth trends for targeted income-eligible rental households;

(ii) documented turnover of existing income-eligible targeted rental households;

(iii) confirmed new employment growth for targeted income-eligible rental households; and

(iv) other well reasoned and documented sources of demand determined by the market analyst.

(C) a comprehensive evaluation of the Development in terms of:

(i) correlation of market and submarket demographics of housing demand to the current and proposed supply of housing and the need for the Development;

(ii) rental rate conclusion for each unit type and rental restriction category. Conclusions of rental rates below the maximum net rent limit rents must be well reasoned, documented and consistent with the market data and should address any inconsistencies with the conclusions of the demand for the units. Alternative market acceptable rent for each rent restricted unit should also be included to evaluate the potential to achieve increases in the restricted rents as allowable increases occur;

(iii) absorption projections for the subject until a sustaining occupancy level has been achieved (if absorption projections for the subject differ significantly from historic data, an explanation of such should be included);

(iv) appropriateness of unit mix and unit sizes especially in regard to the income eligible targeted demand and existing or proposed supply for any proposed three and four bedroom units;

(v) appropriateness of interior and exterior physical amenities including appliance package;

(vi) location of the subject in relationship to employment centers, retail businesses, public transportation, schools, etc.; and

(vii) the capture rate for the Development defined as the sum of the proposed units for a given project plus any previously approved but not yet stabilized new units in the sub-market divided by the total income-eligible targeted renter demand identified by the market analysis for a specific Development's primary market or submarket. The Department defines comparable units as units that are dedicated to the same household type as the proposed subject property using the classifications of family, elderly or transitional as housing types. The Department defines a stabilized project as one that has maintained a 90% occupancy level for at least 12 consecutive months. The Department will independently verify the number of affordable multifamily units included in the market study and will ensure that all projects previously allocated funds through the Department are included in the final analysis.

(b) Concentration. The Department intends to limit the approval of funds to new multifamily housing projects requesting funds where the anticipated capture rate is in excess of 25% for the primary or sub-market unless the market is a rural market. In rural markets,

the Department intends to limit the approval of funds to new multifamily housing projects requesting funds from the Department where the anticipated capture rate is in excess of 100% of the qualified demand. Affordable housing which replaces previously existing substandard affordable housing within the same sub-market on a Unit for Unit basis, and which gives the displaced tenants of the previously existing affordable housing a leasing preference, is excepted from these concentration restrictions. The documentation needed to support decisions relating to concentration are identified in subsection (a) of this section.

(c) Environmental Site Assessment Guidelines. The environmental assessment required under §50.7(e) of this title should be conducted and reported in conformity with the standards of the American Society for Testing and Materials (ASTM) and such other recognized industry standards as a reasonable person would deem relevant in view of the Property's anticipated use for human habitation. The environmental assessment shall be conducted by an environmental or professional engineer and be prepared at the expense of the Development Owner.

(1) The report must include, but is not limited to:

(A) a review of records, interviews with people knowledgeable about the property;

(B) a certification that the environmental engineer has conducted an inspection of the property, the building(s), and adjoining properties, as well as any other industry standards concerning the preparation of this type of environmental assessment;

(C) a noise study is recommended for developments located in close proximity to industrial zones, major highways, active rail lines and civil and military airfields;

(D) a copy of the current FEMA Flood Map encompassing the site and a determination of the flood risk for the proposed Development;

(E) the report should include a statement that clearly states that the person or company preparing the environmental assessment will not materially benefit from the Development in any other way than receiving a fee for the environmental assessment; and

(2) if the report recommends further studies or establishes that environmental hazards currently exist on the Property, or are originating off-site but would nonetheless affect the Property, the Development Owner must act on such a recommendation or provide either a plan for the abatement or elimination of the hazard. Evidence of action or a plan for the abatement or elimination of the hazard must be presented upon Application submittal.

(3) Developments which have had a Phase II Environmental Assessment performed and hazards identified, the Development Owner is required to maintain a copy of said assessment on site available for review by all persons which either occupy the Development or are applying for tenancy.

(4) Developments whose funds have been obligated by TxRD will not be required to supply this information; however, the Development Owners of such Developments are hereby notified that it is their responsibility to ensure that the Development is maintained in compliance with all state and federal environmental hazard requirements.

(5) Those Developments which have or are to receive first lien financing from HUD may submit HUD's environmental assessment report, provided that it conforms with the requirements of this subsection.

§49.10. Compliance Monitoring and Material Non-Compliance.

(a) The Code, §42(m)(1)(B)(iii), requires the Department as the housing credit agency to include in its QAP a procedure that the Department will follow in monitoring Developments for noncompliance with the provisions of the Code, §42 and in notifying the IRS of such noncompliance of which the Department becomes aware. Such procedure is set out in this QAP and in the Owner's Compliance Manual prepared by the Department's Compliance Division, as amended from time to time. Such procedure only addresses forms and records that may be required by the Department to enable the Department to monitor a Development for violations of the Code and the LURA and to notify the IRS of any such non-compliance. This procedure does not address forms and other records that may be required of Development Owners by the IRS more generally, whether for purposes of filing annual returns or supporting Development Owner tax positions during an IRS audit.

(b) The Department, through the division with responsibility for compliance matters, shall monitor for compliance with all applicable requirements the entire construction phase associated with any Development under this title. The monitoring level for each Development must be based on the amount of risk associated with the Development. The Department shall use the division responsible for credit underwriting matters and the division responsible for compliance matters to determine the amount of risk associated with each Development. After completion of a Development's construction phase, the Department shall periodically review the performance of the Development to confirm the accuracy of the Department's initial compliance evaluation during the construction phase. Developments having financing from TxRD-USDA will be exempt from these inspections, provided that the Applicant provides the Department with copies of all inspections made by TxRD-USDA throughout the construction of the Development within fifteen days of the date the inspection occurred.

(c) The Department will monitor compliance with all covenants made by the Development Owner in the Application and in the LURA, whether required by the Code, Treasury Regulations or other rulings of the IRS, or undertaken by the Development Owner in response to Department requirements or criteria.

(d) The Department may contract with an independent third party to monitor a Development during its construction or rehabilitation and during its operation for compliance with any conditions imposed by the Department in connection with the allocation of housing tax credits to the Development and appropriate state and federal laws, as required by other state law or by the Board. The Department may assign Department staff other than housing tax credit division staff to perform the relevant monitoring functions required by this section in the construction or rehabilitation phase of a Development.

(e) The Department shall create an easily accessible database that contains all Development compliance information developed under this section.

(f) The Development Owner must keep records for each qualified low income building in the Development, showing on a monthly basis (with respect to the first year of a building's Credit Period and on an annual basis, thereafter):

(1) the total number of residential rental Units in the building (including the number of bedrooms and the size in square feet of each residential rental Unit);

(2) the percentage of residential rental Units in the building that are low income Units;

(3) the rent charged for each residential rental Unit in the building including, with respect to low income Units, documentation to support the utility allowance applicable to such Unit;

(4) the number of occupants in each low income Unit;

(5) the low income Unit vacancies in the building and information that shows when, and to whom, all available Units were rented;

(6) the annual income certification of each tenant of a low income Unit, in the form designated by the Department in the Compliance Manual, as may be modified from time to time;

(7) documentation to support each low income tenant's income certification, consistent with the verification procedures required by HUD under Section 8 of the United States Housing Act of 1937 ("Section 8"). In the case of a tenant receiving housing assistance payments under Section 8, the documentation requirement is satisfied if the public housing authority provides a statement to the Development Owner declaring that the tenant's income does not exceed the applicable income limit under the Code, §42(g) as described in the Compliance Manual;

(8) the Eligible Basis and Qualified Basis of the building at the end of the first year of the Credit Period;

(9) the character and use of the nonresidential portion of the building included in the building's Eligible Basis under the Code, §42(d), (e.g. whether tenant facilities are available on a comparable basis to all tenants; whether any fee is charged for use of the facilities; whether facilities are reasonably required by the Development); and

(10) any additional information as required by the Department.

(g) The Development Owner will deliver to the Department within 90 days after the end of each calendar year, the current financial statements, in form and content satisfactory to the Department, itemizing the income and expenses of the Development.

(h) Specifically, to evidence compliance with the requirements of the Code, Section 42(h)(6)(B)(iv) which requires that the LURA prohibit Development Owners of all tax credit Developments placed in service after August 10, 1993 from refusing to lease to persons holding Section 8 vouchers or certificates because of their status as holders of such Section 8 voucher or certificate, Development Owners must:

(1) maintain a written management plan that is available for review upon request. Such management plan must state an intention of the Development Owner to comply with state and federal fair housing and anti-discrimination laws. Owners and managers of all tax credit Developments placed in service after August 10, 1993, are prohibited from having policies, practices, procedures and/or screening criteria which exclude applicants solely because they have a Section 8 voucher or certificate. Such management plan must also clearly state the objectives identified in subparagraphs (A) - (C) of this paragraph. Failure to have the required objectives set forth clearly in the management plan or failure to follow such required objectives in the operation of the Development will be treated by the Department as noncompliance with the LURA.

(A) prospective applicants who hold Section 8 vouchers or certificates are welcome to apply and will be provided the same consideration for occupancy as any other applicant;

(B) any minimum income requirements for Section 8 voucher and certificate holders will only be applied to the portion of the rent the prospective tenant would pay, provided, however, that if Section 8 pays 100% of the rent for the Unit, the Development Owner may establish other reasonable minimum income requirements to ensure that the tenant has the financial resources to meet daily living expenses. Minimum income requirements for Section 8 voucher and certificate holders will not exceed 2.5 times the portion of rent the tenant pays; and

(C) all other screening criteria, including employment policies or procedures and other leasing criteria (such as rental history, credit history, criminal history, etc.) must be applied to applicants uniformly and in a manner consistent with the Texas and federal Fair Housing Acts and with Department and Code requirements;

(2) post Fair Housing logos and the Fair Housing poster in the leasing office;

(3) approve and distribute a written Affirmative Marketing Plan to the property management and on-site staff.

(4) communicate annually during the first quarter of each year in writing with the director of each Section 8 program which has jurisdiction within the geographic area where the Development is located. Such communication will include information on the unit characteristics and rents and will advise the administrating agency that the property accepts Section 8 vouchers and certificates and will treat referrals in a fair and equal manner. Copies of such correspondence must be available during on-site reviews conducted by the Department.

(i) Record retention provision. The Development Owner is required to retain the records described in subsection (f) of this section for at least six years after the due date (with extensions) for filing the federal income tax return for that year; however, the records for the first year of the Credit Period must be retained for at least six years beyond the due date (with extensions) for filing the federal income tax return for the last year of the Compliance Period of the building.

(j) Certification and Review.

(1) On or before February 1st of each year, the Department will send each Development Owner of a completed Development an Owner's Certification of Program Compliance (form provided by the Department) to be completed by the Owner and returned to the Department on or before the first day of March of each year in the Compliance Period. Any Development for which the certification is not received by the Department, is received past due, or is incomplete, improperly completed or not signed by the Development Owner, will be considered not in compliance with the provisions of §42 of the Code and reported to the IRS on Form 8823, Low Income Housing Credit Agencies Report of Non Compliance. The Owner Certification of Program Compliance shall cover the proceeding calendar year and shall include at a minimum the following statements of the Development Owner:

(A) the Development met the minimum set-aside test which was applicable to the Development;

(B) there was no change in the Applicable Fraction of any building in the Development, or that there was a change, and a description of the change;

(C) the owner has received an annual income certification from each low income tenant and documentation to support that certification;

(D) each low income Unit in the Development was rent-restricted under the Code, §42(g)(2) and Treasury Regulation §1.42-10 regarding utility allowances;

(E) all Units in the Development were for use by the general public and used on a non-transient basis (except for transitional housing for the homeless provided under the Code, §42(I)(3)(B)(iii));

(F) No finding of discrimination under the Fair Housing Act, 42 U.S.C. 3601-3619, has occurred for the Development. A finding of discrimination includes an adverse final decision by the Secretary of HUD, 24 CFR 180.680, an adverse final decision by a substantially equivalent state or local fair housing agency, 42 U.S.C. 3616a(a)(1), or and adverse judgement from a federal court;

(G) each building in the Development was suitable for occupancy, taking into account local health, safety, and building codes, and the state or local government unit responsible for making building code inspections did not issue a report of a violation for any building or low income Unit in the Development. If a violation report or notice was issued by the governmental unit, the Development Owner must attach either a statement summarizing the violation report or notice or a copy of the violation report or notice, and in addition, the Development Owner must state whether the violation has been corrected;

(H) either there was no change in the Eligible Basis (as defined in the Code, §42(d)) of any building in the Development, or that there has been a change, and the nature of the change;

(I) all tenant facilities included in the Eligible Basis under the Code, §42(d), of any building in the Development, such as swimming pools, other recreational facilities, and parking areas, were provided on a comparable basis without charge to all tenants in the building;

(J) if a low income Unit in the Development became vacant during the year, reasonable attempts were, or are being, made to rent that Unit or the next available Unit of comparable or smaller size to tenants having a qualifying income before any other Units in the Development were, or will be, rented to tenants not having a qualifying income;

(K) if the income of tenants of a low income Unit in the Development increased above the limit allowed in the Code, §42(g)(2)(D)(ii), the next available Unit of comparable or smaller size in the Development was, or will be, rented to tenants having a qualifying income;

(L) a LURA including an Extended Low Income Housing Commitment as described in the Code, §42(h)(6)(B), was in effect for buildings subject to the Revenue Reconciliation Act of 1989, §7106(c)(1) (generally any building receiving an allocation after 1989), including the requirement under the Code, §42(h)(6)(B)(iv) that a Development Owner cannot refuse to lease a Unit in the Development to an applicant because the applicant holds a voucher or certificate of eligibility under Section 8, and the Development Owner has not refused to lease a Unit to an applicant because of his or her status as a holder of a Section 8 voucher nor is the Development out of compliance with the provisions, including any special provisions, outlined in the Extended Low Income Housing Commitment;

(M) no change in the ownership of a Development has occurred during the reporting period;

(N) the Development Owner has not been notified by IRS that the Development is no longer "a qualified low income housing Development" within the meaning of the Code, §42;

(O) the Development met all terms and conditions which were recorded in the LURA, or if no LURA was required to be recorded, the Development met all representations of the Development Owner in the Application for credits;

(P) if the Development Owner received its Housing Credit Allocation from the portion of the state ceiling set-aside for Developments involving Qualified Nonprofit Organizations under the Code, §42(h)(5), a Qualified Nonprofit Organization owned an interest in and materially participated in the operation of the Development within the meaning of the Code, §469(h);

(Q) all low income Units in the Development were used on a nontransient basis (except for transitional housing for the homeless provided under §42(i)(3)(B)(iii) of the Code or single-room-occupancy units rented on a month-by-month basis under §42(i)(3)(B)(iv) of the Code; and

(R) no low income Units in the Development were occupied by households in which all members were Students.

(2) Review.

(A) The Department staff will review each Owner's Certification of Program Compliance for compliance with the requirements of the Code, §42.

(B) The Department will perform on-site inspections of all buildings in each low income housing Development by the end of the second calendar year following the year the last building in the Development is placed in service and, for at least 20% of the low income Units in each Development, inspect the Units and review the low income certifications, the documentation the Development Owner has received to support the certifications, the rent records for each low income tenant in those Units, and any additional information that the Department deems necessary.

(C) The Department will perform on site monitoring reviews at least once every three years on low income housing Developments. A monitoring review will include an inspection of the income certification, the documentation the Development Owner has received to support that certification, the rent record for each low income tenant, and a property inspection including individual Units and any additional information that the Department deems necessary, for at least 20% of the low income Units in those Developments.

(D) The Department may, at the time and in the form designated by the Department, require the Development Owners to submit for compliance review, information on tenant income and rent for each low income Unit, and may require a Development Owner to submit for compliance review copies of the tenant files, including copies of the income certification, the documentation the Development Owner has received to support that certification and the rent record for any low income tenant.

(E) The Department will randomly select which low income Units and tenant records are to be inspected and reviewed by it. The Department may determine to review tenant records wherever they are stored, whether on-site or off-site. Units and tenant records to be inspected and reviewed will be selected in a manner that will not give Development Owners advance notice that a particular Unit and tenant records for a particular year will or will not be inspected or reviewed. However, the Department will give reasonable notice to the Development Owner that an on-site inspection or a tenant record review will occur, so that the Development Owner may notify tenants of the inspection or assemble tenant records for review.

(3) Exception. The Department may, at its discretion, enter into a Memorandum of Understanding with the TxRD-USDA, whereby the TxRD-USDA agrees to provide to the Department information concerning the income and rent of the tenants in buildings financed by the TxRD-USDA under its §515 program. Owners of such buildings may be excepted from the review procedures of subparagraph (B) or (C) of this paragraph or both; however, if the information provided by TxRD-USDA is not sufficient for the Department to make a determination that the income limitation and rent restrictions of the Code, §42(g)(1) and (2), are met, the Development Owner must provide the Department with additional information. TxRD-USDA Developments satisfy the definition of Qualified Elderly Development if they meet the definition for elderly used by TxRD-USDA, which includes persons with disabilities.

(k) Inspection provision. The Department retains the right to perform an on site inspection of any low income housing Development

including all books and records pertaining thereto through either the end of the Compliance Period or the end of the period covered by any Extended Low Income Housing Commitment, whichever is later. An inspection under this subsection may be in addition to any review under subsection (j)(2) of this section.

(l) The Department retains the right to require the Owner to submit tenant data in the electronic format as developed by the Department. The Department will provide general instruction regarding the electronic transfer of data.

(m) Notices to Owner. The Department will provide prompt written notice to the Development Owner if the Department does not receive the certification described in subsection (g)(1) of this section or discovers through audit, inspection, review or any other manner, that the Development is not in compliance with the provisions of the Code, §42 or the LURA. The notice will specify a correction period which will not exceed 90 days, during which the Development Owner may respond to the Department's findings, bring the Development into compliance, or supply any missing certifications. The Department may extend the correction period for up to six months if it determines there is good cause for granting an extension. If any communication to the Development Owner under this section is returned to the Department as unclaimed or undeliverable, the Development may be considered not in compliance without further notice to the Development Owner.

(n) Notice to the IRS.

(1) Regardless of whether the noncompliance is corrected, the Department is required to file IRS Form 8823 with the IRS. IRS Form 8823 will be filed not later than 45 days after the end of the correction period specified in the Notice to Owner, but will not be filed before the end of the correction period. The Department will explain on IRS Form 8823 the nature of the noncompliance and will indicate whether the Development Owner has corrected the noncompliance or has otherwise responded to the Department's findings.

(2) The Department will retain records of noncompliance or failure to certify for six years beyond the Department's filing of the respective IRS Form 8823. In all other cases, the Department will retain the certification and records described in §49.10 of this title for three years from the end of the calendar year the Department receives the certifications and records.

(o) Notices to the Department. A Development Owner must notify the division responsible for compliance within the Department in writing of the events listed in paragraphs (1) - (3) of this subsection.

(1) prior to any sale, transfer, exchange, or renaming of the Development or any portion of the Development. For Rural Developments that are federally assisted or purchased from HUD, the Department shall not authorize the sale of any portion of the Development;

(2) any change of address to which subsequent notices or communications shall be sent; or

(3) within thirty days of the placement in service of each building, the Department must be provided the in service date of each building.

(p) Liability. Compliance with the requirements of the Code, §42 is the sole responsibility of the Development Owner of the building for which the credit is allowable. By monitoring for compliance, the Department in no way assumes any liability whatsoever for any action or failure to act by the Development Owner including the Development Owner's noncompliance with the Code, §42.

(q) These provisions apply to all buildings for which a low income housing credit is, or has been, allowable at any time. The Department is not required to monitor whether a building or Development was in compliance with the requirements of the Code, §42, prior to January 1, 1992. However, if the Department becomes aware of noncompliance that occurred prior to January 1, 1992, the Department is required to notify the IRS in a manner consistent with subsection (j) of this section.

(r) Material Non-Compliance. In accordance with §49.5(b)(6), the Department will disqualify an Application for funding if the Applicant or other Persons, general partner, general contractor, and their respective principals or Affiliates active in the ownership or control of low income housing located in the State of Texas is determined by the Department to be in Material Non-Compliance on the date the Pre-Application Round opens. The Department will classify a property as being in Material Non-Compliance when such property has a Non-Compliance score that is equal to or exceeds 30 points in accordance with the methodology and point system set forth in this subsection.

(1) Each property that has received an allocation from the Department will be scored according to the type and number of noncompliance events as it relates to the tax credit program or other Department programs. All projects regardless of status that have received an allocation are scored even if the project no longer actively participates in the program.

(2) Uncorrected non-compliance will carry the maximum number of points until the non-compliance event has been reported corrected by the Department. Once reported corrected by the Department the score will reduce to the "corrected value" in paragraph (4) of this subsection. Corrected non-compliance will no longer be included in the project score three years after the date the non-compliance was reported corrected by the Department. Non-compliance events that occurred and were identified by the Department through the issuance of the IRS form 8823 prior to January 1, 1998 are assigned corrected point values to each non-compliance event. The score for these events will no longer be included in the project's score three years after the date the form 8823 was executed. For Applicants under this QAP, a non-compliance report will be run by the Department's Compliance Division on the date the Pre-Application Round opens. Any corrective action documentation affecting this compliance status score must be received by the Department no later than November 15, 2001.

(3) Events of non-compliance are categorized as either "project events" or "unit/building events". Project events of non-compliance affect all the buildings in the property. However, the property will receive only one score for the event rather than a score for each building. Other types of non-compliance are identified individually by unit. This type of non-compliance will receive the appropriate score for each building cited with an event. The building scores accumulate towards the total score of the project.

(4) Each type of non-compliance is assigned a point value. The point value for non-compliance is reduced upon correction of the non-compliance. The scoring point system and values are as described in subparagraphs (A) and (B) of this paragraph. The point system weighs certain types of non-compliance more heavily than others; therefore certain non-compliance events carry a sufficient number of points to automatically place the property in Material Non-Compliance. However other types of non-compliance by themselves do not warrant the classification of Material Non-Compliance. Multiple occurrences of these types of non-compliance events may produce enough points to cause the property to be in Material Non-Compliance.

(A) Project Non-Compliance items are identified in clauses (i) - (xviii) of this subparagraph.

(i) Major property condition violations. Project displays major violations of health and safety standards documented by the city. Uncorrected is 30 points. Corrected is 20 points.

(ii) Failure to meet minimum low-income occupancy levels. Project failed to meet required minimum low-income occupancy levels of 20/50 (20% of the units occupied by tenants with household incomes of less than or equal to 50% of area median gross income) or 40/60. Uncorrected is 20 points. Corrected is 10 points.

(iii) Failure to meet additional State required rent and occupancy restrictions. Project has failed to meet state restrictions that exist in addition to the federal requirements. Uncorrected is 10 points. Corrected is 3 points.

(iv) Failure to provide required supportive services as promised at application. Uncorrected is 10 points. Corrected is 3 points.

(v) Failure to provide housing to the elderly as promised at application. Uncorrected is 10 points. Corrected is 3 points.

(vi) Failure to provide special needs housing. Project has failed to provide housing for tenants with special needs as promised at application. Uncorrected is 10 points. Corrected is 3 points.

(vii) No evidence or failure to certify to non-profit material participation. Uncorrected is 10 points. Corrected is 3 points.

(viii) Owner refused to lease to holder of rental assistance certificate/voucher because of the status of the prospective tenant as such a holder. Uncorrected is 30 points. Corrected is 10 points.

(ix) Changes in eligible basis. Changes occur when common areas become commercial; fees are charged for facilities, etc. Uncorrected is 3 points. Corrected is 1 point.

(x) LURA not in effect. The LURA was not executed within the required time period. Uncorrected is 3 points. Corrected is 1 point.

(xi) Owner failed to pay fees or allow on-site monitoring review. Uncorrected is 3 points. Corrected is 1 point.

(xii) Failure to submit annual, monthly, or quarterly reports. Uncorrected is 3 points. Corrected is 1 point.

(xiii) Pattern of minor property condition violations. Project displays a pattern of property violations. However those violations do not impair essential services and safeguards for tenants. Uncorrected is 3 points. Corrected is 1 point.

(xiv) Owner failed to make available or maintain management plan. Uncorrected is 10 points. Corrected is 3 point.

(xv) Owner failed to post Fair Housing Logo and/or poster in leasing offices. Uncorrected is 10 points. Corrected is 3 point.

(xvi) Owner failed to approve and distribute Affirmative Marketing Plan. Uncorrected is 10 points. Corrected is 3 point.

(xvii) Owner failed to provide required annual notification to local administering agency for the Section 8 program. Uncorrected is 10 points. Corrected is 3 point.

(xviii) Project is out of compliance and never expected to comply. Uncorrected is 30 points. Not correctable.

(B) Unit Non-Compliance items are identified in clauses (i) - (ix) of this subparagraph.

(i) Unit not leased to Low Income Household. Project has units that are leased to households that do not meet the income requirements. Uncorrected is 3 points. Corrected is 1 point.

(ii) Unit(s) occupied by students. Project has units leased to non-qualified students. Typically, full-time students are non-qualified. Uncorrected is 3 points. Corrected is 1 point.

(iii) Units used on transient basis. Project has units that are leased for less than six months. Uncorrected is 3 points. Corrected is 1 point.

(iv) Unit not available to general public. Uncorrected is 3 points. Corrected is 1 point.

(v) Income of household increased above the re-certification limit and unit not replaced. Uncorrected is 3 points. Corrected is 1 point.

(vi) Rent exceeds rent limit. Project has units in which the rent exceeds the allowable program limits. Uncorrected is 3 points. Corrected is 1 point.

(vii) Utility allowance not calculated properly or not available for review. Uncorrected is 3 points. Corrected is 1 point.

(viii) Income not certified or documentation not maintained. Project management has not maintained tenant income certifications or supporting documentation. Uncorrected is 3 points. Corrected is 1 point.

(ix) Failure to annually inspect HOME units. Project has failed to inspect units as required by the HOME program. Uncorrected is 3 points. Corrected is 1 point.

(x) Units not available for occupancy due to natural disaster or hazard due to no fault of the Owner. This carries no point value.

§49.11. Housing Credit Allocations.

(a) In making a Housing Credit Allocation under this chapter, the Department shall rely upon information contained in the Applicant's Application to determine whether a building is eligible for the credit under the Code, §42. The Applicant shall bear full responsibility for claiming the credit and assuring that the Development complies with the requirements of the Code, §42. The Department shall have no responsibility for ensuring that an Applicant who receives a housing credit allocation from the Department will qualify for the housing credit.

(b) The Housing Credit Allocation Amount shall not exceed the dollar amount the Department determines is necessary for the financial feasibility and the long term viability of the Development throughout the Compliance Period. Such determination shall be made by the Department at the time of issuance of the Commitment Notice or Determination Notice; at the time the Department makes a Housing Credit Allocation; and/or the date the building is placed in service. Any Housing Credit Allocation Amount specified in a Commitment Notice, Determination Notice or Carryover Allocation Document is subject to change by the Department dependent upon such determination. Such a determination shall be made by the Department based on its evaluation and procedures, considering the items specified in the Code, §42(m)(2)(B), and the department in no way or manner represents or warrants to any applicant, sponsor, investor, lender or other entity that the Development is, in fact, feasible or viable.

(c) The General Contractor hired by the Applicant must meet specific criteria as defined by the Seventy-fifth Legislature. A general contractor hired by an applicant or an applicant, if the applicant serves as general contractor must demonstrate a history of constructing similar

types of housings without the use of federal tax credits. Evidence must be submitted to the Department which sufficiently documents that the general contractor has constructed some housing without the use of low income housing credits. This documentation will be required as a condition of the commitment notice or carryover agreement, and must be complied with prior to commencement of construction and at cost certification and final allocation of credits.

(d) All Carryover Allocations will be contingent upon the following:

(1) A current original plat of survey of the land, prepared by a duly licensed Texas Registered Professional Land Surveyor. Such survey shall conform to standards prescribed in the Manual of Practice for Land Surveying in Texas as promulgated and amended from time to time by the Texas Surveyors Association as more fully described in the Carryover Procedures Manual.

(2) A review of information provided by the IRS as permitted pursuant to IRS Form 8821, Tax Information Authorization, for the release of tax information relating to non-disclosure or recapture issues. Each Applicant must execute and provide to the Department Form 8821 within ten business days of the issuance of a Commitment Notice or Determination Notice. The form must be signed and executed on behalf of the Development Owner. If any issues of recapture or non-disclosure are identified by the IRS, the Board may determine if a Carryover Allocation will be made.

(3) Attendance of the Development Owner and Development architect at eight hours of Fair Housing training.

(4) the Development Owner's closing of the construction loan shall occur not later than the second Friday in June of the year after the execution of the Carryover Allocation Document with the possibility of a one-time 30 day extension as described in §49.13 of this title. Copies of the closing documents must be submitted to the Department within two weeks after the closing. At the time of submission of Construction Closing documentation, the Development Owner must also submit a Management Plan and a Affirmative Marketing Plan as further described in the Carryover Allocation Procedures Manual. The Carryover Allocation will automatically be revoked if the Development Owner fails to meet the aforementioned closing deadline, and all credits previously allocated to that Development will be returned to the general pool for reallocation.

(5) the Development Owner must commence and continue substantial construction activities not later than the second Friday in November of the year after the execution of the Carryover Allocation Document with the possibility of an extension as described in §49.13(j) of this title. Substantial construction activities for new Developments will generally be defined as post foundation construction activities. Evidence of such activity shall be provided in a format prescribed by the Department in the LIHTC Progress Report--Commencement of Construction which will document progress towards placing the Development in service in an expeditious manner.

(e) An allocation will be made in the name of the Applicant identified in the related Commitment Notice or Determination Notice. If an allocation is made in the name of the party expected to be the general partner in an eventual owner partnership, the Department may, upon request, approve a transfer of allocation to such owner partnership in which such party is the sole general partner. Any other transfer of an allocation will be subject to review and approval by the Department. The approval of any such transfer does not constitute a representation to the effect that such transfer is permissible under §42 of the Code or without adverse consequences thereunder, and the Department may condition its approval upon receipt and approval of complete documentation regarding the new owner including all the criteria for scoring, evaluation and underwriting, among others, which were applicable to the original Applicant.

(f) The Department shall make a Housing Credit Allocation, either in the form of IRS Form 8609, with respect to current year allocations for buildings placed in service, or in the Carryover Allocation Document, for buildings not yet placed in service, to any Development Owner who holds a Commitment Notice which has not expired, and for which all fees as specified in §49.13 of this title, have been received by the Department. For Tax Exempt Bond Developments, the Housing Credit Allocation shall be made in the form of a Determination Notice. For an IRS Form 8609 to be issued with respect to a building in a Development with a Housing Credit Allocation, satisfactory evidence must be received by the Department that such building is completed and has been placed in service in accordance with the provisions of the Department's Cost Certification Procedures Manual. The manual will require, in addition to other items, that a self-evaluation form for compliance with Americans with Disabilities Act, Fair Housing Act and Section 504 of the Rehabilitation Act has been completed by the Owner. The Department shall mail or deliver IRS Form 8609 (or any successor form adopted by the Internal Revenue Service) to the Development Owner, with Part I thereof completed in all respects and signed by an authorized official of the Department. The delivery of the IRS Form 8609 will occur only after the Development Owner has complied with all procedures and requirements listed within the Cost Certification Procedures Manual. Regardless of the year of Application to the Department for low income housing tax credits, the current year's Cost Certification Procedures Manual must be utilized when filing all cost certification requests. A separate housing credit allocation shall be made with respect to each building within a Development which is eligible for a housing credit; provided, however, that where an allocation is made pursuant to a Carryover Allocation Document on a Development basis in accordance with the Code, §42(h)(1)(F), a housing credit dollar amount shall not be assigned to particular buildings in the Development until the issuance of IRS Form 8609s with respect to such buildings.

(g) In making a Housing Credit Allocation, the Department shall specify a maximum Applicable Percentage, not to exceed the Applicable Percentage for the building permitted by the Code, §42(b), and a maximum Qualified Basis amount. In specifying the maximum applicable percentage and the maximum Qualified Basis amount, the Department shall disregard the first-year conventions described in the Code, §42(f)(2)(A) and §42(f)(3)(B). The housing credit allocation made by the Department shall not exceed the amount necessary to support the extended low income housing commitment as required by the Code, §42(h)(6)(C)(i).

(h) Development inspections shall be required to show that the Development is built or rehabilitated according to required plans and specifications. At a minimum, all Development inspections must include an inspection for quality during the construction process while defects can reasonably be corrected and a final inspection at the time the Development is placed in service. All such Development inspections shall be performed by the Department or by an independent, third party inspector acceptable to the Department. The Development Owner shall pay all fees and costs of said inspections as described in §49.13(g) of this title.

(i) After the entire Development is placed in service, which must occur prior to the deadline specified in the Carryover Allocation Document, the Development Owner shall be responsible for furnishing the Department with documentation which satisfies the requirements set forth in the Cost Certification Procedures Manual. A newly constructed or rehabilitated building is not placed in service until all units in such building have been completed and certified by the appropriate

local authority or registered architect as ready for occupancy. The Cost Certification must be submitted for the entire Development, therefore partial Cost Certifications are not allowed. The Department may require copies of invoices and receipts and statements for materials and labor utilized for the new construction or rehabilitation and, if applicable, a closing statement for the acquisition of the Development as well as for the closing of all interim and permanent financing for the Development. If the Applicant does not fulfill all representations made in the Application, the Department may make reasonable reductions to the tax credit amount allocated via the IRS Form 8609 or may withhold issuance of the IRS Form 8609s until these representations are met.

§49.12. Department Records; Certain Required Filings.

(a) At all times during each calendar year the Department shall maintain a record of the following:

(1) the cumulative amount of the State Housing Credit Ceiling that has been reserved pursuant to reservation notices during such calendar year;

(2) the cumulative amount of the State Housing Credit Ceiling that has been committed pursuant to Commitment Notices during such calendar year;

(3) the cumulative amount of the State Housing Credit Ceiling that has been committed pursuant to Carryover Allocation Documents during such calendar year;

(4) the cumulative amount of housing credit allocations made during such calendar year; and

(5) the remaining unused portion of the State Housing Credit Ceiling for such calendar year.

(b) The Department shall maintain for each Application an Application Log that tracks the Application from the date of its submission. The Application Log will contain, at a minimum, the information identified in paragraphs (1) - (9) of this subsection.

(1) the names of the Applicant and Related Parties, the owner contact name and phone number, and full contact information for all members of the Development Team;

(2) the name, physical location, and address of the Development, including the relevant region of the state;

(3) the number of Units and the amount of housing tax credits requested for allocation by the Department to the Applicant;

(4) any set-aside category under which the Application is filed;

(5) the requested and awarded score of the Application in each scoring category adopted by the Department under the Qualified Allocation Plan;

(6) any decision made by the Department or Board regarding the Application, including the Department's decision regarding whether to underwrite the Application and the Board's decision regarding whether to allocate housing tax credits to the Development;

(7) the names of persons making the decisions described by paragraph (6) of this subsection, including the names of Department staff scoring and underwriting the Application, to be recorded next to the description of the applicable decision;

(8) the amount of housing tax credits allocated to the Development; and

(9) a dated record and summary of any contact between the Department staff, the Board, and the Applicant or any Related Parties.

(c) The Department shall mail to the Internal Revenue Service, not later than the 28th day of the second calendar month after the close of each calendar year during which the Department makes housing credit allocations, the original of each completed (as to Part I) IRS Form 8609, a copy of which was mailed or delivered by the Department to a Development Owner during such calendar year, along with a single completed IRS Form 8610, Annual Low Income Housing Credit Agencies Report. When a Carryover Allocation is made by the Department, a copy of IRS Form 8609 will be mailed or delivered to the Development Owner by the Department in the year in which the building(s) is placed in service, and thereafter the original will be mailed to the Internal Revenue Service in the time sequence in this subsection. The original of the Carryover Allocation Document will be filed by the Department with IRS Form 8610 for the year in which the allocation is made. The original of all executed Agreement and Election Statements shall be filed by the Department with the Department's IRS Form 8610 for the year a housing credit allocation is made as provided in this section. The Department shall be authorized to vary from the requirements of this section to the extent required to adapt to changes in IRS requirements.

§49.13. Program Fees and Extensions.

(a) Pre-Application Fee. Each Applicant that submits a Pre-Application shall submit to the Department, along with such Pre-Application, a non refundable Pre-Application fee, in the amount of $15 per Unit. Units for the calculation of the Pre-Application Fee include all Units within the Development, including tax credit, market rate and owner-occupied Units. Pre-Applications without the specified Pre-Application Fee in the form of a cashiers check will not be accepted. Community Housing Development Organizations (CHDOs) will receive a discount of 10% off the calculated Pre-Application fee.

(b) Application Fee. Each Applicant that submits an Application shall submit to the Department, along with such Application, an Application fee. For Applicants having submitted a Pre-Application which met Pre-Application Threshold and for which a Pre-Application fee was paid, the Application fee will be $5 per Unit. For Applicants not having submitted a Pre-Application, the Application fee will be $20 per Unit. Units for the calculation of the Application Fee include all Units within the Development, including tax credit, market rate and owner-occupied Units. Applications without the specified Application Fee in the form of a cashiers check will not be accepted. Community Housing Development Organizations will receive a discount of 10% off the calculated Application fee.

(c) Refunds of Pre-Application or Application Fees. The Department shall refund the balance of any fees collected for a Pre-Application or Application that is withdrawn by the Applicant or that is not fully processed by the Department. The amount of refund on Applications not fully processed by the Department will be commensurate with the level of review completed. Intake and data entry will constitute 30% of the review, the site visit will constitute 45% of the review, and Threshold and Selection review will constitute 25% of the review. The Department must provide the refund to the Applicant not later than the 30th day after the date the last official action is taken with respect to the Application.

(d) Third Party Underwriting Fee. Applicants will be notified in writing prior to the evaluation of a Development by an independent third party underwriter in accordance with §49.7(b)(3) of this title if such a review is required. The fee must be received by the Department prior to the engagement of the underwriter. The fees paid by the Development Owner to the Department for the third party underwriting will be credited against the commitment fee established in subsection (e) of this section, in the event that a Commitment Notice or Determination Notice is issued by the Department to the Development Owner.

(e) Commitment or Determination Notice Fee. Each Development Owner that receives a Commitment Notice or Determination Notice shall submit to the Department, not later than the expiration date on the commitment notice, a non-refundable commitment fee equal to 4% of the annual housing credit allocation amount. The commitment fee shall be paid by cashier's check.

(f) Compliance Monitoring Fee. Upon the Development being placed in service, the Development Owner will pay a compliance monitoring fee in the form of a cashier's check equal to $25 per tax credit Unit per year or $100, whichever is greater. Payment of the first year's compliance monitoring fee must be received by the Department prior to the release of the IRS Form 8609 on the Development. Subsequent anniversary dates on which compliance monitoring fee payments are due shall be determined by the date the Development was placed in service.

(g) Building Inspection Fee. Development Owners must pay for any inspections that the Department requires, whether during construction or after completion, and estimated charges for all such inspections may be aggregated and distributed among the Developments according to Development size, cost or other criteria. All outstanding building inspection fees must be received by the Department prior to the release of the IRS Form 8609.

(h) Public Information Requests. Public information requests are processed by the Department in accordance with the provisions of the Government Code, Chapter 552. The Texas Building and Procurement Commission (formerly General Services Commission) determines the cost of copying, and other costs of production.

(i) Amendment of Fees by the Department and Notification of Fees. All fees charged by the Department in the administration of the tax credit program will be revised by the Department from time to time as necessary to ensure that such fees compensate the Department for its administrative costs and expenses. The Department shall publish not later than July 1 of each year a schedule of Application fees that specifies the amount to be charged at each stage of the application process.

(j) Extension Requests. All extension requests relating to the Commitment Notice, Carryover, Closing of Construction Loan, Substantial Construction Commencement, Placed in Service or Cost Certification requirements shall be submitted to the Department in writing and be accompanied by a non-refundable extension fee in the form of a cashier's check in the amount of $2,500. Such requests must be submitted to the Department at least ten business days prior to the date for which an extension is being requested. The extension request shall specify a requested extension date and the reason why such an extension is required. The Department, in its sole discretion, may consider and grant such extension requests for all items except for the Closing of Construction Loan and Substantial Construction Commencement. The Board may grant extensions, for the Closing of Construction Loan and Substantial Construction Commencement. The Board may waive related fees.

§49.14. Manner and Place of Filing Applications and Other Required Documentation.

(a) An Application or Pre-Application for a Housing Credit Allocation from the State Housing Credit Ceiling and the required Application or Pre-Application fee as described in §49.13(a) and (b) of this title must be filed during the Application Acceptance Periods published periodically in the Texas Register.

(b) Applications for a Determination Notice for a Tax Exempt Bond Development may be submitted to the Department as described in paragraphs (1) and (2) of this subsection:

(1) Applicants which receive advance notice of a Program Year 2002 reservation as a result of the Texas Bond Review Board's (TBRB) lottery for the private activity volume cap must file a complete Application per the requirements of §49.7(h) of this title not later than 60 days after the date of the TBRB lottery. Such filing must be accompanied by the Application fee described in §49.13(b) of this title.

(2) Applicants which receive advance notice of a Program Year 2002 reservation after being placed on the waiting list as a result of the TBRB lottery for private activity volume cap must submit Volume 1 of the Application prior to the Applicant's bond reservation date as assigned by the TBRB. The Application fee described in §49.13(b) of this title and any outstanding documentation required under §49.7(i) of this title must be submitted to the Department at least 45 days prior to the Board meeting at which the decision to issue a Determination Notice would be made.

(c) All Applications, letters, documents, or other papers filed with the Department will be received only between the hours of 8:00 a.m. and 5:00 p.m. on any day which is not a Saturday, Sunday or a holiday established by law for state employees.

(d) All notices, information, correspondence and other communications under this title shall be deemed to be duly given if delivered or sent and effective in accordance with this subsection. Such correspondence must reference that the subject matter is pursuant to the Tax Credit Program and must be addressed to the Low Income Housing Tax Credit Program, Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, TX 78711-3941 or for hand delivery or courier to 507 Sabine, Suite 400, Austin, Texas 78701. Every such correspondence required or contemplated by this title to be given, delivered or sent by any party may be delivered in person or may be sent by courier, telecopy, express mail, telex, telegraph or postage prepaid certified or registered air mail (or its equivalent under the laws of the country where mailed), addressed to the party for whom it is intended, at the address specified in this subsection. Notice by courier, express mail, certified mail, or registered mail will be effective on the date it is officially recorded as delivered by return receipt or equivalent and in the absence of such record of delivery it will be presumed to have been delivered by the fifth business day after it was deposited, first-class postage prepaid, in the United States first class mail. Notice by telex or telegraph will be deemed given at the time it is recorded by the carrier in the ordinary course of business as having been delivered, but in any event not later than one business day after dispatch. Notice not given in writing will be effective only if acknowledged in writing by a duly authorized officer of the Department.

§49.15. Withdrawals, Cancellations, Amendments.

(a) An Applicant may withdraw an Application prior to receiving a Commitment Notice, Determination Notice, Carryover Allocation Document or Housing Credit Allocation, or may cancel a Commitment Notice or Determination Notice by submitting to the Department a notice, as applicable, of withdrawal or cancellation.

(b) The Board in its sole discretion may allocate credits to a Development Owner in addition to those awarded at the time of the initial Carryover Allocation in instances where there is bona fide substantiation of cost overruns and the Department has made a determination that the allocation is needed to maintain the Development's financial viability as a qualified low income Development.

(c) The Department may, at any time and without additional administrative process, determine to award credits to Developments previously evaluated and awarded credits if it determines that such previously awarded credits are or may be invalid and the owner was not responsible for such invalidity. The Department may also consider an

amendment to a Commitment Notice, Determination Notice or Carryover Allocation or other requirement with respect to a Development if the revisions:

(1) are consistent with the Code and the tax credit program;

(2) do not occur while the Development is under consideration for tax credits;

(3) do not involve a change in the number of points scored (unless the Development's ranking is adjusted because of such change);

(4) do not involve a change in the Development's site; or

(5) do not involve a change in the set-aside election.

(d) The Department may cancel a Commitment Notice, Determination Notice or Carryover Allocation prior to the issuance of IRS Form 8609 with respect to a Development if:

(1) the Development Owner or any member of the Development Team, or the Development, as applicable, fails to meet any of the conditions of such Commitment Notice or Carryover Allocation or any of the undertakings and commitments made by the Development Owner in the applications process for the Development;

(2) any statement or representation made by the Development Owner or made with respect to the Development Owner, the Development Team or the Development is untrue or misleading;

(3) an event occurs with respect to any member of the Development Team which would have made the Development's Application ineligible for funding pursuant to §49.5 of this title if such event had occurred prior to issuance of the Commitment Notice or Carryover Allocation; or

(4) the Development Owner, any member of the Development Team, or the Development, as applicable, fails to comply with these Rules or the procedures or requirements of the Department.

§49.16. Waiver and Amendment of Rules.

(a) The Board, in its discretion, may waive any one or more of these Rules in cases of natural disasters such as fires, hurricanes, tornadoes, earthquakes, or other acts of nature as declared by Federal or State authorities.

(b) The Department may amend this chapter and the Rules contained herein at any time in accordance with the Government Code, Chapter 2001, as may be amended from time to time.

§49.17. Forward Reservations; Binding Commitments.

(a) Anything in §49.4 of this title or elsewhere in this chapter to the contrary notwithstanding, the Department with approval of the Board may determine to issue commitments of tax credit authority with respect to Developments from the State Housing Credit Ceiling for the calendar year following the year of issuance (each a "forward commitment"). The Department may make such forward commitments:

(1) with respect to Developments placed on a waiting list in any previous Application Round during the year; or

(2) pursuant to an additional Application Round.

(b) If the Department determines to make forward commitments pursuant to a new Application Round, it shall provide information concerning such round in the *Texas Register*. In inviting and evaluating Applications pursuant to an additional Allocation Round, the Department may waive or modify any of the set-asides set forth in §49.6 of this title and make such modifications as it determines appropriate in the Threshold Criteria, evaluation factors and Selection Criteria set forth in §49.7 of this title and in the dates and times by which actions are required to be performed under this chapter. The Department may also, in an additional Application Round, include Developments previously evaluated within the calendar year and rank such Developments together with those for which Applications are newly received.

(c) Unless otherwise provided in the Commitment Notice with respect to a Development selected to receive a forward commitment or in the announcement of an Application Round for Developments seeking a forward commitment, actions which are required to be performed under this chapter by a particular date within a calendar year shall be performed by such date in the calendar year of the anticipated allocation rather than in the calendar year of the forward commitment.

(d) Any forward commitment made pursuant to this section shall be made subject to the availability of State Housing Credit Ceiling in the calendar year with respect to which the forward commitment is made. No more than 15% of the per capita component of State Housing Credit Ceiling anticipated to be available in the State of Texas in a particular year shall be allocated pursuant to forward commitments to Development Applications carried forward without being ranked in the new Application Round pursuant to subsection (f) of this section. If a forward commitment shall be made with respect to a Development placed in service in the year of such commitment, the forward commitment shall be a "binding commitment" to allocate the applicable credit dollar amount within the meaning of the Code, §42(h)(1)(C).

(e) If tax credit authority shall become available to the Department later in a calendar year in which forward commitments have been awarded, the Department may allocate such tax credit authority to any eligible Development which received a forward commitment, in which event the forward commitment shall be canceled with respect to such Development.

(f) In addition to or in lieu of making forward commitments pursuant to subsection (a) of this section, the Department may determine to carry forward Development Applications on a waiting list or otherwise received and ranked in any Application Round within a calendar year to the subsequent calendar year, requiring such additional information, Applications and/or fees, if any, as it determines appropriate. Development Applications carried forward may, within the discretion of the Department, either be awarded credits in a separate allocation round on the basis of rankings previously assigned or may be ranked together with Development Applications invited and received in a new Application Round. The Department may determine in a particular calendar year to carry forward some Development Applications under the authority provided in this subsection, while issuing forward commitments pursuant to subsection (a) of this section with respect to others.

§49.18. Deadlines for Allocation of Low Income Housing Tax Credits.

(a) Not later than September 30 of each year, the Department shall prepare and submit to the Board for adoption the draft Qualified Allocation Plan required by federal law for use by the Department in setting criteria and priorities for the allocation of tax credits under the low income housing tax credit program.

(b) The Board shall adopt and submit to the Governor the Qualified Allocation Plan not later than November 15 of each year.

(c) The Governor shall approve, reject, or modify and approve the Qualified Allocation Plan not later than December 1 of each year.

(d) An Applicant for a low income housing tax credit to be issued a Commitment Notice during the Application Round in a calendar year must submit an Application to the Department not later than March 1.

(e) The Board shall review the recommendations of Department staff regarding Applications and shall issues a list of approved Applications each year in accordance with the Qualified Allocation Plan not later than June 30.

(f) The Board shall issue final Commitment Notices for allocations of housing tax credits each year in accordance with the Qualified Allocation Plan not later than July 31.

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 November 16, 2001.

TRD-200107098
Ruth Cedillo
Acting Executive Director
Texas Department of Housing and Community Affairs
Effective date: December 6, 2001
Proposal publication date: October 5, 2001
For further information, please call: (512) 475-3726

♦ ♦ ♦

PART 5. TEXAS DEPARTMENT OF ECONOMIC DEVELOPMENT

CHAPTER 199. ELECTRONIC STATE BUSINESS DAILY

10 TAC §§199.101 - 199.116

By Act of Senate Bill 311, Article 7, §7.08, the 77th Legislature transferred rules relating to the business daily pursuant to Government Code, §2155.083, from the Texas Department of Economic Development to the General Services Commission (or its successor agency, the Texas Building and Procurement Commission). In order to comply with the Bill, the Texas Register is moving Title 10, Part 5, Chapter 199, §§199.101-199.116 to Title 1, Part 5, Chapter 113, Subchapter J, §§113.201-113.216. The transfer became effective September 1, 2001.

A complete conversion chart is published in the Tables and Graphics section of the print Texas Register.

Figure: 1 TAC Chapter 113

§199.101. Authority.

§199.102. Purpose.

§199.103. Definitions.

§199.104. General Provisions.

§199.105. Internet Access.

§199.106. Fees.

§199.107. General Posting Requirements.

§199.108. Posting Time Requirements.

§199.109. Emergency Procurements.

§199.110. Registered Agent Requirements.

§199.111. Procurement Opportunity Posting Procedures.

§199.112. Posting Follow-up and Record Keeping.

§199.113. Contract Award.

§199.114. Award Notification.

§199.115. Verification of Compliance.

§199.116. Exceptions and Exclusions.

Filed with the Office of the Secretary of State on November 8, 2001.

TRD-200107010
Effective date: September 1, 2001

♦ ♦ ♦

TITLE 13. CULTURAL RESOURCES

PART 1. TEXAS STATE LIBRARY AND ARCHIVES COMMISSION

CHAPTER 8. TEXSHARE LIBRARY CONSORTIUM

13 TAC §§8.1 - 8.6

The Texas State Library and Archives Commission adopts amendments to §§8.1 - 8.6, regarding establishment and operation of the TexShare library consortium with changes to the text as published in the October 12, 2001, issue of the *Texas Register* (26 TexReg 41). This amendment brings the TexShare rules in alignment with HB 1433, which was enacted by the 76th Legislature and HB 3591, which was enacted by the 77th Legislature.

The amendment revises the language of §§8.1 - 8.6 to allow public libraries and libraries of clinical medicine to join the TexShare consortium and participate in its programs per HB 1433 of the 76th Legislature and HB 3591 of the 77th Legislature. This amendment also establishes the administrative procedures to be followed in admitting these new constituents, providing them with services, and monitoring their activities.

Three comments were received during the comment period. One suggestion asked that the word "customers" in §8.2(4) be changed to "library users." As both terms are accurate descriptions of persons that are served by libraries, with no benefit in clarity resulting from such a change, the language of this section remains as it was proposed.

The second comment questioned the change to §8.3(g) which replaced the statement "Fees will be set by the Director and Librarian on the basis of costs for the individual programs and/or the tier placement of the institutions" with "Fees will be set by the Director and Librarian for different categories of consortium services." While library size (tier) is often an important consideration for determining fee structures, some service costs are independent of library size. The language of this section should establish parameters for setting service fees, while retaining the ability to assign fees that are reflective of the nature of the services rendered. The statement has, therefore, been changed to read: "Fees will be set by the Director and Librarian for different categories of consortium services, in consideration of the costs involved in providing these services to member libraries."

A final comment was made regarding §8.4(a), referring to the composition of the TexShare Advisory Board. This comment asked that the words "at least" be deleted from each place in that section where the rules specify "at least two members must

be affiliated with . . ." The words in this section of the rules reflect those of the enabling legislation (Government Code, §441.226), therefore the original wording is retained.

Additionally, §8.4(f) has been changed to omit the annual election a TexShare advisory board secretary in order to reflect current practice.

The amendments are adopted under Government Code §441.225(b) as amended by HB 2721, Acts, 75 Legislature, R.S. (1997) which authorize the commission to adopt rules to govern the operation of the consortium.

The amendments affect Government Code, §§441.221 - 441.230.

§8.1. Definitions.

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

(1) Institution of higher education--An institution of higher education as defined by Education Code, §61.003, and a private or independent institution of higher education as defined by Education Code, §61.003.

(2) Annual Report--A report submitted to the Commission each year on the member institution of higher education's participation in TexShare programs, the member library of clinical medicine's participation in TexShare programs, or in fulfillment of a public library's system membership requirements.

(3) Commission--The Texas State Library and Archives Commission.

(4) Consortium--The TexShare Library Consortium.

(5) Director and Librarian--Chief executive and administrative officer of the commission.

(6) Public Library has the meaning assigned by Government Code, §441.122

(7) Library of clinical medicine has the meaning assigned to Non-Profit Corporation by Government Code, §441.221.

(A) Extensive library services are defined as those services set forth in §1.81(4)(C) and (D) of this title.

(B) Extensive collections in the fields of clinical medicine and the history of Medicine--a minimum of 10,000 library resources in print and in electronic format, comprised of books, journal titles, technical reports, and databases on clinical medicine and the history of medicine.

(8) Internet connection--A combination of hardware, software and telecommunications services that allows a computer to communicate with any other computer on the worldwide network of networks known as the Internet, and that adheres to Internet standards documents of the Internet Engineering Steering Group, Internet Architecture Board, and the Internet community.

§8.2. Purpose.

The purpose of TexShare is to assist public libraries, libraries of clinical medicine, and libraries at institutions of higher education in Texas:

(1) to improve the availability of library resources in all communities;

(2) to promote the future health and well-being of the citizenry and enhance quality teaching and research excellence at institutions of higher education through the efficient exchange of information and the sharing of library resources;

(3) to maximize the effectiveness of library expenditures by enabling libraries to share staff expertise and to share library resources in print and in an electronic form, including books, journals, technical reports, and databases;

(4) to increase the intellectual productivity of customers at the participating institutions by emphasizing access to information rather than ownership of documents and other information sources; and

(5) to facilitate joint purchasing agreements for purchasing information services and encourage cooperative research and development of information technologies. Membership

§8.3. Membership.

(a) Eligibility. Membership in the consortium is open to all institutions of higher education as determined by the Texas Higher Education Coordinating Board, to libraries of clinical medicine, and to all public libraries that are members of the state library system, as defined in Government Code, §441.127.

(b) Agreement. Public libraries will be TexShare Members so long as they remain members of the state library system. Institutions of higher education and libraries of clinical medicine must file a membership agreement, signed by a duly authorized administrative official, on joining the consortium. Participation in specific programs of the consortium may require additional agreements and fees.

(c) Annual Report. Libraries of member institutions of higher education and member libraries of clinical medicine shall file a current and complete annual report for the preceding year with the commission by January 15 of each year. Public libraries shall file their state library system reports as required by §1.85 of this title.

(d) Multiple Libraries. For institutions of higher education, the unit of membership in the TexShare Library Consortium shall be the institution. Community college districts may apply as a single unit or as individual campuses; other institutions of higher education with libraries in multiple locations shall apply as a single unit. Public libraries with branches shall apply as a single unit. Libraries affiliated with professional schools that demonstrate they are administered and budgeted independently of the campus library may apply for separate membership. For libraries of clinical medicine, the unit of membership shall be the non-profit corporation; those having multiple locations shall apply as a single unit.

(e) Suspension of membership.

(1) Institutions of higher education and libraries of clinical medicine: Membership will be automatically renewed for each state fiscal year, provided that the library of clinical medicine or institution of higher education continues to meet the definition required in subsection (a) of this section; and an annual report has been filed as required by subsection (c) of this section.

(2) Public libraries: Public libraries shall remain TexShare members so long as they remain members of the state library system.

(3) Institutions of higher education, libraries of clinical medicine, and public libraries that no longer meet the definition in subsection (a) of this section, or are otherwise not qualified, will be suspended from membership. They may re-join TexShare when they meet the definition in subsection (a) of this section.

(f) Tiers. Institutions of higher education are placed in one of three tiers on the basis of the size of their book collection and student enrollment, as reflected in the latest statistics from the National Center for Educational Statistics, the Texas Higher Education Coordinating Board, and the Independent Colleges and Universities of Texas.

(1) Tier 1: Over 750,000 volumes or over 10,000 enrollment.

(2) Tier 2: 100,000-749,999 volumes or 2,001-9,999 enrollment.

(3) Tier 3: Under 100,000 volumes and 2,000 or less enrollment.

(g) Fees. Some consortium services are supported by fees paid by participants. Fees will be set by the Director and Librarian for different categories of consortium services, in consideration of the costs involved in providing these services to member libraries.

§8.4. Advisory Board.

(a) The commission shall appoint an eleven-member advisory board to advise the commission on matters relating to the consortium. At least two members must be representatives of the general public, at least two members must be affiliated with a four-year public university in the consortium, at least two members must be affiliated with a public community college in the consortium, at least two members must be affiliated with a private institution of higher education in the consortium and at least two members must be affiliated with a public library in the consortium. The eleventh member is at large without any affiliation specified. Members of the advisory board must be qualified by training and experience to advise the commission on policy.

(b) Members of the advisory board shall be chosen to present as much variety as possible in geographic distribution and size and type of institution.

(c) The advisory board shall meet at least twice a year regarding consortium programs and plans at the call of the advisory board's chairman or of the director and librarian.

(d) Members of the advisory board serve three-year terms beginning September 1.

(e) A member of the advisory board serves without compensation but is entitled to reimbursement for actual and necessary expenses incurred in the performance of official duties, subject to any applicable limitation on reimbursement provided by the General Appropriations Act.

(f) The advisory board shall elect a chairman and a vice chairman at the first meeting of each fiscal year.

(g) The advisory board may recommend to the commission that the consortium enter into cooperative projects with entities other than public libraries, libraries of clinical medicine, or institutions of higher education.

§8.5. Programs.

The programs of the consortium shall include activities designed to facilitate library resource sharing. Such activities may include:

(1) providing electronic networks, shared databases, reciprocal borrowing, delivery services, and other infrastructure necessary to enable the libraries in the consortium to share resources;

(2) negotiating and executing statewide contracts for information products and services;

(3) coordinating library planning, research and development; or

(4) training library personnel.

§8.6. Grants: Access to Local Holdings.

(a) Purpose. To provide seed money to assist libraries in Texas institutions of higher education, libraries of clinical medicine, and public libraries to provide access to their special or unique holdings and to make information about these holdings available to library users across the state.

(b) Eligibility. Libraries in institutions of higher education, libraries of clinical medicine and public libraries that have been certified as meeting the TexShare membership requirements in §8.3 of this title (relating to Membership) for the state fiscal year in which the grant is awarded are eligible to apply for local holdings grants. A member library may apply on behalf of a group of member libraries in a cooperative project, or for funding of the member library portion of a project including other libraries or organizations.

(c) Services to be Provided. This grant program focuses on making unique library collections accessible for TexShare constituents. Applicants may propose projects designed to increase accessibility through a wide range of activities such as organizing, cataloging, indexing, microfilming and digitizing local materials.

(d) Standards requirements. Cataloging or indexing information created under the grant must be available through the OCLC Incorporated bibliographic database or an Internet connection. Digitized materials must be available through an Internet connection, and be created, stored, and accessible in accordance with the Library of Congress National Digital Library Program as published in Digital Historical Collections: Types, Elements, and Construction, Digital Formats for Content Reproductions, and Access Aids and Interoperability, or their successor documents.

(e) General Selection Criteria.

(1) This grant program is competitive. Selection criteria are designed to select applications that provide the best overall value to the state.

(2) The award criteria include:

(A) program quality as determined by a peer review process; and

(B) the cost of proposed service.

(3) The commission may consider additional factors in determining best value, including:

(A) financial ability to perform services;

(B) state and regional service needs and priorities;

(C) ability to continue services after grant period; or

(D) past performance and compliance.

(f) Peer Review

(1) The commission uses peer reviewers to evaluate the quality of applications in competitive grant programs.

(2) The director and librarian will select qualified individuals to serve as peer reviewers. Peer reviewers shall demonstrate appropriate training, or service on citizen boards in an oversight capacity, and shall not have a conflict of interest.

(3) The commission staff will provide written instructions and training for peer reviewers.

(4) The reviewers score each application according to criteria set by the commission.

(g) Award Criteria. Points for each criterion will be based primarily on the measures listed; raters may also consider other relevant factors in scoring each criterion. The measures and weights for the criteria are:

(1) Significance of the collection. Is the collection unique, or unique for a geographic region? Will the materials be useful to users throughout the state? Does this project focus on materials about Texas? Will the project provide an "advancement of knowledge" rather than cleaning up general backlogs? Maximum Points: 30.

(2) Availability. How will access to the collection be provided? Will bibliographic records be available through OCLC or the Internet? Will materials themselves be available through an Internet connection, through interlibrary loan, through reciprocal borrowing, or only on-site use? Maximum Points: 30.

(3) Project Design. Is the project well defined? Is it a discrete project which can be completed in the grant period? Maximum Points: 15.

(4) Cost Sharing. What is the level of local funding available to share in the project costs? Are matching funds currently available? Are the matching funds higher than the required minimum? Maximum Points: 5.

(5) Cost Effectiveness. How appropriate are the chosen hardware, software, staffing, and service providers for the project, given the cost of the project? Is the budget realistic? Does the project proposal make effective use of the grant funds? Maximum Points: 15.

(6) Evaluation. How well has the applicant designed and described the methodology to evaluate the project and estimate the level of usage? Is the evaluation methodology appropriate and effective? Maximum Points: 5.

(h) Eligible costs. Eligible costs are: Staff or contracted services costs for organizing, cataloging, indexing, or digital conversion of materials; charges for updating shared bibliographic database records; central processing units (CPUs) and associated peripherals, storage devices, telecommunications devices and software necessary to provide storage and access for digitized materials; supply costs necessary to provide storage and access; indirect and audit costs; travel necessary to organize materials directly associated with the grant.

(i) Matching requirement. Each applicant must expend an amount from local funds at least equal to 30% of the total budgeted project costs which are eligible grant costs. If the matching requirement is not met, as determined by audit, the institution will have to refund all or a portion of the grant. The match can be from a foundation grant; gifts from citizens, corporations or organizations; friends of the library donations; revenues from the sale of bonds or certificates of obligation; federal funds; locally appropriated funds; or a combination. State or federal funds awarded to the grantee from any other commission program may not be used as matching funds. Required matching funds must be available at the beginning of the grant period; applicants that have matching funds available, or committed, at the time of application will receive a higher funding priority.

(j) Prior expenditures. Expenditures by local applicants for consultant fees and preliminary planning costs of an approved project, made prior to the date of commission approval, are eligible as matching funds, but only if made within the year prior to the beginning of the grant term.

(k) Maximum award. The maximum grant award will be no more than 20% of the available funding in any given award period.

(l) Application and Review Process. A prospective applicant must submit an application to the commission on the forms and at the time specified by the commission.

(1) The commission staff will review applications to determine if all requested information has been provided in a timely fashion, on prescribed forms.

(A) An application must be complete with proper authorization to qualify for further consideration.

(B) Qualified applications will be forwarded to the peer reviewers for evaluation.

(C) The commission staff will notify applicants eliminated through the screening process within 30 days of the submission deadline.

(2) Peer Reviewers will evaluate applications and assign scores based on the award criteria.

(3) Commission staff will rank each application based on points assigned by peer reviewers, and recommend a priority ranked list of projects to the commission for approval.

(m) Funding Decisions.

(1) The commission will approve a priority ranked list of applicants for possible funding based upon recommendations of commission staff. Final approval of a grant award is solely at the determination of the commission.

(2) Applications for grant funding will be evaluated only upon the information provided in the written application.

(3) Funding recommendations to the commission will consist of the highest ranked applications up to the limit of available funds. If available funds are insufficient to fully fund a proposal after the higher-ranking proposals have been fully funded, staff will negotiate with the applicant to determine if a lesser amount would be acceptable. If the applicant does not agree to the lesser amount, the staff will negotiate with the next applicant on the ranked list. The process will be continued until all grant funds are awarded.

(4) In the unlikely event that two proposals receive identical scores and funds are insufficient for both, staff will recommend awarding funds to the applicant requesting the lesser amount of state funding. If any funds remain after an award is made to this applicant, staff will negotiate with the other applicant in question. If these negotiations are unsuccessful, staff will negotiate with the next applicant on the ranked list.

(n) Contract. Following approval of the grant awards by the commission, the staff will issue a contract to the successful applicants based on the information contained in the project application.

(o) Cancellation or Suspension of Grants. The commission has the right to reject all applications and cancel a grant solicitation at any point before a contract is signed.

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 November 19, 2001.

TRD-200107143
Edward Seidenberg
Assistant State Librarian
Texas State Library and Archives Commission
Effective date: December 9, 2001
Proposal publication date: October 12, 2001
For further information, please call: (512) 463-5459

♦ ♦ ♦

TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER H. ELECTRICAL PLANNING

DIVISION 2. ENERGY EFFICIENCY AND CUSTOMER-OWNED RESOURCES

16 TAC §25.182, §25.183

The Public Utility Commission of Texas (commission) adopts new §25.182, relating to Energy Efficiency Grant Program, and new §25.183, relating to Reporting and Evaluation of Energy Efficiency Programs, with changes to the proposed text as published in the September 7, 2001 *Texas Register* (26 TexReg 6817). The new rules will provide guidance for the implementation of an energy efficiency grant program and reporting requirements regarding energy and demand savings, and associated air contaminant emissions reduction as mandated under the Health and Safety Code, Title 5, Subtitle C, Chapter 386, Subchapter E, Energy Efficiency Grant Program.

Under the new rules, electric utilities, electric cooperatives and municipally owned utilities may apply for grants from the commission to administer energy efficiency programs. The program is not mandatory and is available statewide, but will give priority to proposals that will reduce air contaminant emissions in non-attainment areas and affected counties. The program and allowable activities will be consistent with §25.181 of this title, relating to the Energy Efficiency Goal. The Electric Reliability Council of Texas (ERCOT) or other applicable regional transmission organizations (RTO) or independent system operators (ISO) will assist the grantees and utilities in providing the necessary load data that will facilitate the development of a model by which to quantify air contaminant emission reductions resulting from energy efficiency programs. The utilities that administer energy efficiency programs pursuant to §25.181 and grantees that are not members of a RTO or an ISO will provide the necessary data individually. Annually, the commission will report, by county, the energy and demand savings, and the reduction of associated emissions of air contaminants resulting from programs administered under these sections and programs pursuant to §25.181, to the Texas Natural Resource and Conservation Commission (TNRCC).

The commission initiated the rulemaking proceeding on July 17, 2001 under Project Number 24391, *Implementation of Energy Efficiency Grant Program Under Senate Bill 5*. The commission hosted one workshop on August 3, 2001, to elicit input from stakeholders on various aspects of the rulemaking. In addition, staff and parties held informal meetings to resolve issues. At the Open Meeting on August 23, 2001, the commission voted to publish the proposed rule for comments in the September 7, 2001 issue of the *Texas Register*.

Written comments were filed on September 17, 2001. Cardinal Glass Industries (Cardinal), Frontier Associates LLC (Frontier), Public Citizen's Office of Texas (Public Citizen), Reliant Energy, Incorporated (Reliant), and Texas Energy Services Coalition (TESCO) filed written comments. On September 20, 2001, commission staff held a public hearing pursuant to the Administrative Procedures Act (APA) §2001.029. The purpose for the hearing was to give parties the opportunity to provide additional comments, clarifying comments and replies to written comments. Austin Energy; American Electric Power Company (AEP); Cardinal; Clark, Thomas & Winters; Entergy Gulf States (EGS); Frontier; Lennox International (Lennox); Public Citizen; Reliant; TESCO; and TXU Electric Company (TXU) attended the hearing. Five parties provided comments that either addressed provisions set forth in the proposed sections, replied to written comments, or reiterated previous comments. ERCOT was allowed to file late comments on September 28, 2001. To the extent that these comments differ from the submitted written comments, such comments are summarized herein.

Comments on the preamble to the proposed rules

Public Citizen commented that the second paragraph of the preamble was unclear whether electric cooperatives as well as municipally owned utilities can apply for the grants.

The commission finds that the second paragraph of the preamble discusses the possible negative fiscal impact the enforcement of this section may have on state and local government. An electric cooperative is not a governmental entity, and as such, the analysis does not apply to electric cooperatives.

General comments regarding energy demand and peak load

A number of parties provided comments regarding the terminology "energy demand" and "peak energy demand." These comments are summarized below as a group rather than in relation to specific sections in the rule.

Lennox suggested that the definition of "energy demand" in §25.182(c)(3) be titled "energy consumption," consistent with the use of the term in §25.183(d)(3). TESCO and Public Citizen commented that the language in Health and Safety Code §386.205, which reads "reductions of energy demand, peak loads, and associated emissions" and which appears in §25.183(a) should be interpreted as meaning "reductions of energy consumption, peak demand and associated emissions." TESCO and Public Citizen recommended that §25.183(a) be revised to incorporate the latter phrasing. TESCO and Public Citizen further recommended that "energy demand" in §25.182(c), relating to definitions, be changed to "energy consumption," which, they claimed, would be a more useful definition for evaluating energy efficiency measures. Reliant stated that the definition for and usage of the term "energy demand" in §25.182 differs from the definition and usage of the term in §25.181, and recommended that it be made consistent with §25.181. Frontier suggested replacing the term "energy savings" with "energy demand savings" throughout the rule. Frontier reasoned that "energy demand" is consistent with the rule definitions and with the statute.

Health and Safety Code §386.205 formulates the purpose of the program to be "the retirement of materials and appliances that contribute to peak energy demand with the goal of reducing energy demand, peak loads, and associated air emissions of air contaminants." The commission finds that the intent of the program is the reduction of energy consumption during the period of peak demand with the overall goal of reducing energy consumption and peak demand. The commission therefore defines the term "energy demand" as used in the statute as "energy consumption," and "peak load" as "peak demand." In order to

make the language in the body of the rule consistent with industry standards and other commission rules, particularly §25.181 of this title, §25.182(a), relating to the purpose, has been revised to read: "Programs shall include the retirement of materials and appliances that contribute to energy consumption during periods of peak demand with the goal of reducing energy consumption, peak load, and associated emissions of air contaminants." All other terminology related to "energy demand" has been eliminated from both §25.182 and §25.183.

Comments on specific sections

§25.182(a), Purpose

TESCO said that subsection (a) should clarify that the goal of the grant program is to reduce peak demand as well as reduce the amount of energy used at peak times.

Consistent with the discussion regarding "energy demand," the commission has revised the rule to reflect that the purpose of the program is the reduction of energy consumption during the period of peak demand with the goal of reducing energy consumption and peak load.

§25.182(b), Eligibility for grants

Reliant suggested that the rule be revised to clarify that with the unbundling of integrated utilities it is the transmission and distribution utilities that are eligible to receive the grants.

The commission has added a definition of electric utility to §25.182(c) that would limit eligibility to the transmission and distribution utility component of the unbundled utility.

§25.182(c), Definitions

In reference to paragraph (4), Public Citizen commented that there appears to be a word or phrase missing in the definition of "energy efficiency," and offered additional language to complete the definition. Reliant stated that the definition should be consistent with the manner in which the term is defined in §25.181(c). TESCO commented that the term "energy usage equipment" should be changed to "energy using equipment" and that the terminology "technically more advanced" should be deleted.

The commission agrees with Public Citizen that there is a phrase missing from the definition and agrees with Reliant that it is inconsistent with §25.181(c). It has revised the definition to be consistent with the manner in which the term is defined in §25.181(c). In order to maintain consistency with the term as defined in §25.181(c), the commission rejects TESCO's proposed revision.

Reliant stated that the definition for "energy efficiency service provider" under paragraph (5) of this subsection should be consistent with the definitions provided in other commission substantive rules, particularly §25.181(c).

The commission agrees that the definition should be consistent with the manner in which this term is defined in §25.181(c) and has revised the rule accordingly.

Reliant stated that the definition for "peak demand" under paragraph (8) of this subsection should be consistent with the definition provided in other commission substantive rules, particularly §25.181(c). TESCO proposed that the definition be revised to "electrical demand at the time of highest annual energy consumption" to be consistent with the definition of "peak energy demand" under paragraph (10). Frontier proposed that §25.182(c)(8) be revised to use hourly, rather than 15-minute intervals in relation to a utility's "super peak period." In addition, Frontier proposed to add a definition for a utility's "super peak period." Frontier argued this was necessary because basing the measurement on a 15-minute interval would prevent a utility from being able to comply with the cost-effectiveness provisions under §25.181(e), because it can exceed the actual hourly system demand by a factor of four. Frontier proposed that a "super peak period" be defined as the hours from 4:00 p.m. to 7:00 p.m. during the months of June, July, August and September.

The commission finds that no need exists to establish a utility "super peak period" since the existing definition for "peak period" is adequate. The commission believes that the existing definition is valid and disagrees that the 15-minute demand interval reference in §25.182(c)(8) should be changed. Associating the peak demand with 15-minute intervals does not preclude using hourly load data for the purpose of providing incentives and the reporting purposes under §25.183(d)(1). The commission agrees with Reliant that the definition should be consistent with the manner in which this term is defined in §25.181(c) and has revised the rule accordingly.

Reliant stated that the definition for "peak demand reduction" under paragraph (9) of this subsection should be consistent with the definition provided in other commission substantive rules, particularly §25.181(c). Frontier proposed deleting this definition because "peak demand" is defined, and "reduction" is a common word, and is therefore redundant.

The commission disagrees with Frontier. Section 25.181(c)(23) contains this same definition, in addition to the definition for "peak demand," and the inclusion provides a cue for a reader that the term is being used in some fashion within this rule. Also, the inclusion eliminates any possibility that the reader will fail to use the word "reduction" in any manner other than that which is intended. The commission agrees with Reliant that the definition should be consistent with the manner in which this term is defined in §25.181(c) and has revised the rule accordingly.

In reference to proposed §25.182(c)(13), regarding "retirement," Public Citizen recommended that the definition be clarified to ensure that all equipment be retired and to prohibit functioning equipment from being resold. Public Citizen argued that the intent of the law was to ensure that the inefficient equipment was permanently retired from use so that it does not continue to use energy inefficiently. At the public hearing, Public Citizen added that the definition should ensure that the electric-consuming components (e.g. compressor) be permanently removed from consumer use, but allow for proper recycling of those components that are not electric consuming devices. Lennox disagreed with Public Citizen. Lennox claimed the definition contained two concepts: recycling and disposal, whereas the main focus of Senate Bill 5 (SB 5), 77th Legislature, is removal of the appliances from customer use. Lennox proposed to limit the definition to proper disposal.

The commission agrees with Public Citizen and Lennox that all energy consuming equipment that is retired under this program must be permanently removed from use. This can be done through disposal or recycling of energy consuming equipment. The commission disagrees that the definition needs to be changed to reflect this clarification.

§25.182(e), Criteria for making grants

Public Citizen stated that there should be a limit on the amount of funding a single entity may receive in order to encourage programs in a variety of service areas. Public Citizen recommended a limit of 40%.

The available funds under this program are subject to legislative appropriations and therefore funding levels may vary from year to year. In order to meet the goal of SB 5 -- reductions in air contaminant emissions -- the rule must have sufficient flexibility to allow the commission to allocate funds in a manner that has maximum impact. If and when funding is low, this may require funding a single grantee or a small number of grantees. The commission, however, agrees that potential applicants should have information available to them regarding the maximum funding levels for individual applicants prior to submitting an application. Accordingly, the commission has added language to §25.182(d)(1)(B), commission administration, to clarify that the grant application form shall include information regarding maximum and minimum funding levels available to individual applicants.

Cardinal stated that the proposed criteria for awarding grants might cause detrimental competition among energy efficiency programs and result in unreasonable additional administrative effort and expense. Cardinal argued that grants should be awarded on a "first come, first serve" basis, consistent with the manner in which projects are awarded under a standard offer program and that templates already approved by the commission should not be made to compete against each other. In addition, Cardinal pointed out that utilities would consider the incentive levels tailored to each specific program template when choosing a particular program for a grant application. In reference to proposed §25.182(e)(1)(D), TESCO commented that grant applications should be reviewed on the amount of reduced energy consumption at peak time per dollar rather than simply on the reduced energy consumption.

The ultimate goal of the programs under SB 5 is the reduction of air contaminant emissions in nonattainment areas and affected counties. In addition, the statute states that this goal be achieved through a grant program available to utilities, electric cooperatives and municipally owned utilities. The program is voluntary and available statewide. Allowing grants to be awarded on a "first-come, first-serve" basis may result in the allocation of grants to projects that have no impact on air contaminant emissions in nonattainment areas or affected counties. The commission must be able to select proposals that have the greatest potential of reducing air contaminant emissions in the intended areas, and the only way to achieve this end is to evaluate each individual proposal. As the cost-effectiveness standard for the programs and incentive levels are already prescribed in §25.181(d), the cost for energy and demand savings for project proposals within individual customer classes will not vary. The commission, however, agrees that under this criterion the lowest incentive price based on energy and demand savings would give a competitive advantage to projects for large commercial and industrial customers, when the project itself may not necessarily reduce energy consumption during the period of peak demand. The commission has therefore eliminated §25.182(e)(1)(C) and (D) as proposed, and created new subparagraph (C) that would have the commission evaluate a grant based on the amount of energy savings during periods of peak demand that would be achieved under the proposal. In addition, the commission emphasizes that projects will also be evaluated on criteria (A) and (B).

In reference to §25.182(e)(1)(B), TESCO stated that while it is the intent of SB 5 to reduce air contaminant emissions, it is premature to base the awards of energy efficiency grants on air contaminant emission reductions before an accurate model has been developed to estimate the reductions in air contaminant emissions associated with energy efficiency. TESCO stated that until such time that a model has been developed, it is sufficient to base the awards on the reduction in peak demand and reduction in energy consumption at peak times.

As stated above, the ultimate goal of the programs under SB 5 is the reduction of air contaminant emissions in nonattainment areas and affected counties. The program is available statewide, and applications may be submitted for areas that will have absolutely no impact on non-attainment areas or affected counties. The commission must ensure that grants are made based on the best potential to reduce air contaminant emissions. The rule does not require that the commission use this model in evaluating applications. The primary purpose of this model is to quantify air contaminant emission reductions *after* projects have been installed. Once the model is developed it may be appropriate to use it to evaluate applications. Therefore, the commission declines to eliminate this criterion.

§25.182(f), Use of approved program templates

Cardinal disagreed with the requirement that all programs funded through the grant program be program templates developed pursuant to §25.181. Cardinal stated that in addition to the programs developed pursuant to §25.181, the proposed rule should permit the development of additional programs designed to implement SB 5, while remaining consistent with §25.181. Cardinal expressed the concern that the proposed rule seems to prohibit the development of new program templates. Frontier proposed a revision to subsection (f) of this section that would require that the programs funded under the grant programs "conform with" program templates developed pursuant to §25.181, rather than a requirement that these programs "be" such program templates.

Program templates approved by the commission will have been developed under the guidance of and fully reviewed by all stakeholders in Project Number 22241, *Energy Efficiency Implementation Docket (EEID)*. Requiring that only these program templates be used ensures that projects have the best possibility of success and allows for timely evaluation of grant applications. Potential program templates are not, however, limited to those templates in place today. Parties are encouraged to submit program templates concepts that better fit the purpose of this program to the EEID for review and commission approval. In response to comments filed by Frontier, the commission finds that the usage of the term "conform" will allow for minor deviations from program templates adopted by the commission. This, in turn, would require additional scrutiny when evaluating individual grant proposals. The commission declines to revise the rule based on these comments.

In reference to §25.182(f)(5)(B), Lennox agreed that the proposed rule should exclude measures that would be installed in the absence of the energy efficiency service provider's proposed energy efficiency project. However, Lennox disagreed with the clarification to exclude measures that have "wide market penetration." Lennox argued that this would eliminate an air conditioning unit at a seasonal energy efficiency ratio (SEER) of 12 as an eligible measure. Lennox claimed that requiring customers to purchase a SEER 13 air conditioner is cost prohibitive, would discourage customers from buying SEER 12 units, and would

cripple the program. Public Citizen responded that Lennox's argument reflects the cost to the customer in the market place, not the actual incremental cost of production of a SEER 13 unit over a SEER 12 unit. Public Citizen further commented that Lennox's arguments do not take into consideration economies of scale once the market moves towards a SEER 13. Public Citizen further argued that the Department of Energy will adopt a future standard that will be at least SEER 12, but may be as high as SEER 13.

The ultimate goal of energy efficiency programs is to encourage the market to offer products at ever increasing energy efficiency levels. The programs do so by offering incentives for high efficiency products that customers would not decide to purchase on their own. It is therefore appropriate that incentives are only given to projects that offer energy efficiency levels that exceed the common market practice but that are within the technological capability of the manufacturers. It is also appropriate that these requirements exceed current regulatory standards, for it would be inappropriate for an energy efficiency program to provide subsidies for products that are well within the range of the market options. The commission has made the previous finding in its discussions in the preamble to §25.181 that it will disallow measures that already have wide market penetration. The commission created the EEID to provide advice as to the eligibility of measures on a case-by-case basis under this criterion. As a result of this process, the commission has set the minimum standard of eligibility for air conditioning units under the commission approved program templates at a SEER 13. The commission concludes that the rule, as proposed, is consistent with this view of energy efficiency and with §25.181.

§25.182(g) Grantee administration

Reliant and Frontier commented that the rule should specify that grantees may only implement energy efficiency projects within their own service territories to ensure that there will not be competing energy efficiency programs within service areas.

The commission agrees with Reliant and Frontier and has added a new paragraph (3) to disallow the installation of projects outside the grantee's service areas under this program.

Frontier and TESCO recommended revising §25.182(g) such that the cost of administration would not exceed 10% of the total program budget before January 1, 2003, and should not exceed 5.0% of the budget afterwards. The proposed rule mandates that these caps should take effect before and after January 1, 2002, respectively. These parties noted that this is just a few months after the rule is to be adopted.

The commission agrees with Frontier and TESCO and has revised the rule accordingly.

In reference to §25.182(g)(1)(C), Frontier suggested that inspections be conducted not only in accordance with §25.181(k) of this title, but also the provisions required by the program templates. Frontier claims that the templates allow for lower cost inspections than the applicable rules.

The commission finds that inspections must be conducted in accordance with the requirements of §25.181(k). Neither the program templates nor §25.181 address the cost of inspections. The commission declines to implement the proposed suggestion.

In reference to proposed §25.182(g)(3), Reliant stated that not allowing grantees to count energy and demand savings achieved under this program towards the energy efficiency goal in the Public Utility Regulatory Act (PURA) §39.905 will be a disincentive for utilities to participate in this program. TESCO suggested that §25.182(g)(3) be reworded to clarify that utilities, cooperatives and municipalities may not count any emission reductions resulting from this program to count towards "its own" reductions under state or federal programs. Frontier stated that the requirement only apply to peak demand savings rather than all demand savings.

In response to Reliant's comment, the commission finds that this is a statutory provision under Health and Safety Code §386.205 and cannot eliminate this requirement. The commission also finds that TESCO's and Frontier's suggestions change the intent of this statutory requirement and declines to make the revision.

Regarding proposed §25.182(g)(4), Frontier stated it was unclear what constitutes supplementing or increasing funds.

Grantees may expand their existing standard offer programs with this grant program. Grantees may not, however, pay for the same energy and demand savings from both the existing programs and the grant programs. The commission has revised the rule to clarify this issue.

Frontier suggested that proposed §25.182(g)(6) be revised to add inspection requirements.

Section 25.182(g)(6) (now (g)(7)) details the compensation of energy efficiency services providers. Inspection requirements are already detailed under §25.182(g)(1)(C). Frontier has not adequately supported its suggestion for additional inspection requirements. The commission declines to make the suggested revision.

§25.183. Reporting and Evaluation of Energy Efficiency Programs

§25.183(a) Purpose

TESCO suggested that the purpose be revised to read that the report will quantify reductions in "energy consumption" rather than "energy demand."

Consistent with the commission's discussion regarding §25.182 and the intent of SB 5 in using the term "energy demand," the commission revises the wording in this section to "energy consumption."

Public Citizen suggested adding language to §25.183(a) to specify that the commission and the Energy Systems Laboratory of Texas A&M University (Laboratory) report meets the reporting requirements of the TNRCC and Environmental Protection Agency (EPA). At the APA hearing, Public Citizen clarified that its main concern was that the metrics contained in the commission's reports (e.g. MWh, tons of emissions per kWh, etc.) match the metrics used by TNRCC and EPA in the State Implementation Plan.

The commission's main reporting responsibility is to provide, by county, data regarding reductions in energy consumption and peak demand, and associated emissions of air contaminants. The commission will cooperate with the TNRCC to meet its reporting requirements with the EPA to the maximum feasible extent. However, the commission's reporting standards will not be subject to formal approval by either TNRCC or EPA. The commission declines to add this requirement to the rule.

§25.183(d) Reporting

Frontier said that an applicant's ISO or RTO should be required to file a plan describing how it would achieve the reporting requirements, including milestones and target dates for data acquisition, consolidation and reporting. Frontier explained that the data collection responsibilities are unclear in the event that the ISO or RTO cannot report hourly load data. In addition, Frontier argued, grantees should not have to report information that is duplicated by the ISO or RTO. According to Frontier, the only way to ensure communication to those secondary sources of information is to add the proposed additional reporting requirement to the ISO's or RTO's duties.

ERCOT submitted comments opposing the reporting requirements placed on ERCOT. ERCOT argued that grantees and utilities are already required to provide extensive information to the commission in the energy efficiency reports. ERCOT commented that the only load information it would have for a grantee or utility is originally obtained from the utility itself. According to ERCOT, it therefore makes no sense to place the additional reporting requirement proposed in §25.183(d) on ERCOT. Moreover, specific customer load information is proprietary as per the contractual arrangements between ERCOT and market participants as well as ERCOT's commission-approved ERCOT Protocol 1.3 that prohibits it from disclosing "Proprietary Customer Information" and "Protected Information." In addition, ERCOT claimed that these requirements would require substantial staff and financial resources on the part of ERCOT.

In reply comments, TXU agreed with the reporting system in proposed §25.183(d). According to TXU, this system will enable load data throughout the entire ERCOT system to be most efficiently generated and reported to the Laboratory. Although, TXU recognized ERCOT's concern with being asked to take on an additional responsibility, TXU argued that the solution is not as simple as ERCOT's comments lead one to believe. TXU stated that it does *not* generate, much less report to ERCOT, load data in the form required by the proposed rule, and it suspects that other transmission and distribution service providers (TDSP) are similarly situated. Moreover, the information that the utilities are currently required to provide under §25.181(g)(5) is considerably different from the load information required by proposed §25.183. Having ERCOT perform the reporting function would result in economies of scale and would be much more efficient than having each individual TDSP perform the tasks necessary to generate the required information and reports. Moreover, ERCOT is already experienced in functioning as a clearing-house for information, acting to take information from ERCOT TDSPs and to combine them into one standard format.

TXU also disputed ERCOT's argument that it cannot provide the requested load data because of ERCOT Protocol 1.3. According to TXU, this argument is without merit because ERCOT Protocol 1.3.5 (Exceptions) provides in section (1) that "Receiving Party may, without violating this Subsection 1.3, Confidential Information, Disclose Protected Information to governmental officials, Market Participant(s), the public, or others as required by any law, regulation, or order, or by these Protocols, provided that any Receiving Party make reasonable efforts to restrict public access to the Disclosed Protected Information by protective order, by aggregating information, or otherwise if reasonably possible; . . . . ."

TXU Electric agrees that the load information required by the draft rule to be provided to Laboratory may be competitively sensitive and may rise to the level of "Protected Information." However, according to TXU, ERCOT Protocol 1.3 specifically addresses the ability of ERCOT to provide Protected Information to necessary persons, as determined by the commission, and provides procedures to govern the disclosure of such information. Furthermore, if ERCOT acts as a clearing-house to receive and aggregate load data, then the information provided to the Laboratory may, in cases where more than one TDSP serves a service area, be less competitively-sensitive because it has been more comprehensively aggregated. Accordingly, not only is ERCOT not prohibited from performing the reporting of load function required by the draft rule, it is the most appropriate entity to perform such function. Reliant indicated that it supported TXU's reply comments and emphasized that ERCOT is the only entity capable of providing the data required under proposed §25.183.

The commission concludes that there are significant opportunities to report information more efficiently, if it is reported by a single organization and is already being gathered in large part as part of that organization's normal operations. In the case of an ISO or RTO that is operating ancillary service and balancing energy markets, the information is probably available. While a grantee or utility may be the originator of the load information in the ERCOT database, for example, ERCOT may be able to provide information for a number of grantees in the same format. It may also be necessary to gather information from ERCOT relating to entities that are not grantees. Consequently, the commission agrees with Frontier, TXU and Reliant that grantees should not have to report to the commission information that is also maintained by the ISO or RTO. The commission finds that the level of detail of the data necessary to develop the model should be determined at a later date in coordination with all the stakeholders, and has revised the rule accordingly. The commission also finds that the RTO or ISO will not be required to perform additional analysis or devote substantial resources to the data necessary to develop this model. The commission has also added language to both §25.183(d) and (e) to protect the proprietary nature of this data.

Reliant said grantees should not be required to report energy efficiency information they are also required to report under §25.181(g)(5). It said the information reported under the existing rule should be sufficient for the purposes of the proposed rule.

While the commission recognizes that the information required under the two rules comes from the same sources, the purposes are different. The commission finds, however, that it would be acceptable for a grantee to file one report to satisfy the requirements of both §25.181 and §25.183, as long as SB 5 related items are clearly itemized and summarized. For example, if a utility were to receive an energy efficiency grant under an Energy Star Homes Market Transformation Program (ESH) template, the utility could file one report showing how much of its own funds were disbursed for ESH, how much grant money was disbursed for ESH, total energy savings attributable to ESH, and then allocate the ESH energy savings between the utility-funded and grant-funded ESH programs on the basis of total disbursements. The commission does not find the need to revise the rule to clarify this intent.

Public Citizen suggested expanding the reporting requirements under §25.183(d)(2) and (3) to include zip code and substation level. This would make these two paragraphs consistent with

§25.183(d)(1), which requires interval load data by county, zip code and/or substation.

The commission finds that county-level summaries are sufficient for the purposes of paragraphs (2) and (3). While §25.183(d)(1) deals strictly with raw data on load that can be simply measured, §25.183(d)(2) and (3) involve inferences drawn from the measured load and consumption data. It is unrealistic to expect that the inferences of paragraphs (2) and (3) will be of the same precision as the measurements in paragraph (1) . The commission therefore declines to amend these paragraphs as suggested by Public Citizen.

Entergy stated that the company does not have an ISO or RTO, and it may be difficult for the company to provide the required data, particularly the emissions data.

The commission recognizes the utility may not operate under an ISO or RTO. Where this is the case, the primary responsibility for providing the data will be on the grantee and utility. The data reporting requirement in the rule relates to load profiles, not air emissions. As such, the company should have this information for its day-to-day operations. If the company does not have this information, it should file a good cause exception explaining why it does not have access to this data and how the objectives of the program can be met without it. The commission declines to revise the rule.

§25.183(e) Evaluation

TESCO also suggested that the reports pursuant to §25.183(e)(1) be submitted by January 1 of each year, because providing a fixed date would help the commission, TNRCC and other parties make corrective adjustments to the program on a regular basis.

The report requires data from both SB 7 and SB 5 programs. The SB 7 data is due to the commission by April 1st each year. Because SB 5 energy efficiency programs will be evaluated during the summer months, and these data reporting requirements are currently being developed, the date of January 1st might not be the best choice for utilities to provide SB 5 data. The commission finds that it will set a due date for the report when it develops the data reporting requirements. The commission declines to make the proposed revision.

In reference to §25.183(e), Public Citizen stated the rule should include a provision to estimate the magnitude of the cost-effective peak demand reductions that could occur as a result of investments in energy efficiency, i.e., the extent to which peak demand reduction would be cheaper than the average market price of electricity.

The commission is required to provide the TNRCC with a report that quantifies the energy and demand savings, and associated air contaminant emission reduction. The commission may include any other data or information it deems relevant. The commission declines to add the additional requirement to this rule.

Public Citizen recommended adding a new paragraph (3) to subsection (e). This recommendation would mandate the commission suggest changes to the Texas Emission Reduction Plan Board concerning the statute or funding levels.

The commission is required to provide the TNRCC with a report that quantifies the energy and demand savings, and concomitant air contaminant emission reduction. The commission may include any other data or information it deems relevant. It is, however, the responsibility of the TNRCC to report to the Texas Emissions Reduction Plan Board. The commission declines to add the additional requirement to this rule.

These new sections are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2001) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically Section 11(c) of Senate Bill 5 (An Act of the 77th Leg., R.S., Ch. 967, eff. Sept. 1, 2001) which require(s) the commission to adopt all rules necessary to carry out its duties under the Act within 45 days after the effective date of the Act.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §39.905; Texas Health and Safety Code §§386.201-386.205.

§25.182. Energy Efficiency Grant Program.

(a) Purpose. The purpose of this section is to provide implementation guidelines for the Energy Efficiency Grant Program mandated under the Health and Safety Code, Title 5, Subtitle C, Chapter 386, Subchapter E, Energy Efficiency Grant Program. Programs offered under the Energy Efficiency Grant Program shall utilize program templates that are consistent with §25.181 of this title (relating to the Energy Efficiency Goal). Programs shall include the retirement of materials and appliances that contribute to energy consumption during periods of peak demand with the goal of reducing energy consumption, peak loads, and associated emissions of air contaminants.

(b) Eligibility for grants. Electric utilities, electric cooperatives, and municipally owned utilities are eligible to apply for grants under the Energy Efficiency Grant Program. Multiple eligible entities may jointly apply for a grant under one energy efficiency grant program application. Grantees shall administer programs consistent with §25.181 of this title.

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

(1) Affected counties - Bastrop, Bexar, Caldwell, Comal, Ellis, Gregg, Guadalupe, Harrison, Hays, Johnson, Kaufman, Nueces, Parker, Rockwall, Rusk, San Patricio, Smith, Travis, Upshur, Victoria, Williamson, and Wilson. An affected county may include a nonattainment area, at which point it will be considered a nonattainment area.

(2) Demand side management (DSM) - Activities that affect the magnitude or timing of customer electrical usage, or both.

(3) Electric utility - As defined in the Public Utility Regulatory Act (PURA) § 31.002(6).

(4) Energy efficiency - Programs that are aimed at reducing the rate at which energy is used by equipment or processes. Reduction in the rate of energy used may be obtained by substituting technically more advanced equipment to produce the same level of end-use services with less electricity; adoption of technologies and processes that reduce heat or other energy losses; or reorganization of processes to make use of waste heat. Efficient use of energy by consumer-owned end-use devices implies that existing comfort levels, convenience, and productivity are maintained or improved at lower customer cost.

(5) Energy efficiency service provider - A person who installs energy efficiency measures or performs other energy efficiency services. An energy efficiency service provider may be a retail electric provider or a customer, if the person has executed a standard offer contract with the grantee.

(6) Grantee - the entity receiving energy efficiency grant program funds.

(7) Nonattainment area - An area so designated under the federal Clean Air Act §107(d) (42 U.S.C. §7407), as amended. A nonattainment area does not include affected counties.

(8) Peak demand - Electrical demand at the time of highest annual demand on the utility's system, measured in 15 minute intervals.

(9) Peak demand reduction - Peak demand reduction on the utility system during the utility system's peak period.

(10) Peak load - Peak demand.

(11) Peak period - Period during which a utility's system experiences its maximum demand. For the purposes of this section, the peak period is May 1 through September 30.

(12) Retirement - The disposal or recycling of all equipment and materials in such a manner that they will be permanently removed from the system with minimal environmental impact.

(d) Commission administration. The commission shall administer the Energy Efficiency Grant Program, including the review of grant applications, allocation of funds to grantees and monitoring of grantees. The commission shall:

(1) Develop an energy efficiency grant program application form. The grant application form shall include:

(A) Application guidelines;

(B) Information on available funds, including minimum and maximum funding levels available to individual applicants;

(C) Listing of applicable affected counties and counties designated as nonattainment areas; and

(D) Information on the evaluation criteria, including points awarded for each criterion.

(2) Evaluate and approve grant applications, consistent with subsection (e) of this section.

(3) Enter into a contract with the successful applicant.

(4) Reimburse participating grantees from the fund for costs incurred by the grantee in administering the energy efficiency grant program.

(5) Monitor grantee progress on an ongoing basis, including review of grantee reports provided under subsection (g)(8) of this section.

(6) Compile data provided in the annual energy efficiency report, pursuant to §25.183 of this title (relating to Reporting and Evaluation of Energy Efficiency Programs).

(e) Criteria for making grants.

(1) Grants shall be awarded on a competitive basis. Applicants will be evaluated on the minimum criteria established in subparagraphs (A)-(F) of this paragraph.

(A) The extent to which the proposal would reduce emissions of air pollutants in a nonattainment area.

(B) The extent to which the proposal would reduce emissions of air pollutants in an affected county.

(C) The amount of energy savings achieved during periods of peak demand.

(D) The extent to which the applicant has achieved verified peak demand reductions and verified energy savings under this or other similar energy efficiency programs and has complied with the requirements of the grant program established under this section.

(E) The extent to which the proposal is credible, internally consistent, and feasible and demonstrates the applicants ability to administer the program.

(F) Any other criteria the commission deems necessary to evaluate grant proposals.

(2) Applicants who receive the most points under the evaluation criteria shall be awarded grants, subject to the following constraints:

(A) The commission reserves the right to set maximum or minimum grant amounts, or both.

(B) The commission reserves the right to negotiate final program details and grant awards with a successful applicant.

(f) Use of approved program templates. All programs funded through the energy efficiency grant program shall be program templates developed pursuant to §25.181 of this title.

(1) Program templates adopted under this program shall include the retirement of materials and appliances that contribute to energy consumption during periods of peak demand to ensure the reduction of energy, peak demand, and associated emissions of air contaminants.

(2) Cost effectiveness and avoided cost criteria shall be consistent with §25.181(d) of this title.

(3) Incentive levels shall be consistent with program templates and in accordance with §25.181(g)(2)(F) of this title.

(4) Inspection, measurement and verification requirements shall be consistent with program templates and in accordance with §25.181(k) of this title.

(5) Projects or measures under this program are not eligible for incentive payments or compensation if:

(A) A project would achieve demand reduction by eliminating an existing function, shutting down a facility, or operation, or would result in building vacancies, or the re-location of existing operations to locations outside of the facility or area served by the participating utility.

(B) A measure would be installed even in the absence of the energy efficiency service provider's proposed energy efficiency project. For example, a project to install measures that have wide market penetration would not be eligible.

(C) A project results in negative environmental or health effects, including effects that result from improper disposal of equipment and materials.

(D) The project involves the installation of self-generation or cogeneration equipment, except for renewable demand side management technologies.

(g) Grantee administration: The cost of administration may not exceed 10% of the total program budget before January 1, 2003, and may not exceed 5.0% of the total program budget thereafter. The commission reserves the right to lower the allowable cost of administration in the application guidelines.

(1) Administrative costs include costs necessary for grantee conducted inspections and the costs necessary to meet the following requirements:

(A) Conduct informational activities designed to explain the program to energy efficiency service providers and vendors.

(B) Review and select proposals for energy efficiency projects in accordance with the program template guidelines and applicable rules of the standard offer contracts under §25.181(i) of this title, and market transformation contracts under §25.181(j) of this title.

(C) Inspect projects to verify that measures were installed and are capable of performing their intended function, as required in §25.181(k) of this title, before final payment is made. Such inspections shall comply with PURA §39.157 and §25.272 of this title (relating to Code of Conduct for Electric Utilities and Their Affiliates) or, to the extent applicable to a grantee, §25.275 of this title (relating to the Code of Conduct for Municipally Owned Utilities and Electric Cooperatives Engaged in Competitive Activities).

(D) Review and approve energy efficiency service providers' savings monitoring reports.

(2) A grantee administering a grant under this program shall not be involved in directly providing customers any energy efficiency services, including any technical assistance for the selection of energy efficiency services or technologies, unless a petition for waiver has been granted by the commission pursuant to §25.343 of this title (relating to Competitive Energy Services), to the extent that section is applicable to a grantee.

(3) Only projects installed within the grantee's service area are eligible for compensation under this program.

(4) An electric utility may not count the energy and demand savings achieved under the energy efficiency grant program towards satisfying the requirements of PURA §39.905.

(5) Incentives paid for energy and demand savings under the energy efficiency grant program may not supplement or increase incentives made for the same energy and demand savings under programs pursuant to PURA §39.905.

(6) An electric utility, electric cooperative or municipally owned utility may not count air contaminant emissions reductions achieved under the energy efficiency grant program towards satisfying an obligation to reduce air contaminant emissions under state or federal law or a state or federal regulatory program.

(7) The grantee shall compensate energy efficiency service providers for energy efficiency projects in accordance with the applicable rules of the standard offer contracts under §25.181(i) of this title, and market transformation contracts under §25.181(j) of this title, and the requirements of this section.

(8) The grantee shall provide reports consistent with contract requirements and §25.183 of this title.

§25.183. Reporting and Evaluation of Energy Efficiency Programs.

(a) Purpose. The purpose of this section is to establish reporting requirements sufficient for the commission, in cooperation with Energy Systems Laboratory of Texas A&M University (Laboratory), to quantify, by county, the reductions in energy consumption, peak demand and associated emissions of air contaminants achieved from the programs implemented under §25.181 of this title (relating to the Energy Efficiency Goal) and §25.182 of this title (relating to Energy Efficiency Grant Program).

(b) Application. This section applies to electric utilities administering energy efficiency programs implemented under the Public Utility Regulatory Act (PURA) §39.905 and pursuant to §25.181 of this title, and grantees administering energy efficiency grants implemented under Health and Safety Code §§386.201-386.205 and pursuant to §25.182 of this title, and independent system operators (ISO) and regional transmission organizations (RTO).

(c) Definitions. The words and terms in §25.182(c) of this title shall apply to this section, unless the context clearly indicates otherwise.

(d) Reporting. Each electric utility and grantee shall file by April 1, of each program year an annual energy efficiency report. The annual energy efficiency report shall include the information required under §25.181(g)(5) of this title and paragraphs (1)-(4) of this subsection in a format prescribed by the commission.

(1) Load data within the applicable service area. If such information is available from an ISO or RTO in the power region in which the electric utility or grantee operates, then the ISO or RTO shall provide this information to the commission instead of the electric utility or grantee.

(2) The reduction in peak demand attributable to energy efficiency programs implemented under §25.181 and §25.182 of this title, in kW by county, by type of program and by funding source.

(3) The reduction in energy consumption attributable to energy efficiency programs implemented under §25.181 and §25.182 of this title, in kWh by county, by type of program and by funding source.

(4) Any data to be provided under this section that is proprietary in nature shall be filed in accordance with §22.71(d) of the commission's Procedural Rules.

(5) Any other information determined by the commission to be necessary to quantify the air contaminant emission reductions.

(e) Evaluation.

(1) Annually the commission, in cooperation with the Laboratory, shall provide the Texas Natural Resources and Conservation Commission (TNRCC) a report, by county, that compiles the data provided by the utilities and grantees affected by this section and quantifies the reductions of energy consumption, peak demand and associated air contaminant emissions.

(A) The Laboratory shall ensure that all data that is proprietary in nature is protected from disclosure.

(B) The commission and the Laboratory shall ensure that the report does not provide information that would allow market participants to gain a competitive advantage.

(2) Every two years, the commission, in cooperation with the Energy Efficiency Implementation Docket under Project Number 22241, shall evaluate the Energy Efficiency Grant Program under §25.182 of this title.

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 November 13, 2001.

TRD-200106993

Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Effective date: December 3, 2001
Proposal publication date: September 7, 2001
For further information, please call: (512) 936-7308

♦ ♦ ♦

TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 100. CHARTERS

SUBCHAPTER A. OPEN-ENROLLMENT CHARTER SCHOOLS

19 TAC §100.101

The Texas Education Agency (TEA) adopts the repeal of §100.101, concerning adverse action on an open-enrollment charter, without changes to the proposed text as published in the September 28, 2001, issue of the *Texas Register* (26 TexReg 7383) and will not be republished. The section specifies procedures for modifying, placing on probation, revoking, or denying renewal of the charter of an open- enrollment charter school. This repeal is necessary since House Bill (HB) 6, 77th Texas Legislature, 2001, transferred authority for rules governing adverse action on open-enrollment charters, including modification, placement on probation, revocation, or denial of renewal of a charter, from the State Board of Education (SBOE) to the commissioner of education.

No comments were received regarding adoption of the repeal.

The repeal is adopted under the Texas Education Code, §§12.115, 12.116, 12.1161, and 12.1162, as amended and added by House Bill 6, 77th Texas Legislature, 2001, which authorizes the commissioner of education to modify, place on probation, revoke, or deny 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 November 19, 2001.

TRD-200107115
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Effective date: December 9, 2001
Proposal publication date: September 28, 2001
For further information, please call: (512) 463-9701

♦ ♦ ♦

TITLE 22. EXAMINING BOARDS

PART 22. TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY

CHAPTER 501. RULES OF PROFESSIONAL CONDUCT

SUBCHAPTER A. GENERAL PROVISIONS

22 TAC §501.52

The Texas State Board of Public Accountancy adopts an amendment to §501.52, concerning Definitions with a minor grammatical change to the proposed text as published in the October 5, 2001, issue of the *Texas Register* (26 TexReg 7732). The change is in paragraph (18) where there should be a space in between the words "be" and "licensed." Because this change is editorial rather than substantive, public action is not required.

The amendment allows new terms of the Texas Public Accountancy Act to be brought into the rules.

The amendment will function by allowing new terms of the Texas Public Accountancy Act to be brought into the rules.

This rule was considered by a Joint Taskforce on Senate Bill 1358 (SB 1358). This Taskforce consisted of six members and former members of the Texas State Board of Public Accountancy; seven Texas CPAs actively involved in the development of SB 1358, and the Executive Directors of both the Texas State Board of Public Accountancy and the Texas Society of CPAs. The Taskforce met twice, on July 26, 2001 and August 20, 2001. These meetings were open to the public, and notices of these meetings were filed with the Secretary of State's office on July 13, 2001, Docket Number 2001006220, and on August 16, 2001, Docket Number 20017290. After discussing these matters, the Taskforce recommended this rule to the Texas State Board of Public Accountancy for consideration.

No comments were received regarding adoption of the rule.

The amendment is adopted under the Public Accountancy Act, Texas Occupations Code, §901.151 (Vernon 2001) which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

§501.52. Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. The masculine shall be construed to include the feminine or neuter and vice versa, and the singular shall be construed to include the plural and vice versa.

(1) Act--The Public Accountancy Act, Chapter 901, Occupations Code.

(2) Advertisement--A message which is transmitted to persons by, or at the direction of, a certificate or registration holder and which has reference to the availability of the certificate or license holder to perform Professional Services.

(3) Affiliated entity--An entity controlling or being controlled by or under common control with another entity, directly or indirectly, through one or more intermediaries.

(4) "Attest Service" means:

(A) an audit or other engagement required by the board to be performed in accordance with the auditing standards adopted by the American Institute of Certified Public Accountants or another national accountancy organization recognized by the board;

(B) a review, compilation or other engagement required by the board to be performed in accordance with standards for accounting and review services adopted by the American Institute of Certified

Public Accountants or another national accountancy organization recognized by the board;

(C) an engagement required by the board to be performed in accordance with standards for attestation engagements adopted by the American Institute of Certified Public Accountants or another national accountancy organization recognized by the board; or

(D) any other assurance service required by the board to be performed in accordance with professional standards adopted by the American Institute of Certified Public Accountants or another national accountancy organization recognized by the board.

(5) Board--The Texas State Board of Public Accountancy.

(6) Certificate or registration holder--The holders of all currently valid:

(A) certificates issued to individuals who have been awarded the designation certified public accountant by the board pursuant to the Act, or pursuant to corresponding provisions of a prior Act;

(B) registrations with the board under §901.355 of the Act; and

(C) firm licenses or registrations.

(7) Charitable Organization--An organization which has been granted tax-exempt status under the Internal Revenue Code of 1986, §501(c), as amended.

(8) Client--A person who enters into an agreement with a license holder or a license holder's employer to receive a professional accounting service.

(9) Client Practice of Public Accountancy is the offer to perform or the performance by a certificate or registration holder for a client or a potential client of a service involving the use of accounting, attesting, or auditing skills. The phrase "service involving the use of accounting, attesting, or auditing skills" includes:

(A) the issuance of reports on, or the preparation of, financial statements, including historical or prospective financial statements or any element thereof;

(B) the furnishing of management or financial advisory or consulting services;

(C) the preparation of tax returns or the furnishing of advice or consultation on tax matters;

(D) the advice or recommendations in connection with the sale or offer for sale of products (including the design and implementation of computer software), when the advice or recommendations routinely require or imply the possession of accounting or auditing skills or expert knowledge in auditing or accounting; and/or

(E) litigation support services.

(10) Commission--Compensation for recommending or referring any product or service to be supplied by another person.

(11) Contingent fee--A fee for any service where no fee will be charged unless a specified finding or result is attained, or in which the amount of the fee is otherwise dependent upon the finding or result of such service. However, a certificate or registration holder's non-Contingent fees may vary depending, for example, on the complexity of the services rendered. Fees are not contingent if they are fixed by courts or governmental entities acting in a judicial or regulatory capacity, or in tax matters if determined based on the results of judicial proceedings or the findings of governmental agencies acting in a judicial or regulatory capacity, or if there is a reasonable expectation of substantive review by a taxing authority.

(12) Financial Statements--A presentation of financial data, including accompanying notes, derived from accounting records and intended to communicate an entity's economic resources or obligations at a point in time, or the changes therein for a period of time, in accordance with generally accepted accounting principles. Incidental financial data to support recommendations to a client or in documents for which the reporting is governed by Statements or Standards for attestation Engagements and tax returns and supporting schedules do not constitute financial statements for the purposes of this definition.

(13) Firm--A proprietorship, partnership, or professional or other corporation, or other business engaged in the practice of public accountancy.

(14) Good standing--Compliance by a certificate or registration holder with the Board's licensing rules, including the mandatory continuing education requirements and payment of the annual license fee, and any penalties and other costs attached thereto. In the case of board-imposed disciplinary or administrative sanctions, the certificate or registration holder must be in compliance with all the provisions of the board order to be considered in Good standing.

(15) Licensee--The holder of a license issued by the board to a certificate or registration holder pursuant to the Act, or pursuant to provisions of a prior Act.

(16) Peer review or Quality Review--The study, appraisal, or review of the professional accounting work of a public accountancy firm that performs attest services by a certificate holder who is not affiliated with the firm.

(17) Person--An individual, partnership, corporation, registered limited liability partnership, or limited liability company.

(18) Practice unit--An office of a firm required to be licensed with the board for the purpose of practicing public accountancy.

(19) Professional services or professional accounting work--means services or work that requires the specialized knowledge or skills associated with certified public accountants, including:

(A) issuing reports on financial statements;

(B) providing management or financial advisory or consulting services;

(C) preparing tax returns; and

(D) providing advice in tax matters.

(20) Report--When used with reference to financial statements, means either an engagement performed through the application of procedures under the Statement on Standards for Accounting and Review Services or any opinion, report, or other form of language that states or implies assurance as to the reliability of any financial statements and/or includes or is accompanied by any statement or implication that the person or firm issuing it has special knowledge or competence in accounting or auditing. Such a statement or implication of special knowledge or competence may arise from use by the issuer of the report of names or titles indicating that he or it is an accountant or auditor or from the language of the report itself. The term "report" includes any form of language which disclaims an opinion when such form of language is conventionally understood to imply any assurance as to the reliability of the financial statements to which reference is made. It also includes any form of language conventionally used with respect to a compilation or review of financial statements, and any other form of language that implies such special knowledge or competence.

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 November 16, 2001.

TRD-200107063
William Treacy
Executive Director
Texas State Board of Public Accountancy
Effective date: December 6, 2001
Proposal publication date: October 5, 2001
For further information, please call: (512) 305-7848

♦ ♦ ♦

SUBCHAPTER C. RESPONSIBILITIES TO CLIENTS

22 TAC §501.76

The Texas State Board of Public Accountancy adopts an amendment to §501.76, concerning Records and Work Papers without changes to the proposed text as published in the October 5, 2001, issue of the *Texas Register* (26 TexReg 7734).

The amendment allows that client records of CPAs and CPA firms are retained for at least four years.

The amendment will function by allowing that client records of CPAs and CPA firms are retained for at least four years.

The Board received three comments concerning the proposed rule. These commenters raised related although not identical concerns.

All the commenters remarked that the four year retention period is longer than the two year statute of limitations on simple malpractice claims. One commenter suggested that the Board could not change the statute of limitations. In response, the Board's proposed rule has no effect on the statute of limitation on civil claims. Adopting the rule as proposed would not affect the statute of limitations.

All the commenters suggested that requiring a longer retention period than the limitations period for simple negligence claims undermines this limitation and is burdensome.

In Response, the four year period reflected in the rule is the same as the statute of limitations that applies to other claims that arise between CPAs and their clients and is consistent with the recommendation of professional standards setting bodies. The AICPA Accounting Practice Management Manual, paragraph 209-08 provides: "One factor some firms use when determining their record retention period is their state's statute of limitations. These firms' record retention periods generally correspond with the longest statute of limitations prevailing in each state for breach of contract, breach of fiduciary duty, and professional liability claims." The applicable statute of limitations in Texas for breach of contract and breach of fiduciary duty is four years. TEX. CIV. PRAC. & REM. CODE 16.004 (Vernon's 2001). This four year period is the longest statute as recommended by the AICPA. The Board's proposed rule is consistent with appropriate statutory limitations periods. Because it is so consistent, the proposed rule change does not encourage claims and delay. These issues, to the extent that they exist, inhere in the system because the legislature set a four year limitations period.

The proposed rule's required retention period is materially shorter than the retention period recommended by the AICPA, a professional standard setting body. The AICPA Accounting Practice Management Manual, paragraph 209.08 advises retention of all records for three years in the office and current clients' records permanently in storage. The manual recommends destroying former clients' records after seven years in storage. Therefore, the shortest retention period urged by the AICPA is ten years. This period is materially longer than the four years established in the rule. In response, the proposed amendment to Rule 501.76 addresses only a very specific subset of the records normally generated in the course of a CPA's relationship to his client. Only "documentation or working papers required by professional standards for attest services" must be kept for four years. There is no retention period specified in the proposed rule for other documents generated in the course of client representation.

The Board also received comments that the rule would increase the expense of records storage. Although the increases were characterized as "significant" and "very costly" there was no specific data offered. The Board does not believe that the costs of complying with this rule are material. First, because of current standards, including the existing peer review requirements, many firms may already be complying with longer retention periods. The rule change will not have any cost effect on these firms. Second, the records subject to the retention period are only a very specific subset of CPA client records. These records may not be so voluminous that an additional storage period would include "significant" increased costs.

The amendment is adopted under the Public Accountancy Act, Texas Occupations Code, §901.151 (Vernon 2001) which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

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 November 16, 2001.

TRD-200107064
William Treacy
Executive Director
Texas State Board of Public Accountancy
Effective date: December 6, 2001
Proposal publication date: October 5, 2001
For further information, please call: (512) 305-7848

♦ ♦ ♦

SUBCHAPTER D. RESPONSIBILITIES TO THE PUBLIC

22 TAC §501.81

The Texas State Board of Public Accountancy adopts an amendment to §501.81, concerning Firm License Requirements with a change to the proposed text as published in the October 5, 2001, issue of the *Texas Register* (26 TexReg 7736). The change is in subsection (c) in which "This firm not licensed by the Texas State Board of Public Accountancy" should be deleted and changed to "This firm is not a CPA firm." The rule will still require a disclaimer. The change merely edits the disclaimer to make it simpler and

less onerous. Because this change is editorial rather than substantive, public action is not required.

The amendment allows rule changes to the firm registration process established by amendments to the Texas Public Accountancy Act. The rule will exempt certain entities owned by CPAs and non-CPAs registering with the Board. As a result of enforcing this rule, all entities offering attest services or claiming to be capable of offering attest services will be licensed. Through the licensing system, these firms must adhere to minimum competency standards. The public will have clear information about which firms are licensed and which are not.

The amendment will function by allowing for rule changes to the firm registration process established by amendments to the Texas Public Accountancy Act.

This rule was considered by a Joint Taskforce on Senate Bill 1358 (SB 1358). This Taskforce consisted of six members and former members of the Texas State Board of Public Accountancy; seven Texas CPAs actively involved in the development of SB 1358, and the Executive Directors of both the Texas State Board of Public Accountancy and the Texas Society of CPAs. The Taskforce met twice, on July 26, 2001 and August 20, 2001. These meetings were open to the public and notices of these meetings were filed with the Secretary of State's office on July 13, 2001, Docket Number 2001006220, and on August 16, 2001, Docket Number 20017290. After discussing these matters, the Taskforce recommended this rule to the Texas State Board of Public Accountancy for consideration.

Before these rules were proposed by the Board, the Board received four comments on the subject of the disclaimer in old §501.81(b) and on the development of new rules in light of amendments to the Public Accountancy Act. Two comments were received after the Board considered the proposed rule. This disclaimer, part of the Board rules since 1995, required unlicensed firms to disclose "Not qualified to register with the Texas State Board of Public Accountancy to practice public accountancy in Texas" where any associated individual used his or her CPA designation, and the entity was in the client practice of public accountancy. These comments urged that the disclaimer be shortened and that any negative inference about the qualifications of the unregistered entity be eliminated. The proposed rule shortens the disclaimer to "This firm not licensed by the Texas State Board of Public Accountancy." This statement also eliminates any reference to the qualifications of the licensed entity.

One commenter suggested that the disclaimer in the old rule, and potentially any disclaimer, was not permissible under *Ibanez v. Florida Dept. of Bus. & Prof. Reg.,* 000 U.S. U10369 (1994). The Board has enforced the current rule without court challenge since 1995. The limits *Ibanez* (and other cases) place on mandatory disclaimers were carefully considered by the Board at the time its disclaimer rule was drafted. The disclaimer proposed is reasonable in scope, directly related to an identified public risk and no more burdensome than necessary to meet its objectives. Similar restrictions have been upheld in Texas. *Texans Against Censorship v. State Bar of Texas,* 888 F.Supp. 1328, 1354-55 (E.D. Tex. 1995) (Upholding mandatory disclaimer of Board certification in advertisement asserting expertise); *Gonzalez v. State Bar of Texas,* 904 S.W.2d 823, (Ct. of App. - San Antonio 1995) (Upholding discipline for failure to include mandatory disclosures in advertisement about fees).

One commenter suggested that the Board should require that non-CPAs associated with CPA firms use a disclaimer because the risk to the public is the same as in the situation where a CPA is employed by an unlicensed firm. However, because of the licensing structure the risk to the public is very different in the two situations. The Board has set and enforces minimum standards of conduct for CPAs and CPA firms in its Rules of Professional Conduct. These rules require, among other things, competence (§501.74), integrity and objectivity (§501.73), and in some instances, including tax engagements, adherence to substantive accounting standards (§§501.60 - 501.62). The CPA must also maintain the confidences of his client (§501.75).

The licensing structure holds the CPA firm responsible for assuring that all non-CPA employees of a CPA firm meet the standards of conduct expected of a CPA. First, under §901.354(b)(2)(F) of the Act, all non-CPA owners of CPA firms must comply with the Rules of Professional Conduct. Second, a CPA firm is bound by the Board's Rules of Professional Conduct. Act §901.502 (Violation of a rule of professional conduct is grounds for discipline of a firm). One of the Rules of Professional Conduct, §501.77, prohibits a firm from accomplishing through others what it cannot do itself. Because of this rule, a CPA firm cannot disavow the acts of its employees in dealing with clients. Therefore, a member of the public dealing with an employee of a licensed CPA firm can expect that the Rules of Professional conduct will be followed, whether or not the employee is licensed. There is no need for a disclaimer in this instance.

A member of the public dealing with a CPA employee of an unlicensed firm confronts a different situation. The CPA must follow the Rules of Professional Conduct by performing services competently (§501.74) and with integrity and objectivity (§501.73). The CPA must maintain the confidences of his client (§501.75). The unlicensed firm and the rest of the unlicensed firm's non-CPA employees are under no such restrictions. They can behave incompetently, unfairly and unethically without risking a license. Therefore, a member of the public could contract with an unlicensed entity for the entity to do his taxes based on a solicitation letter signed by a CPA. The entity could have an unlicensed person prepare the taxes, and if they were improperly done, the member of the public would have no recourse against the CPA or the entity. The Board's disclaimer simply informs the public of the difference between the individual's licensed status and that of his employer. The public can use this information to make an informed choice.

Two commenters suggested that the Board use the disclaimer "Not a CPA firm." In considering this comment, the Board determined that the disclaimer suggested would be easier for the public to understand than the discussion of the licensed status of the firm in the proposed rule. Further, this disclosure parallels the claim that requires licensure under the amended act. A firm that uses the term "a CPA firm" must be licensed; one that has no license must say the opposite "This firm is not a CPA firm."

After the proposed rule was published in the *Texas Register*, the Board received one comment listing several hypothetical situations and urging the Board not to require licensure in any of them. The situations all include a CPA merely filing a tax return for his or her self or for others and signing the return in compliance with federal regulations. This conduct, by itself, does not require licensure under the rule.

The amendment is adopted under the Public Accountancy Act, Texas Occupations Code, §901.151 (Vernon 2001) which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

§501.81. Firm License Requirements.

(a) A Firm may not provide attest services or use the title "CPA's," "CPA Firm," "Certified Public Accountants," "Certified Public Accounting Firm," or "Auditing Firm" or any variation of those titles unless the firm holds a Firm license.

(b) An individual may not provide attest services unless:

(1) the individual has a license or registration issued under the Act; and

(2) the individual offers the attest services through an entity holding a firm license.

(c) Each advertisement or written promotional statement that refers to a CPA's designation and his or her association with an unlicensed entity in the client practice of public accountancy must include the disclaimer: "This firm is not a CPA firm." The disclaimer must be included in conspicuous proximity to the name of the unlicensed entity and be printed in type not less bold than that contained in the body of the advertisement or written statement. If the advertisement is in audio format only, the disclaimer shall be clearly declared at the conclusion of each such presentation.

(d) The requirements of subsection (c) of this section do not apply with regard to a certificate or registration holder performing services:

(1) as a licensed attorney at law of this state while in the practice of law or as an employee of a licensed attorney when acting within the scope of the attorney's practice of law; or

(2) as an employee, officer, or director of a federally-insured depository institution, when lawfully acting within the scope of the legally permitted activities of the institution's trust department.

(e) On the third determination by the board that a certificate holder has practiced without a license or through an unregistered entity in violation of subsection (c) of this section, the individual's certificate shall be subject to revocation and may not be reinstated for at least 12 months from the date of the revocation.

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 November 16, 2001.

TRD-200107065
William Treacy
Executive Director
Texas State Board of Public Accountancy
Effective date: December 6, 2001
Proposal publication date: October 5, 2001
For further information, please call: (512) 305-7848

♦ ♦ ♦

CHAPTER 513. REGISTRATION

SUBCHAPTER B. REGISTRATION OF CPA FIRMS

22 TAC §513.7

The Texas State Board of Public Accountancy adopts new rule §513.7, concerning Eligibility for Firm License without changes to the proposed text as published in the October 5, 2001, issue of the *Texas Register* (26 TexReg 7737).

The new rule allows the Board to set forth firm registration requirements established in the Public Accountancy Act ("Act") as amended by Senate Bill 1358 (SB 1358), which passed in the last session of the legislature. As a result of enforcing this rule, CPA firms will meet specific ownership requirements, and attest services will be properly supervised. The ownership requirements specified in the Act and outlined in this rule protect professional judgements of the firm and the quality of service offered to the public.

The new rule will function by specifying the requirement for firm licensure and the provision of attest services.

This rule was considered by a Joint Taskforce on SB 1358. This Taskforce consisted of six members and former members of the Texas State Board of Public Accountancy; seven Texas CPAs actively involved in the development of SB 1358, and the Executive Directors of both the Texas State Board of Public Accountancy and the Texas Society of CPAs. The Taskforce met twice, on July 26, 2001 and August 20, 2001. These meetings were open to the public, and notices of these meetings were filed with the Secretary of State's office on July 13, 2001, Docket Number 200100622, and on August 16, 2001, Docket Number 20017290. After discussing these matters, the Taskforce recommended this rule to the Texas State Board of Public Accountancy for consideration.

No comments were received regarding adoption of the rule.

The new rule is adopted under the Public Accountancy Act, Texas Occupations Code, §901.151 (Vernon 2001) which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

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 November 16, 2001.

TRD-200107066
William Treacy
Executive Director
Texas State Board of Public Accountancy
Effective date: December 6, 2001
Proposal publication date: October 5, 2001
For further information, please call: (512) 305-7848

♦ ♦ ♦

22 TAC §513.8

The Texas State Board of Public Accountancy adopts new §513.8, concerning Qualifications for Non-CPA Owners of Firm License Holders with changes to the proposed text as published in the October 5, 2001, issue of the *Texas Register* (26 TexReg 7738). The first change corrects an error in subsection (b)(4) in which "(pertaining to Definitions)" should be deleted and replaced with "(pertaining to Recognized Colleges and Universities)." A second change is required in subsection (b)(3) in which "as required by board rule" should be inserted at the end of the sentence after the word "course". The Board reflected on the

proposed rule and determined that the language of subsection (b)(3) did not clearly reflect the statutory change. Therefore, the Board voted to add the phrase "as required by board rule" to the end of subsection (b)(3) of the rule. The language of the rule then reflects the language of the statute §901.354. The Board has not considered how much CPE should be required of non-CPA owners. Because the changes are not substantive changes and because the changes are more favorable than the proposal the Board did not re-notice the rule.

The new rule allows the Board to set forth qualifications for non-CPA owners of registered firms effected by amendments to the Texas Public Accountancy Act. As a result of enforcing this rule, the CPA firms will meet specific ownership requirements, and attest services will be properly supervised.

The new rule will function by setting forth qualifications for non-CPA owners of registered firms effected by amendments to the Texas Public Accountancy Act

This rule was considered by a Joint Taskforce on Senate Bill 1358 (SB 1358). This Taskforce consisted of six members and former members of the Texas State Board of Public Accountancy; seven Texas CPAs actively involved in the development of SB 1358, and the Executive Directors of both the Texas State Board of Public Accountancy and the Texas Society of CPAs. The Taskforce met twice, on July 26, 2001 and August 20, 2001. These meetings were open to the public, and notices of these meetings were filed with the Secretary of State's office on July 13, 2001, Docket Number 2001006220, and on August 16, 2001, Docket Number 20017290. After discussing these matters, the Taskforce recommended this rule to the Texas State Board of Public Accountancy for consideration.

No comments were received regarding adoption of the rule.

The new rule is adopted under the Public Accountancy Act, Texas Occupations Code, §901.151 (Vernon 2001) which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

§513.8. Qualifications for Non-CPA Owners of Firm License Holders.

(a) A firm which includes non-CPA owners may not qualify for a firm license unless every non-CPA owner of the firm:

(1) is a natural person;

(2) is actively involved in the firm or an affiliated entity; and

(3) is of good moral character as demonstrated by a lack of history of dishonest or felonious acts.

(b) Each of the non-CPA owners who are residents of the State of Texas must also:

(1) pass an examination on the rules of professional conduct as determined by board rule;

(2) comply with the rules of professional conduct;

(3) maintain professional continuing education applicable to license holders including the Board approved ethics course as required by board rule;

(4) hold a baccalaureate or graduate degree conferred by a college or university within the meaning of §511.52 of this title (pertaining to Recognized Colleges and Universities) or equivalent education; and

(5) maintain any professional designation held by the individual in good standing with the appropriate organization or regulatory body that is identified or used in an advertisement, letterhead, business card, or other firm-related communication.

(c) "Actively involved" means providing personal services in the nature of management of some portion of the firm's business interests or performing services for clients of the firm.

(d) "Owner" includes any person who has any financial interest in the firm or any voting rights in the firm.

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 November 16, 2001.

TRD-200107067
William Treacy
Executive Director
Texas State Board of Public Accountancy
Effective date: December 6, 2001
Proposal publication date: October 5, 2001
For further information, please call: (512) 305-7848

♦ ♦ ♦

22 TAC §513.9

The Texas State Board of Public Accountancy adopts new §513.9, concerning Application for Firm License without changes to the proposed text as published in the October 5, 2001, issue of the *Texas Register* (26 TexReg 7739).

The new rule allows the Board to set forth requirements for firm registration applications. As a result of enforcing this rule, there will be efficient licensure of CPA firms in Texas and protection of the public through licensed firm oversight.

The new rule will function by allowing the Board to set forth requirements for firm registration applications.

This rule was considered by a Joint Taskforce on Senate Bill 1358 (SB 1358). This Taskforce consisted of six members and former members of the Texas State Board of Public Accountancy; seven Texas CPAs actively involved in the development of SB 1358, and the Executive Directors of both the Texas State Board of Public Accountancy and the Texas Society of CPAs. The Taskforce met twice, on July 26, 2001 and August 20, 2001. These meetings were open to the public, and notices of these meetings were filed with the Secretary of State's office on July 13, 2001, Docket Number 2001006220, and on August 16, 2001, Docket Number 20017290. After discussing these matters, the Taskforce recommended this rule to the Texas State Board of Public Accountancy for consideration.

No comments were received regarding adoption of the rule.

The new rule is adopted under the Public Accountancy Act, Texas Occupations Code, §901.151 (Vernon 2001) which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

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 November 16, 2001.

TRD-200107068
William Treacy
Executive Director
Texas State Board of Public Accountancy
Effective date: December 6, 2001
Proposal publication date: October 5, 2001
For further information, please call: (512) 305-7848

♦ ♦ ♦

22 TAC §513.10

The Texas State Board of Public Accountancy adopts new rule §513.10 concerning Certification of Corporate Franchise Tax Status without changes to the proposed text as published in the October 5, 2001 issue of the *Texas Register* (26 TexReg 7740).

The new rule allows the Board to require that firms certify that their corporate franchise taxes are current. As a result of enforcing this rule, there will be efficient licensure of CPA firms in Texas and protection of the public through licensed firm oversight.

The new rule will function by allowing the Board to require that firms certify that their corporate franchise taxes are current.

This rule was considered by a Joint Taskforce on S.B. 1358. This Taskforce consisted of six members and former members of the Texas State Board of Public Accountancy; seven Texas CPAs actively involved in the development of S.B. 1358, and the Executive Directors of both the Texas State Board of Public Accountancy and the Texas Society of CPAs. The Taskforce met twice, on July 26, 2001 and August 20, 2001. These meetings were open to the public, and notices of these meetings were filed with the Secretary of State's office on July 13, 2001, Docket Number 2001006220, and on August 16, 2001, Docket Number 20017290. After discussing these matters, the Taskforce recommended this rule to the Texas State Board of Public Accountancy for consideration.

No comments were received regarding adoption of the rule.

The new rule is adopted under the Public Accountancy Act, Tex. Occupations Code, Section 901.151 (Vernon 2001) which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

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 November 16, 2001.

TRD-200107069
William Treacy
Executive Director
Texas State Board of Public Accountancy
Effective date: December 6, 2001
Proposal publication date: October 5, 2001
For further information, please call: (512) 305-7848

♦ ♦ ♦

22 TAC §513.11

The Texas State Board of Public Accountancy adopts new rule §513.11 concerning Affidavit of Firm without changes to the proposed text as published in the October 5, 2001 issue of the *Texas Register* (26 TexReg 7740).

The new rule allows the Board to require that each firm submit an affidavit describing any legal actions pending against the firm or its owners. As a result of enforcing this rule, there will be efficient licensure of CPA firms in Texas and protection of the public through licensed firm oversight.

The new rule will function by allowing the Board to require that each firm submit an affidavit describing any legal actions pending against the firm or its owners.

This rule was considered by a Joint Taskforce on S.B. 1358. This Taskforce consisted of six members and former members of the Texas State Board of Public Accountancy; seven Texas CPAs actively involved in the development of S.B. 1358, and the Executive Directors of both the Texas State Board of Public Accountancy and the Texas Society of CPAs. The Taskforce met twice, on July 26, 2001 and August 20, 2001. These meetings were open to the public, and notices of these meetings were filed with the Secretary of State's office on July 13, 2001, Docket Number 2001006220, and on August 16, 2001, Docket Number 20017290. After discussing these matters, the Taskforce recommended this rule to the Texas State Board of Public Accountancy for consideration.

No comments were received regarding adoption of the rule.

The new rule is adopted under the Public Accountancy Act, Tex. Occupations Code, Section 901.151 (Vernon 2001) which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

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 November 16, 2001.

TRD-200107070
William Treacy
Executive Director
Texas State Board of Public Accountancy
Effective date: December 6, 2001
Proposal publication date: October 5, 2001
For further information, please call: (512) 305-7848

♦ ♦ ♦

22 TAC §513.12

The Texas State Board of Public Accountancy adopts new rule §513.12 concerning Firm Offices without changes to the proposed text as published in the October 5, 2001 issue of the *Texas Register* (26 TexReg 7741).

The new rule allows the Board to require that each firm license holder hold a license for each firm office in Texas. It also requires that each office have a resident manager who is licensed as a CPA in Texas. As a result of enforcing this rule, there will be efficient licensure of CPA firms in Texas and protection of the public through licensed firm oversight.

The new rule will function by allowing the Board to require that each firm license holder hold a license for each firm office in

Texas. It also requires that each office have a resident manager who is licensed as a CPA in Texas.

This rule was considered by a Joint Taskforce on S.B. 1358. This Taskforce consisted of six members and former members of the Texas State Board of Public Accountancy; seven Texas CPAs actively involved in the development of S.B. 1358, and the Executive Directors of both the Texas State Board of Public Accountancy and the Texas Society of CPAs. The Taskforce met twice, on July 26, 2001 and August 20, 2001. These meetings were open to the public, and notices of these meetings were filed with the Secretary of State's office on July 13, 2001, Docket Number 2001006220, and on August 16, 2001, Docket Number 20017290. After discussing these matters, the Taskforce recommended this rule to the Texas State Board of Public Accountancy for consideration.

No comments were received regarding adoption of the rule.

The new rule is adopted under the Public Accountancy Act, Tex. Occupations Code, Section 901.151 (Vernon 2001) which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

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 November 16, 2001.

TRD-200107071
William Treacy
Executive Director
Texas State Board of Public Accountancy
Effective date: December 6, 2001
Proposal publication date: October 5, 2001
For further information, please call: (512) 305-7848

♦ ♦ ♦

22 TAC §§513.22 -513.26, 513.28, 513.31 - 513.34

The Texas State Board of Public Accountancy adopts the repeal of §513.22, §513.23, §513.24, §513.25, §513.26, §513.28, §513.31, §513.32, §513.33 and §513.34 concerning Registration of Partnerships without changes to the proposed text as published in the October 5, 2001 issue of the *Texas Register* (26 TexReg 7742).

The repeal allows the Board to institute new rules to conform to the amendments of the Texas Public Accountancy Act.

The repeal will function by instituting new rules to conform to the amendments of the Texas Public Accountancy Act.

These rules were considered by a Joint Taskforce on S.B. 1358. This Taskforce consisted of six members and former members of the Texas State Board of Public Accountancy; seven Texas CPAs actively involved in the development of S.B. 1358, and the Executive Directors of both the Texas State Board of Public Accountancy and the Texas Society of CPAs. The Taskforce met twice, on July 26, 2001 and August 20, 2001. These meetings were open to the public, and notices of these meetings were filed with the Secretary of State's office on July 13, 2001, Docket Number 2001006220, and on August 16, 2001, Docket Number 20017290. After discussing these matters, the Taskforce recommended these rules to the Texas State Board of Public Accountancy for consideration.

No comments were received regarding adoption of the repeal.

The repeal is adopted under the Public Accountancy Act, Tex. Occupations Code, Section 901.151 (Vernon 2001) which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

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 November 16, 2001.

TRD-200107072
William Treacy
Executive Director
Texas State Board of Public Accountancy
Effective date: December 6, 2001
Proposal publication date: October 5, 2001
For further information, please call: (512) 305-7848

♦ ♦ ♦

SUBCHAPTER C. REGISTRATION OF CORPORATIONS

22 TAC §§513.41 - 513.44, 513.46, 513.47

The Texas State Board of Public Accountancy adopts the repeal of §513.41, §513.42, §513.43, §513.44, §513.46, and §513.47 concerning Registration of Corporations without changes to the proposed text as published in the October 5, 2001 issue of the *Texas Register* (26 TexReg 7743).

The repeal allows the Board to institute new rules to conform to the amendments of the Texas Public Accountancy Act.

The repeal will function by instituting new rules to conform to the amendments of the Texas Public Accountancy Act.

These rules were considered by a Joint Taskforce on S.B. 1358. This Taskforce consisted of six members and former members of the Texas State Board of Public Accountancy; seven Texas CPAs actively involved in the development of S.B. 1358, and the Executive Directors of both the Texas State Board of Public Accountancy and the Texas Society of CPAs. The Taskforce met twice, on July 26, 2001 and August 20, 2001. These meetings were open to the public, and notices of these meetings were filed with the Secretary of State's office on July 13, 2001, Docket Number 2001006220, and on August 16, 2001, Docket Number 20017290. After discussing these matters, the Taskforce recommended these rules to the Texas State Board of Public Accountancy for consideration.

No comments were received regarding adoption of the repeal.

The repeal is adopted under the Public Accountancy Act, Tex. Occupations Code, Section 901.151 (Vernon 2001) which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

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 November 16, 2001.

TRD-200107073
William Treacy
Executive Director
Texas State Board of Public Accountancy
Effective date: December 6, 2001
Proposal publication date: October 5, 2001
For further information, please call: (512) 305-7848

♦ ♦ ♦

SUBCHAPTER D. REGISTRATION OF OFFICES

22 TAC §§513.61 - 513.63

The Texas State Board of Public Accountancy adopts the repeal of §513.61, §513.62 and §513.63 concerning Registration of Offices without changes to the proposed text as published in the October 5, 2001 issue of the *Texas Register* (26 TexReg 7743).

The repeal allows the Board to institute new rules to conform to the amendments of the Texas Public Accountancy Act.

The repeal will function by instituting new rules to conform to the amendments of the Texas Public Accountancy Act.

These rules were considered by a Joint Taskforce on S.B. 1358. This Taskforce consisted of six members and former members of the Texas State Board of Public Accountancy; seven Texas CPAs actively involved in the development of S.B. 1358, and the Executive Directors of both the Texas State Board of Public Accountancy and the Texas Society of CPAs. The Taskforce met twice, on July 26, 2001 and August 20, 2001. These meetings were open to the public, and notices of these meetings were filed with the Secretary of State's office on July 13, 2001, Docket Number 2001006220, and on August 16, 2001, Docket Number 20017290. After discussing these matters, the Taskforce recommended these rules to the Texas State Board of Public Accountancy for consideration.

No comments were received regarding adoption of the repeal.

The repeal is adopted under the Public Accountancy Act, Tex. Occupations Code, Section 901.151 (Vernon 2001) which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

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 November 16, 2001.

TRD-200107074
William Treacy
Executive Director
Texas State Board of Public Accountancy
Effective date: December 6, 2001
Proposal publication date: October 5, 2001
For further information, please call: (512) 305-7848

♦ ♦ ♦

SUBCHAPTER E. REGISTRATION OF SOLE PROPRIETORSHIPS

22 TAC §§513.81 - 513.84, 513.86

The Texas State Board of Public Accountancy adopts the repeal of §513.81, §513.82, §513.83, §513.84 and §513.86 concerning Registration of Sole Proprietorships without changes to the proposed text as published in the October 5, 2001 issue of the *Texas Register* (26 TexReg 7744).

The repeal allows the Board to institute new rules to conform to the amendments of the Texas Public Accountancy Act.

The repeal will function by instituting new rules to conform to the amendments of the Texas Public Accountancy Act.

These rules were considered by a Joint Taskforce on S.B. 1358. This Taskforce consisted of six members and former members of the Texas State Board of Public Accountancy; seven Texas CPAs actively involved in the development of S.B. 1358, and the Executive Directors of both the Texas State Board of Public Accountancy and the Texas Society of CPAs. The Taskforce met twice, on July 26, 2001 and August 20, 2001. These meetings were open to the public, and notices of these meetings were filed with the Secretary of State's office on July 13, 2001, Docket Number 2001006220, and on August 16, 2001, Docket Number 20017290. After discussing these matters, the Taskforce recommended these rules to the Texas State Board of Public Accountancy for consideration.

No comments were received regarding adoption of the repeal.

The repeal is adopted under the Public Accountancy Act, Tex. Occupations Code, Section 901.151 (Vernon 2001) which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

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 November 16, 2001.

TRD-200107075
William Treacy
Executive Director
Texas State Board of Public Accountancy
Effective date: December 6, 2001
Proposal publication date: October 5, 2001
For further information, please call: (512) 305-7848

♦ ♦ ♦

CHAPTER 521. FEE SCHEDULE

22 TAC §521.1

The Texas State Board of Public Accountancy adopts amendment to §521.1 concerning Individual License Fees without changes to the proposed text as published in the October 5, 2001 issue of the *Texas Register* (26 TexReg 7745).

The amendment allows the removal of the CPA firm fee requirements from the rule and places them in rule 521.13 as required by the amendments to the Texas Public Accountancy Act. As a result of enforcing this rule, there will be increased efficiency

through rule consolidation and implementation of the amendments to the Texas Public Accountancy Act.

The amendment will function by allowing the removal of the CPA firm fee requirements from the rule and by placing them in rule 521.13 as required by the amendments to the Texas Public Accountancy Act.

This rule was considered by a Joint Taskforce on S.B. 1358. This Taskforce consisted of six members and former members of the Texas State Board of Public Accountancy; seven Texas CPAs actively involved in the development of S.B. 1358, and the Executive Directors of both the Texas State Board of Public Accountancy and the Texas Society of CPAs. The Taskforce met twice, on July 26, 2001 and August 20, 2001. These meetings were open to the public, and notices of these meetings were filed with the Secretary of State's office on July 13, 2001, Docket Number 2001006220, and on August 16, 2001, Docket Number 20017290. After discussing these matters, the Taskforce recommended this rule to the Texas State Board of Public Accountancy for consideration.

No comments were received regarding adoption of the rule.

The amendment is adopted under the Public Accountancy Act, Tex. Occupations Code, Section 901.151 (Vernon 2001) which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

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 November 16, 2001.

TRD-200107076
William Treacy
Executive Director
Texas State Board of Public Accountancy
Effective date: December 6, 2001
Proposal publication date: October 5, 2001
For further information, please call: (512) 305-7848

♦ ♦ ♦

22 TAC §521.13

The Texas State Board of Public Accountancy adopts new rule §521.13 concerning Firm License Fees with a change to the proposed text as published in the October 5, 2001 issue of the *Texas Register* (26 TexReg 7746). The change corrects an error in the last sentence of subsection (d), in which "of this subsection" should be deleted and replaced with "of subsection (c)." Because this change is editorial rather than substantive, public action is not required.

The new rule allows the Board to impose a $50.00 license fee on all firms applying for a license and will impose a graduated fee per CPA Employee and non-CPA owner for larger firms. See table in rule. The $50.00 fee originated in rule 521.1 which has now been amended. As a result of enforcing this rule, firm license fees will vary with the size of the firm licensed. Larger firms will pay proportionally larger fees.

The new rule will function by allowing the Board to impose a $50.00 license fee on all firms applying for a license and will impose a graduated fee per CPA Employee and non-CPA owner for larger firms. See table in rule. The $50.00 fee originated in rule 521.1, now amended.

This rule was considered by a Joint Taskforce on S.B. 1358. This Taskforce consisted of six members and former members of the Texas State Board of Public Accountancy; seven Texas CPAs actively involved in the development of S.B. 1358, and the Executive Directors of both the Texas State Board of Public Accountancy and the Texas Society of CPAs. The Taskforce met twice, on July 26, 2001 and August 20, 2001. These meetings were open to the public, and notices of these meetings were filed with the Secretary of State's office on July 13, 2001, Docket Number 2001006220, and on August 16, 2001, Docket Number 20017290. After discussing these matters, the Taskforce recommended this rule to the Texas State Board of Public Accountancy for consideration.

No comments were received regarding adoption of the rule.

The new rule is adopted under the Public Accountancy Act, Tex. Occupations Code, Section 901.151 (Vernon 2001) which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

§521.13. Firm License Fees

(a) The fee for a firm license shall be $50 for each office of the firm in Texas plus the fee required by subsection (b) of this section, if any.

(b) A firm shall pay an additional fee based on the number of CPAs employed at the firm in Texas plus the number of non-CPA owners of the firm in Texas, in accordance with the following chart:
Figure: 22 TAC §521.13(b)

(c) A firm "employs" a CPA within the meaning of this rule when:

(1) a CPA is a partner, owner, member, shareholder, or employee of the firm;

(2) a CPA works at the firm, either temporarily or long term, under a lease agreement or contract with any other entity, including but not limited to personnel staffing agencies or service companies affiliated with the firm;

(3) a CPA works at the firm on anything less than a full time basis;

(4) a CPA has any of the relationships described in paragraphs (1)-(3) of this subsection with an entity that is a partner, owner, member, or shareholder of the firm; or

(5) a CPA has any of the relationships described in paragraphs (1)-(3) of this subsection with an entity affiliated with the firm and that CPA participates in performing professional services for clients of the firm.

(d) Each firm shall certify to the board the highest number of CPAs it employs within the meaning of this rule during the 30 days prior to filing its application. Each CPA should be counted only once, even if he or she has more than one relationship as described in paragraphs (1)-(5) of subsection (c).

(e) If a firm is required to be licensed in Texas but has no office in Texas, the fee shall be $50 plus the fee required by subsection (b) of this section, if any.

(f) Firm license fees shall not be prorated or refunded.

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 November 16, 2001.

TRD-200107077
William Treacy
Executive Director
Texas State Board of Public Accountancy
Effective date: December 6, 2001
Proposal publication date: October 5, 2001
For further information, please call: (512) 305-7848

♦ ♦ ♦

CHAPTER 523. CONTINUING PROFESSIONAL EDUCATION
SUBCHAPTER D. MANDATORY CONTINUING PROFESSIONAL EDUCATION (CPE) PROGRAM

22 TAC §523.63

The Texas State Board of Public Accountancy adopts an amendment to §523.63 concerning Mandatory Continuing Professional Education Attendance without changes to the proposed text as published in the October 5, 2001 issue of the *Texas Register* (26 TexReg 7747).

The amendment to this rule is necessary because changes to the Public Accountancy Act made by S.B. 1358 give the Board the authority to establish by rule a program of continuing professional education (CPE) designed to maintain professional competency. See Section 901.411 of the Public Accountancy Act. As a result of enforcing this rule, CPAs will continue to maintain their professional knowledge and skills.

The amendment will function by requiring CPAs to take and report 120 hours of CPE in every three year period.

No comments were received regarding adoption of the rule.

The amendment is adopted under the Public Accountancy Act, Tex. Occupations Code, Section 901.151 (Vernon 2001) which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

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 November 16, 2001.

TRD-200107078
William Treacy
Executive Director
Texas State Board of Public Accountancy
Effective date: December 6, 2001
Proposal publication date: October 5, 2001
For further information, please call: (512) 305-7848

♦ ♦ ♦

TITLE 28. INSURANCE

PART 2. TEXAS WORKERS' COMPENSATION COMMISSION

CHAPTER 133. GENERAL MEDICAL PROVISIONS
SUBCHAPTER C. SECOND OPINION FOR SPINAL SURGERY

28 TAC §133.206

The Texas Workers' Compensation Commission (the commission) adopts an amendment to §133.206 with changes to the proposed text published in the August 3, 2001, issue of the *Texas Register* (26 TexReg 5755).

As required by the Government Code §2001.033(1), the commission's reasoned justification for this rule is set out in this order which includes the preamble, which in turn includes the rule. This preamble contains a summary of the factual basis of the rule, a summary of comments received from interested parties, names of those groups and associations who commented and whether they were for or against adoption of the rule, and the reasons why the commission agrees or disagrees with some of the comments and proposals.

Section 408.026 of the Texas Workers' Compensation Act (the Act) requires a Spinal Surgery Second Opinion process for all non-emergency spinal surgery. House Bill 2600 (HB-2600), passed by the 77th Legislature, 2001, amended §408.026 by deleting the second opinion process directive and requiring the addition of spinal surgery to the list of health care treatments and services that require express preauthorization and concurrent review.

Additionally, §413.014 of the Act, relating to Preauthorization, requires the commission to specify by rule which health care treatments and services require express preauthorization by the insurance carrier (carrier). The enactment of HB-2600 establishes carrier liability for the costs related to non-emergency spinal surgery under the provision of §413.014 and directs that all non-emergency spinal surgery procedures require preauthorization approval prior to surgery, and concurrent review approval for the continuation of treatment beyond previously approved treatment.

To comply with the provisions of HB-2600, the commission will, by separate rulemaking, adopt amendments to §134.600 of this title (relating to Preauthorization, Concurrent Review, and Voluntary Certification of Health Care). Recommendations for spinal surgery submitted prior to the effective date of the amendments to §134.600 of this title (relating to procedure for requesting preauthorization of specific treatments and services) are to be processed pursuant to the rule and statute in effect at the time of the submission. Subsection (m) has been amended to specify its applicability. The date on which §134.600 becomes effective for spinal surgery has been changed in §133.206(m) from March 1, 2002, as proposed, to January 1, 2002, so that it is consistent with simultaneously adopted amendments to §134.600.

Comments opposing the proposed amendment to §133.206 were received from the following groups: Hill Country Sports Medicine; Argonaut Insurance; Flahive, Ogden & Latson; Nurse & Associates; Pathfinder Consulting. Comments indicating support of the proposed amendment to §133.206 were received from the following groups: AR-CMI; Insurance Council of Texas; Claims Administrative Services, Inc.; OccMD Group. Comments

neither specifically opposing or in favor of the proposed amendment to §133.206, but offering suggestions were received from the following groups: JI Speciality Services, Inc.; Texas Back Institute; Injured Workers Assistance Center; Texas Imaging and Diagnostic Center; American Insurance Association.

Summaries of the comments and commission responses are as follows:

COMMENT: Commenters voiced general support for the rules as proposed, stating the rules are a move towards medical evidence and away from opinions and decisions based on reputation, referral source, consensus and camaraderie. Commenters further stated that streamlining and expediting the spinal surgery process should benefit all parties (TWCC, employees, providers and insurance carriers).

RESPONSE: The changes mandated by the 77th Legislature in HB-2600 eliminate the current Spinal Surgery Second Opinion process and include spinal surgery in the preauthorization process as outlined in §134.600. These changes should provide a streamlined process that incorporates objective evidence-based-criteria in spinal surgery determinations.

COMMENT: Commenters recommended that there should be an option for the patient to exercise when an initial denial is received, to either undergo medical dispute or opt for a commission-appointed second opinion. Commenters suggested that the rule needs an exceptional provision that allows for preauthorization of spinal surgery to include preauthorization for length of stay and bone growth stimulators (both non-implantable and implantable); preauthorization for these items should not be required in addition to preauthorization for the spinal surgery. Commenters suggested clarification of type of dispute, procedure or body part that is referred to in the preamble statement: "Only in the event of a dispute could the injured employee be subject to a second physical exam per statutory mandate."

RESPONSE: The commission disagrees. HB-2600 requires use of the same process for all health care listed in §134.600(h). The statutory requirements include use of the medical dispute process to appeal the denial after first submitting a request for reconsideration to the carrier and receiving a second denial. HB-2600 also stipulates that preauthorization be required for inpatient hospitalization, including length of stay, and this provision is included in §134.600(h). A single request for preauthorization can include a request for approval of the surgery, the length of stay, and any bone growth stimulator. The commission provides clarification regarding the injured employee being subjected to a second physical examination in the event of a dispute. The statute allows a reviewer in an independent review organization (IRO) to request that the employee be physically examined by a designated doctor.

COMMENT: Commenters suggested that an individual of the same or elevated credentials as the surgeon proposing the procedure should undertake reconsideration for spinal surgery. Other commenters opposed any requirement for a specific type of provider or like-trained surgeon, because it would add additional burden to the process and increase the cost to employers and carriers.

RESPONSE: The commission disagrees that preauthorization of spinal surgery should be treated differently than other health care. HB-2600 does not stipulate any requirement for a specific type of provider or like-trained surgeon for the preauthorization process. The Texas Department of Insurance utilization review rules require review by physicians, dentists, or other health care providers, as "appropriate", and require that the notification of a utilization review agent's (URA) decision must include the qualifications of the reviewing physician or provider. URAs are subject to licensing and monitoring by the Texas Department of Insurance. Existing rules are sufficient to ensure review by an appropriate health care provider.

COMMENT: Commenter recommended that the time for determining spinal surgery response should remain 14 days, as is the current policy, instead of 10 days, which is not enough time to get a good review. Another commenter suggested that the treating physician be required to notify the insurance carrier a minimum of 30 days prior to scheduling spinal surgery to allow the carrier the opportunity to request an independent medical exam (IME) or a second opinion.

RESPONSE: The commission disagrees. The amendments to §133.206 address only the applicability of that rule. The details of the preauthorization process are contained in simultaneously adopted §134.600. The removal of the spinal surgery second opinion process and placement of spinal surgery into the preauthorization process is required by statute. The preauthorization process should take less time than the second opinion process. Amendments to §134.600 require the carrier to contact the requestor with a decision to approve or deny the request within three working days of receipt of a request for preauthorization or concurrent review. For length of stay issues the contact must be within one working day of the receipt of the request. The carrier must also send written notification within one working day of the decision, to the employee, the employee's representative, and the requestor if not previously sent by facsimile or electronic transmission. Similar time frames are set for responding to a request for reconsideration. The statute no longer provides for a request by the carrier that the employee attend a second opinion examination for spinal surgery.

COMMENT: Commenters stated that the treating doctor would be pushing paper with no objective physical exam to determine medical necessity and recommended that another party should examine the patient to determine medical necessity. Commenter opposed the rule, stating that employees have the surgery just to prolong time off work.

RESPONSE: The commission disagrees. HB-2600 requires that spinal surgery be included in the list of health care services requiring preauthorization in the workers' compensation system. The preauthorization process requires documentation from the doctor. Preauthorization of spinal surgery is now treated like other health care which requires prospective approval. Also, the statute allows a reviewer in an independent review organization (IRO) to request that a designated doctor physically examine the employee. The process should ensure that spinal surgeries performed are medically necessary.

COMMENT: Commenters stated that the rule is redundant to §134.600 and recommended that instead of a two-step process, TWCC should simply repeal the rule effective March 1, 2002; and, suggested the language read, "Requests for preauthorization of spinal surgery filed prior to March 1, 2002 shall be subject to the rule in effect at the time the request was made."

RESPONSE: The commission disagrees. Previous §133.206 must remain in effect for the processing of submissions and resubmissions of second opinion requests received prior to the effective date of this rule. The commission prefers the transition process adopted so that the procedure for a spinal surgery second opinion is easily available for reference in applicable cases.

Spinal surgery procedures requested on or after the specified date are subject to preauthorization per §134.600. The effective date of these amendments has been changed to January 1, 2002 to be consistent with §134.600 which is being simultaneously amended.

COMMENT: Commenters oppose the rule stating that the system is reverting to what was in place prior to 1991 and disagreed that the rule would be beneficial compared to what is already in place. Commenter opposes change in the rule stating that the second opinion process protects workers' compensation patients, and should be even more involved.

RESPONSE: The commission disagrees. HB-2600 deleted the spinal surgery second opinion process and mandates that spinal surgery be included in the list of items requiring preauthorization under §134.600. HB-2600 also enacted changes to the medical dispute resolution process. Appeals from an adverse determination of a URA in a medical necessity dispute will now go to an IRO for review. The URA and IRO processes provide review of medical issues by an appropriate health care provider, and require an opportunity for the requestor to discuss medical necessity with the reviewer prior to denial of the request. The commission will no longer review and determine medical necessity disputes, therefore the commission's medical necessity dispute resolution workload will not increase. This is beneficial for all concerned.

The amendment is adopted under the Texas Labor Code, §402.061, which authorizes the Commission to adopt rules necessary to administer the Act; the Texas Labor Code, §402.072, which mandates that only the Commission can impose sanctions which deprive a person of the right to practice before the Commission, receive remuneration in the workers' compensation system, or revoke a license, certification or permit required for practice in the system; the Texas Labor Code, §408.022, which requires an employee receiving treatment under the workers' compensation system to choose a doctor from a list of doctors approved by the Commission and establishes the extent of an employee's option to select an alternate doctor; the Texas Labor Code §408.026, (as amended by HB-2600, 2001 Texas Legislature) that requires the preauthorization of spinal; the Texas Labor Code Chapter 410, which provides procedures for the adjudication of disputes; the Texas Labor Code §413.014 (as amended by HB-2600, 2001 Texas Legislature) that requires the commission to specify by rule, except for treatments and services required to treat a medical emergency, which health care treatments and services require express preauthorization and concurrent review by the carrier as well as allowing health care providers to request pre-certification and allowing the carriers to enter agreements to pay for treatments and services that do not require preauthorization or concurrent review. This mandate also states the carrier is not liable for the cost of the specified treatments and services unless preauthorization is sought by the claimant or health care provider and either obtained or ordered by the commission; the Texas Labor Code §413.031, which provides a process for dispute resolution for disputes involving medical services; the Texas Labor Code, §415.034, which allows a party charged with an administrative violation or the Executive Director of the Commission to request a hearing with the State Office of Administrative Hearings; and the Texas Government Code, §2003.021(c), which requires the State Office of Administrative Hearings to conduct hearings under the Texas Labor Code, Title 5, in accordance with the applicable substantive rules and policies of the Texas Workers' Compensation Commission.

The amendment is adopted under the Texas Labor Code, §402.061, §402.072, §408.022, §408.026, Chapter 410, §413.014, §413.031, §415.034, and the Texas Government Code, §2003.021(c).

§133.206. Spinal Surgery Second Opinion Process.

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

(1) Division--The Medical Review division of the Texas Workers' Compensation Commission.

(2) Medical emergency--A diagnostically documented condition including but not limited to:

(A) unstable vertebral fracture of such critical nature that increased impairment may result without immediate surgical intervention;

(B) bowel or bladder dysfunction related to the spinal injury;

(C) severe or rapidly progressive neurological deficit; or

(D) motor or sensory findings of spinal cord compression.

(3) Treating doctor--The doctor who is primarily responsible for coordinating the injured employee's health care for a compensable injury.

(4) Surgeon--The doctor listed on the form TWCC-63 as the surgeon to perform spinal surgery.

(5) Acknowledgment date--The earlier of the date on which the insurance carrier representative in Austin signs for the TWCC-63 form or narrative report, or the day after the date the TWCC-63 form or narrative report is placed in the carrier's box.

(6) List--A list maintained by the division of surgeons whose current practice includes performing spinal surgery.

(7) Sublist--A sublist of five qualified doctors from the List, selected as required by subsection (c) of this section, and provided by the division to the injured employee and the carrier for selection of a second opinion doctor.

(8) Qualified doctor--A doctor who meets the minimum qualifications as listed in subsection (d) of this section.

(9) Carrier-selected doctor--A qualified doctor selected by a carrier within 14 days of the acknowledgment date, to render a second opinion on spinal surgery.

(10) Employee-selected doctor--A qualified doctor other than the treating doctor or surgeon, selected by an employee to render a second opinion on spinal surgery.

(11) Commission-selected doctor--A qualified doctor selected by the commission to render a second opinion on spinal surgery.

(12) Second opinion doctor--A commission-selected doctor, an employee-selected doctor and/or a carrier-selected doctor, provided that the injured employee and the carrier each may select only one second opinion doctor.

(13) Concurrence--A second opinion doctor's agreement that the surgeon's proposed type of spinal surgery is needed. Need is assessed by determining if there are any pathologies in the area of the spine for which surgery is proposed (i.e., cervical, thoracic, lumbar, or adjacent levels of different areas of the spine) that are likely to

improve as a result of the surgical intervention. Types of spinal surgery include but are not limited to: stabilizing procedures (e.g., fusions); decompressive procedures (e.g., laminectomy); exploration of fusion/removal of hardware procedures; and procedures related to spinal cord stimulators.

(14) Nonconcurrence--A second opinion doctor's disagreement with the surgeon's recommendation that a particular type of spinal surgery is needed.

(15) Refusal--Refusal to perform second opinion exam except when due to absence from the office because of illness, accident or personal leave.

(16) Change of condition--A documented worsening of condition, new or updated diagnostic test results and/or the passage of time providing further evidence of the condition, or follow up of treatment recommendations outlined by a second opinion doctor.

(b) Carrier Liability for Spinal Surgery Costs.

(1) Subject to the provisions of paragraph (4) of this subsection, the carrier is liable in any of the following situations for the reasonable and necessary costs of the proposed type of spinal surgery and the medically necessary care related to the spinal surgery. The surgery must be related to the compensable injury and performed by a surgeon who was on the List at the time the TWCC-63 was filed with the commission by the treating doctor or the surgeon. The carrier is liable in the following situations:

(A) medical emergencies;

(B) carrier waiver of second opinion;

(C) no carrier request within 14 days of acknowledgment date, for a second opinion;

(D) concurrence by both second opinion doctors;

(E) no timely appeal after two second opinions, only one of which is a concurrence;

(F) final and nonappealable commission order to pay.

(2) The medically necessary care related to the spinal surgery generally includes the services of the surgeons and ancillary providers for the hospital admission, and the hospital services.

(3) If a carrier becomes liable for spinal surgery pursuant to the provisions of this section, disputes regarding the proposed and concurred upon type of spinal surgery shall be limited to a dispute as to the reasonableness of the fees charged. A carrier may challenge whether medical care related to the spinal surgery is medically necessary. A carrier's bill review for medical necessity must be performed in accordance with any applicable rules and regulations regarding utilization review. In dispute resolution proceedings regarding medical necessity, carriers are required to provide documentation indicating compliance with applicable rules and regulations regarding utilization review. A carrier shall not unreasonably deny benefits which are medically necessary. The division may recommend administrative violation proceedings when a carrier unreasonably denies benefits.

(4) Determinations of carrier liability made pursuant to paragraph (1)(B), (C), (D), (E), or (F) of this subsection are valid for one year from the date the determination is made. After one year, medical necessity for the proposed spinal surgery shall be reevaluated before surgery occurs.

(A) If the carrier liability determination resulted from a situation described in paragraph (1)(B) or (C) of this subsection, the spinal surgery second opinion process shall be reinitiated through submission of a new TWCC-63 form in accordance with subsection (e) of this section.

(B) If the carrier liability resulted from a situation described in paragraph (1)(D), (E), or (F) of this subsection or from concurrence by only one second opinion doctor, the treating doctor or surgeon shall submit a copy of the original TWCC-63 to the division and all second opinion doctors with documentation indicating the continued medical necessity for the type of spinal surgery. The second opinion doctor(s) shall review the documentation, examine the injured employee if indicated, and submit an addendum report in accordance with subsection (l)(2) and (3) of this section. Addendum decisions, reports, records, and payments, and appeal to a CCH are governed by all of the provisions of this section.

(c) Commission List and Sublist.

(1) The division will maintain a list of surgeons who perform spinal surgery, including specialty, any specialty training/certification in spinal surgery, and names of spinal surgeons with whom the surgeon is economically associated or shares office space.

(2) The initial List will consist of all doctors who have billed for spinal surgery under the Texas Workers' Compensation Act (the Act), as indicated in the division's billing data base, and who have provided the required information set out in paragraph (1) of this subsection. The division will request the required information from each of these doctors. Failure of the doctor to timely respond may result in an order to respond to the division's request, issued pursuant to §102.9 of this title (relating to Submission of Information Requested by the Commission). A doctor may be added to the List by filing with the division a written request which includes both a statement that the doctor performs spinal surgery, and the additional information required by the division for the List.

(3) If requested by an injured employee, a treating doctor or surgeon on behalf of the injured employee, or a carrier, the division will provide a sublist of five qualified doctors from which a second opinion doctor may be chosen. The sublist will be composed of qualified doctors located within 75 miles of the injured employee's residence, and will be selected from the List by the division on a rotating basis. If the List does not include five qualified doctors located within 75 miles of the injured employee's residence, the division will include on the sublist the qualified doctors who are located at a greater distance. The treating doctor or surgeon must, within seven days of receiving the sublist from Medical Review, notify Medical Review of the employee's selection of second opinion doctor, and the date and time of the employee-selected second opinion appointment.

(4) A doctor may be removed from the List for just cause in compliance with the following procedures, for any of the following actions:

(A) two refusals, within a 90 day period or two consecutive refusals to perform within the required time frames a requested second opinion for which the doctor is qualified;

(B) two untimely submissions, within 90 day period or two consecutive untimely submissions of second opinion narrative reports or any reports, records, or forms required by this section to be filed or provided;

(C) intentionally postponing or delaying a recommendation for surgery while suspended from the List.

(5) A doctor who has been referred for an administrative violation pursuant to subsection (d)(5) of this section and meets the

criteria of paragraph (4) of this subsection will be suspended from the List by the division for 30 days.

(6) The division will notify a doctor by delivery, return receipt requested, of suspension from the List. The suspension will be effective from the date of receipt of the notice by the doctor. A doctor who has been suspended from the List for 30 days may be reinstated to the List by filing with the division a written request which includes a commitment to perform timely and appropriate second opinions and to submit timely reports, records, and forms in compliance with this section.

(7) The commissioners may suspend a doctor from the List for up to a one-year period, if a doctor who was suspended for 30 days and reinstated to the List, again meets the criteria of paragraph (4) of this subsection.

(8) The division will again suspend the doctor from the List for 30 days, notify the doctor as required in paragraph (6) of this subsection and prepare a recommendation to the commissioners that the doctor be suspended from the List for a period of up to one year.

(9) The division will notify the doctor by delivery, return receipt requested, of the division's intent to recommend to the commissioners that the doctor be suspended from the List. Within 20 days after receiving the notice, a doctor may request a hearing to be held as provided by §145.3 of this title (relating to Requesting a Hearing) or as provided by §148.3 of this title (relating to Requesting a Hearing) as applicable. The request must be in writing to the division and actually received in the commission's central office in Austin, Texas, within 20 days after the doctor's receipt of the notice of intent to suspend the doctor from the List. If a request for hearing is timely received, the commission will hold a hearing as provided in Chapter 145 of this title (relating to Dispute Resolution--Hearings Under the Administrative Procedure Act) or the State Office of Administrative Hearings will hold a hearing as provided in Chapter 148 of this title (relating to Hearings Conducted by the State Office of Administrative Hearings). At the conclusion of a hearing conducted under the provisions of Chapter 145 or Chapter 148 of this title, the hearing officer shall propose a decision to the commission for final consideration and decision by the commission. If no request for a hearing is timely filed, the division's recommendation will be reviewed by the commissioners at a public meeting and a decision made to either suspend or maintain the doctor on the List.

(10) If the commissioners decide to suspend a doctor from the List, the commissioners will issue an order of suspension which states the length of the suspension and describes the effects of the suspension. The order may also state restrictions on reinstatement or impose a specific method for reinstatement to the List. The order will be delivered to the doctor, return receipt requested. After receipt, a second opinion doctor shall inform injured employees seeking second opinions on spinal surgery under the Act, of the doctor's suspension from the List and that the insurance carrier will not be liable for the costs of a second opinion exam performed by that doctor while he is suspended from the List. After receipt, a treating doctor or surgeon shall inform injured employees seeking spinal surgery under the Act, of the doctor's suspension from the List and that the insurance carrier will not be liable for the costs of spinal surgery for which the TWCC-63 is filed with the commission while that doctor is suspended from the List. Failure to inform the injured employee in the form and format prescribed by the commission may subject the doctor to administrative penalties of up to $10,000 and other sanctions as provided by the Act.

(11) Unless a different period of suspension or method of reinstatement is provided by the commission order suspending the doctor from the List, a doctor suspended from the List may be reinstated as follows. A doctor may be reinstated to the List after a six month period by written request to the division which includes a renewed commitment to perform timely and appropriate second opinions and to submit timely reports, records, and forms in compliance with this section, provided appropriate members of the doctor's staff have attended a division seminar for providers within the suspension period. After a one year period, a doctor may be reinstated by written request to the division which includes a renewed commitment to perform timely and appropriate second opinions and to submit timely reports, records, and forms in compliance with this section. The division will immediately notify a doctor who has been reinstated to the List. The reinstatement will be effective from the date of the division's action to reinstate.

(d) Second Opinion Doctor's Qualifications.

(1) The doctor rendering a second opinion must meet the following minimum qualifications:

(A) be a spinal surgeon on the List;

(B) be a spinal surgeon with specialty training in spine surgery;

(C) not be economically associated with or share office space with the treating doctor or the surgeon;

(D) not be scheduled to perform or assist with the recommended surgery; and

(E) currently active on the TWCC Approved Doctor List.

(2) The doctor rendering the second opinion cannot for a period of 12 months after rendering a second opinion become the injured employee's treating doctor or surgeon for the medical condition on which the doctor rendered a second opinion.

(3) An out-of-state doctor who is not on the List may be approved by the division as a qualified doctor if the claimant is residing out-of-state.

(4) When deemed necessary the division at its discretion may waive any of the requirements in paragraph (1) of this subsection, with the exception of paragraph (1)(B) of this subsection, to secure timely and reasonable appointments.

(5) The division may issue an order requiring timely submission of a report, record, or form required by this section, recommend administrative violation proceedings, take action to remove a doctor from the List as described in subsection (c) of this section and/or take action to remove a doctor from the Approved Doctor List in compliance with §126.8 of this title (relating to Commission Approved Doctor List) for noncompliance with the order.

(6) A second opinion doctor is responsible for performing an exam if requested by the insurance carrier, the injured employee or the commission unless the division releases the doctor from assessing a particular employee. To consider releasing a proposed second opinion doctor from the requirement to render an opinion on a specific case, Medical Review must agree that the selected second opinion doctor is not qualified due to unique or complex pathology or because the doctor's expertise excludes the involved body area.

(e) Submission of Request for Spinal Surgery and for Second Opinion by Employee-Selected Doctor; Doctors' Responsibilities and Records.

(1) To recommend spinal surgery, the treating doctor or surgeon shall submit to the division a TWCC-63 in the form and manner prescribed by the division. The TWCC-63 may be faxed directly to the division.

(2) The doctor submitting the TWCC-63 shall advise the injured employee of the injured employee's right to obtain a second opinion from a qualified doctor. If the injured employee decides to seek a second opinion, the injured employee or the treating doctor or surgeon on behalf of the employee, shall request that the division provide a sublist of qualified doctors. The injured employee with assistance from the treating doctor or surgeon shall select a qualified second opinion doctor from the sublist and schedule the appointment date prior to submitting the TWCC-63. The second opinion appointment should be scheduled to occur within 30 days from the date the TWCC-63 is submitted to the division. The name of the selected doctor and the appointment information shall be submitted on the TWCC-63 in the form and manner prescribed by the division.

(3) The surgeon shall ensure that all medical records and films arrive at each second opinion doctor's office prior to the date of the scheduled second opinion.

(4) The doctor submitting the TWCC-63 shall maintain accurate records to reflect:

(A) medical information regarding emergency conditions;

(B) injured employee notification of right to a second opinion;

(C) the submission date of the TWCC-63, and any amended TWCC-63's;

(D) the date and time of any second opinion appointment scheduled with employee-selected doctor; and

(E) the date the medical records were sent by the surgeon to each second opinion doctor.

(f) Commission Notification to Carrier. The division will notify the carrier via the carrier representative in Austin of the receipt of any required TWCC-63's by placing copies in the carrier representative's box. The division will also provide a sublist to the carrier. The carrier representatives shall sign for the forms. The carrier representative is responsible for the receipt of and the response to TWCC-63's.

(g) Carrier Waiver of or Request for Second Opinion by Carrier-Selected Doctor; Carrier Records.

(1) The carrier must waive the second opinion or request a second opinion exam be performed by a carrier-selected doctor. This decision and choice of the carrier-selected doctor from a sublist must be made and submitted to the division on a TWCC-63 in the form and manner prescribed by the division and without undue delay but no later than 14 days after the acknowledgment date. The TWCC-63 may be faxed or delivered directly to the division.

(2) The carrier shall set the appointment and include appointment information on the TWCC-63 in the form and manner prescribed by the division. The appointment date set by the carrier should be within 14 days and must not exceed 30 days from the acknowledgment date.

(3) A carrier will be deemed to have waived a second opinion if the carrier chooses a doctor not on the sublist or sets an appointment which exceeds 30 days from the acknowledgment date or fails to timely notify the injured employee, the surgeon, and the treating doctor of the scheduled second opinion examination. Notification of the examination must be sent at least ten calendar days prior to the appointment.

(4) The carrier shall notify in writing the injured employee, the treating doctor, and the surgeon of the appointment information. This notification shall be in the form and manner prescribed by the division and shall include a copy of the TWCC-63, and a narrative explanation of the purpose of the exam.

(5) The carrier representative shall maintain accurate records to reflect:

(A) the acknowledgment date of the TWCC-63;

(B) the date the TWCC-63 required by paragraph (1) of this subsection was submitted to the division;

(C) the date the notice required by paragraph (4) of this subsection was given;

(D) if applicable, the name of the carrier-selected doctor and the date and time of the scheduled exam; and

(E) the acknowledgment date of the narrative report required by subsection (i) of this section.

(h) Division Notification to Employee of Option to Obtain a Second Opinion From an Employee-Selected Doctor.

(1) If the carrier elects to have a second opinion and the employee has not already scheduled a second opinion from an employee-selected doctor, the division shall notify the employee of the following:

(A) that the carrier will be obtaining a second opinion from a carrier-selected doctor and the date and time;

(B) that the employee may obtain a second opinion from an employee-selected doctor;

(C) the sublist from which the employee may select an employee-selected doctor; and

(D) the procedures and the time deadlines for obtaining a second opinion from an employee-selected doctor;

(2) The treating doctor or surgeon must within five days of receiving notification from the division, notify the division if the employee is going to select an employee-selected doctor.

(3) If the injured employee elects to have an employee-selected second opinion, the injured employee shall select a qualified second opinion doctor from the sublist. The injured employee may seek assistance from the treating doctor or surgeon in selecting a doctor from the sublist. The appointment must be scheduled prior to the treating doctor's or surgeon's submission of an amended TWCC-63 which contains the information required by subsection (e) of this section. The amended TWCC-63 must be filed with the division no later than ten days after the treating doctor's or surgeon's receipt of notification from the division.

(4) The second opinion exams scheduled in this subsection shall be set for a date later than the carrier-selected doctor second opinion appointment.

(5) If the second opinion of the carrier-selected doctor is a concurrence the appointment scheduled in this subsection may be canceled.

(6) Decisions, reports, records, and payments for second opinions obtained pursuant to this subsection shall be governed by the same provisions applicable to second opinions pursuant to subsections (i) and (j) of this section.

(7) If the carrier selected second opinion exam results in a nonconcurrence and the division has not received notice of the employee's choice of second opinion doctor, the division will notify the employee, treating doctor and surgeon of the following:

(A) that the carrier selected second opinion exam resulted in a nonconcurrence;

(B) that in order for the carrier to become liable for the costs of surgery, the employee must receive a concurrence from one of the doctors on the employee sublist; and

(C) that failure to inform the division of the employee's selection of a second opinion doctor, within 14 days of nonconcurrence notification from the division, will result in withdrawal of the recommendation for spinal surgery.

(8) If a recommendation is withdrawn, the treating doctor or surgeon may resubmit in accordance with subsection (l)(1) of this section.

(i) Second Opinion Decisions and Reports; Second Opinion Doctors' Records.

(1) A second opinion doctor must provide appointments for requested second opinions within the 30-day time frames required by subsections (e)(2) and (g)(2) of this section.

(2) The second opinion doctor's opinion must be based on physical examination of the injured employee and review of the medical records and films forwarded by the surgeon. The second opinion doctor shall call the designated phone number at the division within two days after the exam to submit the results of a second opinion. The message must include the injured employee's name and social security number, the date and time of the exam, the name of the second opinion doctor and a clear decision of a "concurrence" or "nonconcurrence" with the need for the recommended type of spinal surgery. The second opinion doctor shall return any films within three days to the doctor who submitted the films.

(3) The second opinion doctor must complete a narrative report regarding the second opinion exam which indicates the second opinion doctor's decision, and submit it to the division, the treating doctor, the surgeon, and the carrier, within ten days of the exam. The division will notify the employee of the decision(s) of the second opinion doctor(s).

(4) A second opinion doctor shall maintain accurate records to reflect the following for second opinions:

(A) the date for which the exam was scheduled;

(B) the circumstances regarding a cancellation, no show or other situations where the exam did not occur as scheduled;

(C) the date of the examination;

(D) the second opinion doctor's decision;

(E) the date the decision was called into the division;

(F) the date the narrative was mailed to the treating doctor, the surgeon, and the carrier; and

(G) the date the narrative was sent to the division.

(j) Payment for the Second Opinion Exam.

(1) The division shall notify the carrier via the carrier representative of narrative reports received by the division. The carrier representative shall sign and acknowledge receipt of notice of narrative reports. Carriers shall not pay a doctor for a second opinion exam until receipt of notice of the narrative report. A carrier's time frame for payment of the bill for a second opinion begins with the receipt of the bill from the doctor or the acknowledgment date of notice of the narrative report from the division, whichever is the later of the two dates, regardless of the time frame or process established by Chapter 134 of this title (relating to Guidelines for Medical Services, Charges, and Payments).

(2) The insurance carrier is responsible for paying the reasonable costs of a second opinion exam by a qualified doctor whether requested by the injured employee or the carrier. The second opinion doctor's bill and the carrier's payment for second opinion exams shall be inclusive of the exam, review of records and films, and the preparation and submission of the reports, and shall be the lesser of the charged amount or the following fees for the applicable service:

(A) $350 for second opinions (use code WC001);

(B) $100 if the injured employee fails to show up for a scheduled second opinion exam or if a scheduled second opinion exam is cancelled by the employee with less than 24 hours notice (use code WC002); or

(C) $150 to reconsider an earlier decision (use code WC003).

(3) A carrier shall pay for the reasonable travel expenses for an injured employee to attend a second opinion appointment.

(4) The carrier shall be responsible for the reasonable copying costs of the films and records needed to perform a second opinion.

(k) Appeal to a Contested Case Hearing (CCH).

(1) An employee may appeal to a CCH if there is no second opinion concurrence.

(2) A carrier may appeal to a CCH if there is a second opinion nonconcurrence.

(3) The appeal must be filed within 10 days after receipt of notice from the commission regarding carrier liability for spinal surgery. The appeal must be filed in compliance with §142.5(c) of this title (relating to Sequence of Proceedings To Resolve Benefit Disputes). The contested case will be scheduled to be held within 20 days of commission receipt of the request for a CCH. The hearings and further appeals shall be conducted in accordance with Chapters 140 - 143 of this title (relating to Dispute Resolution/General Provisions, Benefit Review Conference, Benefit Contested Case Hearing, and Review by the Appeals Panel).

(4) Of the three recommendations and opinions (the surgeon's, and the two second opinion doctors'), presumptive weight will be given to the two which had the same result, and they will be upheld unless the great weight of medical evidence is to the contrary. The only opinions admissible at the hearing are the recommendation of the surgeon and the opinions of the two second opinion doctors.

(l) Resubmitting the Issue of Spinal Surgery.

(1) If the injured employee has a change of condition at any time after a nonconcurrence, the treating doctor or surgeon may submit a TWCC-63 to the division and to both the second opinion doctors with documentation indicating the change of condition as defined in subsection (a)(16) of this section. The second opinion doctors will review the documentation for the purpose of evaluating the presence of criteria listed in subsection (a)(16) of this section prior to submission of an addendum report. If in the doctor's opinion the documentation does not meet the criteria of subsection (a)(16) of this section, the second opinion doctor shall submit a report to the division and the treating doctor or surgeon indicating there is no change in condition. If documentation meets the criteria in subsection (a)(16) of this section, the second opinion doctors shall issue an addendum to the original decision and send a copy to the division, the treating doctor, the surgeon, and the carrier with the word "ADDENDUM" clearly indicated on the narrative report. Addendum decisions, reports, records, and payments,

and appeal to a CCH are governed by all of the provisions of this section. If the addendum second opinions result in carrier liability, any pending appeal shall be dismissed.

(2) Addendum decisions, reports, records, and payment shall be governed by subsections (i) and (j) of this section with the following exception. The narrative report shall be submitted within 10 days of the reviewing doctor's receipt of the request for an addendum opinion or within 10 days of a subsequent physical examination of the patient.

(3) The treating doctor or surgeon may communicate with the second opinion doctors to exchange medical information and knowledge; however, communication as described in the Texas Labor Code, §418.001(a) (Penalty For Fraudulently Obtaining or Denying Benefits) is prohibited.

(m) This section shall be effective for all Form TWCC-63's filed with the commission on or after July 1, 1998 and prior to January 1, 2002. On or after January 1, 2002, spinal surgery shall be subject to §134.600 of this title (relating to Preauthorization, Concurrent Review, and Voluntary Certification of Health Care) as it may be amended or revised. Form TWCC-63's filed prior to July 1, 1998 shall be subject to the rule in effect at the time the form was filed with the commission.

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 November 19, 2001.

TRD-200107154
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Effective date: January 1, 2002
Proposal publication date: August 3, 2001
For further information, please call: (512) 804-4287

♦ ♦ ♦

CHAPTER 134. BENEFITS--GUIDELINES FOR MEDICAL SERVICES, CHARGES, AND PAYMENTS

SUBCHAPTER G. PROCEDURE FOR REQUESTING PRE-AUTHORIZATION OF SPECIFIC TREATMENTS AND SERVICES

28 TAC §134.600

The Texas Workers' Compensation Commission (the commission) adopts amendments to §134.600, concerning the procedures for requesting prospective and concurrent review of health care and the voluntary certification of health care with changes to the proposed text published in the August 3, 2001, issue of the *Texas Register* (26 TexReg 5757).

The *Texas Register* published text shows the adopted amended language and should be read to determine all amendments. Changes made to the proposed rules are in response to public comment received in writing and at a public hearing and are described herein, including the summary of comments and responses section of this preamble. Other changes were made based upon further review by staff, including the Medical Advisor, to simplify and clarify the rules, ensure consistency, or to correct the typographical or grammatical errors.

Prospective review is one aspect of utilization control. It is statutorily mandated and preauthorization of over-utilized health care remains a priority with the commission. House Bill 2600 (HB-2600) continues to mandate the use of preauthorization and establishes a Medical Quality Review Panel (MQRP), which will address issues of over-utilization by outliers and monitor the professional behavior of system participants. In addition, rules regarding treatment and work-release parameters have been proposed and are currently in the public comment process.

Preauthorization provides a strong deterrent and is necessary to control the potential over- utilization and abuse of treatment, which accounts for the higher costs in Texas. The process allows for provider communication with the carrier before health care is rendered. The rule promotes a non-adversarial environment, facilitates medical consensus regarding claims and treatment programs, and reduces the probability of litigation, as well as leading to best outcomes. The adopted changes to preauthorization are integral to the cost containment intent of HB-2600 and provide the foundation for improved accountability and fiscal responsibility among system participants.

An increase in the number and types of health care that must be preauthorized would increase the volume of denials. In light of public comments received, the commission has re-evaluated and revised the proposed list of health care requiring preauthorization. The volume of health care that requires preauthorization has been reduced, which should greatly reduce the number of disputes and should ensure continuity of care without interruption or delay, as well as serving as a deterrent against the delivery of unnecessary health care. A sublist of the health care requiring preauthorization has been established to address only those treatments or devices for which an extension of previously preauthorized health care would be appropriate.

Administrative costs, volume of paperwork, and the attendant cost burden to health care providers in securing preauthorization and concurrent reviews must be considered. The responsibility for requesting preauthorization has been changed to allow the health care provider who will be delivering the health care and billing for it, to request preauthorization. This revision in response to public comment will greatly reduce the administrative cost burden that would have been imposed by the rule as proposed.

The rule as proposed carried the probability of an enormous increase in the volume of disputes; the cost per dispute may be too expensive to support, possibly resulting in unabated approval of unnecessary medical care. The increased cost to insurance carriers due to the increased preauthorization requests would result in the carriers passing these costs on to the employers in increased premiums.

Support was expressed by the business community for primary reliance on the preauthorization process, notwithstanding that the statute requires the carriers to pay for preauthorization review by the independent review organizations (IRO). The reasons given were: carriers will better control costs with TWCC monitored mandatory preauthorization than with carrier-directed retrospective review; non-medical costs of inappropriate care are more important than increased IRO charges for carriers; only a tiny percentage of preauthorization denials reach the IRO level

in group health insurance, as most are settled through reconsideration, and the same will be true in workers' compensation; retrospective reviews involve more time to process than do preauthorization decisions, resulting in higher IRO fees for retrospective disputes; due to split decisions and split fees, the IRO costs to carriers may be higher in retrospective review disputes than in preauthorization disputes; retrospective denials may be more frequently disputed than preauthorization denials due to the unfairness rendered to health care providers who have already provided the care; and overall, the cost to carriers for preauthorization IRO decisions will be minimal compared to the reduction in medical costs as a result of preauthorization.

An increase in cost could result from an increase in the volume of preauthorization requests. However, the number of health care treatments that require preauthorization or concurrent review has been reduced from the rule as proposed, and preauthorization remains a valuable tool for control of utilization, as discussed above.

The commission is aware that the process of preauthorization has been deleted from other systems including commercial carriers, Medicare and HMOs; however, the process is required in the Texas workers' compensation system by legislative mandate. A preauthorization process is an essential component of containing costs while assuring timely delivery of appropriate health care to injured employees.

BACKGROUND AND DESCRIPTION OF RULE

House Bill 3697 (HB-3697) passed by the 76th Legislative Session, 1999, required that the Texas Workers' Compensation Insurance Fund enter into a joint venture with the Research and Oversight Council (ROC) on workers' compensation for interim studies. These studies were to include examination of the quality and cost-effectiveness of the then-current workers' compensation health care delivery system as compared to other health care delivery systems in Texas and workers' compensation health care delivery systems in other states.

Research studies commissioned by the ROC pursuant to HB-3697 confirmed perceptions that Texas workers' compensation medical costs are higher than those in other states and other health care delivery systems. The ROC concluded that, "These cost differences result primarily from more medical testing and treatment provided to Texas injured workers for longer periods of time than for workers with similar injuries in other state workers' compensation systems and in group health plans."

The Workers' Compensation Research Institute (WCRI), in its December 2000 publication, The Anatomy of Workers' Compensation Medical Costs and Utilization: A Reference Book finds, "Across all claim types, the average medical cost per claim in Texas is significantly higher than that of the median state, a function of higher utilization overall. Higher utilization is most pronounced for chiropractors: The average number of visits per claim is almost double that of the median state. The payment per chiropractic service is also the highest among the eight states. And the utilization rate and per-service payment for physical/occupational therapists also are among the highest."

Over-utilization of medical care can both endanger the health of injured workers and unnecessarily inflate system costs. Unnecessary and inappropriate health care does not benefit the injured employee or the workers' compensation system. Unnecessary treatment may place the injured worker at medical risk, cause loss of income, and may lead to a disability mindset. Unnecessary or inappropriate treatment can cause an acute or chronic condition to develop. The 77th Legislature passed HB-2600, which restructured some of the basic components of medical management in the workers' compensation system. This includes participation, training, and monitoring of health care providers and insurance carriers, utilization review (including preauthorization, concurrent review, and voluntary certification), and medical dispute resolution. The commission is the regulatory agency responsible for implementing the statutory provisions, some of which will require data compilation and training to effect.

HB-2600 amended and added statutory provisions to strengthen the commission's ability to control medical costs. These include: changes to the approved doctor list and application process, grounds for sanctions of doctors and carriers, a Medical Advisor on commission staff, a MQRP to assist the commission and the Medical Advisor in reviewing the conduct of health care providers and carriers relating to medical benefit delivery, control features of the Medicare system, treatment guidelines and work release guidelines that can be used as effective utilization and quality controls, and a new medical necessity dispute resolution process. Preauthorization disputes are required to be conducted by an Independent Review Organization (IRO). The statute requires that the carrier pay for the cost of all IRO reviews of preauthorization disputes even if the IRO upholds the denial. At this time, the fee for an IRO review has been established by the Texas Department of Insurance at two levels: $650 and $460. Significant additions to the list of health care requiring preauthorization could result in a substantial increase in the number of medical necessity disputes that must be resolved by an IRO. Preauthorization is a costly form of utilization control, and its costs must be considered along with its savings. There is no clear answer or consensus regarding the cost/benefit impact of increasing the items for which preauthorization is required.

Those who oppose shortening the list of health care that requires preauthorization and shifting emphasis to retrospective review, assert that retrospective review does not protect the injured employee from inappropriate treatment, occurs after the health care provider has provided the health care, is harder to monitor, and costs more and takes more time than a prospective review. Those who favor a shorter list of health care that requires preauthorization assert that carrier costs to review preauthorization and deny health care will be greatly increased because of the statutory requirement that the carrier pay for all IRO reviews of preauthorization denials, that only a small percentage of preauthorization requests are denied and progress to an IRO review, and that the Medicare program and many commercial managed care carriers have modified or eliminated their prospective reviews in favor of a utilization review process. The non-prevailing party pays for retrospective IRO reviews in the workers' compensation system. In either scenario, employers will ultimately pay for any increased costs in the system.

As the balance of arguments on each side shows, preauthorization is still a valuable tool for regulation of the quality and the utilization of health care in the workers' compensation system. Section 413.014 of the Texas Workers' Compensation Act (the Act) requires the commission to specify by rule which health care treatments and services require preauthorization. Passed by the 77th Texas Legislature in its 2001 session, HB-2600 amended Texas Labor Code §413.014 by adding the concept of concurrent review to preauthorization and identifying categories of services for which the commission must require preauthorization or concurrent review by the insurance carrier (carrier). These

services are: spinal surgery; work-hardening or work-conditioning services provided by a health care facility that is not credentialed by an organization recognized by commission rules; inpatient hospitalization; outpatient or ambulatory surgical services; and any investigational or experimental services or devices. The statute defines "investigational or experimental service or device" and provides that an insurance carrier is not liable for payment for treatments and services that require preauthorization unless preauthorization is sought and obtained from the insurance carrier or ordered by the commission. HB-2600 also added Texas Labor Code §408.0231(b)(4), which provides that additional preauthorization or reduced preauthorization requirements may be applied to individual doctors or individual workers' compensation medical claims.

In conjunction with the preauthorization amendments, HB-2600 amended §408.026 of the Act, regarding spinal surgery second opinions, to clarify that spinal surgery is now subject to preauthorization. Amended §413.014 of the Act provides that a carrier and a health care provider may not be prohibited from voluntarily discussing health care treatment and treatment plans, either prospectively or concurrently, nor may the carrier be prohibited from certifying or agreeing to pay for health care consistent with those agreements.

Preauthorization is prospective utilization review. Concurrent review is review of the continuation of treatment beyond previously approved health care. The addition of concurrent review allows case management and cost containment by the carrier and ensures ongoing treatment of the injured employee without delay or interruption. The addition of voluntary certification allows prospective carrier review of health care not listed in subsection (h), encourages communication between the health care provider and the carrier, and provides assurance of carrier liability for approved health care other than those treatments and services which require preauthorization under subsection (h). This provides quality health care and cost containment and may reduce disputes by encouraging communications regarding appropriateness of care.

The intent of the list of items that require preauthorization and concurrent review is to effect cost containment while ensuring employee access to quality health care, and to prevent the injured employee from being subjected to unnecessary care by assuring the appropriate utilization of services and treatments included on the list. The intent of amendments to this section is to comply with statutory mandates in the Texas Labor Code as amended by HB-2600, adopted during the 2001 Texas Legislative Session. The commission has included additional requirements and excluded some, to achieve the joint statutory purposes of the timely delivery of appropriate medical care and effective medical cost containment.

In developing this amended rule, the commission sought to balance the interests of all system participants while ensuring the injured employee's access to timely, reasonable and medically necessary health care for the compensable injury. At various times in the drafting of this amendment, the commission received input and reviewed information from a wide variety of sources including employees, employers, health care providers, insurance carriers, third party administrators, the Commission's Claims Services Task Force, the Commission's Medical Advisor, the Commission's Medical Advisory Committee (MAC), Guideline Standardization Subcommittee of the MAC, Spine Treatment Guideline Revision Workgroup (STGRW), Research & Oversight Council on Workers' Compensation (ROC), Workers' Compensation Research Institute, other states' workers' compensation systems, and other payor systems including Medicare, Medicaid, group health and managed care organizations. The input, data and information was crucial in ensuring the development of a rule that will achieve the joint statutory purposes of timely delivery of appropriate health care and effective cost control.

The adoption of this section amends the title of Subchapter G from, "Treatments and Services Requiring Pre-Authorization," to "Prospective and Concurrent Review of Health Care," and further changes the section title "Procedure for Requesting Pre-Authorization of Specific Treatments and Services," to, "Preauthorization, Concurrent Review, and Voluntary Certification of Health Care." These changes more accurately describe the purpose of the amendments and incorporate the new concepts of concurrent review and voluntary certification.

A brief subsection to provide definitions applicable to this section has been included as new subsection (a) in the adopted rule, thereby requiring a re-lettering of the subsequent text for subsections (a) - (e). Proposed subsection (f), regarding the maintenance of records, is moved and re-lettered as subsection (l). The position of subsections (g) and (h) were not changed. A brief subsection to identify health care that will require concurrent review has been included as new subsection (i), thereby requiring re-lettering of subsequent subsections (j) - (o). The references to the changes in the subsections are as they are lettered in the rule as adopted.

Based upon comments, several terms have been defined in subsection (a) of the adopted rule, including: "ambulatory surgical services"; "concurrent review"; "final adjudication"; and "outpatient surgical services". These are terms used in the Labor Code provisions amended by HB-2600. "Preauthorization" is defined to distinguish between the statutory terms "preauthorization" and "concurrent review". "Requestor" is defined to identify individuals who may request preauthorization or concurrent review. These definitions provide clarity to terminology otherwise open to interpretation.

The rule, as proposed, required the requestor to be the treating doctor, the prescribing or referral doctor, or the injured employee. Based upon comments, the adopted rule defines "requestor" as the health care provider or designated representative, including office staff or a referral health care provider/health care facility that requests preauthorization, concurrent review, or voluntary certification. The rule clarifies those situations in which a requestor or the injured employee may file a request, and those instances in which only a requestor may file.

Subsection (b) establishes the situations that result in carrier liability for the listed health care requiring preauthorization. Currently, preauthorization is not required for treatments and services provided in an emergency. Subsection (b)(1) of the adopted section references the definition of emergency as defined in §133.1 of this title (relating to Definitions). This language better defines what constitutes an emergency and provides consistency among commission rules. The carrier is also liable when the requestor has received approval from the carrier through one of three processes: preauthorization (prospective approval of health care listed in subsection (h)); concurrent review (approval of an extension of on-going treatments or services beyond what was previously approved for health care listed in subsection (i)); or voluntary certification or agreement (voluntary approval of health care not included

in subsection (h)). To establish carrier liability, each of these approvals must occur prior to the provision of or continuation of the requested health care.

Subsection (c) clarifies that even if preauthorization is approved, the approval does not guarantee payment if there has been a final adjudication that the injury is not compensable or that the health care was provided for a condition unrelated to the compensable injury. "Final adjudication" is defined in subsection (a) as the issuance of a final commission decision or order that is no longer subject to appeal by either party.

Subsection (d) as proposed requires a carrier to designate accessible direct telephone and facsimile numbers. This subsection makes clear that a carrier's agent is included in the term "carrier" as used in these rules. The rule as adopted allows a carrier to also designate an electronic transmission address for use by the requestor or employee to request preauthorization or concurrent review during normal business hours. The direct number must be answered or the facsimile or electronic transmission address responded to, by the carrier within the time limits established in subsection (f) of the rule.

Subsection (e) outlines the procedure for requesting preauthorization or concurrent review. Preauthorization must be requested and approved prior to providing or receiving the health care listed in subsection (h). Concurrent review must be requested prior to the conclusion of the specific number of treatments or period of time preauthorized, and approval must be obtained prior to extending the health care listed in subsection (i). Changes from the rule as proposed, make it clear that approval must have been obtained prior to providing the health care.

The rule, as proposed, allowed a request to be transmitted to the insurance carrier by telephone or facsimile. The rule as adopted also allows a request to be transmitted by electronic transmission. Subsection (e) also describes what information must be included in the request: the specific health care listed in subsection (h) or (i); the number of specific health care treatments and/or the specific period of time requested; the medical information to substantiate the need for the health care recommended; the accessible telephone and facsimile numbers and any designated electronic transmission address for use by the carrier; the name of the health care provider performing the health care; and the facility name and estimated date of proposed health care.

Subsection (f) addresses requirements for an insurance carrier response to a request for preauthorization or concurrent review. The rule clarifies that the carrier must approve or deny requests for preauthorization or concurrent review based solely upon the reasonable and necessary medical health care required to treat the injury, regardless of unresolved issues of compensability, extent of or relatedness to the compensable injury; the carrier's liability for the injury; or the fact that the employee has reached maximum medical improvement.

This procedure provides consistency with other commission rules and Texas Department of Insurance (TDI) rules for Utilization Reviews for Health Care Provided Under Workers' Compensation Insurance Coverage (UR). Prior to the issuance of a denial, the carrier must afford the requestor a reasonable opportunity to discuss the clinical basis for a denial with the appropriate doctor or health care provider performing the review. The carrier must contact the requestor or employee by telephone, facsimile, or electronic transmission with the decision to approve or deny the request. The contact must occur within three working days of receipt of a request for preauthorization or concurrent review. However, for a request for concurrent review of length of hospital stay, the contact must occur within one working day of the receipt of the request. The rule as proposed required the contact to be within one day for all concurrent review. The carrier must also send written notification of the approval or denial of the request, within one working day of the decision, to the employee, the employee's representative, and the requestor, if not previously sent by facsimile or electronic transmission.

An approval must include the specific health care and the number of health care treatments and/or the specific period of time approved. An approval must also contain notice of any unresolved denial of compensability or liability or an unresolved dispute of extent of or relatedness to the compensable injury. A denial must include the description or source of screening criteria used and the principal reasons and clinical basis for making the denial. In accordance with HB-2600, a denial must also contain plain language notifying the employee of the right to timely request reconsideration of the health care denied under subsection (g) of this section.

Subsection (g) addresses the steps and required timeframes in the event of a denial of preauthorization or concurrent review. The requestor (or the employee for preauthorization denials), must request reconsideration of a denial by the carrier prior to seeking Medical Dispute Resolution. The request for reconsideration must be submitted within 15 working days from receipt of the written denial. This was increased from the five days allowed in the rule as proposed. The carrier must respond to reconsideration requests within five working days for preauthorization, within three working days for concurrent review, and within one working day of receipt of a request for concurrent review of hospital length of stay. The requestor or employee may appeal the denial of a reconsideration request by filing a dispute in accordance with the Medical Dispute Resolution rules of the commission. A request for preauthorization for the same health care, that has been denied at the IRO level as not medically necessary, may only be resubmitted if the requestor can objectively document a substantial change in employee's medical condition (see adopted (g)(4)).

Subsection (h) lists the categories of health care that require preauthorization by the carrier. The current list identifies sixteen categories or treatments that require preauthorization. The adopted rule adds the categories mandated by HB-2600, and adds, deletes, and revises other categories as necessary to achieve the statutory purposes of timely delivery of appropriate medical care and effective medical cost containment. The statute requires that commission rules adopted under this section must provide that preauthorization and concurrent review are required at a minimum for: (1) spinal surgery, as provided by Texas Labor Code §408.026; (2) work-hardening or work-conditioning services provided by a health care facility that is not credentialed by an organization recognized by commission rules; (3) inpatient hospitalization, including any procedure and length of stay; (4) outpatient or ambulatory surgical services, as defined by commission rule; and (5) any investigational or experimental services or devices. Subsections have also been renumbered as a result of statutory inclusions and commission additions.

Inpatient hospitalization is one of the statutorily mandated categories. Subsection (h)(1) clarifies that preauthorization for inpatient hospital admissions includes preauthorization of the principal scheduled procedures and length of stay. If the length of stay needs to be extended, a request for concurrent review is required.

In accordance with HB-2600, subsection (h)(2) includes all outpatient surgical services and ambulatory surgical services in the list of health care that requires preauthorization. In accordance with the definitions in subsection (a), this includes surgical services provided in a facility that operates primarily to provide surgical services, or in a freestanding surgical center or a hospital outpatient department, to patients who do not require overnight hospital care.

Subsection (h)(3) adds spinal surgery to the list as required by HB-2600 amendments to §408.026 and §413.014 of the Texas Labor Code.

Subsection (h)(4) combines two of the items listed in the current preauthorization rule. The current rule requires preauthorization for all psychiatric or psychological therapy or testing, except as a part of a work hardening program. These items have remained on the list as a cost containment feature. The added requirement of preauthorization for repeat interviews also serves as a cost containment feature. Adopted subsection (h)(4) amends language regarding testing to clarify that, except as part of a preauthorized or exempt rehabilitation program under subsection (h)(9) and (10), psychological testing and psychotherapy require preauthorization, as well as do repeat interviews, and biofeedback. The intent is that if these services are part of a preauthorized or exempt rehabilitation program, they will not require additional separate preauthorization. If, however, these services are stand-alone procedures, they do require separate preauthorization. Initial psychiatric or psychological interviews are essential assessment tools and will not require preauthorization; however, repeat interviews will require preauthorization and concurrent review as a cost containment feature.

Subsection (h)(5), (7), and (8) are unchanged from the current rule. Subsection (h)(6) has been revised from the rule as proposed to remove acupuncture, facet and trigger point injections. The rule as adopted does not require preauthorization for acupuncture because low utilization levels and low costs of acupuncture do not warrant inclusion on the list at this time. Facet and trigger point injections have been removed because although their utilization is high, low to moderate costs per treatment does not warrant inclusion. The phrase "non-emergency" has been removed from subsection (h)(7) because it is equally applicable to all health care on the list requiring preauthorization. Preauthorization is not required for health care provided in an emergency.

These items from the current rule remain on the list because: bone growth stimulators and chemonucleolysis are high cost; Myelograms, discograms, and surface EMGs have moderate cost and high utilization and diagnostic studies greater than $350 are high cost and their usage needs to be monitored. Monitoring of costs and utilization levels will afford the commission the necessary data to guide future changes.

The current rule requires preauthorization of video fluoroscopy and radiation therapy or chemotherapy; these items have been deleted from the list of health care that requires preauthorization due to low cost and low utilization levels.

Subsection (h)(9) incorporates the statutory requirement for preauthorization of work hardening and work conditioning provided by a health care facility that is not credentialed by an organization recognized by commission rules. In the rule as proposed, the commission did not recognize any credentialing organization, and required preauthorization for all work hardening or work conditioning services. In the adopted rule, work hardening and work conditioning services provided in a facility that has not been approved for exemption by the commission requires preauthorization. For approval, facilities must submit documentation of current accreditation by the Commission on Accreditation of Rehabilitation Facilities (CARF) to the commission. A comprehensive occupational rehabilitation program or a general occupational rehabilitation program provided in a facility accredited by CARF constitute work hardening or work conditioning for purposes of this section. All work hardening or work conditioning programs, regardless of accreditation, will be subject to preauthorization and concurrent review on or after one year from the effective date of this section. Commission exempted facilities are subject to commission verification and audit, and the commission will provide a list of the facilities approved for exemption on the TWCC website, *www.twcc.state.tx.us.*

Subsection (h)(10) requires preauthorization of rehabilitation programs, including outpatient medical rehabilitation and chronic pain management/interdisciplinary pain rehabilitation. This subsection includes the more widely accepted terminology in rehabilitation settings, and requires preauthorization for the initiation of treatment. These programs are high cost, have high utilization, and remain on the list of health care requiring preauthorization.

Subsection (h)(11) includes both the purchase and expected cumulative rental of durable medical equipment (DME) greater than $500 per item, as required in the current rule. There is a need to monitor DME, DME supplies, and tranecutaneous electrical nerve stimulators (TENS) units for potential abuse.

Subsection (h)(12) and (13) requiring preauthorization of nursing home, convalescent, residential, all home health care services and treatments, and chemical dependency or weight loss programs are the same as in the current rule, except that they are referred to as "programs" rather than "clinics". These are all high cost items with the potential for abuse without case management.

As required by HB-2600, subsection (h)(14) adds to the preauthorization list services and devices that are investigational or experimental, for which there is early, developing, scientific or clinical evidence demonstrating the potential efficacy of the treatment, service, or device but that is not yet broadly accepted as the prevailing standard of care. This is the statutory definition adopted in HB-2600.

Although the current rule requires preauthorization of physical therapy or occupational therapy beyond eight weeks of treatment, the rule as adopted does not require preauthorization for physical or occupational therapy or manipulations except as part of a rehabilitation program. Prospective review is one aspect of utilization control and the need for preauthorization of over-utilized health care remains a priority with the commission. HB-2600 mandates the use of preauthorization and the establishment of a MQRP, which will address issues of over-utilization by outliers and the monitoring of professional behavior of system providers. The number of items on the list requiring preauthorization has been reduced in an effort to

avoid an increase in disputes. Additionally, the commission is advised by the business industry that the savings in medical costs effected by continuing preauthorization as opposed to retrospective review will outweigh the IRO costs to the carrier.

HB-2600 added the concept of concurrent review to preauthorization. Subsection (i) lists the categories of health care that require concurrent review and approval from the carrier. These services are: inpatient length of stay; work hardening or work conditioning services; investigational or experimental services or use of devices; rehabilitation programs; DME in excess of $500 per item and TENS usage; nursing home, convalescent, residential, and home health care services; and chemical dependency or weight loss programs.

HB-2600 amended §413.014 of the Texas Labor Code to also provide that the commission may not prohibit a carrier and a health care provider from voluntarily discussing health care treatment and treatment plans either prospectively or concurrently, and may not prohibit a carrier from certifying or agreeing to pay for health care consistent with those agreements. In accordance with this directive, proposed subsection (j) allows a health care provider to voluntarily request certification or concurrent certification of health care and treatment plans from the carrier, either prospectively or concurrently. Further, subsection (j)(2) allows the carrier to prospectively certify or agree to pay for health care consistent with those agreements. This subsection allows requests and payment agreements for health care treatment and/or treatment plans that do not require preauthorization or concurrent review under subsection (h) of this section. Subsection (j)(3) establishes that voluntary certification requests and responses are subject to the provisions of subsections (a) and (b) relating to carrier liability. A carrier is liable for health care treatment that is voluntarily certified or concurrently certified under subsection (i) in the same manner that the carrier is liable for health care that is preauthorized or concurrently reviewed. Subsection (i)(4) provides that denials of voluntary certification requests may not be disputed through the preauthorization dispute resolution, although the health care for which voluntary certification was denied may be retrospectively reviewed for medical necessity.

Subsection (k) states that additional preauthorization or reduced preauthorization requirements may be applied to individual doctors or individual workers' compensation medical claims, in accordance with the Act and other commission rules adopted pursuant to statutory changes to Texas Labor Code §408.0231(b)(4) made by HB-2600

Subsection (l) requires carriers to maintain accurate records. Records maintained must accurately reflect information regarding requests for preauthorization or concurrent review, approvals and/or denials, and appeals, if any. The maintenance of accurate records should facilitate the dispute resolution process. The carrier is required to submit summary information by category of health care with the total numbers of requests, approvals, denials, and appeals to the commission if requested to do so. Also if requested to do so by the commission, the carrier must submit request-specific information on request for preauthorization or concurrent review. Additionally, the carrier is required to electronically submit request-specific information on a quarterly basis in a form and format prescribed by the commission. This detailed information concerning volume of requests, denials/approvals and appeals will allow tracking of outcome data to monitor compliance with the process and determine the efficiency and financial impact of the preauthorization, concurrent review and voluntary certification processes. Subsection (l) provides for the effective dates for the carrier information that is requested or required to be submitted to the commission.

Subsections (m), (n), and (o) address the applicability of the rule. These subsections establish when the amended rule applies to requests for preauthorization, concurrent review and voluntary certification of health care, as well as recommendations for spinal surgery. Subsection (m) provides that requests for preauthorization and/or concurrent review shall be responded to in accordance with the rules in effect at the time of the submission of the request. This provides clear guidance regarding what rules will be applicable to a particular request. Subsection (m) also provides for severability of portions of the rule or continuation of the rule, as it existed prior to amendment, in the event that a court finds a portion of the rule invalid. To smoothly transition from the current spinal surgery second opinion process to the preauthorization process for approval of spinal surgery, subsection (n) clarifies that current §133.206 of this title (relating to Spinal Surgery Second Opinion Process) will remain in effect only for recommendations for or resubmissions of recommendations for spinal surgery submitted prior to the effective date of this section. Section 133.206 is also being amended to make this limited applicability clear. At some point in the future, §133.206 will be repealed. Subsection (o) establishes the effective date of this section as January 1, 2002.

Comments expressing general support for this section were received from the following groups or associations, some with recommendations for changes:

Central Imaging of Arlington; Concentra Health Services; Hansen Association; Insurance Council of Texas; Liberty Mutual Insurance Company; Nurse & Associates; Occumed; Patient Advocates of Texas; PRS, Inc.; Research and Oversight Council for Workers' Compensation; Southwest Behavioral Health Services; State Office of Risk Management; Texas Medical Association; Texas Occupational Therapy Association, Inc.; and Texas Orthopaedic Association.

Comments expressing general opposition to the amendment of this section were received from the following groups or associations:

Allied Pain Management Clinic, PA; American Insurance Association; Body Knowledge, Inc., DBA Occumed; Browne Chiropractic Center, PC; Center for Orthopaedic Specialties, PA; Chiropractic & Health Care Center; Cypress Medical Clinic; Dallas Injury Rehab; Flahive, Ogden & Latson; Hansen Associates; Healthsouth Corporation; Healthwatch, Inc.; Heart of Texas Chiropractic, Inc.; HOT Power and Performance; Human Performance Rehab Services; Isdale Chiropractic of Harker Heights; Kathleen M. Teykl MA, LPC; Lake Arlington Center for Pain Management; Lake Arlington Center for Pain Management; Law offices of Douglass L. Anderson, P.C.; Leff Chiropractic Center; Lone Star Orthopedics; Matrix Rehabilitation Inc.; Nurse & Associates; Positive Pain Management, Inc.; Professional Therapy Services of Texas, Inc.; PRS Inc.; Rehab One Physical Therapy; Service Lloyds Insurance Company; Skelton Chiropractic; State Office of Risk Management; Steven S. Callahan, PhD and Associates; Texas Back Institute; Texas Chiropractic Association; Texas Orthopaedic Association; Texas Physical Therapy Association; Tyler Physical Therapy Clinic; Work & Accident Clinic; and Work Well Performance Center.

Comments seeking clarification and/or asking questions related to this section were received from the following groups or associations:

Allied Pain Management Clinic, PA; Azalea Orthopedic; Body Knowledge, Inc., DBA Occumed; CorVel Corporation; Healthwatch, Inc.; Indemni-Med Management, LLC; JI Specialty Services, Inc.; Lake Arlington Center for Pain; Management; Liberty Mutual Insurance Company; Lone Star Orthopedics; NeuroCare Network; Nurse & Associates; State Office of Risk Management; Steven S. Callahan, PhD and Associates; Texas Occupational Therapy Association; Texas Orthopaedic Association; and Texas Pain Medicine Clinic.

Comments expressing general concerns and/or making recommendations for changes as proposed were received from the following groups or associations:

American Insurance Association; Body Knowledge, Inc., DBA Occumed; Claims Administrative Services; Coalition for Nurses in Advanced Practice; Concentra Health Services; Concentra Medical Centers; CorVel Corporation; Dallas Injury Rehab; EBI Reimbursement, A Biomet Company; Flahive, Ogden & Latson; Forensic Claim Services; HealthSouth; Healthsouth Corporation; Healthwatch, Inc.; Indemni-Med Management, LLC; Insurance Council of Texas; Kathleen M. Teykl MA, LPC; Law offices of Douglass L. Anderson, P.C.; Liberty Mutual Insurance Company; Lockheed Martin Aeronautics Company; Matrix Rehabilitation Inc.; Midwest Employers Casualty Company.; NeuroCare Network; Nurse & Associates; OccMD Group PA; Pathfinder Consulting; Patient Advocates of Texas; Physicians Management Services; PRS Inc.; Research and Oversight Council on Workers' Compensation; Scott & White Memorial Hospital; Service Lloyds Insurance Company; Sierra Insurance Group; Skelton Chiropractic; Southwest Behavioral Health Services; State Office of Risk Management; Steven S. Callahan, PhD and Associates; Texas Association of Business & Chambers of Commerce; Texas Back Institute; Texas College of Occupational & Environmental Medicine; Texas House of Representatives; Texas Medical Association; Texas Mutual Insurance Company; Texas Occupational Therapy Association, Inc.; Texas Orthopaedic Association; Texas Physical Therapy Association; The Well Being Group; Tyler Physical Therapy Clinic; Work Ready Rehabilitation Centers; and Zenith Insurance Company.

SUMMARIES OF COMMENTS AND COMMISSION RESPONSES

A brief subsection to provide definitions applicable to this section has been included as new subsection (a) in the adopted rule, thereby requiring a re-lettering of the subsequent text for subsections (a) - (e). Proposed subsection (f), regarding the maintenance of records, is moved and re-lettered as subsection (l). The position of subsections (g) and (h) were not changed. A brief subsection to identify health care that will require concurrent review has been included as new subsection (i), thereby requiring re-lettering of subsequent text for subsections (j) - (o). The responses to comments below are grouped by rule subsections as they were proposed. Within the responses themselves, references to subsections are to the subsections as they are lettered in the rule as adopted.

COMMENT: Commenters expressed support of rule as proposed. Commenters further stated preauthorization provides a strong deterrent and is necessary to control the potential over utilization and abuse of treatment, which accounts for the higher costs in Texas. Preauthorization allows provider communication with the carrier before health care is rendered, and overall is a step in the right direction. Further, the rule promotes a non-adversarial environment for all involved parties as it facilitates medical consensus regarding claims and treatment programs and reduces the probability of litigation, as well as leading to best outcomes. Commenters stated that proposed changes to preauthorization are integral to the cost containment intent of HB-2600 and provide the foundation for improved accountability and fiscal responsibility among the health care providers.

RESPONSE: The Commission agrees with the commenters' supportive statements. The rule as amended regarding preauthorization and concurrent review promotes greater efficiency and cost containment without denying or delaying reasonable and necessary health care, and enhances communication among parties in the preauthorization process.

COMMENT: Commenters expressed concern about the administrative paperwork and cost burden, when the focus was intended to be cost containment and decreasing costs. Other commenters expressed opposition to the proposed rule due to the increase in preauthorization and concurrent reviews, thereby increasing costs to health care providers. The increased number of requests for preauthorization will result in increased denials, which will take more time away from getting treatment for the injured employees. The time and increased cost burdens imposed on health care providers will discourage good doctors who are currently in the system. Commenters stated that the consequence would be doctors leaving the system and not accepting workers' compensation patients, further causing problems of access to care for the injured workers.

RESPONSE: The commission appreciates the commenters' concern regarding administrative costs and volume of paperwork and the attendant cost burden to health care providers in securing preauthorization and concurrent reviews. The commission agrees with the commenters' assessment of the projected volume of denials resulting from the increase in the number and type of health care that must be preauthorized. In light of public comments received, the commission has re-evaluated the list of health care requiring preauthorization, and has revised the adopted rule from the proposed language. The responsibility for requesting preauthorization has been changed from the treating, prescribing or referral doctors, by re-defining "requestor" to mean the health care provider or designated representative who will be delivering the health care and billing for it (see adopted subsection (a)(4)). In addition, the volume of health care that requires preauthorization has been amended, which should greatly reduce the number of disputes and should ensure continuity of care without interruption or delay, as well as serving as a deterrent against the delivery of unnecessary health care (see adopted subsection (h)). The list of health care requiring concurrent review has also been amended to address only those treatments or devices for which an extension of previously preauthorized health care would be appropriate (see adopted subsection (i)).

COMMENT: Commenters stated that the increased cost to insurance carriers due to the increased preauthorization requests would result in the carriers passing these costs on to the employers in increased premiums. Another commenter expressed support of primary reliance on the preauthorization process, not withstanding the distribution of independent review organizations (IRO) charges. Commenter provided the following reasons: carriers will better control costs with TWCC monitored mandatory

preauthorization than with carrier-directed retrospective review; non-medical costs of inappropriate care are more important than increased IRO charges for carriers; only a tiny percentage of preauthorization denials reach the IRO level in group health insurance, as most are settled through reconsideration, and commenter believes the same will be true in workers' compensation; retrospective reviews involve much more time to process than do preauthorization decisions, resulting in higher IRO fees for retrospective disputes, and due to split decisions and split fees, the IRO costs to carriers may be higher in retrospective review disputes rather than preauthorization disputes; retrospective denials may be more frequently disputed than preauthorization denials due to the unfairness rendered to some health care providers; and the Legislature can be asked to address the distribution of charges if health care providers bring large numbers of meritless appeals to the IRO. Overall, the cost to carriers for preauthorization IRO decisions will be minimal compared to the reduction in medical costs as a result of preauthorization.

RESPONSE: The commission agrees that an increase in cost to the carrier could result from an increase in the volume of preauthorization requests. However, the number of health care treatments that require preauthorization and that require concurrent review has been reduced and preauthorization remains a valuable tool for control of utilization, as discussed above (see adopted subsections (h) and (i)). The commission agrees with commenter's evaluation of the benefits of prospective utilization review over retrospective utilization review. A preauthorization process is an essential component in cost containment while assuring timely delivery of appropriate health care to employees and ensuring that inappropriate and unnecessary health care is avoided.

COMMENT: Commenter is opposed to the proposed §134.600 stating that the rule does not meet the Legislative intent to reduce costs and at the same time remove unethical providers from the system. Commenter refers to ROC research which indicates that the problems lie with only 10% of the doctors responsible for 90% of the billing, arguing that §134.600 attacks the great majority of good doctors instead of controlling the small percentage that are bad doctors. Commenter further states that the Legislative intent is to make the workers' compensation more affordable to the average business and encourage more participation in the system; the proposed rule however encourages the probability of greatly exceeding the amount of disputes presently in the system. With the IRO process the disputes are too expensive for the carriers to support so the result will be continued approval of unnecessary medical costs to the system, further causing an unabated growth to the system.

RESPONSE: Prospective review is one aspect of utilization control and the need for preauthorization of over-utilized health care remains a priority with the commission. HB-2600 mandates the use of preauthorization and the establishment of a MQRP, which will address issues of over-utilization by outliers and the monitoring of professional behavior of system providers. The number of items on the list requiring preauthorization has been reduced in an effort to avoid an increase in disputes. Additionally, the commission is advised by the business industry that the savings in medical costs effected by continuing preauthorization as opposed to retrospective review will outweigh the IRO costs to the carrier.

COMMENT: Commenters expressed concern that the commission has misinterpreted the broader regulatory model under HB-2600, which allows for a more thorough examination of the role of preauthorization in controlling the quality and utilization of medical services and that the legislation targets cost containment more effectively than the commission's attempt to increase the burdens and scope of preauthorization. Further, commenters stated that the proposed rule will burden psychologists and other referral doctors who are required by the proposal to channel preauthorization requests through the treating, prescribing or referral doctors for health care that they will otherwise be providing. Based on the proposed limitations, treating doctors will refuse to refer and referral doctors will refuse to accept referrals of workers' compensation patients causing damage to the injured employee whose care is being delayed or denied. Commenters stated that this sequence violates the stated purpose of the legislative mandates in HB-2600.

RESPONSE: Input from internal and external sources, including intra-agency personnel, the public through public comments, the ROC, and stakeholders in the system have been considered regarding the intent and interpretation of HB-2600, and the commission has revised the rule as discussed throughout this preamble, to meet the legislative intent. In addition, the responsibility for requesting preauthorization has been changed from the treating, prescribing or referral doctors, by re-defining "requestor" to mean the health care provider or designated representative who will be delivering the health care and billing for it (see adopted subsection (a)(4)).

COMMENT: Commenter objected to the validity of the ROC report referenced in the preamble, specifically to the statement regarding cost differences resulting primarily from a greater volume of testing and treatment provided to Texas injured employees for longer periods of time than for workers with similar injuries in other states and within group health plans. Commenter stated that Texas cannot be compared to other states and the comparison should be injury to injury, which has not been done. Commenter further stated that with group health insurance, the treatment is not provided for occupational injuries, the treatment is less complex, and the injury is generally diagnosed and treated immediately. There is a small incidence of injury-related diagnoses with group health, whereas in workers' compensation, most diagnoses are injury-related. Therefore, there is no comparison between workers' compensation and group health treatment. Commenters stated that the physical medicine studies which serve as a basis for the legislation are based on weak associations between Texas and other state workers' compensation systems; that invalid data collection methods were used to analyze the quality and cost effectiveness of care under the current the Commission rules; that there appears to be no scientific correlation and that false assumptions were made; that drawing conclusions regarding the over utilization of physical medicine services and rendering outcomes associated with any specific physical medicine treatment is invalid.

RESPONSE: The commission disagrees that the ROC studies are invalid and that comparison to other states workers' compensation data is also invalid. The commission agrees that comparisons should be based on injury-specific treatments for the same diagnoses. Treatment should be the same for an injury, regardless of the payor system. The position of the ROC was based on research comparing utilization levels for injuries in the Texas workers' compensation system to utilization levels in other states' workers' compensation systems, and with group health in Texas. The comparison was among like diagnoses, measuring and comparing volumes of diagnostics and treatment utilized.

COMMENT: Commenter takes exception to statement in preamble that "carrier is not liable for payment for treatment and services that require preauthorization unless preauthorization is sought and obtained or ordered by the commission" as an erroneous statement. Commenter stated that TWCC provides for liability exemption for preauthorized treatment if injury is deemed non-compensable.

RESPONSE: The rule recognizes that unless an injury is compensable and the delivery of health care is related to treatment of the compensable injury, the carrier is not liable. A workers' compensation insurance carrier is not responsible for medical expenses related to treatment of an injury that is finally adjudicated as a non-compensable injury.

COMMENT: Commenter requested clarification regarding why the commission recognizes chiropractic care when Medicare and Medicaid do not, and why chiropractors are considered physicians under the workers' compensation system. Legislation under HB-2600 requires that caregivers register with the state and practice within the scope of their licensing board and specialization. As chiropractors' training and scope of practice do not include the provision of physical therapy, does this not preclude their providing physical therapy?

RESPONSE: Doctors of chiropractic are not considered physicians, as are doctors licensed by the Board of Medical Examiners to include doctors of medicine and doctors of osteopathic medicine. However, doctors licensed by the Board of Chiropractic Examiners are doctors in the workers' compensation system according to §401.011(17) and §413.011(c) of the Texas Labor Code. The commission may not restrict the ability of chiropractors to serve as treating doctors. The commission agrees that providers rendering services in the Texas workers' compensation system are limited to providing the medical services within their practice act.

COMMENT: Commenter stated that preauthorization might not be the most cost effective way to address utilization problems, as the process is a relatively expensive form of utilization review. Commenter stated that practice guidelines are also a very effective way to control over-utilization and that effective utilization is dependent on valid, scientifically based treatment guidelines, rather than increased preauthorization. Commenters suggested that the commission "hunt out the outliers" who are causing the problems. Commenter further stated that additional full time employees had to be hired to effect preauthorization, so it is important that costs be considered as well as savings that can be realized. Other systems including commercial carriers, commercial managed care and Medicare, have modified or deleted their preauthorization process and are redirecting their efforts to strengthen utilization review. Another commenter expressed opposition stating that an increase in the level of preauthorization would dump more people into the public health system, therefore transferring the cost to the taxpayer.

RESPONSE: The commission agrees that preauthorization may not be the most cost effective method to address the problems of utilization; however, prospective review is a statutorily mandated aspect of utilization control and the need for preauthorization of over-utilized health care remains a priority with the commission. In addition, rules regarding treatment and work-release parameters have been proposed and are currently in the public comment process. Additionally, HB-2600 mandated the establishment of a MQRP, which will be addressing issues of over-utilization by outliers and monitoring the professional behavior of system provider. The commission is aware that the process of preauthorization has been deleted from other systems including commercial carriers, Medicare and HMOs; however, the process is required in the Texas workers' compensation system by legislative mandate. The commission would further remind commenters that other systems include deductibles, co-pays and various other out of pocket expenses that are absent from the Texas workers' compensation system.

COMMENT: Commenters stated that the proposal carries the probability of an enormous increase in the volume of disputes and further, that the cost per dispute will be too expensive for carriers to support, resulting in unabated approval of unnecessary medical costs to the system.

RESPONSE: The commission agrees with the commenters' evaluation of the cost to the system. Amendments made in the adopted rule in response to public comment should reduce the possible volume of disputes and attendant costs. These include a reduction in the number of items that require preauthorization or concurrent review (see adopted subsections (h) and (i)).

COMMENT: Commenter expressed opposition to the rule in general, stating that after having obtained a license to practice medicine and becoming boarded in two areas, there was no logic in being required to obtain special permission to treat workers compensation patients. In addition, commenter stated that to delegate medical decisions to a carrier invites the practice of medicine by the carrier. Another commenter stated that there are too many loopholes in the proposed amendment, allowing a decision for preauthorization by a carrier agent who might determine that an employee "is not hurt badly enough to require surgery," leaving the employee off work and without health care for weeks or months before surgery, if ever approved. Commenter further stated that the rule 'takes into consideration the white-collar injuries" but does not consider the oil or construction industry.

RESPONSE: The commission disagrees with the basic position taken by the commenter. The processes of preauthorization and concurrent review are mandated by the Texas Legislature and do not limit the health care necessary to treat a compensable injury. Preauthorization affects a number of services but not all services that may be provided. It is not the intent of the commission to allow insurance carriers to practice medicine, as any denial of preauthorization or concurrent review requests must be made by an appropriate reviewing doctor or other appropriate health care provider, licensed or trained to perform the health care under review. The commission is unclear what commenter is referencing in regard to comment about "white collar injuries" vs. the construction industry. The commission is concerned with reducing work-related injuries, where possible, and timely treating work-related injuries appropriately, regardless of employee status.

COMMENT: Several commenters requested that the commission address the problem whereby the carriers are providing a tracking number as well as an approval number as a loophole leading the requestor to assume that preauthorization has been given, which it has not.

RESPONSE: It is the position of the commission that health care, which requires preauthorization per subsection (h) or concurrent review per new subsection (i) must be requested and an approval obtained prior to the delivery of the health care. It is not within the parameters of the preauthorization rule to address this specific business practice issue.

COMMENT: Commenters expressed general opposition to the section as proposed. Other commenters stated opposition to preauthorization without presenting any justification or rationale.

RESPONSE: The commission acknowledges the opposition expressed but believes that the preauthorization and concurrent review rule promotes efficiency in the preauthorization process and is beneficial to all participants and to the workers' compensation system as a whole.

COMMENT: Commenters expressed specific opposition to adoption of the preauthorization rule, requesting that the commission withdraw the proposal and reinitiate the development of this section as a negotiated rule through input from stakeholders and the (ROC). Commenters stated that although the stakeholders and ROC members had convened and provided conclusions or recommendations to the commission, the input was not incorporated into the proposal. Commenters recommended the commission send out a survey to providers and consider this input when evaluating the preauthorization process. Commenters further suggested expanding the existing rule with new statutory requirements and to concentrate commission's resources on the control of system participants to include carrier compliance with the timeframes. Other commenters recommended that preauthorization not be expanded beyond that which is statutorily mandated and agreed upon by the stakeholders.

RESPONSE: The commission agrees in part. The commission disagrees with the necessity to withdraw and re-draft the section. The commission declined to conduct a formal negotiated rulemaking process, but did receive input from those interested in the system. The commission disagrees that recommendations from the ROC and stakeholders were disregarded and no input was incorporated into the section. The commission disagrees with the commenters' suggestion to survey providers regarding the process; the "preauthorization survey" avenue was exhausted in 1997 with a minimal response received from health care providers, although a maximal response of >98% was received from insurance carriers. The commission has incorporated statutory requirements and other rules will address the compliance of system participants including violations and penalties. HB-2600 specifies treatments and services that by statute will require preauthorization and concurrent review; however, the language, "at a minimum for" does not limit the commission from expanding the list beyond the five specific health care categories mandated.

COMMENT: Commenters indicated that the commission needs to develop mechanisms to capture treatment data with the initiation of health care and that the proposed rule falls short of ensuring quality care and effective cost control; that the injured employee is the person who will suffer. Commenters further stated that the proposed rule is unfair to injured workers and the utilization would be more appropriately addressed through retrospective review and dispute resolution.

RESPONSE: The commission agrees in part. HB-2600 mandated the employment of a Medical Advisor who will, among other duties, establish a MQRP to monitor and analyze treatment and utilization patterns of doctors and other health care providers as well as to analyze dispute patterns of insurance carriers and utilization review agents. It is anticipated that the MQRP will develop the necessary mechanisms to address the delivery of quality health care, ensuring utilization controls, which will impact and result in cost control. The commission disagrees that this section is unfair or in any way negatively impacts the employee. The commission disagrees with commenters' concern regarding utilization management by retrospective review and dispute resolution. The commission is tasked with preauthorization, which in part, provides protection for injured employees from unnecessary diagnostic services or over-utilization of treatment. If only addressed through retrospective review and dispute resolution, the employee would have already endured the unnecessary treatment or service.

COMMENT: Commenter recommended that the rule be reviewed in one year after broader utilization control measures are in place and modified as necessary.

RESPONSE: The commission appreciates commenter's recommendation. The commission intends to continue to review the efficiency and efficacy of the adopted preauthorization measures, and recognizes that the list of health care requiring preauthorization may be revised as appropriate in the future.

COMMENT: Several commenters submitted various comments and concerns, which were inaccurate interpretations of this proposed rule, irrelevant to the proposed rule, or were too general in nature to warrant a response.

RESPONSE: The commission declines to respond.

COMMENTS ON PROPOSED PREAMBLE

COMMENT: Commenters requested that the commission provide definitions of various terms, to include: approval, concurrent review, denial, emergency, final adjudication, preauthorization, precertification, prescribing doctor, prospective, referral doctor, reasonable opportunity, outpatient surgical services, ambulatory surgical services, reasonableness and medical necessity, retrospective, screening criteria, and specific treatment. Other commenters suggested definitions for preauthorization as "the claims department approval for payment to be made for rendered medical treatment/services" and precertification as "the approval of a medical treatment/service request with medical necessity and appropriateness established".

RESPONSE: The commission agrees in part with the need for clarity regarding several terms, for which amended language provides definitions, including ambulatory surgical services, concurrent review, final adjudication, outpatient surgical services, preauthorization, and requestor in new subsection (a). As a result of the amendments to the rule and/or deletion of language, the need no longer exists for the commission to define prescribing or referral doctors, precertification, or reasonableness and medical necessity. The commission disagrees with the necessity to provide a definition of emergency within the body of this section, as this term is already defined in §133.1 of this title and it is the general practice of the commission to adopt, by reference, terms defined in other rules and not reiterate the definition. In addition, the commission disagrees with the necessity to provide definitions of terms that are standard and accepted in the system, to include: approval, denial, prospective, retrospective, and specific treatment. The terms "reasonable opportunity" and "screening criteria" are consistent with the usage of the terms in the Texas Department of Insurance (TDI) rules that govern the agents' licensing for utilization reviews for health care provided under workers' compensation insurance coverage and will not be defined in this section.

Proposed §134.600

COMMENT: Commenter expressed concern that if those performing utilization review for "preauthorization" do not also perform utilization review for "concurrent review," this will cause

preauthorization to be taken from the ranks of medical approval and placed with the insurance carrier who will be determining medical necessity. Commenters expressed concern about insurance adjustors being allowed to make a determination of medical necessity, as this determination requires the expertise of a health care provider. Commenter also expressed concern regarding situations in which an adjustor approves a preauthorization request verbally, the service is provided by the health care provider, and subsequently the URA denies the medical necessity of the treatment and the preauthorization request.

RESPONSE: The commission disagrees with the commenter's position that medical necessity will be placed with the insurance carrier and not with medical personnel. The carrier is required to use appropriate screening criteria in the determination of an approval; a denial must be the determination of an appropriate doctor or other appropriate health care provider in the employ of the carrier; these decisions are not within the purview of an adjustor. Although the TDI rules do not address concurrent review, per se, the intent of the commission is that the carriers follow the same process for concurrent review as that followed for preauthorization. The commission provides clarification that unless an adjustor is certified by TDI as a URA, an adjustor is not qualified to perform utilization review.

COMMENT: Commenter states concern that there are virtually no rules or standards which govern the way that carriers assess whether medical necessity exists when evaluating a request for preauthorization. Commenter states that adjustors: deny preauthorization based on their own judgment; base denial on a review report that pre-dates the exacerbation; fail to forward documentation to reviewers along with the claims; know that they do not have all of the necessary documentation; do not read the documentation prior to rendering the adverse opinion; fail to cite Texas Labor Code §408.021, "relief of the effects naturally resulting from the injury" is sufficient by itself to support a finding of medical necessity in the workers' compensation system; and, rely on review reports which are based solely on clearly erroneous legal opinions. Further the commenter states that TDI has made it clear that if workers' comp insurance is involved it will leave the matters to the discretion of TWCC and not enforce Texas Insurance Code, Article 21.58A wherein these issues would perhaps fall.

RESPONSE: The commission disagrees with the commenter's position that no rules or standards exist to govern the determination of the medical necessity of the requested health care. According to the TDI rules for utilization review, the carrier is required to use appropriate screening criteria in the determination of an approval; a denial must be the determination of an appropriate doctor or other appropriate health care provider in the employ of the carrier; these decisions are not within the purview of an adjustor. The TDI and the commission will continue to work together to enforce the Insurance Code and the Labor Code.

Proposed §134.600(a)(1) Emergency

COMMENT: Commenters expressed concern that subsection (a) is in violation of the intent of HB-2600, §408.0223(d), which adopts by reference the Article 3.70-3C of the Texas Insurance Code, relative to the definition of "emergency care." Commenter requested that the commission make necessary corrections to bring rule in compliance with legislative intent and consistent with definition of "emergency" in HB-2600. Commenter requested that the definition of "emergency" be repeated in this rule.

RESPONSE: The commission disagrees with the supposition that the definition of "emergency" as specified by Texas Health Maintenance Organization Act is pertinent to the usage of the term under parameters of preauthorization. The term "emergency care" in HB-2600 refers directly to the participation election by an injured employee in a regional network, if and when such network frameworks may be determined to be feasible. In addition, the commission disagrees with the necessity to provide a definition of "emergency" within the body of this section, as this term is already defined in §133.1 of this title. It is the general practice of the commission to adopt, by reference, terms defined in other rules and not reiterate the definition.

Proposed §134.600(a)(2)

COMMENT: Commenters recommended the commission further limit the requestor to the treating doctor and delete language that allows the referral and prescribing doctors or the injured employee to request preauthorization and/or concurrent review. Commenters further stated that a referral physician should not refer injured employee to another health care provider for services, the treating doctor should recommend the services.

RESPONSE: The commission disagrees with the commenter's recommendation to limit a requestor to treating doctor as described by the commenter. The statutory language allows the "claimant or health care provider" to request preauthorization; therefore, the commission adopts amended language for consistency with statutory language (see adopted subsection (a)(6)).

COMMENT: Commenters expressed opposition to the use of the term "requestor", the limitation of "requestor" and the deletion of the phrase, "his/her designated representative," as discriminating against various licensed health care providers and recommended inclusion of language to allow preauthorization requests to come from occupational and physical therapists, qualified mental health providers (to include psychologists and counselors), nurse practitioners, his/her office, and other licensed health care providers. Commenters also requested clarification of the meaning of "prescribing doctor." The commenters expressed concern that unless the treating or other doctor will be providing and billing for the service, they should not be held responsible for obtaining the authorization for the treatment. Commenters further recommended that the requests, including any appeals, come from the provider who has the necessary medical documentation. Not allowing referred providers and specialists to initiate preauthorization will significantly reduce access to ancillary and specialized treatment. Commenters provided numerous reasons for the necessity of allowing other health care providers to serve as the requestor to include that the proposal is: burdensome to the treating doctor/staff, will possibly result in a denial of health care, and necessary for the specialists who provide the care to communicate with the carriers or their agents. Various recommendations were submitted for language changes.

RESPONSE: The commission agrees in part. The commission has changed the definition of requestor in the rule as adopted. The adopted definition deletes usage of the terms "treating, prescribing, and referral doctor". The revised definition should reduce confusion regarding who may request preauthorization and concurrent review and it will broaden the types of entities that may serve as the requestor of preauthorization or concurrent review. The commission agrees that limitation of a requestor to treating, prescribing, or referral doctors may result in an undue burden to these doctors and/or their staff, particularly in light of the fact that the doctor may not be providing or billing for

the service. In addition, the commission agrees that the limitation of requestor, as proposed, might impair employees' access to ancillary or specialized treatment. Although an injured employee may request preauthorization, the adopted definition of requestor does not include an employee, and the rule language reflects the amendment, and adds the employee where appropriate (see adopted subsection (a)(6)).

COMMENT: Commenters stated that the limitation of requestor would have the opposite effect from that which was intended in regard to the confidentiality of records. The proposed rule allows access to detailed confidential psychological information, which would be necessary for the treating or prescribing doctors to have in order to obtain preauthorization for mental health treatment.

RESPONSE: The commission agrees with commenters' assessment of a possible breach of confidentiality regarding the transfer of an employee's mental health information and amends language to the requestor. However, the revised definition of "requestor" makes this comment moot (see adopted subsection (a)(6)).

COMMENT: Commenters expressed opposition to inclusion of injured employee as a requestor for preauthorization under subsection (a)(2), and recommended that the commission delete the language allowing an injured employee to make the request. Commenters requested clarification regarding the responsibility of submission of medical documentation by injured employees and providers of durable medical equipment (DME). Further commenters recommended that injured employee not be grouped with health care providers and language read: "a requestor or injured employee."

RESPONSE: The commission agrees in part. The language that allows an injured employee to make the request is statutory language, per §413.014 of the Texas Labor Code. As an employee will neither be aware of the items to include in a request, nor possess the medical information to substantiate the need for the requested health care, the employee will need to coordinate the request with or through the requestor. A DME provider will need to coordinate any request through a requestor as defined in the rule. The commission has revised the definition of "requestor" to separate injured employees from health care providers in the definition of requestor and has amended language in appropriate subsections of the rule to include the employee where authorized by statute (see adopted subsections (a)(5), (d), (e), (f)(3), (g)(1), and (3)).

COMMENT: Commenters recommended language additions to subsection: "a doctor's office staff may make the request for approval at the direction of the doctor, and must have access to the medical records substantiating the need for the health care recommended, " and "the office staff of physical or occupational therapists be authorized as requestors. " Other commenters requested change in language to include a requestor as "the health care provider who would perform the requested service upon written referral from the treating doctor," or "allow the request to originate with the facility or organization that will actually provide the service." Another commenter stated that it is in no way cost effective to allow only a psychiatrist to request preauthorization for mental health as other qualified mental health practitioners may be providing the service.

RESPONSE: The commission agrees and has incorporated language in the definition of requestor to include "office staff" as "designated representatives" of the requesting health care provider (see adopted subsection (a)(6)).

Proposed subsection (a)(2)(B)

COMMENT: Commenters expressed opposition to commission's definition of concurrent review; states it is in conflict with TDI licensing. Commenters also stated that a reviewer must be licensed in Texas, and requested clarification on who may perform concurrent review, stating that the commission does not so stipulate.

RESPONSE: The commission agrees with the need for clarification of "concurrent review" and has revised the definition. Doctors providing utilization review are required to be licensed in the United States; the medical directors of utilization review companies are required to be licensed in Texas. In addition, the same entities are responsible for the approval or denial of preauthorization and/or concurrent review, which is the continuation of health care which was previously approved.

COMMENT: Commenter objected to having to seek approval for an extension of health care beyond previous approval, which should be left to the health care provider's medical opinion and that the requirement for additional documentation could result in an interruption of care. Commenter stated that payment for services should not be withheld from a health care provider if preauthorization is received subsequent to continuation of treatment. Necessity for the continuation of treatment should be the healthcare provider's determination.

RESPONSE: The commission does not agree that the need for a continuation of previously approved health care should be based on the licensed provider's medical opinion; the statute as amended by HB-2600 includes the use of concurrent review with preauthorization. However, the submission of additional documentation should not result in an interruption of care. No delay or interruption of care will occur if the health care provider requests concurrent review prior to the conclusion of the previously approved health care and allows ample time for the one-day response time, as required by the rule as adopted. (see adopted subsection (f)) If concurrent review is requested and health care is provided prior to receipt of a decision, this will result in no payment and the requestor will not have access to dispute resolution for the health care. To prevent interruption of care, the rule requires the carrier to respond to a request for concurrent review within a short time frame. The health care provider is responsible for requesting concurrent review prior to the conclusion of the preauthorized health care. The decision to approve or deny the continuation of previously approved health care lies with the carrier after review by an appropriate health care provider.

COMMENT: Commenters supported the addition of "concurrent review" to allow expanded case management and cost containment.

RESPONSE: The commission has responded to legislative mandate with the addition of concurrent review as appropriate. It is anticipated that concurrent review will enhance the delivery of quality health care and should effect cost containment in the process.

Proposed §134.600 (a)(2)(C)

COMMENT: Commenter stated that proposed amended language is in conflict with the scope of liability established in subsection (a).

RESPONSE: The commission has amended the language in subsection (b) to eliminate any conflict or confusion caused by reference to subsection (h). The text has been amended in accord with the addition of subsection (i) that lists health care that requires concurrent review (see adopted subsection (b)).

COMMENT: Commenters also recommended amending language from "precertification" to "voluntary preauthorization," as the distinction is between mandatory and voluntary preauthorization, not precertification of coverage. Another commenter expressed opposition to the implementation of proposed "precertification of procedures" as infringing on the patients' care and delaying treatment.

RESPONSE: The commission agrees with the recommendation to delete the term "precertification" and replace it with the term "voluntary certification", and has revised the text accordingly. This should avoid confusion with the term "precertification" in group health plans (see adopted subsections (b)(2) and (j)).

COMMENT: Commenter questioned the commission's authority to establish carrier liability for health care voluntarily preauthorized by the carrier, as not provided in HB-2600.

RESPONSE: The commission disagrees that the commission lacks the authority to establish carrier liability for voluntarily certified health care. The commission is the regulatory agency responsible for determination of intent, and development and enforcement of rules. Once a carrier or its agent approves health care for a compensable injury, the carrier should be held accountable and liable for payment to the health care provider rendering the approved health care.

Proposed §134.600(b)

COMMENT: Commenter recommended adding new subsection entitled, "Initial Health Care Treatment Not Subject to Preauthorization" with inclusive language to such as: The initial period of some of the health care listed in subsection (h) do not require preauthorization and is subject to retrospective review; a presumption does not exist that this initial period of health care is reasonable and medically necessary. The recommendation is projected to prevent unnecessary medical payment disputes, as well as encourage health care providers to document the medical necessity of this initial health care.

RESPONSE: This comment was relevant with respect to the rule as proposed, but is mooted by the text in the rule as adopted. The list of health care that requires preauthorization has been amended to eliminate the need for the recommended language regarding the necessity to explain what types and periods of initial health care are not subject to preauthorization until after a specified threshold has been reached (see adopted subsection (h)).

COMMENT: Commenter takes exception to the liability language that retrospective review can result in a determination of non-compensability. Commenter stated that if a doctor operates in "good faith" and a hospital affords its services, then they both should be reimbursed. To not operate when there is every indication so to do, places the health care provider at risk for malpractice.

RESPONSE: Commission appreciates the "good faith" position taken by the commenter; however, the carrier is not liable for health care for an injury determined to be non-compensable. If the injury is ultimately adjudicated to be non-compensable, the health care provider may seek reimbursement from avenues other than a workers' compensation insurance carrier. In the event that a bill for treatment provided in "good faith" is denied as not compensable and the compensability issue has not been resolved, the doctor may contact the commission's local field office, request status as a sub-claimant and request a benefit review conference to establish compensability, per §409.009 of the Texas Labor Code.

COMMENT: Commenters recommended language change in subsection (b) from ". . . if there has been a final adjudication . . ." to ". . . 'until' there has been a final adjudication.. . . ." stating that TWCC will not set a BRC on request of the carrier, regardless of the carrier's filing of a dispute of compensability or relatedness, setting a hearing only when the injured employee disagrees with the carrier's position and requests a hearing.

RESPONSE: The commission disagrees with the suggestion to amend the proposed language regarding the description of final adjudication in relation to carrier liability. Language is consistent with agency Advisory 2001-03B, already in effect as of April 2, 2001. In addition, the proposed language would mean that a carrier is not liable for the benefits until there is final adjudication that the claim is non-compensable (i.e. that the carrier is NOT liable).

COMMENT: Commenters recommended the deletion of the last sentence, regarding the meaning of "final adjudication," defining the term elsewhere in the section.

RESPONSE: Commission agrees with the recommendation to delete the last sentence in the subsection and define final adjudication elsewhere (see adopted subsection (a)(3)).

COMMENT: Commenter recommended that in cases of disputes of relatedness, the carrier should not be obligated to pay for health care until final adjudication is reached and recommended additional language advising the requestor that the claim is controverted and that no additional benefits will be provided until the issue is resolved.

RESPONSE: The commission agrees that if the carrier has filed a denial of compensability or liability or has disputed the extent of or relatedness to the compensable injury in accordance with §124.3 of this title (relating to Investigation of an Injury and Notice of Denial/Dispute), the carrier will generally not be liable for the payment of benefits until there is a binding order of the commission (such as an interlocutory order) or final adjudication against the carrier. The commission agrees that providers who receive an approval on a claim in which there is an active dispute that affects the payment of benefits, should be made aware of the fact that benefits may be delayed or not paid pending resolution of the dispute. Therefore the commission has added language in subsection (f) that requires this.

COMMENT: Commenters expressed support of the inclusion of language in subsection (b), stating that it provides clarity by plainly stating that approval of preauthorization is not a guarantee of payment in the event that the injury or illness is not compensable under the Texas Labor Code. Other commenters expressed opposition to subsection (b) as convoluted and misleading, requesting correction, stating that section fails to provide justification for not paying for care that has occurred prior to determination of compensability. Commenters further stated that once health care is preauthorized or voluntarily certified, that assures medical necessity and the determination of medical necessity should guarantee payment, which it frequently doesn't.

RESPONSE: The commission agrees that language consistent with TWCC Advisory 2001-03B should remain in the rule. The determination of medical necessity does not guarantee payment if an injury is finally adjudicated as non-compensable, and therefore a determination of medical necessity doesn't guarantee payment from the workers' compensation insurance carrier (such as, in the event that the claim is found to be non-compensable, etc.). However, at that point, the provider of service is free to pursue other avenues for payment, including from the patient or the patient's group health insurance.

COMMENT: Commenters also recommended added language to inform the health care provider of an appropriate appeals process if final adjudication results in non-compensability or that the requested health care is not related to the compensable injury. Commenters requested clarification on how health care providers are notified that there has been a final adjudication that the injury is not compensable.

RESPONSE: The commission disagrees that language should be added that informs the health care provider of the "appropriate appeals process if final adjudication results in non-compensability or that the requested health care is not related to the compensable injury" because there is no appeals process. By definition, final adjudication means that the decision cannot be appealed. Regarding notification to the provider of the final outcome of the denial or dispute, providers can register as "subclaimants" on a claim and if they do, can be notified of the findings.

COMMENT: Commenters voiced opposition to carriers being required to preauthorize health care for an injury that is unrelated or disputed as non-compensable. Commenters recommended that utilization review agents (URA) be allowed to deny preauthorization or voluntary certification based on relatedness to the compensable injury.

RESPONSE: The commission disagrees with the suggestion that it is appropriate to deny preauthorization requests based upon a denial of compensability or liability or a dispute of extent of or relatedness to the compensable injury. The purpose of preauthorization is to prospectively evaluate reasonableness and medical necessity of specific health care. Suspending the preauthorization process while a denial or dispute is being resolved would be equivalent to suspending the employee's access to some types of health care. Since final adjudication on a claim can take months, the employee's return to work would likely be that much further delayed. However, when it comes to issues of extent of injury or relatedness questions, there is nothing that would forbid the carrier from discussing its concerns with the provider, which might resolve the issue. However, the carrier cannot unilaterally deny the request if final adjudication has not yet occurred.

COMMENT: Commenters further recommended the inclusion of language stating that in the event the carrier has paid for preauthorized health care which is finally adjudicated as not compensable or in favor of the carrier, the commission will order the health care provider to refund the payment to the carrier. Commenter stated that if an injury is found to be non-compensable after treatment has been preauthorized and provided, the carrier should secure recoupment of the payment from the injured employee instead of from the health care provider.

RESPONSE: The commission disagrees with both of these suggestions. As noted, carriers are not required to pay for preauthorized services if there is an unresolved denial of compensability or liability or an unresolved dispute of extent of or relatedness to a compensable injury (unless ordered). If the carrier pays in accordance with a decision or order that is ultimately overturned upon final adjudication, the carrier can seek reimbursement from the subsequent injury fund. If the carrier paid for the provider prior to even filing the denial or dispute (which should be rare), the carrier could seek reimbursement but the commission does not believe that this rule is the appropriate place to address the issue because it would only cover preauthorized care and not care that was paid for that did not require preauthorization. Regarding the idea that carriers should seek reimbursement from injured employees, the commission disagrees. The statute clearly anticipates situations in which employees may end up receiving benefits to which they are not entitled (such as when the employee receives benefits pursuant to an interlocutory order which is overturned).

COMMENT: Commenters expressed concern that rule should clearly state that the carrier may dispute payment for preauthorized services if the requestor has misrepresented the facts or failed to disclose relevant information at the time of the request or prior to delivery of the service. Additionally, commenters requested that the commission address the requestor's duty, at the time of the request, to fully disclose all information relevant to the request. Commenters further recommended that language be amended to allow carriers to retain their right to dispute payment, and the right to retrospective review to determine that the actual services provided were the same services requested and either preauthorized or voluntarily certified.

RESPONSE: Commission disagrees. The commission recognizes that the practice of bill review currently allows carriers to dispute payment for health care provided outside the parameters of the preauthorization approval; however, the commission determines it is not necessary to modify or add language in regard to sharing of relevant information. If it is determined through bill review that requestor has misrepresented the facts or failed to disclose relevant information regarding the request, reimbursement may be subject to dispute. It is also worth noting that misrepresenting the facts of a claim in order to secure or deny benefits may be considered fraudulent activity and be subject to fine or imprisonment. In addition, bills for preauthorized services are not subject to retrospective review for medical necessity, which was established with an approval; however, carriers are expected to review all bills for health care provided and billed for. Payment for health care provided in excess of or in lieu of approved health care may also be subject to dispute.

Proposed §134.600(c)

COMMENT: Commenters recommended that email be an acceptable avenue for submitting requests for preauthorization, adding language, ". . . direct telephone number, facsimile number and may also designate an email address for use by the requestor. . . ." and, language for carrier: " . . . shall be answered or the facsimile or email responded to . . . ." Commenters further recommended that requestor must submit requests to the carriers' designated numbers.

RESPONSE: The commission agrees in part. Electronic transmission is an acceptable avenue for submissions of requests for authorization of prospective or concurrent health care and for responses from the carrier or their agent. Language is modified to reflect addition of optional electronic transmissions, wherever appropriate to include both requests for preauthorization and concurrent review and responses to the requests. (see adopted subsections (d), (e)(1), (e)(2)(D), (f)(3), and (4)(C)). The commission

disagrees with language inclusion to mandate that a requestor must use only the designated telephone or facsimile numbers. It is understood that in the best interests of the injured employee, a requestor would access the applicable numbers to facilitate the preauthorization process.

COMMENT: Commenters requested that commission clarify the intent of subsection (c) regarding use of accessible direct telephone number as either optional or mandatory, stating that replacement of ". . . shall designate " with ". . . may designate. . ." will provide the carrier with an option and thereby facilitate the process. Commenters further recommended that language stipulate that carriers "shall designate a fax number" instead of "may designate a fax number . . ." which will be a time saver for requestors. Commenters recommended that the requestor be required to contact the carrier by facsimile, unless the carrier provides no facsimile number.

RESPONSE: The commission disagrees that clarification is necessary for intent of designating routes of communication. Per §102.4(d) of this title (relating to General Rules for Non-Commission Communications) "Insurance carriers and health care providers shall provide telephone and facsimile numbers in sufficient quantity of lines to service the volume of business for receiving required verbal and written communications regarding workers' compensation claims." The commission agrees that the option of providing an electronic transmission address should be allowed. Language is altered to require designation of telephone and facsimile numbers, and to allow designation of an electronic transmission address. The commission disagrees with commenter's recommendation to require the use of a facsimile number for submission of a preauthorization request. The mode of request is left to the discretion of the requestor (see adopted subsection (d)).

COMMENT: Commenters recommended language replacement of the term "agent" with "utilization review agent" in subsection (c) as well as throughout the section.

RESPONSE: The commission disagrees that the term "utilization review agent" should be used, but has revised the rule text to make it clear that the use of the term "carrier" refers not only to the carrier, but also to the carrier's agent(s) (see adopted subsection (b)).

Proposed §134.600(d)

COMMENT: Commenters requested clarification regarding the start of the carrier's time clock for responding to requests, whether timeframe begins with receipt of the initial request or upon receipt of all relevant medical information. Commenters further recommended that the carrier review a request for completeness and if all required information is not provided with the request, the time frame does not begin and the carrier may return the incomplete request.

RESPONSE: The time clock in the rule as adopted starts upon the receipt of a request, complete or incomplete. New subsection (e)(2), lists the six required elements that comprise a request. The commission disagrees with the suggestion that the carrier is allowed to determine what documentation is necessary to support the request and to start the time clock. The requesting health care provider initially determines the medical documentation necessary to justify the health care requested. Within the required time frame, the carrier is obligated to approve or deny the request based on the medical necessity as supported by the documentation submitted; however, before the carrier denies the request, the requestor must be contacted and provided a reasonable opportunity to discuss the clinical basis for the denial.

COMMENT: Commenter recommended the use of a commission adopted standard paper or electronic form for submitting requests for preauthorization to include various specific data elements and format similar to an earlier proposal to amend the preauthorization rule.

RESPONSE: The commission agrees in part. Although the commission recognizes the value of using a standardized form to request preauthorization and/or concurrent review, the commission has not mandated use of a certain form. The commission agrees that the use of a form is expected to enhance communication among participants and as more participants acquire electronic communication capabilities a standardized form may provide new and greater efficiency. The commission will consider the future adoption of a standard form with time for input from system participants.

COMMENT: Commenters stated that proposed rule language allows for the provision of treatment after a request has been submitted but prior to receiving carrier authorization and recommended language to state that requestors are required to "request preauthorization and receive a determination from the carrier prior to providing the proposed health care."

RESPONSE: The commission agrees with commenter's assessment of proposed language and has amended text to make it clear that the requestor or employee must not only request, but also obtain preauthorization prior to the delivery of health care (see adopted subsection (e)).

COMMENT: Commenter recommended that any health care required beyond the original authorization be submitted to the carrier allowing sufficient time for review and response prior to the expiration of the original preauthorization. Commenter further recommended changing "may be requested" to "shall be requested . . . " Commenters also requested that the commission mandate requests for concurrent review to be submitted either three days prior to the end of the original preauthorization period or at the time when no more than three preauthorized treatments remain.

RESPONSE: The commission agrees that concurrent review should be requested allowing sufficient time for carrier review and response prior to the expiration of the original preauthorization approval. The commission agrees that term "may" should be replaced with "shall" to require a timely request for concurrent review. Language has been amended to require timely requests for concurrent review. (see adopted subsection (e)) The commission disagrees with commenter's recommendation to establish a specific time period to request concurrent review; however, the amended language requires the request be submitted prior to the conclusion of the originally approved health care.

COMMENT: Commenters recommended that a preauthorization request be required for any health care that needs to be extended, in lieu of requesting concurrent review. Commenters further stated that the concurrent review process is not workable.

RESPONSE: The commission disagrees with commenter's recommendation for a second preauthorization in lieu of requesting concurrent review. HB-2600 mandated the addition of concurrent review to this section. New subsection (i) establishes

a limited number of health care categories that require concurrent review for the extension of previously approved and on-going health care. In addition, new subsection (g)(4) establishes when a request for preauthorization may be resubmitted. With amended language and concurrent review limited to a shorter list, concurrent review is expected to be a workable process.

COMMENT: Commenters expressed objection to the inclusion of concurrent review requirement for all health care listed in subsection (h), and recommended that the commission identify only the specific health care for which concurrent review would be appropriate, to include inpatient admissions and chronic pain and rehabilitation programs. In addition, a commenter requested clarification regarding time parameters for requesting an extension of surgical services during a surgical procedure, which were not previously identified prior to surgery.

RESPONSE: The commission agrees with commenters' recommendation that TWCC identify the health care requiring concurrent review under this subtitle. New subsection (i) establishes the health care categories that require concurrent review for the extension of previously approved health care. The commission agrees with commenter's concern regarding an extension of surgical services during a surgical procedure, which were not identified when the request for preauthorization was made. Language has been amended regarding an inpatient hospital admission to identify the principal scheduled procedure(s) to be performed. In addition, the length of stay is the only portion of the hospital admission for which concurrent review is appropriate and extension of surgical services, or the need to perform additional procedures during a surgical procedure will not require concurrent review. However, the carrier will retrospectively review the treatment rendered to determine that the health care provided corresponds to the requested and approved health care. Therefore, any deviation thereof will require medical documentation to support the health care rendered.

Proposed §134.600(d)(1)

COMMENT: Commenters requested language addition to subsection (d)(1) to allow email submissions of preauthorization and concurrent review requests.

RESPONSE: The commission agrees with suggested recommendation and language has been modified to reflect the option of using electronic transmission. (see adopted subsection (e)(1))

Proposed §134.600(d)(2)

COMMENT: Commenter recommended that medical information required with the request include "copies of diagnostic films." Commenters further recommended language addition of: "objective medical information" specified by subsection (d)(2).

RESPONSE: The commission disagrees with inclusion of the mandatory language to require copies of diagnostic films and objective medical information to be submitted with the request. The determination of material necessary to support the need for the requested health care is dependent on the requestor's medical judgment. The carrier bases the determination of approval or denial on the documentation accompanying the request per subsection (e)(2)(C).

COMMENT: Commenters recommended that the request include all identifying information on claimant, requestor, provider(s) rendering the service, specific primary and secondary diagnosis codes, specific Medicare HCPCS treatment codes, specific number, frequency, duration of health care to be provided with start and end dates for the treatment, the insurance carrier assumed to be responsible, and the supporting medical justification. Commenter further recommended language to be more specific to includes terms analogous to the requirements for a "complete medical bill".

RESPONSE: The commission agrees in part with the mandatory inclusion of information to be included in the request. It is understood that identifying information on the claimant, requestor, and insurance carrier are essential to the request. The required elements, as part of a request, also include the specific number, frequency, and duration of treatment as well as the medical information to support the need for the health care. In addition, the request should include diagnosis codes (ICD-9) and treatment codes (CPT or HCPCS) if available. The commission disagrees with the recommendation for mandatory additional elements such as start and end dates for all treatment; however, including these dates may be appropriate for some requested health care. The commission disagrees that all elements of a complete medical bill be required on a preauthorization request. Whereas some of the required elements for a "complete medical bill" will apply when requesting preauthorization, others will not and the commission disagrees with the recommendation.

COMMENT: Commenters suggested language from subsection (d)(3)(A) and (B) be incorporated into subsection (d)(2) and included as mandatory parts of the request, rather than making this identifying information mandatory only "if requested by the carrier". Commenters further stated that the URA should not have to waste time by making a follow-up request for information. Commenters recommended deletion of subsection (d)(3) as unnecessary and limiting injured employees from free choice of health care provider and from receiving timely care.

RESPONSE: The commission disagrees with suggestion that the name of the health care provider and facility name is unnecessary and limits the injured employee's choice of provider. At the time of the request, the requestor is expected to know the name of the health care provider who will render the health care and the location the health care is expected to be provided. It is standard practice that the requestor selects or recommends the health care provider who will render the service, if other than the requestor. The commission disagrees that care would be delayed by requiring the requestor to include the provider's name and service location with the request; identification of the provider name and service location is essential to the request. The commission agrees with the commenters' suggestion to incorporate the name of the health care provider who will provide the treatment or service and the facility name where health care is to be provided and the estimated date of the proposed health care. Inclusion of this information as mandatory will facilitate review.

Proposed §134.600(d)(3)

COMMENT: It was suggested by commenters that the commission mandate the provider of health care to submit to the requesting physician a report indicating that the requested health care did take place or were, in fact, denied.

RESPONSE: This comment is moot because the commission is changing the definition of "requestor" in the rule as adopted; a health care provider may be a requestor in the rule as adopted (see adopted subsection (a)(6)).

Proposed §134.600(e)

COMMENT: Commenters recommended incorporating language in new subparagraphs to include: "preauthorization is not

a guarantee of payment" and "carrier reserves the right to deny such payment on factors including but not limited to those listed in subsection (e)(1)(A) - (C)." Commenter recommended that if the carrier is disputing compensability or extent of the injury, they must include on written approvals or denials, a statement that "there is a dispute of compensability pending," which would increase communication and reduce the likelihood of unnecessary medical fee disputes. Commenters expressed opposition to the requirement for the carrier to act on a preauthorization request, which has unresolved issues of compensability, extent or relatedness or for which the carrier may not be liable or for issues that are in dispute. Commenter recommended language inclusion to protect legal and property rights of carrier who has filed a notice of dispute pursuant to §124.2(d) and §124.3(a), relating to carrier reporting and non-compensability or lack of coverage denials

RESPONSE: The commission agrees in part. The commission disagrees with commenters' recommendation to incorporate additional language regarding guarantee of payment and right to deny. The commission has, however, revised the rule to require that an approval include notice of any unresolved denial of compensability or liability or unresolved dispute of extent of relatedness to the compensable injury.

COMMENT: Commenter recommended new subsection (e), entitled Notice of Consequences for Failing to obtain Preauthorization, "a carrier is not liable for payment of treatment and/or services listed in subsection (h) of this section, if a health care provider fails to obtain approval of medical treatment and/or services prior to providing the treatment and/or services in the manner set forth in subsection (g) of this section." Such notice should prevent health care providers from rendering non-emergent care, which requires authorization.

RESPONSE: The commission disagrees with need for text regarding consequences for failing to obtain preauthorization. Subsection (e) clearly states that the requestor shall request and obtain preauthorization from the carrier prior to providing or receiving health care, and subsection (b)(1)(B) and (C) clearly state that the carrier is liable only if preauthorization or concurrent review approval was obtained prior to providing the health care.

Proposed §134.600(e)(1)

COMMENT: Commenters recommended language changes to subsection including: deleting words "reasonableness and" from this subsection, allowing the gatekeeper to determine reasonableness; adding the word "compensable" to subsection (e)(1) before "injury"; and rewording subsection (e)(1)(A) to "unresolved issues of the extent and compensability" (deleting "relatedness"). Other commenters recommended total language revisions to subsection (e) with appropriate renumbering of paragraphs and subparagraphs. Commenters further suggested that the carrier determine the medical necessity for treatment of the compensable injury only as defined at the time of the request and also recommended that the carrier retain the right to deny requests for treatment of unrelated conditions. Commenter stated that the request would not serve as notice to the carrier that the employee has had a change in the scope of the injury.

RESPONSE: The commission agrees in part with the recommendation to delete "reasonableness and", and has amended the text to the statutory language of "reasonable and necessary medical health care". The commission has also reviewed suggested language changes and made changes to the proposed language to be consistent with other commission rules. However, the majority of the suggested language changes would micro-manage the carrier's processing of a complete request. The commission disagrees with the specific recommendation to add the word "compensable" in subsection (e)(1) (as proposed) before "injury", because that portion of the rule addresses instances in which compensability is still at issue. Further, the rule makes it clear that the requests must be reviewed for medical necessity, while the carrier may continue to review for compensability or relatedness to the compensable injury. The commission agrees that a preauthorization request is not intended to, and does not, serve as a notification to carrier of a change in the scope of the injury. (see adopted subsection (f)(1)(A))

COMMENT: General support of subsection was received from commenters, agreeing that preauthorization and concurrent review should be based on reasonableness and medical necessity of health care requested and encourage preauthorization of necessary treatment without regard to compensability issues, thereby resulting in early treatment. Commenters further supported subsection to avoid use of inappropriate rationales by the carrier, forcing treatment to be delayed.

RESPONSE: The commission agrees with commenter's support of subsection and that focus should be on injured employee receiving health care as and when needed.

COMMENT: Commenters suggested that "reasonable opportunity" be defined as "at least one business day to discuss the clinical basis for a denial with the appropriate doctor or health care provider performing the review for preauthorization and four business hours for concurrent review." Other commenters recommended peer review to occur if medical documentation provided is adequate but does not substantiate medical necessity; if peer reviewer is not able to contact requestor within two consecutive business days, a determination will be made based on available medical information. Commenters also recommended language, "Prior to the issuance of a final written denial, afford the requestor a reasonable opportunity to discuss the clinical basis for a denial with the doctor or health care provider performing the review". Commenters requested clarification on "appropriate doctor or health care provider performing the review", and said the reviewer should be a medical school graduate and a specialty graduate who has examined the patient.

RESPONSE: The commission disagrees that "reasonable opportunity" should be defined in this rule; the same terminology is used in the Texas Department of Insurance Utilization Review rules adopted pursuant to Texas Insurance Code article 21.58A. The commission disagrees that peer review is an alternative to reaching a determination on documentation submitted as part of the request. The carrier shall afford the requestor a reasonable opportunity to discuss the clinical basis for the denial but must approve or deny the request within the time parameters set forth in the subsection. The commission further disagrees with the recommendation to include language "final written" into language in new subsection (f)(2), because of possible confusion between the words "final" and "non-appealable".

COMMENT: Commenters suggested that requestor be allowed to talk with a provider who is performing the review and who is "currently licensed to provide or render health care in the applicable area of expertise" or have training in the same specialty area as the requesting health care provider.

RESPONSE: The commission agrees in part that the requestor be allowed to discuss the intended denial with the provider performing the review; however, the commission disagrees with the suggestion that the reviewer be licensed in the same specialty as the requestor. Per new subsection (f)(2) requestor will be afforded reasonable opportunity to discuss treatment with approved doctor or health care provider providing the review. The activity and qualifications of a URA is governed by the Utilization Review rules adopted pursuant to article 21.58A of the Texas Insurance Code.

COMMENT: Commenters suggested that the reasonable opportunity afforded the requestor should have specific time parameters, that the requestor have 24 hours to respond to a reasonable opportunity for discussion with a reviewer. Commenters further suggested that the reviewing physician provide phone number, available times to discuss potential denial and have the appropriate medical documentation on hand for discussion of the requested health care.

RESPONSE: The commission disagrees that the rule should establish specific time frames for a reasonable opportunity to discuss the intended denial. The carrier shall afford the requestor a reasonable opportunity to discuss the clinical basis for the denial but must approve or deny the request within the time parameters set forth in the rule. The commission declines to micromanage communication between the requestor and the reviewer for the URA.

COMMENT: Strong support was expressed by several commenters of peer to peer reviews, evaluations and communication prior to issuing a denial.

RESPONSE: The commission provides clarification that the communication involved in discussion of the treatment and treatment plans and clinical basis for a denial is based on language in the utilization review rules for workers' compensation.

COMMENT: Commenter requested clarification regarding the start of the time clock for the carriers; whether the day of the request is/is not counted as the first working day.

RESPONSE: Pursuant to commission §102.3 (a)(1) of this title (relating to Computation of Time), " . . . the first day is excluded and the last day is included." The day the request is received does not count; the three working days begin on the following working day.

COMMENT: Commenters recommended that email be an acceptable avenue for responding to requests for preauthorization.

RESPONSE: The commission agrees that electronic transmission is an acceptable avenue for submissions of requests for authorization of prospective or concurrent health care and for responses from the carrier or their agent. Language has been modified to reflect addition of optional electronic transmission, wherever appropriate, including both requests for preauthorization and concurrent review and responses to the requests.

COMMENT: Commenter requested clarification if the carrier or URA must be certified by TDI for the authority to approve or deny requests for preauthorization and concurrent review and if required to be certified, commenter recommended that carrier must document that they are certified by TDI to do so.

RESPONSE: Pursuant to TDI §19.2019, (relating to Responsibility of Insurance Companies Performing Utilization Review Under the Insurance Code, Article 21.58A, §14(h)), in order to provide prospective utilization review, a carrier is required to be licensed by TDI and a URA is required to be certified by TDI. A copy of the carrier licensure and URA certification should be available upon request. It can also be verified with the TDI.

COMMENT: Commenters recommended language addition to subsection (e)(3) regarding "authorization is presumed when the carrier does not provide a response within the statutory time line". Commenters further recommended language addition to subsection (e)(3)(A) and (B), "within three working days, or within one working day once all the information has been received in order to make the determination."

RESPONSE: The commission disagrees with presumption of established liability based on non-response. Consistent and strong enforcement of this rule and assessment of penalties by the commission should eliminate carrier refusal or inability to timely respond. Further, the commission disagrees with the necessity of including the phrase regarding the receipt of all information. Subsection (d)(2) delineates all the information necessary for the request; the carrier is expected to make the decision based upon the information received.

COMMENT: Commenters recommended various changes to required time parameters for insurance carrier responses to requests. Recommendations included: extending the three-day time period for preauthorization decisions to 10 days, to five days; reducing to one day. Recommendations also included increasing the one-day concurrent review response to two working days, and to three working days. Commenters recommended the three-day turn around apply for all health care except for a one-day concurrent review response for inpatient admissions.

RESPONSE: Commission reviewed the various recommendations for changes in the time parameters for the carrier to respond to requests. The TDI utilization rules allow three working days to approve or deny the request for utilization review. The subsection has been amended to allow the same time parameters as required by TDI, as this is the current operating procedure for group health, has been a workable process, and ensures timely delivery of appropriate health care. (see adopted subsection (f)(3)(A) and (B))

Proposed §134.600(e)(4)

COMMENT: Commenter requested that the carrier respond only to requesting provider instead of claimant and claimant's representative. Commenter recommended adding new subparagraph (D), "the treating doctor, if not the requestor".

RESPONSE: The commission disagrees with both recommendations to insert addition subparagraphs into this section. Section 102.4 of this title (relating to General Rules for Non-Commission Communications), states ". . . copies of all written communications related to the claim shall thereafter be mailed or delivered to the representative as well as the claimant. . . " The carrier is required to approve or deny the requests and to send approval or denial response to all parties listed in adopted subsection (f)(4). If the requestor is not the treating doctor, it is the requestor's responsibility, not the carrier's, to communicate the information regarding the preauthorization or concurrent review decision to the treating doctor.

Proposed §134.600(e)(5)

COMMENT: Commenters recommended amendments to language: "include in an approval or partial approval"; "treatment or service, identified by the Medical Fee Guideline CPT terminology or coding"; "the Medicare HCPCS codes for the services approved"; "the specific number of approved treatments and the

starting and ending dates for the period in which the treatments will be provided". Commenters recommended that the commission establish a time frame in which the preauthorized health care must be initiated or delete the reference to "specific period of time" in subsection (e)(5)(B). Commenter recommended inclusion of new subparagraph (C) to include the name, address, physician specialty or non-physician professional license category of the requestor or the health care provider who will perform the service, if different.

RESPONSE: Commission disagrees with commenters recommended amendments to "partial approval" language, as that is not applicable under this proposal. The commission declines to micromanage the response to the degree requested by the inclusion of CPT or HCPCS coding terminology. It is appropriate in the response to include the duration of time for which health care is approved; however, the approved health care is initiated at the direction of the requestor and not the carrier. Commission disagrees with deletion of the reference to a "specific period of time"; the commission clarifies this is the approval for the number of treatments and/or the duration or length of time for which the health care may be provided, not the start and end dates for the treatment. Commission also disagrees with addition of subparagraph (C) as superfluous.

COMMENT: Various timeframes were suggested to include 60 days from the time of the approval after which a new preauthorization request would be required.

RESPONSE: Commission agrees with the need for clarifying timeframes and situations when the resubmission of a request would be appropriate. Commission adds language to address appropriate resubmissions of requests for preauthorization (see adopted subsection (g)(4)).

Proposed §134.600(e)(6)

COMMENT: Commenter recommended paragraph 6 to read: "include in a denial or partial approval . . ."

RESPONSE: The commission disagrees. Language recommendation to "include in a denial or partial approval . . ." and recommendation to link "approvals with denials" lends itself to confusion and is not deemed appropriate for this amendment as adopted.

COMMENT: Commenter expressed concern regarding the plain language notification to the injured employee of their right to appeal, which may encourage frivolous review requests and recommended deletion of subparagraph (A) or require the injured employee to communicate with the requesting physician to request reconsideration; the injured employee lacks the medical expertise to support the appeal. Commenters recommended various language changes to the plain language notification to the employee, including addressing questions regarding the process to the TWCC Ombudsman. Another commenter recommended replacing word, "appeal" with "reconsider and reconsideration".

RESPONSE: Commission agrees in part. The Texas Labor Code §413.031(b) includes language that a claimant is entitled to a review in a preauthorization denial. The commission disagrees that the inclusion of this language will lead to frivolous review of requests because few employees will have access to the documentation necessary to support the appeal. Additionally, language recommendation to include "partial" is not deemed appropriate for this rule amendment. The commission agrees in part with commenters' recommendation to replace appeal language with "request reconsideration" and language is amended (see adopted subsection (f)(6)(B)).

Proposed §134.600(e)(6)(B)

COMMENT: Commenter stated that the bill has made it easy for the insurance carrier to issue a denial based on medical necessity. Commenter also stated that the lack of response specificity "bogs the system down" allowing the carrier to base a denial by simply stating "insufficient medical documentation." Commenter recommended that the reasons and bases be "specifically identified".

RESPONSE: The commission disagrees with the commenter's position that the proposed language allows the carrier to justify the denial by simply stating "insufficient medical documentation". The denial must include the principal reasons, clinical basis and a description or source of the screening criteria for the denial. If documentation submitted fails to meet specific screening criteria, the denial is based on not meeting, criteria not on "insufficient medical documentation" (see adopted subsection (f)(6)(A)).

COMMENT: Commenter recommended that the commission require the name and credentials of the person denying the health care. Commenters recommended various language amendments to subsection (e)(6)(B), that the written notification of a decision be reworded replacing "clinical basis for and description or source of screening criteria" with "DECISION/PRINCIPAL REASON: The clinical rationale used in making this non-certification decision shall be sent to the provider in writing, upon request" and "Principal reasons and clinical basis for making the denial". Commenter recommended a further mandate either in rule or preamble to read, "screening criteria must be released to the requesting physician upon request" and be made available to the health care provider.

RESPONSE: The commission disagrees with recommended language changes. The proposed and adopted language is consistent with §19.2010(c)(1) - (3) of the Texas Insurance Code (Notice of Determinations Made by Utilization Review Agents, Excluding Retrospective Review). In addition, screening criteria are considered proprietary and confidential (see adopted subsection (f)(6)(A)).

COMMENT: Commenter recommended the addition of new paragraph (7) as follows: "If the carrier denies the request, the provider can continue treatment and appeal the carrier's decision much like when preauthorization is sought. If, upon independent review, the denial is reversed, then the carrier should be obligated to pay for the treatment. If the denial is upheld, then the carrier should not be obligated to pay for the treatment." Another commenter recommended language stating that the carrier is not required to reimburse preauthorized health care until such time the carrier is in receipt of a TWCC Interlocutory Order to pay.

RESPONSE: The commission disagrees. Carrier liability is not established unless an approval precedes treatment. The requestor is required to both request preauthorization and obtain approval for treatment before initiating treatment. The health care that has been approved for preauthorization or concurrent review cannot be retrospectively reviewed for medical necessity once the request is approved and the treatment rendered. However, the carrier will retrospectively review the treatment rendered to determine that the health care provided corresponds to the requested and approved health care. The commission further disagrees with the recommendation for the carrier to be relieved of liability unless under an interlocutory order as this would

not only greatly encumber the commission at the local field offices, but would have the potential to deplete the subsequent injury fund.

Proposed §134.600(f)

COMMENT: Several commenters expressed agreement with necessity for accurate record keeping.

RESPONSE: The commission agrees with the need to maintain accurate records for future tracking of the preauthorization and concurrent review processes and volume of requests and responses. In order for the commission to monitor the entire preauthorization and concurrent review process, it is essential for accurate and complete data to be gathered by TWCC.

COMMENT: Commenter suggested that preauthorization request information should greatly aid the MQRP in accomplishing its work, and may also be useful for those individuals organizing provider networks. Commenter further stated that such data gathering is relevant to TWCC's implementation of the provisions of HB-2600. Commenter recommended establishing a data collection program similar to that published in the 2000 proposal for preauthorization to include the following elements as part of TWCC's data collection program: standard data elements on all preauthorization requests; data elements collected must include whether reviewed by a physician; and data reporting should be collected by email. This data collection should be the basis of quarterly and annual reports published on the TWCC website after being altered by TWCC the commission to remove patient identifying information and prior to making the information public and available for analyses by all interested parties. Commenters also recommended that TWCC analyze the data by service type, health care provider, carrier and URA, and administer an annual survey. Additionally, commenter recommended that TWCC administer an annual questionnaire to carriers, workers' compensation URAs to obtain data on nurse and peer review staffing and procedures to aid in analysis of request-level data. Commenter recommended adding subsection (f)(1) to read: "carriers shall submit electronically to the commission on a schedule and format to be established by the Executive Director, data elements on each preauthorization requests received including but not limited to (commenter lists 22 data elements)"; this should require very little programming expense by the carriers because the data elements are already collected and in their information systems. Also, a commenter recommended moving the second sentence of subsection (f) and to create a new subsection (f)(2) in order to provide emphasis on carrier data collection, reporting and carrier monitoring.

RESPONSE: The commission agrees that summary information regarding preauthorization and concurrent review requests is essential for use by the MQRP and for other internal monitoring and enforcement purposes. In addition, should provider networks be determined to be feasible, the preauthorization data will be important in establishing the medical participants in the network. The data will also be invaluable in the implementation of HB-2600 provisions. The commission further agrees with commenter's recommendation regarding the establishment of a data collection program. TWCC will establish the collection elements and effective transmission parameters. However, the commission declines agreeing to publish information on the TWCC website. The determination will be made internally regarding the release of analysis information. Commission agrees in general with need for exact data collection and analysis; language is amended in the adopted rule (see adopted subsection (l)(1) - (4)).

COMMENT: Commenters requested clarification regarding what format the commission intended to prescribe for the reporting of requests and suggested that the proposed language offer greater specificity. Commenters offered suggestions and recommendations for the format requirements, including the change of language to read: "in addition to the records and information carriers and URAs are required to maintain by 28 TAC subchapter U..." in order to ensure that carriers do a better job in collecting information that will allow employers and others to monitor their performance. A commenter further recommended and supported TWCC's aligning and utilizing the same reporting requirements as TDI and at a more frequent rate of submission. Commenters recommended that the record keeping of the carrier be limited to that which is on the requests which are denied and not be required on approvals, suggesting that reporting requirements be kept to a minimum.

RESPONSE: The commission agrees there is a need for an established format for data summary collection to be submitted by the carrier to the commission and adopted subsection (l) requires carriers to maintain accurate records. Records maintained must accurately reflect information regarding requests for preauthorization or concurrent review, approvals and/or denials, and appeals, if any. The maintenance of accurate records should facilitate the dispute resolution process. The carrier is required to submit summary information by category of health care with the total numbers of requests, approvals, denials, and appeals to the commission if requested to do so. Also if requested to do so by the commission, the carrier must submit request-specific information on request for preauthorization or concurrent review. Additionally, the carrier is required to electronically submit request-specific information on a quarterly basis in a form and format prescribed by the commission. This detailed information concerning volume of requests, denials/approvals and appeals will allow tracking of outcome data to monitor compliance with the process and determine the efficiency and financial impact of the preauthorization, concurrent review and voluntary certification processes. Subsection (l) provides for the effective dates for the carrier information that is requested or required to be submitted to the commission.

COMMENT: Commenters opposed the requirement of carriers and requestors having to collect and/or submit summary information to the TWCC, suggesting it is a costly paper trail to maintain and store this information, recommending instead, that the information be reported to TWCC from carriers by way of the HCFA-1500 claim form reporting. Commenter recommended the deletion of the second sentence regarding submission of the summary information to TWCC indicating that it is a waste of the carrier's time, and if a dispute were to arise, then the documentation will be provided to the other party involved without having to have this language included, inferring that records may be requested by the requestor. Commenters suggested that every health care provider should be required to have the preauthorization trail of information available for audit and for payment resolution. However, commenters stated that it is onerous to expect every health care provider to keep a summary of reporting and re-reporting requirements and is an additional expense to the health care provider. Commenter suggested that claimant should not be required to maintain such records. Commenters expressed concerns that proposed language does not specify the time period for submission of summary information to the TWCC, nor the length of time required for a health care provider to maintain records.

RESPONSE: The commission provides clarification by amending subsection (l) to require the maintenance of records and submission of summary information by the carrier only. However, the commission disagrees that information on requested or denied health care would be available on a HCFA 1500 form. The commission disagrees with deletion of requirement to submit summary information to TWCC as the data is essential for the implementation of HB-2600 directives, internal monitoring and enforcement initiatives. Subsection (l) requires carriers to maintain accurate records. Records maintained must accurately reflect information regarding requests for preauthorization or concurrent review, approvals and/or denials, and appeals, if any. The maintenance of accurate records should facilitate the dispute resolution process. The carrier is required to submit summary information by category of health care with the total numbers of requests, approvals, denials, and appeals to the commission if requested to do so. Also if requested to do so by the commission, the carrier must submit request-specific information on request for preauthorization or concurrent review. Additionally, the carrier is required to electronically submit request-specific information on a quarterly basis in a form and format prescribed by the commission. This detailed information concerning volume of requests, denials/approvals and appeals will allow tracking of outcome data to monitor compliance with the process and determine the efficiency and financial impact of the preauthorization, concurrent review and voluntary certification processes. Subsection (l) provides for the effective dates for the carrier information that is requested or required to be submitted to the commission. The commission agrees there is a need for documentation of preauthorization requests and appeals; in the event of a dispute or health care provider audit conducted by the commission the health care provider would be able to track preauthorization activity. The commission provides clarity that summary information will be requested quarterly, per adopted paragraph (1) and the commission recommends that medical records be maintained on the standard retention schedule. Rule as proposed excluded the employee (claimant) from maintaining records and submitting summary information.

COMMENT: Commenters recommended using language similar to TDI terminology. "Reconsider and reconsideration" are terms with different meaning than the term "appeals" according to article 21.58A in section 4(b) of the Insurance Code. Another commenter suggested use of the term "appeal" as it is more common regulatory language used in other states.

RESPONSE: The commission appreciates commenters' concern regarding the use of terms "reconsideration and appeals" and has changed language to provide clarification (see adopted subsection (g)).

COMMENT: Commenter requested clarification on how records would affect dispute resolution. The intent of maintaining records is to assist Compliance and Practices with auditing of carriers and health care providers.

RESPONSE: The commission provides clarification that the process outlined in subsection (l) should aid in the dispute resolution process.

Proposed §134.600(g)

COMMENT: Commenters opposed the proposed five working days of a request for reconsideration and recommended deletion of subsection (g)(1) stating; it is not enough time for the health care provider to respond to the rationale set forth in the denial notification; it is onerous and works to the detriment of the injured worker; if request is delayed, then the patient is denied or delayed necessary treatment; if the need for additional visits is denied, the patient will remain in a state of limbo that may lead to an acute condition and that becomes a chronic condition; it is unrealistic for a small practice; it is not sufficient time for the physician to re-look at the request and provide needed medical assistance to injured employees and, it punishes physicians and their patients' care for having to be interrupted in order to meet the five-day deadline. Commenters recommended a variation of dates from the proposed language of "within 5 working days of receipt of a written denial..." allowing a requestor to request that the carrier reconsider the denial. Recommended date changes include: "10 working days" allowing the requestor more time to gather the necessary materials; "15 working days" in order to re-examine the patient and provide new documentation; "within 30 days"; "30-45 days"; or "as long as the care being requested is still appropriate to the requestor and the injured employee".

RESPONSE: The commission considered commenter's concerns and recommendations and has amended subsection based upon them, to give the requestor 15 working days to submit request for reconsideration (see subsection (g)(1)).

COMMENT: Commenter was generally opposed to proposed language in subsection (g) indicating that if the response is a denial of preauthorization or concurrent review, then the only cause for a review is medical necessity for the denied health care. Commenter stated medical necessity is the clinical basis for the denial, even though there may be other issues that can form the basis for the denial. Commenters recommended language substitutions for the term "medical necessity" in a denial, such as, "The requestor is entitled to a review of the medical basis on which the denial for health care has been rendered and the name and credentials of the person denying the health care", or, "If the response is a denial of preauthorization or concurrent review, the requestor is entitled to a review of the medical reasons for the denied health care and the name and credentials of the person denying the health care".

RESPONSE: The commission agrees in part. Subsection has been amended for the requestor and injured employee to request reconsideration of denied health care. The commission disagrees with the need for the name and credentials of the person denying the health care. Per TDI rules, denials of preauthorization and concurrent review requests must be made by an appropriate reviewing doctor or appropriate health care provider.

Proposed §134.600(g)(1)

COMMENT: Commenter stated that the denial and appeal process has been extended too far.

RESPONSE: The commission disagrees with commenter's evaluation. The timeframes for the denial and appeal process are consistent with commission and TDI rules, and appeals are established by statute.

Proposed subsection (g)(2)

COMMENT: Commenter recommended consistent application of "three working day timeframe from date received" to all portions of the rule. Other commenters recommended a variation of dates for carriers to respond to a request for reconsideration, including: "within 72 hours"; "within three working days"; "seven working days"; and "10 working days". Commenter's reasons for recommending 10 working days are: because a well researched decision in a complex case may require review of

multiple records; if the treatment is not an emergency, 10 days should not be a hardship for the injured employee; and the 10 day recommendation for a carrier to respond is that a specialty-matched review will often require the carrier to use a contract peer reviewer who will not respond as quickly as the proposed time frame. Commenters opposed the five-day requirement for a carrier to respond to a request for reconsideration and indicated that five days is not enough time to properly review the extent of medical information and for the discussion to occur between the provider and reviewers. Commenter recommended a variation of periods of time for carriers to respond to a reconsideration request of denied concurrent review suggesting time be based on "as soon as possible", "a longer period for a regular request", or "be the same for a reconsideration request as for denied preauthorization". Time recommendations include changing one day to: "two working days", "three working days", "five working days", "continuation of the 72-hour response rule", and the day of submission will not count. Commenters stated that one-day timeframe is unreasonable. Commenter suggested change one working day to 24 hours for consistency with TWCC Advisory 2001-03 and since the necessity has previously been established. Commenter recommended changing the one working day for responding to reconsideration when denied concurrent review to "five working days" except in the case of denied concurrent review of requests for inpatient hospital admissions and the extension of length of stay for inpatient hospitalizations. Commenters recommended adding language to subsection (g)(2)(B) to read, "If the injured employee is currently hospitalized and the request is for extension of the current hospital stay", or similar language as provided in the URA standards. Commenter recommended that requests for reconsideration of denied concurrent reviews of inpatient hospital admissions and the extension of length of stay be responded to within one working day of receipt of the request for reconsideration. Commenter's reasons are that physical medicine and other treatment plans have a pre-planned visit and time frequency which allows adequate time the health care provider to request concurrent review, and one day review timeframe does not afford the carrier and URA the time necessary to review additional medical records and documentation to ensure hospitalization treatment is medically necessary. Commenter additionally stated that the one-day review in such a circumstance thwarts the intent of HB-2600 to control medical costs by depriving the carrier of a reasonable amount of time to consider requests. Commenter supported language as proposed in subsection (g)(2)(A) and (B) stating this section establishes a period of time within for reviewing what must be processed, will make the preauthorization system more efficient, and will better assure that the delivery of medically necessary care will not be postponed. Commenter recommended giving consideration for "extended timeframes" for appeals involving non-emergency surgery, or appeals where the treatment being disputed is controversial or costing more than $5,000.

RESPONSE: The commission agrees in part to commenter's various recommendations. The commission disagrees that five days is an insufficient amount of time to review a reconsideration request on preauthorization. Unless the requestor provides additional medical documentation different than what was already submitted, the review is a second review of the same request. With or without additional medical documentation, five days should be sufficient time to review the request. The commission has amended subsection (f)(3)(B) to require that the insurance carrier respond to request for reconsideration of denied concurrent review within three working days. The commission agrees in part to the commenters' concern regarding reduced response time in the case of concurrent review for inpatient length of stay. The commission disagrees with the need for extending response time to five working days for reconsideration of denied concurrent review and subsection is amended to reflect a three working day response time. The commission further agrees with need to amend language regarding inpatient length of stay and amends language to require a one working day response time for concurrent review for the extension of inpatient length of stay; however, exact Utilization Review Accreditation Commission, Inc. (URAC) language is not adopted. The commission disagrees with recommendation to change to 24 hours instead of one working day. If a request is received on a Friday, the insurance carrier would not be able to respond within 24 hours (which would be Saturday) when requestor and carrier are not available. The commission disagrees with extended timeframes for appeals of denied health care involving non-emergency surgery or treatment that is controversial or costs over $5,000. The timeframes for appeals is in accordance with the Texas Labor Code §413.031 and §133.305 of this title (relating to Medical Dispute Resolution) (see adopted subsection (g)(2)(B)).

COMMENT: Commenter asked if the health care provider might bill for the documentation when submitting a request for reconsideration, or bill for the phone call to the insurance carrier for having to determine the necessary documentation that is needed.

RESPONSE: The commission provides clarification. The submitting of medical documentation for a request for reconsideration or phone calls to the insurance carrier to discuss medical documentation needed are considered part of the administrative costs of a business and not reimbursed by the insurance carrier.

COMMENT: Commenter asked what would occur if the requestor does not request reconsideration of a denial within five days, and is the URA required to send back a request that is received late.

RESPONSE: The commission provides clarification. If the requestor does not pursue reconsideration within the time parameters set forth in subsection (g)(1), no further action is required by the insurance carrier.

COMMENT: Commenter noted that concurrent reviews work for approvals, but creates an awkward loop if there is a denial. Commenter recommended that if the provider still believes the care is necessary following a denial on a concurrent review, the provider would be justified in notifying the carrier of the disagreement and proceeding with the care subject to retrospective review.

RESPONSE: The commission acknowledges commenter's concern. If the requestor provides the health care that was denied following an IRO denial, the insurance carrier is not liable for the costs of the health care. However, if the requestor can objectively document a substantial change in employee's medical condition, the requestor may resubmit a request for preauthorization (see adopted subsection (g)(4)).

Proposed subsection (g)(2)

COMMENT: Commenter requested definitions for the terms "respond" and "reconsideration", and also asked if "respond" means acknowledgement of receipt of the reconsideration request, or the actual determination; further if "reconsideration" means appeal.

RESPONSE: The commission offers clarification. The carrier shall "respond" means approve or deny the request. Reconsideration means requestor requires the insurance carrier to reconsider the denied health care.

COMMENT: Commenters recommended language changes, such as: "A request for reconsideration should be reviewed by a physician who is licensed, is of like specialty as the requesting physician, and who regularly treats similar patients", and "The carrier shall provide a peer review by a reviewer of a like or similar specialty to the requestor and ...". URAC standards for internal appeals require the second peer review to be performed by a health care provider of a like or similar specialty, as the reason of support for the language change as provided by one of the commenters.

RESPONSE: The commission disagrees with commenter's language recommendations. In accordance with TDI UR rules pursuant to article 21.58A of the Insurance Code, any denial of preauthorization requests, to include reconsideration requests, must be made by an appropriate reviewing doctor or other appropriate health care provider. Per TDI adoption preamble, to require that all UR functions be performed only by like health care providers would be burdensome and costly to URAs and would likely delay the UR process. Although the TDI rules do not address concurrent review, per se, the intent of the commission is that carriers follow the same process for concurrent review as that followed for preauthorization.

COMMENT: Commenter recommended adding language to this subsection: "automatically accept a presumed authorization of requested services if the carrier or the carrier's delegated agent does not comply with the time lines established in subsection (e)(3) or (g)(2)."

RESPONSE: The commission disagrees with commenter's recommended language that preauthorization is presumed approved if carrier has not timely responded to the request. The commission recommends that in the event of no response to the request, the requestor contact the carrier and attempt to resolve. If the carrier is still not responsive, requestor should contact the field office for assistance and report it to the commission's Compliance and Practice Division.

Proposed subsection (g)(3)

COMMENT: Commenters opposed proposed language changes in subsection (g)(3) stating that the changes are inconsistent, or, in conflict with §413.031 of the Texas Labor Code, which allows a health care provider to request medical dispute resolution. Commenter opposed reducing the carrier's response time for making determination on services from 45 days to 72 hours. The proposed changes will not allow a "non-doctor" health care provider to be a party to medical dispute resolution since they cannot be a "requestor".

RESPONSE: The commission agrees that language in subsection (g)(3) appears to be in conflict with Texas Labor Code §413.031 and §133.305 of this title (regarding a health care provider requesting medical dispute resolution). The definition of requestor is amended to "health care provider", which will allow any health care provider to be a party to medical dispute resolution. The commission provides clarification that, before a party may request medical dispute resolution, the party shall request that the insurance carrier reconsider its decision regarding the disputed issues. The carrier shall respond to the request for reconsideration within established time frames. The commenter is confusing the time frame for appealing a disputed reconsideration request to the commission for dispute resolution and the time frame established for the carrier to reconsider the denial of request.

Proposed §134.600(h)

COMMENT: Commenters offered support for the proposed preauthorization rule stating that the commission has correctly interpreted the recent studies on over-utilization in the Texas workers' compensation system and has modified and expanded the list subsection (h) appropriately. Another commenter encouraged TWCC to focus attention on the true cost drivers in the workers' compensation arena, which are: over-utilization of special imaging and diagnostic tests, over-utilization of chiropractic and therapy services, indemnity payments, and unnecessary specialty referrals.

RESPONSE: The commission appreciates commenters' support. The intent to curb over-utilization through prospective utilization review continues to be a primary focus with the adopted rule. As a result of the legislative inclusion of IROs as the avenue for preauthorization dispute resolution at the expense of the carrier, the commission has determined that several high utilization services are better addressed under the umbrella of retrospective utilization review. HB-2600 mandated that the payment to the IRO be at the expense of the non-prevailing party for retrospective dispute resolution of medical necessity, at the expense of the carrier for preauthorization disputes.

COMMENT: Commenter opposed any shortening of the list of services subject to mandatory preauthorization and attempting to place primary reliance on retrospective utilization review to control over-utilization. Commenter further opposes shifting the emphasis from preauthorization to retrospective review to manage excess utilization for the following reasons: retrospective review cannot protect injured employees from the adverse effects of inappropriate treatment, properly performed, preauthorization can; retrospective review occurs after health care providers have delivered the service and it is unfair to providers, like hospitals and surgery centers, which have no culpability if a physician decides to provide inappropriate care and it is easier to monitor carrier performance on preauthorization than on retrospective review, as preauthorization requests are easily tracked, processed with defined rules to a documented result, while retrospective review lacks the aspects.

RESPONSE: The commission agrees with commenters' assessment that the need for preauthorization continues to exist as a means of controlling the over-utilization of services at this time; the emphasis continue to remain on prospective review as mandated by legislative action and commission intent to require carriers to approve or deny medical necessity of specific health care.

COMMENT: Commenters offered suggestions recommending that any item from the list which is in conflict with Texas Labor Code §408.021 (Entitlement to Medical Benefits) be deleted as these items should not be subject to prospective review. Commenters recommended establishing trigger or other threshold mechanisms to make preauthorization a more reasonable and practical requirement. Commenters suggested that the overall scope of the list be reduced to have a more positive impact and recommended using a long list for outlier providers as a sanction and a short list for doctors in good standing. Commenters suggested that either everything be preauthorized or nothing be

preauthorized. Commenters recommended that preauthorization should be eliminated for injuries with clear cut surgical indicators. Commenters recommended that health care providers submit a treatment plan for review and approval by the carrier rather than requiring preauthorization or concurrent review for continuation of treatment thus eliminating the need for repeated authorizations. Commenters suggested the commission monitor the injured employee utilization of the review option and act quickly to counter abuse and frivolous use of the options.

RESPONSE: The commission disagrees with recommendation to preauthorize all or nothing or exclude clear surgical cases. Legislative language establishes preauthorization and concurrent review and mandates that TWCC require preauthorization for five categories of treatments and determine other health care that will require preauthorization and concurrent review. It would not be in the best interest of the injured employee to allow any and all treatment that any health care provider decides to provide, or in the best interest of the carriers to be liable for payment for inappropriate health care. The commission agrees with commenter's recommendation for thresholds and trigger mechanisms and holds carriers responsible for the prospective use of appropriate screening criteria as required by TDI UR rules, as well as applying screening criteria for retrospective review. HB-2600 requires TWCC to establish monitoring of health care providers by a MQRP that will identify outliers and take appropriate action to identify and regulate over utilization of health care. The commission agrees with commenters' recommendation of treatment plan review and clarifies that a treatment plan would fall under subsection (j) whereby health care providers and carriers may discuss a treatment plan and reach agreement. However, the mandate for preauthorization and concurrent review remains in effect. The commission appreciates commenter's recommendation for monitoring of employee request for services, this is accomplished through record keeping by the carriers.

COMMENT: Commenters opposed to the rule in general stated that the proposed rule expands the list beyond what is intended by the Legislature and required by HB-2600. Commenters stated that the items added to the list will increase the number of disputes and disproportionately impact certain health care specializations.

RESPONSE: The commission recognizes commenters' opposition to adoption of list items; however the commission disagrees that the intent of HB-2600 limits the commission from expanding the list beyond the five specific health care categories mandated. Additionally, the amended list of health care requiring preauthorization or concurrent review is not expected to increase the volume of disputes or in any way disproportionately impact any specific health care discipline.

COMMENT: Commenter requested clarification whether treatment of a new patient would require preauthorization to initiate treatment, and any deviations, thereof.

RESPONSE: The commission provides clarification that the health care listed in subsections (h) and (i) of this section are the only treatments and/or services, which currently require preauthorization or concurrent review. An initial new patient office visit to evaluate and establish records would not require preauthorization and full history and physical exam with records of any prior treatment would determine if preauthorization might be necessary; i.e. repeat diagnostic studies paid in excess of $350.

Proposed subsection (h)(1) Inpatient Hospital Admissions

COMMENT: Commenters supported inclusion of hospital inpatient admissions and the length of stay as preauthorization items.

RESPONSE: The commission agrees with commenters' support.

COMMENT: Commenters recommended for clarification language changes including a better definition of primary treatments or services and a change from inpatient hospital admissions to non-emergency hospitalizations. Commenter stated that subsection (h)(1) is too vague and recommended giving the primary diagnosis and general treatment plan along with the estimated length of stay.

RESPONSE: The commission agrees that explanation may be needed and provides clarity that the primary procedure is the principal scheduled procedure identified by the health care provider to treat the injury and the principle reason for the admission. The term principal refers to the "main" procedure. The health care provider is not required to enumerate every procedure to be performed during the admission. In addition, the commission disagrees with the suggestion to include the term "non-emergency" with hospital emergency because all of the health care that requires preauthorization is non-emergency care; however, to provide clarity the term is added to subsection (h) (see adopted subsection (h)).

Proposed subsection (h)(2) Outpatient Surgical Or Other Ambulatory Surgical Services

COMMENT: Commenters questioned the definitions of terms in subsection (h)(2) and requested clarification of commission's interpretation of outpatient surgical services and ambulatory surgical services; commenters asked if all injection codes are included, all codes designated under CPT 2001 coding as surgery, other invasive procedures, as well. Commenter requested the inclusion of a definition of "outpatient surgery" to ensure consistent application of utilization review and to avoid the potential of carrier penalty if inappropriate preauthorization is preformed. Commenter recommended that procedures, which border on the definition of surgical be eliminated from this category. Commenter further recommended including various procedure by name in a separate category if preauthorization is required. Commenters had several recommendations including change language to "non-emergency outpatient surgical or other ambulatory surgical services", "surgical procedures regardless of the place of service," and deleting the word "other". Also, was clarification on how to access preauthorization and concurrent review after hours.

RESPONSE: The commission agrees with commenters' recommendation to clarify outpatient and ambulatory surgical services. Definitions have been added to subsection (a). Services such as injection codes, invasive procedures, and CPT surgical codes will require preauthorization if provided as ambulatory surgical or outpatient surgical services as defined in subsection (a). The commission provides clarification that preauthorization is for non-emergency health care and the preauthorization process is to operate during normal business hours on a working day. In an emergency situation preauthorization does not apply.

Proposed subsection (h)(3) Spinal Surgery

COMMENT: Commenters supported the inclusion of spinal surgery on the preauthorization list and the doing away with the Spinal Surgery Second Opinion process stating the changes will benefit the injured employees, health care providers, insurance carriers and the Commission.

RESPONSE: The commission agrees with commenter's evaluation of the added benefit to injured employees.

COMMENT: Commenters questioned who would perform the reviews for spinal surgery and whether or not there would be a conflict with HB-2600 if an independent spine surgeon examination were preformed in lieu of a denial, stipulating that general practitioners not review a request from an orthopedist.

RESPONSE: The commission provides clarification that a request for spinal surgery will be handled in the same manner by carriers and their URAs as all other health care identified in subsection (h). Utilization Review rules establish appropriate doctor or other health care provider as reviewer. There are no options for exams by independent spinal surgeon; communication and coordination between requestor and carrier are expected by the commission.

COMMENT: Commenters recommended incorporating spinal surgery into subsection (h)(2) and changing language to read, "surgical procedures regardless of the place of service". Commenters suggested that a request for preauthorization for spinal surgery come from a spinal surgeon with the requesting surgeon outlining prior treatments and services (including: MRI, myelogram, discograms with actual reports, prior spine surgeries with op reports, EMG/NCV studies with reports and a current physical exam by the surgeon). Commenters indicated adding spinal surgery to the list with the provision of an employee elected second opinion if the carrier denies treatment.

RESPONSE: The commission disagrees with commenters regarding provision of a second opinion if the carrier denies the health care. Legislative mandates specifically identify spinal surgery as an item that is required to be preauthorized. The commission further disagrees with recommendation to limit requestor to spinal surgeons or to mandate specific request inclusions not addressed in subsection (e)(2).

Proposed subsection (h)(4) Psychological Testing, Psychotherapy

COMMENT: Commenters supported the mandatory preauthorization of psychological services stating the great amount of abuse of these services in the Texas workers' compensation system.

RESPONSE: The commission agrees that the reason for including psychological testing and psychotherapy continues to remain.

COMMENT: Commenters questioned and requested clarification regarding the definition of repeat evaluations, interviews and rehabilitation programs. Commenters asked if the word "evaluation" is used to denote "interview" stating the term does not correspond to any CPT code; commenter further asked if CPT code 99354, relating to Prolonged Evaluation and Management, requires preauthorization, or CPT code 99214, relating to Office or other outpatient visit. Commenters inquired about initial psychological and/or psychiatric testing (MMPI, MCI or other tests) considered as part of the evaluation process. Commenters also asked, if the preauthorization process is in conflict with the Mental Health and Spine Treatment Guidelines stating, "why would the second mental health assessment require preauthorization when it is mandated in the Spine Treatment guidelines before the tertiary level of care?"

RESPONSE: The commission agrees that additional clarification is needed for psychological services and has amended subsection (h)(4) to include all psychological testing and psychotherapy. Commenters concern regarding conflict with treatment guideline is moot due to HB-2600 abolishment of all treatment guideline effective January 1, 2002.

COMMENT: To provide clarity and reduce confusion commenters recommended several different language changes such as, "...repeat mental health evaluations and interviews..."; "all psychological testing, all psychotherapy, and any interview provided within six months time of the most recent interview for a specific injury (however, when provided as a part of a rehabilitation program, these services do not require separate preauthorization although the program itself does require preauthorization)"; "Repeat mental health evaluations and interviews by the same provider within a six month time period, all psychological testing, and all psychotherapy, unless rendered as part of a rehabilitation program in which case preauthorization is not required."; "All psychological testing, all psychotherapy, and repeat interviews or testing, except those which are part of a preauthorization rehabilitation program."; "All psychological testing and all psychotherapy including repeat evaluations and interviews except as included in a rehabilitation program."; "Repeat psychological or psychiatric evaluations and interviews except as part of an authorized rehabilitation program, all psychological testing and all psychotherapy." Other commenters recommended further language and format amendments including: expressly stating that the preauthorization requirement is provider specific and that a new qualified mental health provider (QMHP) has the right to conduct a new assessment without the burden of preauthorization; deleting "repeat evaluations and interviews"; and, dividing paragraph (4) into subparagraphs (A) and (B).

RESPONSE: The commission reviewed commenters' various language changes and agrees that additional clarification is warranted. Subsection is amended to include all psychological testing and psychotherapy, and repeat interviews. The commission disagrees with commenters' additional language recommendations regarding provider-specific and assessment by a new QMHP. The QMHP is not the treating doctor, but is a referral health care provider and is entitled to receive pertinent medical information to include any assessments performed by the previous QMHP. Adopted subsection (h)(4) applies for any psychological testing and for repeat interviews.

COMMENT: Commenters opposed to the inclusion stated that mental health assessments provide critical information at a low cost and that additional evaluations are justified as a cost containment feature since medical conditions change periodically. Opposition by commenters also stated that a delay to obtain preauthorization might limit the effectiveness of the clinician's ability to assess and address the issues when acute developments follow surgery. Commenters stated motive of subsection (h)(4) is to deny mental health services to injured employees and not affording them a realistic opportunity of returning to gainful employment. Commenter disagrees with Commission's position that initial psychiatric or psychological evaluations and interviews are essential assessment tools and do not require preauthorization.

RESPONSE: The commission appreciates commenters' concerns and provides clarification that the only exemption from preauthorization under this paragraph is the initial interview. The commission exempts the initial interview and whatever parameters are included in the CPT coding for "interview". The commission recognizes and agrees that a mental condition changes periodically and advises that at any point an acute

development requires immediate attention, per definition of a mental emergency, the QMHP is expected to address the condition appropriately. The commission disagrees that any denial of necessary mental health care is intended by the inclusion of this paragraph or is intended to delay return to work, and restates that initial psychiatric and psychological interviews are essential assessment tools.

Proposed subsection (h)(5) all external and implantable bone growth stimulators

COMMENT: Commenters suggested language change to, "all external and implantable bone growth stimulators, spinal cord stimulators, and implantable medication pumps" as these procedures are invasive, expensive and high maintenance treatments. Other commenters suggested omitting the preauthorization and concurrent review requirements for bone growth stimulators and instead reviewing them retrospectively as the determination for need often is made during the surgical procedure. Additionally, commenter requested a definition for "spinal cord stimulators."

RESPONSE: The commission disagrees with commenters' suggested list additions and exclusions. Basically, additions to the list were limited to statutory mandates; several exclusions were also effected. Monitoring of costs and utilization levels will afford TWCC the necessary data to support future changes. The commission declines commenters' request for a definition of spinal cord stimulators.

Proposed subsection (h)(6) All Chemonucleolysis, Acupuncture, Facet, Or Trigger Point Injections;

COMMENT: Commenters concurred with the inclusion of acupuncture to the preauthorization list. Other commenters state it is effective and can be used as an adjunct treatment, as well as not being a cost driver in the system.

RESPONSE: The commission has determined that the low utilization levels of acupuncture do not warrant inclusion at this time. The commission will continue to monitor utilization levels and costs of this health care and evaluate for future list inclusion.

COMMENT: Commenters asked why trigger point injections and facet injections were listed if all surgical outpatient procedures must be preauthorized.

RESPONSE: The list has been amended to remove facet and trigger point injections. These services are low to moderate cost for treatment and therefore inclusion is not cost effective.

COMMENT: Commenters recommended a language change to read, "acupuncture, trigger point injections, and all therapeutic/diagnostic spinal injections (facet, ESIs, spinal injections)" as some spinal injections are done in the doctor's office and some without video fluoroscopy, thus avoiding the preauthorization process. Commenter recommended the inclusion of ESIs to require preauthorization as these injections are frequently given in a series of three, regardless of whether the first two were effective.

RESPONSE: The commission appreciates commenters' concern regarding injection, however, the list has been amended and does not require preauthorization for acupuncture, facet or trigger point injections. These and all spinal injection procedures will be closely monitored for any increase in utilization levels and costs.

COMMENT: Commenters opposed preauthorization of acupuncture because available literature does not provide consistent evidence-based clinical research regarding efficacy; therefore, reviewers will not have the information to base a decision to approve or deny requests. Further comments stated that listing acupuncture in this section is unnecessary as it would be considered under proposed subsection (h)(19)(B) as "any investigational or experimental service or device for which there is early, developing scientific or clinical evidence demonstrating the potential efficacy of the treatment, service or device but is not yet broadly accepted as the prevailing standard of care".

RESPONSE: The commission agrees with deletion of acupuncture from preauthorization due to low cost and low utilization. As mentioned previously, acupuncture will be monitored and researched for efficacy studies. The commission does not consider acupuncture as experimental or investigational; therefore, acupuncture is not included in adopted subsection (h)(14).

Proposed subsection (h)(7) All Non-Emergency Myelograms, Discograms, Or Surface Electromyograms

COMMENT: Commenters supported the mandatory preauthorization of these services because the procedures are invasive and have the potential for serious complications; therefore medical necessity should be established for the benefit of the injured employee.

RESPONSE: The commission agrees with the continued preauthorization of these diagnostic procedures because of the utilization levels and costs, and the commission will continue to monitor utilization levels of these procedures.

COMMENT: Commenters recommended inclusion of surface EMGs under experimental or investigational services because these procedures are not recognized as a true measure according to established and accepted medical literature.

RESPONSE: The commission disagrees with inclusion of surface EMGs under experimental or investigational service as it is on the current list and the adopted list, and already has an established CPT code. Additionally, surface EMG billing will be monitored for utilization levels.

Proposed subsection (h)(8) Repeat Individual Diagnostic Study

COMMENT: Commenters supported the mandatory preauthorization of these services because "diagnostic radiology is an area recognized for its potential for self-referral and abuse" with physicians often requesting repeat MRIs based only on the fact that it has been six months since the last test.

RESPONSE: The commission agrees that these services are warranted for continued inclusion on the list, and will continue to be monitored for levels of utilization and inappropriate usage.

COMMENT: Commenters made recommendations that the Commission investigate and eliminate the financial incentive to the abusers and establish guidelines for frequency and time periods and allow for documentation of need, thus requiring less regulation in this area.

RESPONSE: The commission agrees that system abusers need to be identified and denied participation in the system; the MQRP is being established to monitor providers and identify system abusers. In addition, the MQRP will have the authority to recommend increased preauthorization for outliers and abusers and decreased preauthorization for consistently compliant providers.

COMMENT: Commenters opposed preauthorization of repeat diagnostic studies as only a doctor can establish need for retesting, not the reviewer. Another commenter recommended requiring preauthorization for "repeat baseline diagnostic studies greater than $350."

RESPONSE: The commission appreciates commenters' remarks, but declines recommendation to remove expensive repeat diagnostic radiologic studies from preauthorization. The commission has maintained the current list of health care requiring preauthorization, and repeat diagnostics are already on the list. The commission has included legislative mandates and maintained the list with minimal deletions unless the item is a low cost, low utilization item, or a low cost, high utilization cost driver.

Proposed subsection (h)(9) Video Fluoroscopy

COMMENT: Commenters recommended that since video fluoroscopy is used sparingly, it is no longer necessary to preauthorize this procedure.

RESPONSE: The commission agrees with commenters' recommendation and based on low utilization and low cost determines that the need for preauthorization no longer exists. The list has been amended and does not require preauthorization for video fluoroscopy.

Proposed subsection (h)(10) radiation therapy or chemotherapy

COMMENT: Commenters recommended removing radiation therapy and chemotherapy from the list, as they are not a factor in workers compensation.

RESPONSE: The commission agrees with the commenters' recommendation and the list has been amended not to require preauthorization for radiation therapy and chemotherapy. These procedures have relatively low utilization levels in the workers' compensation system, and are therefore removed from the list.

Proposed subsection (h)(11) Biofeedback

COMMENT: Commenters recommended rewriting this section for clarity and expansion to detail the different types of biofeedback services that exist. Commenters recommended language to read, "all biofeedback, including psycho-physiological profile assessments and psycho-physiological therapy, (however, when provided as a part of a rehabilitation program, these services do NOT require separate preauthorization although the program itself does require preauthorization)".

RESPONSE: The commission acknowledges commenters' recommendation and has included biofeedback in subsection (h)(11) with psychological testing and psychotherapy, and repeat interviews; except when part of a preauthorized or exempt program. No additional language clarification is needed at this point.

Proposed subsection (h)(12) All Physical Medicine And Rehabilitation Modalities And Procedures

COMMENT: Commenter recommended that preauthorization for physical therapy services no longer be required, as all major carriers have gone so far as to not require any physical or occupational therapy preauthorizations because the physician generates the referral and 99% of those referrals are not denied for medical necessity.

RESPONSE: The commission agrees with commenters' assessment of the issue regarding the removal of a preauthorization requirement for physical and occupational therapy. The list has been amended to reflect this deletion.

COMMENT: Commenters supported the clarification and mandatory preauthorization of physical medicine and rehabilitation modalities and procedures as a much-needed restriction because over-utilization has been fully documented by WCRI and ROC studies. Commenters expressed approval for requiring preauthorization after 18 sessions and for allowing 18 sessions prior to preauthorization both pre-operatively and post-operatively rather than a number of weeks.

RESPONSE: The commission recognizes commenters' position; however, elects to remove these high frequency procedures due to the HB-2600 mandate for preauthorization disputes to be resolved by independent review organizations (IROs) at the expense of the carrier regardless of decision. The commission has determined that the inclusion of physical medicine and rehabilitation procedures on the list has the potential for massive numbers of disputes for denied preauthorization. Therefore, the commission concludes that the inclusion of physical medicine and rehabilitation procedures would be fiscally irresponsible, and would no longer be an effective control of utilization.

COMMENT: Commenters requested clarification regarding the 18 sessions, asking if the 18 sessions were all inclusive, or if 18 sessions were allowed prior to surgery and 18 sessions after surgery. Commenters asked who decided the number of sessions and how 18 became the "magic number" of sessions because this is a problem and ultimately punishes the patient. Commenters requested the names of scientific journals and studies that were consulted to stop allowing physical therapy after eight weeks of treatments as the current rule allows. Commenters asked if massage therapy is included under this rule stating that this treatment is therapeutic and important in treating the whole person. Commenters recommended returning to the original language of "beyond eight weeks of treatment" because the health care providers should make the judgment as to how many sessions are necessary. Commenters suggested adding "...beyond 18 sessions" to include a reasonable time frame in the scope of eight weeks, because without a timeframe the employee or provider could stretch into an unreasonable time period. Commenters recommended deleting the word "all" from "all physical medicine and rehabilitation modalities". Commenters recommended language amendments to read, "6 weeks or 18 visits, which ever occurs first". Commenters recommended decreasing the number of sessions, "requiring preauthorization after five sessions, 6-12 sessions, 9-15 sessions, and 12-15 sessions" to limit, control and prevent over utilizations as well as produce larger financial savings for the Commission. Other commenters recommended increasing the number of sessions to 24 sessions or eight weeks, both prior to and after surgery because 18 sessions is insufficient. Commenters suggested language adoptions to include: "the provider must contact the URA at the time of the initial session/visit", "threshold number of sessions/visits is subject to non-clinical review", and "all on-going treatment after the 12-session/visit threshold is subject to clinical review." Commenters recommended language modifications to provide for treating/referring doctor re-examination after the first eight weeks if an individual licensed to evaluate and render physical medicine treatment provides physical medicine treatment; if someone not licensed provides physical medicine treatment under a physician's delegation, then re-examination by that physician would be required monthly or more often. Commenter suggests that a reasonable time period be included to read,

"be administered within a 4 to 6 week period". Commenters recommended modification of this subsection to provide for treating/referring doctor re-examination after the first eight weeks if an individual licensed to evaluate and render physical medicine treatment provides the physical medicine care in accordance with Texas statute. If someone not so licensed is providing the care under a physician's delegation then re-examination by that physician should be at least once a month and possibly more often depending on the tasks being delegated and the qualifications and experience of the individual.

RESPONSE: The commission reviewed and evaluated the commenters' various concerns and recommendations. The list has been amended and does not require preauthorization for physical medicine and rehabilitation procedures as stated above.

COMMENT: Commenters strongly suggested that the commission not require preauthorization of physical therapy and not reduce the already sparse treatment that can be given to patients as physical therapy improves range of motion and mobility. Commenters suggested that instead of the preauthorization process and concurrent review, the commission should monitor, and govern abusers and outliers by administering and utilizing controls such as UR, medical peer review, required medical exams or the medical dispute resolution interventions of Benefit Review Conference and Contested Case Hearing. Regarding physical medicine and rehabilitation programs, commenters recommended that each request should be a new preauthorization request not subject to concurrent review. Commenters recommended providing a professional designation modifier to each physical medicine and rehabilitation CPT code to assist in identifying over utilization. Another recommendation by commenters was to ensure that only occupational therapists licensed by the state of Texas be allowed to use the physical medicine and rehabilitation modalities and procedure codes relating to occupation therapy services. Commenters suggested that the Commission create a set of rules for adjusters that govern the processing of the preauthorization request in addition to creating the 18-visit trigger for physical medicine and rehabilitation. Commenters recommended requiring the carrier to state in writing the number of prior sessions and using that number as the basis for determining whether future services require preauthorization. Commenters voiced opposition to preauthorization after 18 sessions as the process takes valuable treatment time from the provider and injured worker while awaiting a medical determination from the insurance carrier. Commenters expressed opposition to the decrease from the current eight-week initial phase to the limitation of 18 sessions because the restriction increases inconvenience to patients and providers, harms the patient, interrupts progress and care, saves money for the insurance, and causes unnecessary burdens to all parties including adding costs. Commenters opposed to a restriction on the number of sessions because it supercedes the professional judgment of the health care providers who deserve a range of prescription parameters for a full range of injuries, without harassment or barriers from insurance carriers.

RESPONSE: The commenters' suggestions were reviewed by the commission. The determination to delete the physical medicine and rehabilitation modalities and procedures from preauthorization removes the necessity to specifically address additional comments.

Proposed subsection (h)(13) All Rehabilitation Programs

COMMENT: Commenters confirm and support the inclusion of preauthorization for all rehabilitation programs, regardless of accreditation, as a much-needed addition to preauthorization criteria. Commenters expressed support for the required preauthorization of all rehabilitation programs, excluding no facility for initial physical medicine rehabilitation services from preauthorization stating that recent trends in medical costs seem to indicate that preauthorization will help with cost and abuse concerns. Commenter states that CARF accreditation does not equate to medical necessity or appropriateness of a program for a specific injured employee at a specific point in the recovery process. Other commenters agreed with the addition of work hardening and work conditioning from day one as a good decision because the entrance criteria are often too vague and because inappropriate work hardening can delay recovery and return to employment. In addition, the preauthorization of work hardening should benefit the injured employee and reduce the necessity of peer reviews.

RESPONSE: Commission has reviewed all comments regarding the exemption of rehabilitation programs to include work conditioning, work hardening, outpatient medical rehabilitation and chronic pain management. The commission has determined that current terminology varies among programs offered and various facilities that may or may not possess accreditation for various accrediting associations. By statute, the commission is required to provide an avenue for exemption for work hardening and work conditioning programs provided in facilities that are accredited by an organization that the commission recognizes in a commission rule. Therefore, the commission has included an avenue for exemption for facilities that are accredited by the Commission on the Accreditation of Rehabilitation Facilities (CARF). By statute, the only programs that qualify to be approved by the commission for exemption, are the programs of work hardening and work conditioning, which may be described by the facility as either general occupational rehabilitation programs or comprehensive occupational rehabilitation programs and are provided in a CARF accredited facility. Therefore, the commission has separated these two programs from other rehabilitation programs. The other rehabilitation programs will require preauthorization, as well as all work hardening and work conditioning programs that are not provided in a facility accredited by CARF and approved for exemption by the commission. Rehabilitation programs are high cost and have high utilization, and remain on the list of health care requiring preauthorization. (see adopted subsection (h)(9))

COMMENT: Commenters recommended that the only rehab programs that should be approved are those that are CARF accredited. Commenters stated that the Commission must consider CARF accreditation because the services provided in these facilities have been proven to be outcome-driven programs in accordance with national quality standards. Commenters assert that the intent and wording of HB-2600 (77th Legislative Session) and HB-3597 (76th Legislative Session) is that facilities not accredited by an organization recognized by the Commission should be subject to preauthorization and CARF accredited facilities should be exempt from preauthorization; CARF accreditation provides relief due to the high quality and aggressive UR of these facilities; CARF accreditation serves as a form of prospective review with strict admission and discharge criteria, as well as justifies the medical reasonableness and medical necessity of health care when the standards are correctly applied to treatment practices for work hardening and work conditioning; exempting CARF accredited facilities from preauthorization and concurrent review would eliminate a

majority of chiropractic-based programs and accomplish cost containment goals; and, relief for CARF accreditation would serve as an incentive to achieve this accreditation. Commenters declared that under this rule health care facilities are limited to one accreditation, and asked why CARF is the only accreditation recognized by the commission; Commenters stated that there are other accreditations that could better benefit both carriers and providers by offering a national data bank for outcome studies, therefore commenter recommended changing CARF to "a nationally recognized accrediting agency for rehabilitation facilities" to include American Academy of Pain Management and JCAHO. Commenters voiced opposition to CARF accreditation payment levels, as the return of the initial investment is too little. Commenters questioned if the Commission would offer any financial assistance or guidance on CARF certification. Commenter opposed to the comment in the Preamble that states, "Although the 1996 Medical Fee Guideline recognized the Commission on Accreditation of Rehabilitation Facilities (CARF) for purposes of higher reimbursement as opposed to non-CARF accredited facilities, no accreditation entities or organizations are recognized by the commission for exclusion from prospective and concurrent review of health care. CARF accreditation does not accomplish prospective UR of health care."

RESPONSE: Commission disagrees with validity of commenters' remarks stating that CARF accreditation, in itself, serves as a form of prospective review, or the statement that CARF accreditation would eliminate a majority of chiropractic-based programs and accomplish cost containment; however, the commission agrees with commenter's statement that the relief for CARF accreditation would serve as an incentive to achieve this accreditation. Further, the commission cannot offer any financial assistance on CARF certification. Although other commenters expressed opposition to the exclusive exclusion of CARF accreditation, stating that there are other nationally recognized accrediting agencies for rehabilitation facilities, a review of the standards manuals of other accrediting agencies did not indicate an offering of either work hardening or work conditioning programs or similar programs. As stated above, HB-2600 mandates preauthorization or concurrent review for work hardening and work conditioning programs that are not provided in a facility that is accredited by an organization that the commission recognizes in commission rules. Language is amended in adopted subsection (h)(9) to reflect this.

COMMENT: Commenter recommended that to maintain continuity of care preauthorization should not be required for the first 4-6 six weeks because in most cases this is a more than sufficient time to return employees to work and eliminates the red tape fight for patients.

RESPONSE: Commission disagrees with elimination of preauthorization for four to six weeks of rehabilitation programs in order to maintain continuity of care and eliminate the hassle of obtaining preauthorization. Preauthorization controls levels of utilization by identifying parameters for treatment, beyond which health care providers are required to justify the necessity for the requested treatment or service in advance. As the commission is tasked with cost containment, a blanket exemption of preauthorization for four to six of all rehabilitation programs would potentially open a door to over-utilization and abuse.

COMMENT: Commenter requested clarification regarding how preauthorization of all work conditioning was in the best interest of the patient and how this would save money and not delay treatment.

RESPONSE: The commission provides clarification that preauthorization of single disciplinary work conditioning programs would help ensure program entry from a physical therapy program that might or might not have been totally approved and completed. The commission has provided for exemption as authorized by the statute, as discussed above.

COMMENT: Commenters stated questions regarding the preauthorization of work hardening and work conditioning; the issues questioned include: do initial evaluations require preauthorization; can the provider perform both work conditioning and work hardening for the same injury; and, can the provider treat simultaneously two dates of injury, one with work hardening and one with work conditioning. Also, commenters asked if preauthorization is required for work hardening to return the patient to work if a patient transfers care to another provider, including a designated doctor. Commenters further asked if an injured employee may progress from work hardening or work conditioning into a chronic pain management program, what is the definition of a pain clinic, and if a pain clinic could perform "chronic pain management/interdisciplinary pain rehabilitation". Many commenters made language change recommendations including: change "outpatient medical rehabilitation" to "outpatient health care rehabilitation"; remove the "all" in "all rehabilitation programs" to read "the following rehabilitation programs", as "all" includes return to work programs, transitional duty programs, back stabilization programs, and aquatic programs; rewrite to state, "All rehabilitation programs (including their component parts which should NOT be preauthorized separately), including but not limited to (to clarify between services to be preauthorized separately and those to be preauthorized as a part of a rehabilitation program):"; and, delete language, "including but not limited to" as it is ambiguous. Commenter suggested that rehabilitation programs not be subject to concurrent review, that each request should be a new preauthorization request and not subject to concurrent review. Commenters suggested defining issues such as what constitutes "outpatient medical rehabilitation" and clarifying whether rehabilitation modalities and procedures preformed pursuant to a treatment plan in a doctor's office (doctors of DC, MD) requires preauthorization.

RESPONSE: The commission provides clarification that if work hardening or work conditioning programs are provided by a facility that is not CARF accredited, the initial evaluations, as part of the program, will require preauthorization; however, no preauthorization is required for an initial evaluation as part of a work hardening or work conditioning program provided by a CARF accredited facility once the facility has received an exemption from the commission. The commission further clarifies that all claims are reviewed on a case-by-case basis, and the commission declines to address individual scenarios in this venue. The commission provides clarification on the position that an employee should not progress from one rehabilitation program into another, unless the medical documentation of the employee's condition can support such a progression. (e.g. from work conditioning into work hardening into chronic pain management) Commission defers to professional utilization review agents to determine the levels of pain management that can be provided in a pain clinic. In the amendments to this subsection from the current language, the term "pain clinic" has been replaced by the broader program

term "chronic pain management / interdisciplinary pain rehabilitation." The commission agrees with commenters' suggestion to remove phrase, "including, but not limited to," and that language has been deleted. The commission reviewed and amended rule to remove the word "all" from "all rehabilitation programs". Commission disagrees with commenter's recommendation to exclude rehabilitation programs from concurrent review and allow a new preauthorization request for any continuation of the program. The commission believes that the continuation of a rehabilitation program through concurrent review is a quicker process and should require less documentation to support than would a new preauthorization request. Clarification is provided that rehabilitation modalities and procedures provided in a doctor's office or other location would not require preauthorization, but will be reviewed retrospectively as physical medicine and rehabilitation if not preauthorized as a rehabilitation program.

COMMENT: Commenter recommended including URA re-evaluation time frame guidelines for recommended or requested continuing rehabilitative services such as ongoing psychiatric, psychological, biofeedback, and physical maintenance/rehabilitative care.

RESPONSE: Commission is unclear as to commenter's intent in recommending the inclusion of utilization review re-evaluation time frame guidelines for the continuation of rehabilitative services after the completion of a rehabilitation program. To continue a specific health care that was previously a component of a completed preauthorized or exempt program would require preauthorization if the health care is included in the list of treatments requiring preauthorization under subsection (h) of this section.

COMMENT: Commenters opposed to inclusion of work hardening and work conditioning on the preauthorization list stated that it is unreasonable to require preauthorization for these programs because of negative ramifications such as delays and denials of treatment, denials to accessible care in an efficient and effective manner, and shifts of costs to other areas of workers' compensation due to prolonged time off. Commenters disagreed with inclusion of work conditioning because the programs are cost effective, usually completed in four weeks and are the natural completion of physical therapy.

RESPONSE: Commission disagrees with commenters' evaluation that preauthorization of work hardening and work conditioning is unreasonable. If documentation supports the need for a program, there should be no delay or denial to access of care, whether work hardening or work conditioning. More importantly, the legislature mandated preauthorization of work hardening and work conditioning unless the program is provided in a facility that is accredited by an organization recognized by the commission rules.

Proposed subsection (h)(14) DME and TENS Units

COMMENT: Commenters supported the proposed clarifications in subsection (h)(14) and the inclusion of all TENS and DME over $500.00.

RESPONSE: Commission acknowledges commenters' agreement with requirement for preauthorization of DME over $500 and all TENS.

COMMENT: Commenters recommended that the Commission clarify what constitutes durable medical equipment (DME) and provide a more definitive list that includes a dollar threshold of DME items subject to preauthorization.

RESPONSE: Commission provides clarification according to the ground rules of the *Medical Fee Guideline* that DME refers to items that: can withstand repeated use; are primarily used to serve a medical purpose; are generally not useful to a person in absence of illness, injury or disease; and are appropriate for use in the injured workers' home. The commission declines to provide a list of DME including a dollar threshold of items subject to preauthorization; no such information exists.

COMMENT: Commenters stated that there are a variety of electro-medical devices in addition to TENS and recommended language change to read, "all durable medical equipment in excess of $500.00 per item (either purchase or expected cumulative rental) and electro-medical devices". Also, commenters requested clarification of neuromuscular stimulators (NMS) stating that health care providers will prescribe a NMS unit because it does not require preauthorization instead of a TENS unit which does require preauthorization. Commenters requested definition of TENS units and asked if "all TENS units" means "all TENS rentals" or "all TENS purchases". Other commenters stated that many DME companies automatically send out TENS and NMS supplies to people who have the units, recommending that injured employees sign statement on receipt of supplies and continued usage.

RESPONSE: The commission disagrees with language recommended to include, "and electro-medical devices". If an electro-medical device, a neuromuscular stimulator (NMS) or any other equipment costs greater than $500, preauthorization is required. The commission provides clarification that a NMS unit is not a TENS unit and the preauthorization of unit is dependent upon the costs or expected cumulative rental.

COMMENT: Commenters suggested that this entire item be eliminated from the preauthorization process, specifically that TENS units be eliminated from preauthorization and concurrent review. Commenter stated that the commission was targeting TENs units and independent medical equipment providers by continuing to require preauthorization for TENs units; that "Rules propagate physicians and other health care providers to buy and sell their own equipment opening the door further to increased occurrences of writing prescriptions for profit." Commenter addressed several issues regarding "expected cumulative rental", stating that this preauthorization requirement will "create a monster" of preauthorization requests for carriers and health care providers and stated that if rentals are required to be preauthorized, quarterly rental periods would make more sense and lessen the fiscal impact on all parties.

RESPONSE: Commission disagrees with the commenters' suggestion to eliminate preauthorization requirement of all DME, specifically TENS units. The commission disagrees that TENS and independent medical equipment providers or any other system participant are being targeted by the continuation of preauthorization of DME. Basically, additions to the list were limited to statutory mandates; several exclusions were also effected. Monitoring of costs and utilization levels will afford TWCC the necessary data to guide future changes. The commission disagrees with commenters' recommendation to preauthorize rentals on a quarterly basis; it is improbable to project medical need for continued usage on a quarterly basis. There is a need to monitor DME, DME supplies, and TENS units for potential abuse.

Proposed subsection (h)(15) Nursing Home, Convalescent, Residential, And All Home Health Care Services And Treatments

COMMENT: Commenter strongly supports mandatory preauthorization of these services as they are very expensive and the potential for abuse is great.

RESPONSE: The commission acknowledges commenter's expressed support of the continuation of mandatory preauthorization for all home health care services and treatments. The commission agrees that they are high cost and have potential for abuse.

Proposed subsection (h)(16) Chemical Dependency Or Weight Loss Programs

COMMENT: Commenter stated that the word "clinic" is archaic and recommended change in language to read, "chemical dependency treatment and weight loss programs".

RESPONSE: The commission agrees that the word "clinic" would best be replaced by the word, "programs", and language has been changed. Because of the lack of ongoing monitoring and high potential for abuse, these programs have remained on the list.

Proposed subsection (h)(17) non-emergency dental services

No comments were received. Dental services have been deleted from the list in the rule as adopted.

Proposed subsection (h)(18) Manipulative Treatments Or Manipulations

COMMENT: Commenters agreed that chiropractic treatments should not be held to standards different than any other therapy programs and stated approval for preauthorization of chiropractic treatment after 18 visits. Commenters concurred with the WCRI and ROC studies that document over-utilization of chiropractic care. Commenters stated that without this requirement extended courses of treatment occur which are counter productive, keep the injured employee in a disabled mindset, delay recovery and make worse the overall outcome. Commenters supported the preauthorization of these services stating that it is a much-needed restriction that would create a drastic overall cost savings and would reduce the necessity of peer review while being more effective and beneficial.

RESPONSE: The commission appreciates commenters' suggestions; however, elects to remove these high frequency procedures due to the HB-2600 mandate for preauthorization disputes to be resolved by IROs at the expense of the carrier, regardless of decision. The commission has determined that the inclusion of manipulative treatments and manipulations has the potential for massive number of disputes for denied preauthorization and concludes that the inclusion of manipulative treatments and manipulations would be fiscally irresponsible and would no longer be an effective control of utilization.

COMMENT: Commenter stated that the 18 visits for manipulation treatments could be a loophole for some providers to use all 18 visits for manipulations only. Commenters asked questions and requested clarification regarding the 18 visits: are the 18 visits for all providers or only for chiropractors; are osteopathic manipulations included; what is the effective date for the 18 visits; does the number of visits include office visits only; and, what is the rationale necessary to secure preauthorization for additional visits. Commenters recommended that for the purpose of controlling over utilization the focus should be on limiting the number of therapy and chiropractic visits to 9-15 visits while another commenter recommended reducing the number of manipulations to 12 sessions within a 4 - 6 week period. Commenters made suggestions to include a time frame of 8 weeks because without a time frame the employee or provider could stretch into an unreasonable time period. Commenters suggested changing the preauthorization requirement after 18 manipulations to a certain number of manipulation sessions and then requiring that exercise must begin or treatment will be denied. Commenter recommended that the 18 visit preauthorization threshold for manipulative treatment or manipulations should be clarified so as to make it clear that the 18 visits applies to treatment rendered for each claim and not just per health care provider. Commenter gave a recommendation to classify manipulations under subsection (h)(12) as manipulations are seen as passive physical therapy modality to prevent health care providers claiming an exemption for 18 physical therapy sessions plus 18 manipulative sessions. Commenters also requested clarification regarding joint mobilization vs. manipulation to the same body area on the same day, stating that this is a duplication of services. Commenter offered the suggestion that the Commission either strike manipulation from the list, or add to the list prescription medicines after 18 days worth of medicine. Commenter also suggested that manipulations not be subject to concurrent review, and recommended that each request should be a new preauthorization request and not subject to concurrent review. Commenter recommended the following language be added: (1) the chiropractic care provider must contact the URA at the time of the initial session/visit; (2) the threshold number of sessions/visits is subject to non-clinical review; (3) all on-going treatment post the 12-session/visit threshold is subject to clinical review. Commenters strongly object to the inclusion of manipulations to the preauthorization list. Commenters state that preauthorization of manipulations do not need to be on the list, do not serve as a cost containment measure since manipulation is global to the office visit, that it is a waste of funds and that it will result in fewer providers willing to care for injured workers. In addition, commenter made reference to the Meade study on chiropractic care vs. outpatient medical treatment for low back pain. Commenters stated objection to the preauthorization of manipulations for injured workers because it: creates another hurdle and delay in receiving care; limits the injured workers' rights to see a chiropractor and violates the Act by not allowing treatment as and when needed; will harm injured workers due to carrier limitation of chiropractic care to 18 visits; discriminates against the injured worker who chooses a chiropractor as the treating doctor; is unfair to the injured worker as a limitation and it limits access to the treating doctor's care; injured workers are left with no option but facing prolonged medications and surgery; and, the injured worker will have to wait for preauthorization that takes a long time; the injured worker will be subject to treatment that stops then starts again and will not do well physically or mentally; changes from an acute presentation to a chronic condition will occur; the injured worker will have to wait for dispute resolution before getting needed care. Commenters requested clarification whether the requirement for preauthorization of manipulations was different for chiropractors and osteopaths. Commenters also opposed the requirement for manipulations and stated it was not the intent of the Legislature and HB-2600 to require preauthorization for manipulations. Further, commenter stated that it is a violation of the Texas Labor Code to require Doctors of Chiropractic and Doctors of Osteopathy to preauthorize office visits while exempting Medical Doctors, as it targets, discriminates and is inequitable to chiropractors. No other medical profession must receive preauthorization for the primary method of health care delivery; chiropractic manipulations and manipulative treatments

are completely different methods from manipulations done by a medical doctor or osteopathic medical doctor; chiropractic care is a part of treatment and is not physical therapy; it limits the scope of practice of chiropractors; and, it will force chiropractors to preauthorize any visit beyond eight weeks, possibly even consultations. Commenters voiced disagreement with the restriction limiting the number of visits to 18 stating that there are occasions when an injured worker requires additional treatment; most injuries do not resolve in six - seven weeks and preauthorization of manipulations will allow less treatment than the eight weeks of therapy that are now allowed (without preauthorization) resulting in limited healing. Commenter refers to article in Volume 19 of Spine that reports the average time to reach MMI after a low back injury in a motor vehicle accident as seven months, one week (29 weeks X 3 manipulations = 87 visits). Commenters opposed to the preauthorization of osteopathic manipulation and do not want the already sparse treatment reduced as manipulative medicine improves range of motion and mobility.

RESPONSE: The determination to delete manipulative treatments and manipulations from preauthorization and concurrent review, removes the necessity to specifically address additional comments. As previously noted, the commission will be addressing outliers and administering utilization controls through the activity of the MQRP. In addition, commenter made reference to the "Meade" study, which commission staff reviewed. The referenced Meade study indicated that chiropractors were limited to a maximum of 10 treatments, intended to be concentrated in the first three months, which could be spread out over a year's time, if necessary. A reviewer of that study stated that it should be considered by those practitioners who have a tendency to schedule their patients for 30 or more visits upon the initial examination.

Proposed subsection (h)(19) Investigational or Experimental Service or Device

COMMENT: Commenters support mandatory preauthorization of investigational or experimental services or devices as these could potentially have serious side effects or complications for injured workers; and, this equipment is often marketed to physicians and other practitioners as an additional revenue stream.

RESPONSE: The commission acknowledges commenters' supportive statements regarding mandatory preauthorization of investigational or experimental services or devices. This category of health care requires mandatory preauthorization and concurrent review under HB-2600. Language was amended to delete reference to there being no current or investigational CPT code, as this was determined to cause confusion regarding coding issues.

COMMENT: Commenters stated that the commission would need to become the "entity of intervention" in determining or defining what is and what is not investigational or experimental as the definition of "investigational or experimental" is vague and expansive. Listings of treatments, procedures or devices will need to be developed, vigorously maintained and regularly distributed to all URA organizations; and, access to definitive clinical studies for devices is limited as FDA studies only attest to safety and not the efficacy of the device. Commenters questioned what services, procedures and devices fall under the category of "investigational or experimental" and asked if there will be a list of these services and devices, including Stellare ganglion blocks and Botox injections. Commenters made recommendations to this section suggesting that the commission clarify that unless the medical efficacy of a device or service has been established by clinical trials published in the peer reviewed medial literature the carrier has no obligation to pay for these services. Additional commenters recommended adding a subparagraph (C) of this section to read, "the requestor intends to bill using a CPT code that requires documentation of procedure" because this will afford the insurance carrier an opportunity to review these treatments, services and issues that often go on without address. Commenter suggested adding the language, "...Efficacy of the treatment, service, or device but that is not yet broadly..." to clarify the meaning of the sentence. Commenter recommended deleting proposed subsection (h)(19)(A) because HB-2600 requires preauthorization regardless of an investigational code; the proposed wording allows investigational or experimental services and devices to be provided without preauthorization or concurrent review in instances where the American Medical Association has established an investigational CPT code for the service or device while the service or device is still investigational or experimental. Commenters disagree with this section stating the language "no current or investigational CPT code" over reaches and violates the intent of HB-2600. Commenters recommended that proposed subsection (h)(19) be in agreement with HB-2600 by only stating "any investigational or experimental services or devices" and not contain paragraphs (A) and (B). Another commenter states that subparagraph (B) misquotes HB-2600 and that it needs correction.

RESPONSE: The commission appreciates commenters' recommendations and suggestions, and language has been amended to delete reference to whether AMA has established a current or investigational CPT code. The commission declines to define or enumerate specific services, procedures or devices which would be categorized as investigational or experimental (see adopted subsection (h)(14)).

Proposed §134.600(i)(2)

COMMENT: Commenter asked if the insurance carrier could refuse to precertify a request. Commenter recommended adding, at the end of subsection (i)(2), the following: "The carrier has no obligation to process a request for voluntary preauthorization and may decline to accept the request without having the merits of the request reviewed by a nurse, physician's assistant or physician." Commenter suggested that the distinction between denying a request and declining to process a request should be made explicit. Commenter further suggested the carrier should be able to decline a request for voluntary preauthorization as an administrative matter, and the individual declining to process the voluntary request need not have clinical qualifications. Commenter offered suggested language to subsection (i)(2) to underscore the fact that a carrier or URA individually will retain the right to determine whether or not to honor the voluntary precertification request option as part of their standard business practice. Such a decision by the carrier or URA may be made without risk of penalty or fine and will not constitute as grounds for a provider complaint.

RESPONSE: The commission disagrees that additional rule language is needed. The statute allows a carrier and a provider to voluntarily discuss health care treatment and treatment plans, either prospectively or concurrently, and allows a carrier to certify or agree to pay for health care in accordance with the agreement. The statute makes it clear that all of this is voluntary on the part of both the provider and the carrier.

COMMENT: Commenter recommended that voluntary precertification language be removed from the rule. Commenter further

suggested that if the language were to remain, the combination of subsection (i)(1) and (2) would add clarification to the issue.

RESPONSE: The commission disagrees that subsection (i) should be removed from the rule. Voluntary certification is expressly addressed and allowed by the statute, and should therefore be addressed in the rule implementing that statute.

Proposed subsection (i)(2)

COMMENT: Commenter stated that the proposed introduction of subsection (i)(2) is in conflict with the stated scope of liability in the proposed §134.600(a).

RESPONSE: The commission agrees and has revised the language in adopted subsection (b)(2) to be consistent with the voluntary certification provisions in the rule and in the statute.

Proposed subsection (i)(3)

COMMENT: Commenters recommended that precertification requests be conducted in writing, in order to prevent miscommunication, and that the carrier or URA provide written confirmation of the specific treatment precertified. Commenter recommended adding the following language to the end of proposed subsection (i)(3): "To create carrier liability, the request and the response must be in writing and must be in the same format used for mandatory preauthorization." Commenter suggested that such language is necessary to avoid misunderstandings and disputes, and further should not deviate from standards defined for mandatory preauthorization.

RESPONSE: The commission disagrees with the commenters' recommendation that the rule require a written request and a written response, because of the voluntary nature of participation in such a process. The commission has, however, added text to adopted subsection (j)(2) to state that the carrier and the requestor should document the agreement.

COMMENT: Commenter recommended the deletion of subsection (i)(3) stating the intent of HB-2600 was to prevent the TWCC from interfering in communications between the carrier and provider and their agreements regarding precertification and payment for health care consistent with those agreements. Commenter further opines that the Texas Labor Code does not provide TWCC with the authority to enforce a precertification agreement entered into by a health care provider and a carrier, and the inclusion of proposed language in subsection (i)(3) would create enforcement powers that the TWCC has not been granted.

RESPONSE: The commission disagrees. Although the process is a voluntary one, the commission rule must address how voluntary certification affects both the provider and the liability of the carrier. In the absence of such a provision, voluntary certification could seem meaningless.

Proposed subsection (i)(4)

COMMENT: Commenters asked for clarification of proposed language, requesting whether it means the requestor can not request reconsideration, or appeal, of the denial of precertification; or, if it means that the requestor cannot request dispute resolution in accordance with Texas Labor Code, §413.031 and §133.305 of this title. Commenter questioned where precertification requests can be disputed, if not through this process, and questioned who performs the retrospective review. Commenter recommended the subsection (i)(4) be deleted because denials of precertification should progress to medical review.

RESPONSE: If voluntary certification is denied, the requestor may not request reconsideration and may not appeal the decision to an IRO. To allow appeals on items other than those listed in subsection (h) could be contrary to the legislative intent that preauthorization be required for only some health care, and not all. It could also adversely impact the dispute resolution system established by HB-2600. The health care is subject to retrospective review by the carrier, and the requestor may at that time appeal any denials in accordance with Texas Labor Code, §413.031 and Chapter 133 of this title (relating to General Medical Provisions).

Proposed §134.600(j)

COMMENT: Commenters expressed concern and opposition to the language in subsection (j) regarding the commission's authority to increase or decrease the levels of preauthorization and concurrent review for specific doctors in the system pursuant to other sections in the Texas Labor Code, questioning the "fairness" of such action and suggesting it is "discriminatory." Commenters requested clarification on the intent, stating that the language implies "an attempt to audit health care providers" and "change rules on given providers." Another commenter expressed concern that there is no way in which the commission can sanction a doctor not licensed by a Texas licensing board. Commenters further requested clarification on action the commission proposes to effect. Another stated that the authority to increase or decrease review and preauthorization controls applies only to regional networks, under Article 2 of HB-2600.

RESPONSE: The commission disagrees that the authority to increase or decrease utilization review and preauthorization controls on a doctor applies only to regional networks under Article 2 of HB-2600. Texas Labor Code §408.0231(b)(4) authorizes the commission to establish criteria to impose increased or decreased utilization review and preauthorization controls. Any such action will be governed by other rules of the commission and will not be applied in a discriminatory manner. The commission's authority to do so is noted in this rule because it deals with preauthorization and concurrent review. The commission's authority applies to all participants in the Texas workers' compensation system, regardless of their location.

COMMENT: Commenters suggested the re-writing or deletion of subsection (j) as poorly written, unnecessary, serving no purpose, and without explanation of what specific remedies might be applied. Commenters further recommended that insurance carriers be held to the same standards as are others involved in the system and requested clarification regarding what criteria the commission will employ to base it's application of increased or decreased preauthorization controls on individual doctors or individual workers' compensation claims. Commenter recommended that other providers be included in the monitoring of doctors, as they, as case managers, often see over-utilization of services, particularly in rehabilitation programs. Commenters suggested that as an adjunct to the preauthorization rules, and as a more cost effective practice, the commission analyze: utilization patterns, the pattern of appeals, provider types providing health care, and providers who practice outside established standards of care and then compare these data with established utilization standards and consider rules restricting the identified providers. Commenter recommended that the commission identify system abusers by use of professional designation modifiers and restrict those providers or remove them from the process.

RESPONSE: As noted above, HB-2600 added Texas Labor Code §408.0231(b)(4) to authorize the commission to establish

criteria to impose increased or decreased utilization review and preauthorization controls. As with all sanctions, any such action will be governed by other rules of the commission and will not be applied in a discriminatory manner. The commission's monitoring and enforcement actions will be directed toward all types of participants in the workers' compensation system. This rule is only one of many statutory and rule provisions that address monitoring and sanctions. The commission's authority to do so is noted in this rule because it deals with preauthorization and concurrent review.

Proposed §134.600(k) No comments were received pertinent to this subsection.

Proposed §134.600(l)

COMMENT: Commenter stated that there is no justification for §133.206 of this title to remain in effect, and recommended that language be amended as follows: "Section 133.206 will remain in effect only for recommendations or resubmissions of recommendations for spinal surgery submitted prior to the effective date of this section. Recommendations or resubmissions of recommendations for spinal surgery submitted prior to the effective date of this section shall be subject to the rule in effect at the time the original recommendation was submitted."

RESPONSE: The commission disagrees with commenters' position that no justification exists for §133.206 of this title to remain in effect. Current §133.206 must remain in effect for processing Form TWCC-63's filed with the commission before January 1, 2002.

Proposed §134.600(m)

COMMENT: Commenters expressed agreement with the stated effective date of the section; other commenter recommended that for consistency, language should be amended as follows: "The effective date of this section is March 1, 2002. Requests for preauthorization submitted prior to March 1, 2002 shall be subject to the rule in effect at the time the request was submitted." Commenter recommended that requestor must provide objective documentation that there is a substantial change in the medical condition before submitting a new request for preauthorization for the same listed health care, as stated in the current §133.206 of this title.

RESPONSE: The commission agrees with the suggested language for the effective date, although the effective date has been changed to January 1, 2002. The commission also agrees that a request for preauthorization for the same health care that has been denied at the IRO level as not medically necessary, should be limited Language has been revised and added to the rule to appropriately reflect the recommendation (see adopted subsection (g)(4) and subsection (o)).

The amendment is adopted 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, the Texas Labor Code: §402.061, which authorizes the commission to adopt rules necessary to administer the Act; the Texas Labor Code §406.010 that authorizes the commission to adopt rules regarding claims service; 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, §408.025 which requires the Commission to specify by rule what reports a health care provider is required to file; the Texas Labor Code §408.026, (as amended by HB-2600, 2001 Texas Legislature) that requires the preauthorization of spinal surgery; the Texas Labor Code, §409.021, which requires insurance carriers to timely initiate or dispute compensation; 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; 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, §413.013 which requires the Commission by rule to establish a program for prospective, concurrent, and retrospective review and resolution of a dispute regarding health care treatments and services; a program for the systematic monitoring of the necessity of the treatments administered and fees charged and paid for medical treatments or services including the authorization of prospective, concurrent or retrospective review and a program to detect practices and patterns by insurance carriers in unreasonably denying authorization of payment for medical services, and a program to increase the intensity of review; the Texas Labor Code §413.014 (as amended by HB-2600, 2001 Texas Legislature) that requires the commission to specify by rule, except for treatments and services required to treat a medical emergency, which health care treatments and services require express preauthorization and concurrent review by the carrier as well as allowing health care providers to request voluntary certification and allowing the carriers to enter agreements to pay for treatments and services that do not require preauthorization or concurrent review. This mandate also states the carrier is not liable for the cost of the specified treatments and services unless preauthorization is sought by the claimant or health care provider and either obtained or ordered by the commission; the Texas Labor Code §413.017 that establishes medical services to be presumed reasonable when provided subject to prospective, concurrent review and are authorized by the carrier; the Texas Labor Code §413.031, that establishes the right to access medical dispute resolution; 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; 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;

and the Texas Insurance Code, Article 21.58A, which provides requirements for the certification of health care utilization review agents, standards for utilization review, and provides for appeal of adverse determinations of utilization review agents.

The amendment is adopted under the Texas Labor Code, §401.011, §401.024, §402.042, §402.061, §406.010, §408.021(a), §408.025, §408.026, §409.021, §409.022, §413.002, §413.011 §413.012, §413.013, §413.014, §413.017, §413.031, §414.007, §415.002, §415.003 and the Texas Insurance Code, Article 21.58A,

No other statutes, articles, or codes are affected by the adoption.

§134.600. Preauthorization, Concurrent Review, and Voluntary Certification of Health Care.

(a) The following words and terms, used in this section shall have the following meanings, unless the context clearly indicates otherwise:

(1) Ambulatory surgical services: surgical services provided in a facility that operates primarily to provide surgical services to patients who do not require overnight hospital care;

(2) Concurrent review: a review of on-going health care listed in subsection (i) of this section for an extension of treatment beyond previously approved health care listed in subsection (h) of this section;

(3) Final adjudication: the commission has issued a final decision or order that is no longer subject to appeal by either party;

(4) Outpatient surgical services: surgical services provided in a freestanding surgical center or a hospital outpatient department to patients who do not require overnight hospital care;

(5) Preauthorization: prospective approval obtained from the insurance carrier by the requestor or injured employee (employee) prior to providing the health care treatment or services (health care); and

(6) Requestor: the health care provider or designated representative, including office staff or a referral health care provider/health care facility who requests preauthorization, concurrent review or voluntary certification.

(b) The insurance carrier is liable for all reasonable and necessary medical costs relating to the health care required to treat a compensable injury:

(1) listed in subsection (h) or (i) of this section, only when the following situations occur:

(A) an emergency, as defined in §133.1 of this title (relating to Definitions);

(B) preauthorization of any health care listed in subsection (h) of this section was approved prior to providing the health care;

(C) concurrent review of any health care listed in subsection (i) of this section was approved prior to providing the health care; or

(D) when ordered by the commission; or

(2) per subsection (j) of this section, when voluntary certification was requested and payment agreed upon prior to providing the health care, for any health care not listed in subsection (h) of this section.

(c) The carrier is not liable under subsection (b) of this section if there has been a final adjudication that the injury is not compensable or that the health care was provided for a condition unrelated to the compensable injury.

(d) The carrier or its agent, to include utilization review agent (carrier) shall designate accessible direct telephone and facsimile numbers, and may designate an electronic transmission address for use by the requestor or employee to request preauthorization or concurrent review during normal business hours. The direct number shall be answered or the facsimile or electronic transmission address responded to by the carrier within the time limits established in subsection (f) of this section.

(e) The requestor or employee shall request and obtain preauthorization from the carrier prior to providing or receiving health care listed in subsection (h) of this section. Concurrent review shall be requested prior to the conclusion of the specific number of treatments or period of time preauthorized and approval must be obtained prior to extending the health care listed in subsection (i) of this section. The request shall:

(1) be sent to the carrier by telephone, facsimile, or electronic transmission;

(2) include:

(A) the specific health care listed in subsections (h) or (i) of this section;

(B) the number of specific health care treatments and/or the specific period of time requested;

(C) the medical information to substantiate the need for the health care recommended;

(D) the accessible telephone and facsimile numbers and may designate an electronic transmission address for use by the carrier;

(E) the name of the provider performing the health care; and

(F) the facility name and estimated date of proposed health care.

(f) The carrier shall:

(1) approve or deny requests for preauthorization or concurrent review based solely upon the reasonable and necessary medical health care required to treat the injury, regardless of:

(A) unresolved issues of compensability, extent of or relatedness to the compensable injury;

(B) the carrier's liability for the injury; or

(C) the fact that the employee has reached maximum medical improvement.;

(2) prior to the issuance of a denial, afford the requestor a reasonable opportunity to discuss the clinical basis for a denial with the appropriate doctor or health care provider performing the review;

(3) contact the requestor or employee by telephone, facsimile, or electronic transmission with the decision to approve or deny the request:

(A) within three working days of receipt of a request for preauthorization; or

(B) within three working days of receipt of a request for concurrent review; , except for health care listed in subsection (i)(1) of this section, which is due within one working day of the receipt of the request.

(4) send written notification of the approval or denial of the request, within one working day of the decision to:

(A) the employee;

(B) the employee's representative; and

(C) the requestor, if not previously sent by facsimile or electronic transmission;

(5) include in an approval:

(A) the specific health care;

(B) number of health care treatments and/or the specific period of time approved; and

(C) notice of any unresolved denial of compensability or liability or an unresolved dispute of extent of or relatedness to the compensable injury; or

(6) include in a denial:

(A) the description or source of screening criteria used, the principal reasons, and clinical basis for making the denial; and

(B) plain language notifying the employee of the right to timely request reconsideration of the health care denied under subsection (g) of this section.

(g) If the response is a denial of preauthorization the requestor or employee may request a reconsideration of the denied health care. If the response is a denial of health care requiring concurrent review, the requestor may request reconsideration of the denied health care.

(1) The requestor or employee may, within 15 working days of receipt of a written denial, request the carrier to reconsider the denial and shall document the reconsideration request.

(2) The carrier shall respond to the request for reconsideration of the denial:

(A) within five working days of receipt of a request for reconsideration of denied preauthorization; or

(B) within three working days of receipt of a request for reconsideration of denied concurrent review, except for health care listed in subsection (i)(1), which is due within one working day of the receipt of the request;

(3) The requestor or employee may appeal the denial of a reconsideration request by filing a dispute in accordance with Texas Labor Code §413.031 and §133.305 of this title (relating to Medical Dispute Resolution).

(4) A request for preauthorization for the same health care, that has been denied at the IRO level as not medically necessary, may only be resubmitted when the requestor provides objective documentation of a substantial change in the employee's medical condition.

(h) The non-emergency health care requiring preauthorization includes:

(1) inpatient hospital admissions including the principal scheduled procedure(s) and the length of stay;

(2) outpatient surgical or ambulatory surgical services, as defined in subsection (a) of this section;

(3) spinal surgery, as provided by Texas Labor Code §408.026;

(4) all psychological testing and psychotherapy, repeat interviews, and biofeedback; except when any service is part of a preauthorized or exempt rehabilitation program;

(5) all external and implantable bone growth stimulators;

(6) all chemonucleolysis

(7) all myelograms, discograms, or surface electromyograms;

(8) unless otherwise specified, repeat individual diagnostic study, with a fee established in the current Medical Fee Guideline of greater than $350 or documentation of procedure (DOP). (Diagnostic study is defined as any test used to help establish or exclude the presence of disease/injury in symptomatic persons; the test can help determine the diagnosis, screen for specific diseases/injury, guide the management of an established disease/injury and help formulate a prognosis.);

(9) work hardening and work conditioning services provided in a facility that has not been approved for exemption by the commission. For approval, facilities must submit documentation of current accreditation by the Commission on Accreditation of Rehabilitation Facilities (CARF) to the commission. A comprehensive occupational rehabilitation program or a general occupational rehabilitation program provided in a facility accredited by CARF constitute work hardening or work conditioning for purposes of this section. All work hardening or work conditioning programs, regardless of accreditation, will be subject to preauthorization and concurrent review on or after one year from the effective date of this section. Commission exempted facilities are subject to commission verification and audit, and the commission will provide a list of the facilities approved for exemption on the TWCC website, (www.twcc.state.tx.us);

(10) rehabilitation programs to include:

(A) outpatient medical rehabilitation; and

(B) chronic pain management/interdisciplinary pain rehabilitation;

(11) all durable medical equipment (DME) in excess of $500 per item (either purchase or expected cumulative rental) and all tranecutaneous electrical nerve stimulators (TENS) units;

(12) nursing home, convalescent, residential, and all home health care services and treatments;

(13) chemical dependency or weight loss clinics programs; and

(14) any investigational or experimental service or device for which there is early, developing scientific or clinical evidence demonstrating the potential efficacy of the treatment, service, or device but that is not yet broadly accepted as the prevailing standard of care.

(i) The health care requiring concurrent review for an extension for previously approved services includes:

(1) inpatient length of stay;

(2) work hardening or work conditioning services;

(3) investigational or experimental services or use of devices;

(4) rehabilitation programs;

(5) DME in excess of $500 per item and TENS usage;

(6) nursing home, convalescent, residential, and home health care services; and

(7) chemical dependency or weight loss programs.

(j) This subsection governs requests for voluntary certification of health care treatment and treatment plans, either prospectively or

concurrently, that do not require preauthorization or concurrent review under subsections (h) and (i) of this section respectively.

(1) The requestor and carrier may voluntarily discuss health care and/or treatment plans.

(2) The carrier may certify or agree to pay for health care requested under paragraph (1) of this subsection. The carrier and requestor should document the agreement.

(3) Carrier certification, or agreement to pay, subjects the carrier to liability in accordance with subsection (b)(2) of this section.

(4) Denials of voluntary certification under this subsection are not subject to prospective necessity dispute resolution; however, health care for which voluntary certification was denied, is subject to retrospective necessity dispute resolution.

(k) An increase or decrease in review and preauthorization controls may be applied to individual doctors or individual workers' compensation claims, by the commission in accordance with §408.0231(b)(4) of the Texas Labor Code and other sections of this title.

(l) The carrier must maintain accurate records to reflect information regarding requests for preauthorization or concurrent review, approval/denial decisions, and appeals, if any and provide such information in the form and manner prescribed by the commission.

(1) Upon request of the commission, the carrier shall submit summary information by category of health care with the total numbers of requests, and total number of approvals, denials, and appeals.

(2) Upon request of the commission, the carrier shall submit request-specific information on requests for preauthorization or concurrent review including the information requested by the commission.

(3) On a quarterly basis, the carrier shall electronically submit request-specific information on requests for preauthorization or concurrent review received by the carrier in the prior quarter in the form and format prescribed by the commission.

(4) Paragraph (3) of this subsection is effective upon the earlier of January 1, 2003 or 6 months after the commission specifies the format and manner for electronic submission of the information required under paragraph (3) of this subsection. Paragraphs (1) and (2) of this subsection expire upon the effective date of paragraph (3) of this subsection.

(m) Requests for preauthorization and/or concurrent review shall be responded to in accordance with rules in effect at the time of submission of the request. Where any terms or portions of this section are determined by a court of competent jurisdiction to be invalid, the remaining terms and provisions of this section shall remain in effect to the extent possible. If a portion of this section is declared invalid in a final judgment that is not subject to appeal, or is suspended by order of the court which is given immediate effect, the rule as it existed prior to the effective date of this section shall remain in effect for all requests for preauthorization to the extent necessary.

(n) Section 133.206 of this title (relating to Spinal surgery Second Opinion Process) will remain in effect only for recommendations or resubmissions of recommendations for spinal surgery submitted prior to the effective date of this section.

(o) The effective date of this section is January 1, 2002. Requests for preauthorization submitted prior to January 1, 2002 shall be subject to the rule in effect at the time the request was submitted.

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 November 19, 2001.

TRD-200107155
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: January 1, 2002
For further information, please call: (512) 804-4287

CHAPTER 166. WORKERS' HEALTH AND SAFETY--ACCIDENT PREVENTION SERVICES

28 TAC §166.2

The Texas Workers' Compensation Commission (the commission) adopts an amendment to §166.2, concerning the initial writing and resumption of writing of workers' compensation insurance without changes to the proposed text published in the August 3, 2001, issue of the *Texas Register* (26 TexReg 5766).

As required by the Government Code §2001.033(1), the commission's reasoned justification for this rule is set out in this order that includes the preamble, which in turn includes the rule. This preamble contains a summary of the factual basis of the rule, a summary of comments received from interested parties, names of those groups and associations who commented and whether they were for or against adoption of the rule.

Senate Bill 994 (SB 994), passed by the 77th Texas Legislature, 2001, amended Section 411.061 of the Labor Code to read as follows: (a) As a prerequisite for writing workers' compensation insurance in this state, an insurance company must maintain or provide accident prevention facilities that are adequate to provide accident prevention services required by the nature of its policyholders' operations. Previously §411.061 required the maintenance of accident prevention facilities as a prerequisite for obtaining a license to write workers' compensation insurance. The proposed change to §166.2, necessitated by SB 994, will allow an insurance company to be issued its initial license to write workers' compensation insurance in Texas prior to filing a plan with the division. However, the company shall not write workers' compensation insurance in Texas until they have filed a plan with the division, and it is approved, describing the accident prevention services they will provide. In addition, proposed §166.2 changes the reference to Chapter 145 of the commission's rules to Chapter 148 to reflect the rules, which are applicable to disputes related to the approval of Accident Prevention Services Plans

One comment supporting the proposed amendment to §166.2 was received from the Insurance Council of Texas. A summary of the comment and commission response is as follows:

COMMENT: Commenter indicated support for the adoption of the proposed amendment of §166.2.

RESPONSE: The commission agrees that the amendment is needed.

The amended rule is adopted pursuant to the Texas Labor Code §402.061, which requires the commission to adopt rules necessary for the implementation and enforcement of the Texas Workers Compensation Act, and the Texas Labor Code §411.061, which requires an insurance company to provide accident prevention services.

The amended rule is adopted pursuant to the Texas Labor Code §402.061 and §411.061.

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 November 19, 2001.

TRD-200107150
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Effective date: December 9, 2001
Proposal publication date: August 3, 2001
For further information, please call: (512) 804-4287

♦ ♦ ♦

TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 371. DRINKING WATER STATE REVOLVING FUND

The Texas Water Development Board (the board) adopts amendments to 31 TAC §§371.2, 371.12, 371.21, 371.32, 371.71, 371.89 and new §371.33 concerning the Drinking Water State Revolving Fund (the "DWSRF"), without changes to the proposed amendments and new section as published in the October 5, 2001 issue of the *Texas Register* (26 TexReg 7809) and will not be republished. The amendments will update a legal reference in a definition, clarify the board's ability to provide loans with up to a 30-year repayment term, and delete a provision exempting Disadvantaged Communities from a rating scale which provides that projects having either identical or tied scores will be listed in order of population. The amendments will delete a potentially confusing provision which appeared to contradict the intent of a section authorizing the executive administrator to exempt certain applicants from a requirement that they submit monthly certified requests for payment. The amendments will also add flexibility to the board's ability to provide loans to private applicants, nonprofit noncommunity applicants, and non-profit water supply corporation applicants with regard to a surcharge required under the board's current rules.

The amendments to §371.2(21) will update a reference to a legal citation, by adding language to reflect that Article 1434a, Vernon's Texas Civil Statutes has been codified as Chapter 67 of the Texas Water Code. The amendments to §371.12(1)(B) will clarify that the board has the ability to make loans with up to a 30-year repayment schedule to applicants which qualify as Disadvantaged Communities pursuant to Chapter 371. The amendments to §371.21(a) will delete a provision which exempts Disadvantaged Communities from a rating scale which provides that projects having either identical or tied scores will be listed in order of population. The board does not believe that disadvantaged communities should be treated differently from other communities for purposes of this section.

Section 371.32(b)(12) is amended to clarify that a copy of an acknowledgment from the Texas Natural Resource Conservation Commission (TNRCC) of a surcharge filing with the TNRCC is required as a prerequisite to board consideration of an item, for applicants required to utilize a surcharge. New §371.33 will clarify a requirement that eligible private applicants and eligible nonpublic noncommunity applicants that are not also eligible public applicants are required to utilize a surcharge and surcharge account through the TNRCC. The new section is intended to provide flexibility by providing that the board may consider other sources of revenue in cases in which a surcharge is not available to an applicant, based upon evidence satisfactory to the executive administrator of the board that a surcharge is not available.

Amendments to §371.71(a)(9) will clarify that a surcharge account is only required for eligible private applicants and eligible NPNC applicants which are not also eligible public applicants. Amendments to §371.71(a)(9) will delete a reference to monthly monitoring by the TNRCC regarding surcharges imposed on applicants. Additionally, §371.71(a)(9) is amended to clarify that a first mortgage lien on a water system, an owners title insurance policy, and a first lien on all revenues of a water system will not be required for eligible NPNC applicants which are also eligible public applicants.

The amendments to §371.89 will remove a provision which appears to contradict the intent of §371.89. Section 371.89 allows the executive administrator of the board to exempt applicants whose projects are not funded with federal grant funds from a requirement that they submit monthly certified requests for payment. The deleted language required applicants to submit such documents even after the executive administrator had provided an exemption from this requirement pursuant to this section.

There were no comments received on the proposed amendments and new section.

SUBCHAPTER A. INTRODUCTORY PROVISIONS

31 TAC §371.2

The amendments are adopted under the authority of the Texas Water Code, §6.101 and §15.605 which provide 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 the SRF 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 November 14, 2001.

TRD-200107020

Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: December 4, 2001
Proposal publication date: October 5, 2001
For further information, please call: (512) 463-7981

♦ ♦ ♦

SUBCHAPTER B. PROGRAM REQUIREMENTS

31 TAC §371.12, §371.21

The amendments are adopted under the authority of the Texas Water Code, §6.101 and §15.605 which provide 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 the SRF 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 November 14, 2001.

TRD-200107021
Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: December 4, 2001
Proposal publication date: October 5, 2001
For further information, please call: (512) 463-7981

♦ ♦ ♦

SUBCHAPTER C. APPLICATION FOR ASSISTANCE

31 TAC §371.32, §371.33

The amendments and new section are adopted under the authority of the Texas Water Code, §6.101 and §15.605 which provide 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 the SRF 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 November 14, 2001.

TRD-200107022
Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: December 4, 2001
Proposal publication date: October 5, 2001
For further information, please call: (512) 463-7981

♦ ♦ ♦

SUBCHAPTER F. PREREQUISITES TO RELEASE OF FUNDS

31 TAC §371.71

The amendments are adopted under the authority of the Texas Water Code, §6.101 and §15.605 which provide 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 the SRF 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 November 14, 2001.

TRD-200107023
Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: December 4, 2001
Proposal publication date: October 5, 2001
For further information, please call: (512) 463-7981

♦ ♦ ♦

SUBCHAPTER G. BUILDING PHASE

31 TAC §371.89

The amendments are adopted under the authority of the Texas Water Code, §6.101 and §15.605 which provide 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 the SRF 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 November 14, 2001.

TRD-200107024
Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: December 4, 2001
Proposal publication date: October 5, 2001
For further information, please call: (512) 463-7981

♦ ♦ ♦

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 §1.122

The Texas Department of Public Safety adopts the repeal of §1.122, concerning Driver Records Bureau Fees, without changes to the proposed text as published in the September 14, 2001, issue of the *Texas Register* (26 TexReg 7068) and will not republish it.

The repeal is necessary due to the rule being outdated. Fees are now established by statute as a result of the passage of Tex. H.B. 1544, Acts 2001, 77th Leg., R.S., ch. 1032, §2.

No comments were received regarding adoption of the repeal.

The repeal 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, §521.005.

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 November 15, 2001.

TRD-200107055
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: December 5, 2001
Proposal publication date: September 14, 2001
For further information, please call: (512) 424-2135

♦ ♦ ♦

37 TAC §1.129

The Texas Department of Public Safety adopts an amendment to §1.129, concerning Fees for Sale of Motor Vehicle Accident Reports in Highway Patrol Field Offices, without changes to the proposed text as published in the September 14, 2001, issue of the *Texas Register* (26 TexReg 7068) and will not republish it.

The amendment is necessary to bring the rule current and consistent with statute.

Amendment to §1.129 subsection (b) removes the fee previously set by rule and allows for any future adjustments as a result of Tex. H.B. 1544, Acts 2001, 77th Leg., R.S., ch. 1032, §5, which increased the fee for the sale of accident reports.

No comments were received regarding adoption of the 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, §521.005.

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 November 15, 2001.

TRD-200107053
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: December 5, 2001
Proposal publication date: September 14, 2001
For further information, please call: (512) 424-2135

♦ ♦ ♦

CHAPTER 15. DRIVERS LICENSE RULES
SUBCHAPTER B. APPLICATION REQUIREMENTS--ORIGINAL, RENEWAL, DUPLICATE, IDENTIFICATION CERTIFICATES

37 TAC §§15.38, 15.45, 15.47

The Texas Department of Public Safety adopts amendments to §§15.38, 15.45, and 15.47, concerning Application Requirements - Original, Renewal, Duplicate, Identification Certificates, without changes to the proposed text as published in the September 14, 2001, issue of the *Texas Register* (26 TexReg 7071) and will not republish them.

Amendments to the sections are necessary to ensure that the public is aware of when thumbprints are required to be taken, the proof of eligibility requirements veterans must meet for fee exemption, and rules consistent with statute.

Section 15.38(1)(4)(C) is amended to prohibit an applicant, who otherwise meets the veteran fee exemption requirements but is subject to the sex offender registration requirements of Chapter 62, Code of Criminal Procedure, from receiving a fee waiver as passed by Tex. H.B. 2663, Acts 2001, 77th Leg., R.S., ch. 546, §8.

Section 15.45 originally only waived the requirement for obtaining thumbprints for mail renewal applicants; since the implementation of other alternative methods for renewing or duplicating a driver license or identification certificate, this section is amended to allow for this waiver to apply to those alternative methods also.

Section 15.47 is amended due to the passage of Tex. H.B. 3016, Acts 2001, 77th Leg., R.S., ch. 3016, §1, which allows the use of the electronically readable information on a Texas driver license, commercial driver license, or identification certificate to include the authorization to utilize this format for the prevention of the sale of alcoholic beverages to minors or to comply with the Texas Alcoholic Beverage Commission record keeping rules regarding private club membership.

No comments were received regarding adoption of the amendments.

The amendments are 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, §521.005.

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 November 15, 2001.

TRD-200107054

Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: December 5, 2001
Proposal publication date: September 14, 2001
For further information, please call: (512) 424-2135

♦ ♦ ♦

PART 6. TEXAS DEPARTMENT OF CRIMINAL JUSTICE

CHAPTER 155. REPORTS AND INFORMATION GATHERING

SUBCHAPTER C. PROCEDURES FOR RESOLVING CONTRACT CLAIMS AND DISPUTES

37 TAC §155.31

The Texas Department of Criminal Justice adopts an amendment to §155.31, concerning Establishing Procedures for Resolving Contract Claims and Disputes without changes to the proposed text as published in the October 19, 2001, issue of the *Texas Register* (26 TexReg 8325). The purpose of the amendment to subsection (j) is to further outline the appeal process with regard to contracts for private correctional facilities.

The amendment will enable the existence of orderly contract dispute resolution procedures for the Department, in compliance with state law.

No comments were received regarding adoption of the amendment as proposed.

The amendment is adopted under Texas Government Code, §492.013, which grants general rulemaking authority to the Board and §495.008(e)(2001), which specifically authorizes 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 November 19, 2001.

TRD-200107110
Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Effective date: December 9, 2001
Proposal publication date: October 19, 2001
For further information, please call: (512) 463-9693

♦ ♦ ♦

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 9. TEXAS DEPARTMENT ON AGING

CHAPTER 260. AREA AGENCY ON AGING ADMINISTRATIVE REQUIREMENTS

40 TAC §260.4

The Texas Department on Aging adopts new §260.4, concerning Certification of Benefits Counselors Regarding the Preparation of Advanced Directives, without changes to the proposed text as published in the August 31, 2001, issue of the *Texas Register* (26 TexReg 6638) and will not be republished.

Section 260.4 is adopted in order to conform to the requirements of House Bill 1420 (HB 1420). HB 1420 was enacted during the 77th Legislative Session. In accordance with this bill, the "practice of law" does not include technical assistance, consultation, and documentation completion assistance relating to medical power of attorney or other advance directives under Chapter 166, Health and Safety Code or a designation of guardian before need arises under Section 679, Texas Probate Code when the assistance is provided by an employee or volunteer of an area agency on aging affiliated with the Texas Department on Aging who meets the identified requirements under the bill. HB 1420 requires the Texas Department on Aging by rule to develop certification procedures.

No comments were received regarding adoption of the new rule.

The new rule is adopted under Texas Government Code, §2161.003, which provides the Texas Department on Aging with the authority to promulgate rules governing the operation of the Department.

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 November 13, 2001.

TRD-200106996
Gary Jesse
Aging Network Policy Coordinator
Texas Department on Aging
Effective date: December 3, 2001
Proposal publication date: August 31, 2001
For further information, please call: (512) 424-6857

♦ ♦ ♦

TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 5. FINANCE

SUBCHAPTER B. COLLECTION OF DEBTS

43 TAC §5.11

The Texas Department of Transportation adopts new §5.11, concerning charges for dishonored checks. Section 5.11 is adopted without changes to the proposed text as published in the September 14, 2001, issue of the *Texas Register* (26 TexReg 7084) and will not be republished.

EXPLANATION OF ADOPTED NEW SECTION

Business and Commerce Code, §3.506, authorizes the holder of a dishonored check seeking collection of the face value of the check to charge the drawer or endorser of the check a reasonable processing fee, not to exceed $25. In Fiscal Year 2000, the department processed 969 dishonored checks totaling $715,522.17 in payments made to the department.

The department incurs personnel costs of approximately $18 per check to process checks returned after dishonor. Additionally, banks or other financial institutions linked to the state's rapid deposit system charge the department fees ranging from $7.50 to $25.00 per item or deposit if the deposited check is dishonored. As a result, the department incurs processing costs exceeding the $25 fee allowed under state law each time a check made payable to the department is returned after its dishonor.

New §5.11 is necessary to allow the department to implement the authority to charge a fee to offset administrative expenses incurred in processing a dishonored check received as payment to the department, and to prescribe procedures for processing dishonored checks. New §5.11 specifies that upon receipt of notice of dishonor by a bank or other financial institution, the department will send written notice of dishonor to the check's drawer or endorser, requesting payment of the face amount of the check and a $25 processing fee. New §5.11 also prescribes the method of payment, required procedures in processing obligations that are not paid and become delinquent, and alternative collection procedures such as referring a dishonored check for criminal prosecution pursuant to Penal Code, §32.41.

COMMENTS

No comments were received on the proposed new section.

STATUTORY AUTHORITY

The new section is adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation.

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 November 15, 2001.

TRD-200107037
Richard D. Monroe
General Counsel
Texas Department of Transportation
Effective date: December 5, 2001
Proposal publication date: September 14, 2001
For further information, please call: (512) 463-8630

♦ ♦ ♦

CHAPTER 9. CONTRACT MANAGEMENT
SUBCHAPTER A. GENERAL

43 TAC §9.9

The Texas Department of Transportation adopts new §9.9, concerning interlocal contracts. Section 9.9 is adopted without changes to the proposed text as published in the September 14, 2001, issue of the *Texas Register* (26 TexReg 7085) and will not be republished.

EXPLANATION OF ADOPTED NEW SECTION

House Bill 1831, 77th Legislature, 2001, added new §201.209 to the Transportation Code, effective September 1, 2001, which authorizes the department to enter into interlocal contracts with one or more local governments in accordance with Government Code, Chapter 791.

Until the passage of new Transportation Code, §201.209 the department only had the authority to enter into agreements for non-highway improvement projects if two or more local governments also agreed to the contract pursuant to Government Code, Chapter 791. This limited the department's ability to efficiently and effectively accomplish transportation projects that were not directly connected to a highway. The types of contracts that were limited to agreements with two local governments include, but were not limited to, contracts to share equipment, treat water, test materials, control traffic, and expand intelligent transportation systems. Allowing the department to contract with one local government will expedite transportation projects.

COMMENTS

No comments were received on the proposed new section.

STATUTORY AUTHORITY

The new section is adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation, and more specifically, Transportation Code, §201.209 which authorizes the department to enter into an interlocal contract with one or more local governments and by rule adopt policies and procedures consistent with applicable state procurement practices for soliciting and awarding contracts.

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 November 15, 2001.

TRD-200107038
Richard D. Monroe
General Counsel
Texas Department of Transportation
Effective date: December 5, 2001
Proposal publication date: September 14, 2001
For further information, please call: (512) 463-8630

♦ ♦ ♦

CHAPTER 17. VEHICLE TITLES AND REGISTRATION
SUBCHAPTER B. MOTOR VEHICLE REGISTRATION

43 TAC §17.24, §17.28

The Texas Department of Transportation adopts amendments to §17.24 and §17.28, concerning disabled person license plates and identification placards and special category license plates, symbols, tabs, and other devices. Sections 17.24 and 17.28 are adopted without changes to the proposed text as published in

the September 14, 2001, issue of the *Texas Register* (26 TexReg 7090) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

House Bill 15, 77th Legislature, 2001, amended Transportation Code, §502.253, to provide that disabled person license plates may be issued for motor vehicles with a carrying capacity of two tons or less. Previously, disabled person license plates could only be issued for passenger cars, motorcycles, and light trucks.

Senate Bill 777, 77th Legislature, 2001, amended Transportation Code, §502.253 and §681.003, to provide that in the case of a mobility problem caused by a disorder of the foot, an application for a disabled person license plate or placard may be signed by a podiatrist. Previously, the application had to be signed by a physician.

House Bill 1831, 77th Legislature, 2001, amended Transportation Code, §502.299, to provide for a fee of $30 for YMCA license plates. Previously, the fee was set by the department.

Section 17.24(b)(1)(A) is amended to reflect that House Bill 15 allows disabled person license plates to be issued for motor vehicles with carrying capacities of up to two tons and not just for passenger vehicles.

Section 17.24(c)(3)(B) and (D) is amended to reflect that House Bill 777 permits podiatrists to sign applications for disabled person license plates and placards if the mobility problem is caused by a disorder of the foot.

Section 17.28(b)(2)(iii) is eliminated because House Bill 1831 set the fee for YMCA license plates; and therefore it is no longer necessary for the commission to set the fee.

Section 17.28 (d)(1)(B)(v) is eliminated because the expiration dates of Disabled Veteran license plates are now staggered throughout the year.

COMMENTS

No comments were received on the proposed amendments.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation, and more specifically, Transportation Code, Chapter 502, which authorizes the department to carry out the provisions of the those laws governing the registration of motor vehicles.

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 November 15, 2001.

TRD-200107039
Richard D. Monroe
General Counsel
Texas Department of Transportation
Effective date: December 5, 2001
Proposal publication date: September 14, 2001
For further information, please call: (512) 463-8630

♦ ♦ ♦

CHAPTER 25. TRAFFIC OPERATIONS
SUBCHAPTER A. GENERAL

43 TAC §25.2

The Texas Department of Transportation adopts new §25.2 concerning load limits on county roads or bridges. Section 25.2 is adopted without changes to the proposed text as published in the September 14, 2001, issue of the *Texas Register* (26 TexReg 7096) and will not be republished.

EXPLANATION OF ADOPTED RULES

Senate Bill 220, 77th Legislature, 2001 amended Transportation Code, §621.301 to provide that a county may establish load limits for a county road or bridge only with the concurrence of the department. New §25.2 prescribes the policies and procedures governing department concurrence with a proposed county load limit.

The Code of Federal Regulations (C.F.R.), Title 23, Part 650, Subpart C, requires the department to inspect all bridges on publicly owned roads and to determine the safe load limits of these bridges. Subpart C also requires load limits to be posted on any bridge that is found to be incapable of carrying unrestricted traffic. Professional engineers licensed in the State of Texas make these determinations.

Transportation Code, §201.8035, requires the department to notify counties if the department inspects a bridge pursuant to Subpart C and determines that the bridge qualifies for a lower load limit. This section also requires counties to post notices on the road or highway approaching the bridge that has been determined by the department to be incapable of carrying unrestricted traffic.

Bridge load limit recommendations made by the department are based on safety inspections. As a part of the inspection process the department calculates the load limit for each bridge. If the calculated load limit is below the threshold for unrestricted traffic flow, the department notifies the county regarding the bridge load limit so that proper signs can be posted to warn the traveling public.

While the department has a bridge inspection program, the department does not currently inspect or evaluate county roads. As a result the department has not historically made load limit recommendations for county roads.

Subsection (a) of the new rule states the purpose of the rule, which is to prescribe policies and procedures governing department concurrence with a proposed county load limit.

Subsection (b) defines words and terms used in the section.

Subsection (c) provides that if the department inspects a bridge and notifies the county that the bridge qualifies for a lower load limit under 23 C.F.R. Part 650, a load limit established consistent with the department's notification is deemed to have department concurrence. The department's notification serves as evidence of concurrence. This subsection provides a mechanism for counties to receive department concurrence without placing an administrative burden on county government.

Subsection (d)(1) requires a county to submit a proposed revision to a load limit to the department's district engineer. This paragraph does not apply to concurrence under subsection (c).

Subsection (d)(2) requires that each proposed change in load limit be accompanied by supporting documentation that is sealed

by a licensed engineer. The submitted information is necessary for the department to determine that the proposed load limit is based on accepted engineering principles.

Subsection (d)(3)(A) specifies that the district engineer will concur with a county's proposed load limit if upon review it is determined that the submitted documentation and calculations are based on accepted engineering principles. This provision is intended to ensure that the proposed load limit is warranted and that load limits are consistently established across the state.

Subsection (d)(3)(B) indicates that written notification, regarding concurrence or non-concurrence, will be provided to the counties by the district engineer within 30 calendar days.

Subsection (d)(3)(C) states that if department concurrence is not received within 30 calendar days of receipt by the department of a request that includes all the required documentation, the proposed load limit shall be deemed concurred with by the department. The department may remove this automatic concurrence at any time after 30 calendar days by providing written notification to the county. The 30 calendar days allow the department time to review the proposed load limit and confirm that consistency is maintained statewide. The review also facilitates prompt load posting ensuring the safety of the traveling public.

Subsection (d)(4) allows the county to appeal the decision of the district engineer. If the county wishes to appeal it shall submit a written request, along with the required documentation, to the department's executive director. The executive director will review the request and determine if department concurrence will be granted. Any decision by the executive director regarding a county's appeal is final.

COMMENTS

No comments were received on the proposed new section.

STATUTORY AUTHORITY

This new section is adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation.

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 November 15, 2001.

TRD-200107040
Richard D. Monroe
General Counsel
Texas Department of Transportation
Effective date: December 5, 2001
Proposal publication date: September 14, 2001
For further information, please call: (512) 463-8630

♦ ♦ ♦

SUBCHAPTER I. SAFE ROUTES TO SCHOOL PROGRAM

43 TAC §§25.500 - 25.503

The Texas Department of Transportation adopts new Subchapter I in Chapter 25, §§25.500-25.503, concerning the Safe Routes to School Program. Section 25.500 is adopted without changes to the proposed text as published in the September 14, 2001, issue of the *Texas Register* (26 TexReg 7098), and will not be republished. Based on comments received, and agency clarifications, §§25.501-25.503 are adopted with changes.

EXPLANATION OF ADOPTED NEW SECTIONS

House Bill 2204, 77th Legislature, 2001, added Transportation Code, §201.614 directing the Texas Department of Transportation (the department) to establish the Safe Routes to School Program (SRS). The overall purpose of this program is to improve safety in and around school areas for school age children.

House Bill 2204 also allows, but does not require, the department to use federal Hazard Elimination Program (HES) funds from the United States Department of Transportation for SRS projects.

The department is developing rules in two steps for the implementation of HB 2204. The first step, as adopted in this rulemaking, describes eligible project types and the application submittal process. The second round of rulemaking will focus on the factors the department will consider in evaluating SRS applications. The department is using this two-step approach in order to initiate the Safe Routes to School Program rules as soon as possible.

Section 25.500 describes the purpose of the new subchapter, which is to implement House Bill 2204, establishing the Safe Routes to School Program. The section notes that the purpose of the program is to improve safety in and around school areas, and that candidate projects may be awarded federal HES construction funds.

Section 25.501 provides definitions for words and terms used in the new subchapter. This section defines "public property" as that owned by the state, city, or county. The section also defines the term "political subdivision" as a municipality or county within the State of Texas. SRS projects may be funded by federal Hazard Elimination construction funds. These federal funds must be expended for projects on public property. These definitions are included to ensure that any funded Safe Routes to School projects are implemented in a manner consistent with federal guidelines.

In addition, the department believes SRS projects will be constructed on public property owned by municipalities and counties. These definitions ensure that candidate SRS projects have the full support of the appropriate local jurisdiction.

Section 25.502 describes which types of projects are eligible for the SRS program. Projects including traffic calming measures will be accepted for the SRS program, but only for placement on local roads (such as city streets and county roads). Traffic calming devices are not utilized on the state highway system because the department believes that they are inappropriate for higher speed roadway facilities.

Section 25.502 states that only projects submitted by political subdivisions are eligible for the program. As noted earlier, this requirement will ensure that submitted SRS projects have the full support of the local jurisdiction in which the project will be constructed.

Section 25.502 also requires eligible projects to be located on public property, either on or off the designated state highway system. As noted earlier, this will ensure that SRS projects are developed in compliance with federal program guidelines.

The section requires eligible projects to be within a two-mile radius of a school. The department has included this requirement since many school districts will not provide bus service to students that live within two miles of a school. The department believes inclusion of this requirement will provide enough flexibility to ensure that proposed SRS projects can adequately address student pedestrian and bicycle needs.

The section also notes that proposals must cover a single school site, except that applications covering multiple school sites will be considered if they are for similar improvements and the schools covered by the proposal are located within a two-mile radius of each other. Single applications covering multiple types of work at multiple disparate school campuses will not be accepted. This will allow the department to target specific problems and ensure that limited funding is directed to specific schools with documented safety problems. This requirement will also ensure that any submitted SRS projects can be determined to be cost/beneficial in the same manner as other types of safety construction projects.

Section 25.503 describes how the department will call for project applications, how this call will be publicized, who may apply for the program, and the process by which an applicant will submit an application to the department. This section requires candidate SRS projects to be submitted through local department districts. This requirement will ensure that the department's local district offices are familiar with any SRS project proposed within their region.

COMMENTS

On September 19, 2001, a public hearing was held to receive comments, views, or testimony concerning the proposed adoption of §§25.500-25.503. Comments in favor of the proposed rule were received at the hearing from Gayle Cummins of the Texas Bicycle Coalition. Preston Tyree, of the Texas Bicycle Coalition, spoke on the proposed new language. Three sets of written comments were also received.

Comment: One commenter suggested that we modify the definition of "school" as contained in §25.501 to include public or private universities or colleges. The commenter noted that he believed that this change would not modify the spirit of House Bill 2204.

Response: The department believes that the intent of House Bill 2204 is to improve safety for school age children. House Bill 2204 added §201.614(b)(2) to the Transportation Code. This section requires the department to consider the potential of any proposed Safe Routes to School project "to reduce child injuries and fatalities" when evaluating any application. College and university students are almost always adults and fall outside of the stated intent of the legislation. The department also believes that expanding project eligibility to colleges and universities would dilute the availability of limited federal funding. For these reasons, the department declines to modify the definition of schools as contained in §25.501 to include public or private universities or colleges

However, the department wishes to make an agency clarification regarding the definition of "school" as contained in §25.501. The department has added the category "intermediate" to the list of eligible types of schools in order to ensure that we cover all types of eligible schools. The new definition will now read "A public or private elementary, intermediate, middle, junior high, or high school."

Comment: Two commenters noted that, in general, the Safe Routes to School concept involves a more comprehensive approach than that proposed by the department through this rulemaking action. These commenters noted that a successful SRS should involve residents, school administrators, city or county authorities, and traffic engineers.

Response: The department concurs that a community-wide SRS program may incorporate additional elements other than the construction program proposed by the department in this rulemaking action. However, the department believes that House Bill 2204 directs the department to develop a program focusing on construction improvements. House Bill 2204 specifically mentions various types of construction activities that the department may consider during the evaluation of candidate projects and that the department may use federal Hazard Elimination Program construction funds for these projects. The department believes that our role is limited as per House Bill 2204 to developing a program to consider construction projects designed to improve school area safety. There is nothing contained in the proposed rules that would prevent any group or organization from promoting a broader SRS program such as that described by the commenters.

Comment: Three commenters noted that under proposed §25.501 a political subdivision is defined as a municipality and county. These commenters also noted that this section defines public property without including property owned by independent school districts. These commenters noted that independent school districts could also be considered a political subdivision. The commenters suggest that broadening the definition to include public school districts would allow them to submit their own projects under the SRS program.

Response: The department believes that the most effective safety projects will involve roadway construction on city, county, or state right-of-way. In addition, the department also believes that it will be critically important for affected jurisdictions to support and concur with any proposal that affects their right of way.

In addition, the expansion of the definition of "political subdivision" to include independent school districts would create a serious equity issue for private schools. Federal law, as contained in 23 U.S.C. §152 only allows the expenditure of Hazard Elimination Funds on publicly owned property.

For these reasons, the department declines to modify this section as originally proposed.

Comment: One commenter also noted that projects on public school property would be allowable under federal law as contained in 23 U.S.C. §152(c)(2).

Response: The department notes that the rules for the Hazard Elimination Program as promulgated by the Federal Highway Administration of the United States Department of Transportation and contained in 23 CFR Part 924 focus extensively on public roadways. The purpose of the program as noted in this section is "reducing the number and severity of accidents and decreasing the potential for accidents on all highways." Furthermore, in §924.7 all states are directed to develop a Hazard Elimination Program which "covers all public roads." Finally, §924.11(b) notes that apportioned Hazard Elimination Program funds are to be used to implement highway safety improvement projects on any public road. For these reasons, the department believes that federal Hazard Elimination Program funds are not appropriate for use on public school district property and that these

improvements would be more aptly completed by the school districts themselves.

Comment: Three commenters noted that definitions as contained §25.502 have the effect of requiring a SRS project application to be submitted by either a city or county. These commenters believe that this requirement may be unnecessary burdensome to school districts who wish to originate and submit their own applications. One commenter also noted that some school districts may be located in multiple cities or counties and that this requirement may make it difficult for these districts to submit an application.

Response: As per the proposed rules, all Safe Routes to School Projects will be constructed on some portion of public right of way controlled by a city, county, or by the state. For this reason the department believes that support by the local jurisdiction in which a proposed Safe Routes to School project is located is crucial. There would be little point to submitting an application for such a project without this support.

The department also believes that most submitted applications will cover projects contained in only a single municipality or county. In situations where an SRS project covers multiple jurisdictions, the department believes it will still be important for both affected jurisdictions to show support for the project by endorsing and submitting the project application. The department believes that it will be able to exhibit sufficient flexibility at the local level to ensure that this process can work without forcing an undue burden on local schools.

Comment: Three commenters noted that the proposed §25.503 prohibits the submission of multiple projects covering an entire school district. These commenters suggested that the department allow school districts to propose similar projects across an entire school district, even if these projects are not located within two miles of each other.

Response: The department believes that it is appropriate to limit projects to finite geographical areas. As noted earlier, the department wishes to target problems as specifically as possible due to the limited nature of available federal safety construction funds.

In addition, the department would like to note that the proposed rules do allow applications for projects of a similar nature across multiple school campuses as long as those campuses are within a two-mile radius of each other.

For these reasons, the department declines to change this portion of the rules as originally proposed.

The department wishes to clarify §25.502(d) regarding required local contributions. As originally proposed this portion of the rules states that all projects are required to provide a matching contribution. After review, the department is modifying this provision to only require a local contribution when the project is located on city or county right of way. When a proposed project is located on the state highway system no local contribution will be required and the state will provide the required match. This revision will make submitted Safe Routes to School project applications more consistent with other federal projects.

Comment: Three commenters suggested that the notification and publication procedures for the SRS program as proposed §25.503 should be expanded. These commenters recommended that the department follow the procedures used by the agency's Transportation Enhancement Program.

Response: The department agrees with the commenters general concept regarding broadening notification of the SRS program. Accordingly, the department will consider other means of publication in addition to the Texas Register during the initial calls for SRS project submissions. Section 25.503 is amended to reflect this change.

Comment: One commenter also suggested that the department offer regional training on the SRS similar to that offered for the department's Transportation Enhancements Program.

Response: Each department district will be knowledgeable regarding the SRS program and will be able to provide a reasonable level of assistance in completing a project application if so requested. Accordingly, the department declines to modify the rules to incorporate this comment.

Comment: One commenter noted that §25.503(c)(1) requires Safe Routes to School Projects to be submitted through local department districts and is unnecessarily restrictive.

Response: The department believes that it is important for our local districts to be aware of projects proposed for their area, especially those that involve construction on the state highway system. Local department officials are extremely knowledgeable about ongoing and future transportation improvements in their area. The department believes that it would be in the best interest of all parties involved in the SRS program to retain this requirement as originally proposed.

Comment: Two commenters also offered a general comment regarding the project evaluation criteria that House Bill 2204 requires the department to consider. They noted that criteria are not present in the rules as proposed.

Response: The department is developing the SRS rules in two phases. The second phase of the SRS rules will address the criteria that will be used to evaluate each project application. The department intends to fully meet the requirements of House Bill 2204, including those for project evaluation.

STATUTORY AUTHORITY

The new sections are adopted under Transportation Code, §201.101, which authorizes the Texas Transportation Commission to promulgate rules for the conduct of the work of the Texas Department of Transportation, and more specifically, Transportation Code, §201.614 as added by House Bill 2204, 77th Legislature, 2001, which requires the department to adopt rules to implement the Safe Routes to School Program.

§25.501. Definitions.

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

(1) Commission - The Texas Transportation Commission.

(2) Department - The Texas Department of Transportation.

(3) District - One of 25 geographical areas, managed by a district engineer, in which the department conducts its primary work activities.

(4) Executive director - The executive director of the Texas Department of Transportation or his or her designee.

(5) HES - The federal Hazard Elimination Program established under 23 U.S.C. §152.

(6) On-system road - A road or highway that is a portion of the designated state highway system.

(7) Off-system road - A road or highway open to the public that is not part of the designated state highway system, such as a county road or city street.

(8) Public property - Property owned by a state, city, or county.

(9) Political subdivision - A municipality or county within the State of Texas.

(10) Program - The Safe Routes to School Program.

(11) School - A public or private elementary, intermediate, middle, junior high, or high school.

(12) State highway system - The system of highways in the state included in a comprehensive plan prepared by the executive director with the approval of the commission, in accordance with Transportation Code, §201.103.

§25.502. Project Eligibility.

(a) Project eligibility. The Safe Routes to School Program is a construction program designed to improve the bicycle and pedestrian safety of school age children. Projects may be submitted by political subdivisions as defined in this subchapter.

(b) Types of projects. Projects eligible to receive funding under this program include the following categories or improvements:

(1) sidewalk improvements such as new sidewalks, widened sidewalks, sidewalk gap closures, sidewalk repairs, curb cuts for ramps, and the construction of curbs and gutters;

(2) pedestrian/bicycle crossing improvements such as new or upgraded traffic signals, crosswalks, median refuges, pavement markings, traffic signs, pedestrian and/or bicycle over-crossings and under-crossings, flashing beacons, traffic signal phasing extensions, bicycle sensitive actuation devices, pedestrian activated signal upgrades, and sight distance improvements;

(3) on-street bicycle facilities such as new or upgraded bike lanes, widening outside lanes and/or roadway shoulders, geometric improvements, turning lanes, channelization and roadway realignment, traffic signs, and pavement markings;

(4) traffic diversion improvements including improved pick-up/drop-off areas, separation of pedestrians and bicycles from vehicular traffic adjacent to school facilities, and traffic diversion away from school zones or designated routes to a school;

(5) off-street bicycle and pedestrian facilities including exclusive multi-use bicycle and/or pedestrian trails and pathways; and

(6) traffic calming measures for off-system roads such as roundabouts, traffic circles, curb extensions at intersections that reduce curb-to-curb roadway travel widths, center islands, full and half-street closures, and other speed reduction techniques.

(c) Project location.

(1) Eligible projects may be located on or off the designated state highway system; however, candidate projects must be located on public property.

(2) Eligible projects must be located within a two-mile radius of a school.

(d) Required local contribution. Political subdivisions awarded funding under this program must provide a local contribution towards the total cost of the project when the project is located on municipal or county right-of-way. This requirement is consistent with regulations governing federal funds.

(e) Eligible project boundaries.

(1) Except as provided in paragraph (2) of this subsection, each project application must be in connection with a single school campus.

(2) Applications covering multiple school sites will be accepted for projects in which:

(A) similar improvements are being made at each school site; and

(B) the school sites contained in the application are located within a two-mile radius of each other.

(3) One master project application for an entire school district covering multiple school sites and multiple categories of improvements will not be accepted.

§25.503. Project Application.

(a) Call for applications. The department will call for applications for Safe Routes to School projects by publication in the Texas Register. This notice will contain information on the application, application content, and submission deadlines. The department will also consider alternative means of publication of the program announcement as necessary to reach interested local jurisdictions and interested parties.

(b) Who may apply. The department will accept and consider candidate projects from political subdivisions.

(c) How to submit a project.

(1) In order to submit a proposed project, an eligible political subdivision must submit its application to the district engineer of the district office responsible for the area in which the proposed improvement will be constructed.

(2) The application must be completed and returned to the appropriate district within the required deadlines as described in the project call notification.

(3) The candidate project must utilize the application form prescribed by the department for this purpose.

(4) Copies of the application form will be available at each department district office as well as from the Traffic Operations Division in Austin.

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 November 15, 2001.

TRD-200107041
Richard D. Monroe
General Counsel
Texas Department of Transportation
Effective date: December 5, 2001
Proposal publication date: September 14, 2001
For further information, please call: (512) 463-8630

♦ ♦ ♦

CHAPTER 28. OVERSIZE AND OVERWEIGHT VEHICLES AND LOADS
SUBCHAPTER B. GENERAL PERMITS

43 TAC §§28.11, 28.13, 28.14

The Texas Department of Transportation adopts amendments to §28.11, §28.13, and §28.14, concerning general permits for oversize and overweight vehicles and loads. The amendments to §28.13 are adopted without changes to the text as proposed by publication in the September 14, 2001, issue of the *Texas Register* (26 TexReg 7100) and will not be republished. The amendments to §28.11 and §28.14 are adopted with changes.

EXPLANATION OF ADOPTED AMENDMENTS

House Bill 468, 77th Legislature, 2001 amended Transportation Code, Section 623.093. The amendments to Section 623.093 require that applications for a permit to move a manufactured home (other than a move from the retailer pursuant to an original sale) be accompanied by documentation showing the home's ad valorem tax status.

The amendments are necessary to implement this legislation and to clarify policies and procedures concerning issuance of oversize/overweight permits, thereby preserving the transportation infrastructure, and providing safe, effective and efficient movement of people and goods. The amendments further ensure the department's proper administration of the laws concerning the issuance of permits for the movement of oversize and overweight loads.

Proposed amendments to §28.11(c)(4) stipulate that the department's Oversize/Overweight Permit Branch will be closed on certain days which include the Friday following Thanksgiving Day, Christmas Eve, and any Saturday immediately preceding or following New Year's Day, Memorial Day, Independence Day, Labor Day, Christmas Eve, and Christmas Day, when such fall on a Friday or Monday, in order to more efficiently utilize personnel resources.

As a result of department review it was determined that certain Saturdays be excluded from the proposed Permit Branch holidays to avoid being closed four days in a row. Excluded from the proposed holidays will be the Saturday before Christmas Eve when Christmas Eve falls on a Monday and the Saturday after Christmas Day when Christmas Day falls on a Friday.

Amendments to §28.11(g)(4) and (5) specify the conditions under which an existing permit will be amended in order to clarify current policy and more efficiently utilize personnel resources.

Section 28.11(l)(2) is amended to clarify the circumstances under which a permitted vehicle is allowed to move at night in order to provide safe, effective and efficient movement of people and goods and facilitate permittee compliance by ensuring consistency in permit issuance procedures.

Section 28.11(l)(3) is amended to remove weekend movement restrictions that are not specified in state or federal statute, with the exception that the department may restrict such movement of specific loads based on a determination that the load may create a hazard for the traveling public, in order to ensure consistency with surrounding states and provide safe, effective and efficient movement of people and goods by distributing the movement of permitted loads over a longer timeframe.

Also, §28.11(e)(5), §28.13(b)(11) and (e)(1)(G), and §28.14(e)(11) are amended to remove uncertainties regarding the department's policies on void permits.

Amendments to §28.13(e)(6)(E) and (G) specify that permitted vehicles transporting power line poles may not travel over a load restricted bridge or load zoned road when exceeding posted limits, and must be accompanied by a rear escort when moving at night. These amendments are necessary to clarify current policy, preserve the transportation infrastructure, and provide safe, effective and efficient movement of people and goods.

Amendments to §28.14, Manufactured Housing and Industrialized Housing and Building Permits, specify that applications for permits to transport a manufactured home from a residential home site must be accompanied by: a written statement from the chief appraiser of the county appraisal district stating that no unpaid ad valorem taxes due any taxing unit for which the district appraises property have been reported to the appraiser; or written evidence from a chief appraiser that the manufactured house was moved into the county after January 1 of the current year; or a certificate from the appraisal district stating that the owner of the manufactured house or other person has provided information sufficient to list the manufactured home in the supplemental appraisal records of that district; or a copy of a writ of possession for the manufactured home issued by a court of competent jurisdiction.

In response to public comment the department is clarifying the proposed rules to better reflect that any of the above mentioned written tax statements or certificates can come from the chief appraiser, or others, including the county tax assessor-collector, when operating on the chief appraiser's behalf.

RESPONSE TO COMMENTS

A public hearing was held on October 23, 2001. Four oral comments were received: one from Mobile Consultants, one from Brazos Valley Transit, and two from the Texas Manufactured Housing Association. The department received written comments from the Denton county tax assessor-collector, the Texas Manufactured Housing Association, and Davenport Mammoet.

Comment: The Denton county tax assessor-collector recommended that the rule language in §28.14(b)(3)(A) be changed to include the county tax assessor-collector as a valid provider of the required tax statements or certificates when the tax assessor-collector and appraisal district have entered into an interlocal agreement for the purpose of providing the tax statement.

Response: House Bill 468, Section 3, which amends Tax Code, §32.03, states that "A chief appraiser and county tax assessor-collector may enter into a contract that authorizes the assessor-collector to issue a written statement under this section. If a chief appraiser and a county tax assessor-collector enter into such a contract, a reference in this section to the chief appraiser means the county tax assessor-collector." Amendments to §28.14(b)(3)(A) are adopted with changes to clarify that either the chief appraiser, or when authorized, the tax assessor-collector may provide the tax statements required by this section.

Comment: The Denton county tax assessor-collector suggested that the department remove proposed §28.14(b)(3)(B) and (C) as acceptable proof of tax status because proof that the home was moved into the county after January 1 of the current year or a statement indicating the owner has provided information sufficient to list the home on the supplemental appraisal roll is not sufficient documentation to indicate an applicant's tax status. Denton County suggested that the department only accept a statement that no taxes are due.

Response: The department disagrees with the suggested change. Transportation Code, §623.093 specifically identifies which documents the department can accept prior to issuing a

permit to move a manufactured home from a residential home site. Section 28.14 reflects the language provided in the statute.

Comment: The Texas Manufactured Housing Association suggested that the department interpret "Writ of Possession" to include a "Writ of Sequestration" as an acceptable document to issue a permit to move a manufactured home because a Writ of Sequestration is also a possessory writ.

Response: Transportation Code, §623.093, as amended by House Bill 468, specifies the documents that must be provided in connection with an application to move a manufactured home. A Writ of Sequestration is not included in that list of acceptable documents. Therefore, §28.14 (b)(3)(D) will not be changed.

Comment: The Texas Manufactured Housing Association, Mobile Consultants, and Brazos Valley Transit all submitted comments regarding the additional time it is taking to obtain permits as a result of the new statute. They all commented that many of the counties are not following the five-day time frame specified in Tax Code, §32.03(f) to process the requested tax documentation. In many cases it is taking from 10 days to two weeks to receive the appropriate tax documents from the county. They suggested that if the county does not provide the appropriate tax documentation within the five days, as provided by the Tax Code, §32.03(f), then the department should be allowed to issue the permit without the tax documentation.

Response: The department does not have the ability to regulate the amount of time it takes a county to provide a permit applicant with tax status documentation nor has the legislature given the department the discretion to waive the requirement that certain documents be included with the application to move a manufactured home.

Comment: The Texas Manufactured Housing Association suggested that the department adopt a uniform request for a statement of tax status to simplify the process and decrease response time.

Response: The department does not have the authority to require that individual taxing authorities use a specific form.

Comment: The Texas Manufactured Housing Association (TMHA) commented that House Bill 468 identifies the years for which taxes can be collected and the conditions that apply. House Bill 468 allows the chief appraiser to accept partial payment of taxes due and issue a paid tax receipt if no liens have been filed. TMHA recommends that the department issue a permit when a paid tax receipt is presented indicating that taxes have been collected for the time period prescribed by House Bill 468.

Response: The rules reflect the language provided in Transportation Code, §623.093, which specifies the documentation that must accompany a permit application to move a manufactured home. A paid tax receipt from the county is not listed in the statute as valid proof that no unpaid ad valorem taxes are due.

Comment: The Texas Manufactured Housing Association made a comment in reference to Tax Code, §32.015, which required counties, prior to September 1, 2001, to file tax liens with the Texas Department of Housing and Community Affairs. The comment focused on the fact that many counties did not file the appropriate liens in accordance with this tax code. It was suggested that the department look into the Department of Housing and Community Affairs tax lien records to see if counties filed appropriate tax lien records prior to September 1, 2001 for specific houses. If the counties did not file that particular tax lien, then TMHA suggests that the department issue a permit.

Response: The department has not been given the authority to waive the requirement that applications for permits to move manufactured homes be accompanied by documents from the chief appraiser in the circumstances the commentor describes.

Comment: Davenport Mammoet commented that there will be no negative impact to their business by the permit branch being closed additional days. They were also complimentary of the Texas permit system.

Response: Comment noted.

Concerning §28.11(c)(4), the department has also determined that some of the proposed additional holidays would result in oversize/overweight permits not being issued for four days in a row. The department is amending its rules so that Saturdays prior to a Monday Christmas Eve and Saturdays after a Friday Christmas Day will be excluded from the list of holiday closures. This revision will eliminate any four day period that the permit branch will be unable to process permits.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation, and more specifically, Transportation Code, Chapter 623 which authorizes the department to carry out the provisions of the those laws governing the issuance of oversize and overweight permits.

§28.11. General Oversize/Overweight Permit Requirements and Procedures.

(a) Purpose and scope. This section contains general requirements relating to oversize/overweight permits, including single trip permits. Specific requirements for each type of specialty permit are provided for in this chapter.

(b) Prerequisites to obtaining an oversize/overweight permit. Unless exempted by law or this chapter, the following requirements must be met prior to the issuance of an oversize/overweight permit.

(1) Commercial motor carrier registration or surety bond. Prior to obtaining an oversize/overweight permit, an applicant permitted under the provisions of Transportation Code, Chapter 623, Subchapter D, must be registered as a commercial motor carrier under Chapter 18 of this title (relating to Motor Carriers) or, in lieu of commercial motor carrier registration, file a surety bond with the department as described in subsection (n) of this section.

(2) Vehicle registration. A vehicle registered with a permit plate will not be issued an oversize/overweight permit under this subchapter. A permitted vehicle operating under this subchapter must be registered with one of the following types of vehicle registration:

(A) current Texas license plates that indicate the permitted vehicle is registered for maximum legal gross weight or the maximum weight the vehicle can transport;

(B) Texas temporary registration;

(C) current out of state license plates that are apportioned for travel in Texas; or

(D) foreign commercial vehicles registered under Texas annual registration.

(c) Permit application.

(1) An application for a permit may be made to the MCD by telephone, by facsimile, electronically, or in person at a cash collection office. All applications shall be made on a form prescribed by the department, and all applicable information shall be provided by the applicant, including:

(A) name, address, and telephone number of applicant;

(B) applicant's customer identification number;

(C) applicant's motor carrier registration number or single state registration number, if applicable;

(D) complete load description, including maximum width, height, length, overhang, and gross weight;

(E) complete description of equipment, including truck make, license plate number and state of issuance, and vehicle identification number, if required;

(F) equipment axle and tire information including number of axles, distance between axles, axle weights, number of tires, and tire size for overweight permit applications; and

(G) any other information required by law.

(2) Applications transmitted electronically are considered signed if a digital signature is transmitted with the application and intended by the applicant to authenticate the application.

(A) The department may only accept a digital signature used to authenticate an application under procedures that comply with any applicable rules adopted by the Department of Information Resources regarding department use or acceptance of a digital signature.

(B) The department may only accept a digital signature to authenticate an application if the digital signature is:

(i) unique to the person using it;

(ii) capable of independent verification;

(iii) under the sole control of the person using it; and

(iv) transmitted in a manner that will make it infeasible to change the data in the communication or digital signature without invalidating the digital signature.

(3) All permit applications shall be accompanied by the appropriate fees described in this paragraph, in a payment method described in subsection (f) of this section.

(A) The fee for a single trip (not exceeding 80,000 pounds) permit is $30. Fees for other types of permits are indicated in the appropriate subchapters of this chapter.

(B) Highway maintenance fees are as indicated in the following table, and are in addition to the permit fee.
Figure 1: 43 TAC §28.11(c)(3)(B) (No change.)

(C) Vehicle supervision fees are as indicated in the following table, and are in addition to the permit fee and the highway maintenance fee.
Figure 2: 43 TAC §28.11(c)(3)(C) (No change.)

(4) The MCD is closed on:

(A) Sundays;

(B) New Year's Day;

(C) Memorial Day;

(D) Independence Day;

(E) Labor Day;

(F) Thanksgiving Day and the Friday following Thanksgiving Day;

(G) Christmas Eve and Christmas Day;

(H) the Saturday prior to any of the holidays listed in this paragraph falling on a Monday, except the Saturday before Christmas Eve when Christmas Eve falls on a Monday;

(I) the Saturday after any of the holidays listed in this paragraph falling on a Friday, except for the Saturday following Thanksgiving Day and the Saturday following Christmas Day when Christmas Day falls on a Friday; and

(J) at other times as deemed necessary by the department's administration, such as in the case of emergency weather conditions.

(5) The MCD shall be open for the issuance of permits from 6:00 a.m. until 6:00 p.m. (Central Standard Time) Monday through Friday, and from 6:00 a.m. until 2:00 p.m. (Central Standard Time) on Saturdays.

(d) Maximum permit weight limits.

(1) General. An overweight permitted vehicle will not be routed over a load restricted bridge when exceeding the posted capacity of the bridge, unless a special exception is granted by the MCD, based on an analysis of the bridge.

(A) An axle group must have a minimum spacing of four feet, measured from center of axle to center of axle, between each axle in the group to achieve the maximum permit weight for the group.

(B) The maximum permit weight for an axle group with spacings of five or more feet between each axle will be based on an engineering study conducted by the MCD.

(C) A permitted vehicle will be allowed to have air suspension, hydraulic suspension and mechanical suspension axles in a common weight equalizing suspension system for any axle group.

(D) The MCD may permit axle weights greater than those specified in this section, for a specific individual permit request, based on an engineering study of the route and hauling equipment.

(E) An overdimensional load may not exceed the manufacturer's rated tire carrying capacity.

(F) Two or more consecutive axle groups having an axle spacing of less than 12 feet, measured from the center of the last axle of the preceding group to the center of the first axle of the following group, will be reduced by 2.5% for each foot less than 12 feet.

(2) Maximum axle weight limits. Maximum permit weight for an axle or axle group is based on 650 pounds per inch of tire width or the following axle or axle group weights, whichever is the lesser amount:

(A) single axle -- 25,000 pounds;

(B) two axle group -- 46,000 pounds;

(C) three axle group -- 60,000 pounds;

(D) four axle group -- 70,000 pounds;

(E) five axle group -- 81,400 pounds; and

(F) axle group with six or more axles -- determined by the MCD based on an engineering study of the equipment, which will include the type of steering system used, the type of axle suspension, the spacing distance between each axle, the number of tires per axle, and the tire size on each axle.

(3) Weight limits for load restricted roads. Maximum permit weight for an axle or axle group, when traveling on a load restricted road, will be based on 650 pounds per inch of tire width or the following axle or axle group weights, whichever is the lesser amount:

(A) single axle -- 22,500 pounds;

(B) two axle group -- 41,400 pounds;

(C) three axle group -- 54,000 pounds;

(D) four axle group -- 63,000 pounds;

(E) five axle group -- 73,260 pounds;

(F) axle group with six or more axles -- determined by the MCD based on an engineering study of the equipment, which will include the type of steering system used, the type of axle suspension, the spacing distance between each axle, the number of tires per axle, and the tire size on each axle; and

(G) two or more consecutive axle groups having an axle spacing of less than 12 feet, measured from the center of the last axle of the preceding group to the center of the first axle of the following group will be reduced by 2.5% for each foot less than 12 feet.

(e) Permit issuance.

(1) General. Upon receiving an application, the MCD will review the permit application for the appropriate information and will then determine the most practical route. After a route is selected and a permit number is assigned by the MCD, an applicant requesting a permit by telephone must legibly enter all necessary information on the permit application, including the approved route and permit number. Permit requests made by methods other than telephone will be returned via facsimile, mail, or electronically.

(2) Routing.

(A) A permitted vehicle will be routed over the most practical route available taking into consideration:

(i) the size and weight of the overdimension load in relation to vertical clearances, width restrictions, steep grades, and weak or load restricted bridges;

(ii) the geometrics of the roadway in comparison to the overdimension load;

(iii) sections of highways restricted to specific load sizes and weights due to construction, maintenance, and hazardous conditions;

(iv) traffic conditions, including traffic volume;

(v) route designations by municipalities in accordance with Transportation Code, §623.072;

(vi) load restricted roads; and

(vii) other considerations for the safe transportation of the load.

(B) When a permit applicant desires a route other than the most practical, more than one permit will be required for the trip unless an exception is granted by the MCD.

(3) Return movements. A permitted vehicle will be allowed return movement of oversize and overweight hauling equipment to the permitted vehicle's point of origin or the permittee's place of business, and may transport a non-divisible load of legal dimensions on the return trip, provided the transport is completed within the time period stated on the permit.

(4) Records retention.

(A) The original permit, a facsimile copy of the permit, or a MCD computer generated permit must be kept in the permitted vehicle until the day after the date the permit expires.

(B) All telephone requests for permits are recorded and retained for future reference.

(C) Permit information shall be stored in the department's mainframe computer located in Austin, which shall constitute the official permit record.

(f) Payment of permit fees, refunds.

(1) Payment methods. All permit applications must be accompanied by the proper fee, which shall be payable as described in this subsection.

(A) Credit card. A permit may be purchased with a valid credit card approved by the department. Credit card payments are subject to a $1 fee per transaction in addition to the applicable permit fee.

(B) Permit Account Card (PAC)

(i) Application for a PAC should be made directly to the issuing institution. A PAC must be established and maintained according to the contract provisions stipulated between the PAC holder and the financial institution under contract to the department and the Comptroller of Public Accounts.

(ii) An applicant purchasing a permit with a PAC is subject to a $1.00 fee per transaction in addition to the applicable permit fee.

(C) Checks, money orders, cashier's checks, or cash. Checks, money orders, cashier's checks, and cash are acceptable forms of payment for a permit. When ordering a permit by telephone, facsimile, or electronically, such payments shall be made at a cash collection office prior to obtaining the permit. Checks, money orders, and cashier's checks may also accompany applications made by mail.

(D) Escrow accounts. A permit applicant may establish an escrow account with the department for the specific purpose of paying any fee that is related to the issuance of a permit under this subchapter. An escrow account may also be utilized to pay fees related to the issuance of a vehicle storage facility license or a motor carrier registration issued under Chapter 18 of this title (relating to Motor Carriers).

(i) A permit applicant who desires to establish an escrow account shall complete and sign an escrow account agreement, and shall return the completed and signed agreement to the department with a check in the minimum amount of $305, which shall be deposited to the appropriate fund by the department with the Comptroller of Public Accounts. In lieu of submitting a check for the initial deposit to an applicant's escrow account, the applicant may transfer funds to the department electronically.

(ii) Upon initial deposit, and each subsequent deposit made by the escrow account holder, $5.00 will be charged as an escrow account administrative fee and shall be deposited in the state highway fund.

(iii) The escrow account holder is responsible for monitoring of the escrow account balance.

(iv) An escrow account holder must submit a written request to the department to terminate the escrow account agreement. Any remaining balance will be returned to the escrow account holder.

(2) Refunds. A permit fee will not be refunded after the permit number has been issued unless such refund is necessary to correct an error made by the permit officer.

(g) Amendments. A permit may be amended for the following reasons:

(1) vehicle breakdown;

(2) changing the intermediate points in an approved permit route;

(3) extending the expiration date due to conditions which would cause the move to be delayed;

(4) changing route origin or route destination prior to the start date as listed on the permit;

(5) changing vehicle size limits prior to the permit start date as listed on the permit, provided that changing the vehicle size limit does not necessitate a change in the approved route; and

(6) correcting any mistake that is made due to permit officer error.

(h) Requirements for overwidth loads.

(1) An overwidth load must travel in the outside traffic lane on multi-lane highways, when the width of the load exceeds 12 feet.

(2) Overwidth loads are subject to the escort requirements of subsection (k) of this section.

(3) A permitted vehicle exceeding 16 feet in width will not be routed on the main lanes of a controlled access highway, unless an exception is granted by the MCD, based on a route and traffic study. The load may be permitted on the frontage roads when available, if the movement will not pose a safety hazard to other highway users.

(4) An applicant requesting a permit to move a load exceeding 20 feet wide will be furnished with a proposed route, which the applicant must physically inspect to determine if the overdimension load can safely negotiate the proposed route, unless an exception is granted based on a route and traffic study conducted by the MCD.

(A) The applicant must notify the MCD in writing whether the overdimension load can or cannot safely negotiate the proposed route.

(B) If any section of the proposed route is unacceptable, the applicant shall provide the MCD with an alternate route around the unacceptable section.

(C) Once a route is decided upon and a permit issued, the permit may not be amended unless an exception is granted by the MCD.

(i) Requirements for overlength loads.

(1) Overlength loads are subject to the escort requirements stated in subsection (k) of this section.

(2) A single vehicle, such as a motor crane, that has a permanently mounted boom is not considered as having either front or rear overhang as a result of the boom because the boom is an integral part of the vehicle.

(3) When a single vehicle with a permanently attached boom exceeds the maximum legal length of 45 feet, a permit will not be issued if the boom projects more than 25 feet beyond the front bumper of the vehicle, or when the boom projects more than 30 feet beyond the rear bumper of the vehicle, unless an exception is granted by the MCD, based on a route and traffic study.

(4) Maximum permit length for a single vehicle is 75 feet.

(5) A load extending more than 20 feet beyond the front or rearmost portion of the load carrying surface of the permitted vehicle must have a rear escort, unless an exception is granted by the MCD, based on a route and traffic study.

(6) A permit will not be issued for an overdimension load with:

(A) more than 25 feet front overhang; or

(B) more than 30 feet rear overhang, unless an exception is granted by the MCD, based on a route and traffic study.

(7) An applicant requesting a permit to move an overdimension load exceeding 125 feet overall length will be furnished with a proposed route, which the applicant must physically inspect to determine if the overdimension load can safely negotiate the proposed route, unless an exception is granted based on a route and traffic study conducted by the MCD.

(A) The applicant must notify the MCD in writing whether the overdimension load can or cannot safely negotiate the proposed route.

(B) If any section of the proposed route is unacceptable, the applicant shall provide the MCD with an alternate route around the unacceptable section.

(C) Once a route is decided upon and a permit issued, the permit may not be amended unless an exception is granted by the MCD.

(8) A permitted vehicle that is not overwidth or overheight, and does not exceed 150 feet overall length, may be moved in a convoy consisting of not more than four overlength permitted vehicles. A permitted vehicle that is not overwidth or overheight that exceeds 150 feet, but does not exceed 180 feet overall length, may be moved in a convoy consisting of not more than two overlength permitted vehicles. Convoys are subject to the requirements of subsection (k) of this section. Each permitted vehicle in the convoy must:

(A) be spaced at least 1,000 feet, but not more than 2,000 feet, from any other permitted vehicle in the convoy; and

(B) have a rotating amber beacon or an amber pulsating light, not less than eight inches in diameter, mounted at the rear top of the load being transported.

(j) Requirements for overheight loads.

(1) Overheight loads are subject to the escort requirements stated in subsection (k) of this section.

(2) An applicant requesting a permit to move an overdimension load with an overall height of 19 feet or greater will be furnished with a proposed route, which the applicant must physically inspect to determine if the overdimension load can safely negotiate the proposed route, unless an exception is granted based on a route and traffic study conducted by the MCD.

(A) The applicant must notify the MCD in writing whether the overdimension load can or cannot safely negotiate the proposed route.

(B) If any section of the proposed route is unacceptable, the applicant shall provide the MCD with an alternate route around the unacceptable section.

(C) Once a route is decided upon and a permit issued, the permit may not be amended unless an exception is granted by the MCD.

(k) Escort vehicle requirements. Escort vehicle requirements are provided to facilitate the safe movement of permitted vehicles and to protect the traveling public during the movement of permitted vehicles. A permittee must provide for escort vehicles and law enforcement assistance when required by the MCD. The requirements in this subsection do not apply to the movement of manufactured housing, portable building units, or portable building compatible cargo. Escort vehicle requirements for the movement of manufactured housing are described in §28.14 of this subchapter (relating to Manufactured Housing and Industrialized Housing and Building Permits). Escort vehicle requirements for the movement of portable building units and portable building compatible cargo are described in §28.15 of this subchapter (relating to Portable Building Unit Permits).

(1) General.

(A) Applicability. The operator of an escort vehicle shall, consistent with applicable law, warn the traveling public when:

(i) a permitted vehicle must travel over the center line of a narrow bridge or roadway;

(ii) a permitted vehicle makes any turning movement that will require the permitted vehicle to travel in the opposing traffic lanes;

(iii) a permitted vehicle reduces speed to cross under a low overhead obstruction or over a bridge;

(iv) a permitted vehicle creates an abnormal and unusual traffic flow pattern; or

(v) in the opinion of MCD, warning is required to ensure the safety of the traveling public or safe movement of the permitted vehicle.

(B) Law enforcement assistance. Law enforcement assistance may be required by the MCD to control traffic when a permitted vehicle is being moved within the corporate limits of a city, or at such times when law enforcement assistance would provide for the safe movement of the permitted vehicle and the traveling public.

(C) Obstructions. It is the responsibility of the permittee to contact utility companies, telephone companies, television cable companies, or other entities as they may require, when it is necessary to raise or lower any overhead wire, traffic signal, street light, television cable, sign, or other overhead obstruction. The permittee is responsible for providing the appropriate advance notice as required by each entity.

(2) Escort requirements for overwidth loads. Unless an exception is granted by the MCD, based on a route and traffic study, an overwidth load must:

(A) have a front escort vehicle if the width of the load exceeds 14 feet, but does not exceed 16 feet, when traveling on a two lane roadway;

(B) have a rear escort vehicle if the width of the load exceeds 14 feet, but does not exceed 16 feet, when traveling on a roadway of four or more lanes; and

(C) have a front and a rear escort vehicle for all roads, when the width of the load exceeds 16 feet.

(3) Escort requirements for overlength loads. Unless an exception is granted by the MCD, based on a route and traffic study, overlength loads must have:

(A) a front escort vehicle when traveling on a two lane roadway if the vehicle exceeds 110 feet overall length, but does not exceed 125 feet overall length;

(B) a rear escort vehicle when traveling on a multi-lane highway if the vehicle exceeds 110 feet overall length, but does not exceed 125 feet overall length; and

(C) a front and rear escort vehicle at all times if the permitted vehicle exceeds 125 feet overall length.

(4) Escort requirements for overheight loads. Unless an exception is granted by the MCD, based on a route and traffic study, overheight loads must have:

(A) a front escort vehicle equipped with a height pole to accurately measure overhead obstructions for any permitted vehicle that exceeds 17 feet in height; and

(B) a front and rear escort vehicle for any permitted vehicle exceeding 18 feet in height.

(5) Escort requirements for permitted vehicles exceeding legal limits in more than one dimension. When a load exceeds more than one dimension that requires an escort under this subsection, front and rear escorts will be required unless an exception is granted by the MCD. For example, under this subsection one escort is required for a load exceeding 14 feet in width, and one escort is required for a load exceeding 110 feet in length. In the case of a permitted vehicle that exceeds both 14 feet in width and 110 feet in length, both front and rear escorts are required.

(6) Escort requirements for convoys. Convoys must have a front escort vehicle and a rear escort vehicle on all highways at all times.

(7) General equipment requirements. The following special equipment requirements apply to permitted vehicles and escort vehicles that are not motorcycles.

(A) An escort vehicle must be equipped with two flashing amber lights or one rotating amber beacon of not less than eight inches in diameter, affixed to the roof of the escort vehicle, which must be visible to the front, sides, and rear of the escort vehicle while actively engaged in escort duties for the permitted vehicle.

(B) An escort vehicle must display a sign, on either the roof of the vehicle, or the front or rear of the vehicle, with the words "OVERSIZE LOAD." The sign must meet the following specifications:

(i) at least five feet, but not more than seven feet in length, and at least 12 inches, but not more than 18 inches in height;

(ii) the sign must have a yellow background with black lettering;

(iii) letters must be at least eight inches, but not more than 10 inches high with a brush stroke at least 1.41 inches wide; and

(iv) the sign must be visible from the front or rear of the vehicle while escorting the permitted vehicle, and the signs must not be used at any other time.

(C) An escort vehicle must maintain two-way radio communications with the permitted vehicle and other escort vehicles involved with the movement of the permitted vehicle.

(D) Warning flags must be either red or orange fluorescent material, at least 12 inches square, securely mounted on a staff or securely fastened by at least one corner to the widest extremities of an overwidth permitted vehicle, and at the rear of an overlength permitted vehicle or a permitted vehicle with a rear overhang in excess of four feet.

(8) Equipment requirements for motorcycles.

(A) An official law enforcement motorcycle may be used as a primary escort vehicle for a permitted vehicle traveling within the limits of an incorporated city, if the motorcycle is operated by a highway patrol officer, sheriff, or duly authorized deputy, or municipal police officer.

(B) An escort vehicle must maintain two-way radio communications with the permitted vehicle and other escort vehicles involved with the movement of the permitted vehicle.

(l) Restrictions.

(1) Restrictions pertaining to road conditions. Movement of a permitted vehicle is prohibited when road conditions are hazardous based upon the judgement of the operator and law enforcement officials. Law enforcement officials shall make the final determination regarding whether or not conditions are hazardous. Conditions that should be considered hazardous include, but are not limited to:

(A) visibility of less than 2/10 of one mile; or

(B) weather conditions such as wind, rain, ice, sleet, or snow.

(2) Daylight and night movement restrictions.

(A) A permitted vehicle may be moved only during daylight hours unless:

(i) the permitted vehicle is overweight only;

(ii) the permitted vehicle is traveling on an interstate highway and does not exceed 10 feet wide and 100 feet long, with front and rear overhang that complies with legal standards; or

(iii) the permitted vehicle meets the criteria of clause (ii) of this subparagraph and is overweight.

(B) An exception may be granted allowing night movement, based on a route and traffic study conducted by the MCD. Escorts may be required when an exception allowing night movement is granted.

(3) Weekend and holiday restrictions. The maximum size limits for a permit issued under Transportation Code, Chapter 622, Subchapter E and Chapter 623, Subchapters D and E, for holiday movement is 14 feet wide, 16 feet high, and 110 feet long, unless an exception is granted by the MCD based on a route and traffic study. The department may restrict weekend and holiday movement of specific loads based on a determination that the load could pose a hazard for the traveling public due to local road or traffic conditions.

(4) Curfew restrictions. The operator of a permitted vehicle must observe the curfew movement restrictions of any city in which the vehicle is operated.

(m) General provisions.

(1) Multiple commodities.

(A) Except as provided in subparagraph (B) of this paragraph, when a permitted commodity creates a single overdimension, two or more commodities may be hauled as one permit load, provided legal axle weight and gross weight are not exceeded, and provided an overdimension of width, length or height is not created or made greater by the additional commodities. For example, a permit issued for the movement of a 12 foot wide storage tank may also include a 10 foot wide storage tank loaded behind the 12 foot wide tank provided that legal axle weight and gross weight are not exceeded, and provided an overdimension of width, length or height is not created.

(B) When the transport of more than one commodity in a single load creates or makes greater an illegal dimension of length, width, or height the department may issue an oversize permit for such load subject to each of the following conditions.

(i) The permit applicant or the shipper of the commodities files with the department a written certification by the Texas Department of Economic Development, approved by the Office of the Governor, attesting that issuing the permit will have a significant positive impact on the economy of Texas and that the proposed load of multiple commodities therefore cannot be reasonably dismantled. As used in this clause the term significant positive impact means the creation of not less than 100 new full-time jobs, the preservation of not less than 100 existing full-time jobs, that would otherwise be eliminated if the permit is not issued, or creates or retains not less than one percent of the employment base in the affected economic sector identified in the certification.

(ii) Transport of the commodities does not exceed legal axle and gross load limits.

(iii) The permit is issued in the same manner and under the same provisions as would be applicable to the transport of a single oversize commodity under this section; provided, however, that the shipper and the permittee also must indemnify and hold harmless the department, its commissioners, officers, and employees from any and all liability for damages or claims of damages including court costs and attorney fees, if any, which may arise from the transport of an oversized load under a permit issued pursuant to this subparagraph.

(iv) The shipper and the permittee must file with the department a certificate of insurance on a form prescribed by the department, or otherwise acceptable to the department, naming the department, its commissioners, officers, and employees as named or additional insurers on its comprehensive general liability insurance policy for coverage in the amount of $5 million per occurrence, including court costs and attorney fees, if any, which may arise from the transport of an oversized load under a permit issued pursuant to this subparagraph. The insurance policy is to be procured from a company licensed to transact insurance business in the State of Texas.

(v) The shipper and the permittee must file with the department, in addition to all insurance provided in clause (iv) of this subparagraph, a certificate of insurance on a form prescribed by the department, or otherwise acceptable to the department, naming the department, its commissioners, officers, and employees as insurers under an auto liability insurance policy for the benefit of said insurers in an amount of $5 million per accident. The insurance policy is to be procured from a company licensed to transact insurance business in the State of Texas. If the shipper or the permittee is self-insured with regard to automobile liability then that party must take all steps and perform all acts necessary under the law to indemnify the department, its commissioners, officers, and employees as if the party had contracted for insurance pursuant to, and in the amount set forth in, the preceding sentence and shall agree to so indemnify the department, its commissioners, officers, and employees in a manner acceptable to the department.

(vi) Issuance of the permit is approved by written order of the commission which written order may be, among other things, specific as to duration and routes.

(C) An applicant requesting a permit to haul a dozer and its detached blade may be issued a permit, as a non-dismantable load, if removal of the blade will decrease the overall width of the load, thereby reducing the hazard to the traveling public.

(2) Oversize hauling equipment. A vehicle that exceeds the legal size limits, as set forth by Transportation Code, Chapter 621, Subchapter C, may only haul a load that exceeds legal size limits unless

otherwise noted in this subchapter, but such vehicle may haul an overweight load that does not exceed legal size limits, except for the special exception granted in §28.13(b)(4) of this subchapter (relating to Time Permits issued under Transportation Code, Chapter 623, Subchapter D).

(n) Surety bonds.

(1) General. The following conditions apply to surety bonds specified in Transportation Code, §623.075.

(A) The surety bond must:

(i) be made payable to the department with the condition that the applicant will pay the department for any damage caused to the highway by the operation of the equipment covered by the surety bond;

(ii) be issued on an annual basis with an expiration date of August 31;

(iii) include the complete mailing address and zip code of the principal;

(iv) be filed with the MCD and have an original signature of the principal;

(v) have a single entity as principal with no other principal names listed; and

(vi) be countersigned by a Texas resident agent of the surety company issuing the surety bond, if it is not issued in the State of Texas.

(B) A certificate of continuation will not be accepted.

(C) The owner of a vehicle bonded under Transportation Code, §622.013, §623.075, and §623.163, that damages the state highway system as a result of the permitted vehicle's movement will be notified by certified mail of the amount of damage and will be given 30 days to submit payment for such damage. Failure to make payment within 30 days will result in the department's placing the claim with the attorney general for collection.

(D) The venue of any suit for a claim against a surety bond for the movement of a vehicle permitted under the provisions of Transportation Code, Chapter 623, Subchapter D, will be any court of competent jurisdiction in Travis County.

(2) Permit surety bonds.

(A) A surety bond required under the provisions of Transportation Code, Chapter 623, Subchapter D, must be submitted on the department's standard surety bond form in the amount of $10,000.

(B) A facsimile or electronic copy of the surety bond is acceptable in lieu of the original surety bond, for a period not to exceed 10 days from the date of its receipt in the MCD. If the original surety bond has not arrived in the MCD by the end of the 10 days, the applicant will not be issued a permit until the original surety bond has been received in the MCD.

(C) The surety bond requirement does apply to the delivery of farm equipment to a farm equipment dealer.

(D) A surety bond is required when a dealer or transporter of farm equipment or a manufacturer of farm equipment obtains a permit.

(E) The surety bond requirement does not apply to driving or transporting farm equipment which is being used for agricultural purposes if it is driven or transported by or under the authority of the owner of the equipment.

(F) The surety bond requirement does not apply to a vehicle or equipment operated by a motor carrier registered with the department under Transportation Code, Chapters 643 or 645 as amended.

§28.14. Manufactured Housing, and Industrialized Housing and Building Permits.

(a) General information.

(1) A manufactured home that exceeds size limits for motor vehicles as defined by Transportation Code, Chapter 621, Subchapters B and C, must obtain a permit from the department.

(2) Pursuant to Transportation Code, Chapter 623, Subchapter E, a permit may be issued to persons registered as manufacturers, installers, or retailers with the Texas Department of Housing and Community Affairs or motor carriers registered with the department under Transportation Code, Chapter 643.

(3) The department may issue a permit to the owner of a manufactured home provided that:

(A) the same owner is named on the title of the manufactured home and towing vehicle;

(B) or the owner presents a lease showing that the owner of the manufactured home is the lessee of the towing vehicle.

(b) Application for permit.

(1) The applicant must complete the application and shall include the manufactured home's HUD label number, Texas seal number, or the complete identification number or serial number of the manufactured home, and the overall width, height, and length of the home and the towing vehicle in combination. If the manufactured home is being moved to or from a site in this state where it has been, or will be, occupied as a dwelling, the permit must also show the name of the owner of the home, the location from which the home is being moved, and the location to which the home is being delivered.

(2) Applications for industrialized housing and building permits, and permits for manufactured housing not being transported from the manufacturer or retailer pursuant to the original sale, exchange, or lease-purchase of the manufactured home to a consumer, shall be submitted in accordance with §28.11(c) of this subchapter (relating to General Oversize/Overweight Permit Requirements and Procedures).

(3) An application for a permit to move a manufactured home not described under paragraph (2) of this subsection must be accompanied by:

(A) a written statement from the chief appraiser of the county appraisal district, or by interlocal agreement, the county tax assessor-collector, stating that no unpaid ad valorem taxes have been reported as due by any taxing unit for which the district appraises property;

(B) evidence from the county appraiser, or by interlocal agreement, the county tax assessor-collector, for the county in which the home is located showing that the manufactured home was moved into the county after January 1 of the current year;

(C) a certificate from the appraisal district, or by interlocal agreement, the county tax assessor-collector, for the county in which the manufactured home is located that states the owner of the manufactured home or other person has provided information sufficient to list the manufactured home in the supplemental appraisal records of that district; or

(D) a copy of a writ of possession for the manufactured home, issued by a court of competent jurisdiction.

(c) Permit issuance.

(1) Permit issuance is subject to the requirements of §28.11(e)(4) of this subchapter (relating to General Oversize/Overweight Permit Requirements and Procedures).

(2) Amendments can only be made to change intermediate points between the origination and destination points listed on the permit.

(d) Payment of permit fee. The cost of the permit is $20, payable in accordance with §28.11(f) of this subchapter (relating to General Oversize/Overweight Permit Requirements and Procedures).

(e) Permit provisions and conditions.

(1) The overall combined length of the manufactured home and the towing vehicle includes the length of the hitch or towing device.

(2) The height is measured from the roadbed to the highest elevation of the manufactured home.

(3) The width of a manufactured home includes any roof or eaves extension or overhang on either side.

(4) A permit will be issued for a single continuous movement not to exceed five days.

(5) Movement must be made during daylight hours only and may be made on any day except New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, and Christmas Day.

(6) The department may limit the hours for travel on certain routes because of heavy traffic conditions.

(7) The department will publish any limitations on movements during the national holidays listed in this subsection, or any limitations during certain hours of heavy traffic conditions, and will make such publications available to the public prior to the limitations becoming effective.

(8) The permit will contain the route for the transportation of the manufactured home from the point of origin to the point of destination.

(9) The route for the transportation must be the most practical route as described in §28.11(e) of this subchapter (relating to General Oversize/Overweight Permit Requirements and Procedures), except where construction is in progress and the permitted vehicle's dimensions exceed the construction restrictions as published by the department, or where bridge or overpass width or height would create a safety hazard.

(10) The department will publish annually a map or list of all bridges or overpasses which, due to height or width, require an escort vehicle to stop oncoming traffic while the manufactured home crosses the bridge or overpass.

(11) A permittee may not transport a manufactured home with a void permit; a new permit must be obtained.

(f) Escort requirements.

(1) A manufactured home exceeding 12 feet in width must have a rotating amber beacon of not less than eight inches in diameter mounted somewhere on the roof at the rear of the manufactured home, or may have two five-inch flashing amber lights mounted approximately six feet from ground level at the rear corners of the manufactured home. The towing vehicle must have one rotating amber beacon of not less than eight inches in diameter mounted on top of the cab. These beacons or flashing lights must be operational and luminiferous during any permitted move over the highways, roads, and streets of this state.

(2) A manufactured home with a width exceeding 16 feet but not exceeding 18 feet must have a front escort vehicle on two-lane roadways and a rear escort vehicle on roadways of four or more lanes.

(3) A manufactured home exceeding 18 feet in width must have a front and a rear escort on all roadways at all times.

(4) The escort vehicle must have:

(A) one red 16 inch square flag mounted on each of the four corners of the vehicle;

(B) a sign mounted on the front and rear of the vehicle displaying the words "WIDE LOAD" in black letters at least eight inches high with a brush stroke at least 1.41 inches wide against a yellow background; and

(C) an amber light or lights, visible from both front and rear, mounted on top of the vehicle in one of the following configurations:

(i) two simultaneously flashing lights or

(ii) one rotating beacon of not less than eight inches in diameter.

(5) Two transportable sections of a multi-section manufactured home, or two single section manufactured homes, when towed together in convoy, may be considered one home for purposes of the escort vehicle requirements, provided the distance between the two units does not exceed 1,000 feet.

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 November 15, 2001.

TRD-200107042
Richard D. Monroe
General Counsel
Texas Department of Transportation
Effective date: December 5, 2001
Proposal publication date: September 14, 2001
For further information, please call: (512) 463-8630

♦ ♦ ♦

SUBCHAPTER C. PERMITS FOR OVER AXLE AND OVER GROSS WEIGHT TOLERANCES

43 TAC §28.30

The Texas Department of Transportation adopts amendments to §28.30, concerning permits for over axle and over gross weight tolerances. Section 28.30 is adopted without changes to the proposed text as published in the September 14, 2001, issue of the *Texas Register* (26 TexReg 7112) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Senate Bill 220, 77th Legislature, 2001, added new Section 623.0113 to the Transportation Code. This new section describes route restrictions for overweight vehicles operated under weight tolerance ("2060") permits issued pursuant to Transportation Code, Section 623.011. The restrictions prohibit

the operation of such vehicles on load posted bridges at weights greater than the posted limits. An exception is allowed for travel on load posted bridges providing the only public vehicular access to or from a permittee's origin or destination.

The amendments to §28.30 are necessary to preserve the transportation infrastructure, implement the provisions of Senate Bill 220, and ensure the department's proper administration of the laws concerning the issuance of permits for the movement of oversize and overweight loads.

COMMENTS

No written comments were received regarding the proposed changes to §28.30. Additionally, a public hearing was held on October 23, 2001, and no verbal comments where received regarding §28.30.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation, and more specifically, Transportation Code, Chapter 623 which authorizes the department to carry out the provisions of the those laws governing the issuance of oversize and overweight permits.

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 November 15, 2001.

TRD-200107043
Richard D. Monroe
General Counsel
Texas Department of Transportation
Effective date: December 5, 2001
Proposal publication date: September 14, 2001
For further information, please call: (512) 463-8630

♦ ♦ ♦

TEXAS DEPARTMENT OF INSURANCE

Notification Pursuant to the Insurance Code, Chapter 5, Subchapter L

As required by the Insurance Code, Article 5.96 and 5.97, the ***Texas Register*** publishes notice of proposed actions by the Texas Board of Insurance. Notice of action proposed under Article 5.96 must be published in the ***Texas Register*** not later than the 30th day before the board adopts the proposal. Notice of action proposed under Article 5.97 must be published in the ***Texas Register*** not later than the 10th day before the Board of Insurance adopts the proposal. The Administrative Procedure Act, the Government Code, Chapters 2001 and 2002, does not apply to board action under Articles 5.96 and 5.97.

The complete text of the proposal summarized here may be examined in the offices of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78714-9104.)

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Administrative Procedure Act.

Texas Department of Insurance

Final Action

The Commissioner of Insurance, at a public hearing under Docket No. 2500 held at 9:30 a.m., November 12, 2001 in Room 100 of the William P. Hobby Jr. State Office Building, 333 Guadalupe Street in Austin, Texas, adopted amendments proposed by Staff to the Texas Automobile Rules and Rating Manual (the Manual). The amendments consist of new and/or adjusted 2000, 2001, and 2002 model Private Passenger Automobile Physical Damage Rating Symbols and revised identification information. Staff's petition (Ref. No. A-0901-15-I) was published in the October 5, 2001 issue of the *Texas Register* (26 TexReg 7893).

The new and/or adjusted symbols for the Manual's Symbols and Identification Section reflect data compiled on damageability, repairability, and other relevant loss factors for the 2000, 2001, and 2002 model year of the listed vehicles.

The amendments as adopted by the Commissioner of Insurance are shown in exhibits on file with the Chief Clerk under Ref. No. A-0901-15-I, which are incorporated by reference into Commissioner's Order No. 01-1083.

The Commissioner of Insurance has jurisdiction over this matter pursuant to the Insurance Code, Articles 5.10, 5.96, 5.98, and 5.101.

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Government Code, Chapter 2001 (Administrative Procedure Act).

Consistent with the Insurance Code, Article 5.96(h), the Department will notify all insurers writing automobile insurance of this adoption by letter summarizing the Commissioner's action.

IT IS THEREFORE THE ORDER of the Commissioner of Insurance that the Manual is amended as described herein, and the amendments are adopted to become effective on the 60th day after publication of the notification of the Commissioner's action in the *Texas Register*.

TRD-200107148
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: November 19, 2001

♦ ♦ ♦

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.

Agency Rule Review Plan

Texas Department of Transportation

Title 43, Part 1

Filed: November 16, 2001

♦ ♦ ♦

Proposed Rule Reviews

Credit Union Department

Title 7, Part 6

The Texas Credit Union Commission proposes to revise and reorganize its Standard Credit Union Bylaws in connection with its ongoing Rule Review Program (Program). This proposal is one component of the ongoing Program designed to review all of the Commission's rules and regulations to eliminate regulatory requirements that impose inefficient and costly regulatory burdens on credit unions, to eliminate requirements that do not contribute significantly to maintaining safety and soundness, and to revise rules that do not effectively advance the Commission's other goals and statutory responsibilities. The purpose of this notice is to solicit comments on the proposed text of the standard bylaws, as well as any substantive issues the commentors wish to see addressed in the proposal. Based upon those comments, the Commission will issue the final standard bylaws.

The Commission is also interested in receiving comments on whether, upon revision of the bylaws, credit unions should be required to adopt the revised bylaws? The Commission is grappling with the issue of whether credit unions should be obligated to adopt the revised bylaws. On the one hand, the Commission believes that consistent bylaws among credit unions is preferable. On the other hand, the Commission recognizes that a complete revision of a credit union's bylaws may create a hardship for some credit unions. The Commission request comments on whether it should be mandatory for all credit unions to adopt the new standard bylaws and if so, what would be a reasonable time-frame for compliance.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Harold Feeney, Commissioner, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699. You may Fax comments to (512) 832-0278 or E-mail comments to info@tcud.state.tx.us. Please send comments by one method only.

TRD-200107149
Harold E. Feeney
Commissioner
Credit Union Department
Filed: November 19, 2001

♦ ♦ ♦

Texas Department of Health

Title 25, Part 1

The Texas Department of Health (department) will review and consider for readoption, revision or repeal Title 25, Texas Administrative Code, Part 1, Chapter 229. Food and Drug, Subchapter O. Licensing Of Wholesale Distributors Of Drugs--Including Good Manufacturing Practices, §§229.251 - 229.255.

This review is in accordance with the requirements of the Texas Government Code, §2001.039.

An assessment will be made by the department as to whether the reasons for adopting or readopting these rules continue to exist. This assessment will be continued during the rule review process. Each rule will be reviewed to determine whether it is obsolete, whether the rule reflects current legal and policy considerations, and whether the rule reflects current procedures of the department. The review of all rules must be completed by August 31, 2003.

Comments on the review may be submitted in writing within 30 days following the publication of this notice in the *Texas Register* to Linda Wiegman, Office of General Counsel, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756. Any proposed changes to these rules as a result of the review will be published in the Proposed Rule Section of the *Texas Register* and will be open for an additional 30 day public comment period prior to final adoption or repeal by the department.

TRD-200107016

Susan K. Steeg
General Counsel
Texas Department of Health
Filed: November 14, 2001

♦ ♦ ♦

Railroad Commission of Texas

Title 16, Part 1

The Railroad Commission of Texas files this notice of intention to review and readopt without change the following sections of 16 Texas Administrative Code, Part 1, Chapter 3: §3.22, relating to protection of birds; §3.35, relating to procedures for identification and control of wellbores in which certain logging tools have been abandoned; §3.43, relating to application for temporary field rules; and §3.47, relating to allowable transfers for saltwater injection wells. This review and consideration is being conducted in accordance with Texas Government Code §2001.039 (*as added by Acts 1999, 76th Leg., ch. 1499, §1.11(a)*). The agency's reasons for adopting these rules continue to exist.

Comments may be submitted to Leslie L. Savage, Oil and Gas Division, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967 or leslie.savage@rrc.state.tx.us. Comments will be accepted for 30 days after publication of this notice in the *Texas Register*.

Issued in Austin, Texas, on November 20, 2001.

TRD-200107170
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Filed: November 20, 2001

♦ ♦ ♦

Texas Department of Transportation

Title 43, Part 1

Notice of Intention to Review: In accordance with the General Appropriations Act of 1999, House Bill 1, Section 10.13, Article IX, and Government Code, §2001.039, as added by Senate Bill 178, 76th Legislature, the Texas Department of Transportation (department) files this notice of intention to review Title 43 TAC, Part I, Chapter 9, Contract Management, Chapter 13, Materials Quality, §§15.1-15.8, Transportation Planning, §15.13, New Product Evaluation, §15.21, Distribution and Availability, §§15.40-15.42, Texas Highway Trunk System, §15.60, State Park Roads, §§15.70-15.76, International Bridges, §§15.80-15.93, Transportation Corporations, §21.21, State Participation in Relocation, Adjustment, and/or Removal, §§21.31-21.56, Utility Accommodation, §21.71, Incidental Expenses, §21.81, Passes, §§21.101-21.104, Disposal of Real Estate Interests, §§21.131-21.133, Control and Screening of Junkyards and Automobile Junkyards, §§21.141-21.162, Control of Outdoor Advertising Signs, §§21.401-21.581, Control of Signs Along Rural Roads, and Chapter 27, Toll Projects.

The department will accept comments regarding whether the reasons for adopting these rules continue to exist. The comment period will last 30 days beginning with the publication of this notice of intention to review.

Comment or questions regarding this rule review may be submitted in writing to Bob Jackson, Deputy General Counsel, Texas Department of Transportation, 125 E. 11th Street, Austin, Texas 78701-2483, or by phone at (512) 463-8630.

TRD-200107121
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: November 19, 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 377, Hydrographic Survey Program, 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 §377.3 and §377.4.

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 377 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-200107032
Suzanne Schwartz
General Counsel
Texas Water Development Board
Filed: November 15, 2001

♦ ♦ ♦

Adopted Rule Reviews

Credit Union Department

Title 7, Part 6

The Credit Union Commission readopts, without changes, 7 TAC §91.103 Public Notice of Department Activities, 7 TAC §91.104 Notice of Applications, 7 TAC §91.1003 Mergers/Consolidations, 7 TAC §91.3001 Opportunity to Submit Comments on Certain Applications, and 7 TAC §91.3002 Conduct of Meetings to Receive Comments, pursuant to Section 2001.39, Government Code. The proposed review was published in the August 24, 2001 issue of the *Texas Register* (26 TexReg 6375).

The Credit Union Commission received no comments related to the rule review requirement as to whether the reason for adopting each rule continues to exist. The Commission finds that the reasons for adopting 7 TAC §§91.103, 91.104, 91.1003, 91.3001 and 91.3002 continue to exist.

TRD-200107138
Harold E. Feeney
Commissioner
Credit Union Department
Filed: November 19, 2001

♦ ♦ ♦

Texas Education Agency

Title 19, Part 2

The Texas Education Agency (TEA) adopts the review of 19 TAC Chapter 105, Foundation School Program, pursuant to the Texas

Government Code, §2001.039. The TEA proposed the review of 19 TAC Chapter 105 in the September 28, 2001, issue of the *Texas Register* (26 TexReg 7581).

The TEA finds that the reason for adopting continues to exist. The TEA received no comments related to the rule review requirement as to whether the reason for adopting the rules continues to exist. This concludes the review of 19 TAC Chapter 105.

TRD-200107114
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Filed: November 19, 2001

♦ ♦ ♦

Texas Department of Transportation

Title 43, Part 2

The Texas Turnpike Authority of the Texas Department of Transportation readopts without changes Title 43 TAC, Part 2, Chapter 53, Contracting and Procurement Procedures, Subchapter A, Turnpike Project Improvement Projects and Subchapter B, Contracting for Architectural and Engineering Services. This review was conducted in accordance with Government Code, §2001.039, as added by Senate Bill 178, 76th Legislature.

The proposed review was published in the September 21, 2001, issue of the *Texas Register* (26 TexReg 7286). No comments were received regarding the readoption of these rules. The Texas Turnpike Authority has reviewed these rules and determined that the reasons for adopting them continue to exist.

TRD-200107188
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: November 20, 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: 1 TAC Chapter 113

Old Rule Number	New Rule Number	Title
10 TAC §199.101	1 TAC §113.201	Authority
10 TAC §199.102	1 TAC §113.202	Purpose
10 TAC §199.103	1 TAC §113.203	Definitions
10 TAC §199.104	1 TAC §113.204	General Provisions
10 TAC §199.105	1 TAC §113.205	Internet Access
10 TAC §199.106	1 TAC §113.206	Fees
10 TAC §199.107	1 TAC §113.207	General Posting Requirements
10 TAC §199.108	1 TAC §113.208	Posting Time Requirements
10 TAC §199.109	1 TAC §113.209	Emergency Procurements
10 TAC §199.110	1 TAC §113.210	Registered Agent Requirements
10 TAC §199.111	1 TAC §113.211	Procurement Opportunity Posting Procedures
10 TAC §199.112	1 TAC §113.212	Posting Follow-up and Record Keeping
10 TAC §199.113	1 TAC §113.213	Contract Award
10 TAC §199.114	1 TAC §113.214	Award Notification
10 TAC §199.115	1 TAC §113.215	Verification of Compliance
10 TAC §199.116	1 TAC §113.216	Exceptions and Exclusions

Figure: 22 TAC §521.13(b)

Total number of CPA employees and non-CPA owners in all offices in Texas:	Fee per each CPA employee and non-CPA owner:
Less than 6	$0.00
6-9	$7.50
10-49	$10.00
50-99	$15.00
100-249	$17.50
250 or more	$20.00

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.

Texas Department of Agriculture

Request for Proposals - Integrated Pest Management Grant Program

Statement of Purpose. Pursuant to the Texas Agriculture Code, §12.002, and §12.007, the Texas Department of Agriculture (TDA) hereby requests proposals for projects, for the period April 1, 2002 through March 31, 2003, that use and expand the use of integrated pest management (IPM) in agriculture. A total amount of up to $300,000 may be awarded. Two categories will be considered: Geographically Specific Implementation Projects and Statewide Projects.

Eligibility. Grant proposals will be accepted from non-profit producer, educational or research organizations involved in IPM programs.

Funding Areas. Funding is limited to the following two categories:

1. **Geographically Specific Project** - Implementation projects should be for the demonstration of IPM principles and technology, the establishment of educational programs to expand the use of biologically intensive IPM, or delivering biologically intensive IPM programs to farmer/rancher groups in a short period of time. Joint efforts between public and private entities are encouraged. Preference will be given to proposals that:

(a) emphasize the final development and delivery of new technologies;

(b) compare different IPM strategies;

(c) implement new IPM tactics, strategies, or components of IPM systems;

(d) seek implementation of IPM practices in Texas counties and areas where such practices have not been used;

(e) demonstrate economic benefits for Texas; or

(f) implement IPM in non-traditional commodities.

2. **Statewide Projects** - The following areas within this category are eligible. They are as follows:

(a) **Internship Project.** A program to develop and deliver trained, experienced IPM professionals by providing college students in the crop production/protection disciplines the opportunity to earn college credits while gaining expertise and experience in non-profit, producer operated, professionally supervised IPM programs at the county level. An amount up to $37,000 is available for this project.

(b)**Crop Management Manual.** Develop, publish and deliver an integrated crop management manual for a Texas crop, addressing production practices from planting to harvest and prevention, monitoring, and management of major insect, weed, and disease pests. The manual must be practical in nature. An amount up to $20,000 is available for this project.

(c) **Boll Weevil Research to Support Management Plans.** Conduct research to evaluate different boll weevil management techniques applicable to: (1) specific boll weevil issues pertaining to the ginning industry such as: boll weevil detection in seed cotton being transported on cotton modules to a gin and effective control techniques to prevent reinfestation of an eradicated area and (2) proper management of green bolls and other field residue to reduce the number of boll weevils emerging and re-infesting the zone or the following years crop. This could include stalk residue in no-till management fields.

This boll weevil research should be a coordinated effort to be conducted in 3 distinctly different areas of Texas such as: South Texas, Central Texas (Brazos Valley) and Northwest Texas (Texas High Plains). This will address the differences that need to be considered. Research must be replicated and will be used for support in the development of statewide management plans to support boll weevil eradication efforts. An amount up to $35,000 is available for this project.

Proposal Limitations. Geographically specific projects are limited to no more than $15,000 per project. Statewide projects are limited to no more than the following: internship project - $37,000, crop management manual - $22,000, and, boll weevil research project - $35,000.

Geographically specific grant projects are limited to one year of funding; however, a no-cost extension may be requested if properly justified in writing **no later** than thirty (30) days prior to the termination date of the project. If approved, the extension shall not exceed one year past the original termination date. Research conducted in previous funding cycles will not be considered for subsequent funding.

Generally statewide grant projects are limited to one year of funding with the availability of a no-cost extension if properly justified in writing no later than thirty (30) days prior to the project's termination date. However, subsequent year funding may be available if the proposal meets eligible statewide funding areas.

Proposals may not include more than 10% in indirect costs.

Proposals may include the use of no more than two (2) chemical products for experimental control purposes to validate IPM methods. Those proposals focusing on chemical efficacy testing will not be considered for funding.

Matching Requirements. There are no matching requirements for this grant program.

Eligible Expenses. Expenses that are necessary and reasonable for proper and efficient performance and administration of a project are eligible; however, these expenses must be properly documented with sufficient backup detail, including copies of paid invoices. Examples of eligible expenditures are:

1. Personnel costs - both salary and benefits;

2. Travel - domestic only;

3. Equipment - nonexpendable, tangible personal property having a useful life of more than one year and costs $1,000 or more;

4. Supplies and direct operating expenses - equipment that costs less than $1,000, research and office supplies, postage, telecommunications, printing, etc.; and

5. Indirect costs - no more than 10%.

Ineligible Expenses. Expenses that are prohibited by state or federal law are ineligible. Refer to the Uniform Grant Management Standards for more detailed information at http ://www.governor.state.tx.us/the office/gts tracs/Grants/guidelines.htm. Following are some examples of these ineligible expenses:

1. Alcoholic beverages;

2. Entertainment;

3. Contributions - charitable or political;

4. Expenses falling outside of the contract period;

5. Expenditures not specifically listed in the project budget; and

6. Expenses that are not adequately documented.

Submission Requirements. Each proposal may not exceed six (6) pages and must include the following criteria:

1. Cover sheet with names, titles, addresses, telephone and fax numbers, and email addresses of the principal researchers. Indicate who is designated as the lead researcher and point of contact.

2. Project summary, not to exceed one page. Include a statement about whether project is statewide or geographically specific. If geographically specific, indicate the impact area by region and county listing.

3. Identification of the key personnel to be involved in the project, including information on their experience.

4. Rationale/justification for the project.

5. Performance objectives.

6. Work plan.

7. Detailed description of the anticipated beneficial impact on agriculture and deliverables.

8. Detailed project budget, including justification for proposed line item expenditures.

Additional Requirements for Statewide Renewal Proposals. In the case of statewide proposals seeking subsequent year funding for the logical expansion of the existing project, or to ensure adequate replication of field experiments, an additional page is required and is to be inserted after the coversheet. This page shall constitute a Progress Summary that will succinctly describe progress attained in the prior year of funding, any significant accomplishments and statements clearly explaining the rationale and justification for seeking a subsequent year of funding.

Reporting Requirements. Approved projects are required to submit the following reports:

1. Narrative reports on a quarterly basis from one to three pages in length detailing accomplishment of project objectives for the time periods specified in the award document.

2. Final compliance narrative report due either upon completion of the project or thirty (30) days after the termination of the contract. The final report shall contain:

(a) a project summary -history of the project, its objectives, importance, effort, results, and commercial applications of the project;

(b) a description of the successes, challenges, and any limitations of the program;

(c) technical and economic content - overall background of the project and the part (if any) that research plays in providing results, discussion of the technical, social and other benefits to the local community and to Texas, discussion of the economics of the project, including direct impact on local communities (jobs) and/or indirect impact (related businesses), and commercialization of the project; and

(d) a description of future plans, including how the project will continue after the grant is expended and how additional funding might address expansion efforts.

3. Budget reports on a quarterly basis for the time periods specified in the award document that details the grant award spent to date.

General Compliance Information.

1. All grant awards are subject to the availability of appropriations and authorizations by the Texas Legislature.

2. Any information or documentation submitted to TDA is subject to disclosure under the Texas Public Information Act.

3. Awarded grant projects must remain in full compliance with state and federal laws and regulations or be subject to termination at the discretion of TDA.

4. Upon grant award, TDA shall have access to and the right to examine all books, accounts, records, files and other papers or property belonging to or in use by the grantee and pertaining to the grant award. Additionally, these records must remain available and accessible no less than three (3) years after the termination of the grant project.

5. In any year in which a financial audit is conducted, a copy must be submitted to TDA, including the audit transmittal letter, management letter, and any schedules in which the grantee's funds are included.

6. In accordance with Texas Government Code Ann. §783.007, grant awards shall comply in all respects with the Uniform Grant Management Standards (UGMS). Upon grant award, grantees will be provided a copy or it may be downloaded from http://www.governor.state.tx.us/the_office/gts_tracs/Grants/guide lines.htm.

Deadline and Submission Information. Proposals should be submitted to Ms. Carol Funderburgh, Contracts and Grants Coordinator, Texas Department of Agriculture, P. O. Box 12847, Austin, Texas 78711. The street address is 1700 North Congress, 9th Floor, Austin, Texas 78701.

Proposals must be received no later than 5:00 p.m. January 15, 2002. One original and nine copies must be submitted. Fax copies will not be accepted.

Please contact Ms. Funderburgh at 512/463-8536 or by email at carol.funderburgh@agr.state.tx.us with any questions you may have.

Evaluation and Award Information. All proposals will be subject to evaluation by a committee based on the criteria set forth in this RFP. TDA shall not pay for any costs incurred by any entity in responding to this RFP. TDA reserves the right to accept or reject any or all proposals submitted. TDA reserves the right to fund proposals from alternative funding sources if the proposal meets the stipulated requirements of that RFP. TDA is under no legal or other obligation to award a grant on the basis of this RFP or any other RFP. The Commissioner will make final funding decisions.

The announcement of grant awards will be made no later than March 15, 2002.

TRD-200107139
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Filed: November 19, 2001

♦ ♦ ♦

Request for Proposals - Surplus Agricultural Products Grant Program

Statement of Purpose. Pursuant to the Texas Agriculture Code (the Code), §12.002 and House Bill 1086, enacted by the 77th Legislature, 2001, and codified as the Code, Chapter 20, the Texas Department of Agriculture (TDA) hereby requests proposals for projects, for the period March 1, 2002 through August 31, 2003, that collect and distribute surplus Texas agricultural products to food banks and other charitable organizations that serve needy or low-income individuals.

Eligibility. Grant proposals will be accepted from non-profit organizations that have a 501 (c) (3) IRS designation. These organizations must be established and operate under religious, charitable or educational purposes and not financial gain. Additionally, these organizations must not distribute any of their income to their members, directors or officers.

Organizations must have at least 5 years of experience coordinating a statewide network of food banks and charitable organizations that serve each of the 254 counties of this state.

Funding Limitations. Proposals are limited to $250,000 per year for a total biennial budget of $500,000.

Funding is limited to the operation of a program that coordinates the collection and transportation of surplus Texas agricultural products to a statewide network of food banks that provide food to the needy or low-income individuals.

Matching Requirements. There are no matching requirements for this grant program.

Eligible Expenses. Generally, expenses that are necessary and reasonable for proper and efficient performance and administration of a project are eligible; however, these expenses must be properly documented with sufficient backup detail, including copies of paid invoices. Examples of eligible expenditures are:

1. Personnel costs - both salary and benefits;

2. Travel - in-state only and incurred by grant personnel on official grant-related business;

3. Equipment - nonexpendable, tangible personal property having a useful life of more than one year and costs $1,000 or more;

4. Supplies and direct operating expenses - equipment that costs less than $1,000, office supplies, postage, telecommunications, printing, fidelity bond, packaging, collection, transportation, etc.; and

5. Indirect costs - no more than 10%.

Ineligible Expenses. Expenses that are prohibited by state or federal law are ineligible. Examples of these expenditures are:

1. Alcoholic beverages;

2. Entertainment;

3. Contributions - charitable or political;

4. Fundraising;

5. Expenses falling outside of the contract period;

6. Expenses for expenditures not specifically listed in the project budget; and

7. Expenses that are not adequately documented.

Submission Requirements. Each proposal may not exceed six (6) pages and must include the following criteria:

1. Cover sheet with project title, name, title, address, telephone and fax numbers, and email address of the individual designated as the point of contact.

2. Project summary, not to exceed one page.

3. Identification of the key personnel to be involved in the project, including information on their experience.

4. Measurable goals - a description of realistic goals that are measurable and potentially attainable.

5. Evaluation plan - a description of the method(s) to be used to determine the success of the project.

6. Work plan - a description of how the collection and distribution of surplus agriculture products will be accomplished.

7. Project budget - must be detailed with year 1 and year 2 expenditures and include justification for proposed line item expenditures.

Reporting Requirements. Upon award, the following reports will be required:

1. Narrative reports on a quarterly basis from one to three pages in length detailing accomplishments of project objectives for the time periods specified in the award document.

2. Final compliance narrative report shall be due either upon completion of the project or thirty (30) days after the termination of the grant project, whichever occurs first. The final report shall contain:

(a) A project summary - history of the project, objectives, importance, effort, and results;

(b) Details pertaining to the measured goals and project evaluation;

(c) A description of the successes, challenges, and any limitations; and

(d) A description of future plans - include how the project will continue after the grant is expended and how additional funding may address expansion efforts.

3. Budget reports on a quarterly basis for the time periods specified in the award document that details the grant award funds spent to date.

General Compliance Information.

1. All grant awards are subject to the availability of appropriations and authorizations by the Texas Legislature.

2. Any information or documentation submitted to TDA is subject to disclosure under the Texas Public Information Act.

3. Awarded grant projects must remain in full compliance or be subject to termination at the discretion of TDA.

4. Upon grant award, TDA shall have access to and the right to examine all books, accounts, records, files and other papers or property belonging to or in use by the grantee and pertaining to the grant award. Additionally, these records must remain available and accessible no less than three (3) years after the termination of the grant project.

5. Audit requirements will be in accordance with the State of Texas Single Audit Circular Section 200. In any year in which a financial audit is conducted, a copy must be submitted to TDA within 30 days upon receipt, including the audit transmittal letter, management letter, and any schedules in which the grantee's funds are included.

6. In accordance with Texas Government Code Ann. §783.007, grant awards shall comply in all respects with the Uniform Grant Management Standards (UGMS). Upon grant award, grantees will be provided a copy or it may be downloaded from http: //www.governor.state.tx.us/the office/gts tracs/Grants/guidelines.htm.

7. Grantees must adhere to the state and federal regulations pertaining to the movement of Texas agriculture products.

Deadline and Submission Information. Proposals should be submitted to Ms. Carol Funderburgh, Contracts and Grants Coordinator, Texas Department of Agriculture, P. O. Box 12847, Austin, Texas 78711. The street address is 1700 North Congress, 9th Floor, Austin, Texas 78701.

Proposals must be received no later than 5:00 p.m. January 31, 2002. One original and nine copies must be submitted. Fax copies will not be accepted.

Please contact Ms. Funderburgh at (512) 463-8536 or by email at carol.funderburgh@agr.state.tx.us with any questions you may have.

Evaluation and Award Information. All proposals will be subject to evaluation by a committee based on the criteria set forth in this RFP. TDA shall not pay for any costs incurred by any entity in responding to this RFP. TDA reserves the right to accept or reject any or all proposals submitted. TDA is under no legal or other obligation to award a grant on the basis of this RFP or any other RFP. The Commissioner will make final funding decisions.

The announcement of grant awards will be made no later than February 15, 2002.

TRD-200107158
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Filed: November 19, 2001

♦ ♦ ♦

Capital Area Rural Transportation System

Request for Qualifications

The Capital Area Rural Transportation System (CARTS) wishes to engage a consultant to review and assess transit needs and opportunities for enhancing mobility in Williamson County Texas, a rapidly urbanizing area just north of Austin. The general scope of the project will be to assess transit needs and to develop plans and resources to achieve an acceptable level of public transit services in the County, while providing convenient connections to the metropolitan area. One city in the County, Round Rock, now exceeds 50,000 and will either be part of the metropolitan area or a small urban area. That city is conducting a separate study, now underway, with which this one will be coordinated in such a way that the two efforts are complementary.

Interested and qualified individuals, firms and consultant teams are invited to submit one original and ten copies of materials that demonstrate their experience in performing projects of this scale. Documentation should include: Names and Phone Numbers of up to five clients who may be contacted, including at least three for whom services were rendered in the last two years; Resumes of key team members proposed to perform work in this project; Samples of past planning projects for rural transit systems, in particular rural areas becoming rapidly urbanized; Demonstrated strengths in community-based participatory planning processes, including the ability to assist in structuring and facilitating a planning process that actively involves all segments of the community; Demonstrated creative and innovative approaches to transportation planning and community participation in the planning process by the consultant team; and, The extent of knowledge of and/or experience in conducting rural transit planning projects in rural Texas or areas with demographics similar to the proposed project. A selection committee will review submitted materials, and the successful teams invited to submit a proposal in approximately February of 2002. Submittals must be mailed or delivered to arrive by December 28th at 4:00 p.m. to: David Marsh, Executive Director, CARTS, 2010 East 6th Street, Austin, Texas 78702, (Mail: P.O. Box 6050 78762).

TRD-200107184
David Marsh
Executive Director
Capital Area Rural Transportation System
Filed: November 20, 2001

♦ ♦ ♦

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 November 9, 2001, through November 15, 2001. The public comment period for these projects will close at 5:00 p.m. on December 21, 2001.

FEDERAL AGENCY ACTIONS:

Applicant: Sabco Operating Company; Location: The project's proposed pipeline would run from State Tract 49, Well No. 1 surface location to the production platform 49 in State Tract 49. State Tract 49 is located approximately 6.8 miles east of Corpus Christi, offshore Nueces County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Portland, Texas. Approximate UTM Coordinates: Zone: 14; Easting: 668111; Northing: 3072642. CCC Project No.: 01-0389-F1; Description of Proposed Action: The applicant proposes to install a 2-7/8-inch pipeline next to an existing 2-7/8-inch pipeline. The applicant owns and operates the adjacent leases surrounding State Tracts 49 and 52. The bottom of the bay in the proposed project area is beneath 20 feet of water at Mean Low Tide and does not support any sea grass or oyster reef development. The proposed pipeline would be approximately 4,459 feet long and buried a minimum of 3 feet deep. Approximately 1,486 cubic yards of material would be displaced during pipeline construction. Type of Application: U.S.A.C.E. permit application #22174/007 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403). NOTE: The CMP consistency review for this project may be conducted by the Railroad Commission of Texas as part of its certification under §401 of the Clean Water Act.

Applicant: Texas Department of Transportation; Location: The proposed project site is located along the east and west shorelines of the Port Arthur Ship Canal, along State Highway 87, from south of the Gulf Intracoastal Waterway (GIWW) to northeast of Keith Lake and along State Highway 82 from east of the GIWW to east of Keith Lake, south of Port Arthur, Jefferson County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Port Arthur South, Texas. Approximate UTM Coordinates: Zone: 15; Easting: 409894; Northing: 3293257. CCC Project No.: 01-0392-F1; Description of Proposed Action: The applicant proposes to perform shoreline stabilization activities as needed along approximately nine miles of the east and west shorelines of the Port Arthur Ship Canal. This would be done by placing concrete slabs, weighing approximately one to two tons, on top of a prepared layer of sized concrete rubble with a layer of filter fabric placed in between. The rubble would be placed on prepared gravel foundations. The proposed concrete slabs would extend from below the existing grade or mudline to above the high tide level to allow for anticipated surges in water levels. The applicant also proposes to use earthen cofferdams to temporarily de-water the work areas in order to prepare the gravel foundations. All de-watering materials would be removed and placed in upland areas. Type of Application: U.S.A.C.E. permit application #22313 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: Houston Fuel Oil Terminal; Location: The proposed project site is located east of Beltway 8, south of Interstate 10, northeast of the intersection of Jacintoport Blvd. and Sheldon Rd., in Houston, Harris County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Highlands, Texas. Approximate UTM Coordinates: Zone: 15; Easting: 295402; Northing: 3293618. CCC Project No.: 01-0394-F1; Description of Proposed Action: The applicant proposes to expand terminal operations located at the Jacintoport facility. This expansion will involve the multi-phase development of an approximately 115-acre tract of land located adjacent to the existing terminal. The applicant proposes to build an above ground storage tank facility with supporting administrative and maintenance facilities to meet current and anticipated future demand for tank storage. There are 9.57 acres of jurisdictional wetlands on the site. The conceptual site plan for the facility includes the eventual utilization of the entire 115-acre site, including filling of all of the 9.57 acres of wetlands. The applicant proposes to construct a dredge disposal cell to raise and level an approximate 11-acre site. This site will allow for the construction of storage tanks in future development phases of the project. The revised plans for Phase 1 include construction of storage tanks on approximately 50 acres during this phase. The tanks will be constructed in the two large areas south of the 11-acre area. The revised plans also include filling of all of the wetlands depicted on the site plan, approximately 4.15 acres of emergent herbaceous wetlands. This project may impact additional coastal wetlands. The applicant proposes to use dredged material from maintenance dredging as fill material for the 11-acre site. In addition to the revised plans, the applicant proposes to enter an in-lieu-fee agreement with The Nature Conservancy to compensate for the proposed impacts to the 4.15 acres of wetlands. The mitigation would be performed at a designated site along Dickinson Bayou. Type of Application: U.S.A.C.E. permit application #22404 (Revised Plans) 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: Texas Parks & Wildlife Department; Location: The proposed project site is located at the Battleship Texas Museum, south of Interstate 10, at 3523 State Highway 134 in LaPorte, Harris County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Highlands, Texas. Approximate UTM Coordinates: Zone: 15; Easting: 297956; Northing: 3293349. CCC Project No.: 01-0398-F1; Description of Proposed Action: The applicant proposes to conduct maintenance dredging of the Battleship Texas slip to its confluence with the Houston Ship Channel to the authorized depth of 33 feet below mean sea level. Approximately 75,000 cubic yards of dredged material will be placed in either the Lost Lake or Peggy Lake Dredged Material Placement Areas or in the San Jacinto Marsh restoration project. The applicant also proposes to replace approximately 1,000 linear feet of concrete revetment mat around the slip, re-grading the slope, and placing filter fabric beneath the mats to prevent erosion. Approximately 700 feet of the revetment will require the placement of granular fill material at the toe of the revetment. Approximately 404 cubic yards of granular fill will be place at the tow of the new revetment in order to prevent erosion beneath the mat. The old revetment will be demolished and reused on uplands for erosion protection. Type of Application: U.S.A.C.E. permit application #18412(03) 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: Michael Bennett; Location: The proposed project site is located on FM 1781, Fulton, 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: 690116; Northing: 3108015. CCC Project No.: 01-0399-F1; Description of Proposed Action: The applicant proposes to mechanically dredge an existing harbor and entrance channel, bulkhead the inside perimeter of the existing basin, and construct two riprap breakwaters at the channel entrance. The applicant also proposes to construct a boat ramp, two fishing piers, a boathouse, and two boat docks within this basin. Approximatly 0.3-acre of jurisdictional area will be filled for the breakwater and behind the proposed bulkhead. An area of approximately 14,241 square feet of shoal grass would be excavated during construction. The excavated material will be placed in leveed disposal areas on both sides of the property. The applicant proposes to compensate for the impacts to aquatic resources by creating a 14,241 square foot area of shoal grass behind the breakwater and to create 0.3-acre of wetlands at

six small sites around the basin area. Type of Application: U.S.A.C.E. permit application #22276 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).

Applicant: Houston Port Authority; Location: The proposed project site is located along the Bayport Ship Channel, approximately 30 miles southeast of downtown Houston, in the City of Pasadena, between the cities of Shoreacres and Seabrook in Harris County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: League City, Texas and Bacliff, Texas. Approximate UTM Coordinates: Zone: 15; Easting: 305000; Northing: 3277000. CCC Project No.: 01-0400-F1; Description of Proposed Action: The applicant proposes to develop a major marine terminal complex on approximately 1,091 acres along the south side of the Bayport Ship Channel. This development would include facilities for docking, loading and unloading container and cruise ships, container storage areas, an intermodal yard, warehousing, and properties available for light industrial development. This project would be constructed in phases and would require the dredging of approximately 9 million cubic yards of material over the life of the construction project. The dredged material from the initial phase of construction would be placed onsite while dredged material from future phases would be placed into offsite dredged material placement areas or utilized in a beneficial uses of dredged material project. This project would also require the placement of fill material into approximately 2.5 acres of jurisdictional wetlands. This project may impact additional coastal wetlands. As mitigation for the project impacts, the applicant proposes to purchase a 163-acre tract of land located adjacent to Armand Bayou Nature Center and Taylor Lake. The applicant proposes to create 12.38 acres of adjacent wetlands within this tract and place a conservation easement on the entire tract. In addition, the applicant expects that at least 200 acres of intertidal wetlands would be created as a result of the beneficial use of the dredged material.. Type of Application: U.S.A.C.E. permit application #21520 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).

Applicant: Gryphon Exploration Company; Location: The proposed project site is located in the Matagorda Island Area, Block 721-L, S/2 of the NW/4 in the Aransas Pass Anchorage Area, Gulf of Mexico, approximately 4 miles offshore Aransas County, Texas. The XY coordinates for the proposed well are X=2,659,568.94' and Y=17,964.46'. CCC Project No.: 01-0401-F1; Description of Proposed Action: The applicant proposes to install, operate, and maintain a typical jack-up rig, caisson well protector with appurtenant structures, and equipment necessary to conduct oil and gas drilling operations and production for State Tract 721-L, Well No. 1. No dredging or fill activities are required for the proposed project. All work would be performed within a 500-foot radius of the proposed well coordinates. There are no known structures within a 2-1/2-mile radius. The water depth at the proposed site is approximately 50-feet deep. Type of Application: U.S.A.C.E. permit application #22519 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403).

FEDERAL AGENCY ACTIVITIES:

Applicant: U.S. Dept. of the Interior - Minerals Management Service; CCC Project No.: 01-0390-F2; Description of Proposed Action: The applicant requests comment and consideration on a consistency determination for the proposed Central Gulf of Mexico Lease Sale 182 (March 2002) with respect to the Texas coastal Zone Management Program.

Applicant: U.S. Dept. of Commerce - NOAA - National Marine Fisheries Service; CCC Project No.: 01-0397-F2; Description of Proposed Action: The applicant requests a consistency determination for the proposed rule to amend regulations protecting sea turtles in the shrimp trawl fishery.

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-200107199
Larry R. Soward
Chief Clerk, General Land Office
Coastal Coordination Council
Filed: November 21, 2001

♦ ♦ ♦

Comptroller of Public Accounts

Notice of Requests for Proposals

Notice of Request for Proposals: Pursuant to Chapter 2254, Subchapter B, Texas Government Code, and Chapter 54, Subchapters F and G, Texas Education Code, the Comptroller of Public Accounts (Comptroller) on behalf of the Texas Prepaid Higher Education Tuition Board (Board) announces its Request for Proposals (RFP #131a) for the purpose of obtaining investment consulting services for the Board. The selected consultant ("Consultant") will advise and assist the Board and the Comptroller in administering all of the Board's investment activities related to the Texas Tomorrow Constitutional Trust Fund ("Fund"). The Fund currently includes a prepaid tuition program and a college savings plan as authorized under Section 529 of the Internal Revenue Code. The Comptroller, as Chair and Executive Director of the Board, is issuing this RFP in order that the Board may move forward with retaining the necessary Consultant. The Comptroller and the Board reserve the right to award more than one contract under the RFP. If approved by the Board, the Consultant will be expected to begin performance of the contract on or about January 11, 2002.

Contact: Parties interested in submitting a proposal should contact John C. Wright, Assistant General Counsel, Contracts, Comptroller of Public Accounts, 111 E. 17th St., Room G-24, Austin, Texas 78774, (512) 305-8673, to obtain a complete copy of the RFP. The Comptroller will mail copies of the RFP only to those parties specifically requesting a copy. The RFP will be available for pick-up at the above referenced address on Friday, November 30, 2001, between 2:00 p.m. and 5:00 p.m. Central Zone Time (CZT), and during normal business hours thereafter. The Comptroller will also make the entire RFP available electronically on the Texas Marketplace after Friday, November 30, 2001, 2:00 p.m. CZT. The Texas Marketplace website address is http://esbd.tbpc.state.tx.us.

Questions and Non-Mandatory Letters of Intent: All written inquiries, questions, and non-mandatory Letters of Intent to propose must be received at the above-referenced address not later than 2:00 p.m. (CZT) on Friday, December 7, 2001. Prospective proposers are encouraged to fax non-mandatory Letters of Intent and Questions to (512) 475-0973 to ensure timely receipt. The Letter of Intent must be addressed to John C. Wright, Assistant General Counsel, Contracts, and must contain the information as stated in the corresponding Section of the RFP and be

signed by an official of that entity. Non-mandatory Letters of Intent and Questions received after this time and date will not be considered. On or before Monday, December 10, 2001, the Comptroller expects to post responses to questions as a revision to the Texas Marketplace notice of issuance of this RFP.

Closing Date: Proposals must be delivered to the Office of Assistant General Counsel, Contracts, at the location specified above (ROOM G24) no later than 2:00 p.m. (CZT), on Monday, December 17, 2001. Proposals received in ROOM G24 after this time and date will not be considered.

Evaluation Criteria: Proposals will be evaluated under the evaluation criteria outlined in the RFP. The Board makes the final decision on award(s).

The Comptroller and the Board each reserve the right to accept or reject any or all proposals submitted. The Comptroller and the Board are not obligated to execute a contract on the basis of this notice or the distribution of any RFP. The Comptroller and the Board shall not pay for any costs incurred by any entity in responding to this Notice or the RFP.

The anticipated schedule of events pertaining to this solicitation is as follows: Issuance of RFP - November 30, 2001, 2:00 p.m. CZT; Non-Mandatory Letter of Intent to propose and Questions Due - December 7, 2001, 2:00 p.m. CZT; Official Responses to Questions posted - December 10, 2001; Proposals Due - December 17, 2001, 2:00 p.m. CZT; Contract Execution - January 11, 2002, or as soon thereafter as practical; Commencement of Work - January 11, 2002. Revisions to this schedule will be posted as revisions to the Texas Marketplace notice of issuance of this RFP.

TRD-200107180
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: November 20, 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 303.003, 303.009, and 304.003, Tex. Fin. Code.

The weekly ceiling as prescribed by Sec. 303.003 and Sec. 303.009 for the period of 11/26/01 - 12/02/01 is 18% for Consumer [1]/Agricultural/Commercial [2]/credit thru $250,000.

The weekly ceiling as prescribed by Sec. 303.003 and Sec. 303.009 for the period of 11/26/01 - 12/02/01 is 18% for Commercial over $250,000.

The judgment ceiling as prescribed by Sec. 304.003 for the period of 12/01/01 - 12/31/01 is 10% for Consumer/Agricultural/Commercial/credit thru $250,000.

The judgment ceiling as prescribed by Sec. 304.003 for the period of 12/01/01 - 12/31/01 is 10% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-200107160
Leslie L. Pettijohn
Commissioner
Consumer Credit Commissioner
Filed: November 20, 2001

♦ ♦ ♦

Credit Union Department

Application(s) to Expand Field of Membership

Notice is given that the following applications have been filed with the Credit Union Department and are under consideration:

An application was received from Community Credit Union, Plano, Texas to expand its field of membership. The proposal would permit persons who work or reside within a 5-mile radius of the following CCU branch locations: 10203 E. Northwest Highway, Dallas, Texas and 2100 W. Northwest Highway, Grapevine, Texas to be eligible for membership in the credit union.

An application was received from Medical Community Credit Union, Odessa, Texas to expand its field of membership. The proposal would permit persons who live or work within a 5-mile radius of Medical Community Credit Union branch location at Loop 250 and Highway 191, Midland, Texas to be eligible for membership in the credit union.

An application was received from PriorityONE Credit Union, Dallas, Texas to expand its field of membership. The proposal would permit persons who are permanent/full time employees of Corporate Solutions in McAllen, Texas and affiliated companies whose employees are co-employed by Corporate Solutions, excluding individuals eligible for primary membership in another occupation or association based credit union to be eligible for membership in the credit union.

An application was received from Southeast Affiliated Federal Employees Credit Union, Beaumont, Texas to expand its field of membership. The proposal would permit persons who live, work or attend school in the City of Beaumont, Texas, to be eligible for membership in the credit union.

An application was received from Southwest 66 Credit Union, Odessa, Texas to expand its field of membership. The proposal would permit persons who live, work or are located in Ector County, Texas, to be eligible for membership in the credit union.

An application was received from TCUL Credit Union, Dallas, Texas to expand its field of membership. The proposal would permit persons who live, work or attend school in, and businesses and other legal entities located in the following zip codes: 75007, 75287, 75252, 75006, 75248, 75080, 75234, 75244, 75240, 75230, and 75229, to be eligible for membership in the credit union.

An application was received from United Credit Union, Tyler, Texas to expand its field of membership. The proposal would permit persons who live, work or attend school in the City of Tyler, Texas, to be eligible for membership in the credit union.

An application was received from United Heritage Credit Union, Austin, Texas to expand its field of membership. The proposal would permit employees of Tallyho Plastics, Incorporated, Jacksonville, Texas, to be eligible for membership in the credit union.

An application was received from Star One Credit Union, Sunnyvale, California to expand its field of membership of its branch office located in Austin, Texas. The proposal would permit employees of Jusung America who work at or are paid from or supervised from or headquartered in Austin, Texas, to be eligible for membership in the credit union.

An application was received from Star One Credit Union, Sunnyvale, California to expand its field of membership of its branch office located in Austin, Texas. The proposal would permit employees of Midtown Grooming who work at or are paid from or supervised from or headquartered in Austin, Texas, to be eligible for membership in the credit union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Credit unions that wish to comment on any application must also complete a Notice of Protest form. The form may be obtained by contacting the Department at (512) 837-9236. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Texas Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-200107183
Harold E. Feeney
Commissioner
Credit Union Department
Filed: November 20, 2001

♦ ♦ ♦

Notice of Final Action Taken

In accordance with the provisions of 7 TAC Section 91.103, the Credit Union Department provides notice of the final action taken on the following application(s):

Application(s) to Expand Field of Membership - Approved

OmniAmerican Credit Union (29 Applications), Fort Worth, Texas - See *Texas Register* issue dated August 31, 2001.

Application(s) to Amend Articles of Incorporation - Approved

OmniAmerican Credit Union, Fort Worth, Texas - See *Texas Register* issue dated August 31, 2001.

Application(s) for Foreign Credit Union to Operate a Branch Office - Approved

Lennox Employees Credit Union, Marshalltown, Iowa - See *Texas Register* issue dated August 31, 2001.

TRD-200107182
Harold E. Feeney
Commissioner
Credit Union Department
Filed: November 20, 2001

♦ ♦ ♦

Deep East Texas Local Workforce Development Board

Request for Proposal

The Deep East Texas Local Workforce Development Board, Inc. is seeking a qualified entity to provide a 12 station Wireless, mobile training lab. Bidder shall be an experienced reseller offering project management, delivery of equipment, and successful implementation.

RFP release date: 8:00 a.m., Tuesday, November 20, 2001.

Deadline for submission of proposal: 10:00 a.m. CST, Thursday, December 4, 2000

Requests for copies of the RFP can be made to:

Martha Ann Paine, Technology Manager

Deep East Texas Local Workforce Development Board, Inc.

1318 S. John Redditt Drive, Suite C

Lufkin, Texas 75904

(936)639-8898

(936)633-7332

Email: martha.paine@twc.state.tx.us

TRD-200107157
Marilyn Hartsook
Planner
Deep East Texas Local Workforce Development Board
Filed: November 19, 2001

♦ ♦ ♦

Texas Education Agency

Request for Proposals Concerning Texas Permanent School Fund/State Board of Education Performance Measurement Services

Eligible Proposers. The Texas Education Agency (TEA) is requesting proposals under Request for Proposals (RFP) #701-02-007 from qualified investment consulting companies to provide performance measurement services to the State Board of Education (SBOE). Historically underutilized businesses (HUBs) are encouraged to submit proposals. If subcontracting opportunities exist, the contractor is encouraged to seek assistance from HUBS.

Description. The performance measurement contractor is expected to prepare, provide and present to the SBOE's Committee on School Finance/Permanent School Fund (PSF) on a quarterly basis a performance evaluation report that measures the risk and return characteristics of multiple portfolios of the PSF for each calendar quarter during the contract period. The contractor will also present the performance report to the SBOE. In connection with the performance report, the contractor will give a capital market review, including appropriate index and style return reviews. Other topics of evaluation shall include comparisons of rates of return and risk characteristics for the total fund and individual managers to PSF peer groups. In addition, the report shall include the measurement and analysis of the PSF's asset allocation, historical returns, various risk characteristics, investment style, and any other portfolio characteristics deemed appropriate by the contractor to assist the SBOE and the PSF staff in meeting their fiduciary obligations relative to oversight of the PSF. The contractor shall also prepare, provide, and report performance results on a fiscal year basis for each portfolio including composite portfolios as required by the PSF. The selected contractor will be expected to provide as many as 50 copies of each report.

Dates of Project. All services and activities related to this proposal will be conducted within specified dates. Proposers should plan for a starting date of no earlier than April 1, 2002. The ending date of the contract is subject to a thirty-day cancellation clause.

Project Amount. The total amount of the contract is subject to negotiated bid.

Selection Criteria. Proposals will be selected based on the ability of each proposer to carry out all requirements contained in this RFP. The SBOE and/or TEA will base its selection on, among other things, the demonstrated competence, experience, and qualifications of the proposer and upon the reasonableness of the proposed fee. The firm selected must meet requirements established by statute, administrative

rule, the TEA, the SBOE, the State Comptroller, and the State Auditor. The TEA reserves the right to select from the highest-ranking proposals those that address all requirements in the RFP and that are most advantageous to the project.

The TEA is not obligated to execute a resulting contract, provide funds, or endorse any proposal submitted in response to this RFP. This RFP does not commit TEA to pay any costs incurred before a contract is executed. The issuance of this RFP does not obligate TEA to award a contract or pay any costs incurred in preparing a response.

Requesting the Proposal. A complete copy of RFP #701-02-007 may be obtained by writing the: Document Control Center, Room 6-108, Texas Education Agency, William B. Travis Building, 1701 N. Congress Avenue, Austin, Texas 78701; by calling (512) 463-9304; by e-mailing dcc@tea.state.tx.us; or may be downloaded from the TEA website at www.tea.state.tx.us/psf. Please refer to the RFP number in your request.

Further Information. For clarifying information about this RFP, contact Paul Ballard, Permanent School Fund, TEA, (512) 463-9169.

Deadline for Receipt of Proposals. Proposals must be received in the Document Control Center of the TEA by 5:00 p.m. (Central Time), Thursday, January 10, 2002, to be considered.

TRD-200107209
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Filed: November 21, 2001

♦ ♦ ♦

State Employee Charitable Campaign

Public Notice

The State Policy Committee of the State Employee Charitable Campaign is seeking applications for state campaign manager from agencies meeting eligibility requirements found in Texas Government Code Annotated, §659.131 et seq. (Vernon 1994 & Supp. 1998). Applications are available from, and questions may be referred to, the current state campaign manager, (512) 478-6601. Completed applications must be received at 3724 Executive Center Drive, Suite 210, Austin, Texas, 78731, no later than 3:00 p.m. on Thursday, January 10, 2002.

TRD-200107189
Janelle Williams
Vice President, Development
State Employee Charitable Campaign
Filed: November 20, 2001

♦ ♦ ♦

Texas Forest Service

Notice of Consultant Contract Award for Forest-Based Economic Development Plan

Pursuant to the provisions of Texas Government Code, Chapter 2254, the Texas Forest Service publishes this notice of a contract award for consultant services for a Texas Forest -Based Economic Development Implementation Plan. The Consultant Invitation For Offer request was published in the August 10, 2001 issue of the *Texas Register*(26 TexReg 6045).

The selected consultant will undertake the study, design, and development of a Texas forest-based economic development assistance model and implementation plan for the Texas Forest Service. The consultant will conduct the project in three phases and will furnish the Texas Forest Service with a final report.

The consultant selected for this project is TIP Development Strategies, Inc., 6836 Austin Center Blvd., Suite 140, Austin, TX 78731. The maximum amount of this contract is $75,000.

The contract period begins on November 23, 2001 and continues until August 31, 2002.

All documentation, data, and final report are due on or before June 21, 2002.

TRD-200107198
James B. Hull
Director and State Forester
Texas Forest Service
Filed: November 21, 2001

♦ ♦ ♦

Texas Department of Health

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
Dallas	Cumbre Inc	L05474	Dallas	00	11/12/01
Tyler	Tyler Cancer Imaging Institute LP	L-5476	Tyler	00	11/14/01
Webster	Roger C. Willette MD PA	L05466	Webster	00	11/01/01

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Arlington	Metroplex Hematology Oncology Associates	L03211	Arlington	63	11/14/01
Bay City	Matagorda County Hospital District	L02701	Bay City	09	10/30/01
Baytown	Jacinto MRI and Diagnostic Center	L04808	Baytown	11	11/14/01
Bedford	Columbia North Hills Hospital Subsidiary LP	L03455	Bedford	30	11/06/01
Carrollton	Tenet Health System Hospitals Dallas Inc	L03765	Carrollton	36	11/02/01
Carrollton	Osram Sylvania Products Inc	L04691	Carrollton	04	11/09/01
College Station	College Station Hospital LP	L02559	College Station	38	11/05/01
Colorado City	Mitchell County Hospital	L01643	Colorado City	20	11/09/01
Corpus Christi	Koch Petroleum Group LP	L00322	Corpus Christi	31	11/14/01
Dallas	Tenet Health System Hospitals Dallas Inc	L02314	Dallas	44	09/02/01
Dallas	Lone Star Cardiology Consultants PA	L04997	Dallas	24	11/07/01
Dallas	Pet Net Pharmaceuticals Inc	L05193	Dallas	08	11/12/01
Denton	Columbia Medical Center of Denton Subsidiary	L02764	Denton	44	11/9/01
DFW Airport	Delta Airlines Inc	L03967	DFW Airport	21	11/07/01
Ft Worth	TIDC Inc	L05247	Ft Worth	06	11/01/01
Ft Worth	Trans America International Inc Nuclear Imaging	L04634	Ft Worth	23	11/12/01
Garland	Cardiology Consultants of North Dallas PA	L05454	Garland	01	11/09/01
Houston	Columbia/HCA Healthcare Corporation	L02473	Houston	43	11/01/01
Houston	Guidant Corporation VI	L05178	Houston	08	11/02/01
Houston	Atomic Energy Ind Laboratories of the SW Inc	L01067	Houston	24	11/13/01
Houston	Rice University Dept of Biomedical Engineering	L00631	Houston	24	11/12/01
Houston	Houston Interventional Cardiology PA	L05470	Houston	01	10/12/01
Houston	Institute of Biosciences and Technology	L04681	Houston	15	11/14/01
Humble	Cardiovascular Association PLLC	L05421	Humble	01	11/08/01
Laredo	Cardiovascular Consultants PA	L05377	Laredo	01	11/07/01
Laredo	Laredo Regional Medical Center	L02192	Laredo	25	11/09/01
Longview	Longview Regional Hospital Inc	L02882	Longview	30	11/13/01
Lubbock	University Medical Center	L04719	Lubbock	45	11/02/01
Lubbock	Cardiologist of Lubbock PA	L05038	Lubbock	08	11/07/01
Mesquite	Medical Center of Mesquite	L02428	Mesquite	28	11/02/01
N Richmond Hills	Columbia North Hills Hospital Subsidiary LP	L02271	N Richland Hills	38	11/05/01
Odessa	Suresh N Gadasalli MD PA	L05156	Odessa	05	11/13/01

(CONTINUED) AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Pampa	Mundy Contract Maintenance Inc	L04360	Pampa	18	11/09/01
Pasadena	Equistar Chemicals LP	L02153	Pasadena	26	11/08/01
Pasadena	Pasadena Paper Company	L00906	Pasadena	36	11/15/01
Rockwall	Rowlett Cardiology Associates PA	L05450	Rockwall	01	11/05/01
San Angelo	Shannon Medical Center	L02174	San Angelo	44	11/06/01
San Antonio	Baptist Health System	L00455	San Antonio	104	11/01/01
San Antonio	Santa Rosa Health Care	L02237	San Antonio	66	11/01/01
San Antonio	Baptist Health System	L00455	San Antonio	105	11/02/01
San Antonio	CTRC Research Foundation	L03350	San Antonio	32	11/08/01
San Antonio	CTRC Clinical Foundation	L01922	San Antonio	59	11/08/01
San Antonio	Cardiology Clinic of San Antonio PA	L04489	San Antonio	18	11/12/01
Sugarland	US Imaging Inc Ft Bend Imaging	L04459	Sugarland	25	11/14/01
The Woodlands	Lexicon Genetics Inc	L04932	The Woodlands	07	11/08/01
Throughout TX	Reinhart and Associates Inc	L03189	Austin	37	11/02/01
Throughout TX	MFG Inc	L05260	Austin	03	11/06/01
Throughout TX	E D Baker Company Ltd	L04872	Borger	05	11/01/01
Throughout TX	Lyondell Chemical Company	L04439	Channelview	15	11/14/01
Throughout TX	Alliance Geotechnical Group Inc	L05314	Dallas	03	11/09/01
Throughout TX	Catch A Fault	L02725	Denton	16	11/09/01
Throughout TX	Millennium Engineers Group Inc	L05388	Edinburg	02	11/15/01
Throughout TX	Momentum Design and Construction Inc	L05212	El Paso	02	11/14/01
Throughout TX	Williams Brothers Construction Company	L04823	Houston	02	11/01/01
Throughout TX	C B & I Constructors Inc	L01902	Houston	48	11/02/01
Throughout TX	Longview Inspection Inc	L01774	Houston	174	11/06/01
Throughout TX	Baker Hughes Oilfield Operations Inc	L00446	Houston	134	11/08/01
Throughout TX	Anatec Inc	L04865	Nederland	44	11/09/01
Throughout TX	Turner Industrial Technical Corporation	L05417	Nederland	01	11/05/01
Throughout TX	Desert Industrial X-ray LP	L04590	Odessa	31	11/02/01
Throughout TX	Conam Inspection	L05010	Pasadena	41	11/09/01
Throughout TX	All American Inspection Inc	L01336	San Antonio	40	11/08/01
Tyler	The University of Texas Health Center at Tyler	L04117	Tyler	27	11/11/01
Tyler	East Texas Medical Center	L00977	Tyler	87	11/12/01
Tyler	Trinity Mother Frances Health System	L01670	Tyler	92	11/14/01
Victoria	Citizens Medical Center	L00283	Victoria	64	11/05/01
Wichita Falls	US Oncology Inc	L05287	Wichita Falls	03	11/08/01

RENEWALS OF EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Houston	James A Smelley MD	L01413	Houston	09	11/09/01
Throughout TX	Century Inspection Inc	L00062	Dallas	95	11/01/01

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-200107211
Susan Steeg
General Counsel
Texas Department of Health
Filed: November 21, 2001

♦ ♦ ♦

Notice of Request for Proposals for Syphilis Elimination Activities

INTRODUCTION

The Texas Department of Health (TDH) requests proposals from community based organizations (CBOs) in the Houston metropolitan area that serve Men Who Have Sex With Men (MSM) of all racial and ethnic groups, to conduct a needs assessment and provide outreach, screening and health promotion services to MSM who frequent anonymous sex venues. The awardee must be or become an active member of the Houston Syphilis Elimination Community Coalition and work collaboratively with the TDH, the Houston Department of Health and Human Services and other members of the community coalition. Project proposals will be reviewed and one award will be made on a competitive basis.

PURPOSE

The specific purposes of community involvement in Syphilis Elimination are to:

acknowledge and respond to the effects of racial inequities, poverty, and social issues relevant to the persistence of syphilis in the United States;

develop and maintain partnerships to increase the availability of and accessibility to quality preventive and care services;

assure that affected communities are collaborative partners in developing, delivering, and evaluating syphilis elimination interventions.

ELIGIBLE APPLICANTS

Eligible entities include CBOs located within the Houston area that serve MSM of all racial and ethnic groups. Eligible organizations are defined as those that have (1) a significant number of individuals from the affected community in service provision positions, and (2) an established record of service to the affected community. If the organization is a local affiliate of a larger organization with a national board, the larger organization must meet the same requirements listed above. Individuals are not eligible to apply. Applicants must have experience and/or expertise in working with the target population. Entities that have had state or federal contracts terminated within the last 24 months for deficiencies in fiscal or programmatic performance are not eligible to apply. Applicants must provide historical evidence of fiscal and administrative responsibility.

AVAILABLE FUNDS

Award of these funds is contingent upon annual federal grant awards to the TDH from the Centers for Disease Control and Prevention. This announcement is made prior to the award of these funds to allow applicants sufficient time to respond by the application due date. Award of these funds is contingent upon satisfactory completion of the grant application and the negotiation process. The projected amount available for project activities is approximately $64,317 for each of Calendar Year 2002 and Calendar Year 2003. The TDH expects to fund one project for the project period May 1, 2002, through December 31, 2003.

DEADLINE

Applications must be received by the Manager, Grants and Contracts Branch, HIV/STD Health Resources Division, Texas Department of Health, 2115 Kramer Lane, Austin, Texas 78758, on or before 5:00 p.m., February 11, 2002. No facsimiles will be accepted.

FOR INFORMATION

For a copy of the RFP, contact Ms. Laura Ramos, HIV/STD Health Resources Division, at (512) 490-2525 or by e-mail at laura.ramos@tdh.state.tx.us. Refer to RFP number 0028. No copies of the RFP will be released prior to December 10, 2001. The RFP will also be available through the Bureau of HIV and STD Prevention website at www.tdh.state.tx.us/hivstd/grants/default.htm on or after December 10, 2001.

TRD-200107212
Susan Steeg
General Counsel
Texas Department of Health
Filed: November 21, 2001

♦ ♦ ♦

Texas Health and Human Services Commission

Notice of Public Hearing

The Texas Health and Human Services Commission (HHSC) will conduct a public hearing to receive public comment on proposed Vendor Fiscal Intermediary payment rates for: out-of-home respite in the Community Based Alternatives program; in-home and out-of-home respite in the Deaf-Blind Multiple Disabilities Waiver program; and respite personal assistance services (PAS) and adjunct PAS in the Medically Dependent Children Program. These programs are operated by the Texas Department of Human Services. These payment rates are proposed to be effective January 1, 2002. The hearing will be held in compliance with Title 1 of the Texas Administrative Code (TAC) §355.105(g), which requires public hearings on proposed payment rates. The public hearing will be held on December 13, 2001, at 9:00 a.m. in Room 450C (fourth floor, west tower), of the John H. Winters Human Services Building at 701 West 51st Street, Austin, Texas. Written comments regarding payment rates may be submitted in lieu of testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Tony Arreola, HHSC Rate Analysis, MC W-425, P.O. Box 149030, Austin, Texas 78714-9030. Express mail can be sent to Mr. Arreola, HHSC Rate Analysis, MC W-425, 701 West 51st Street, Austin, Texas, 78751-2312. The receptionist in the lobby of the John H. Winters Human Services Building at 701 West 51st Street, Austin, Texas, will accept hand-delivered written comments addressed to Mr. Arreola. Alternatively, written comments may be sent via facsimile to Mr. Arreola at (512) 438-2165. Interested parties may request to have mailed to them or may pick up a briefing package concerning the proposed payment rates by contacting Mr. Arreola, HHSC Rate Analysis, MC W-425, P.O. Box 149030, Austin, Texas 78714-9030, telephone number (512) 438-4817.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Tony Arreola, HHSC Rate Analysis, MC W-425, P.O. Box 149030, Austin, Texas 78714-9030, telephone number (512) 438-4817, by December 10, 2001, so that appropriate arrangements can be made.

TRD-200107181
Marina Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Filed: November 20, 2001

♦ ♦ ♦

Texas Department of Housing and Community Affairs

Announcement of the Application Acceptance Period for the 2002 Low Income Housing Tax Credit Program Application Round

The Texas Department of Housing and Community Affairs (the Department) announces the Application Acceptance Period for the 2002 Low Income Housing Tax Credit Program Application Round.

The Pre-Application and Application Acceptance Periods Open at 8:00 A.M. CST, Tuesday, December 4, 2001.

The Close of the Pre-Application Acceptance Period is 5:00 P.M. CST, Friday January 4, 2002.

The Close of the Application Acceptance Period is 5:00 P.M. CST, Friday, March 1, 2002.

The Low Income Housing Tax Credit Program assists in building affordable housing through the issuance of federal tax credits used to fund new construction and rehabilitation of multifamily residential developments. The tax credits allow the developments to be leased to qualified families at below market rents. The Qualified Allocation Plan and Rules (QAP) required under Section 42 of the Internal Revenue Code governs the administration of the program, provides application submission requirements and describes the policies and procedures by which the federal tax credits are distributed.

The 2002 LIHTC Application and supporting reference material will be available at the Department's web site at http://www.tdhca.state.tx.us/lihtc.htm. For more information on the program or to order a copy of the application package, please contact Brooke Boston of the LIHTC Program directly at (512) 475-3340 or at bboston@tdhca.state.tx.us.

TRD-200107083
Ruth Cedillo
Acting Executive Director
Texas Department of Housing and Community Affairs
Filed: November 16, 2001

♦ ♦ ♦

Announcement of the Low Income Housing Tax Credit Program Targeted Regional Distribution for the 2002 Credit Allocation

The Texas Department of Housing and Community Affairs (the Department) announces the targeted regional distribution for the 2002 credit allocation.

The Low Income Housing Tax Credit Program assists in building affordable housing through the issuance of federal tax credits used to fund new construction and rehabilitation of multifamily residential developments. The tax credits allow the developments to be leased to qualified families at below market rents. The Qualified Allocation Plan and Rules (QAP) required under Section 42 of the Internal Revenue Code governs the administration of the program, provides application submission requirements and describes the policies and procedures by which the federal tax credits are distributed.

As required by Section 2306.111 of the Texas Government Code, the Department will use a regional distribution formula to distribute credits from the State Housing Credit Ceiling. This formula established targeted tax credit amounts for each of the state service region and is based on an estimated state credit ceiling of $37,961,260.

The targeted credit amount for Region 1 is $1,640,765.

The targeted credit amount for Region 2 is $1,146,214.

The targeted credit amount for Region 3 is $5,321,198.

The targeted credit amount for Region 4 is $2,213,025.

The targeted credit amount for Region 5 is $1,749,320.

The targeted credit amount for Region 6 is $7,504,095.

The targeted credit amount for Region 7 is $3,536,183.

The targeted credit amount for Region 8A is $4,393,270.

The targeted credit amount for Region 8B is $7,119,779.

The targeted credit amount for Region 9 is $1,147,127.

The targeted credit amount for Region 10 is $2,190,283.

The targeted regional distribution for the 2002 credit allocation will be available at the Department's web site at http://www.tdhca.state.tx.us/lihtc.htm. For more information on the program please contact Brooke Boston directly at (512) 475-3340 or bboston@tdhca.state.tx.us.

TRD-200107084
Ruth Cedillo
Acting Executive Director
Texas Department of Housing and Community Affairs
Filed: November 16, 2001

♦ ♦ ♦

Notice of Public Hearing

Multifamily Housing Revenue Bonds (Stone Hearst Apartments) Series 2002

Notice is hereby given of a public hearing to be held by the Texas Department of Housing and Community Affairs (the "Department") at the Beaumont Civic Center, 701 Main Street, Beaumont, Texas 77701 at 6 p.m. on December 18, 2001 with respect to an issue of tax-exempt multifamily residential rental project revenue bonds in the aggregate principal amount not to exceed $10,900,000 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 Stone Way Limited Partnership, a 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: 216-unit multifamily residential rental development to be constructed on approximately 27 acres of land located on the 1700 block of East Lucas Drive next to Lucas Elementary in Beaumont, Jefferson County, Texas 77703. The project will be initially owned and operated by the Borrower.

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-200107112
Ruth Cedillo
Acting Executive Director
Texas Department of Housing and Community Affairs
Filed: November 19, 2001

♦ ♦ ♦

Notice of Public Hearing

Multifamily Housing Revenue Bonds (West Oaks/Finlay III Apartments) Series 2002

Notice is hereby given of a public hearing to be held by the Texas Department of Housing and Community Affairs (the "Department") at the Kendall Branch Library, 14330 Memorial Drive, Houston, Texas 77079 at 6 p.m. on December 17, 2001 with respect to an issue of tax-exempt multifamily residential rental project revenue bonds in the aggregate principal amount not to exceed $11,200,000 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 West Oaks/Finlay Partners III, LP, a 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: 168-unit multifamily residential rental development to be constructed on approximately 9.7 acres of land located at the northeast corner of the intersection of Gray Ridge and Addicks-Clodine Road in Houston, Harris County, Texas 77082. The project will be initially owned and operated by the Borrower.

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-200107111
Ruth Cedillo
Acting Executive Director
Texas Department of Housing and Community Affairs
Filed: November 19, 2001

♦ ♦ ♦

Texas Department of Insurance

Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application for incorporation in Texas of Citifinancial Administrative Services, Inc., a domestic third party administrator. The home office is Fort Worth, Texas.

Any objections must be filed within 20 days after this notice was filed with the Secretary of State, addressed to the attention of Charles M. Waits, MC 107-5A, 333 Guadalupe, Austin, Texas 78714-9104.

TRD-200107171
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: November 20, 2001

♦ ♦ ♦

Texas Lottery Commission

Instant Game No. 268 "Triple Play"

1.0 Name and Style of Game.

A. The name of Instant Game No. 268 is "TRIPLE PLAY". The play styles are "key number match", "match 3", and "tic-tac-toe".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 268 shall be $3.00 per ticket.

1.2 Definitions in Instant Game No. 268.

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: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, $1.00, $2.00, $3.00, $4.00, $7.00, $10.00, $20.00, $50.00, $100, $1,000, $3,000, $30,000, HORSESHOE SYMBOL, and MONEY BAG 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. 268 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
$1.00	ONE$
$2.00	TWO$
$3.00	THREE$
$4.00	FOUR$
$7.00	SEVEN$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$100.00	ONE HUND
$1,000	ONE THOU
$3,000	THR THOU
$30,000	30 THOU
HORSESHOE SYMBOL	WIN
MONEY BAG	$BAG

Table 2 of this section. Figure 2:16 TAC GAME NO. 268 - 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:

CODE	PRIZE
THR	$3.00
FOR	$4.00
SVN	$7.00
TEN	$10.00
TWL	$12.00
TWN	$20.00

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 $3.00, $4.00, $7.00, $10.00, $12.00, or $20.00.

H. Mid-Tier Prize - A prize of $50.00 or $100.

I. High-Tier Prize - A prize of $1,000, $3,000, or $30,000.

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 (268), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 000 and end with 124 within each pack. The format will be: 268-0000001-000.

L. Pack - A pack of "TRIPLE PLAY" Instant Game tickets contain 152 tickets, which are packed in plastic shrink-wrapping and fanfolded in pages of one (1). There will be two (2) fanfold configurations for this game. Configuration A will show the front of ticket 000 and the back of ticket 124. Configuration B will show the back of ticket 000 and the front of ticket 124.

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 "TRIPLE PLAY" Instant Game No. 268 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 "TRIPLE PLAY" Instant Game is determined once the latex on the ticket is scratched off to expose 30 (thirty) play symbols. In Game 1, if the player matches any of YOUR NUMBERS to the WINNING NUMBER, the player will win the prize shown for that number. If the player gets a horseshoe symbol, the player will win triple the prize shown. In Game 2, if the player gets three (3) like amounts, the player will win that amount. If the player gets two (2) like amounts and a money bag symbol, the player will win triple that amount. In Game 3, if the player gets three (3) like numbers in any row, column or diagonal, the player will win the prize shown. If the player gets three (3) "3" symbols in any row, column or diagonal, the player will win triple the prize shown. 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 30 (thirty) 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 30 (thirty) 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 30 (thirty) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 30 (thirty) 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 will not have identical play area, spot for spot.

B. There will be no correlation between the Your Numbers play symbols and the prize symbols in Game 1.

C. There will be no duplicate non-winning Your Number play symbols in Game 1.

D. There will be no duplicate non-winning prize symbols within a game in Game 1.

E. The Tripler symbol will never appear more than once within Game 1.

F. There will be no four or more like play symbols on a ticket within Game 2.

G. There will be no more than two (2) pairs of like play symbols within Game 2.

H. No three (3) of a kind and a Tripler symbol in Game 2.

I. There will be only one (1) pair of like prize symbols when the ticket wins with the tripler in Game 2.

J. Game 3 will never have four (4) or more of any play symbols except for the 3 symbol.

K. In Game 3, every ticket will contain at least four (4) "3"s.

L. Game 3 may only win once.

2.3 Procedure for Claiming Prizes.

A. To claim a "TRIPLE PLAY" Instant Game prize of $3.00, $4.00, $7.00, $10.00, $12.00, $20.00, $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 "TRIPLE PLAY" Instant Game prize of $1,000, $3,000, or $30,000, 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 "TRIPLE PLAY" 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

E. 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 "TRIPLE PLAY" 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 "TRIPLE PLAY" 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 8,191,750 tickets in the Instant Game No. 268. The approximate number and value of prizes in the game are as follows:

Table 3 of this section Figure 3:16 TAC GAME NO. 268- 4.0

Prize Amount	Approximate Number of Prizes *	Approximate Odds are 1 in **
$3.00	1,245,336	6.58
$4.00	196,503	41.69
$7.00	327,800	24.99
$10.00	229,411	35.71
$12.00	81,838	100.10
$20.00	81,890	100.03
$50.00	51,270	159.78
$100	10,779	759.97
$1,000	342	23,952.49
$3,000	15	546,116.67
$30,000	7	1,170,250.00

**The number of actual winners may vary based on sales, distribution, and number of prizes claimed.

*The overall odds of winning a prize are 1 in 3.68. The individual odds of winning for a particular prize level may vary based on sales, distribution, and number of prized 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. 268 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. 268, 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-200107033

Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: November 15, 2001

♦ ♦ ♦

Instant Game No. 269 "Mariachi Money"

1.0 Name and Style of Game.

A. The name of Instant Game No. 269 is "MARIACHI MONEY". The play style is "match 3 of 9 with tripler".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 269 shall be $1.00 per ticket.

1.2 Definitions in Instant Game No. 269.

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: $1.00, $2.00, $5.00, $10.00, $25.00, $100, $1,000, and $3,000, and MUSICAL NOTE 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. 269 - 1.2D

PLAY SYMBOL	CAPTION
$1.00	ONE$
$2.00	TWO$
$5.00	FIVE$
$10.00	TEN$
$25.00	TWY FIV
$100.00	ONE HUND
$1,000	ONE THOU
$3,000	THR THOU
MUSICAL NOTE SYMBOL	TRIPLE

Table 2 of this section. Figure 2:16 TAC GAME NO. 269 - 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:

CODE	PRIZE
ONE	$1.00
TWO	$2.00
THR	$3.00
FIV	$5.00
TEN	$10.00
FTN	$15.00

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, $3.00, $5.00, $10.00, or $15.00.

H. Mid-Tier Prize - A prize of $25.00, $30.00, $75.00, $100, or $300.

I. High-Tier Prize - A prize of $1,000 or $3,000.

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 (269), 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: 269-0000001-000.

L. Pack - A pack of "MARIACHI MONEY" Instant Game tickets contain 250 tickets, which are packed in plastic shrink-wrapping and fanfolded in pages of five (5). Tickets 000 to 004 will be on the top page; tickets 005 to 009 on the next page; etc.; and ticket 245 to 249 will be on the last page. Tickets 000 and 249 will be folded down to expose the pack ticket number though the shrink wrap.

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 "MARIACHI MONEY" Instant Game No. 269 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 "MARIACHI MONEY" Instant Game is determined once the latex on the ticket is scratched off to expose nine (9) play symbols. If the player gets three (3) like amounts, the player will win that amount. If the player gets two (2) like amounts and a musical note symbol, the player will win triple that amount. 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 nine (9) 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 nine (9) 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 nine (9) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the nine (9) 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 will not have identical play data, spot for spot.

B. There will be no four (4) or more like play symbols on a ticket.

C. The tripler symbol will never appear on a ticket which contains three (3) like play symbols.

D. There will be no more than one tripler symbol on a ticket.

E. No more than one (1) pair will appear on a ticket containing a tripler symbol.

F. There will be no more than two (2) pairs of like play symbols on a ticket which does not contain a tripler.

2.3 Procedure for Claiming Prizes.

A. To claim a "MARIACHI MONEY" Instant Game prize of $1.00, $2.00, $3.00, $5.00, $10.00, $15.00, $25.00, $30.00, $75.00, $100, or $300, 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 $30.00, $75.00, $100, or $300 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 "MARIACHI MONEY" Instant Game prize of $1,000, or $3,000, 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 "MARIACHI 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

E. 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 "MARIACHI 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 "MARIACHI 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 15,012,750 tickets in the Instant Game No. 269. The approximate number and value of prizes in the game are as follows:

Table 3 of this section Figure 3:16 TAC GAME NO. 269- 4.0

Prize Amount	Approximate Number of Prizes *	Approximate Odds are 1 in **
$1.00	1,381,096	10.87
$2.00	780,808	19.23
$3.00	720,681	20.83
$5.00	120,224	124.87
$10.00	60,005	250.19
$15.00	60,013	250.16
$25.00	15,625	960.82
$30.00	6,271	2,394.00
$75.00	4,691	3,200.33
$100	3,123	4,807.16
$300	1,514	9,915.95
$1,000	20	750,637.50
$3,000	29	577,413.46

**The number of actual winners may vary based on sales, distribution, and number of prizes claimed.

*The overall odds of winning a prize are 1 in 4.76. The individual odds of winning for a particular prize level may vary based on sales, distribution, and number of prized 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. 269 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. 269, 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-200107034
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: November 15, 2001

♦ ♦ ♦

Instant Game Number 703 "Wild Cash"

1.0. Name and Style of Game.

A. The name of Instant Game Number 703 is "WILD CASH". The play style "key number match with auto win".

1.1. Price of Instant Ticket.

A. Tickets for Instant Game Number 703 shall be $2.00 per ticket.

1.2. Definitions in Instant Game Number 703.

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: $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $50.00, $100, $300, $1,000, $3,000, $20,000, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and MONEY BAG 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:

Figure 1: GAME NO. 703 - 1.2D

PLAY SYMBOL	CAPTION
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUND
$300	THR HUND
$1,000	ONE THOU
$3,000	THR THOU
$20,000	20 THOU
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
MONEY BAG SYMBOL	MBAG

Figure 2: GAME NO. 703 - 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:

CODE	PRIZE
$2.00	TWO
$4.00	FOR
$8.00	EGT
$10.00	TEN
$20.00	TWN

Low-tier winning tickets use the required codes listed in Figure 2: GAME NO. 703 - 1.2E. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2: GAME NO. 703 - 1.2E 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 digit security number which will be boxed and placed randomly within the Serial Number. The remaining nine 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 $2.00, $4.00, $8.00, $10.00, or $20.00.

H. Mid-Tier Prize--A prize of $50.00, $100, or $300.

I. High-Tier Prize--A prize of $3,000 or $20,000.

J. Bar Code--A 22 character interleaved two of five bar code which will include a three digit game ID, the seven digit pack number, the three digit ticket number and the nine digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number--A 22 digit number consisting of the three digit game number (703), a seven digit pack number, and a three digit ticket number. Ticket numbers start with 000 and end with 249 within each pack. The format will be: 703-0000001-000.

L. Pack--A pack of "WILD CASH" Instant Game tickets contain 250 tickets, which are packed in plastic shrink-wrapping and fanfolded in pages of two. Tickets 000 and 001 will be shown on the front of the pack; the backs of tickets 248 and 249 will show. Every other book will be opposite.

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 "WILD CASH" Instant Game Number 703 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 "WILD CASH" Instant Game is determined once the latex on the ticket is scratched off to expose 22 play symbols. If the player matches any of the YOUR NUMBERS to either WINNING NUMBER, the player will win the prize shown for that number. If the player gets a money bag 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 22 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 22 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 22 Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 22 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. Non-winning prize symbols will not match a winning prize symbol on a ticket.

C. There will be no duplicate Winning Number symbols on a ticket.

D. There will be no correlation between the matching symbols and the prize amount.

E. The auto win symbol will never appear more than once on a ticket.

F. The auto win symbol will only appear on winning tickets.

G. The auto win symbol will never appear as either of the Winning Numbers.

H. No duplicate non-winning Your Number play symbols on a ticket.

2.3. Procedure for Claiming Prizes.

A. To claim a "WILD CASH" Instant Game prize of $2.00, $4.00, $8.00, $10.00, $20.00, $50.00, $100, or $300, 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, $100, or $300 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 "WILD CASH" Instant Game prize of $3,000, or $20,000, 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 "WILD CASH" 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

E. 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 "WILD CASH" 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 "WILD CASH" 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 5,184,750 tickets in the Instant Game Number 703. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 703 - 4.0

Prize Amount	Approximate Number of Prizes*	Approximate Odds are 1 in **
$2.00	528,832	9.80
$4.00	269,556	19.23
$8.00	129,663	39.99
$10.00	93,313	55.56
$20.00	41,478	125.00
$50.00	20,095	258.01
$100	3,161	1,640.22
$300	812	6,385.16
$3,000	66	78,556.82
$20,000	2	2,592,375.00

*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 4.77. 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 Number 703 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 Number 703, 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-200107162

Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: November 20, 2001

♦ ♦ ♦

Instant Game Number 704 "Big Bonus Bucks"

1.0. Name and Style of Game.

A. The name of Instant Game Number 704 is "BIG BONUS BUCKS". The play style is "4 games-double, triple".

1.1. Price of Instant Ticket.

A. Tickets for Instant Game Number 704 shall be $5.00 per ticket.

1.2. Definitions in Instant Game Number 704.

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: $5.00, $10.00, $20.00, $50.00, $100, $500, $1,000, $5,000, $40,000, SINGLE SYMBOL, DOUBLE SYMBOL, TRIPLER SYMBOL, DBL DBLR SYMBOL, CLOVER SYMBOL, DIAMOND SYMBOL, GOLD BAR SYMBOL, POT OF GOLD SYMBOL, MONEY BAG SYMBOL, TOP HAT SYMBOL, STACK OF BILLS SYMBOL, DOLLAR SIGN SYMBOL, STAR SYMBOL, and HORSESHOE SYMBOL 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:

Figure 1: GAME NO. 704 - 1.2D

PLAY SYMBOL	CAPTION
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUND
$500	FIV HUND
$1,000	ONE THOU
$5,000	FIV THOU
$40,000	40 THOU
SINGLE SYMBOL	SINGLE
DOUBLE SYMBOL	DOUBLE
TRIPLE SYMBOL	TRIPLE
DOUBLE DOUBLER SYMBOL	DBL DBLR
CLOVER SYMBOL	CLVR
DIAMOND SYMBOL	DIAMD
GOLD BAR SYMBOL	GOLD
POT OF GOLD SYMBOL	POTGLD
MONEY BAG SYMBOL	MBAG
TOP HAT SYMBOL	TPHAT
STACK OF BILLS SYMBOL	BILLS
DOLLAR SIGN SYMBOL	MONEY
STAR SYMBOL	STAR
HORSESHOE SYMBOL	SHOE

Figure 2: GAME NO. 704 - 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:

CODE	PRIZE
$5.00	FIV
$10.00	TEN
$15.00	FTN
$20.00	TWY

Low-tier winning tickets use the required codes listed in Figure 2: GAME NO. 704 - 1.2E . Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2: GAME NO. 704 - 1.2E 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 digit security number which will be boxed and placed randomly within the Serial Number. The remaining nine 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 $5.00, $10.00, $15.00, or $20.00.

H. Mid-Tier Prize--A prize of $30.00, $50.00, $100, or $500.

I. High-Tier Prize--A prize of $1,000, $5,000, or $40,000.

J. Bar Code--A 22 character interleaved two of five bar code which will include a three digit game ID, the seven digit pack number, the three digit ticket number and the nine digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number--A 22 digit number consisting of the three digit game number (704), a seven digit pack number, and a three digit ticket number. Ticket numbers start with 000 and end with 074 within each pack. The format will be: 704-0000001-000.

L. Pack--A pack of "BIG BONUS BUCKS" Instant Game tickets contain 75 tickets, which are packed in plastic shrink-wrapping and fanfolded in pages of one. The packs will alternate. One will show the front of the ticket 000 and the back of 074, while the other fold will show the back of ticket 000 and the front of 074.

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 "BIG BONUS BUCKS" Instant Game Number 704 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 "BIG BONUS BUCKS" Instant Game is determined once the latex on the ticket is scratched off to expose 30 play symbols. In Game 1, if the player matches three like amounts, the player will win that amount. In Game 2, if the player matches three like amount, the player will win that amount. The player may scratch the DOUBLE BOX for a chance to win double the prize. In Game 3, if the player matches three like amounts, the player will win that amount. The player may scratch the TRIPLE BOX for a chance to win triple the prize. In Game 4, if the player matches three like amounts, the player will win that amount. The player may scratch the DOUBLE DOUBLER BOX for a chance to win four times the prize. In Game 5, if the player matches two out of three symbols, the player will win $10 instantly. 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 30 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 30 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 30 Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 30 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 will not have identical play data, spot for spot.

B. No four or more like amounts within a game.

C. No three pairs in a game.

D. In Game 5, there will never be three like play symbols on a ticket.

2.3. Procedure for Claiming Prizes.

A. To claim a "BIG BONUS BUCKS" Instant Game prize of $5.00, $10.00, $15.00, $20.00, $30.00, $50.00, $100, or $500, 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, $100, or $500 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 "BIG BONUS BUCKS" Instant Game prize of $1,000, $5,000, or $40,000, 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 "BIG BONUS BUCKS" 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

E. 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 "BIG BONUS BUCKS" 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 "BIG BONUS BUCKS" 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 3,008,850 tickets in the Instant Game Number 704. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 704 - 4.0

Prize Amount	Approximate Number of Prizes*	Approximate Odds are 1 in **
$5.00	561,608	5.36
$10.00	208,870	10.71
$15.00	40,118	75.00
$20.00	80,225	37.51
$30.00	13,799	218.05
$50.00	9,514	316.25
$100	3,517	855.52
$500	783	3,842.72
$1,000	101	29,790.59
$5,000	12	250,737.50
$40,000	4	752,212.50

*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 3.04. 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 Number 704 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 Number 704, 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-200107163
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: November 20, 2001

♦ ♦ ♦

Instant Game No. 705 "$50,000 Fortune"

1.0 Name and Style of Game.

A. The name of Instant Game No. 705 is "$50,000 FORTUNE". The play style is "4 games multiple spots".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 705 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 705.

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: $5.00, $10.00, $25.00, $50.00, $100, $500, $1,000, $5,000, $50,000, 1 SYMBOL, 2 SYMBOL, 3 SYMBOL, 4 SYMBOL, 5 SYMBOL, 6 SYMBOL, A CARD, K CARD, Q CARD, J CARD, 10 CARD, 9 CARD, 8 CARD, 7 CARD, 6 CARD, 5 CARD, 4 CARD, 3 CARD, 2 CARD, GOLD BAR SYMBOL, MONEY BAG SYMBOL, STACK OF BILLS SYMBOL, DOLLAR SIGN SYMBOL, CHIP SYMBOL, STACK OF COINS SYMBOL, POT OF GOLD 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. 705 - 1.2D

PLAY SYMBOL	CAPTION
A	ACE
K	KNG
Q	QUN
J	JCK
10	TEN
9	NIN
8	EGT
7	SVN
6	SIX
5	FIV
4	FOR
3	THR
2	TWO
1	ONE
$5.00	FIVE$
$10.00	TEN$
$25.00	TWY FIV
$50.00	FIFTY
$100	ONE HUND
$500	FIV HUND
$1,000	ONE THOU
$5,000	FIV THOU
$50,000	50 THOU
GOLD BAR SYMBOL	GOLD
MONEY BAG SYMBOL	$BAG
STACK OF BILLS SYMBOL	BILLS
DOLLAR SIGN SYMBOL	MONEY
MONEY CHIP SYMBOL	CHIP
STACK OF COINS SYMBOL	STACK
POT OF GOLD SYMBOL	POTGLD

Table 2 of this section. Figure 2:16 TAC GAME NO. 705 - 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:

CODE	PRIZE
$5.00	FIV
$10.00	TEN
$15.00	FTN
$20.00	TWY

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 $5.00, $10.00, $15.00, or $20.00.

H. Mid-Tier Prize - A prize of $25.00, $50.00, $100, or $500.

I. High-Tier Prize - A prize of $1,000, $5,000, or $50,000.

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 (705), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 000 and end with 074 within each pack. The format will be: 705-0000001-000.

L. Pack - A pack of "$50,000 FORTUNE" Instant Game tickets contain 75 tickets, which are packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of ticket 000 and back of 074, while the other fold will show the back of ticket 000 and front of 074.

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 "$50,000 FORTUNE" Instant Game No. 705 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 "$50,000 FORTUNE" Instant Game is determined once the latex on the ticket is scratched off to expose 40 (forty) play symbols. In the Beat the Dealer section, if the player's YOUR CARD beats the DEALER'S CARD in the same game, the player will win the prize shown for that game. In the Match Up section, if the player matches three (3) across the same game, the player will win the prize shown. In the Lucky Wheel section, if the player matches the Your Lucky Dollar Amounts to the Prize Amount in the center, the player will win that amount. In the 7-11 section, if the player's dice adds up to 7 or 11 in the same roll, the player will wint the prize shown for that roll. 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 40 (forty) 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 40 (forty) 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 40 (forty) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 40 (forty) 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 will not have identical play data, spot for spot.

B. There will never be three (3) or more like card symbols in the eight (8) play spots in the Beat the Dealer section.

C. No duplicate non-winning prize symbols will appear in the Beat the Dealer section.

D. There will be no ties in the Beat the Dealer section.

E. There will be no three (3) or more like non-winning symbols in the Match Up section.

F. There will be no duplicate non-winning games in any order in the Match Up section.

G. There will be no duplicate non-winning Your Lucky Dollar Amounts in the Lucky Wheel section.

H. There will be no duplicate non-winning rolls in any order in the 7-11 section.

2.3 Procedure for Claiming Prizes.

A. To claim a "$50,000 FORTUNE" Instant Game prize of $5.00, $10.00, $15.00, $20.00, $25.00, $50.00, $100, or $500 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, $100, or $500 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 "$50,000 FORTUNE" Instant Game prize of $1,000, $5,000, or $50,000, 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 "$50,000 FORTUNE" 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

E. 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 "$50,000 FORTUNE" 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 "$50,000 FORTUNE" 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 3,009,525 tickets in the Instant Game No. 705. The approximate number and value of prizes in the game are as follows:

Table 3 of this section Figure 3:16 TAC GAME NO. 705- 4.0

Prize Amount	Approximate Number of Prizes*	Approximate Odds are 1 in **
$5.00	571,704	5.26
$10.00	290,866	10.35
$15.00	70,294	42.81
$20.00	40,127	75.00
$25.00	19,941	150.92
$50.00	8,526	352.98
$100	4,171	721.54
$500	752	4,002.03
$1,000	182	16,535.85
$5,000	15	200,635.00
$50,000	4	752,381.25

*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 2.99. 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. 705 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. 705, 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-200107082
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: November 16, 2001

♦ ♦ ♦

Texas Natural Resource Conservation Commission

Correction of Error

The Texas Natural Resource Conservation Commission adopted new 30 TAC §114.52, concerning Control of Air Pollution from Motor Vehicles, which appeared in the November 16, 2001, issue of the *Texas Register* (26 TexReg 9386).

On page 9411 in §114.52(b) a cross-reference to subsection (d) is incorrect. The subsection should read as follows.

"(b) Eligibility. In order to be eligible to receive the incentive described in subsection (g) of this section, an emissions inspection station owner or operator must meet the following requirements."

In §114.52(b)(1) the reference to subsection (e) in incorrect. The paragraph should read as follows.

"(1) The emissions inspection station owner or operator must enroll and submit the information described in subsection (d) of this section by January 15, 2002."

TRD-200107210

♦ ♦ ♦

Enforcement Orders

A default order was entered regarding CARL BIRDSONG, INC. DBA BIRDSONG FREEWAY AMERICA, Docket Number 2000-0339-PST-E on November 12, 2001 assessing $6,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting LAURENCIA FASOYIRO, Staff Attorney at (713) 422-8914, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding KENNETH SANDERS DBA JERRY'S KWIK CHANGE, Docket Number 1999-0267-PST-E on November 9, 2001 assessing $12,100 in administrative penalties with $11,500 deferred.

Information concerning any aspect of this order may be obtained by contacting DARREN REAM, Staff Attorney at (817) 588-5878, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding BAXTER OIL SERVICE, INC., Docket Number 2000-1302-MLM-E on November 9, 2001 assessing $6,750 in administrative penalties with $1,350 deferred.

Information concerning any aspect of this order may be obtained by contacting CRAIG FLEMING, Enforcement Coordinator at (512) 239-5806, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding BAXTER OIL SERVICE, INC. DBA JONES OIL SERVICE, Docket Number 2001-0460-MSW-E on November 9, 2001 assessing $250 in administrative penalties with $50 deferred.

Information concerning any aspect of this order may be obtained by contacting CRAIG FLEMING, Enforcement Coordinator at (512) 239-5806, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding WATE FASELER, Docket Number 2000-0706-OSI-E on November 9, 2001 assessing $1,875 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting DAVID SPEAKER, Staff Attorney at (512) 239-2548, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CROWN CENTRAL PETROLEUM CORPORATION, Docket Number 1999-0486-AIR-E on November 9, 2001 assessing $350,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting RICHARD O'CONNELL, Staff Attorney at (512) 239-5528, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CITY OF PREMONT, Docket Number 2000-1318-MLM-E on November 9, 2001 assessing $2,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting CAROL MCGRATH, Enforcement Coordinator at (361) 825-3275, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding AKZO NOBEL POLYMER CHEMICALS LLC, Docket Number 2000-1073-IHW-E on November 9, 2001 assessing $17,600 in administrative penalties with $3,520 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 RIO GRANDE VALLEY SUGAR GROWERS, INC., Docket Number 2001-0293-AIR-E on November 9, 2001 assessing $5,625 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting JAIME GARZA, Enforcement Coordinator at (956) 430-6030, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding LOUISIANA PACIFIC CORPORATION, Docket Number 2001-0320-PWS-E on November 9, 2001 assessing $3,000 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 TUBOSCOPE VETCO INTERNATIONAL L.P., Docket Number 2000-1184-AIR-E on November 9, 2001 assessing $1,875 in administrative penalties with $375 deferred.

Information concerning any aspect of this order may be obtained by contacting JAMES JACKSON, Enforcement Coordinator at (254) 751-0335, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding MOBILE OIL CORPORATION, Docket Number 2001-0147-AIR-E on November 9, 2001 assessing $6,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting LAURA CLARK, Enforcement Coordinator at (409) 899-8760, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding PHILLIPS 66 COMPANY, A DIVISION OF PHILLIPS PETROLEUM COMPANY, Docket Number 2001-0173-AIR-E on November 9, 2001 assessing $2,500 in administrative penalties with $300 deferred.

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 UNITED STATES POSTAL SERVICE-SPRING, Docket Number 2001-0079-PWS-E on November 9, 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 CITY OF WEINERT, Docket Number 2000-1452-MWD-E on November 9, 2001 assessing $3,000 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 CITY OF DE LEON, Docket Number 2000-0687-MWD-E on November 9, 2001 assessing $10,000 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 PETROLEUM WHOLESALE, INC., Docket Number 2001-0251-MLM-E on November 9, 2001 assessing $36,000 in administrative penalties with $7,200 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 MEN WATER SUPPLY CORPORATION, Docket Number 2000-1346-PWS-E on November 9, 2001 assessing $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 CONNY WHITEHORN DBA FRIO WATER, INC., Docket Number 2001-0136-PWS-E on November 9, 2001 assessing $875 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 FRANK'S FUELS, INC., Docket Number 2001-0431-MSW-E on November 9, 2001 assessing $250 in administrative penalties with $50 deferred.

Information concerning any aspect of this order may be obtained by contacting GLORIA STANFORD, Enforcement Coordinator at (512) 239-1871, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding WESTERN RIM INVESTORS, LLC, Docket Number 2001-0465-EAQ-E on November 9, 2001 assessing $12,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting ROBERT MIKESH, 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 SAND FLAT WATER SUPPLY CORPORATION, Docket Number 2000-1380-PWS-E on November 9, 2001 assessing $188 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 PAGAN-LEWIS MOTORS, INC., Docket Number 2001-0183-PST-E on November 9, 2001 assessing $3,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting AUDRA BAUMGARTNER, Enforcement Coordinator at (361) 825-3312, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding TWIN LAKES GOLF COURSE, INC. & A. M. & D. TREE FARM, Docket Number 2001-0316-WR-E on November 9, 2001 assessing $1,500 in administrative penalties with $300 deferred.

Information concerning any aspect of this order may be obtained by contacting ELNORA MOSES, Enforcement Coordinator at (903) 535-5136, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding HOLLIS ROGERS DBA ROUGH CANYON MARINA, Docket Number 2001-0567-PWS-E on November 9, 2001 assessing $125 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting TIM HAASE, Enforcement Coordinator at (512) 239-6007, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ANGEL BROTHERS ENTERPRISES, LTD. DBA ANGEL'S GAS & GROCERY #11, Docket Number 2001-0227-PST-E on November 9, 2001 assessing $2,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting FAYE LIU, Enforcement Coordinator at (713) 767-3726, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ORBIT SYSTEMS, INC., Docket Number 2000-1140-MWD-E on November 9, 2001 assessing $2,000 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 NEW BRAUNFELS UTILITIES, Docket Number 2001-0468-MWD-E on November 9, 2001 assessing $1,875 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting GILBERT ANGELLE, Enforcement Coordinator at (512) 239-4489, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding MINSA CORPORATION, Docket Number 2001-0386-IWD-E on November 9, 2001 assessing $11,375 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 SHERMAN WIRE COMPANY, Docket Number 2001-0416-MWD-E on November 9, 2001 assessing $5,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting JUDY FOX, Enforcement Coordinator at (817) 588-5825, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding S. I. ENTERPRISES, LLC, Docket Number 2000-1354-MWD-E on November 12, 2001 assessing $1,500 in administrative penalties with $300 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 ALVIN KIDD DBA GREENWOOD TERRACE MOBILE HOME SUBDIVISION, Docket Number 2001-0190-PWS-E on November 9, 2001 assessing $450 in administrative penalties with $90 deferred.

Information concerning any aspect of this order may be obtained by contacting DAN LANDENBERGER, Enforcement Coordinator at (915) 570-1359, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding RICHARD KEENAN DBA K & B WATERWORKS, Docket Number 2001-0597-PWS-E on November 9, 2001 assessing $125 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting DAVID VAN SOEST, Enforcement Coordinator at (512) 239-0468, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding TEXAS WATER SERVICES, INCORPORATED, Docket Number 2001-0078-PWS-E on November 9, 2001 assessing $8,876 in administrative penalties.

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 DIAMOND SHAMROCK REFINING AND MARKETING COMPANY, Docket Number 2001-0274-PST-E on November 9, 2001 assessing $6,250 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 EDNA DERRICK DBA COUGAR WATER SUPPLY, Docket Number 2001-0582-PWS-E on November 9, 2001 assessing $150 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting THOMAS GREIMEL, Enforcement Coordinator at (512) 239-5690, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding BOLING MUNICIPAL WATER DISTRICT, Docket Number 2000-1422-MWD-E on November 9, 2001 assessing $6,000 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 SAFRIN, INC. DBA SUNRISE SUPER STOP, Docket Number 2001-0674-PST-E on November 9, 2001 assessing $10,000 in administrative penalties with $2,000 deferred.

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 FINE MEADOW FARM, INCORPORATED, Docket Number 2000-1298-MWD-E on November 9, 2001 assessing $9,375 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting JORGE IBARRA, Enforcement Coordinator at (817) 588-5890, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CITY OF MALONE, Docket Number 2000-1324-MWD-E on November 9, 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 HOUSTON MARINE SERVICES, INC., Docket Number 2001-0466-MSW-E on November 9, 2001 assessing $250 in administrative penalties with $50 deferred.

Information concerning any aspect of this order may be obtained by contacting MERRILEE GERBERDING, Enforcement Coordinator at (512) 239-4490, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CITY OF ELKHART, Docket Number 1999-0591-MWD-E on November 9, 2001 assessing $21,000 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 HANOVER COMPRESSION, INC., Docket Number 2000-1208-AIR-E on November 9, 2001 assessing $7,500 in administrative penalties with $1,500 deferred.

Information concerning any aspect of this order may be obtained by contacting JAIME GARZA, Enforcement Coordinator at (956) 430-6030, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-200107191
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: November 20, 2001

♦ ♦ ♦

Notice of Comment Period and Announcement of Public Meetings on Draft Standard Permit for Rock Crushers

The Texas Natural Resource Conservation Commission (TNRCC) is providing an opportunity for public comment and will conduct public meetings to receive testimony concerning a draft standard permit for rock crushers that process nonmetallic minerals proposed for issuance under Texas Clean Air Act, Texas Health and Safety Code, §382.05195 and Texas Administrative Code (TAC), Chapter 116, Subchapter F.

DRAFT PERMIT

The draft standard permit for rock crushers is applicable to those facilities and associated equipment for which throughput is limited to less than 250 tons per hour and for which operating hours are limited based on throughput. General requirements concerning distance limits, emission limits, control requirements, notification and registration requirements, and recordkeeping are contained in the standard permit.

In addition to the standard permit that is the subject of this notice, the TNRCC is soliciting comments on the concept of a standard permit for larger rock crushers with a throughput of between 250 and 350 tons per hour. The TNRCC is soliciting comments on the concept of a standard permit for these larger rock crushing units to determine whether TNRCC may, at some future date, develop a standard permit for the larger units. *A standard permit for the larger units is not being proposed at this time*.

The New Source Review Program under Chapter 116 requires any person who plans to construct any new facility or to engage in the modification of any existing facility which may emit air contaminants into the air of the state to obtain a permit pursuant to 30 TAC §116.111, or satisfy the conditions of a standard permit, a flexible permit, or a permit by rule, before any actual work is begun on the facility. A standard permit authorizes the construction or modification of new or existing facilities which are similar in terms of operations, processes, and emissions.

A draft standard permit is subject to the procedural requirements of 30 TAC §116.603, which includes a 30-day public comment period and a public meeting to provide an additional opportunity for public comment. Any person who may be affected by the emission of air pollutants from facilities that may be registered under the standard permit is entitled to submit written or verbal comments regarding the proposed standard permit.

PUBLIC MEETINGS

Public meetings on the draft standard permit for rock crushers will be held in Austin, Houston, and Dallas. The meetings 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. Open discussion with the audience will not occur during the meeting; however, TNRCC staff members will be available to discuss the draft standard permit for rock crushers 30 minutes prior to the meeting and staff will also answer questions after the meeting. The public meetings will be held on the following dates at the stated times and locations: January 3, 2002 at 7:00 p.m., Texas Natural Resource Conservation Commission Building C, Room 131E, 12100 Park 35 Circle, Austin, Texas; January 3, 2002 at 7:00 p.m., City of Arlington Council Chambers Municipal Building, 101 West Abram Street, Arlington, Texas; January 3, 2002 at 7:00 p.m., City of Houston Pollution Control Auditorium, 7411 Park Place Boulevard Houston, Texas.

PUBLIC COMMENT AND INFORMATION

Copies of the draft standard permit for rock crushers and the concept for a possible standard permit for larger facilities may be obtained from the TNRCC website at *http://www.tnrcc.state.tx.us/permitting/airperm/index.html#nsr* or by contacting the Texas Natural Resource Conservation Commission, Office of Permitting, Remediation, and Registration, Air Permits Division at (512) 239-1240. Comments may be mailed to Blake Stewart, Texas Natural Resource Conservation Commission, Office of Permitting, Remediation, and Registration, Air Permits Division, MC 163, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-1300. All comments should reference the draft standard permit for rock crushers. Comments must be received by 5:00 p.m. on December 31, 2001. To inquire about the submittal of comments or for further information, contact Blake Stewart at (512) 239-6931.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-1240. Requests should be made as far in advance as possible.

TRD-200107200

Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: November 21, 2001

♦ ♦ ♦

Notice of District Petition

Notices mailed during the period October 16, 2001 through November 16, 2001.

TNRCC Internal Control 04172001-D03; Pearland Investments Limited Partnership (Petitioners) have filed a petition for the creation of Brazoria County Municipal Utility District Number 26 with the Texas Natural Resource Conservation Commission (TNRCC). The petition was filed pursuant to Article XVI, Section 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TNRCC. The petition states that: (1) the petitioner is the owner of a majority in value of the land to be included in the proposed District; (2) the petition states that there are eight lien holders on the property to be included in the proposed district; (3) the proposed District will contain approximately 912.311 acres located within Brazoria County, Texas; and (4) the proposed District is within the corporate boundaries of the City of Pearland, Texas. By Ordinance No. 1004, effective February 26, 2001, the City of Pearland passed, approved and gave its consent to create District, and has given its authorization to initiate proceedings to create such political subdivision within its jurisdiction. According to the petition, a preliminary investigation has been made to determine the cost of the project, and it is estimated by the petitioners, from the information available at this time, that the cost of said project will be approximately $66,800,000.

TNRCC Internal Control Number 06142001-D02; CET, Ltd., ABE, Ltd., and Crighton Park, Ltd. (Petitioners) filed a petition for creation of Montgomery County Municipal Utility District Number 90 with the Texas Natural Resource Conservation Commission (TNRCC). The petition was filed pursuant to Article XVI, Section 59 of the Texas Constitution; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TNRCC. The petition states that: (1) the petitioners are the owners of a majority in value of the land to be included in the proposed District; (2) there is one lien holder on the property to be included in the proposed district; (3) the proposed District will contain approximately 653.0 acres located within Montgomery County, Texas; and (4) the proposed District is within the corporate limits of the city of Conroe, Texas. The petition states that the improvements are necessary because there is not an adequate waterworks system, sanitary sewer system, drainage system or storm sewer system within the area to be included in the district to serve the future residential and commercial developments there. The petitioners estimate the cost of the project to be approximately $16,800,000.

TNRCC Internal Control Number 04182001-D01; Phelps Water Supply Corporation (Petitioner) has filed a petition with the Texas Natural Resource Conservation Commission (TNRCC) to convert Phelps Water Supply Corporation to Phelps Special Utility District and to transfer Certificate of Convenience and Necessity (CCN) No. 10129 from Phelps Water Supply Corporation to Phelps Special Utility District. Phelps Special Utility District's business address will be 455 FM 2296, Huntsville, Texas 77340. The petition was filed pursuant to Chapters 13 and 65 of the Texas Water Code; 30 Texas Administrative Code Chapters 291 and 293; and the procedural rules of the TNRCC. The proposed District is located in Walker County and will contain approximately 8,818 acres. The territory to be included within the proposed District includes all of the singly certified service area covered by CCN

No. 10129. CCN No. 10129 will be transferred after a positive confirmation election.

TNRCC Internal Control Number 02012001-D01; Texas National Municipal Utility District of Montgomery County has applied to the Texas Natural Resource Conservation Commission (TNRCC) for authority to adopt and impose an annual uniform operations and maintenance standby fee of $179.68 per equivalent single family connection (ESFC) for calendar years 2001-2003, on unimproved property within the District. The application was filed pursuant to Chapter 49 of the Texas Water Code, 30 Texas Administrative Code Chapter 293, and under the procedural rules of the TNRCC. The Commission may approve the annual standby fees as requested, or it may approve a lower annual standby fee, but it shall not approve an annual standby fee greater than the amount requested. The standby fee is a personal obligation of the person owning the undeveloped property on January 1 of the year for which the fee is assessed. A person is not relieved of his pro-rated share of the standby fee obligation on transfer of title to the property. On January 1 of each year, a lien is attached to the undeveloped property to secure payment of any standby fee imposed and the interest or penalty, if any, on the fee. The lien has the same priority as a lien for taxes of the District. The purpose of standby fees is to distribute a fair portion of the cost burden for operations and maintenance costs and debt service of the District facilities to owners of property who have not constructed vertical improvements but have water, wastewater or drainage facilities or services available. Any revenues collected from the operations and maintenance standby fees shall be used to supplement the District's operations and maintenance account.

TNRCC Internal Control Number 03012001-D10; Roman Forest Consolidated Municipal Utility District of Montgomery County has applied to the Texas Natural Resource Conservation Commission (TNRCC) for authority to adopt and impose an annual uniform operations and maintenance standby fee up to $4323.00 per equivalent single family connection (ESFC) for calendar years 2001-2003, on unimproved property within the District. The application was filed pursuant to Chapter 49 of the Texas Water Code, 30 Texas Administrative Code Chapter 293, and under the procedural rules of the TNRCC. The Commission may approve the annual standby fees as requested, or it may approve a lower annual standby fee, but it shall not approve an annual standby fee greater than the amount requested. The standby fee is a personal obligation of the person owning the undeveloped property on January 1 of the year for which the fee is assessed. A person is not relieved of his pro-rated share of the standby fee obligation on transfer of title to the property. On January 1 of each year, a lien is attached to the undeveloped property to secure payment of any standby fee imposed and the interest or penalty, if any, on the fee. The lien has the same priority as a lien for taxes of the District. The purpose of standby fees is to distribute a fair portion of the cost burden for operations and maintenance costs and debt service of the District facilities to owners of property who have not constructed vertical improvements but have water, wastewater or drainage facilities or services available. Any revenues collected from the operations and maintenance standby fees shall be used to supplement the District's operations and maintenance account.

TNRCC Internal Control Number 05252001-D06; Polk County Fresh Water Supply District No. 2 has applied to the Texas Natural Resource Conservation Commission (TNRCC) for authority to adopt and impose an annual uniform operations and maintenance standby fee up to $112.82 per equivalent single family connection (ESFC) for calendar years 2001-2003, on unimproved property within the District. The application was filed pursuant to Chapter 49 of the Texas Water Code, 30 Texas Administrative Code Chapter 293, and under the procedural rules of the TNRCC. The Commission may approve the annual standby fees as requested, or it may approve a lower annual standby fee, but it shall not approve an annual standby fee greater than the amount requested. The standby fee is a personal obligation of the person owning the undeveloped property on January 1 of the year for which the fee is assessed. A person is not relieved of his pro-rated share of the standby fee obligation on transfer of title to the property. On January 1 of each year, a lien is attached to the undeveloped property to secure payment of any standby fee imposed and the interest or penalty, if any, on the fee. The lien has the same priority as a lien for taxes of the District. The purpose of standby fees is to distribute a fair portion of the cost burden for operations and maintenance costs and debt service of the District facilities to owners of property who have not constructed vertical improvements but have water, wastewater or drainage facilities or services available. Any revenues collected from the operations and maintenance standby fees shall be used to supplement the District's operations and maintenance account.

TNRCC Internal Control Number 02122001-D02; Cottonwood Holdings, Ltd., Edward Gonzenbach and Eleanor Gonzenbach, and to the extent of their respective interests, International Bancshares Corporation and Cottonwood Holdings, Ltd. d/b/a Travis County Mineral Company, (Petitioners) filed a petition for creation of Wilbarger Creek Municipal Utility District Number 2 with the Texas Natural Resource Conservation Commission (TNRCC). The petition was filed pursuant to Article XVI, Section 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TNRCC. The petition states that: (1) the petitioner is the owner of a majority in value of the land to be included in the proposed District; (2) the petition states that there is one lien holder on the property to be included in the proposed district; (3) the proposed District will contain approximately 165.22 acres located within Travis County , Texas; and (4) the proposed District is within the extraterritorial jurisdiction of the City of Manor, Texas, and is not within such jurisdiction of any other city. By Ordinance No. 173, effective March 21, 2001, the City of Manor passed, approved and gave its consent to create the District, and has given its authorization to initiate proceedings to create such political subdivision within its jurisdiction. According to the petition, a preliminary investigation has been made to determine the cost of the project, and it is estimated by the petitioners, from the information available at this time, that the cost of said project will be approximately $12,680,000.

TNRCC Internal Control Number 02122001-D01; Cottonwood Holdings, Ltd., Edward Gonzenbach, Eleanor Gonzenbach, Ben Russell Eppright, Jr., Individually, and Nancy E. Nordquist Trust by Ben Russell Eppright Jr., Trustee, (Petitioners) filed a petition for creation of Wilbarger Creek Municipal Utility District Number 1 with the Texas Natural Resource Conservation Commission (TNRCC). The petition was filed pursuant to Article XVI, Section 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TNRCC. The petition states that: (1) the petitioner is the owner of a majority in value of the land to be included in the proposed District; (2) the petition states that there is one lien holder on the property to be included in the proposed district; (3) the proposed District will contain approximately 329.27 acres located within Travis County, Texas; and (4) the proposed District is within the extraterritorial jurisdiction of the City of Manor, Texas, and is not within such jurisdiction of any other city. By Ordinance 172, effective March 21, 2001, the City of Manor passed, approved and gave its consent to create the District, and has given its authorization to initiate proceedings to create such political subdivision within its jurisdiction. According to the petition, a preliminary investigation has been made to determine the cost of the project, and it is estimated by the petitioners, from the information available at this time, that the cost of said project will be approximately $20,845,000.

The TNRCC may grant a contested case hearing on this petition if a written hearing request is filed within 30 days after the newspaper publication of this notice. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the petitioner and the TNRCC Internal Control Number; (3) the statement "I/we request a contested case hearing"; (4) a brief description of how you would be affected by the petition in a way not common to the general public; and (5) the location of your property relative to the proposed district's boundaries. You may also submit your proposed adjustments to the petition which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below.

The Executive Director may approve the petition unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of this notice. If a hearing request is filed, the Executive Director will not approve the petition and will forward the petition and hearing request to the TNRCC Commissioners for their consideration at a scheduled Commission meeting. If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court.

Written hearing requests should be submitted to the Office of the Chief Clerk, MC 105, TNRCC, P.O. Box 13087, Austin, Texas 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, the same address. For additional information, individual members of the general public may contact the Office of Public Assistance, at 1-800-687-4040. General information regarding the TNRCC can be found at our web site at www.tnrcc.state.tx.us.

TRD-200107190
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: November 20, 2001

♦ ♦ ♦

Notice of United States Environmental Protection Agency Approval of State Plan for Designated Facilities - Hospital/Medical/Infectious Waste Incinerators in 30 TAC Chapter 113

Notice is hereby given that the United States Environmental Protection Agency (EPA) published approval of the Texas state plan and rules for hospital/medical/infectious waste incinerators (HMIWI) in the October 1, 2001, issue of the *Federal Register* (66 FR 49834) with an effective date of November 30, 2001. The Texas state rules are found in 30 TAC Chapter 113, Subchapter D, Division 2, §§113.2070 - 113.2079 (relating to Hospital/Medical/Infectious Waste Incinerators). These rules apply to those designated facilities with existing HMIWI units for which construction was commenced on or before June 20, 1996.

Under §113.2079 (relating to Compliance Schedules) the date of compliance or shutdown of an affected facility is September 15, 2002. Within 60 days from the date of this notice, an owner or operator subject to the requirements of this division shall submit to the executive director of the Texas Natural Resource Conservation Commission, a notice of intent to comply with these requirements or to shut down by September 15, 2002. The commission rules, adopted on May 17, 2000, allowed one year after EPA approval to comply or shut down with the possibility to extend compliance or shutdown. In no case however, could the compliance or shutdown extend past September 15, 2002. Because the EPA approval of these rules leaves less than one year until September 15, 2002, there can be no extensions granted. For HMIWI units that will continue operation in compliance with these requirements, operator training and certification must be completed no later than September 15, 2002. For small-remote HMIWI units, as defined in §113.2070(15)(G), the inspection requirements specified in §113.2074(a) must be completed no later than September 15, 2002.

TRD-200107169
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: November 20, 2001

♦ ♦ ♦

North Central Texas Council of Governments

Notice of Consultant Contract Award

Pursuant to the provisions of Government Code, Chapter 2254, the North Central Texas Council of Governments publishes this notice of consultant contract award. The consultant proposal request appeared in the May 4, 2001 issue of the *Texas Register* (26 TexReg 3414). The selected consultant will develop a public transportation strategic plan for the City of Grand Prairie.

The consultant selected for this project is LKC Consulting Services, Inc., 4200 Montrose Blvd., Suite 380, Houston, Texas 77006. The maximum amount of this contract is $97,083. Work on this project began July 11, 2001, and all work will be completed in June 2002.

TRD-200107159
R. Michael Eastland
Executive Director
North Central Texas Council of Governments
Filed: November 20, 2001

♦ ♦ ♦

Texas Department of Public Safety

Notice of Temporary Injunction

The Texas Department of Public Safety will not implement or enforce Adopted Rule 37 TAC §23.80 (relating to Out-of-State Vehicle Identification Number Verification) and Adopted Rule 37 TAC §23.52 (relating to Vehicle Inspection Forms). §23.80 was published in the October 26, 2001 issue of the *Texas Register* (26 TexReg 8547) and was effective October 29, 2001. §23.52 was published in the November 2, 2001 issue of the *Texas Register* (26 TexReg 8852) and was effective November 5, 2001. These sections were adopted by the Public Safety Commission on October 3, 201.

Implementation and enforcement is halted pursuant to a court order entered October 4, 2001 in the District Court of Travis County, 200th Judicial District, in the case of *H.M. Dodd Motor Co., Inc., et al., vs. Texas Department of Public Safety, et al*. The court has temporarily restrained and enjoined the Department of Public Safety from enforcing §9 of Senate Bill 5, codified September 1, 2001, at §548.256(c) and (d) of the Texas Transportation Code. This temporary injunction enjoins the Department of Public Safety from enforcing or otherwise implementing any agency rules that have been proposed and/or adopted relating to §9 of Senate Bill 5, including any such rules adopted by the Texas Department of Public Safety on or about October 3, 2001.

The Department of Public Safety will not implement or enforce §23.80 and §23.52 until the court has entered final judgment in this action, or until further order of the court.

TRD-200107161

Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Filed: November 20, 2001

♦ ♦ ♦

Public Utility Commission of Texas

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 November 16, 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 POLR Power, LP for Retail Electric Provider (REP) certification, Docket Number 25014 before the Public Utility Commission of Texas.

Applicant's requested service area by geography includes the service area of specific transmission and distribution utilities and/or municipal utilities or electric cooperatives in which competition is offered, as follows: TXU East-DFW POLR service area; CPL Gulf Coast and CPL Valley POLR service areas; and WTU POLR service area.

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 December 7, 2001. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-200107145
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 19, 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 November 16, 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 ICC Energy Corporation for Retail Electric Provider (REP) certification, Docket Number 25016 before the Public Utility Commission of Texas.

Applicant's requested service area by geography 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 December 7, 2001. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-200107146
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 19, 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 November 12, 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 A-Tech Telecom, Inc. for a Service Provider Certificate of Operating Authority, Docket Number 25003 before the Public Utility Commission of Texas.

Applicant intends to provide plain old business and residential telephone service.

Applicant's requested SPCOA geographic area includes the area served by all incumbent local exchange companies throughout the 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 December 5, 2001. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-200107028
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 15, 2001

♦ ♦ ♦

Notice of Application Pursuant to P.U.C. Substantive Rule §26.208

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application filed on November 15, 2001, pursuant to P.U.C. Substantive Rule §26.208(h) by Valor Telecommunications of Texas, L.P.

Tariff Title and Number: Application of Valor Telecommunications of Texas, L.P. to Withdraw Local Measured Service Pursuant to P.U.C. Substantive Rule §26.208(h). Tariff Number 25011.

The Application: On November 15, 2001, Valor Telecommunications of Texas, LP (Valor) filed an application to withdraw local measured service pursuant to P.U.C. Substantive Rule §26.208(h). In its application, Valor states that local measured service has no customers and has had no customers since Valor became operational in Texas on September 1, 2000. Valor states the reason for withdrawing the service is lack of customer interest and states that annual revenues from Local Measured Service have been zero since September 1, 2000. Valor requests the requirement to provide customer notice be waived and states that the grandfathering provisions do not apply in this proceeding.

Persons who wish to intervene in the proceeding or 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 or (888) 782-8477. Hearing- and speech-impaired individuals with text telephones (TTY)

may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. Please reference Tariff Number 25011.

TRD-200107179
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 20, 2001

♦ ♦ ♦

Notice of Application to Reclassify Exchanges to the Proper Rate Bands

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application filed on October 26, 2001. GTE Southwest, Inc. doing business as Verizon Southwest TXC (Verizon) filed an application to revise its General Exchange Tariff to properly align individual exchanges with their respective Rate Band pursuant to the Public Utility Regulatory Act §58.058 (PURA) and P.U.C. Substantive Rule §26.207.

Docket Style and Number: Application of Verizon Southwest TXC to Reclassify Exchanges to the Proper Rate Bands, Docket Number 24917.

Application: On October 26, 2001, GTE Southwest, Inc. doing business as Verizon Southwest TXC (Verizon) filed an application to revise its General Exchange Tariff to properly align individual exchanges with their respective Rate Band pursuant to the Public Utility Regulatory Act §58.058 (PURA) and P.U.C. Substantive Rule §26.207. Verizon states its local exchange rate groups are based on the number of exchange access arrangements (i.e., number of access lines in the rate group which can be called locally) within the specific exchange area, exclusive of any extended area service (EAS) (or extended local calling (ELC)) arrangements. In its application, Verizon asserts the following: (1) the exchanges governed by the Verizon Southwest TXC tariff fall into one of two Rate Band categories; the number of exchange access arrangements for Rate Band 1 is from 1 to 3,200 and for Rate Band 2 is from 3,201 to 13,000; (2) the exchanges of Emory, Hawkins, Quinlan, Reno and Springtown have experienced growth such that the number of exchange access arrangements in each of these exchanges now falls into the Rate Band 2 category and its application seeks to move the exchanges into Rate Band 2; (3) the total annual revenue impact for residential service will be $40,000 and will affect 15,283 customers; and (4) the revenue impact for business is approximately $19,000 and will effect 1,739 customers.

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 or (888) 782-8477. Hearing and speech- impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. The deadline for intervention in the proceeding will be established. The commission should receive a letter requesting intervention on or before the intervention deadline.

TRD-200107093
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 16, 2001

♦ ♦ ♦

Notice of Application to Reclassify Exchanges to the Proper Rate Bands

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application filed on October 26, 2001. GTE Southwest, Inc. doing business as Verizon Southwest TXG (Verizon) filed an application to revise its General Exchange Tariff to properly align individual exchanges with their respective Rate Band pursuant to the Public Utility Regulatory Act §58.058 (PURA) and P.U.C. Substantive Rule §26.207.

Docket Style and Number: Application of Verizon Southwest TXG to Reclassify Exchanges to the Proper Rate Bands, Docket Number 24919.

Application: On October 26, 2001, GTE Southwest, Inc. doing business as Verizon Southwest TXG (Verizon) filed an application to revise its General Exchange Tariff to properly align individual exchanges with their respective Rate Bands pursuant to the Public Utility Regulatory Act §58.058 (PURA) and P.U.C. Substantive Rule §26.207. Verizon states its local exchange rate groups are based on the number of exchange access arrangements (i.e., number of access lines in the rate group which can be called locally) within the specific exchange area, exclusive of any extended area service (EAS) (or extended local calling) (ELC) arrangements.

In its application, Verizon asserts the following: the exchanges governed by the Verizon Southwest TXC tariff fall into one of four Rate Band categories; the number of exchange access arrangements for Rate Group 1 is 1 to 3,200, Rate Group 2 is 3,201 to 13,001 to 60,000 and Rate Group 4 is 60,001 to 120,000. Verizon states that Rate Group 5 is being established in order to move Plano and Irving into the rate classification that corresponds to the exchange access arrangements of each exchange per Section 6, Sheet Number 1 of the General Exchange Tariff. Verizon is currently in Rate Group 4 and Plano is in Rate Group 3 but both have seen significant increases in their local calling areas and should therefore be moved to the appropriate rate group, Rate Group 5. The rates for Rate Group 5 will remain the same as Rate Group 4 so there is no revenue impact for the Irving exchange. Verizon asserts the residential customers who will be impacted by the reclass are 629,541 and the total revenue impact on residential service will be $1,245,684. Verizon asserts the business customers who will be impacted by this change are 134,113 and the revenue impact will be $2,222,688.

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 or (888) 782-8477. Hearing and speech- impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. The deadline for intervention in the proceeding will be established. The commission should receive a letter requesting intervention on or before the intervention deadline.

TRD-200107094
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 16, 2001

♦ ♦ ♦

Notice of Notification for Discontinuance of Certain Services

On May 31, 2001, @Link Networks, Inc. filed notification with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60224. Applicant intends to discontinue certain services.

The Application: Notification of @Link Networks, Inc. of Discontinuation of Certain Services, Docket Number 24183.

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 December 5, 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 24183.

TRD-200107156
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 19, 2001

♦ ♦ ♦

Public Notice of Amendment to Interconnection Agreement

On November 13, 2001, Southwestern Bell Telephone Company and SBC Advanced Solutions, 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 25007. 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 25007. 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 December 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 25007.

TRD-200107035
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 15, 2001

♦ ♦ ♦

Public Notice of Amendment to Interconnection Agreement

On November 13, 2001, Allegiance Telecom of Texas, Inc. and Verizon Southwest, 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 25008. 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 25008. 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 December 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 25008.

TRD-200107036
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 15, 2001

♦ ♦ ♦

Public Notice of Amendment to Interconnection Agreement

On November 19, 2001, Southwestern Bell Telephone Company and IP Communications Corporation, 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 25034. 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 25034. 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 December 19, 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 25034.

TRD-200107178
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 20, 2001

♦ ♦ ♦

Public Notice of Interconnection Agreement

On November 9, 2001, Southwestern Bell Telephone Company and Posner Telecommunications, 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 application was filed pursuant to the arbitration award issued in the *Petition of Posner Telecommunications, Inc. for Arbitration with Southwestern Bell Telephone Company Pursuant to the Telecommunications Act of 1996*. The application has been designated Docket Number 23859. The petition for arbitration, arbitration award and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The FTA authorizes the commission to review and approve an interconnection agreement that is a result of arbitration. Pursuant to FTA §252(e)(2) the commission may reject any agreement resulting from an arbitration award if it finds that the agreement does not meet the requirements of Section 251, including the regulations prescribed by the commission pursuant to FTA §251, or the standards set forth in FTA §252(d). Additionally, under FTA §252(e)(3) the commission may establish or enforce other requirements of the state law in its review of the agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

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 23859. The comments shall be filed by December 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) does not meet the requirements of FTA §251, including any Federal Communication Commission regulation implementing FTA§251; or

b) is not consistent with the standards established in FTA §252(d); 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 application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202.

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 23859.

TRD-200107113
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 19, 2001

♦ ♦ ♦

Public Notice of Interconnection Agreement

On November 16, 2001, Tele-One Communications, Inc. and Verizon Southwest, 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 25021. 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 25021. 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 December 19, 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 25021.

TRD-200107174
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 20, 2001

♦ ♦ ♦

Public Notice of Interconnection Agreement

On November 16, 2001, Ganoco, Inc. doing business as American Dial Tone and Verizon Southwest, 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 25022. 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 25022. 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 December 19, 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 25022.

TRD-200107175
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 20, 2001

♦ ♦ ♦

Public Notice of Interconnection Agreement

On November 16, 2001, Vartec Telecom, Inc. and Verizon Southwest, 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 25023. 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 25023. 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 December 19, 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 25023.

TRD-200107176
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 20, 2001

♦ ♦ ♦

Public Notice of Interconnection Agreement

On November 16, 2001, Preferred Carrier Services, Inc. doing business as Phones For All and Verizon Southwest, 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 25024. 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 25024. 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 December 19, 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 25024.

TRD-200107177
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 20, 2001

♦ ♦ ♦

University of North Texas Health Science Center

Notice of Request for Information (RFI) for Outside Legal Services Related to Intellectual Property Matters

THIS NOTICE, ORIGINALLY PUBLISHED IN *TEXAS REGISTER* ISSUE 45 ON NOVEMBER 9, 2001, IS BEING REPUBLISHED DUE TO EDITING AND FORMATTING ERRORS CONTAINED IN THE ORIGINAL NOTICE.

The University of North Texas System (UNT System) requests information from law firms interested in representing its component institution the University of North Texas Health Science Center at Fort Worth (UNTHSC) in intellectual property matters. This RFI is issued to establish (for the time frame beginning September 1, 2001 to August 31, 2002) a referral list from which UNT System, by and through its Office of Vice Chancellor and General Counsel, will select appropriate counsel for representation on specific intellectual property matters as the need arises.

Description: The UNT System comprises one health institution and two academic institutions located in three cities in Texas. Research activities and other educational pursuits at UNTHSC produce intellectual property that is carefully evaluated for protection and licensing to commercial entities. Subject to approval by the Office of the Attorney General (OAG) for the State of Texas, UNTHSC will engage outside counsel to prepare, file, prosecute, and maintain patent applications in the United States and other countries; secure copyright protection for computer software; and to prepare, file and prosecute applications to register trademarks and service marks in the United States and other countries. UNTHSC also will engage outside counsel from time to time to pursue litigation against infringers of these intellectual property rights and to handle other related matters. The UNT System invites responses to this RFI from qualified firms for the provision of such legal services under the direction and supervision of UNT System's Office of Vice Chancellor and General Counsel.

Responses; Qualifications: Responses to this RFI should include at least the following information: (1) a description of the firm's or attorney's qualifications for performing the legal services requested, including the firm's prior experience in intellectual property-related matters, and appropriate information regarding efforts made by the firm to encourage and develop the participation of minorities and women in the provision both of the firm's legal services generally and intellectual property matters in particular; (2) the names, experience, and scientific or technical expertise of the attorneys who may be assigned to work on such matters; (3) the submission of fee information (either in the form of hourly rates for each attorney who may be assigned to perform services in relation to UNTHSC's intellectual property matters, flat fees, or other fee arrangements directly related to the achievement of specific goals and cost controls) and billable expenses; (4) disclosures of conflicts of interest (identifying each and every matter in which the firm has, within the past calendar year, represented any entity or individual with an interest adverse to the UNT System, UNTHSC, or to the State of Texas, or any of its boards, agencies, commissions, universities, or elected or appointed officials); and (5) confirmation of willingness to comply with policies, directives and guidelines of the UNT System, UNTHSC and the OAG for the State of Texas.

The law firm(s) or attorney(s) will be selected based on demonstrated knowledge and experience, quality of staff assigned to perform services under the contract, compatibility with the goals and objectives of UNTHSC, and reasonableness of proposed fees. The successful firm(s) or attorney(s) will be required to sign the Texas OAG's Outside Counsel Agreement, and execution of a contract with UNTHSC is subject to approval by the Texas OAG. UNTHSC reserves the right to accept or reject any or all responses submitted. UNTHSC is not responsible for and will not reimburse any costs incurred in developing and submitting a response.

UNTHSC previously contracted with the law firm of Merchant & Gould LLP for intellectual property services and intends to award one of the contracts to Merchant & Gould LLP to continue last year's work.

Format and Person to Contact: Two copies of the response are requested. The response should be typed, preferably double spaced, on 8 1/2 x 11 inch paper with all pages sequentially numbered, and either stapled or bound together. They should be sent by mail, facsimile, or electronic mail, or delivered in person, marked "Response to Request for Information," and addressed to William S. LeMaistre, JD, MPH, Associate General Counsel, Office of the Vice Chancellor and General Counsel, UNT System, c/o UNTHSC Legal Affairs, 3500 Camp Bowie Blvd., Fort Worth, TX, 76107-2699; or email wlemaist@hsc.unt.edu; or fax to (817) 735-0433.

Deadline for Submission of Response: All responses must be received by UNTHSC Legal Affairs at the address set forth above no later than 5:00 p.m., Friday, December 7, 2001. Questions regarding this request may be directed to Mr. LeMaistre at (817) 735-2527.

TRD-200107019
Ronald R. Blanck, D.O.
President
University of North Texas Health Science Center
Filed: November 14, 2001

♦ ♦ ♦

Texas Workforce Commission

Withdrawal of Request for Qualifications for Selection of Professional Architectural/Engineering Services

The Texas Workforce Commission (TWC), Facilities, Construction and Maintenance Department, 101 E. 15th St., Room 226T, Austin, Texas 78778-0001 together with and on behalf of the Cameron County Workforce Development Board d/b/a Cameron Works, Inc. (the Board), hereby withdraws the request for statement of interest and qualifications (RFQ) for the purpose of selecting a professional architectural/engineering (A/E) firm for interior and exterior building renovations for TWC agency owned building located at 245 E. Levee Street, Brownsville, Texas as published in the November 9, 2001 issue of the *Texas Register* (26 TexReg 9333).

TRD-200107172
John Moore
Assistant General Counsel
Texas Workforce Commission
Filed: November 20, 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
_____
_____