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Ashley Turner
10th Grade

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. 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.

The artwork featured on the front cover is chosen at random. Inside each issue, 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*.

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IN THIS ISSUE

THE ATTORNEY GENERAL

The *Texas Register* publishes summaries of the following: Requests for Opinions, Opinions, Open Records Decisions.

An index to the full text of these documents is available from the Attorney General's Internet site http://www.oag.state.tx.us. Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: http://www.oag.state.tx.us/opinopen/opinhome.shtml.)

Request for Opinion

RQ-0935-GA

Requestor:

Mr. Steven McCraw, Director

Texas Department of Public Safety

Post Office Box 4087

Austin, Texas 78773-0001

Re: Whether the Department of Public Safety's rehiring of a retired peace officer tolls the two-year period during which the officer may purchase his or her service revolver under section 614.051, Government Code (RQ-0935-GA)

Briefs requested by January 17, 2011

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

TRD-201007263
Jay Dyer
Deputy Attorney General
Office of the Attorney General
Filed: December 20, 2010

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EMERGENCY RULES

Emergency Rules include new rules, amendments to existing rules, and the repeals of existing rules. A state agency may adopt an emergency rule without prior notice or hearing if the agency finds that an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires adoption of a rule on fewer than 30 days' notice. An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days (Government Code, §2001.034).

TITLE 28. INSURANCE

PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

CHAPTER 134. BENEFITS--GUIDELINES FOR MEDICAL SERVICES, CHARGES, AND PAYMENTS

SUBCHAPTER F. PHARMACEUTICAL BENEFITS

28 TAC §134.503

The Commissioner of Workers' Compensation (Commissioner), Texas Department of Insurance (Department), Division of Workers' Compensation (Division) adopts on an emergency basis amendments to §134.503, concerning the pharmacy fee guideline, pursuant to House Bill (HB) 7, §8.005(e) and Government Code §2001.034 because of the near-term imminent peril to injured employees in the workers' compensation system if the rules are not adopted on an emergency basis. Because of this imminent peril and pursuant to Government Code §2001.036(a)(2), these amendments shall become effective on January 1, 2011.

The title of this section is amended from "Reimbursement Methodology" to "Pharmacy Fee Guideline" to conform to statutory nomenclature. This section also applies to networks certified under Insurance Code Chapter 1305, because Insurance Code §1305.101(c) specifically states that "prescription medication and services as defined by Section 401.011(19)(E), Labor Code, may not be delivered through a workers' compensation health care network" and that "prescription medication and services shall be reimbursed as provided by the Texas Workers' Compensation Act and applicable rules of the commissioner of workers' compensation."

The amendments to §134.503 are necessary to implement portions of HB 7, enacted during the 79th Legislature, Regular Session, effective September 1, 2005 as they apply to reimbursement of pharmaceutical services. The amendments will permit expedited compliance with statutory changes to the Labor Code as a result of changes to §408.028. The changes affected by HB 7 include revisions to Labor Code §408.028 which added section (f) requiring the Commissioner by rule to adopt a fee schedule for pharmacy and pharmaceutical services that will: "(1) provide reimbursement rates that are fair and reasonable; (2) assure adequate access to medications and services for injured workers; and (3) minimize costs to employees and insurance carriers." HB 7 also added the following language to Labor Code §408.028(g): "Insurance carriers must reimburse for pharmacy benefits and services using the fee schedule as developed by this section, or at the rates negotiated by contract."

In addition, HB 7 added the following language to Labor Code §413.011(d): "Notwithstanding Section 413.016 or any other provision of this title, an insurance carrier may pay fees to a health care provider that are inconsistent with the fee guidelines adopted by the division if the insurance carrier or a network under Chapter 1305, Insurance Code, has a contract with the health care provider and that contract includes a specific fee schedule." Labor Code §413.011(d) was then further amended under HB 473 during the 80th Legislature, Regular Session, effective September 1, 2007, to grant insurance carriers or their authorized agents the authority to use an informal or voluntary network as defined by Labor Code §413.0115 to contract with health care providers, including pharmacies, for fees different from the fees authorized under the Division's fee guidelines.

On January 1, 2011, however, certain provisions enacted by of HB 473 under Labor Code §413.011, specifically subsections (d-1), (d-2), and (d-3), relating to contractual agreements with informal or voluntary networks, will expire. Section 413.011(d-4) will remain in effect, which permits insurance carriers, their authorized agents, or certified networks arranging for non-network services, to contract with health care providers to secure health care for injured employees for fees in excess of the Division's fee guidelines. Additionally, the §408.028(f) requirement that the Division adopt a pharmacy fee guideline that ensure adequate access to prescription medications and services will remain in effect. On May 20, 2010 the Division requested an opinion from the Office of the Attorney General regarding whether a workers' compensation insurance carrier may, on or after January 1, 2011, pay for a prescription drug at rates lower than the fee rate allowed by the Division's fee guidelines and if so, whether insurance carriers may contract with informal or voluntary networks to obtain these discounted rates. The Office of the Attorney General issued Opinion No. GA-0828 on December 10, 2010 in response to this request. The Division did not request an opinion regarding the expiration of §413.011, Subsections (d-1), (d-2), and (d-3) or the application of §413.0115 as these provisions relate to contractual agreements between insurance carriers and health care providers for health care services other than pharmacy services.

The Division has determined it is necessary to adopt these amendments on an emergency basis to continue uninterrupted dispensing and payment of prescription drugs, medicines or other remedies after January 1, 2011 and for the Division to meet the statutory mandates of Labor Code §408.028(f)(2) and §413.011(d) that require that the Division's pharmacy fee guidelines must ensure the quality of and adequate access to prescription medication services. Furthermore, the emergency adoption of these amendments is necessary to ensure that the Division meets the Labor Code §402.021(b)(4) requirement that the workers' compensation system of Texas provide timely, appropriate, and high-quality medical care that supports the

restoration of the injured employee's physical condition and earning capacity. If the Division does not adopt these amendments on an emergency basis, uncertainty regarding insurance carriers' continued authority, after January 1, 2011, to negotiate for contracts that permit them to pay for prescription medications and services at the fee rates currently permitted under the Labor Code would lead to mass expiration of currently existing insurance carrier contracts and the inability to negotiate new written contracts in their place. Furthermore, alternate mechanisms to negotiate pharmacy payment under this uncertain statutory authorization for pharmacy contracting cannot be implemented before January 1, 2011. This mass market dislocation and disruption, without any clearly authorized and implementable alternative, will result in pharmacies and/or their agents being confused about their ability to be paid and the appropriate reimbursement rates for prescription medications and services after January 1, 2011. This confusion will drastically delay, limit, or alter injured employees' access to prescription medications services and, therefore, place them in near-term imminent peril after January 1, 2011.

These amendments, however, are only intended to temporarily resolve the uncertainty regarding payment and reimbursement of pharmacy and pharmaceutical services while the Legislature considers possible statutory changes to clarify the reimbursement of pharmaceutical services within the workers' compensation system. Additional rulemaking will be necessary at the conclusion of the 82nd legislative session to adopt a long-term pharmacy fee guideline that conforms with all applicable law.

The Division, therefore, adopts amendments to §134.503 to clarify that: (1) §134.503 is a pharmacy fee guideline and (2) health care providers and insurance carriers may continue to contract for pharmaceutical services at rates above or below the Division's pharmacy fee guideline. Additionally, these amendments do not limit insurance carriers' authority to negotiate these written contracts with pharmacies or pharmacy processing agents directly or to do so through the use of their authorized agents, such as pharmacy benefit managers.

The section is adopted on an emergency basis under the Labor Code §§408.028, 401.011, 402.021, 408.021, 413.011, 413.0111, 413.0115, 402.00111, 402.00116, 402.00128, and 402.061; Insurance Code Chapter 1305; Government Code §§2001.034 and 2001.036 as well as §8.005 of House Bill 7, enacted by the 79th Legislature, Regular Session, effective September 1, 2005 (HB 7). Labor Code §408.028 requires the Commissioner by rule to adopt a fee schedule for pharmacy and pharmaceutical services that will provide reimbursement rates that are fair and reasonable; assure adequate access to medications and services for injured employees and minimize costs to employees and insurance carriers. Section 408.028 also provides that insurance carriers must reimburse health care providers for pharmacy benefits and services using the Division's fee schedule or at rates negotiated by written contract. Section 401.011 contains definitions used in the Texas workers' compensation system (in particular, §401.011(19)(E), the definition of "health care," which includes a prescription drug, medicine or other remedy, §401.011(22), the definition of "health care provider," and §401.011(42), the definition of "health care reasonably required."). Section 402.021 states that the workers' compensation system of this state must provide timely, appropriate, and high-quality medical care supporting restoration of the injured employee's physical condition and earning capacity. Section 408.021 states that an injured employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed. Section 413.011 requires the Commissioner by rule to establish medical policies and guidelines relating to necessary treatment for injuries and designed to ensure the quality of medical care and to achieve effective medical cost control. Section 413.0111 requires that a rule on reimbursement of prescription medication or services must authorize pharmacies to use agents or assignees to process claims and act on behalf of pharmacies. Section 413.0115 requires that all informal or voluntary networks must be certified as a workers' compensation health care network under Insurance Code Chapter 1305 by January 1, 2011. Section 402.00111 provides that the Commissioner shall exercise all executive authority, including rulemaking authority, under the Labor Code and other laws of this state. Section 402.00116 grants the powers and duties of chief executive and administrative officer to the Commissioner and the authority to enforce Labor Code Title 5, other workers' compensation laws of this state, and other laws granting jurisdiction to or applicable to the Division or Commissioner. Section 402.00128 provides general operational powers to the Commissioner to conduct daily operations of the Division and implement Division policy including the duty to delegate, assess and enforce penalties and enter appropriate orders as authorized by Labor Code Title 5. Section 402.061 provides the Commissioner the authority to adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act (Act). Insurance Code Chapter 1305 is the Workers' Compensation Health Care Network Act that authorizes the establishment of certified networks for the provision of workers' compensation benefits. In particular, §1305.101(c) sets forth that prescription medication and services may not be delivered through a workers' compensation health care network and that prescription medication and services for certified network claims shall be reimbursed as provided by the Act and applicable rules of the Commissioner. Further, §1305.051 provides that a person may not operate a certified network in this state unless the person holds a certificate issued under Chapter 1305 and rules adopted by the Commissioner of Insurance. Government Code §2001.034 provides for the adoption of administrative rules on an emergency basis without notice and comment if an agency finds that an imminent peril to the public health, safety, or welfare, or requirement of state or federal law, requires adoption of a rule on fewer than 30 days notice. Government Code §2001.036 provides that if a state agency finds that an expedited effective date is necessary because of imminent peril to the public health, safety, or welfare, a rule is effective immediately on filing with the secretary of state, or on a state date less than 20 days after the filing date. In addition, §8.005(e) of HB 7 gives the Commissioner the authority to adopt rules on expedited basis using the procedures established in Government Code §2001.034 without making the finding described in Government Code §2001.034(a).

§134.503. Pharmacy Fee Guideline [~~Reimbursement Methodology~~].

(a) Applicability of this section is as follows:

(1) This section applies to the reimbursement of prescription and nonprescription drugs that are:

(A) dispensed on or after January 1, 2011; and

(B) for outpatient use in the Texas workers' compensation system, which includes claims:

(i) subject to a certified workers' compensation health care network as defined in §134.500 of this title (relating to Definitions); and

(ii) not subject to a certified workers' compensation health care network.

(2) This section does not apply to:

(A) parenteral drugs; or

(B) claims subject to Labor Code §504.053(b)(2).

(b) For coding, billing, reporting, and reimbursement of prescription and nonprescription drugs, Texas workers' compensation system participants shall apply the provisions of Chapters 133 and 134 of this title (relating to General Medical Provisions and Benefits--Guidelines for Medical Services, Charges, and Payments, respectively).

(c) [~~(a)~~] The [~~maximum allowable~~] reimbursement [~~(MAR)~~] for prescription drugs shall be as follows [~~the lesser of~~]:

(1) A negotiated or contract amount between the insurance carrier and the pharmacy, or the pharmacy processing agent, if applicable, that is greater than the reimbursement established by paragraph (3)(A) of this subsection may be paid for prescription drugs used for an injured employee's claim at any time when it is necessary to secure health care for an injured employee; [~~The provider's usual and customary charge for the same or similar service;~~]

(2) A negotiated or contracted amount between the insurance carrier and the pharmacy, or the pharmacy processing agent, if applicable, that is less than the reimbursement established by paragraph (3)(A) of this subsection; or

(3) In the event a negotiated or contract amount between the insurance carrier, pharmacy, or pharmacy processing agent does not exist, the lesser of:

(A) [~~(2)~~] the fee [~~The fees~~] established by the following formulas based on the average wholesale price (AWP) as reported [~~determined~~] by [~~utilizing~~] a nationally recognized pharmaceutical price guide or other publication of pharmaceutical pricing data [~~reimbursement system (e.g. Redbook, First Data Bank Services)~~] in effect on the day the prescription drug is dispensed:[~~.~~]

(i) [~~(A)~~] Generic drugs: ((AWP per unit) x (number of units) x 1.25) + $4.00 dispensing fee = reimbursement amount [~~MAR~~];

(ii) [~~(B)~~] Brand name drugs: ((AWP per unit) x (number of units) x 1.09) + $4.00 dispensing fee = reimbursement amount [~~MAR~~];

(iii) When compounding, a single compounding fee of $15 per prescription shall be added to the calculated total for either subparagraph (A)(i) or (ii) of this paragraph; or

(B) the provider's billed amount.

[~~(C) A compounding fee of $15 per compound shall be added for compound drugs; or~~]

[~~(3) A negotiated or contract amount.~~]

(d) Reimbursement for nonprescription drugs or over-the-counter medications shall be the retail price of the lowest package quantity reasonably available that will fill the prescription.

(e) If an amount to calculate the reimbursement cannot be determined in accordance with subsections (c) or (d) of this section, reimbursement shall be determined in accordance with §134.1 of this title (relating to Medical Reimbursement).

(f) [~~(b)~~] When the prescribing doctor has written a prescription for a generic drug or a prescription that does not require the use of a brand name drug in accordance with §134.502(a)(3) of this title (relating to Pharmaceutical Services), reimbursement shall be as follows:

(1) the pharmacist shall dispense the generic drug as prescribed and shall be reimbursed the fee established for the generic drug in accordance with subsection (c) [~~(a)~~] of this section; or

(2) when an injured employee chooses to receive a brand name drug instead of the prescribed generic drug, the pharmacist shall dispense the brand name drug as requested and shall be reimbursed:

(A) by the insurance carrier, the fee established for the prescribed generic drug in accordance with subsection (c) [~~(a)~~] of this section; and

(B) by the injured employee, the cost difference between the fee established for the generic drug in subsection (c) of this title and the fee established for the brand name drug in accordance with subsection (c) of this section [~~§134.503(a)(2) of this title~~].

(g) [~~(c)~~] When the prescribing doctor has written a prescription for a brand name drug in accordance with §134.502(a)(3) of this title, reimbursement shall be in accordance with subsections (c) - (e) [~~subsection (a)~~] of this section.

[~~(d) Reimbursement for over-the-counter medications shall be the retail price of the lowest package quantity reasonably available that will fill the prescription.~~]

[~~(e) This section applies to the dispensing of all drugs except inpatient drugs and parenteral drugs.~~]

(h) [~~(f)~~] Upon request by the health care provider or the division, the insurance carrier shall disclose the source of the pricing reference [~~AWP~~] used to calculate the reimbursement.

(i) Where any provisions of this section are determined by a court of competent jurisdiction to be inconsistent with any statutes of this state, or to be unconstitutional, the remaining provisions of this section shall remain in effect.

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

Filed with the Office of the Secretary of State on December 17, 2010.

TRD-201007198
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Effective Date: January 1, 2011
Expiration Date: April 30, 2011
For further information, please call: (512) 804-4703

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PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 1. ADMINISTRATION

PART 2. TEXAS ETHICS COMMISSION

CHAPTER 50. LEGISLATIVE SALARIES AND PER DIEM

1 TAC §50.3

The Texas Ethics Commission proposes new §50.3 to set the legislative per diem as required by the Texas Constitution, Article III, §24a. This section sets the per diem for members of the legislature and the lieutenant governor at $150 for each day during the regular session and any special session.

David A. Reisman, Executive Director, has determined that for each odd numbered year of the first five years this rule is in effect there will be a fiscal implication of a decrease of $458,640 from the current level for the state and no fiscal implication for local government as a result of enforcing or administering this rule. This amount may increase if any special sessions are called.

Mr. Reisman also has determined that for each year of the first five years this rule is in effect the public benefit expected as a result of adoption of the proposed rule is a determination, in compliance with the Texas Constitution, of the per diem entitled to be received by each member of the legislature and the lieutenant governor under the Texas Constitution, Article III, §24, and Article IV, §17, during the regular session and any special session.

Mr. Reisman has also determined there will be no direct adverse effect on small businesses or micro-businesses because the rule does not apply to single businesses.

Mr. Reisman has further determined that there are no economic costs to persons required to comply with the rule.

The Texas Ethics Commission invites comments on the proposed rule from any member of the public. A written statement should be mailed or delivered to David A. Reisman, Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070, or by facsimile (FAX) to (512) 463-5777. A person who wants to offer spoken comments to the commission concerning the proposed rule may do so at any commission meeting during the agenda item "Communication to the Commission from the Public" and during the public comment period at a commission meeting when the commission considers final adoption of the proposed rule. Information concerning the date, time, and location of commission meetings is available by telephoning (512) 463-5800.

The new §50.3 is proposed under the Texas Constitution, Article III, §24a, and the Government Code, Chapter 571, §571.062.

The new §50.3 affects the Texas Constitution, Article III, §24, Article III, §24a, and Article IV, §17.

§50.3. Legislative Per Diem.

(a) The legislative per diem is $150. The per diem is intended to be paid to each member of the legislature and the lieutenant governor for each day during the regular session and for each day during any special session.

(b) If necessary, this rule shall be applied retroactively to ensure payment of the $150 per diem for 2011.

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 December 13, 2010.

TRD-201007077
David A. Reisman
Executive Director
Texas Ethics Commission
Earliest possible date of adoption: January 30, 2011
For further information, please call: (512) 463-5800

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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 1. ADMINISTRATION

SUBCHAPTER A. GENERAL POLICIES AND PROCEDURES

10 TAC §1.23

The Texas Department of Housing and Community Affairs (the "Department") proposes amendments to §1.23, concerning the State of Texas Low Income Housing Plan and Annual Report (SLIHP). The section adopts by reference the annual 2011 State of Texas Low Income Housing Plan and Annual Report (SLIHP). The purpose of the SLIHP is to serve as a comprehensive reference on statewide housing needs, housing resources, and strategies for funding allocations. The document reviews the Department's programs, current and future policies, resource allocation plan to meet state housing needs, and reports on 2010 performance. The Department is required to submit the SLIHP annually to its Board of Directors in accordance with §2306.072 of the Texas Government Code.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the amended section is in effect there will be no fiscal implications for state or local governments as

a result of enforcing or administering the amended section as proposed.

Mr. Gerber has also determined that for each year of the first five years the SLIHP is in effect, the public benefit anticipated will be improved communication with the public regarding the Department's programs and activities. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the amended section as proposed. The amended section will not impact local employment.

The full text of the 2011 SLIHP may be viewed at the Department's website: www.tdhca.state.tx.us. The public may also receive a copy of the 2011 SLIHP by contacting the Department's Housing Resource Center at (512) 475-3976.

The public comment period will be between January 10 and February 8, 2011. A public hearing will be held at 10:30 a.m., January 27, 2011 at the Stephen F. Austin Building, Room 170, 1700 N. Congress Ave. Austin, Texas. Written comments may be submitted to Texas Department of Housing and Community Affairs, Elizabeth Yevich, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: elizabeth.yevich@tdhca.state.tx.us, or by fax to (512) 475-1672.

The TDHCA Board of Directors will consider the final 2011 SLIHP at the March 2011 board meeting. The 2011 SLIHP will become effective 20 days after being filed with the Office of the Secretary of State.

The amendment is proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by the proposed amendment.

§1.23. State of Texas Low Income Housing Plan and Annual Report (SLIHP).

The Texas Department of Housing and Community Affairs (the "Department") [(~~the Department~~)] adopts by reference the 2011 [~~2010~~] State of Texas Low Income Housing Plan and Annual Report (SLIHP). The full text of the 2011 [~~2010~~] SLIHP may be viewed at the Department's website: www.tdhca.state.tx.us. The public may also receive a copy of the 2011 [~~2010~~] SLIHP by contacting the Department's Housing Resource Center at (512) 475-3976.

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 December 20, 2010.

TRD-201007218
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: January 30, 2011
For further information, please call: (512) 475-3916

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TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 5. CARBON DIOXIDE (CO_2) SUBCHAPTER C. CERTIFICATION OF GEOLOGIC STORAGE OF ANTHROPOGENIC CARBON DIOXIDE (CO_2) INCIDENTAL TO ENHANCED RECOVERY OF OIL, GAS, OR GEOTHERMAL RESOURCES

16 TAC §§5.301 - 5.308

The Railroad Commission of Texas (Commission) proposes a new subchapter in Chapter 5, new Subchapter C, relating to Certification of Geologic Storage of Anthropogenic Carbon Dioxide (CO_2) Incidental to Enhanced Recovery of Oil, Gas, or Geothermal Resources, to implement Senate Bill (SB) 1387, 81st Legislature (Regular Session, 2009), which was effective September 1, 2009. SB 1387 amended the Texas Water Code and the Texas Natural Resources Code to provide for the implementation of projects involving the capture, injection, sequestration, or geologic storage of carbon dioxide (CO_2). The purpose of the proposed new rules is to provide for certification of geologic storage of anthropogenic CO_2 incidental to enhanced recovery of oil, gas, or geothermal resources.

Senate Bill 1387 requires the Commission to adopt rules regarding geologic storage and associated injection of CO_2 in connection with enhanced recovery operations for which: (1) there is a reasonable expectation of more than insignificant future production volumes or rates as a result of the injection of anthropogenic CO_2; and (2) operating pressures are not higher than reasonably necessary for enhanced recovery.

The Commission proposes new §5.301, relating to Applicability, which sets out the applicability of the new subchapter and establishes the requirements for certification of the injection and incidental storage of anthropogenic CO_2 into productive reservoirs associated with enhanced recovery of oil, gas, or geothermal resources, and for which the operator requests certification from the Commission that the anthropogenic CO_2 is permanently stored.

The Commission proposes new §5.302, relating to Definitions. This new section defines anthropogenic CO_2 as it is defined in the Texas Water Code, §27.002(19)(A), but includes CO_2 contained in acid gas produced in association with the processing of natural gas. The new section further includes definitions for "anthropogenic carbon dioxide (CO_2) stream," "CO_2 injection well," "certification," "enhanced recovery," "enhanced recovery facility," "geologic storage," and "productive reservoir."

The Commission proposes new §5.303, relating to Registration for Certification. The section requires that the operator or the proposed operator of an enhanced recovery facility for which the operator proposes to document geologic storage of anthropogenic CO_2 incidental to enhanced recovery register with the Commission in Austin. The section further establishes the registration application requirements, including a registration fee. The section further states that, within 90 days of receipt of a complete registration application, the director will approve or deny the registration application.

The Commission proposes new §5.304, relating to Fees. The proposed new section would require a non-refundable registra-

tion fee of $500 for each enhanced recovery facility to be registered and a non-refundable annual certification fee of $0.025 per metric ton of anthropogenic CO_2 injected into each enhanced recovery facility registered under this subchapter.

The Commission proposes new §5.305, relating to Monitoring, Sampling, and Testing Plan. The proposed new rule establishes requirements for the monitoring, sampling, and testing plan in order to allow a determination by mass balancing or actual system modeling of the quantities of anthropogenic CO_2 permanently stored within the enhanced recovery reservoir for documentation to the Commission. The section further states that any person registering a enhanced recovery facility under this subchapter may comply with the sampling, monitoring, and reporting requirements of this subchapter by complying with, and submitting to the Commission a copy of the information submitted to the United States Environmental Protection Agency under, Subparts RR or UU of 40 CFR Part 98, Mandatory Reporting of Greenhouse Gases: Injection and Geologic Sequestration of Carbon Dioxide.

The Commission proposes new §5.306, relating to Standards for Certification. The proposed new rule establishes the standards for certification.

The Commission proposes new §5.307, relating to Reporting and Recordkeeping, which establishes the reporting and recordkeeping requirements for the subchapter.

The Commission proposes new §5.308, relating to Requirements for Certification, which states that, to verify geologic storage of CO_2 incidental to enhanced recovery operations, the operator must maintain, and be in compliance with, the approved testing, monitoring, and reporting plan required by §5.305 of this subchapter. The section further states that, annually, the Commission may issue a certification to the operator validating the geologic storage of anthropogenic CO_2 incidental to enhanced recovery at the registered facility and that certifications issued under this subchapter continue in effect until revoked, modified, or suspended by the Commission. The operator must comply with each requirement set forth in this subchapter as a condition of the certification unless modified by the terms of the certification.

Leslie Savage, Planning and Administration, Oil and Gas Division, has determined that for each year of the first five years that the proposed new rules will be in effect there will be negative fiscal implications for state government.

SB 1387 provided the Commission with a method for funding this new program by establishing the Anthropogenic Carbon Dioxide Storage Trust Fund through Texas Natural Resources Code, §120.003, and allowing the Commission to charge fees under Texas Water Code, §27.045. However, the Commission cannot collect any fees to fund the program until it receives applications. Therefore, for the first two years, the Commission will bear the costs of rulemaking and initial implementation without any offsetting revenue.

Ms. Savage has determined that for each year of the first five years that the proposed new rules will be in effect, enforcing or administering the rules does not have foreseeable implications relating to cost or revenues of local governments.

Texas Government Code, §2006.002, relating to Adoption of Rules with Adverse Economic Effect, directs that, as part of the rulemaking process, a state agency prepare an economic impact statement that assesses the potential impact of a proposed rule on small businesses and micro-businesses, and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule if the proposed rule will have an adverse economic effect on small businesses or micro-businesses.

The Commission's proposed new rules in Subchapter C are anticipated to have a potential cost impact on those persons performing geologic storage of anthropogenic CO_2 incidental to production of oil, gas or geothermal resources. However, because an operator is not likely to register for certification unless it is economic to do so, the Commission concludes that the benefits will outweigh those costs.

Companies performing activities under the jurisdiction of the Commission are not required to make filings with the Commission reporting the number of employees or annual gross receipts, which are elements of the definitions of "micro-business" and "small business" in Texas Government Code, §2006.001; therefore, the Commission has no factual bases for determining whether any persons that will be engaged in geologic storage of CO_2 incidental to production of oil, gas or geothermal resources will be classified as small businesses or micro-businesses, as those terms are defined. Specifically, Texas Government Code, §2006.001(2), defines a "small business" as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit; is independently owned and operated; and has fewer than 100 employees or less than $6 million in annual gross receipts. Texas Government Code, §2006.001(1), defines "micro-business" as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit; is independently owned and operated; and has not more than 20 employees.

Based on the information the Commission has received regarding the companies that are likely to pursue certification for facilities for the geologic storage of anthropogenic CO_2 incidental to the production of oil, gas, or geothermal resources, Ms. Savage concludes that it is extremely unlikely that any company that potentially could be affected by the proposed rules would be classified as a small business or micro-business, as those terms are defined in Texas Government Code, §2006.001. However, for purposes of performing the analysis mandated by Texas Government Code, §2006.002(c), the Commission assumes that at least one small business or micro-business will apply for certification under proposed new Subchapter C.

The North American Industrial Classification System (NAICS) sets forth categories of business types. There is no category for geologic storage of CO_2. This category is not listed on the Texas Comptroller of Public Accounts website page entitled "HB 3430 Reporting Requirements-Determining Potential Effects on Small Businesses." The most suitable category on that website is business type 2212 (Natural Gas Distribution), for which there are listed 144 companies in Texas. This source further indicates that 119 companies (82 percent) are small businesses or micro-businesses as defined in Texas Government Code, §2006.002.

According to information provided by EPA as support documentation of the cost of compliance with EPA's proposed Class VI rules, EPA estimated an overall cost of approximately $2.20 per ton of CO_2 stored over the lifetime of a commercial geologic storage project. See *Federal Register* Vol. 73, No. 144, July 25, 2008, pages 43528-43529. However, those requirements are much more stringent than the requirements for certification proposed in this rulemaking, and therefore those costs are much higher than the costs expected for compliance with the require-

ments for certification proposed in this rulemaking. In addition, the requirements of this proposed subchapter are less stringent that the requirements of EPA's recently adopted Mandatory Reporting of Greenhouse Gases regulations, Subpart W (from Petroleum and Natural Gas Systems) (http://www.epa.gov/climatechange/emissions/subpart/w.html), Subpart UU (Injection of Carbon Dioxide) (http://www.epa.gov/climatechange/emissions/subpart/uu.html), and Subpart RR (Geologic Sequestration of Carbon Dioxide). The only additional costs associated with this proposed new subchapter would be the costs of preparing and submitting to the Commission the application for registration and the associated fee, and preparation and submission of the annual report for certification and the associated fee.

The Commission's proposed fee structure for registration and for annual certification of a project registered under proposed Subchapter C is based on the estimated cost to the Commission of reviewing registrations and monitoring the registered facilities. Because the Commission's proposed annual fee, intended to provide revenue to the Trust Fund, is based on the volume of CO_2 injected, the fee generally will be proportional to the size of the facility. That does not necessarily mean, however, that the fee will be proportional to the size of the entity operating the facility, although it could tend to reduce the likely actual annual costs for smaller businesses and modestly increase the actual annual costs for the larger businesses. Other factors that might affect the distribution of the economic burden of regulating registered facilities, such as net value of CO_2 as established by the Federal government in a carbon credit program, cannot be calculated because Congress has not yet established such a program. However, because registration under the proposed new subchapter is voluntary, the Commission concludes that an operator will not apply for registration under this new subchapter unless there would be a resulting economic benefit. The Commission also concludes that because registration is voluntary, there is likely no adverse economic impact on small businesses or micro-businesses.

The Commission has determined that the economic impact of the proposed new rules will be the same for small businesses and micro-businesses as for larger businesses. The Commission has also determined that consideration of the use of regulatory methods that will achieve the purpose of the proposed rules while minimizing the adverse impacts on small businesses is not consistent with the health, safety, and environmental and economic welfare of the state, and therefore has not prepared a regulatory flexibility analysis.

The Commission anticipates that the operation of a registered facility would not be likely affect a local economy. The Commission anticipates that the effect on any local economy would be similar to that of the oil and gas industry as a whole. Therefore, the Commission has not prepared a local employment impact statement pursuant to Texas Government Code, §2002.022.

The Commission has determined that the proposed new rules in Subchapter C of Chapter 5 are not major environmental rules, because the rules do not meet the requirements set forth in Texas Government Code, §2001.0225(a).

Ms. Savage has determined that for each year of the first five years that the new rules will be in effect the public benefit will be a reduction in the amount of anthropogenic CO_2 released to the atmosphere and an enhanced ability of Texas industries to comply with future federal climate regulations.

Comments on the proposal may be submitted to Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at www.rrc.state.tx.us/rules/commentform.php; or by electronic mail to rulescoordinator@rrc.state.tx.us. Comments should refer to O&G Docket No. 20-0264802, and will be accepted until 12:00 noon on January 31, 2011, which is 31 days after publication in the *Texas Register.* The Commission finds that this comment period is reasonable because the proposal and an online comment form will be available on the Commission's web site at least 16 days prior to *Texas Register* publication of the proposal, giving interested persons more than two additional weeks to review, analyze, draft, and submit comments. The Commission encourages all interested persons to submit comments no later than the deadline. The Commission cannot guarantee that comments submitted after the deadline will be considered. For further information, call Ms. Savage at (512) 463-7308. The status of Commission rulemakings in progress is available at www.rrc.state.tx.us/rules/proposed.php.

The Commission proposes the rules in new Subchapter C pursuant to Texas Natural Resources Code, §81.051 and §81.052, which give the Commission jurisdiction over all persons owning or engaged in drilling or operating oil or gas wells in Texas and the authority to adopt all necessary rules for governing and regulating persons and their operations under the jurisdiction of the Commission; Texas Natural Resources Code, Chapter 91, Subchapter R, as enacted by SB 1387, relating to authorization for multiple or alternative uses of wells; Texas Water Code, Chapter 27, Subchapter C-1, as enacted by SB 1387, which gives the Commission jurisdiction over the geologic storage of CO_2 in, and the injection of CO_2 into, a reservoir that is initially or may be productive of oil, gas, or geothermal resources or a saline formation directly above or below that reservoir; and Texas Water Code, Chapter 120, as enacted by SB 1387, which establishes the Anthropogenic Carbon Dioxide Storage Trust Fund, a special interest-bearing fund in the state treasury, to consist of fees collected by the Commission and penalties imposed under Texas Water Code, Chapter 27, Subchapter C-1, and to be used by the Commission for only certain specified activities incidental to geologic storage facilities and associated anthropogenic CO_2 injection wells.

Texas Natural Resources Code, §81.051 and §81.052; Texas Natural Resources Code, Chapter 91, Subchapter R; and Texas Water Code, Chapters 27 and 120, are affected by the proposed new rules.

Statutory authority: Texas Natural Resources Code, §81.051 and §81.052; Texas Natural Resources Code, Chapter 91, Subchapter R; and Texas Water Code, Chapters 27 and 120.

Cross-reference to statute: Texas Natural Resources Code, §81.051 and §81.052; Texas Natural Resources Code, Chapter 91, Subchapter R; and Texas Water Code, Chapters 27 and 120.

Issued in Austin, Texas on December 14, 2010.

§5.301. Applicability.

(a) This subchapter establishes the requirements for certification of the injection, and incidental storage, of anthropogenic CO_2 into productive reservoirs for the purpose of enhanced recovery of oil, gas, or geothermal resources, and for which the operator requests certification from the Commission that the anthropogenic CO_2 is permanently stored.

(b) This subchapter applies to the injection of anthropogenic CO_2 in a reservoir in connection with enhanced recovery for which:

(1) there is a reasonable expectation of more than insignificant future production of oil, gas, or geothermal volumes or rates as a result of the injection of CO_2; and

(2) using operating pressures not anticipated to be higher than reasonably necessary to produce such production of oil, gas, or geothermal volumes and rates are covered by this rule, and the wells used in such enhanced recovery continue to be covered in accordance with the requirements of §3.46 of this title (relating to Fluid Injection into Productive Reservoirs).

(c) For the purposes of this subsection, the CO_2 stream injected into a productive reservoir may include any proportion of anthropogenic CO_2 and naturally sourced CO_2.

(d) The operator of an enhanced recovery facility registering for certification of geologic storage of anthropogenic CO_2 incidental to enhanced recovery operations is subject to the monitoring provisions of this subchapter.

(e) No permit is required for a person to register with, or obtain a certification from, the Commission for geologic storage of anthropogenic CO_2 incidental to enhanced recovery under this subchapter. Registration for certification by an operator under this subchapter is separate and distinct from an application for a Geologic Storage Facility under Subchapter B of this chapter (relating to Geologic Storage and Associated Injection of Anthropogenic Carbon Dioxide (CO_2)). The wells into which CO_2 is injected for the purpose of enhanced recovery continue to be covered by §3.46 of this title.

(f) Registration under this subchapter is voluntary. An enhanced recovery facility may register under this subchapter to account for geologic sequestration of anthropogenic CO_2. Additionally, this subchapter does not preclude the operator of an enhanced recovery project from opting into a regulatory program that provides carbon credit for the geologic storage of anthropogenic CO_2 incidental to enhanced recovery.

(g) An enhanced recovery facility subject to this subchapter includes all structures associated with injection and production located between the injection/production wells and the separators, but does not include the following:

(1) storage of CO_2 above ground;

(2) temporary storage of CO_2 below ground;

(3) transportation or distribution of CO_2;

(4) purification, compression, or processing of CO_2 at the surface;

(5) capture of CO_2; or

(6) CO_2 in cement, precipitated calcium carbonate, or any other technique that does not involve injection of CO_2 into the subsurface.

(h) Conflict with other requirements. If a provision of this section conflicts with any provision or term of a Commission order, field rule, or permit, the provision of such order, field rule, or permit controls.

§5.302. Definitions.

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

(1) Anthropogenic carbon dioxide (CO_2)--Anthropogenic CO_2 as defined in the Texas Water Code, §27.002(19)(A), and CO_2 contained in acid gas produced in association with the processing of natural gas. The term does not include naturally occurring CO_2 that is produced, acquired, recaptured, recycled, and reinjected as part of enhanced recovery. The use of the term "CO_2" in this subchapter includes anthropogenic CO_2.

(2) Anthropogenic CO_2 stream--CO_2 that has been captured from an emission source, incidental associated substances derived from the source materials and the capture process, and any substances added to the stream to enable or improve the injection process. The term does not include any CO_2 stream that meets the definition of a hazardous waste under 40 Code of Federal Regulations Part 261.

(3) CO_2 injection well--An injection well used to inject or transmit CO_2 into an enhanced recovery reservoir.

(4) Certification--As used in this subchapter, a document issued annually by the director validating the geologic storage of anthropogenic CO_2 incidental to enhanced recovery at a facility registered under this subchapter.

(5) Enhanced recovery--Any process to displace hydrocarbons from a reservoir other than by primary recovery, including using any physical, chemical, thermal, or biological process and any co-production project. This term does not include pressure maintenance or disposal projects.

(6) Enhanced recovery facility--The underground reservoir, underground equipment, injection wells, and surface buildings and equipment and all surface and subsurface rights and appurtenances necessary to an enhanced recovery operation.

(7) Geologic storage--The incidental underground storage of CO_2 in a productive reservoir that occurs incidental to enhanced recovery.

(8) Productive reservoir--A reservoir that is productive of oil, gas and geothermal resources and for which:

(A) there is a reasonable expectation of more than insignificant future production of oil, gas or geothermal volumes or rates as a result of the injection of CO_2; and

(B) using operating pressures not anticipated to be higher than reasonably necessary to produce such production of oil, gas or geothermal volumes and rates.

§5.303. Registration for Certification.

(a) The operator or the proposed operator of an enhanced recovery facility for which the operator proposes to document geologic storage of anthropogenic CO_2 incidental to enhanced recovery must register with the Commission in Austin.

(1) The operator or proposed operator must include the prescribed fee with the registration application and must ensure that the registration application is executed by a party having knowledge of the facts entered on the registration.

(2) The operator or proposed operator must include with the registration application the following:

(A) the name, mailing address, and location of the facility for which the application is being submitted and the operator's name, address, telephone number, Commission Organization Report number, and ownership of the facility;

(B) a demonstration that the reservoir is undergoing enhanced recovery using injection of anthropogenic CO_2, including:

(i) the Commission field designation;

(ii) the Commission order approving such enhanced recovery project and a plat of the designated area;

(iii) a list of all injection wells permitted under §3.46 of this title (relating to Fluid Injection into Productive Reservoirs) within the enhanced recovery facility; and

(iv) information regarding the period of time for which CO_2 injection has been conducted, or is expected to be conducted, together with the total anticipated volume of anthropogenic CO_2 to be injected; and

(C) a testing, monitoring, and reporting plan.

(b) Within 90 days of receipt of a complete registration application, the director will approve or deny the registration application. If the director approves the registration application, the acknowledgement will include the conditions certification, including conditions for monitoring and reporting.

§5.304. Fees.

The operator or proposed operator must remit the following non-refundable fees to the Commission with each registration application under this subchapter:

(1) a non-refundable fee of $500 for each enhanced recovery facility to be registered; and

(2) annually, a non-refundable certification fee of $0.025 per metric ton of anthropogenic CO_2 injected into each enhanced recovery facility registered under this subchapter.

§5.305. Monitoring, Sampling, and Testing Plan.

A person registering for certification under this subchapter must submit a monitoring, sampling, and testing plan to verify geologic storage of the anthropogenic CO_2 incidental to enhanced recovery.

(1) The monitoring, sampling, and testing plan must include the following:

(A) an analysis of the CO_2 stream at a frequency sufficient to yield data representative of its chemical and physical characteristics;

(B) installation of continuous monitoring devices (including digital devices to capture periodic data) to monitor pressure, rate, and volume and to record daily pressure on the annulus between the tubing and the long string casing. These devices may be removed during well workovers but must be reinstalled at the completion of the workover;

(C) demonstration of external mechanical integrity by one of the following, or another approved, method: oxygen-reactivation, tracer survey, temperature log, noise log, or casing inspection log until the well is permanently plugged;

(D) corrosion monitoring of the well materials that will come into contact with water for loss of mass, thickness, cracking, pitting, and other signs of corrosion. Monitoring will initially be performed and reported quarterly, but may be modified to a less frequent schedule as approved by the Commission, based on the construction materials, operating conditions, and monitoring history that show the well components meet minimum standards and performance by:

(i) analyzing coupons of the well construction materials placed in contact with the CO_2 stream; or

(ii) routing the CO_2 stream through a closed loop constructed with the material used in the well and inspecting the material in the loop; or

(iii) using an alternative method, materials, or time period approved by the Commission;

(E) annual monitoring of the injection zone pressure in the productive reservoir, including at a minimum, at least once every five years, a shut-down of the well for a time sufficient to estimate reservoir pressure;

(F) monitoring wells as needed for continuous monitoring for pressure changes in an appropriately porous and permeable formation above the confining zone. For each well installed, the operator must set forth the specified frequency of sampling the interval and analyzing the constituents as specified in the plan;

(G) periodic monitoring of the useable quality water strata overlying the productive reservoir to monitor for changes in quality due to CO_2 injection; and

(H) the use of indirect, geophysical techniques to determine the position of the CO_2 fluid front, or to provide other site-specific data.

(2) For an operator to make a determination by mass balancing or actual system modeling of the quantities of anthropogenic CO_2 permanently stored within the enhanced recovery reservoir for documentation to the Commission, the testing, monitoring, and reporting plan must:

(A) be based upon a site-specific assessment and may include monitoring wells or other monitoring devices to ensure that the injected anthropogenic CO_2 is confined to the productive reservoir; and

(B) include a methodology for accounting for the following:

(i) the volumes of anthropogenic CO_2 injected into the productive reservoir;

(ii) the anthropogenic CO_2 separated from the enhanced recovery production;

(iii) the anthropogenic CO_2 entrained in the production;

(iv) the volume of produced anthropogenic CO_2 recycled for injection into the reservoir;

(v) any *de minimus* losses of anthropogenic CO_2; and

(vi) the volume of make-up anthropogenic CO_2 injected to the enhanced recovery project.

(3) Any person registering a enhanced recovery facility under this subchapter may comply with the sampling, monitoring, and reporting requirements of this subchapter by complying with, and submitting to the Commission a copy of the information submitted to the United States Environmental Protection Agency under, Subparts RR or UU of 40 CFR Part 98, Mandatory Reporting of Greenhouse Gases: Injection and Geologic Sequestration of Carbon Dioxide.

§5.306. Standards for Certification.

(a) The requirements of this subchapter apply in addition to the requirements of §3.46 of this title (relating to Fluid Injection into Productive Reservoirs) and any permit conditions to which the Commission has subjected the injection wells.

(b) The total volume of anthropogenic CO_2 injected into the enhanced recovery facility must be metered through a master meter or a series of master meters. The volume of anthropogenic CO_2 injected into each injection well must be metered through an individual well meter.

(c) The operator must install and use continuous recording devices to monitor the injection pressure and the rate, volume, and temperature of the CO_2 stream. The operator must monitor the pressure on the annulus between the tubing and the long string casing. The operator must continuously record, continuously monitor, or control by a preset high-low pressure sensor switch the wellhead pressure of each injection well.

(d) The operator must fill the annulus between the tubing and the long string casing with a corrosion inhibiting fluid approved by the director.

(e) The operator of an injection well subject to this subchapter must maintain and comply with the approved monitoring, sampling, and testing plan to verify that the facility is operating as permitted and that the injected fluids are confined to the injection zone. The director may require additional monitoring as necessary to determine compliance with the intent of this subchapter.

(f) A person registered under this subchapter must submit, as applicable, a description of any proposed well stimulation program and a determination that well stimulation will not compromise containment.

(g) In addition to the requirements of §3.14 of this title (relating to Plugging), the operator of an enhanced recovery facility subject to this subchapter must, prior to plugging:

(1) flush each injection well with a buffer fluid;

(2) measure to determine bottomhole reservoir pressure;

(3) perform final tests to assess mechanical integrity; and

(4) ensure that the material to be used in plugging is compatible with the CO_2 stream and the formation fluids.

(h) In any registration for geologic storage of anthropogenic CO_2 incidental to enhanced recovery, the director shall impose terms and conditions reasonably necessary to prevent the escape of CO_2.

§5.307. Reporting and Recordkeeping.

(a) The operator of a facility registered under this subchapter must provide, at a minimum, an annual statement, signed by an appropriate company official, confirming that the operator has complied with the requirements of this subchapter.

(b) The operator must report the results of injection pressure and injection rate monitoring of each injection well on Form H-10, Annual Disposal/Injection Well Monitoring Report, and the results of mechanical integrity testing on Form H-5, Disposal/Injection Well Pressure Test Report. Operators must submit other reports in a format acceptable to the Commission.

(c) The operator must retain all wellhead pressure records, metering records, and integrity test results for a minimum of five years.

§5.308. Requirements for Certification.

(a) To verify geologic storage of CO_2 incidental to enhanced recovery operations, the operator must maintain, and be in compliance with, the approved testing, monitoring, and reporting plan required by §5.305 of this subchapter (relating to Monitoring, Sampling, and Testing Plan).

(b) Annually, the Commission may issue a certification to the operator validating the geologic storage of anthropogenic CO_2 incidental to enhanced recovery at the registered facility.

(c) Certifications issued under this subchapter continue in effect until revoked, modified, or suspended by the Commission. The operator must comply with each requirement set forth in this subchapter as a condition of the certification unless modified by the terms of the certification.

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 December 14, 2010.

TRD-201007097
Mary Ross McDonald
Managing Director
Railroad Commission of Texas
Earliest possible date of adoption: January 30, 2011
For further information, please call: (512) 475-1295

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TITLE 22. EXAMINING BOARDS

PART 7. STATE COMMITTEE OF EXAMINERS IN THE FITTING AND DISPENSING OF HEARING INSTRUMENTS

CHAPTER 141. FITTING AND DISPENSING OF HEARING INSTRUMENTS

22 TAC §141.16

The State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments (committee) proposes an amendment to §141.16, concerning the licensing and regulation of fitters and dispensers of hearing instruments.

BACKGROUND AND PURPOSE

The amendment to §141.16 relates to the enforcing of testing for hearing acuity. The requirements for audiometric testing not conducted in a stationary acoustical enclosure are intended to improve and maintain the quality of hearing testing services provided to the public in accordance with procedures referenced in Texas Occupations Code, §402.352(3).

SECTION SUMMARY

The amendment to §141.16 relates to enforcing testing for hearing acuity and compliance with other state and federal regulations. Specific requirements relating to the maximum allowable noise level and notations in customer records when audiometric testing is not conducted in a stationary acoustical enclosure are proposed for amendment.

FISCAL NOTE

Joyce Parsons, Executive Director, has determined that for each year of the first five years that the section will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the section as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Parsons has also determined that there will be no economic costs to small businesses or micro-businesses required to comply with the section as proposed. This was determined by interpretation of the rule that small businesses and micro-businesses will not be required to alter their business practices in order to

comply with the section. The section applies only to individuals, not businesses.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

Ms. Parsons has also determined that for each year of the first five years the section is in effect, the public will benefit from adoption of the section. The public benefit anticipated as a result of enforcing and administering the section is to effectively regulate the practice of fitting and dispensing of hearing instruments in Texas, which will protect and promote public health, safety, and welfare.

REGULATORY ANALYSIS

The committee has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The committee has determined that the proposed amendment does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Joyce Parsons, Executive Director, State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments, Department of State Health Services, Mail Code 1982, P.O. Box 149347, Austin, Texas 78714-3947 or by email to fdhi@dshs.state.tx.us. When emailing comments, please indicate "Comments on Proposed Rules" in the email subject line. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

STATUTORY AUTHORITY

The amendment is proposed under Texas Occupations Code, §402.102, which authorizes the committee to adopt rules necessary for the performance of the committee's duties.

The amendment affects Texas Occupations Code, Chapter 402.

§141.16. Conditions of Sale.

(a) - (f) (No change.)

(g) Audiometric testing not conducted in a stationary acoustical enclosure.

(1) A notation shall be made on the customer's Bill of Sale and the audiogram [~~hearing test~~] if testing was not done in a stationary acoustical enclosure and sound-level measurements must be conducted at the time of the testing to ensure that ambient noise levels meet permissible standards for testing threshold to 20 dB based on the most current American National Standards Institute "ear covered" octave band criteria for Permissible Ambient Noise Levels During Audiometric Testing, or the test environment shall have a maximum allowable ambient noise level of 42 dBA when using supra-aural earphones or 59 dBA when using insert earphones.

(2) Procedures referenced in the Act, §402.352(3) for air and bone conduction acuity testing should be followed when testing outside of a stationary acoustical enclosure provided the noise level does not exceed 23 dBA when testing bone conduction to determine if a 15 dB or greater air-bone gap is present.

[~~(2) Ambient noise level of the location of the audiometric testing, if not done in a stationary acoustical enclosure, shall include a notation on the hearing test of the following items:~~]

[~~(A) type(s) of equipment used to determine ambient noise level;~~]

[~~(B) model and serial number of equipment used to determine ambient noise level;~~]

[~~(C) date of last calibration of equipment used to determine ambient noise level; and~~]

[~~(D) the ambient noise level of the test environment.~~]

(h) (No change.)

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

Filed with the Office of the Secretary of State on December 16, 2010.

TRD-201007143
Ken Haesly
Chair
State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments
Earliest possible date of adoption: January 30, 2011
For further information, please call: (512) 458-7111 x6972

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PART 30. TEXAS STATE BOARD OF EXAMINERS OF PROFESSIONAL COUNSELORS

CHAPTER 681. PROFESSIONAL COUNSELORS

SUBCHAPTER N. PARENT COORDINATION AND PARENT FACILITATION

22 TAC §681.251, §681.252

The Texas State Board of Examiners of Professional Counselors (board) proposes new §681.251 and §681.252 concerning the licensing and regulation of professional counselors who serve as parent coordinator and parent facilitator.

Sections 681.251 and 681.252 are proposed to comply with House Bill 1012, 81st Legislature, 2009, codified as Family Code, Chapter 153. The proposed sections address parent coordination and parent facilitation. Parent coordinators and

parent facilitators are persons appointed by the court to aid the parties and the court in resolving parenting issues, within the limits of the court order of appointment. Parent coordinators are appointed in high conflict situations and report to the court only whether parent coordination should continue. Parent facilitators may deal with similar issues as a parent coordinator, but may report to the court recommendations regarding particular issues between the parties, but not recommendations regarding custody or visitation.

SECTION-BY-SECTION SUMMARY

Section 681.251 is proposed to define the duties and responsibilities of a parent coordinator and establish certain prohibitions and requirements for a licensed professional counselor who serves as a parent coordinator.

Section 681.252 is proposed to define the duties and responsibilities of a parent facilitator and establish certain prohibitions and requirements for a licensed professional counselor who serves as a parent facilitator.

FISCAL NOTE

Bobbe Alexander, Executive Director, has determined that for each year of the first five years the sections are in effect, there will not be a fiscal impact to state or local governments as a result of enforcing or administering the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Alexander has also determined that there will be no economic costs to small businesses or micro-businesses. This was determined by interpretation of the rules that these entities will not be required to alter their business practices to comply with the sections as proposed. The rules relate to individuals who are licensed as professional counselors.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

Ms. Alexander has also determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections is to effectively regulate the practice of counseling in Texas, which will protect and promote public health, safety, and welfare, and to ensure that statutory directives are carried out.

REGULATORY ANALYSIS

The board has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The board has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Bobbe Alexander, Executive Director, State Board of Examiners of Professional Counselors, Department of State Health Services, Mail Code 1982, P.O. Box 149347, Austin, Texas 78714-9347 or by email to lpc@dshs.state.tx.us. When emailing comments, please indicate "Comments on Proposed Rules" in the email subject line. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

STATUTORY AUTHORITY

The new rules are authorized by Occupations Code, §503.203, which authorizes the board to adopt rules necessary for the performance of the board's duties; and Family Code, Chapter 153, which contains law concerning a parenting coordinator and facilitator.

The new rules affect Occupations Code, Chapter 503; and Family Code, Chapter 153.

§681.251. Parent Coordination.

(a) In accordance with the Family Code, §153.601(3), "parenting coordinator" means an impartial third party:

(1) who, regardless of the title by which the person is designated by the court, performs any function described in Family Code, §153.606, in a suit; and

(2) who:

(A) is appointed under Family Code, Chapter 153, Subchapter K (relating to Parenting Plan, Parenting Coordinator, and Parenting Facilitator) by the court on its own motion or on a motion or agreement of the parties to assist parties in resolving parenting issues through confidential procedures; and

(B) is not appointed under another statute or a rule of civil procedure.

(b) A licensee who serves as a parent coordinator is not acting under the authority of a license issued by the board and is not engaged in the practice of professional counseling. The services provided by the licensee who serves as a parent coordinator are not within the jurisdiction of the board, but rather the jurisdiction of the appointing court.

(c) A licensee who serves as a parent coordinator has a duty to provide the information in subsection (b) of this section to the parties to the suit.

(d) Records of a licensee serving as a parenting coordinator are confidential under Civil Practice and Remedies Code, §154.073. Licensees serving as a confidential parenting coordinator shall comply with the Civil Practice and Remedies Code, Chapter 154, relating to the release of information.

(e) A licensee shall not provide professional counseling services to any person while simultaneously providing parent coordination services. This section shall not apply if the court enters a finding that mental health services are not readily available in the location where the parties reside.

§681.252. Parent Facilitation.

(a) In accordance with House Bill 1012, 81st Legislature, 2009, and Family Code, Chapter 153, this section establishes the practice standards for licensees who desire to serve as parenting facilitators.

(b) In accordance with Family Code, §153.601(3-a), a "parenting facilitator" means an impartial third party:

(1) who, regardless of the title by which the person is designated by the court, performs any function described by Family Code, §153.6061, in a suit; and

(2) who:

(A) is appointed under Family Code, Chapter 153, Subchapter K (relating to Parenting Plan, Parenting Coordinator, and Parenting Facilitator) by the court on its own motion or on a motion or agreement of the parties to assist parties in resolving parenting issues through procedures that are not confidential; and

(B) is not appointed under another statute or a rule of civil procedure.

(c) Notwithstanding any other provision of this chapter, licensees who desire to serve as parent facilitators shall comply with all applicable requirements of the Family Code, Chapter 153, and this section. Licensees shall also comply with all requirements of this chapter unless a provision is clearly inconsistent with the Family Code, Chapter 153, or this section.

(d) In accordance with Family Code, §153.6102(e), a licensee serving as a parenting facilitator shall not provide other professional counseling services to any person while simultaneously providing parent facilitation services. This section shall not apply if the court enters a finding that mental health services are not readily available in the location where the parties reside.

(e) In accordance with Family Code, §153.6101(b)(1), a licensed professional counselor intern shall not serve as a parent facilitator.

(f) A licensee serving as a parenting facilitator utilizes child-focused alternative dispute resolution processes, assists parents in implementing their parenting plan by facilitating the resolution of disputes in a timely manner, educates parents about children's needs, and engages in other activities as referenced in Family Code, Chapter 153.

(g) A licensee serving as a parent facilitator shall assist the parties involved in reducing harmful conflict and in promoting the best interests of the children.

(h) A licensee serving as a parenting facilitator functions in four primary areas in providing services.

(1) Conflict management function--The primary role of the parenting facilitator is to assist the parties to work out disagreements regarding the children to minimize conflict. To assist the parents in reducing conflict, the parenting facilitator may monitor the electronic or written exchanges of parent communications and suggest productive forms of communication that limit conflict between the parents.

(2) Assessment function--A parenting facilitator shall review applicable court orders, including protective orders, social studies, and other relevant records to analyze the impasses and issues as brought forth by the parties.

(3) Educational function--A parenting facilitator shall educate the parties about child development, divorce, the impact of parental behavior on children, parenting skills, and communication and conflict resolution skills.

(4) Coordination/case management function--A parenting facilitator shall work with the professionals and systems involved with the family (for example, mental health, health care, social services, education, or legal) as well as with extended family, stepparents, and significant others as necessary.

(i) A licensee serving as a parent facilitator shall be alert to the reasonable suspicion of acts of domestic violence directed at a parent, a current partner, or children. The parent facilitator shall adhere to protection orders, if any, and take reasonable measures to ensure the safety of the participants, the children and the parent facilitator, while understanding that even with appropriate precautions a guarantee that no harm will occur can be neither stated nor implied.

(j) In order to protect the parties and children in domestic violence cases involving power, control and coercion, a parenting facilitator shall tailor the techniques used so as to avoid offering the opportunity for further coercion.

(k) A licensee serving as a parent facilitator shall be alert to the reasonable suspicion of substance abuse by parents or children, as well as mental health impairment of a parent or child.

(l) A licensee serving as a parenting facilitator shall not provide legal advice.

(m) A licensee serving as a parenting facilitator shall serve by written agreement of the parties and/or formal order of the court.

(n) A licensee serving as a parenting facilitator shall not initiate providing services until the licensee has received and reviewed the fully executed and filed court order or the signed agreement of the parties.

(o) A licensee serving as a parenting facilitator shall maintain impartiality in the process of parenting facilitation. Impartiality means freedom from favoritism or bias in word, action, or appearance, and includes a commitment to assist all parties, as opposed to any one individual.

(p) A licensee serving as a parenting facilitator:

(1) shall terminate or withdraw services if the licensee determines the licensee cannot act in an impartial or objective manner;

(2) shall not give or accept a gift, favor, loan or other item of value from any party having an interest in the parenting facilitation process;

(3) shall not coerce or improperly influence any party to make a decision;

(4) shall not intentionally or knowingly misrepresent or omit any material fact, law, or circumstance in the parenting facilitator process; and

(5) shall not accept any engagement, provide any service, or perform any act outside the role of parenting facilitation that would compromise the facilitator's integrity or impartiality in the parenting facilitation process.

(q) A licensee serving as a parenting facilitator may make referrals to other professionals to work with the family, but shall avoid actual or apparent conflicts of interest by referrals. No commissions, rebates, or similar remuneration shall be given or received by a licensee for parenting facilitation or other professional referrals.

(r) A licensee serving as a parenting facilitator should attempt to bring about resolution of issues by agreement of the parties; however, the parenting facilitator is not acting in a formal mediation role. An effort towards resolving an issue, which may include therapeutic, mediation, education, and negotiation skills, does not disqualify a licensee from making recommendations regarding any issue that remains unresolved after efforts of facilitation.

(s) A licensee serving as a parenting facilitator shall communicate with all parties, attorneys, children, and the court in a manner

which preserves the integrity of the parenting facilitation process and considers the safety of the parents and children.

(t) A licensee serving as a parenting facilitator:

(1) may meet individually or jointly with the parties, as deemed appropriate by the parenting facilitator, and may interview the children;

(2) may interview any individuals who provide services to the children to assess the children's needs and wishes; and

(3) may communicate with the parties through face-to-face meetings or electronic communication.

(u) A licensee serving as a parenting facilitator shall, prior to the beginning of the parenting facilitation process and in writing, inform the parties of:

(1) the limitations on confidentiality in the parenting facilitation process; and

(2) the basis of fees and costs and the method of payment including any fees associated with postponement, cancellation and/or nonappearance, and the parties' pro rata share of the fees and costs as determined by the court order or written agreement of the parties.

(v) Information obtained during the parenting facilitation process shall not be shared outside the parenting facilitation process except for professional purposes, as provided by court order, by written agreement of the parties, or as directed by the board.

(w) In the initial session with each party, a licensee serving as a parenting facilitator shall review the nature of the parenting facilitator's role with the parents to ensure that they understand the parenting facilitation process.

(x) A licensee serving as a parenting facilitator:

(1) shall comply with all mandatory reporting requirements, including but not limited to Family Code, Chapter 261, concerning abuse or neglect of minors;

(2) shall report to law enforcement or other authorities if they have reason to believe that any participant appears to be at serious risk to harm themselves or a third party;

(3) shall maintain records necessary to support charges for services and expenses and shall make a detailed accounting of those charges to the parties and their counsel if requested to do so;

(4) shall maintain notes regarding all communications with the parties, the children, and other persons with whom they speak about the case; and

(5) shall maintain records in a manner that is professional, legible, comprehensive, and inclusive of information and documents that relate to the parenting facilitation process and that support any recommendations made by the licensee.

(y) Records of a licensee serving as a parenting facilitator are not mental health records and are not subject to the disclosure requirements of Health and Safety Code, Chapter 611. At a minimum, records shall be maintained for the period of time described in §681.41(q) of this title (relating to General Ethical Requirements), or as otherwise directed by the court.

(z) Records of a licensee serving as a parenting facilitator shall be released on the request of either parent, as directed by the court, or as directed by the board.

(aa) Charges for parenting facilitation services shall be based upon the actual time expended by the parenting facilitator or as directed by the written agreement of the parties and/or formal order of the court.

(bb) All fees and costs shall be appropriately divided between the parties as directed by the court order of appointment and/or as noted in the parenting facilitators' written fee disclosure to the parties.

(cc) Fees may be disproportionately divided fees if one parent is disproportionately creating a need for services and if such a division is outlined in the court order of appointment and/or as noted in the parenting facilitators' written fee disclosure to the parties.

(dd) Services and activities for which a licensee serving as a parenting facilitator may charge include time spent interviewing parents, children and collateral sources of information; preparation of agreements, correspondence, and reports; review of records and correspondence; telephone and electronic communication; travel; court preparation; and appearances at hearings, depositions and meetings.

(ee) The minimum training for a licensee serving as a parent facilitator that is required by Family Code, §153.6101(b)(2), and is determined by the court is:

(1) eight hours of family violence dynamics training provided by a family violence service provider;

(2) 40 classroom hours of training in dispute resolution techniques in a course conducted by an alternative dispute resolution system or other dispute resolution organization approved by the court;

(3) 24 classroom hours of training in the fields of family dynamics, child development, family law; and

(4) 16 hours of training in the laws and board rules governing parent coordination and facilitation, and the multiple styles and procedures used in different models of service.

(ff) A licensee serving as a parent facilitator shall decline an appointment, withdraw, or request appropriate assistance when the facts and circumstances of the case are beyond the licensee's skill or expertise.

(gg) Since parenting facilitation services are addressed under multiple titles in different jurisdictions nationally, acceptability of training to meet the requirements of subsection (cc) of this section is based on functional skills taught during the training rather than the use of specific titles or names.

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 December 17, 2010.

TRD-201007179
Glynda Corley
Chair
Texas State Board of Examiners of Professional Counselors
Earliest possible date of adoption: January 30, 2011
For further information, please call: (512) 458-7111 x6972

PART 40. ADVISORY BOARD OF ATHLETIC TRAINERS

CHAPTER 871. ATHLETIC TRAINERS

SUBCHAPTER A. GENERAL GUIDELINES AND REQUIREMENTS

22 TAC §§871.5, 871.9, 871.14

The Advisory Board of Athletic Trainers (board) proposes amendments to §§871.5, 871.9, and 871.14, concerning the licensure and regulation of athletic trainers.

BACKGROUND AND PURPOSE

In accordance with Occupations Code, Chapter 451, the sections are being amended to establish deadlines for incomplete applications, and for applicants to take the state licensing examination after being approved. The proposed amendments also establish guidelines for accepting the surrender of a license during the course of a complaint.

SECTION-BY-SECTION SUMMARY

The amendment to §871.5 requires an applicant to clear application deficiencies within one year of filing the application or the application shall be voided. The amendment to §871.9 requires an applicant to take the state licensure examination within two years after being approved for examination, or the approval may be withdrawn and the application voided. The amendment to §871.14 establishes guidelines for the board to accept the surrender of a license after a complaint has been filed against the licensee.

FISCAL NOTE

Stewart Myrick, Program Director, has determined that for each fiscal year of the first five years the sections are in effect, there will be no fiscal implications to state or local governments as a result of enforcing or administering the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Mr. Myrick has also determined that there will be no effect on small businesses or micro-businesses required to comply with the sections as proposed. This was determined by interpretation of the rules that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the sections.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Mr. Myrick has also determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections is to continue to ensure public health and safety through the licensing and regulation of athletic trainers.

REGULATORY ANALYSIS

The board has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The board has determined that the proposed rules do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Stewart Myrick, Program Director, Advisory Board of Athletic Trainers, Mail Code 1982, P.O. Box 149347, Austin, Texas 78714-9347, or by email to at@dshs.state.tx.us. When emailing comments, please indicate "Comments on Proposed Rules" in the subject line. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

STATUTORY AUTHORITY

The amendments are proposed under Occupations Code, §451.103, which authorizes the board to adopt rules necessary for the performance of its duties.

The amendments affect Occupations Code, Chapter 451.

§871.5. Processing Applications.

(a) - (f) (No change.)

(g) If an application remains deficient for one year after notice of deficiency has been sent to the applicant, the application shall be voided.

§871.9. Examination for Licensure.

(a) - (j) (No change.)

(k) An applicant who fails to take the examination within a period of two years after the initial examination approval notice is mailed by the board may have such approval withdrawn and the application for licensure voided.

(l) - (n) (No change.)

§871.14. Violations, Complaints and Disciplinary Actions.

(a) - (h) (No change.)

(i) When a licensee has offered the surrender of his or her license after a complaint has been filed, the board shall consider whether to accept the surrender of the license.

(1) Surrender of a license without acceptance thereof by the board, or a licensee's failure to renew the license, shall not deprive the board of jurisdiction against the licensee under the Act, this chapter, or other applicable statute.

(2) When the board has accepted a license surrender after a complaint has been filed, the license surrender is deemed to be the result of a formal disciplinary action, and a board order shall be prepared accepting the license surrender.

(3) Upon surrender of a license after a complaint has been filed, the surrender is considered a final disciplinary action and may be considered for denial upon subsequent reapplication for license.

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 December 16, 2010.

TRD-201007149
David L. Weir
Chair
Advisory Board of Athletic Trainers
Earliest possible date of adoption: January 30, 2011
For further information, please call: (512) 458-7111 x6972

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 9. TITLE INSURANCE

SUBCHAPTER A. BASIC MANUAL OF RULES, RATES AND FORMS FOR THE WRITING OF TITLE INSURANCE IN THE STATE OF TEXAS

28 TAC §9.50

The Texas Department of Insurance (Department) proposes new §9.50, concerning the adoption by reference of amendments to procedural rules P-1, P-12 and P-28; an amendment to Form T-57: Agreement to Furnish Title Evidence, the addition of new administrative rules G-3, G-4, G-5, G-6; and G-7 and the addition of new forms T-G4, T-G5, T-G6, T-G7, Exhibit I Financial Statement of Title Agent's Unencumbered Assets, and Texas Title Agent's/Direct Operation Minimum Capitalization Bond in the *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas* (Basic Manual). The proposed adoption by reference of amendments to procedural rules and forms, the addition of new administrative rules, and the addition of new forms is necessary to implement House Bill (HB) 4338 as enacted by the 81st Legislature, Regular Session. The proposed amendments, new rules, and new forms are necessary to promote efficient and effective regulation of the business of title insurance in Texas. The amendments further update internal references and references related to nonsubstantive revisions of the Insurance Code.

Background and Purpose. In enacting HB 4338, the Legislature sought to strengthen the existing regulatory system for title insurance agents that were identified during the 2009 economic downturn (TEXAS BUSINESS AND COMMERCE COMMITTEE, BILL ANALYSIS (Engrossed), HB 4338, 81st Legislature, Regular Session (May 22, 2009)). Further legislative findings indicate several other relevant factors. Several title insurance agents have failed, leaving files in the middle of closing, offices and file storage facilities padlocked. On the last day of July 2008, one of the largest independent title insurance companies in Texas was shut down by its out-of-state owners with no warning to its underwriters, employees, customers, vendors or lessors, or to the Department. The Department had just completed an escrow audit of the agent and was reasonably certain that there were no shortages in the escrow account. Because of the size of the agent and the fact that the Department and the Texas Title Insurance Guaranty Association were also involved with other failed agents, the Department's resources were stretched very thin, and the Department and the agent's underwriters were forced to devise a system to deal with the files that were in various stages of closing with upwards of $12 million needing to be funded.

While extraordinary efforts by the Department and the underwriters allowed this failed agent's customers to have their transactions closed, existing liens paid, and documents recorded, all with no known loss of funds, it became apparent that changes to the title insurance act were needed to prevent similar problems in the future. This bill and the rules that implement the bill allow the Commissioner of Insurance (Commissioner) more flexibility in handling impaired title insurance agents and companies.

House Bill 4338 and the rules in this proposal that implement the bill provide a mechanism for the Department, as the receiver for an impaired agent or the title insurance companies for which the agent was licensed, to have improved access to the agent's files and provide for the confidentiality of the information contained in such files. The bill and rules that implement the bill allow the Department to obtain information about the possible insolvency of a title insurance agent, place the funds derived from a division of premium between an agent and an underwriter or another agent into a trust, and require all abstract plants to cover a period beginning not later than January 1, 1979. The bill and rules that implement the bill increase the educational requirements for title insurance agents and their management personnel and specifies the entities that can provide such education. The bill and rules that implement the bill establish a staggered period during which many title insurance agents and direct operations must reach a certain level of minimum capitalization based on the population of the county or counties for which the agent is licensed. The following is an item by item overview of the proposal.

Item HB 4338-1. The proposed amendments to P-28 amend subsection A and add a new subsection B to set forth requirements for the establishment of a professional training program for title agent management personnel and incorporate the use of a certified transcript as a means of providing evidence of the completion of title agent continuing education courses.

A proposed amendment to P-28 A.2 amends the definition of "Provider" to replace the language "a proprietary school as defined in the Texas Proprietary School Act (the Education Code, Chapter 32)" with the new language "a career school or college as defined by the Education Code §132.001." This amendment is necessary to conform the definition of "Provider" in P-28 with the Insurance Code §2651.0021(d)(3).

Another proposed amendment to P-28 A.2 adds a new definition of "Certified Transcript" to specify the requirements for a certified transcript that may be used as evidence of successful completion of continuing education courses.

Another proposed amendment to P-28 A.2 adds a new definition of "Control" to specify the meaning of this term as it is used in defining the management personnel who will be required to complete the Professional Training Program for Title Agent Management Personnel.

The proposed amendments to P-28 A.7 amend subsection (6) and P-28 A.8 amends subsection (c) to add the new language "or a certified transcript." This amendment is necessary to allow a course provider to issue a certified transcript as evidence of the completion of the course to a licensee who successfully completes a certified continuing education course.

The proposed amendment to P-28 A.9 amends subsection (a) to require that all continuing education courses be filed with the

Department a minimum of 30 days before the courses are offered to students.

Proposed new subsection P-28 B.1 defines "management personnel" as all personnel who are designated as management personnel on the Application for Title Insurance Agent's License and the Title Agent Update Form.

Proposed new subsection P-28 B.2 specifies that a corporation or partnership licensed as a title agent must file in the Application for Title Insurance Agent's License and the Title Agent Update Form the following biographical information: (i) each executive officer, director, or partner who administers the entity's day to day operations in this state; (ii) each shareholder who is in control of the corporation or partner who has the right or ability to control the partnership; and (iii) if the corporation or partnership is owned, in whole or in part, by another entity, each individual who is in control of the parent entity.

The new definition of "control" added to P-28 A.2 is that control is the power to direct or cause the direction of the management and policies of a title agent, whether directly or indirectly. A person is considered to control a title agent structured as a corporation if the person, individually or acting with others, directly or indirectly, holds with the power to vote, owns, or controls, or holds proxies representing, at least 10 percent of the voting stock or voting rights of the corporate title agent. A person is considered to control a title agent structured as a partnership if the person through a right to vote or through any other right or power exercises rights in the management, direction, or conduct of the day to day operations of the title agent.

Proposed new subsections P-28 B.1 and B.2 are necessary to clearly specify the title agent management personnel who will be required to complete the professional training program for title agent management personnel. By focusing on this group of key personnel that exercise rights in the management, direction, or conduct of the day to day operations of the title agent as those who are required to complete the professional training program for title agent management personnel, the Department's goal is to enhance the level of professionalism of the management personnel in the title insurance industry.

Proposed new subsection P-28 B.3 specifies that an individual who holds a management position for a title agent cannot engage in the business of title insurance unless the individual has completed the management training course within 12 months of the effective date of rule.

Proposed new subsection P-28 B.4 specifies that an individual is exempt from the professional training requirements if the individual has held a position as management personnel with a title agent for at least five years or a comparable position.

Proposed new subsection P-28 B.5 specifies that a continuing education course that provides professional training for title agent management personnel must be submitted to the Department for certification by the Department that the course meets the necessary requirements prior to offering the course.

Proposed new subsection P-28 B.6 specifies that licensees may count the management training course toward completion of the licensee's continuing education requirements.

Proposed new subsection P-28 B.7 specifies that individuals who are required to complete the management training course must maintain proof of course completion for a period of four years from the date that the course was completed.

Proposed new subsection P-28 B.8 specifies that the completion certificate or the certified transcript for the management training course must comply with all of the requirements set forth in P-28 A.8.

Proposed new subsection P-28 B.9 specifies the course topics that must be covered in a management training course.

Proposed new subsection P-28 B.10 specifies that course providers for the management training course must meet all of the requirements for providers set forth in P-28.

Item HB 4338-2. The proposed new administrative rule G-3 pertains to the filing of title agent quarterly withholding tax reports with the Department.

Proposed new subsection G-3 I. requires all title agents to submit to the Department on a quarterly basis a copy of the agent's quarterly withholding tax report that the title agent filed with the Internal Revenue Service and evidence that the taxes have been paid.

Proposed new subsection G-3 II. requires that the title agent submit the agent's quarterly withholding tax report and evidence that the taxes have been paid no later than 45 days after the end of the calendar quarter. Additionally, proposed new subsection G-3 II. sets forth a schedule of the ending dates for the quarter and the date that the reports are due to the Department.

Proposed new subsections G-3 III. and IV. specify that the withholding report and evidence that taxes have been paid must be submitted to the Title Examinations Section of the Department and that form T-G4 may be obtained from the Title Examinations Section of the Department or from the Department's website.

Proposed new subsection G-3 V. provides that an agent who does not have employees must certify to the Department that there has not been a material change in the agent's financial condition. This certification for agents that do not have employees must be submitted to the Department in accordance with the schedule set forth in subsection G-3 II. The proposed new form T-G4 Title Agent Certification Form of Agent's Financial Condition provides a method for a title agent to certify that a title agent did not have any employees during a calendar quarter and therefore did not file a quarterly withholding tax report.

The purpose of requiring title agents to file their withholding tax reports is that it provides the Department with an early warning tool to monitor the financial condition of the title agent on a quarterly basis. Often one of the earliest signs that a title agent is in financial difficulty is the failure to pay their quarterly withholding taxes. By monitoring whether or not a title agent is paying these taxes on a quarterly basis, the Department will be alerted that the title agent is having financial problems and have the ability to schedule an examination and gather information on the title agent's financial condition much earlier than if this were uncovered in the course of a routine examination.

Item HB 4338-3. The proposed new administrative rule G-4 pertains to title company requirements, procedures, and forms for providing privileged title agent solvency information to the Department. The rule provides that an underwriter may provide information to the Department about a financial matter that would reasonably call into question the solvency of a title agent that the underwriter has appointed.

The proposed new form Annual Report of Underwriter's Officers Authorized to Provide Information On Title Agent Financial Matters (T-G5) designates the underwriter's officers who are au-

thorized to provide information to the Department on title agent financial solvency matters. The proposed new form Financial Matter Disclosure Report (T-G6) is the form that underwriters are required to use if the underwriter is submitting financial solvency information regarding one of the underwriter's appointed title agents to the Department. Information provided on T-G6 is privileged information and may not be disclosed except in an administrative hearing or proceeding. Any information provided to the Department on form T-G6 is not public information subject to Chapter 552 of the Government Code except that: (i) the Commissioner may release information that is received on form T-G6 to an underwriter that has appointed or that is considering appointing the title agent; or (ii) the Commissioner may release information to the title agent under the Insurance Code §2651.206 if the information is evidence on which an audit report or examination report relies. The Department has determined that the title underwriter's consideration of appointing a title agent would commence when the underwriter makes application to the Department to appoint the title agent that may have solvency problems and such application is pending. An underwriter that receives information under new administrative rule G-4 may not release the information except under a subpoena.

The purpose of this new rule and new forms is to facilitate communication between title insurance companies and the Department concerning financial matters that might reasonably call into question the solvency of a title insurance agent. Underwriters may have information concerning the solvency of a title agent; however, in the past if such information were disclosed to the Department the information may have been subject to an open records request by a third party. The prospect of the information becoming public information through an open records request had a chilling effect on disclosure to the Department by the underwriter of what could be considered sensitive information. This new rule concerning the release of financial information regarding a title agent's solvency provides procedures and safeguards for both the title agent and the underwriter such that it promotes the flow of information to the Department early in the process so that the title agent has the best possible chance of rehabilitation from the hazardous financial condition.

Item HB 4338-4. The proposed new administrative rule G-5 pertains to minimum capitalization standards for title agents, a procedure for certification of a title agent's unencumbered assets, a new form for submission of the certification of unencumbered assets to the Department, and a procedure and new form for use in determining the value of a title agent's unencumbered assets.

Proposed new subsection G-5 I. specifies the minimum capitalization standards for a title agent. Title agents are required to maintain unencumbered assets with a market value in excess of liabilities, exclusive of abstract plants in the amounts specified in the Insurance Code §2651.012(c)(1) - (4). The amount of unencumbered assets in excess of liabilities that a title agent is required to maintain is as follows: (i) $25,000 for a title agent with a principal office in a county with a population of 10,000 or more but less than 50,000; (ii) $50,000 for a title agent with a principal office in a county with a population of 50,000 or more but less than 200,000; (iii) $100,000 for a title agent with a principal office in a county with a population of 200,000 or more but less than 1,000,000; and (iv) $150,000 for a title agent with a principal office in a county with a population of 1,000,000 or more.

Proposed new subsection G-5 II. provides a schedule for compliance with the minimum capitalization standards specified in subsection I. The schedule provides specific time periods and specific benchmarks within those time periods for an agent to attain the required capitalization. The phase-in time periods for title agents to comply with the capitalization standards vary depending on the length of time that a title agent has been licensed. There is a range of time periods for attaining the required capital beginning with three years for an agent that has been licensed for at least three years but less than four years on September 1, 2009, and ending with nine years for an agent that has been licensed for at least nine years on September 1, 2009. If an agent has been licensed less than three years as of September 1, 2009, then the agent has two years to attain the required capital. On or after the effective date of the rule, a title agent that applies for a new license will be required to have 100 percent of the required capital as a requirement for issuance of a new license. Additionally, on or after the effective date of the rule, if there is a change in ownership or control of a title agent the new owner will be required to have 100 percent of the required capital as a requirement for issuance of a new license.

Proposed new subsection G-5 III. specifies the filing requirements and the form to be used for a title agent to provide certification to the Department that the title agent has the appropriate unencumbered assets for licensure.

Proposed new subsection G-5 III.A provides that the title agent must submit to the Department, with the annual audit of escrow accounts, a certification by a certified public accountant that the title agent has the appropriate unencumbered assets as specified in subsection G-5 I.A of this administrative rule on the form titled Certification Form For Title Agent's Unencumbered Assets Form Number T-G7.

Proposed new subsection G-5 III.B provides that the initial certification on Form Number T-G7 must be submitted to the Department with the title agent's annual audit of escrow accounts that is filed with the Department between September 1, 2011, and August 31, 2012.

Proposed new subsection G-5 III.C provides that the subsequent annual certification Form Number T-G7 and the title agent's annual audit of escrow accounts are to be submitted annually between September 1 and September 30 of each year for the preceding calendar year beginning in 2012. The filing requirements for the subsequent certifications after the initial certification set forth a new schedule with respect to the filing of title agent annual escrow audits. Currently, agents file their escrow audit up to 90 days after the end of their fiscal year which can end any month of the year. Since new §2651.012(g) of the Insurance Code requires title agents to follow a specific schedule for compliance with the new capitalization requirements, the filing of the annual escrow audits are also required to follow the compliance schedule for capitalization requirements (i.e., September 1st of each year). This is due to the fact that new §2651.158(a) has linked the filing of the certification of assets with the filing of the escrow audit and the additional statutory requirement in §2651.012(g) that title agents follow the schedule for compliance with the capitalization requirements that has been set forth in that subsection.

Proposed new subsections G-5 III.D and III.E provide that Form Number T-G7 can be obtained from the Title Examinations Section of the Department or the Department's website and that certification forms must be submitted to the Title Examinations Section of the Department.

Proposed new subsection G-5 III.F provides that an agent that has made a deposit with the Department under §2651.012(f) of the Insurance Code is exempt from the certification requirement.

However, if an agent elects to utilize a deposit with the Department as the method of complying with the title agent's capitalization requirement, then the agent must at the time of license renewal provide written notice to the Title Examinations Section that a deposit has been made and that the deposit meets the title agent's statutory capitalization requirement.

The proposed new Form Number T-G7 Certification Form for Title Agent's Unencumbered Assets requires a Certified Public Accountant (CPA) to audit the Financial Statement of Title Agent's Unencumbered Assets (Exhibit I). The Financial Statement of Title Agent's Unencumbered Assets (Exhibit I) is prepared by the title agent including management, officers, and directors from documents evidencing the title agent's unencumbered assets and account information that is maintained by the title agent. The title agent including management, officers, and directors are responsible for the accuracy of the information on Exhibit I and the accuracy and authenticity of the supporting documents and account information. It is the CPA's responsibility to express an opinion on the Financial Statement of Title Agent's Unencumbered Assets (Exhibit I) based on the CPA's audit. The form specifies that the audit shall be conducted in accordance with generally accepted auditing standards. Those standards require that the CPA plan and perform the audit to obtain reasonable assurance concerning whether the Financial Statement of Title Agent's Unencumbered Assets (Exhibit I) is free of material misstatement. New Form Number T-G7 requires the CPA conducting the audit to certify that Exhibit I as of the date of the audit that was prepared from the documents evidencing the title agent's unencumbered assets and account information presents fairly in all material respects that the title agent's unencumbered assets exceed the liabilities, exclusive of the value of the abstract plants as required by §2651.012(c) of the Insurance Code.

Proposed new subsection G-5 IV. sets forth the procedures and requirements that a CPA must use for determining the value of a title agent's assets and proposes a new form Financial Statement of Title Agent's Unencumbered Assets (Exhibit I).

Proposed new subsection G-5 IV.A specifies that it is the responsibility of the title agent including management, officers, and directors to prepare the Financial Statement of Title Agent's Unencumbered Assets (Exhibit I) and to provide Exhibit I along with the supporting documents and account information to a CPA for audit.

Proposed new subsection G-5 IV.B sets forth the procedures that a CPA must use in the preparation of Exhibit I and are as follows: (i) verify that all assets are free and clear of any liens and obligations such as liens and mortgages; and (ii) verify that the title agent is solvent by determining that the market value of all of the title agent's assets exceeds the book value of all liabilities.

Proposed new subsection G-5 IV.C specifies that a CPA must use Generally Accepted Accounting Principles to verify the market value of the title agent's assets and it provides some examples of verified assets.

Proposed new subsection G-5 IV.D specifies that a CPA who is determining the value of a title agent's assets and the book value of the title agent's liabilities as preparation for providing a certification of unencumbered assets to the Department in accordance with §2651.158(a) of the Insurance Code must attach to the annual audit of escrow accounts a Certification Form For Title Agent's Unencumbered Assets (Form Number T-G7) certifying that the title agent has the appropriate unencumbered assets as specified in §2651.158(a) of the Insurance Code. Additionally, Exhibit I Financial Statement of Title Agent's Unencumbered Assets must be attached to Form Number T-G7.

Proposed new subsection G-5 IV.E specifies that a title agent must use the form Exhibit I titled "Financial Statement of Title Agent's Unencumbered Assets" when filing the certification of unencumbered assets.

The proposed new form Exhibit I Financial Statement of Title Agent's Unencumbered Assets (Exhibit I) requires the title agent including management, officers, and directors to provide information on the form concerning the title agent's total unencumbered assets and total liabilities. Exhibit I and the documentation to support the information reported on Exhibit I are then submitted to a CPA for audit to verify the accuracy of the information reported on Exhibit I. The preparation of Exhibit I and the audit of the accuracy of the information provided in Exhibit I are necessary for the CPA to certify that the title agent has the appropriate unencumbered assets in accordance with §2651.012(c) of the Insurance Code.

The purpose of the new minimum capitalization requirements is to enhance the ability of a title insurance agent to remain solvent during periods when the title insurance agent is having financial problems. The capital that an agent will be required to maintain will provide a reserve fund that the agent can use during periods of reduced cash flow. Additionally, this reserve capital will provide funds for administrative expenses to wind down the title agent's affairs in the event that insolvency cannot be avoided.

Item HB 4338-5. The proposed new Administrative Rule G-6 pertains to the surety bond that title agents may use to comply with the new minimum capitalization requirements.

Proposed new subsection G-6 I. specifies the procedures for use of the surety bond by the title agent.

Proposed new subsection G-6 I.A specifies that a title agent may file a surety bond with the Department to comply with the minimum capitalization requirements for a title agent set forth in the Insurance Code §2651.012(c)(1) - (4).

Proposed new subsection G-6 I.B provides that the conditions of the bond are as follows: (i). the bond shall be in the amount that a title agent requests to comply with the minimum capitalization requirements set forth in the Insurance Code §2651.012(c)(1) - (4); (ii) the bond must be executed by a surety company authorized to do business in Texas; and (iii) the bond must be payable to the Commissioner of Insurance.

Proposed new subsection G-6 I.C concerns the bond proceeds and specifies that if the Commissioner makes a claim for bond proceeds it must be made on behalf of (i) a supervisor or conservator appointed by the Commissioner; (ii) a court-appointed receiver, rehabilitator, or liquidator; or (iii) the Texas Title Insurance Guaranty Association. Additionally, subsection G-6 I.C specifies that bond proceeds shall be used as permitted by the Commissioner by the supervisor, conservator, receiver, rehabilitator, or liquidator, or the Texas Title Insurance Guaranty Association. The contingencies for use of the bond proceeds include payment of administrative expenses incurred or that may be incurred by or on behalf of a title agent that has been declared impaired either before or after the date of impairment. The bond proceeds collected or received shall not be considered property of the state.

Proposed new subsection G-6 I.D specifies that the bond does not expire nor is it subject to cancellation until the 60th day after written notice of expiration of cancellation has been served on the Department either personally or by certified mail. After

the notice of cancellation is issued, the title agent may not perform the acts of a title insurance agent unless the agent provides the Department with evidence of compliance with the Insurance Code §2651.012 on or before the expiration of the 60 day period.

Proposed new subsection G-6 I.E specifies that if an agent elects to a utilize a surety bond as the method of complying with the title agent's capitalization requirement, then the agent must at the time of license renewal provide written notice to the Title Examinations Section that a surety bond has been purchased and that such surety bond meets the title agent's statutory capitalization requirements.

Proposed new subsection G-6 II. prescribes the form and content of the surety bond in subsection V Exhibits and Forms of the Basic Manual.

The purpose of the new bond form is to provide title agents with an alternative method of complying with the new minimum capitalization standards. The purchase of a surety bond may be more suitable to the needs of certain title agents for complying with the new statutory capitalization standards. Therefore, this option will be available through the promulgation of a new bond form and rules.

Item HB 4338-6. The proposed new administrative rule G-7 pertains to the requirements and procedures for a title agent audit, review, or examination.

Proposed new subsection G-7(A) specifies the requirements and procedures for an audit, review, or examination of a title agent or direct operation conducted under Chapter 2651 or Chapter 2602 of the Insurance Code and are as follows: (i) before the report from an examination, review, or audit becomes final, the Department must furnish a copy of the report and any evidence on which the report relies to the title agent or direct operation; (ii) the title agent or direct operation must be provided a reasonable period of not less than 10 days after the title agent or direct operation receives the report and evidence on which the report relies from the Department for the title agent or direct operation to respond; (iii) the title agent or direct operation must be provided an opportunity for an appeal under §7.83 of Title 28 of the Texas Administrative Code (pertaining to appeal of examination reports); and (iv) the report and any evidence regarding the report are confidential and not subject to disclosure under the Insurance Code or Chapter 552 of the Government Code and may be transmitted only to designated representatives of the title agent or direct operation previously specified in writing by the title agent.

Proposed new subsection G-7(B) requires the Commissioner to furnish the title agent or direct operation with a draft of the report and a copy of any evidence on which the report relies not later than the 10th day before the scheduled date of a meeting requested by the Department regarding a report.

Proposed new subsection G-7(C) defines work papers and specifies the Department's responsibility for production of the work papers in an audit or examination. Section 2651.206 of the Insurance Code does not require the Department to turn over work papers. Work papers as specified in §2651.206(c) of the Insurance Code include work programs, analyses, memoranda, letters of confirmation and representation, abstracts of company documents and schedules, and commentaries prepared or obtained by the auditor or examiner that support the opinions of the auditor or examiner.

The purpose of this new administrative rule is to establish guidelines and procedures for an audit, review, or examination conducted under Chapter 2651 or Chapter 2602 of the Insurance Code.

Item HB 4338-7. Section 1 of HB 4338 amended the Insurance Code §2501.004(b) to require that all title abstract plants in Texas cover a period beginning not later than January 1, 1979, in order to provide additional safety and protection for policyholders. In order to conform the rules in the Basic Manual that pertain to abstract plants with the new requirements specified in HB 4338, the Department is proposing the following amendments to Procedural Rule P-1 Definitions and Procedural Rule P-12 Abstract Plants and Form T-57: Agreement to Furnish Title Evidence:

Procedural Rule P-1 i which is the definition of "Abstract plant" is proposed to be amended to replace the language "currently kept to date" with the new language "kept current." The purpose of this change is to conform the definition of "Abstract plant" in the Basic Manual with the newly amended statutory language in the Insurance Code §2501.004(b)(2).

Procedural Rule P-1 z, which is the definition of "Furnishing title evidence," is proposed to be amended to replace the language "going back not less than 25 years" with the new language "covering a period beginning not later than January 1, 1979." The purpose of this change is to conform the definition of "Furnishing title evidence" in the Basic Manual with the new statutory requirement for the beginning date of an abstract plant specified in the Insurance Code §2501.004(b)(2).

Procedural Rule P-12 Abstract Plants has a definition of "abstract plant" that is proposed to be amended to replace the language "for a period of at least 25 years immediately prior to the date of search" with the new language " covering a period beginning not later than January 1, 1979." The purpose of this change is to conform the definition of "abstract plant" in Procedural Rule P-12 with the new statutory requirement for the beginning date of an abstract plant specified in the Insurance Code §2501.004(b)(2). Additionally, new language is proposed to be added after the first sentence as follows: " An abstract plant that is fulfilling the licensing requirement for a title insurance agent's license on September 1, 2009, but does not on that date, cover a period beginning not later than January 1, 1979 as required by §2501.004 of the Insurance Code, is not required to comply with §2501.004 before January 1, 2014." The purpose of this new language is to conform the definition of abstract plant with SECTION 19 of HB 4338 that specifies "An abstract plant that exists on September 1. 2009, but that does not, on that date, cover a period beginning not later than January 1, 1979, as required by §2501.004, Insurance Code, as amended by this act, is not required to comply with that section before January 1, 2014." SECTION 19 provides for a grace period beginning on September 1. 2009, and ending on January 1, 2014, for title agents to bring their abstract plants into compliance with the requirement that the plant cover a period beginning not later than January 1, 1979. However, if a joint abstract plant or subscription plant is in operation prior to September 1. 2009, and the plant does not have a "begin" date of January 1, 1979, a title agent who is using such a plant would be able to take advantage of the grace period through January 1, 2014. However, if the joint plant or subscription plant is not brought into compliance on or before January 1, 2014, any title agent that is using such a plant to fulfill its abstract plant licensing requirement would be subject to disciplinary action up to and including license revocation.

Form T-57: Agreement to Furnish Title Evidence is proposed to be amended to replace the language "at least 25 years immediately prior to the date of search" with the new language "a period beginning not later than January 1, 1979." The purpose of this change is to conform Form T-57 in the Basic Manual with the new statutory requirement for the beginning date of an abstract plant specified in the Insurance Code §2501.004(b)(2).

The Department has filed a copy of each of the proposed items with the Secretary of State's *Texas Register* Section. Persons desiring copies of the proposed items may obtain them from the Office of the Chief Clerk, Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78701-3938. To request copies, please contact the Office of the Chief Clerk at (512) 463-6326.

FISCAL NOTE. Robert R. Carter, Jr., Deputy Commissioner for the Title Division, has determined that, for each year of the first five years the proposals are in effect, there will be no fiscal impact on state or local government as a result of enforcing or administering the amendments. Mr. Carter has also determined that there will be no measurable effect on local employment or the local economy.

PUBLIC BENEFIT/COST NOTE. Mr. Carter also has determined that for each year of the first five years the amendments are in effect there are a number of public benefits anticipated as a result of the amendments to the Basic Manual and Statistical Plan. The proposed amendments to P-28 A. and the addition of new P-28 B. set forth the requirements for the establishment of a professional training program for title agent management personnel. The proposed amendments to P-28 that establish a professional training program for title agents' management personnel reflect the changes mandated by HB 4338, codified as Insurance Code §2651.0021. The Department anticipates that there will be costs for those title agents who have management personnel that will be required to attend the professional training program for title agent management personnel. These estimated costs are based on information provided to the Department by a title agent trade organization that is in the process of developing a curriculum for the professional training program for title agent management personnel and that will be offering such a course once the rules are adopted. The estimated cost would be $600 - $800 for each individual to attend a 12 hour in-person course. This cost would depend on: (i) the number of course hours that are ultimately adopted in the rule; (ii) the size of the facility needed based on the number of persons that are attending; and (iii) the fees charged by provider for the speakers. Additionally, it is estimated that the cost for reporting completion of the course to the Department would be minimal. The anticipated public benefit resulting from the establishment of a professional training program for the title agents' management personnel is the enhancement of the level of professionalism of the management personnel in the title insurance industry that will result in more efficient and thorough management of the title agents' business affairs.

The proposed addition of new administrative rule G-3 requires all title agents to submit to the Department on a quarterly basis a copy of the agent's quarterly withholding tax report that the title agent filed with the Internal Revenue Service and evidence that the taxes have been paid. The proposed addition of new administrative rule G-3 requiring all title agents to submit to the Department a copy of the agent's quarterly withholding tax report reflects the changes mandated by HB 4338, codified as Insurance Code §2651.011(c). The Department anticipates that there will be a cost for title agents to submit the agent's quarterly IRS withholding tax report and evidence that the taxes have been paid. These estimated costs are based on information provided to the Department by a title agent trade organization that surveyed its member title agents and requested that they provide an annual cost estimate to comply with this new requirement. Of the 518 licensed agents surveyed, 111 or 22 percent responded. The total cost to comply reported by the 111 agents that responded was $84,974 or an average cost of $764 per title agent. Based on that sample and assuming that the average cost would be the same for the remaining agents who did not respond to the survey, the total estimated cost for all agents who were surveyed to comply would be $395,752 per year. The anticipated costs associated with this new reporting requirement will include: (i) postage for certified mail or overnight delivery; (ii) accountant fees to obtain data on a quarterly basis; (iii) accountant costs to register with the Electronic Federal Tax Payment System; (iv) accountant costs to log in to the IRS website and print the quarterly tax report and give to clerical personnel for mailing; (v) copying costs; (vi) costs to reconcile the returns with payment vouchers; (vii) legal expenses to implement the compliance program; (viii) administrative support costs; and (ix) costs to rewrite computer programs or purchase software to comply with the new reporting requirements. The anticipated public benefit resulting from the agent's quarterly filing of the withholding tax report is that it provides the Department with an early warning tool to monitor the financial condition of the title agent on a quarterly basis. By regularly monitoring whether or not a title agent is paying these taxes, the Department will be alerted in a timely fashion that the title agent is having a financial problem. This early warning will give the Department the ability to schedule an examination and gather information on the title agent's financial condition earlier than if the financial problem was uncovered in the course of a routine examination.

The proposed addition of new administrative rule G-4 pertains to title company requirements, procedures, and forms for providing privileged title agent solvency information to the Department. The rule provides that an underwriter may provide information to the Commissioner about a financial matter that would reasonably call into question the solvency of a title agent that the underwriter has appointed. The proposed addition of new administrative rule G-4 that pertains to title company requirements, procedures, and forms for providing privileged title agent solvency information to the Department reflects the changes mandated by HB 4338, codified as Insurance Code §2651.011(a), (b), and (d). There is no additional cost to agents required to comply with this amendment because the amendment is the result of the legislative enactment of HB 4338, and any cost to comply results directly from the enactment of HB 4338. The anticipated public benefit resulting from proposed addition of new administrative rule G-4 is that it facilitates communication between title insurance companies and the Department concerning financial matters that might reasonably call into question the solvency of a title insurance agent.

The proposed addition of new administrative rule G-5 pertains to new minimum capitalization standards for title agents, a procedure for certification of a title agent's unencumbered assets, a new form for submission of the certification of unencumbered assets to the Department, and a procedure and new form for use in determining the value of a title agent's unencumbered assets. The proposed addition of new administrative rule G-5 reflects the changes mandated by HB 4338, codified as Insurance Code §2651.012 and §2651.158. There is no additional cost to agents required to comply with this amendment because

the amendment is the result of the legislative enactment of HB 4338, and any cost to comply results directly from the enactment of HB 4338. The anticipated public benefit resulting from the proposed addition of new administrative rule G-5 is that the new minimum capitalization requirements enhance the ability of title insurance agents to remain solvent during periods when the title insurance agent is having financial problems. If the title agent elects to fulfill the minimum capitalization requirement through cash or cash equivalents; liquid assets that have a readily determinable market value and that do not have any lien against them; or investments, such as mutual funds, certificates of deposit, and stocks and bonds then the title agent will have access to a portion of the reserve fund that the title agent can use to help him through periods of reduced cash flow. However, if the title agent elects to fulfill the minimum capitalization requirement through a surety bond; a cash deposit made with the Department in accordance with §2651.102 of the Insurance Code; or a letter of credit that meets the requirements of §493.104(b)(2)(c) the provisions of G-5 would limit the ability of the title agent to access such funds for operational purposes. Additionally, this reserve capital will provide funds for the Department to use for administrative expenses to wind down the title agent's affairs in the event that insolvency cannot be avoided.

The proposed addition of new administrative rule G-6 pertains to the surety bond that title agents may use to comply with the new minimum capitalization requirements specified in the Insurance Code §2651.012(c). The proposed addition of new administrative rule G-6 reflects the changes mandated by HB 4338, codified as Insurance Code §2651.012(a)(2)(E) and (j). The Department anticipates that there will be costs for those title agents who choose to purchase a surety bond to fulfill the new minimum capitalization requirement for title agents. The estimated costs are based on information provided to the Department by a surety company that is authorized to do business in Texas and that has reviewed the proposed bond form. The surety company classifies the bond as a Financial Compliance obligation and estimates the rate for the proposed bond to be $15 for each $1,000 of the financial obligation that the surety company assumes on behalf of the title agent. The levels of capitalization for a title agent depend on the population of the county in which the title agent has it its principal office and they are as follows: (i) a title agent with a principal office in a county with a population of 10,000 to 50,000: $25,000; (ii) a title agent with a principal office in a county with a population of 50,000 to 200,00: $50,000; (iii) a title agent with a principal office in a county with a population of 200,000 to 1,000,00: $100,000; or (iv) a title agent with a principal office in a county with a population of more than 1,000,000: $150,000. Therefore, the estimated premium for a surety bond to fulfill these capitalization requirements range from a minimum of $375 per year for a title agent with a principal office in a county with a population of 10,000 to 50,000 to a maximum of $2,250 per year for a title agent with a principal office in a county with a population of more than 1,000,000. The anticipated public benefit resulting from the proposed addition of new administrative rule G-6 is that the new bond form will provide title agents with an alternative method of complying with the new minimum capitalization standards. The purchase of a surety bond may be more suitable to the needs of certain title agents for complying with the new statutory capitalization standards. Therefore, this option will be available through the promulgation of a new bond form and rules.

The proposed addition of new administrative rule G-7 specifies the requirements and procedures for the Department to conduct a title agent, audit, review, or examination. The proposed addition of new administrative rule G-7 reflects the changes mandated by HB 4338, codified as Insurance Code §2651.206. There is no additional cost to agents required to comply with this amendment because the amendment is the result of the legislative enactment of HB 4338, and any cost to comply results directly from the enactment of HB 4338. The proposed addition of new administrative rule G-7 establishes guidelines and procedures for the Department to follow when conducting an audit, review, or examination under Chapter 2651 or Chapter 2602 of the Insurance Code. The anticipated public benefit resulting from the proposed addition of new administrative rule G-7 is to clarify the audit, review, and examination procedures so that the Department is able to conduct these administrative functions more uniformly and efficiently.

Procedural Rule P-1 i which is the definition of "Abstract plant" is proposed to be amended to replace the language "currently kept to date" with the new language "kept current." This change conforms the definition of "Abstract plant" in the Basic Manual with the statutory language in §2501.004(b)(2) as mandated by HB 4338. Procedural Rule P-1 z which is the definition of "Furnishing title evidence" is proposed to be amended to replace the language "going back not less than 25 years" with the new language "covering a period beginning not later than January 1, 1979." This change conforms the definition of "Furnishing title evidence" in the Basic Manual with the new statutory requirement for the beginning date of an abstract plant specified in §2501.004(b)(2) as mandated by HB 4338. Procedural Rule P-12 Abstract Plants has a definition of "abstract plant" that is proposed to be amended to replace the language "for a period of at least 25 years immediately prior to the date of search" with the new language " covering a period beginning not later than January 1, 1979." This change conforms the definition of "abstract plant" in Procedural Rule P-12 with the new statutory requirement for the beginning date of an abstract plant specified in §2501.004(b)(2) as mandated by HB 4338. The Department anticipates that there will be costs for updating the title plant of those title agents whose abstract plant does not cover a period beginning not later than January 1, 1979. These estimated costs are based on information provided to the Department by a title agent trade organization that surveyed its member title agents and requested that they provide an annual cost estimate to comply with this new requirement. Of the 518 licensed agents surveyed, 111 or 22 percent responded to the survey and only five or five percent of these agents reported that they have had or will have costs to bring their abstract plant up to date. The average cost for the five title agents that responded was $129,500. Extrapolating from the percentage of agents that responded to the survey and reported that they would have costs to comply (five percent) and the total number of licensed agents (518) it is assumed that there will be 26 agents that will incur costs to comply (518 total agents x five percent = 26 agents). Assuming the same percentage of the licensed agents that will incur costs (26) and that their average costs would be consistent with the title agents that responded to the survey ($129,500), the total estimated compliance cost would be $3,367,000 (26 x $129,500 = $3,367,000). The anticipated costs associated with this new abstract plant requirement will include: (i) cost to purchase data from the county; (ii) cost to purchase data from other sources; (iii) cost to purchase new servers to hold the additional data; (iv) cost to hire personnel to program and format data to upload into the database; (v) cost for administrative personnel to post, re-key, and locate data for accuracy; (vi) scanning costs; and (vii) additional subscription fees. The anticipated public benefit resulting

from the proposed amendments will be that title abstract plants will be required to cover a period beginning not later than January 1, 1979. This new requirement to extend the mandatory time period that title abstract plants must cover will enhance the safety and security of title examinations and will result in more effective regulation of the title insurance industry.

As to all proposals, the department anticipates no differential impact between small, large, and micro businesses.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. The Government Code §2006.002(c) requires that if a proposed rule may have an adverse economic impact on small businesses, state agencies must prepare as part of the rulemaking process an economic impact statement that assesses the potential impact of the proposed rule on small businesses and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule. The Government Code §2006.001(2) defines "small business" as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit, is independently owned and operated, and has fewer than 100 employees or less than $6 million in annual gross receipts. The Government Code §2006.001(1) defines "micro business" similarly to "small business" but specifies that such a business may not have more than 20 employees. The Government Code §2006.002(f) requires a state agency to adopt provisions concerning micro businesses that are uniform with those provisions outlined in the Government Code §2006.002(b) - (d) for small businesses.

Analysis of Economic Impact. The Department has determined that this proposal contains two new Administrative Rules G-3 and G-6 and amendments to Procedural Rules P-28, P-1, and P-12 and an amendment to Form T-57 that may have an adverse economic effect on approximately 600 small or micro business title insurance agents and that must be analyzed in order to determine costs to small and micro business title insurance agents required to comply with this proposal.

In accordance with the Government Code §2006.002(c), the Department has determined that there are two new Administrative Rules G-3 and G-6 and amendments to Procedural Rules P-28, P-1, and P-12 and an amendment to Form T-57 that may have an adverse economic impact on approximately 600 title agents that qualify as small or micro businesses under the Government Code §2006.001(1) and (2) and that are required to comply with the proposed rules. This estimate is based on the Department's review of information relating to the amount of gross receipts for the 654 title insurance agents licensed in Texas at the end of 2008. The data for 2008 was used because the data from the 2009 statistical plan for annual gross receipts is in the process of being compiled. The Department determined that 37 of these 654 title insurance agents had annual gross receipts of more than $6 million, and therefore did not qualify as small or micro businesses under the Government Code §2006.001(1) and (2) while the remaining 614 did qualify based on the amount of gross receipts. The Department's cost analysis and resulting estimated costs, as detailed in the Public Benefit/Cost Note part of this proposal, are equally applicable to small or micro business title insurance agents.

Impact of Proposed P-28 B. on Title Insurance Agents: Provisions Pertaining to Professional Training for Title Insurance Agent Management Personnel. Proposed P-28 B.3 provides that an individual that holds a management position for a title agent shall not engage in the business of title insurance unless the individual has completed a professional training course for title agent management personnel that meets the requirements of Procedural Rule P-28. The Department has determined that meeting the requirements of Procedural Rule P-28 B. will have an adverse economic impact on small and micro business title insurance agents. The estimated cost would be $600 - $800 for each person designated as management personnel of a title insurance agent to attend a 12 hour in-person course. This cost would depend on: (i) the number of course hours that are ultimately adopted in the rule; (ii) the size of the facility needed based on the number of persons that are attending; and (iii) the fees charged by the speakers. The Insurance Code §2651.021(a) enacted by HB 4338 requires the Commissioner to adopt by rule a professional training program for a title insurance agent and the management personnel of the title insurance agent.

Impact of Proposed Administrative Rule G-3 on Title Insurance Agents: Filing of Title Agent's Quarterly Withholding Tax Report. Proposed new Administrative Rule G-3 provides that all title insurance agents shall submit on a quarterly basis a copy of the agent's quarterly withholding tax report that the agent files with the Internal Revenue Service and evidence that the taxes have been paid. The Department has determined that this requirement may result in costs that will have an adverse economic impact on small or micro business title insurance agents. In summary, the total estimated cost for the title insurance agents who were surveyed to comply with the requirements of new G-3 would be $395,752 per year. The anticipated costs associated with this new reporting requirement will include: (i) postage for certified mail or overnight delivery; (ii) accountant fees to obtain data on a quarterly basis; (iii) accountant costs to register with the Electronic Federal Tax Payment System; (iv) accountant costs to log in to the IRS website and print the quarterly tax report and give to clerical personnel for mailing; (v) copying costs; (vi) costs to reconcile the returns with payment vouchers; (vii) legal expenses to implement the compliance program; (viii) administrative support costs; and (ix) costs to rewrite computer programs or purchase software to comply with the new reporting requirements. The Insurance Code §2651.011(c) enacted by HB 4338 requires that each title insurance agent shall provide the Department, on a quarterly basis, with a copy of the agent's quarterly withholding tax report and evidence that the taxes have been paid.

Impact of Proposed Administrative Rule G-6 on Title Insurance Agents: Surety Bond for Title Agents to Comply with Minimum Capitalization Standards. The proposed addition of new administrative rule G-6 pertains to the surety bond that title agents may use to comply with the new minimum capitalization requirements specified in the Insurance Code §2651.012(c). There will be costs for those title agents who choose to purchase a surety bond to fulfill the new minimum capitalization requirement for title agents. The Department has determined that for those title agents who choose to purchase a surety bond to fulfill the new minimum capitalization requirement, this choice may result in costs that will have an adverse economic impact on small or micro business title insurance agents. In summary, the surety company estimates the rate for the proposed bond to be $15 for each $1,000 of the financial obligation that the surety company assumes on behalf of the title agent. The estimated premium for a surety bond to fulfill the applicable capitalization requirement range from a minimum of $375 per year for a title agent with a principal office in a county with a population of 10,000 to 50,000 to a maximum of $2,250 per year for a title agent with a principal office in a county with a population of more than 1,000,000. The

Insurance Code §2651.012(j) enacted by HB 4338 requires the Commissioner to adopt by rule the form, content, and procedure for use of the surety bond and to establish by rule the procedures for making, filing, using, and paying for the surety bond.

Impact of Proposed Amendments to Procedural Rules P-1 and P-12 and Form T-57 on Title Insurance Agents: Provision that a title insurance agent must update its title plant to 1979. House Bill 4338 amended the Insurance Code §2501.004(b) to require that all abstract plants in Texas cover a period beginning not later January 1, 1979. The Department proposed conforming amendments to Procedural Rules P-1 and P-12 and Form T-57 to implement the new abstract plant requirement. The proposed amendment to Procedural Rule P-1 i, which is the definition of "Abstract plant", replaces the language "currently kept to date" with the new language "kept current." This change conforms the definition of "Abstract plant" in the Basic Manual with the statutory language in §2501.004(b)(2) as mandated by HB 4338. The proposed amendment to Procedural Rule P-1 z, which is the definition of "Furnishing title evidence", replaces the language "going back not less than 25 years" with the new language "covering a period beginning not later than January 1, 1979." This change conforms the definition of "Furnishing title evidence" in the Basic Manual with the new statutory requirement for the beginning date of an abstract plant specified in §2501.004(b)(2) as mandated by HB 4338. The proposed amendment to Procedural Rule P-12 Abstract Plants has a definition of "abstract plant" that is amended to replace the language "for a period of at least 25 years immediately prior to the date of search" with the new language " covering a period beginning not later than January 1, 1979." This change conforms the definition of "abstract plant" in Procedural Rule P-12 with the new statutory requirement for the beginning date of an abstract plant specified in §2501.004(b)(2) as mandated by HB 4338. The Department has determined that this requirement will have an adverse economic impact on small and micro business title insurance agents. In summary, the Department estimates that the total compliance cost for updating the title plants of those title agents whose abstract plant do not currently cover a period beginning not later than January 1, 1979, would be a total of $3,367,000 for all of the agents to bring their title plants into compliance. The anticipated costs associated with this new abstract plant requirement will include: (i) cost to purchase data from the county; (ii) cost to purchase data from other sources; (iii) cost to purchase new servers to hold the additional data; (iv) cost to hire personnel to program and format data to upload into the database; (v) cost for administrative personnel to post, re-key, and locate data for accuracy; (vi) scanning costs; and (vii) additional subscription fees.

REGULATORY FLEXIBILITY ANALYSIS

Proposed amendments and new sections that implement HB 4338. There are two new Administrative Rules G-3 and G-6 and amendments to Procedural Rules P-28, P-1, and P-12 and an amendment to Form T-57 that are necessary to implement HB 4338 and that may also have an adverse economic impact on small or micro business title insurance agents.

Pursuant to the Government Code §2006.002(c-1), an agency must "consider, if consistent with the health, safety, and environmental and economic welfare of the state, using regulatory methods that will accomplish the objectives of applicable rules while minimizing adverse impacts on small businesses." An agency is not required to consider alternatives that while possibly minimizing adverse impacts on small businesses would not be protective of the health, safety, and environmental and economic welfare of the state. The Final Guidelines (Guidelines) issued by the Office of the Texas Attorney General (April 2008) providing guidance for compliance with the Government Code §2006.002(c-1) state that under §2006.002(c-1), an agency must "consider, if consistent with the health, safety, and environmental and economic welfare of the state, using regulatory methods that will accomplish the objectives of applicable rules while minimizing adverse impacts on small business." The Guidelines further state that an agency is not required to consider alternatives that, while possibly minimizing adverse impacts on small businesses would not be protective of the health, safety and environmental and economic welfare of the state. According to the Guidelines, one common example appears to fit within this exception. This example is when agencies are required "to adopt as rules specific fees or specific standards and procedures under a legislative or federal mandate." In these situations, "the mandated language may be considered per se consistent with the health, safety, or environmental and economic welfare of the state and the agency need not consider other regulatory methods."

HB 4338 mandates that the Commissioner adopt specified standards and rules. HB 4338 amends Chapter 2651 of the Insurance Code to add (i) new §2651.021(a) to read: "The commissioner shall adopt by rule a professional training program for a title insurance agent and the management personnel of the title insurance agent" and (ii) new §2651.011(c) to read "Each title insurance agent shall provide the department, on a quarterly basis, with a copy of the agent's quarterly withholding tax report furnished by the agent to the United States Internal Revenue Service. The title insurance agent must also provide to the department proof of the payment of the tax...." HB 4338 enacts new §2651.012(j) to read "Notwithstanding any other provision of this section, this section takes effect only after the commissioner adopts the form, content, and procedures for use of the surety bond authorized under Subsection (a). The commissioner by rule shall establish the procedures for making, filing, using, and paying for the surety bond...."

HB 4338 amended §2501.004(b) to read as follows:

(b) To provide for the *safety and protection of policyholders,* the department shall require that an abstract plant:

(1) *be* geographically arranged;

(2) *cover a period beginning not later than January 1, 1979, and be kept current;* and

(3) *be* adequate for use in insuring titles, as determined by the department. (emphasis added).

As previously stated, two new Administrative Rules G-3 and G-6 and amendments to Procedural Rules P-28, P-1, P-12 and an amendment to Form T-57 that are necessary to implement HB 4338, which may have an adverse economic impact on small or micro business title insurance agents reflect the mandated standards and rules of a legislative mandate. As a result, in accordance with the Guidelines, "the mandated language may be considered *per se* consistent with the health, safety, or environmental and economic welfare of the state and the agency need not consider other regulatory methods."

Because these proposed amendments and new sections would constitute rules that adopt specific standards under the legislative mandate in HB 4338, they may be considered per se consistent with the health, safety, and environmental and economic welfare of the state, and the Department is not required to consider other regulatory methods. Therefore, pursuant to the Gov-

ernment Code §2006.002(c-1) a regulatory flexibility analysis is not required for these proposed amendments and new sections that implement HB 4338.

TAKINGS IMPACT ASSESSMENT. The Department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

REQUEST FOR COMMENTS. To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on February 1, 2011, to Gene C. Jarmon, 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 submitted simultaneously to Robert R. Carter, Jr., Deputy Commissioner, Title Division, Mail Code 106-2T, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.

The Commissioner will consider the adoption by reference of amendments to procedural rules P-1, P-12 and P-28; an amendment to Form T-57: Agreement to Furnish Title Evidence, the addition of new administrative rules G-3, G-4, G-5, G-6; and G-7 and the addition of new forms T-G4, T-G5, T-G6, T-G7, Exhibit I Financial Statement of Title Agent's Unencumbered Assets, and Texas Title Agent's/Direct Operation Minimum Capitalization Bond in the *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas* (Basic Manual) in a public hearing under Docket Number 2725, scheduled for January 27, 2011, 9:30 a.m. in Room 100 of the William P. Hobby, Jr. State Office Building, 333 Guadalupe Street, Austin, Texas. Written and oral comments presented at the hearing will be considered.

STATUTORY AUTHORITY. The adoption by reference of amendments to procedural rules and forms, the addition of new administrative rules, and the addition of new forms are proposed pursuant to the Insurance Code §§2501.004(b), 2651.0021, 2651.011, 2651.012, 2651.158, 2651.206 and 36.001. HB 4338 enacted by the 81st Legislature amended §2501.004(b) to add a requirement that an abstract plant must cover a period beginning not later than January 1, 1979, and be kept current. HB 4338 added new §2651.0021 for the establishment of a professional training program for title agents and the management personnel of title insurance agents. HB 4338 amended §2651.011 to add new requirements and procedures for title companies providing privileged title agent solvency information to the Department and new requirements for the filing of title agent quarterly withholding tax reports with the Department. HB 4338 added new §2651.012 to set forth new minimum capitalization standards for title agents. HB 4338 added new §2651.158 to establish a procedure for certification of a title agent's unencumbered assets and a procedure for determining the value of a title agent's unencumbered assets. HB 4338 added new §2651.206 to establish guidelines and procedures for the Department to follow when conducting an audit, review, or examination under Chapter 2651 or Chapter 2602 of the Insurance Code. Section 36.001 authorizes the Commissioner of Insurance to adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTES. The following statutes are affected by this proposal: Insurance Code §§2501.004(b), 2651.0021, 2651.011, 2651.012, 2651.158, and 2651.206.

§9.50. Procedural Rules, Administrative Rules, and Forms Relating to Minimum Capitalization Requirements, Professional Training Program, and Other Important Matters Concerning Title Agents and Title Companies.

In addition to material adopted by reference under §9.1 of this title (relating to the *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas* (Basic Manual)), the Texas Department of Insurance adopts by reference, as part of the Basic Manual, amendments to procedural rules P-1, P-12 and P-28; an amendment to Form T-57: Agreement to Furnish Title Evidence, the addition of new administrative rules G-3, G-4, G-5, G-6; and G-7 and the addition of new forms T-G4, T-G5, T-G6, T-G7, Exhibit I Financial Statement of Title Agent's Unencumbered Assets, and Texas Title Agent's/Direct Operation Minimum Capitalization Bond. This document is available from and on file at the Texas Department of Insurance, Title Division, Mail Code 106-2T, William P. Hobby State Office Building, 333 Guadalupe Street, P.O. Box 149104, Austin, Texas 78714-9104.

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 December 15, 2010.

TRD-201007118
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: January 30, 2011
For further information, please call: (512) 463-6327

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 3. GENERAL PROVISIONS
SUBCHAPTER B. TRAINING AND EDUCATION OF EMPLOYEES

31 TAC §3.21

INTRODUCTION AND BACKGROUND

The Texas General Land Office (GLO) proposes an amendment to Chapter 3, Subchapter B, concerning Training and Education of Employees, including §3.21, relating to Training and Education. The proposed amendments result from the quadrennial rule review of Chapter 3, Subchapter B, required by Texas Government Code §2001.039.

FISCAL IMPACTS

Larry Laine, Chief Clerk/Deputy Land Commissioner, has determined that for each year of the first five years the proposed amendments will be in effect, minimal fiscal implications for state government will result from better cost recovery for services provided by the GLO.

PUBLIC BENEFIT/COST ANALYSIS

Larry Laine has determined that for each year of the first five years the amendments are proposed to be in effect, the public benefit will be improved operation of the GLO with better clarity and consistency of the GLO's fees and more fair compensation for the state for the cost of providing such services and permitting such activities. The proposed rule changes will enable the agency to continue to provide services and products of a consistently high quality.

SMALL BUSINESS ANALYSIS

The GLO has determined that for each year of the first five years the proposed amendments will be in effect, there will be minimal economic cost to small businesses, micro-businesses, and individuals based on the proposed amendments.

EMPLOYMENT IMPACT

The GLO does not anticipate any employment impact as a result of administering the proposed amendments.

REQUEST FOR COMMENTS BY THE PUBLIC

To comment on the proposed amendments, please send a written comment to Mr. Walter Talley, the GLO Texas Register Liaison, at Texas General Land Office, P.O. Box 12873, Austin, TX 78711-2873, facsimile number (512) 463-6311, or email to walter.talley@glo.state.tx.us.

STATUTORY AUTHORITY

The amendments are 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.

STATUTES AFFECTED

Chapters 31, 32, 51 and 52 of the Texas Natural Resources Code are affected by the proposed rule.

§3.21. Training and Education.

(a) The General Land Office shall make available to its employees funds for training and education in accordance with the Employee Training Act, Government Code §§656.041 - 656.049 [~~§§656.041-049~~].

(b) The General Land Office may provide training or education to its employees that is related to the duties or prospective duties of the employees. All General Land Office employees are eligible to receive training and education, subject to the requirements of agency policy, managerial discretion and availability of funds.

(c) An employee who completes training and education to obtain a degree or certification for which the General Land Office has provided all or part of the required fees must agree in writing to fully repay the General Land Office any amounts paid for educational assistance if the employee voluntarily terminates employment with the agency within one year after the course or courses are completed.

(d) Approval to participate in a training and education program, including an agency-sponsored training, seminar or conference shall not in any way affect an employee's at-will status. The approval of a training and education program is not a guarantee or indication that approval will be granted for subsequent training and education programs. Approval to participate in a training and education program shall in no way constitute a guarantee or indication of continued employment, nor shall it constitute a guarantee or indication of future employment in a current or prospective position.

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

Filed with the Office of the Secretary of State on December 20, 2010.

TRD-201007242
Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
Earliest possible date of adoption: January 30, 2011
For further information, please call: (512) 475-1859

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31 TAC §§3.22 - 3.24

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

INTRODUCTION AND BACKGROUND

The Texas General Land Office (GLO) proposes the repeal of Chapter 3, Subchapter B, relating to Training and Education of Employees, §3.22 concerning Employee Obligation, §3.23 concerning Training and Education Materials and §3.24 concerning No Effect on At-Will Employment Status. The GLO proposes the repeal of §§3.22 - 3.24 because these provisions will be rendered redundant by the amendment to §3.21 published in this issue. The proposed repeals result from the quadrennial rule review of Chapter 3, Subchapter B, required by Texas Government Code §2001.039.

FISCAL IMPACTS

Larry Laine, Chief Clerk/Deputy Land Commissioner, has determined that for each year of the first five years the proposed repeals will be in effect, minimal fiscal implications for state government will result from better cost recovery for services provided by the GLO.

PUBLIC BENEFIT/COST ANALYSIS

Larry Laine has determined that for each year of the first five years the repeals are proposed to be in effect, the public benefit will be improved operation of the GLO with better clarity and consistency of the GLO's fees and more fair compensation for the state for the cost of providing such services and permitting such activities. The proposed rule changes will enable the agency to continue to provide services and products of a consistently high quality.

SMALL BUSINESS ANALYSIS

The GLO has determined that for each year of the first five years the proposed repeals will be in effect, there will be minimal economic cost to small businesses, micro-businesses, and individuals based on the proposed amendments.

EMPLOYMENT IMPACT

The GLO does not anticipate any employment impact as a result of administering the proposed repeals.

REQUEST FOR COMMENTS BY THE PUBLIC

To comment on the proposed repeals, please send a written comment to Mr. Walter Talley, the GLO Texas Register Liai-

son, at Texas General Land Office, P.O. Box 12873, Austin, TX 78711-2873, facsimile number (512) 463-6311, or email to walter.talley@glo.state.tx.us.

STATUTORY AUTHORITY

The repeals are 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.

STATUTES AFFECTED

Chapters 31, 32, 51 and 52 of the Texas Natural Resources Code are affected by the proposed repeals.

§3.22. Employee Obligation.

§3.23. Training And Education Materials.

§3.24. No Effect On At Will Employment Status.

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 December 20, 2010.

TRD-201007243
Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
Earliest possible date of adoption: January 30, 2011
For further information, please call: (512) 475-1859

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SUBCHAPTER C. SERVICES AND PRODUCTS

31 TAC §3.30, §3.31

INTRODUCTION AND BACKGROUND

The Texas General Land Office (GLO) proposes amendments to Chapter 3, Subchapter C, Services and Products, including §3.30, concerning Historically Underutilized Business Programs, and §3.31, concerning Fees. The proposed amendments result from the quadrennial rule review of Chapter 3, Subchapter C, required by Texas Government Code §2001.039. The GLO proposes amendments to §3.30 to conform with nonsubstantive changes made to other rules in the Texas Administrative Code. The GLO proposes to replace §3.31, relating to Fees, in order to more logically organize the rule and update charges for services provided by the GLO.

FISCAL IMPACTS

Larry Laine, Chief Clerk/Deputy Land Commissioner, has determined that for each year of the first five years the proposed amendments will be in effect, minimal fiscal implications for state government will result from better cost recovery for services provided by the GLO.

PUBLIC BENEFIT/COST ANALYSIS

Larry Laine has determined that for each year of the first five years the amendments are proposed to be in effect, the public benefit will be improved operation of the GLO with better clarity and consistency of the GLO's fees and more fair compensation for the state for the cost of providing such services and permitting such activities. The proposed rule changes will enable the agency to continue to provide services and products of a consistently high quality.

SMALL BUSINESS ANALYSIS

The GLO has determined that for each year of the first five years the proposed amendments will be in effect, there will be minimal economic cost to small businesses, micro-businesses, and individuals based on the proposed amendments.

EMPLOYMENT IMPACT

The GLO does not anticipate any employment impact as a result of administering the proposed rule amendments.

REQUEST FOR COMMENTS BY THE PUBLIC

To comment on the proposed amendments, please send a written comment to Mr. Walter Talley, the GLO Texas Register Liaison, at Texas General Land Office, P.O. Box 12873, Austin, TX 78711-2873, facsimile number (512) 463-6311, or email to walter.talley@glo.state.tx.us.

STATUTORY AUTHORITY

The amendments are 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.

STATUTES AFFECTED

Chapters 31, 32, 51 and 52 of the Texas Natural Resources Code are affected by the proposed amendments.

§3.30. Historically Underutilized Business Programs.

In accordance with Texas Government Code, §2161.003, the [~~Texas~~] General Land Office adopts by reference the Comptroller of Public Accounts' rules found at Texas Administrative Code, Title 34, Part 1, Chapter 20, Subchapter B [~~Title 1, Part 5, Chapter 111, Subchapter B~~] relating to the Historically Underutilized Business Program [~~of the Texas Administrative Code~~].

§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: $100.

(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 $25 or the actual amount charged by the county clerk.

(2) Certificates of fact:

(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, supplemental or limited certificates of fact (consisting of specific information or start date for history of a specific tract land): $100 per file.

(B) Spanish documents: $75 per document.

(3) Certified and non-certified classification letters:

(A) Certified classification letter: $50 per file;

(B) Non-certified classification letter: $10 per file.

(4) Preparation of working sketch: $40 per hour ($60 minimum).

(5) Duplication fees - archival records: 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 what method(s) of 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 and maps, sketches and plats:

(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) 11 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) 11 inch by 17 inch: $3.00.

(C) Patent or Deed of Acquittance, includes certification: $5.00.

(D) Official county maps: $15 per map.

(E) Sketches (large format digital copies); per linear foot: $2.00.

(F) Digitally 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.

(G) Digitally reproduced archival map collection on CD-ROM/DVD-ROM.

(i) cost of disk: CD: $11, DVD: $16 plus labor at $40 per hour (prorated at 15 minute intervals);

(ii) cost per image: $10;

(iii) digitization of unscanned map, sketch or file: $25.

(6) Certification:

(A) Individual instruments or maps: $2.00.

(B) Contents of complete files, each file: $25.

(C) Copy of official Spanish translations, each: $25.

(7) Spanish translations:

(A) Original translations: $.15 per word.

(B) Copies of previously translated Spanish or Mexican titles: $2.00 per page.

(8) Digital Transfer Fee, for the transfer of large files over the Internet by the use of a File Transfer Service: $16 per order.

(9) Rush Fee: At General Land Office staff discretion, expedited preparation of photocopies, GIS products, maps and items scanned may be provided for a fee. Payment of the rush fee does not guarantee that requested services will be completed by a specific time. Payment of the rush fee will allow the rush order to be completed ahead of non-rush items: per order $50.

(10) Digital mapping (GIS):

(A) GIS maps printed on special printer paper:

(i) Plotting standard products:

(I) Small maps: Labor, paper and supplies: $15 per map;

(II) 18 inch by 24 inch: Labor, paper and supplies: $20 per map;

(III) 24 inch by 36 inch: Labor, paper and supplies: $25 per map;

(IV) 36 inch by 48 inch: Labor, paper and supplies: $30 per map;

(V) Large maps: Labor, paper and supplies: $40 per map.

(ii) Plotting custom products:

(I) Labor: $50 per hour (one hour minimum);

(II) Paper and Supplies: $10 per map.

(B) Digital GIS data placed on CD-ROM: Each CD: $11, DVD: $16 - plus labor at $40 per hour (prorated at 15 minute intervals).

(11) Vacancies:

(A) Application fee: $150.

(B) Filing fee for original field notes: $25.

(C) Affidavit Filing Fee: $25.

(D) Each deed, title opinion, or other document needed to satisfy the commissioner of claimant's status. Filing fee for each document submitted as required: $25.

(E) Petition For Disqualification of Surveyor costs associated including hearing, mailing copies, other expenses, non-refundable: $250.

(F) Copying Fees, related to vacancy application only:

(i) Black and white photocopies, per page:

(I) 8.5 inch by 11 inch: $.10.

(II) 8.5 inch by 14 inch: $.10.

(III) 11 inch by 17 inch: $.25.

(ii) Color photocopies, per page:

(I) 8.5 inch by 11 inch: $.25.

(II) 8.5 inch by 14 inch: $.25.

(III) 11 inch by 17 inch: $.50.

(iii) Sketches, plats and survey maps (larger than 11 inch by 17 inch): $2.00 per linear foot.

(12) Appraisal fees. Appraisal fees are charged for appraisals required to be paid by the applicant for the purchase of excess acreage and vacancies: For each appraisal: $500.

(13) Recorded media:

(A) VHS videotape, each $10, other video formats $20 per 30 minutes, $30 per 60 minutes;

(B) Audio cassettes, each: $7.50, audio transfer fee, $25 per hour, 1/2 hour minimum;

(C) Video Transfer Fee, 1/2 hour - $25, 1/2 hour minimum;

(D) Recorded media placed on CD/DVD: CD $11, DVD: $16 - plus labor at $40 per hour (prorated at 15 minute intervals);

(E) Video/Audio encoding fee: 1/2 hour - $25, 1/2 hour minimum.

(14) Records research, research of official records of the General Land Office, per hour $50 (minimum 1/2 hour).

(A) Genealogy search, per name: $20.

(B) Other research of official records, i.e., field notes, sketches, maps: per hour $50, minimum 1/2 hour.

(15) Mailing fees:

(A) Mailing tubes, each $3.

(B) Handling and preparation for mailing, each item: $15 per package (optional).

(C) Postage and handling: $15 per package.

(D) Registered mail, each item: $11.50 or current United States Postal Service rate.

(E) Certified mail, each item: $5.10 or current United States Postal Service rate plus current USPS rate for postage.

(16) Publications:

(A) Abstract volume (digital on CD): $11.

(B) Abstract volume supplement (digital on CD): $11.

(C) Spanish Collection Catalogue (Part I): $15.

(D) Spanish Collection Catalogue (Part II): $15.

(E) New Guide to Spanish and Mexican Land Grants in South Texas: $15.

(17) Publication or Broadcast Fee (Image Use Fee): For use of a GLO archival image (map or document) in a book, magazine, motion picture, television broadcast, video, website, reproduction for resale, or other promotional advertising use:

(A) Non-profit organizations, college or university presses, governmental entities, news media, private individuals: no charge.

(B) For profit organizations: $50 per image per use.

(18) 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.

(19) 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 unless deemed unnecessary by the Commissioner: 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.

~~[(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: $100.]

[(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: per file: $100;]

[(ii) non-mineral classified land: per file: $75;]

[(B) Spanish documents: $75 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: per file: $50;]

[(B) Non-certified classification letter: $10 per file.]

[(4) Maps and sketches: The General Land Office, Surveying Division reserves the right to deny duplication of any map or document in the Surveying Division considered too fragile or brittle to safely copy.]

[(A) Official county maps: $15 per map.]

[(B) Sketches (large format digital copies); per linear foot: $2.00.]

[(C) Working sketch, per hour ($60 minimum): $40.]

[(D) Digitally 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.]

[(E) Digitally reproduced archival map collection on CD-ROM/DVD-ROM.]

[(i) cost of disk: CD $11, DVD: $16;]

[(ii) cost per image: $10;]

[(iii) digitization of unscanned map or sketch: $25.]

[(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: $150.]

[(B) Filing fee for original field notes: $25.]

[(C) Affidavit Filing Fee: $25.]

[(D) Each deed, title opinion, or other document needed to satisfy the commissioner of claimant's status. Filing fee for each document submitted as required: $25.]

[(E) Petition For Disqualification of Surveyor costs associated including hearing, mailing copies, other expenses, non-refundable: $250.]

[(F) Copying Fees:]

[(i) Black and white photocopies, per page:]

[(I) 8.5 inch by 11 inch: $.10]

[(II) 8.5 inch by 14 inch: $.10]

[(III) 11 inch by 17 inch: $.25]

[(ii) Color photocopies, per page:]

[(I) 8.5 inch by 11 inch: $.25]

[(II) 8.5 inch by 14 inch: $.25]

[(III) 11 inch by 17 inch: $.50]

[(IV) Sketches, plats and survey maps (larger than 11 inch by 17 inch): $2.00 per linear foot.]

[(8) Appraisal fees. Appraisal fees are charged for appraisals required by applications for deeds of acquittance and vacancies: For each tract: $500.]

[(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 what 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) 11 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) 11 inch by 17 inch: $3.00.]

[(C) Recorded media:]

[(i) VHS videotape, each $10.00, other video formats $20.00 per 30 Minutes, $30.00 per 60 Minutes;]

[(ii) Audio cassettes, each: $7.50, audio transfer fee, $25.00 per hour, 1/2 hour minimum;]

[(iii) Video Transfer Fee, 1/2 hour - $25.00, 1/2 hour minimum.]

[(10) Genealogy search:]

[(A) Per name: $10.00.]

[(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: $3.00.]

[(B) Registered mail, each item: $9.75 or current United States Postal Service rate.]

[(C) Handling and preparation for mailing, each item: $15.00 per package (optional).]

[(D) Certified mail, each item; $4.25 or current United States Postal Service rate.]

[(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.]

[(C) Abstract volume (digital on CD) $11.00.]

[(D) Abstract volume supplement (digital on CD) $11.00.]

[(E) Spanish Collection Catalogue (Part I) $15.00.]

[(F) Spanish Collection Catalogue (Part II) $15.00.]

[(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 unless deemed unnecessary by the Commissioner: 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 December 20, 2010.

TRD-201007247
Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
Earliest possible date of adoption: January 30, 2011
For further information, please call: (512) 475-1859

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION

SUBCHAPTER C. CRUDE OIL PRODUCTION TAX

34 TAC §3.37

The Comptroller of Public Accounts proposes an amendment to §3.37, concerning enhanced oil recovery projects. This section is being amended pursuant to House Bill 3732, 80th Legislature, 2007. House Bill 3732 amends Tax Code, §202.0545, by adding language relating to the establishment of incentives by this state for the implementation of enhanced oil recovery projects that capture and sequester carbon dioxide that would otherwise be emitted into the atmosphere.

John Heleman, 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. Heleman 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 by improving the administration of the severance taxation. This rule is proposed under 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 78711-3528.

This amendment is proposed under Tax Code, §111.002 and §111.0022, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2, and taxes, fees, or other charges which the comptroller administers under other law.

The amendment implements Tax Code, §202.0545.

§3.37. Enhanced Oil Recovery Projects.

(a) Enhanced oil recovery projects.

(1) [(a)] Producers producing crude oil from an enhanced oil recovery project approved and certified by the Texas Railroad Commission may file with the comptroller an application for a reduced tax rate.

(2) [(b)] An application for taxation at the reduced tax rate must be filed.

(A) [(1)] The operator shall make application on forms prescribed by the comptroller for the reduced tax rate on qualified oil produced and sold by the operator. The operator shall be responsible for advising the comptroller whenever the status of the enhanced oil recovery project changes in a manner that would affect the imposition of the tax due on the oil produced from the project area.

(B) [(2)] A nonoperator taking production in-kind from a project area for which the operator has filed an application for tax relief shall also file an application for tax relief on forms prescribed by the comptroller for the qualified oil produced and sold by the nonoperator.

(3) [(c)] The application for tax relief filed by the operator shall include an approved copy of Texas Railroad Commission Form H-12, Enhanced Oil Recovery Project and Area Designation Approval Application, and a copy of the Certificate of Positive Production Response issued by the Texas Railroad Commission.

(4) [(d)] The application for tax relief filed by a nonoperator must contain the project name as designated by the operator, and the project number as designated by the Texas Railroad Commission. The application for tax relief filed by a nonoperator will not be granted until the operator has complied with paragraph (3) of this subsection [subsection (c) of this section].

(5) [(e)] When an application for tax relief has been approved by the comptroller, a producer may file amended reports to recover the additional tax paid by the producer on qualified oil for periods after the effective date of the reduced tax rate and prior to the actual date of approval. In order to obtain a refund, the amended reports must be filed within one year after the date the Texas Railroad Commission certifies that a positive production response has occurred.

(6) [(f)] Producers obtaining an approval for relief from the comptroller shall furnish to any first purchaser required to report a purchase of the enhanced recovery oil a copy of the comptroller's approval. Any first purchaser paying tax on qualified oil for periods after the effective date of the reduced rate and prior to the actual date of approval shall file amended reports to recover the additional tax paid. In order to obtain a refund, the amended reports must be filed within one year after the date the Texas Railroad Commission certifies that a positive production response has occurred.

(7) [(g)] Producers and purchasers reporting enhanced recovery oil shall designate the oil as being qualified secondary recovery oil, or oil recovered by any other approved enhanced recovery method, according to instructions contained on the crude oil tax reports.

(8) [~~(h)~~] The reduced tax rate does not apply until an amount of oil equal to the oil produced and stored on the lease prior to the effective date of the tax relief is removed from the lease.

(9) [~~(i)~~] Any crude oil produced and stored on the lease during a period in which the reduced tax rate applies, but removed from the lease after the reduced tax rate period has expired, qualifies for the reduced tax rate. The reduced tax rate will apply until the volume of oil removed equals the volume of qualified oil stored.

(10) [~~(j)~~] Producers delivering to a first purchaser oil which contains a volume of qualified secondary recovery oil, and/or a volume of qualified oil produced by any other approved recovery method, and a volume of oil not eligible for the reduced tax, or any combination of these, shall furnish to the first purchaser the volume information necessary to enable the purchaser to file proper reports.

(b) Enhanced oil recovery projects using anthropogenic carbon dioxide.

(1) Entitles producers producing crude oil from an approved enhanced oil recovery project to an additional 50% reduction in the crude oil tax rate stated in Tax Code, §202.052(b), if in the recovery of the oil the enhanced oil recovery project uses carbon dioxide that is captured from an anthropogenic source in this state; which would otherwise be released into the atmosphere as industrial emission; is measurable at the source of capture; and is sequestered in one or more geological formations in this state following the enhanced oil recovery process.

(2) In the event that a portion of the carbon dioxide used in the enhanced oil recovery project is anthropogenic carbon dioxide that satisfies the criteria under paragraph (1) of this subsection and a portion of the carbon dioxide used in the project fails to satisfy the criteria of paragraph (1) of this subsection because it is not anthropogenic, the additional tax reduction provided by paragraph (1) of this subsection, is required to be reduced to reflect the proportion of the carbon dioxide used in the project that satisfies the criteria of paragraph (1) of this subsection.

(3) An application for the additional tax reduction must be filed with the comptroller. The operator shall make application on forms prescribed by the comptroller for the additional tax reduction on qualified oil produced and sold by the operator.

(4) The application for additional tax reduction filed by the operator shall include an approved certification from the agency identified under Tax Code, §202.0545(c)(2).

(5) When an application for additional tax reduction has been approved by the comptroller, a producer must file amended reports to recover the additional tax reduction paid by the producer on qualified oil for periods after the effective date of the additional tax reduction and prior to the actual date of approval. To receive the additional credit, the amendments must be filed with the comptroller for the credit not later than the first anniversary of the date the oil is produced.

(6) Producers obtaining an approval for additional tax reduction from the comptroller shall furnish to any first purchaser required to report a purchase of the enhanced recovery oil, a copy of the comptroller's approval. Any first purchaser paying tax on qualified oil for periods after the effective date of the additional tax reduction and prior to the actual date of approval must file amended reports to recover the additional tax paid. In order to receive the additional credit, the amendments must be filed with the comptroller for the credit not later than the first anniversary of the date the oil is produced.

(7) Producers and purchasers reporting anthropogenic carbon dioxide enhanced recovery oil shall designate the oil as being qualified oil according to instructions contained on the crude oil tax reports.

(8) Any crude oil produced and stored on the lease during a period in which the additional tax reduction applies, but removed from the lease after the additional tax reduction period has expired, qualifies for the additional tax reduction. The reduction in tax rate will apply until the volume of oil removed equals the volume of qualified oil stored.

(9) Producers delivering to a first purchaser, oil which contains a volume of qualified oil, and a volume of oil not eligible for the additional tax reduction, or any combination of these, shall furnish to the first purchaser the volume information necessary to enable the purchaser to file proper reports.

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 December 16, 2010.

TRD-201007142
Ashley Harden
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: January 30, 2011
For further information, please call: (512) 475-0387

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SUBCHAPTER O. STATE SALES AND USE TAX

34 TAC §3.322

The Comptroller of Public Accounts proposes an amendment to §3.322, concerning exempt organizations. This amendment makes the following proposed changes:

Subsection (b)(1) clarifies longstanding agency policy that a nonprofit charitable or eleemosynary organization that devotes all or substantially all of its activities to the alleviation of poverty, disease, pain, and suffering by providing medicine and medical treatment may qualify for exempt status. This subsection is also amended to explain agency policy that organizations may engage in activities that are technically not covered by the statutory exemption language but done in support of and incidental to the exempt activities specifically identified in the statutory exemption and still be considered for exempt status. Subsection (b)(10) is amended to implement Senate Bill 275, 78th Legislature, 2003, and Senate Bill 1515, 81st Legislature, 2009, which expand the definition of a "local organizing committee" that qualifies for exemption and redefine the term "games" to include events other than, and in addition to, the Pan American Games and Olympic Games, in accordance with Texas Civil Statutes, Title 83, Chapter 10, Article 5190.14. New subsection (b)(11) and (12) are relocated from current subsection (c)(6) and (7) to correct an error in the section about the correct categorization of the entities identified in these subsections. Subsection (b)(12) updates the statutory cite for the Development Corporation Act to reflect its current location in Local Government Code, Chapter 501, according to House Bill 2278, 80th Legislature, 2007.

Subsection (c)(8) is deleted to implement House Bill 387, 80th Legislature, 2007, which repealed Government Code, Chapter 465, the statutory basis for the Texas National Research Laboratory Commission, and the related sales tax exemption under Tax Code, §151.349.

Subsection (e) updates the procedures used to apply for an exemption to reference applications approved by the comptroller, to clarify which documents are required to apply for exempt status, and to clarify that additional information may be required by the comptroller for an organization to obtain exempt status.

Subsection (f)(1) and (2) clarify agency policy regarding the revocation, withdrawal, or loss of an exemption.

Subsection (g)(1) is amended to correct an error in the section related to the incorrect placement of entities currently identified in subsection (c)(6) and (7) which have now been correctly relocated to subsection (b)(11) and (12); subsection (g)(7) adds an exemption, in accordance with House Bill 2519, 78th Legislature, 2003, and Tax Code, §151.3105, for the purchase, rental or lease of certain bingo equipment by a nonprofit organization granted exemption under Internal Revenue Code, §501(c)(3), (4), (8), (10), or (19), if the bingo equipment will be used in conducting bingo authorized under Occupations Code, Chapter 2001. Subsection (g)(8) implements Senate Bill 1199, 81st Legislation, 2009, which adds new subsection (f) to Tax Code, §151.310, and provides new guidelines for organizations exempt from sales and use tax under §151.310 to claim refunds and credits. All other issues relating to exempt entities and refund claims are still covered by §3.325 of this title.

Subsection (h)(3) expresses agency policy concerning who is responsible for remitting sales tax when an exempt organization contracts with a private entity to sell taxable items belonging to the private entity during fundraising events; subsection (h)(5) adds the content of 34 TAC §3.341 (relating to Sales of Governmental Publications, Records, or Documents), which has been repealed.

Subsection (j) reflects updated information about diplomatic tax exemptions under international and federal law.

Nonsubstantive changes are made throughout the section to reflect accurate cross references to code provisions and section names, as well as to improve overall clarity and readability.

John Heleman, 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. Heleman 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 by clarifying which entities can qualify as an exempt entity and the agency's policies regarding sales tax exemptions for such entities. This rule is proposed under 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 Tax Code, Title 2.

The amendment implements Tax Code, §151.309 (Governmental Entities), §151.310 (Religious, Educational, and Public Service Organizations), §151.3105 (Bingo Equipment Purchased by Certain Organizations), §151.337 (Sales by or to Indian Tribes), and Texas Civil Statutes, Article 5190.14 (Pan American Games; Olympic Games).

§3.322. Exempt Organizations.

(a) General policy. This section is administered using the following guiding principles.[~~:~~]

(1) Because exemptions are not favored under the laws of the State of Texas, the provisions of this section shall be strictly interpreted.

(2) An organization must show by clear and convincing evidence that it meets the requirements of this section and the relevant statutes. Any unresolved question about the qualifications of an organization will result in denial of exempt status.

(b) Entities that must prove exempt status. Entities or organizations that may qualify for exempt status include:

(1) a nonprofit charitable or eleemosynary organization that devotes all or substantially all of its activities to the alleviation of poverty, disease, pain, and suffering by providing food, clothing, medicine, medical [~~drugs,~~] treatment, shelter, or psychological counseling directly to indigent or similarly deserving members of society with its funds derived primarily from sources other than fees or charges for its services. If the organization engages in any substantial activity other than the activities described in this section, it cannot qualify for exemption under this provision because it is not organized for purely public charity. However, if the organization is engaged in activities, other than those described in this section, and the additional activities are incidental to and in support of the activities conducted by the organization that are described in this section, the organization may be considered for this exemption. No part of the net earnings of the organization may inure to the benefit of any private party or individual other than as reasonable compensation for services rendered to the organization. Some examples of organizations that do not meet the definition of a charitable organization, even if they are [~~the~~] nonprofit organizations that perform services that are often charitable in nature, are as follows: fraternal organizations, lodges, fraternities, sororities, service clubs, veterans groups, mutual benefit or social groups, professional groups, trade or business groups, trade associations, medical associations, chambers of commerce, and similar organizations. Although these organizations do not qualify for exemption as charitable organizations, they may qualify for the exemption under [~~the~~] Tax Code, §151.310(a)(2), if they obtain an exemption from the Internal Revenue Service (IRS) under [~~the~~] Internal Revenue Code (IRC), §501(c). Chambers of Commerce may qualify for exemption under paragraph (6) of this subsection;

(2) a nonprofit educational organization or governmental entity whose activities are devoted solely to systematic instruction, particularly in the commonly accepted arts, sciences, and vocations, and has a regularly scheduled curriculum that uses the commonly accepted methods of teaching, a faculty of qualified instructors, and an enrolled student body or students in attendance at a place where the educational activities are regularly conducted. An organization that has activities that solely consist of presentation of discussion groups, forums, panels, lectures, or other similar programs, may qualify for the exemption under this provision, if the presentations provide instruction in the commonly accepted arts, sciences, and vocations. An organization cannot qualify for exemption under this provision if the systematic instruc-

tion or educational classes are incidental to some other facet of the organization's activities. No part of the net earnings of the organization may inure to the benefit of any private party or individual other than as reasonable compensation for services rendered to the organization. Some examples of organizations that do not meet the requirements for exemption under this definition are professional associations, business leagues, information resource groups, research organizations, support groups, home schools, and organizations that merely disseminate information by distributing printed publications. Although these organizations do not qualify for exemption as educational organizations, they may qualify for the exemption under [~~the~~] Tax Code, §151.310(a)(2), if they obtain an exemption from the IRS under [~~the~~] IRC, §501(c);

(3) a nonprofit religious organization that is an organized group of people who regularly meet for the primary purpose of holding, conducting, and sponsoring religious worship services according to the rites of their sect. The organization must be able to provide evidence of an established congregation that shows regular attendance of these services by an organized group of people. An organization that supports or encourages religion as an incidental part of its overall purpose, or one whose general purpose is to further religious work or instill its membership with a religious understanding, cannot qualify for exemption under this provision. No part of the net earnings of the organization may inure to the benefit of any private party or individual other than as reasonable compensation for services rendered to the organization. Some examples of organizations that do not meet the requirements for exemption under this definition are conventions or associations of churches, evangelistic associations, churches with membership consisting of family members only, missionary organizations, and groups that organize for the purpose of holding prayer meetings, Bible study, or revivals. Although these organizations do not qualify for exemption as religious organizations, they may qualify for the [~~an~~] exemption under [~~the~~] Tax Code, §151.310(a)(2), if they obtain an exemption from the IRS under [~~the~~] IRC, §501(c);

(4) a youth athletic organization that is a nonprofit corporation or association that exclusively provides athletic competition among persons under 19 years of age;

(5) a nonprofit organization that applies for and obtains a determination letter or a group exemption ruling letter from the IRS that states that the organization qualifies for exemption from federal income tax under [~~the~~] IRC, §501(c)(3), (4), (8), (10), or (19);

(6) a nonprofit chamber of commerce that represents at least one Texas city, county, or geographic locality. For the purpose of this section, a chamber of commerce is a perpetual organization devoted exclusively to promoting the general economic interest of all commercial enterprises in the city, county, or areas it represents. The term does not include chamber-like organizations such as trade associations or business leagues that serve a single line or closely related lines of business within a single industry;

(7) a nonprofit convention and tourist promotional agency organized or sponsored by at least one Texas city or county;

(8) an electric cooperative formed under the Electric Cooperative Corporation Act (Utilities Code, Chapter 161) and nonprofit electric cooperatives located outside the state;

(9) a telephone cooperative formed under the Telephone Cooperative Act (Utilities Code, Chapter 162) and nonprofit telephone cooperatives located outside the state; [~~and~~]

(10) a local organizing committee, as defined in Texas Civil Statutes, Article 5190.14, §1(7), that is exempt from federal income tax under [~~the~~] IRC, §501(c). The local organizing committee must be authorized by an endorsing municipality, an endorsing county, or more than one endorsing municipality or county acting collectively to pursue an application and submit a bid on the municipality's or county's behalf to a site selection organization for selection as the host site of one or more games or events, as defined in Texas Civil Statutes, Article 5190.14, §§5A, 5B, or 5C; [~~the 2007 Pan American Games or the 2012 Olympic Games.~~]

(11) any company, department, or association organized for the purpose of answering fire alarms and extinguishing fires or for the purpose of answering fire alarms, extinguishing fires, and providing emergency medical services, the members of which receive nominal or no compensation for their services; and

(12) nonprofit corporations formed under Local Government Code, Chapter 501 (Development Corporation Act of 1979) or Health and Safety Code, Chapter 221 (Health Facilities Development Act of 1981) when they purchase items for their exclusive use and benefit. The exemption does not apply to items purchased by the corporation to be lent, sold, leased, or rented.

(c) Entities that are always exempt. Certain [~~The following~~] entities and organizations are exempt under the law and are not required to request and prove exempt status, except to send information as requested by the comptroller to verify its exempt status under this subsection.[~~:~~]

(1) The [~~the~~] United States, its unincorporated agencies and instrumentalities.[~~;~~]

[~~(A)~~] The United States includes all parts of the executive, legislative, and judicial branches and all independent boards, commissions, and agencies of the United States government.

[~~(B)~~] Instrumentalities and agencies of the United States include:

(A) [~~(i)~~] various military entities under the supervision of a base commander;

(B) [~~(ii)~~] organizations that contract with the United States and whose contracts explicitly and unequivocally state that they are agents of the United States;

(C) [~~(iii)~~] organizations wholly owned by the United States or wholly owned by an organization that is itself wholly owned by the United States; [~~and~~]

(D) [~~(iv)~~] organizations specifically named as agents of the United States or exempted as instrumentalities of the United States by federal statutes; and[~~.~~]

(E) [~~(C)~~] [~~Instrumentalities and agencies of the United States also include~~] organizations having substantially all of the following characteristics:

(i) they are funded by the United States;

(ii) they carry out a specific program of the United States;

(iii) they are managed or controlled by officers of the United States;

(iv) their officers are appointed by the United States;

(v) they perform commitments of the United States under an international treaty; and

(vi) they are not organized for private profit;[~~.~~]

(2) any incorporated agency or instrumentality of the United States wholly owned by the United States or by a corporation

wholly owned by the United States. "Wholly owned" means total or 100% ownership;

(3) federal credit unions organized under 12 United States Code, §1768;

(4) the State of Texas, its unincorporated agencies and instrumentalities; and

(5) any county, city, special district or other political subdivision of the State of Texas, and any college or university created or authorized by the State of Texas.[;]

[(6) any company, department, or association organized for the purpose of answering fire alarms and extinguishing fires or for the purpose of answering fire alarms, extinguishing fires, and providing emergency medical services, the members of which receive nominal or no compensation for their services;]

[(7) nonprofit corporations formed under the Development Corporation Act of 1979 or the Health Facilities Development Act of 1981 when they purchase items for their exclusive use and benefit. The exemption does not apply to items purchased by the corporation to be lent, sold, leased, or rented. See §3.291 of this title (relating to Contractors); and]

[(8) nonprofit corporations established by the Texas National Research Laboratory Commission under Government Code, §465.008(g). Taxable items purchased or leased from these corporations are also exempt from tax if the items are used in or for carrying out an eligible undertaking as defined by Government Code, §465.021.]

(d) Qualification requirements. To qualify for exempt status under subsection (b) of this section, an organization must satisfy all of the following requirements.

(1) An organization must be organized or formed solely to conduct one or more exempt activities. The comptroller [Comptroller] will consider all documents necessary to prove the purpose for which an organization is formed.

(2) An organization must devote its operations exclusively to one or more exempt activities.

(3) An organization must dedicate its assets in perpetuity to one or more exempt activities.

(4) No profit or gain may pass directly or indirectly to any private shareholder or individual. All salaries or other benefits furnished officers and employees must be commensurate with the services actually rendered.

(e) How to obtain exempt status.

(1) Application. To apply for and obtain notification [a letter] of exemption from the comptroller, an organization must complete and submit to the comptroller the appropriate application or its equivalent. Applicants should refer to the *Guidelines to Texas Tax Exemptions* (publication 96-1045) for assistance in completing the proper application for any exemption sought. [a written statement that details the nature of the activities conducted or to be conducted and the following documentation:]

[(A) a copy of the bylaws, a copy of its constitution, and a copy of any applicable trust agreement, and if the organization is a corporation, a copy of the articles of incorporation and any related amendments;]

[(B) if the claimed exemption is under §501(c)(3), (4), (8), (10), or (19) of the IRC, a copy of all pages of a determination letter or a group exemption ruling letter from the IRS. If the original determination letter or group exemption ruling letter is more than four years old, then the organization must send a copy of a recent letter from the IRS. A nonprofit organization that claims exemption under a parent's exemption must provide a copy of the parent organization's group exemption ruling letter from the IRS and a letter from the parent organization that states that the applicant nonprofit organization is a subordinate covered under the parent organization's group exemption.]

(2) Documentation required. In addition to a properly completed application, an organization must submit with the application all documents requested by the application and comptroller publication 96-1045, *Guidelines to Texas Tax Exemptions,* all governing documents as indicated by subparagraph (A) of this paragraph, and all IRS documents indicated by subparagraph (B) of this paragraph.

(A) Governing documents. A copy of each of the organization's governing documents must be submitted with the application as indicated in clauses (i) - (iii) of this subparagraph.

(i) An unincorporated organization requesting an exemption must include copies of its formation documents, such as bylaws, constitution, articles of association, certificate of formation, or applicable trust agreement, and any related amendments. If the exemption being sought requires that the organization be a nonprofit, the governing documents must state that the organization is a nonprofit.

(ii) A non-Texas corporation requesting an exemption must include file-stamped copies of its formation documents and certificate of existence from the home state of incorporation, and any related amendments.

(iii) A non-Texas limited liability company requesting an exemption must include file-stamped copies of its formation documents and certificate of existence from the home state of formation, and any related amendments.

(iv) Exception. An organization applying for exemption based on its federal exempt status under IRC, §501(c)(3), (4), (8), (10), or (19), is not required to submit file-stamped copies of its governing documents and certificate of existence unless it is a corporation or limited liability company chartered outside the state of Texas.

(B) IRS documents. If an organization is applying for exemption based on its federal exempt status under IRC, §501(c)(3), (4), (8), (10), or (19), the organization must provide copies of all pages of its IRS determination letter or group exemption ruling letter and include any caveat or addendum that applies. If the original determination letter or group exemption ruling letter is more than four years old, the organization must also include a copy of a recent letter from the IRS to confirm the exemption is still valid. A nonprofit organization that claims exemption under a parent's exemption must provide a copy of the parent organization's IRS group exemption ruling letter and a letter from the parent organization that states the applicant nonprofit organization is a subordinate covered by the parent organization's group exemption.

(3) The comptroller may require an organization to furnish additional information to further clarify the organization's overall purpose and activities to establish the claimed exemption. For example, the comptroller may request a written statement that details the nature of the activities conducted, or to be conducted, financial information, and documentation that shows all services the organization performs.

[(2) The comptroller may require an organization to furnish additional information to establish the claimed exemption. For example, the comptroller may request financial information and documentation that shows all services that the organization performs.]

(4) [~~(3)~~] After a review of the material, the comptroller will inform an organization in writing if it qualifies for exemption.

(5) [~~(4)~~] The comptroller or an authorized representative of the comptroller may audit the records of an organization at any time during regular business hours to verify the validity of the organization's exempt status.

(f) Revocations, withdrawals, or loss of exemptions.

(1) Except as provided in paragraph (2) of this subsection, if at any time the comptroller has reason to believe that an exempt organization no longer qualifies for exemption, a comptroller's representative will notify the organization that its exempt status is under review. A comptroller's representative may request additional information that is necessary to ascertain the continued validity of the organization's exempt status. An organization must immediately notify the comptroller in writing of a revocation, withdrawal, or loss of exemption when the organization no longer qualifies for exemption. If the comptroller determines that an organization is no longer entitled to its exemption, then the comptroller will notify the organization. The date of the notification letter is the effective date of the revocation. All subsequent purchases by the organization are subject to tax.

(2) For nonprofit organizations that are granted an exemption under Tax Code, §151.310(a)(2), the revocation, withdrawal, or loss of the federal income tax exemption automatically terminates the sales tax exemption, effective on [~~the earlier of~~] the date on which the IRS serves formal written notice of the revocation on the nonprofit organization or the date on which the IRS notifies the comptroller, whichever is earlier. All subsequent purchases by the organization are subject to tax.

(A) The effective date of a revocation for a nonprofit organization that was granted an exemption as a recognized subordinate is the date on which the organization ceased to be recognized as a subordinate under the federal group exemption. All subsequent purchases by the organization are subject to tax.

(B) The organization must notify the comptroller in writing of the revocation, withdrawal, or loss of exemption immediately upon receiving notice from the IRS of such revocation, withdrawal, or loss.

(C) Under a federal/state exchange agreement, the IRS may notify the comptroller when an organization no longer qualifies for federal exemption.

(3) An organization that loses its exempt status must immediately notify its suppliers that its purchases are subject to tax. Failure to so notify a supplier is a violation of the sales tax law.

(4) After revocation, the organization may re-apply for exempt status under other provisions of this section.

(g) Purchases by an exempt organization; refund claims and credits. See §3.287 of this title (relating to Exemption Certificates).

(1) The purchase, lease, or rental of a taxable item that relates to the purpose of an exempt organization listed in subsection (b)(1), (2), (3), [~~or~~] (5), (10), (11) or (12) of this section is exempt from tax when the organization or an authorized agent of the organization pays for the item and provides the vendor with an exemption certificate in the form prescribed by the comptroller. [~~See §3.287 of this title (relating to Exemption Certificates).~~]

(2) The purchase, lease, or rental of a taxable item to an exempt organization listed in subsections (c) and (b)(4), (6), (7), (8), or (9) of this section is exempt from tax when the organization or an authorized agent pays for the taxable item and provides the vendor with an exemption certificate in the form prescribed by the comptroller [~~lieu of tax~~].

(3) A purchase voucher issued by any one of the entities identified in subsection (c) of this section is sufficient proof of the entity's exempt status.

(4) An exemption certificate must be given to a vendor when an authorized agent makes a cash purchase of merchandise for an exempt organization.

(5) An employee of an exempt organization cannot claim an exemption from tax when the employee purchases taxable items of a personal nature even though the employee receives an allowance or reimbursement from the organization.

(6) A person who travels on official business for an exempt organization must pay sales tax on taxable purchases whether reimbursed on a per diem basis or reimbursed for actual expenses incurred.

(7) Bingo equipment as defined by Occupations Code, §2001.002, including machinery or devices used to select or hold letters or numbers, electronic or mechanical cardminding devices, pull-tab dispensers, bingo cards, balls, and other devices commonly used in the direct operation of a bingo game, are exempt from sales and use taxes when purchased, leased, or rented by an organization exempt under IRC, §501(c)(3), (4), (8), (10), or (19), and exclusively used to conduct bingo games authorized under Occupations Code, Chapter 2001. Commonly available component parts of bingo equipment such as batteries, light bulbs, and fuses do not qualify for this exemption.

(8) Refund claims and credits by organizations exempted under Tax Code, §151.310.

(A) Qualifying organizations. The following organizations are covered by the provisions of Tax Code, §151.310 and are subject to the provisions of this paragraph:

(i) organizations created for religious, educational, or charitable purposes;

(ii) organizations qualifying for an exemption from federal income taxes under the IRC, §501(c)(3), (4), (8), (10), or (19);

(iii) nonprofit organizations engaged exclusively in providing athletic competition among persons under 19 years old;

(iv) volunteer fire departments; and

(v) chambers of commerce or convention and tourist promotional agencies representing at least one Texas city or county.

(B) Exemption effective dates.

(i) Organizations identified in subparagraph (A) of this paragraph are not considered exempted from sales and use taxes before the earlier of:

(I) the date the organization applied for exemption with the comptroller as evidenced by the postmark date on the organization's qualifying application for exemption as required under subsection (e) of this section; or

(II) the date of assessment of the organization's tax liability by the comptroller as a result of an audit.

(ii) With the exception of entities that qualify for exemption under subsection (c) of this section, organizations' exemption effective dates can be verified by using the comptroller's Texas Tax-Exempt Entity Search located on the agency's Web site.

(C) Refund claims by organizations with exemption effective dates prior to September 1, 2009. Organizations identified in

subparagraph (A) of this paragraph with an exemption effective date prior to September 1, 2009 may request a refund or credit for sales and use taxes paid in error, retroactive to the effective date of the organization's exemption or the four-year statute of limitations, whichever date is more recent.

(D) Refund claims by organizations with exemption effective dates on or after September 1, 2009. Organizations identified in subparagraph (A) of this paragraph with an exemption effective date on or after September 1, 2009 are not eligible to request a refund or credit for sales or use tax paid between September 1, 2009 and the exemption effective date. If the comptroller has determined the organization with an exemption effective date on or after September 1, 2009, has met the requirements for exemption from the sales tax under Tax Code, §151.310 for a period prior to September 1, 2009, the organization may request a refund or credit for sales and use taxes paid in error on purchases made between the earliest date the comptroller determined the organization met the requirements for the exemption or the four-year statute of limitations, whichever is more recent, and August 31, 2009.

(E) See §3.325 of this title (relating to Refunds and Payments Under Protest) for more information about how to claim a refund and §3.339 of this title (relating to Statute of Limitations).

(h) Sales by an exempt organization.

(1) An exempt organization that sells taxable items must obtain a sales tax permit and is responsible for collection and remittance of tax on all sales of taxable items that the organization makes, unless otherwise provided by this subsection or unless such sales are otherwise exempt from the tax. See §3.293 of this title (relating to Food; Food Products; Meals; Food Service), §3.299 of this title (relating to Newspapers, Magazines, Publishers, Exempt Writings), and §3.298 of this title (relating to Amusement Services).

(2) A religious, educational, charitable, or eleemosynary organization, or an organization exempt under IRC, §501(c)(3), (4), (8), (10), or (19), and each of its bona fide chapters, may have two one-day tax-free sales or auctions each calendar year. During a tax-free sale or auction lasting only one day, the organization is not required to collect sales tax on the sales price of taxable items sold for $5,000 or less. Additionally, a taxable item may be sold tax-free during a one-day tax-free sale or auction regardless of price if the item is manufactured by the organization or is donated to the organization and is not sold to the donor.

(A) One day is a consecutive 24-hour period. If a designated tax-free sale or auction exceeds a consecutive 24-hour period, the organization or chapter may not hold another tax-free sale or auction during that calendar year. An organization or chapter may hold the two tax-free sales or auctions consecutively, but the two tax-free sales or auctions by that organization or chapter cannot exceed a maximum of 48 consecutive hours in a calendar year.

(B) The organization may employ an auctioneer to conduct the sale or auction and pay the auctioneer a reasonable fee not to exceed 20% of the gross receipts.

(C) If two or more exempt organizations or chapters jointly hold a tax-free sale or auction, each is considered to have held a tax-free sale or auction during that calendar year. Each exempt organization that participates in a joint tax-free sale or auction may hold one additional tax-free sale or auction during that calendar year.

(3) Fundraisers. Exempt entities engaged in fundraising activities in conjunction with for-profit entities are not the sellers of any taxable items and do not need to be permitted to collect and remit tax on such sales. See §3.286 of this title (relating to Seller's and Purchaser's Responsibilities, including Nexus, Permits, Returns and Reporting Periods, Collection and Exemption Rules, and Criminal Penalties).

(4) [~~(3)~~] Sales by agencies and instrumentalities of the federal government are subject to tax, and the agencies and instrumentalities must collect and remit tax unless the collection of tax is specifically prohibited by federal law. If the collection is prohibited by specific federal law, the purchaser of the taxable item shall be liable for reporting and paying the tax directly to the state.

(5) Sales of governmental publications, records, or documents.

(A) When a governmental body is required to furnish a copy of any document under the Open Records Act, the transaction is not considered the sale of a taxable item. Sales tax is not due on any fee charged by the governmental body for furnishing one or more copies, regardless of whether the copies are certified or the fee is established by statute, ordinance, public official, or state agency.

(B) Sales tax is not due on the fee charged by a governmental body for furnishing a copy or copies of a document not open to public inspection to a person who is authorized to obtain a copy or copies of such document. For example, sales tax is not due on the fee charged by a college for furnishing a student's academic transcript to the student or on the fee charged by the Department of State Health Services for furnishing a person a copy of the person's birth certificate.

(C) Unless such sales are otherwise exempt, sales tax is due on sales of regular publications, records, or general information by a governmental body, even though such publications, records, or information may be open or available to the public by statute. For example, textbooks sold by a state university and magazine subscriptions sold by a state agency are taxable. See §3.299 of this title.

(D) Sales tax collected by state agencies must be remitted in accordance with comptroller accounting requirements.

(i) Organizations that do not qualify for exempt status. Examples of organizations that cannot qualify for exempt status include professional groups, certain mutual benefit or social groups, and political, trade, business, bar, or medical associations. However, certain sales by certain organizations may be exempt. For information on exempt sales by senior citizens' organizations, [~~or exempt sales by~~] student organizations affiliated with a college or university, or nonprofit animal shelters, see §3.316 of this title (relating to Occasional Sales; Joint Ownership Transfers; Sales by Senior Citizens' Organizations; Sales by University and College Student Organizations; and Sales by Nonprofit Animal Shelters [~~and Other Tax-Free Sales~~]).

(j) Diplomatic tax exemptions [~~Consular officers, administrative, and technical employees~~].

(1) Sales tax exemptions provided to foreign diplomatic and consular personnel [~~Foreign diplomatic personnel stationed~~] in the United States are governed by international and federal law as administered [~~exempt from the payment of sales or use tax if they hold a photo-identification card issued~~] by the United States Department of State's Office of Foreign Missions [~~State. Cards are not transferable and may not be used by others, including spouses~~].

(2) Types of exemption cards.

(A) Mission tax exemption cards. Mission tax exemption cards can only be used for official purchases by a foreign consulate or embassy. All purchases must be made in the name of the mission and paid for by a mission check or credit card, not by cash or personal check. The person whose name and photo appear on the card is responsible for ensuring the accuracy of the exemption, but does not need to be present when purchases are made in the name of the mission.

(B) Personal tax exemption cards. Only the person whose photo appears on the front side of the card is permitted to use it to purchase the exempted items that are identified on the card. Personal tax exemption cards are not transferable and may not be used by others.

(3) [~~(2)~~] Procedures [~~Procedure~~] for retailers.

(A) Diplomatic tax exemption cards must be presented to the seller at the time of sale for the exemption to apply. If the exemption is not claimed at the time of sale, the comptroller will not refund tax paid on an item which qualifies for a diplomatic tax exemption. The card must be signed.

(B) [~~(A)~~] To document the sale of an item subject to a diplomatic tax exemption, a [~~A~~] retailer should retain a copy of the sales invoice or contract that bears the identification number appearing on the diplomatic tax exemption card or should make a photocopy of the front and back of the card [~~signed by the consular official that bears the consular exemption certificate number appearing on the back of the card~~].

(C) [~~(B)~~] Certain diplomatic exemption cards are limited to [~~in~~] what and how much may be purchased tax free or may require a minimum purchase before the exemption can be claimed. This information is contained on the diplomatic exemption card itself. Retailers who make sales to persons with cards that require purchases to exceed a certain dollar limit should include only those taxable items that are purchased in the same transaction to determine if the appropriate level has been reached. Purchases made in separate transactions may not be added together to reach minimum exemption levels. Neither type of card identified in paragraph (2) of this subsection can be used to obtain the tax free sale of utilities.

(k) The Alabama-Coushatta, Kickapoo, and [~~the~~] Tigua Native American tribes.

(1) The purchase, lease, or rental of a taxable item to a tribal council or a business owned by a tribal council of these Native American tribes is exempt from sales tax. An exemption certificate or purchase order from the tribal council is sufficient proof of the exempt sale.

(2) Sales made by a tribal council or a business owned by a tribal council of these Native American tribes within the boundaries of the reservation are exempt from sales tax if:

(A) the taxable item being sold is made by a member of the tribe; and

(B) the taxable item is a cultural artifact of the tribe.

(3) Sales made off the reservation or sales made on the reservation of items that are not cultural artifacts are taxable.

(l) Bordering states and governmental units of states that border Texas.

(1) The State of Arkansas, State of Louisiana, State of New Mexico, and State of Oklahoma, or a governmental unit of any of those bordering states [~~a state that borders Texas~~] may qualify for exemption on the purchase, lease, or rental of taxable items, but only to the extent that the bordering state or governmental unit of the bordering [~~a~~] state [~~that borders Texas~~] exempts or does not impose a tax on similar sales of items to the State of Texas or a political subdivision of the State of Texas.

(2) A bordering state or a governmental unit of a bordering state [~~that borders Texas~~] may enter into a reciprocal agreement with the comptroller for the exemption of taxable items purchased, leased, or rented to the State of Texas or a political subdivision of the State of Texas.

(3) The purchase, lease, or rental of a taxable item to a bordering state or a governmental unit of a bordering state is exempt from sales tax to the extent allowed under the terms of the reciprocal agreement. An exemption certificate from a qualifying bordering state or a governmental unit of a bordering state is sufficient proof of the exempt sale.

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 December 15, 2010.

TRD-201007130
Ashley Harden
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: January 30, 2011
For further information, please call: (512) 475-0387

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34 TAC §3.325

(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 Comptroller of Public Accounts or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Comptroller of Public Accounts proposes the repeal of §3.325, concerning refunds, interest and payments under protest. The existing §3.325 is being repealed so that the content can be updated in a new §3.325 to incorporate legislative changes and policy clarifications and to improve clarity and readability.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the repeal of the rule will be in effect, the repeal will not result in any fiscal implications to the state or to units of local government.

Mr. Heleman also has determined that for each year of the first five years the repeal of the rule is in effect, the repeal would benefit the public by providing taxpayers with a new rule that will clarify agency policy and improve rule readability. There would be no anticipated significant economic cost to the public. This repeal is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There are no additional costs to persons who are required to comply with the repeal.

Comments on the repeal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This repeal 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 Tax Code, Title 2.

The repeal implements Tax Code, §111.064.

§3.325. Refunds, Interest, and Payments Under Protest (Tax Code §111.104(d)).

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

Filed with the Office of the Secretary of State on December 15, 2010.

TRD-201007131
Ashley Harden
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: January 30, 2011
For further information, please call: (512) 475-0387

♦ ♦ ♦

34 TAC §3.325

The Comptroller of Public Accounts proposes new §3.325, concerning refunds and payments under protest. The new section replaces the existing §3.325, which is being repealed to update the content to reflect legislative changes and policy clarifications and to reorganize information to improve clarity and readability as follows:

Subsection (a) identifies who can file refund claims and the procedures for making those claims. Paragraph (1) explains refund claim requirements and procedures for non-permitted purchasers. It states expressly that a permitted seller can assign its right to refund to a non-permitted purchaser. Paragraph (2) explains refund claim requirements and procedures for permitted sellers. Pursuant to Senate Bill 1199, 81st Legislature, 2009, which created new Tax Code, §151.4261, paragraph (2)(A) reflects that a permitted seller is entitled to claim a credit or request a refund of sales tax equal to the amount of sales tax refunded to a purchaser when the purchaser receives a full or partial refund of the sales price of a returned taxable item. The agency recognizes that §151.4261 appears to conflict with existing Tax Code, §151.007(c)(2), but believes it is the legislature's intent that new §151.4261 is the controlling statute and is adopting this rule to implement that intent. Paragraph (3) explains refund claim requirements and procedures for permitted purchasers. It addresses longstanding policy that purchasers who claim refunds directly from the comptroller or take credits on returns must be permitted at the time of the transactions giving rise to the refund claim. It also explains that overpayments of tax in error may be calculated by a sample and projection methodology approved by the comptroller. Paragraph (4) defines what it means to "state fully and in detail" the requirements for filing a refund claim with the comptroller. Under Tax Code, §151.022, the provisions of this paragraph are prospective in application from the effective date of the rule and, therefore, will apply to refund claims filed on or after that date.

Subsection (b) explains the statute of limitations requirements for refund claims. It reflects the change made by House Bill 2425, 78th Legislature, 2003 that an informal review of a refund claim does not toll the statute of limitations for the same period and type of tax previously denied in part or in whole by the comptroller. It also provides a cross-reference to another section of this title with information about limitations on refund claims for organizations that are exempt from sales and use tax under Tax Code, §151.310, as required by Senate Bill 1199, 81st Legislature, 2009.

Subsection (c) identifies the types of transactions that are eligible for refund claims, the applicable interest rates, and how interest is calculated. It implements legislative changes made by Senate Bill 1570, 79th Legislature, 2005.

Subsection (d) explains how to determine when a refund claim is filed.

Subsection (e) explains a person's rights when the comptroller denies a refund claim.

Subsection (f) explains the requirements for making payments under protest prior to filing suit under Tax Code, Chapter 112.

John Heleman, 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. Heleman 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 by providing taxpayers with clarifications of agency policy and improved readability. This rule is proposed under 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 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 Tax Code, Title 2.

The proposed new section implements Tax Code, §111.064 (Interest on Refund or Credit), §111.104 (Refunds), §111.1042 (Tax Refund: Informal Review), §111.105 (Tax Refund: Hearing), §111.107 (When Refund or Credit is Permitted), §111.203 (Agreements to Extend Period of Limitation), §112.051 (Protest Payment Required), and §151.4261 (Credit or Reimbursement in Return Transactions).

§3.325. Refunds and Payments Under Protest.

(a) Requirements for refund claims.

(1) Refund claims by non-permitted purchasers. A person who does not have a sales and use tax permit and who has paid tax in error to a permitted seller may request a refund from only the permitted seller to whom the tax was paid. The permitted seller who refunds tax to a purchaser may claim a refund as provided by paragraph (2) of this subsection. A permitted seller may assign its right to refund to the purchaser, who may then request a refund directly from the comptroller as provided by paragraph (4) of this subsection.

(2) Refund claims by permitted sellers.

(A) With one exception relating to the return transactions, no taxes, penalties, or interest will be refunded by the comptroller to a permitted seller who has collected tax in error from a purchaser until all such taxes are first refunded or credited with the purchaser's written consent to the person from whom they were collected. If the refund claim relates to a return of tangible personal property, a permitted seller is entitled to claim a credit or request a refund of sales tax equal to the amount of sales tax refunded to a purchaser when the purchaser receives a full or partial refund of the sales price of a taxable item that is returned to the seller.

(B) Before a permitted seller refunds to a purchaser tax collected in error on the sale of a taxable item, the permitted seller must obtain from the purchaser a properly completed exemption or resale certificate that meets all the requirements of §3.285 of this title (relating to Resale Certificate; Sales for Resale) and §3.287 of this title

(relating to Exemption Certificates). The permitted seller must retain the certificate to document the basis for the refund.

(C) After the permitted seller has refunded or credited the tax to the account of the purchaser, the permitted seller may then seek reimbursement from the comptroller in accordance with the procedures that are outlined in paragraph (4) of this subsection or take a credit on a future sales and use tax return filed by the seller in the amount refunded or credited to the account of the purchaser.

(D) Refunds on exports. See §3.323 of this title (relating to Imports and Exports) for information about amounts a seller can refund on taxable items that are exported by a purchaser.

(3) Refund claims by permitted purchasers.

(A) How to file a refund claim. A permitted purchaser may amend a return for the period in which an overpayment was made, file a refund claim with the comptroller according to the requirements of paragraph (4) of this subsection, or take a credit on a future sales and use tax return filed by the purchaser for taxes paid in error to a permitted seller. The permitted purchaser must have been permitted at the time the tax paid in error was due and payable in order to claim a refund directly from the comptroller, amend a return for the period in which an overpayment was made, or to take a credit on a future sales and use tax return. If the permitted purchaser was not permitted at the time the tax paid in error was due and payable, the permitted purchaser must be assigned the right to refund by the permitted seller and must file a refund claim with the comptroller for the assigned taxes that meets the requirements in paragraph (4) of this subsection.

(B) Sample and projection method of calculating refund claims. A permitted purchaser who paid tax in error to a permitted seller may compute the amount of overpayment by use of a projection based on a sampling of transactions and on a method that complies with generally accepted sampling methods as approved by the comptroller. The purchaser must have been permitted for the entire period included in the projection. The method by which the projection and computation were performed must be retained and be made available upon request of the comptroller.

(C) Credits.

(i) Reports and documentation. A permitted purchaser who paid tax in error to a permitted seller and who takes credits on tax returns is required to report the total amount of tax credit being taken and the earliest date of the tax paid in error on a supplemental sales tax report prescribed by the comptroller. The permitted purchaser must retain, for the period required in Tax Code, Chapter 111, all documentation that is necessary to support the credit claimed.

(ii) Credits allowed on certain purchases. See §3.338 of this title (relating to Multistate Tax Credits and Allowance of Credit for Tax Paid to Suppliers) for additional rules about credits that can be claimed by permitted purchasers.

(4) A person who requests a refund from the comptroller must:

(A) submit a claim in writing that identifies the period during which the claimed overpayment was made and must state fully and in detail the specific grounds upon which the claim is based, including, at a minimum, each of the following about each transaction upon which a refund is requested:

(i) purchaser or seller's name, as appropriate;

(ii) invoice number, if applicable;

(iii) date of transaction;

(iv) description of the item(s) purchased or sold;

(v) specific reason for the refund, such as applicable statutory authority;

(vi) purchase or sale amount subject to refund;

(vii) total amount of tax refund requested;

(viii) identification of all local jurisdictions to which tax was remitted; and

(ix) if requesting a refund for taxes paid in error to a permitted seller, the seller's name, address and sales tax permit number or information that allows the comptroller to identify the seller's sales tax permit number;

(B) submit the claim within the applicable limitations period as provided by subsection (b) of this section; and

(C) submit supporting documentation required by the comptroller to verify any refund claimed or credit taken.

(b) Statute of limitations for refund claims.

(1) Unless otherwise indicated by this section, a claim for refund must be made within four years from the date on which the tax was due and payable as provided by Tax Code, §151.401.

(2) A claim for refund for tax paid pursuant to a deficiency determination must be made by the later of:

(A) four years from the date on which the tax was due and payable; or

(B) six months after the date on which the deficiency determination for the periods becomes final, and is subject to the restriction imposed by paragraph (3) of this subsection.

(3) A refund claim filed within six months after the date on which a deficiency determination becomes final is within the limitations period for all items included in the deficiency determination. A refund claim for all other items is subject to the limitations period in paragraph (1) of this subsection.

(4) Extension of limitations period. Before the expiration of the statute of limitations, the comptroller and a taxpayer may agree in writing to extend the limitation period in accordance with Tax Code, §111.203. An extension applies only to the periods specifically mentioned in the agreement and no single extension agreement may be for a period that exceeds 24 months from the date of the expiration of the limitations period being extended. Any refund request pertaining to periods for which limitations have been extended must be made prior to the expiration date of the agreement. Following expiration of the agreement, the statute of limitations applies to subsequent refund requests as if no extension had been authorized.

(5) A redetermination or refund proceeding does not toll the statute of limitations, except for the issues contested.

(6) Failure to file a claim within the limitations prescribed by this section constitutes a waiver of any demand against the state on account of the overpayment.

(7) The informal review of a refund claim by the comptroller is not a hearing or contested case and does not toll the limitation period for any subsequent claim for refund on the same period and type of tax for which the claim was fully or partially denied.

(8) For more information about the statute of limitations, see §3.339 of this title (relating to Statute of Limitations).

(9) Limitations on refunds and credits claimed by organizations exempt from sales and use tax under Tax Code, §151.310. Or-

ganizations that are exempt from sales and use tax under Tax Code, §151.310 should see §3.322 of this title (relating to Exempt Organizations) for information about limitations on refunds and credits that may be claimed depending on whether the organization qualifies for exemption before or after September 1, 2009.

(c) Interest on Refunds.

(1) Eligibility for Interest. Interest is earned on refunds except in the following situations:

(A) a refund claim for a period for which a report is due before January 1, 2000;

(B) credits taken by a taxpayer on a return;

(C) tax paid on an account that is later determined to be uncollectable and written off as a bad debt for federal tax purposes. See §3.302 of this title (relating to Accounting Methods, Credit Sales, Bad Debt Deductions, Repossessions, Interest on Sales Tax, and Trade-Ins); and

(D) as otherwise determined by the comptroller.

(2) Interest rates.

(A) Refunds claimed before September 1, 2005. The interest rate for a refund that is claimed before September 1, 2005 and granted for a period for which a report is due after December 31, 1999 is the rate set in Tax Code, §111.060, as provided in Tax Code, §111.064.

(B) Refunds claimed on or after September 1, 2005. The interest rate for a refund that is claimed on or after September 1, 2005 and granted for a period for which a report is due after December 31, 1999 is the lesser of the annual rate of interest earned on deposits in the state treasury during December of the previous calendar year as determined by the comptroller or the rate set in Tax Code, §111.060, as provided in Tax Code, §111.064.

(3) Calculation of Interest. Interest accrues on refund claims identified in paragraph (1) of this subsection at a rate determined by paragraph (2) of this subsection on the net amount that is found to be erroneously paid:

(A) beginning on the later of 60 days after the date of payment or the due date of the tax report; and

(B) ending, as determined by the comptroller, on either:

(i) the date of allowance of credit that results from either a final decision that the comptroller has issued or from an audit; or

(ii) a date that is not more than 10 days before the date of the refund warrant.

(d) Determining when a refund is claimed.

(1) The postmark date or its equivalent on a refund request determines when a refund is claimed.

(2) If refund claims or credits are pending with the comptroller and a person makes additional claims for refund, the date of each claim controls whether interest is due and the amount applicable to each separate claim.

(e) Denial of refund claim.

(1) The comptroller will notify the claimant if the comptroller determines that a refund claim cannot be granted in part or in full. The claimant may request a refund hearing within 30 days of the denial.

(2) A person may not refile a refund claim for the same transaction or item, tax type, period, and ground or reason that was previously denied by the comptroller.

(f) Payments under protest. A person who intends to file suit under Tax Code, Chapter 112, Subchapter B, must submit to the comptroller a letter of protest with the payment of the tax that is the subject of the protest. For information about payments under protest and electronic funds transfer payments, see §3.9(h) of this title (relating to Electronic Filing of Returns and Reports; Electronic Transfer of Certain Payments by Certain Taxpayers). The letter of protest must state fully and in detail every reason that the taxpayer contends that the assessment is unlawful or unauthorized and must accompany the payment. If the payment and letter of protest do not accompany one another, the payment will not be deemed to have been made under protest. The comptroller will advise the taxpayer of the amount of payment under protest that the comptroller has received and the date of the payment.

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

Filed with the Office of the Secretary of State on December 15, 2010.

TRD-201007132
Ashley Harden
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: January 30, 2011
For further information, please call: (512) 475-0387

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34 TAC §3.339

(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 Comptroller of Public Accounts or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Comptroller of Public Accounts proposes the repeal of §3.339, concerning statute of limitations. The existing §3.339 is being repealed so that the content can be updated in a new §3.339 to incorporate legislative changes and policy clarifications, and to improve clarity and readability.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the repeal of the rule will be in effect, the repeal will result in any fiscal implications to the state or to units of local government.

Mr. Heleman also has determined that for each year of the first five years the repeal of the rule is in effect, the repeal would benefit the public by providing taxpayers with a new rule that will clarify agency policy and improve rule readability. There would be no anticipated significant economic cost to the public. This repeal is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There are no additional costs to persons who are required to comply with the repeal.

Comments on the repeal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This repeal 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 Tax Code, Title 2.

The repeal implements Tax Code §§111.017, 111.020, 111.1042, 111.107, 111.202, 111.203, 111.205, 111.2051, 111.206, 111,207, 151.507, 151.601, and 151.607.

§3.339. Statute of Limitations.

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 December 15, 2010.

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Ashley Harden
General Counsel
Comptroller of Public Accounts
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For further information, please call: (512) 475-0387

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34 TAC §3.339

The Comptroller of Public Accounts proposes new §3.339, concerning statute of limitations. The new section replaces the existing §3.339, which is being repealed so that the content is updated to reflect legislative changes and policy clarifications, and to reorganize information to improve clarity and readability as follows:

Subsection (a)(1) defines the general statute of limitations for assessments and clarifies agency policy. Subsection (a)(2) identifies the exceptions to the general statute of limitations, including the 73rd Legislature, 1993, amendment to §111.205 concerning the definition of gross error. Subsection (a)(3) reflects the 73rd Legislature, 1993, repeal of §111.2054 and addition of §111.2051 relating to assessments when refunds are claimed.

Subsection (b) provides for an extension to the statute of limitations by agreement between the comptroller and a taxpayer and includes clarification of agency policy.

Subsection (c) reflects legislative changes made by House Bill 2425, 78th Legislature, 2003, relating to events that may toll the statute of limitations.

Subsection (d) provides a cross-reference to §3.325(b) of this title (relating to Refunds and Payments under Protest) which defines the statute of limitations for refund claims so that provisions relating to the statute of limitations and refund claims are located in one rule rather than two.

Subsection (e) defines the statute of limitations for the comptroller to make an assessment in cases of successor liability.

Subsections (f), (g), and (h) address limitations periods relating to suits for collection, notices of delinquency, and seizure, respectively.

Subsection (i) provides that the comptroller's remedies are cumulative.

John Heleman, 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. Heleman 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 by providing taxpayers with clarifications of agency policy and improved readability. This rule is proposed under 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 Tax Code, Title 2.

The new section implements Tax Code, §111.017 (Seizure and Sale of Property), §111.020 (Tax Collection on Termination of Business), §111.202 (Suit Limitation), §111.203 (Agreements to Extend Period of Limitation), §111.205 (Exception to Assessment Limitation), §111.2051 (Assessment When Refund is Claimed), §111.206 (Exception to Limitation: Determination Resulting From Administrative Proceeding), §111.207 (Tolling of Limitation Period), §151.507 (Limitations on Determination), §151.601 (Suit), and §151.607 (Limitation Period).

§3.339. Statute of Limitations.

(a) Assessments.

(1) Except as otherwise provided in this section, the comptroller has four years from the date a tax becomes due and payable to assess a deficiency tax liability. For information as to when a tax becomes due and payable, see §3.286 of this title (relating to Seller's and Purchaser's Responsibilities, including Nexus, Permits, Returns and Reporting Periods, Collection and Exemption Rules, and Criminal Penalties).

(2) The statute of limitations does not apply and the comptroller may assess and collect taxes, penalties, and interest at any time against a taxpayer if:

(A) the taxpayer files a false or fraudulent sales tax return with the intent to evade the tax;

(B) the taxpayer fails to file a sales tax return; or

(C) the taxpayer files a sales tax return that has a gross error. A gross error exists when the amount of tax due and payable, after the correction of error, exceeds the amount of tax reported on the return by at least 25%.

(3) The statute of limitations does not apply to any period for which a taxpayer has filed a timely claim for a sales tax refund if, while investigating the merits of the refund claim, the comptroller determines that additional tax is due. The assessment for the additional tax determined to be due for that period must be made within four years from the date the claim for refund was filed.

(b) Extension of limitations period. Before the expiration of the statute of limitations, the comptroller and a taxpayer may agree in writing to extend the limitation period in accordance with Tax Code, §111.203. An extension applies only to the periods specifically mentioned in the agreement and no single extension agreement may be for a period that exceeds 24 months from the date of the expiration of the period being extended. Any assessment or refund request pertaining to periods for which limitations have been extended must be made prior to the expiration date of the agreement. Following expiration of the

agreement, the statute of limitations applies to subsequent assessments and refund requests as if no extension had been authorized.

(c) Tolling of limitations. In computing the expiration date of a limitation period, the following periods are not considered:

(1) the period following the date of the protest payment to the date of the timely filed lawsuit in district court suspends the statute of limitations for the same contested issues raised;

(2) the period during which a judicial proceeding involving a protest suit is pending suspends the statute of limitations for the same contested issues raised;

(3) the period during which an administrative redetermination or refund hearing is pending suspends the statute of limitations for the same contested issues raised; and

(4) the period during which a bankruptcy proceeding commenced under United States Code, Title 11 is pending suspends the statute of limitations.

(d) Refunds. For information on the statute of limitations for refunds, see §3.325(b) of this title (relating to Refunds and Payments Under Protest).

(e) Successor liability. The comptroller may assess tax against the successor of a business if, at the time the business or stock of goods was acquired, the seller of the business had an outstanding sales tax liability with the state. The assessment must be made within four years from the date of the sale of the business to the successor or from the date a determination against the seller becomes final, whichever event occurs later. For information on successor liability, see §3.7 of this title (relating to Successor Liability: Liability Incurred by Purchase of a Business).

(f) Suit for collection. Within three years from the date that a deficiency or jeopardy determination becomes due and payable, or within three years after the last recording of a lien, the comptroller may file suit for collection of the taxes, penalties and interest. If a redetermination hearing is requested, the determination will not become final until a redetermination decision is issued and becomes final.

(g) Notice of delinquency. Within three years from the date that a deficiency determination becomes due and payable, a jeopardy determination becomes final, the last recording of a lien, or a redetermination decision becomes final, the comptroller may give notice of delinquency to all persons who have in their possession or under their control any credits or other personal property belonging to the delinquent, or who owe any debts to the delinquent.

(h) Seizure. Within three years from the date that a deficiency determination becomes due and payable, a jeopardy determination becomes final, or a redetermination decision becomes final, the comptroller may seize any property of the delinquent and sell the property, or a sufficient part of it, at public auction to pay the taxes, penalties, and interest due.

(i) Remedies cumulative. The remedies of the state are cumulative and no action taken by the comptroller or the attorney general constitutes an election by the state to pursue any remedy to the exclusion of any other remedy for which provision is made.

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

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Ashley Harden
General Counsel
Comptroller of Public Accounts
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For further information, please call: (512) 475-0387

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CHAPTER 9. PROPERTY TAX ADMINISTRATION

SUBCHAPTER H. TAX RECORD REQUIREMENTS

34 TAC §9.3031

The Comptroller of Public Accounts proposes an amendment to §9.3031, concerning rendition forms. This section is being amended to change the title of the General Real Estate Rendition of Taxable Property Form and to increase administrative efficiency by providing for comptroller revision of applicable forms.

John Heleman, 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. Heleman 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 by improving the administration of local property tax valuation and taxation. The proposed amendment would have no fiscal impact on small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the amendment may be submitted to Deborah Cartwright, Director, Property Tax Assistance Division, P.O. Box 13528, Austin, Texas 78711-3528.

This amendment is proposed pursuant to Tax Code, §22.24.

This amendment implements Tax Code, §22.24.

§9.3031. Rendition Forms.

(a) All appraisal offices and all tax offices appraising property for purposes of ad valorem taxation shall prepare and make available at no charge, printed or electronic forms for the rendering of property.

(b) A person rendering property shall use the model form adopted by the Comptroller of Public Accounts or a form containing information which is in substantial compliance with the model form if approved by the comptroller.

(c) Nothing in this section shall be construed to prohibit the combination of the information contained on two or more model forms into a single form in order to use a single form to achieve substantial compliance with two or more model forms.

(d) The comptroller's model forms applicable to this section may be revised at the discretion of the comptroller. Current forms can be obtained from the Comptroller of Public Accounts' Property Tax Assistance Division. [~~The model rendition forms for various categories of property in paragraphs (1) - (17) of this subsection are adopted, as amended, by the comptroller by reference. Copies of these forms are available for inspection at the offices of the Texas Register or may be obtained from the Comptroller of Public Accounts, P.O. Box 13528, Austin, Texas 78711. Copies may also be requested by calling toll-free~~

~~1-800-252-9121. In Austin, call (512) 305-9999.~~] The model rendition forms are:

(1) General Real Property [~~Estate~~] Rendition of Taxable Property (Form 50-141);

(2) General Personal Property Rendition of Taxable Property-Non Incoming Producing (Form 50-142);

(3) Report of Leased Space for Storage of Personal Property (Form 50-148);

(4) Industrial Real Property Rendition of Taxable Property (Form 50-149);

(5) Oil and Gas Lease Rendition of Taxable Property (Form 50-150);

(6) Mine and Quarry Real Property Rendition of Taxable Property (Form 50-151);

(7) Telephone Company Rendition of Taxable Property (Form 50-152);

(8) REA-Financed Telephone Company Rendition of Taxable Property (Form 50-153);

(9) Electric Company and Electric Cooperative Rendition of Taxable Property (Form 50-154);

(10) Gas Distribution Utility Rendition of Taxable Property (Form 50-155);

(11) Railroad Rendition of Taxable Property (Form 50-156);

(12) Pipeline and Right-of-Way Rendition of Taxable Property (Form 50-157);

(13) Business Personal Property Rendition of Taxable Property (Form 50-144);

(14) Watercraft Rendition of Taxable Property (Form 50-158);

(15) Aircraft Rendition of Taxable Property (Form 50-159);

(16) Mobile Homes Rendition of Taxable Property (Form 50-160); and

(17) Residential Real Property Inventory (Form 50-143).

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 December 17, 2010.

TRD-201007178
Ashley Harden
General Counsel
Comptroller of Public Accounts
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For further information, please call: (512) 936-6472

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 35. PRIVATE SECURITY

SUBCHAPTER C. STANDARDS

37 TAC §35.46

The Texas Department of Public Safety (the department) proposes amendments to §35.46, concerning Guidelines for Disqualifying Convictions, in order to clarify that all assaultive offenses are related to the provision of private security services, and are therefore potentially disqualifying from licensure under the Private Security Act, Chapter 1702 of the Texas Occupations Code, in compliance with the requirements of Chapter 53 of the Texas Occupations Code. This rule provides additional guidance to the regulated community, prospective applicants, and department staff, regarding the types of criminal offenses that are disqualifying under the Act.

Cheryl MacBride, Deputy Director, Services, has determined that for each year of the first five-year period the rule is in effect there will be no significant fiscal implications for state or local government, or local economies.

Ms. MacBride also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rule as proposed. There are no anticipated economic costs to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. MacBride 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 greater clarity in the eligibility criteria, and therefore greater efficiency in the manner in which the department administers the statute. There should be no economic costs resulting from the amendment of this rule.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Steve Moninger, Office of Regulatory Counsel, P.O. Box 2047, MSC-0246, Austin, Texas 78765-0246, (512) 424-5842. Written comments must be received no later than thirty (30) days from the date of publication of this proposal.

These amendments are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules

to administer this chapter, and Texas Occupations Code, §1702.004(b), which required the original adoption of this rule.

The proposed amendments affect Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.004(b).

§35.46. Guidelines for Disqualifying Convictions.

(a) (No change.)

(b) Therefore, the Private Security Board (the board) has determined that offenses of the following types directly relate to the duties and responsibilities of those who are licensed under the Private Security Act. Such offenses include those crimes under the laws of another state or the United States, if the offense contains elements that are substantially similar to the elements of an offense under the laws of this state. Such offenses also include those "aggravated" or otherwise enhanced versions of the listed offenses.

(c) The following list is intended to provide guidance only, and is not exhaustive of either the offenses that may relate to a particular regulated occupation or of those that are independently disqualifying under Occupations Code, §53.021(a)(2) - (4). In addition, after due consideration of the circumstances of the criminal act and its relationship to the position of trust involved in the particular licensed occupation, the board [~~Board~~] may find that a conviction not described below also renders a person unfit to hold a license.

(1) - (4) (No change.)

(5) Assault of any type, if classified as a Class A misdemeanor or greater under the Texas Penal Code, or similar law of another state.

(6) [~~(5)~~] Blackmail.

(7) [~~(6)~~] Bribery.

(8) [~~(7)~~] Burglary.

(9) [~~(8)~~] Counterfeiting.

(10) [~~(9)~~] Embezzlement.

(11) [~~(10)~~] Extortion.

(12) [~~(11)~~] False pretenses.

(13) [~~(12)~~] Forgery.

(14) [~~(13)~~] Fraud against revenue or other government functions.

(15) [~~(14)~~] Fraud, including intent to defraud.

(16) [~~(15)~~] Harboring a fugitive from justice (with guilty knowledge).

(17) [~~(16)~~] Indecency with a child.

(18) [~~(17)~~] Kidnapping.

(19) [~~(18)~~] Larceny (grand or petty).

(20) [~~(19)~~] Mail fraud.

(21) [~~(20)~~] Malicious destruction of property.

(22) [~~(21)~~] Manslaughter - Voluntary.

(23) [~~(22)~~] Murder.

(24) [~~(23)~~] Perjury.

(25) [~~(24)~~] Rape, or Sexual Assault.

(26) [~~(25)~~] Receiving stolen goods (with guilty knowledge).

(27) [~~(26)~~] Robbery.

(28) [~~(27)~~] Tax evasion (willful).

(29) [~~(28)~~] Theft (when it involves the intention of permanent taking).

(30) [~~(29)~~] Transporting stolen property (with guilty knowledge).

(31) [~~(30)~~] In addition:

(A) An attempt to commit a crime listed in subsection (c) of this section;

(B) Aiding and abetting in the commission of a crime listed in subsection (c) of this section; and

(C) Being an accessory (before or after the fact) to a crime listed in subsection (c) of this section.

(d) - (g) (No change.)

(h) In determining the fitness to perform the duties and discharge the responsibilities of the licensed occupation of a person who has been convicted of a crime, the Private Security Bureau, (the bureau) will consider the following:

(1) - (6) (No change.)

(i) - (j) (No change.)

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

Filed with the Office of the Secretary of State on December 16, 2010.

TRD-201007136
Duncan R. Fox
Interim General Counsel
Texas Department of Public Safety
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For further information, please call: (512) 424-5848

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SUBCHAPTER F. ADMINISTRATIVE HEARINGS

37 TAC §35.93

The Texas Department of Public Safety (the department) proposes amendments to §35.93, concerning Penalty Range, in order to comply with the statutory mandate provided through the 81st Legislature's amendment of Texas Occupations Code, §1702.402, requiring a rule-based standardized penalty schedule. *See* H.B. 2730, §4.100. This rule will provide guidance to the Private Security Bureau staff and the regulated industry regarding the fines associated with various rule and statutory violations by the regulated community.

Cheryl MacBride, Deputy Director, Services, has determined that for each year of the first five-year period the rule is in effect there will be no significant fiscal implications for state or local government, or local economies.

Ms. MacBride also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rule as proposed. There are no anticipated economic costs to individuals who are required to comply

with the rule as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. MacBride 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 more transparency and greater consistency relating to the manner in which the department administers the statute. There should be no economic costs resulting from the amendment of this rule.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Steve Moninger, Office of Regulatory Counsel, P.O. Box 2047, MSC-0246, Austin, Texas 78765-0246, (512) 424-5842. Written comments must be received no later than thirty (30) days from the date of publication of this proposal.

These amendments are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer this chapter.

The proposed amendments affect Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061 and §1702.402(c).

§35.93. Penalty Range.

The board hereby adopts the following as [~~shall develop, utilize, and publish~~] guidelines for administrative penalties to be used in proceedings under Subchapter Q of the Act (§1702.401 et seq.) for violations of the Act and this chapter [~~these rules~~]. The following fines are to be construed as maximum penalties only. In assessing fines, department personnel are encouraged to consider the factors provided in §1702.402 of the Act.

Figure: 37 TAC §35.93

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 December 16, 2010.

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Duncan R. Fox
Interim General Counsel
Texas Department of Public Safety
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For further information, please call: (512) 424-5848

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SUBCHAPTER I. COMMISSIONED SECURITY OFFICERS

37 TAC §35.142

The Texas Department of Public Safety (the department) proposes amendments to §35.142, concerning Application for a Security Officer Commission, in order to authorize the submission of electronic fingerprints and proof of identification issued by other states, and to require documentation of federal firearm qualification, of those applying for security guard commissions. This rule will clarify for prospective applicants and department staff, the documents necessary for an application.

Cheryl MacBride, Deputy Director, Services, has determined that for each year of the first five-year period the rules are in effect there will be no significant fiscal implications for state or local government, or local economies.

Ms. MacBride also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rules as proposed. There are no anticipated economic costs to individuals who are required to comply with the rules as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. MacBride 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 greater efficiency in the manner in which the department administers the statute and greater assurance that those who are licensed to carry a firearm as a security officer are qualified and legally entitled to do so. There should be no economic costs resulting from the amendment of this rule.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Steve Moninger, Office of Regulatory Counsel, P.O. Box 2047, MSC-0246, Austin, Texas 78765-0246, (512) 424-5842. Written comments must be received no later than thirty (30) days from the date of publication of this proposal.

These amendments are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer this chapter.

The proposed amendments affect Texas Government Code, §411.004(3) and Texas Occupations Code, §§1702.163, 1702.1675, and 1702.1685.

§35.142. Application for a Security Officer Commission.

(a) A completed security officer commission application shall be submitted on the most current version of the form provided by the department [~~bureau~~]. The application shall include:

(1) the required fee;

(2) at least two sets of fingerprints on fingerprint cards approved by the department, or submitted electronically through a department approved vendor, [~~obtained from the board~~] and the $25 [~~$25.00~~] FBI Fingerprint Check Fee;

(3) a copy of the applicant's [~~Level I and~~] Level II certificate of completion; and

(4) a copy of the certificate of completion provided to the applicant from a board approved Level III training school;

(5) A state or government-issued identification card, issued by the State of Texas or by the state of the applicant's residence. [~~Texas Driver License and or Texas Identification Certificate issued by the Texas Department of Public Safety.~~]

(6) Applicants who are not United States citizens shall submit a copy of their current alien registration card. Non-resident aliens must also submit a copy of a current work-authorization card and hunting license, or other documents establishing the right to possess firearms under federal law.

(b) Incomplete applications cannot be processed and will be returned for clarification or missing information.

(c) The employer shall affix one recent color photograph to the pocket card when received from the board. The photograph shall be 1" x 1 1/4". This subsection will not apply to those who have a driver's license or identification card issued by the State of Texas, upon development of an internal, departmental, interface.

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.

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Duncan R. Fox
Interim General Counsel
Texas Department of Public Safety
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For further information, please call: (512) 424-5848

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SUBCHAPTER L. GENERAL REGISTRATION REQUIREMENTS

37 TAC §35.181

The Texas Department of Public Safety (the department) proposes amendments to §35.181, concerning Employment Requirements, in order to clarify the nature of the employer/employee relationship required in order satisfy the statutory requirement of insurance coverage for regulated services. This rule will provide guidance to the Private Security Bureau staff and the regulated industry regarding appropriate employment arrangements.

Cheryl MacBride, Assistant Director, Finance, has determined that for each year of the first five-year period the amendments are in effect there will be no fiscal implications for state or local government or local economies.

Ms. MacBride also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the amendments. There are no economic costs to individuals who are required to comply with the amendments. There is no anticipated negative impact on local employment.

In addition, Ms. MacBride has determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of the amendments are greater assurance that regulated service providers are properly insured against claims arising from the provision of such services. There should be no economic costs resulting from the amendments to this rule.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce the risks to human health from environmental exposure.

The department has determined that Texas Government Code, Chapter 2007, does not apply to this rule. Accordingly, the department is not required to complete a takings impact assessment regarding the amendments.

Written comments on the proposed amendments may be sent to Steve Moninger, Legal Staff, Regulatory Licensing Service-Private Security Bureau, P.O. Box 4143, MSC-0242, Austin, Texas 78765-0242, (512) 424-5842. Written comments must be received no later than thirty (30) days from the date of publication of this proposal.

The amendments are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer this chapter.

The proposed amendments affect Texas Government Code, §411.004(3) and Texas Occupations Code, §§1702.061, 1702.123, and 1702.402(c).

§35.181. Employment Requirements.

(a) The employment relationship between a licensed company and its registrants or commissioned guards must be such that the licensee's commercial liability insurance policy provides coverage for claims arising from the regulated services provided on behalf of the licensee by its registrants or commissioned guards. The failure to obtain and maintain such coverage is a violation of §1702.123 of the Act. [~~A registrant or commissioned security officer of a licensed company must meet the specifications defined by the Internal Revenue Service as an "employee" or "contract laborer."~~]

(b) - (d) (No change.)

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

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Duncan R. Fox
Interim General Counsel
Texas Department of Public Safety
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For further information, please call: (512) 424-5848

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37 TAC §35.186

The Texas Department of Public Safety (the department) proposes amendments to §35.186, concerning Registration Applications, in order to authorize the submission of electronic fingerprints and proof of identification issued by other states, and to require documentation of work authorization from non-resident alien applicants. This amendment will clarify for prospective applicants and department staff the documents necessary for application.

Cheryl MacBride, Assistant Director, Finance, has determined that for each year of the first five-year period the amendments are in effect there will be no fiscal implications for state or local government or local economies.

Ms. MacBride also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the amendments. There are no economic costs to individuals who are required to comply with the amendments. There is no anticipated negative impact on local employment.

In addition, Ms. MacBride has determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of the amendments are greater efficiency in the manner in which the department administers the statute and greater assurance that those who are registered are legally entitled to work in the United States. There should be no economic costs resulting from the amendments of to these rules.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce the risks to human health from environmental exposure.

The department has determined that Texas Government Code, Chapter 2007, does not apply to this rule. Accordingly, the department is not required to complete a takings impact assessment regarding the amendments.

Written comments on the proposed amendments may be sent to Steve Moninger, Legal Staff, Regulatory Licensing Service-Private Security Bureau, P.O. Box 4143, MSC-0242, Austin, Texas 78765-0242, (512) 424-5842. Written comments must be received no later than thirty (30) days from the date of publication of this proposal.

The amendments are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer this chapter.

The proposed amendments affect Texas Government Code, §411.004(3) and Texas Occupations Code, §§1702.061, 1702.230, and 1702.282.

§35.186. Registration Applications.

A completed registration application shall be submitted on the most current version of the form provided by the department [~~board~~]. The application shall include:

(1) the required fee;

(2) at least two sets of fingerprints approved by the department, or submitted electronically through a department approved vendor [~~on cards obtained from the board~~] and the $25 [~~$25.00~~] FBI fingerprint fee;

(3) a copy of the applicant's [~~Level I and~~] Level II certificate of completion;

(4) a state or government-issued identification card, issued by the State of Texas or by the state of the applicant's residence; [~~a copy of the applicant's Texas Driver License or their identification certificate issued by the Department of Public Safety; and~~]

(5) applicants who are not United States citizens shall include a copy of their alien registration card. Non-resident aliens must also submit a copy of a current work-authorization card; and

(6) Upon request of the department, any court documents required as part of the department's criminal history background check. The failure to comply with the request may result in the rejection of the application as incomplete.

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.

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Duncan R. Fox
Interim General Counsel
Texas Department of Public Safety
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For further information, please call: (512) 424-5848

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SUBCHAPTER S. CONTINUING EDUCATION

37 TAC §35.292

The Texas Department of Public Safety (the department) proposes amendments to §35.292, concerning Requirements for Continuing Education Courses, in order to remove the references to fees for continuing education training courses and instructors of such courses, and thus eliminate potential conflicts

with the previously amended §35.70 of this title (relating to Fees). The latter rule specifically addresses all fees charged by the department (including the fees for continuing education training courses and instructors). These amendments will clarify the fees to be charged to such training schools and instructors, and avoid confusion relating to the fee structure.

Cheryl MacBride, Deputy Director, Services, has determined that for each year of the first five-year period the rules are in effect there will be no significant fiscal implications for state or local government, or local economies.

Ms. MacBride also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rules as proposed. There are no anticipated economic costs to individuals who are required to comply with the rules as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. MacBride 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 greater clarity and transparency relating to the fees charged by the department. There should be no economic costs resulting from the amendment of this rule.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Steve Moninger, Office of Regulatory Counsel, P.O. Box 2047, MSC-0246, Austin, Texas 78765-0246, (512) 424-5842. Written comments must be received no later than thirty (30) days from the date of publication of this proposal.

These amendments are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer this chapter.

The proposed amendments affect Texas Government Code, §411.004(3) and Texas Occupations Code, §§1702.061, 1702.103, 1702.163, 1702.1675, 1702.205, and 1702.239.

§35.292. Requirements for Continuing Education Courses.

(a) All recognized continuing education schools shall be licensed by the Private Security Bureau (the bureau).

(b) All continuing education schools shall comply with the following:

(1) - (5) (No change.)

(6) Schools shall teach all continuing education courses in the state of Texas, unless the course has a Texas-licensed continuing education school sponsor approved by the bureau [~~Bureau~~]. A Texas school must make a written request to sponsor an out of state course of instruction to the bureau [~~Bureau~~] at least sixty (60) days prior to the course presentation. The Texas school shall maintain records of instructors, courses taught, number of hours presented, and any Texas licensed or registered attendees of the sponsored school for a period of five (5) years.

(c) School directors of licensed continuing education schools shall comply with the following:

(1) - (5) (No change.)

[~~(6) The school director shall pay an annual licensing fee of $300.00.~~]

(d) Instructors of licensed continuing education schools shall comply with the following:

[~~(1) The instructor shall pay an annual licensing fee of $100.00.~~]

(1) [~~(2)~~] The instructor shall provide proof of qualifications/expertise and a course outline for each course of instruction to the school director sponsoring the course taught by the instructor.

(2) [~~(3)~~] Instructors may use adjunct or assistant instructor to assist in presenting courses of instruction. The instructor shall provide proof of the qualifications of any adjunct or assistant instructor to the school director sponsoring the course. The instructor must be in attendance with the adjunct or assistant instructor during the presentation.

(e) Attendees of courses of continuing education shall maintain certificates of completion furnished by the school director in their files for a period of three (3) years. Attendees shall furnish the bureau [~~Bureau~~] with copies of all certificates of completion upon request.

(f) The bureau [~~Bureau~~] may recognize courses of instruction received through any state-recognized university, college, or community college upon proof of attendance and completion of the course with a passing grade.

(g) Companies licensed by the bureau [~~Bureau~~] with ten (10) or more registered employees may make a written request for a letter of exemption allowing them to provide continuing education to those employees registered under the requesting company's license. Such requests shall be addressed to the bureau manager [~~Bureau Manager~~]. A letter of exemption granted under this section shall be valid for two (2) years. To qualify for a letter of exemption, the company must appoint a training director, assure that all training is in compliance with all related administrative rules, maintain proof of all training, and provide each employee with a certificate of training as required by this section. There is no annual fee associated with a letter of exemption issued under this subsection.

(h) The bureau [~~Bureau~~] shall inspect the continuing education records of 10% of licensees and registrants annually to assure compliance with these requirements and to maintain the integrity of the continuing education 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 December 16, 2010.

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Duncan R. Fox
Interim General Counsel
Texas Department of Public Safety
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For further information, please call: (512) 424-5848

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PART 5. TEXAS BOARD OF PARDONS AND PAROLES

CHAPTER 141. GENERAL PROVISIONS
SUBCHAPTER G. DEFINITION OF TERMS

37 TAC §141.111

The Texas Board of Pardons and Paroles proposes amendments to 37 TAC §141.111 concerning definition of terms. The amendments to §141.111 are proposed to include definitions for inmate, preponderance of the evidence, releasee, treatment and revise the definition for offenders.

Rissie Owens, Chair of the Board, determined that for each year of the first five-year period the proposed amendments are in effect, no fiscal implications exist for state or local government as a result of enforcing or administering this section.

Ms. Owens also has determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the amendments will be to revise the language of the rule. There will be no effect on small businesses. There is no anticipated economic cost to persons required to comply with the amended rule as proposed. No regulatory flexibility analysis required by HB 3430 is necessary.

Comments should be directed to Bettie Wells, General Counsel, Texas Board of Pardons and Paroles, 209 W. 14th Street, Suite 500, Austin, TX 78701, or by e-mail to bettie.wells@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this proposal.

The amended rule is proposed under §§508.001, 508.036 and 508.081, Government Code. Section 508.001 defines releasee. Section 508.036 authorizes the board adopt rules relating to the decision-making processes used by the board and parole panels. Section 508.081 defines inmate.

No other statutes, articles, or codes are affected by these amendments.

§141.111. Definition of Terms.

The following words and terms used within these rules shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (16) (No change.)

(17) Inmate--A person incarcerated in the TDCJ-Correctional Institutions Division, other penal institution, or jail serving a sentence imposed upon conviction of a felony.

(18) [~~(17)~~] Mandatory supervision--The non-discretionary release of an offender from incarceration, but not from the legal custody of the state, under such conditions and provisions for supervision as the parole panel may determine. For the purposes of revocation, the terms "parole" and "mandatory supervision" are interchangeable and reference to either one of said terms includes the other.

(19) [~~(18)~~] Mandatory supervision date--The date on which the release to mandatory supervision of an eligible offender may occur.

(20) [~~(19)~~] Offender--A person incarcerated in the TDCJ-Correctional Institutions Division, other penal institution, or jail serving a sentence imposed upon conviction of a felony or a person released from prison on parole or mandatory supervision.

(21) [~~(20)~~] Pardon--See the definition of "full pardon" set forth in this section.

(22) [~~(21)~~] Parole--The discretionary release of an offender from incarceration, but not from the legal custody of the state, under such conditions and provisions for supervision as a parole panel may determine.

(23) [~~(22)~~] Parole certificate--An order of the board incorporating the terms and conditions of release.

(24) [~~(23)~~] Parole panel--A three member decision-making body authorized to act in release matters. In certain cases, the full board acts as the parole panel.

~~[(24) Parolee--A person released from prison on parole (see definition of parole set forth in this section).]~~

(25) - (27) (No change.)

(28) Preponderance of the Evidence--Evidence that is of greater weight or more convincing than the evidence that is offered in opposition to it; that is evidence which as a whole shows that the fact sought to be proved is more probable than not.

(29) [~~(28)~~] Projected Release Date--The minimum expiration date as determined by the Texas Department of Criminal Justice.

(30) [~~(29)~~] Release plan--Proposed community and place of residence and proposed employment or proposed provision for maintenance and care of the releasee.

(31) Releasee--A person released from prison on parole or mandatory supervision.

(32) [~~(30)~~] Remission of fine or forfeiture--An act of clemency by the governor releasing the grantee from payment of all or a portion of a fine or canceling a forfeiture of a bond.

(33) [~~(31)~~] Reprieve--A temporary release from the terms of an imposed sentence.

(34) [~~(32)~~] Revocation--The cancellation of parole, mandatory supervision, or of a conditional act of executive clemency which subjects the administrative releasee or grantee of the act of executive clemency to immediate incarceration or, in the instance of reprieve of a fine, to immediate payment of the fine.

(35) [~~(33)~~] RMS--Mandatory supervision vote to release to mandatory supervision when TDCJ determines that the offender has reached the projected release date.

(36) [~~(34)~~] Serve-All (SA)--A decision by the board to deny parole and not release the offender until the serve-all date.

(37) [~~(35)~~] Serve-All Date--The projected release date or minimum expiration date as determined by the Texas Department of Criminal Justice.

(38) Treatment--Refers to rehabilitation programs also referred to as counseling or therapy.

(39) [~~(36)~~] Trial officials--The present sheriff, each chief of police, prosecuting attorney, and judge in the county and court of conviction and release.

(40) [~~(37)~~] Victim--A person who is the victim of the offense of sexual assault, kidnapping, aggravated robbery, trafficking of persons, or injury to a child, elderly individual, or disabled individual or who has suffered personal injury or death as a result of the criminal conduct of another, as defined in the Texas Code of Criminal Procedure, Article 56.01 §3.

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 December 20, 2010.

TRD-201007264
Bettie Wells
General Counsel
Texas Board of Pardons and Paroles
Earliest possible date of adoption: January 30, 2011
For further information, please call: (512) 406-5388

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CHAPTER 145. PAROLE
SUBCHAPTER A. PAROLE PROCESS

37 TAC §145.12, §145.15

The Texas Board of Pardons and Paroles proposes amendments to 37 TAC Chapter 145, Subchapter A, §145.12 and §145.15 concerning action upon review and action upon review; extraordinary vote. The amendments to §145.12 and §145.15 are proposed to utilize new voting option FI-9 R Sex Offender Treatment Program (SOTP-9).

Rissie Owens, Chair of the Board, determined that for each year of the first five-year period the proposed amendments are in effect, no fiscal implications exist for state or local government as a result of enforcing or administering this section.

Ms. Owens also has determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the amendments will be to provide a method of selection of certain offenders to participate in a sex offender treatment program prior to release. There will be no effect on small businesses. There is no anticipated economic cost to persons required to comply with the amended rules as proposed. No regulatory flexibility analysis required by HB 3430 is necessary.

Comments should be directed to Bettie Wells, General Counsel, Texas Board of Pardons and Paroles, 209 W. 14th Street, Suite 500, Austin, TX 78701, or by e-mail to bettie.wells@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this proposal.

The amended rules are proposed under §§508.036, 508.0441 and 508.045, Government Code. Section 508.036 authorizes the board to adopt rules relating to the decision-making processes used by the board and parole panels. Sections 508.0441 and 508.045 authorize the Board to adopt reasonable rules as proper or necessary relating to the eligibility of an offender for release to mandatory supervision and to act on matters of release to mandatory supervision.

No other statutes, articles, or codes are affected by these amendments.

§145.12. Action Upon Review.

A case reviewed by a parole panel for parole consideration may be:

(1) - (3) (No change.)

(4) determined that the totality of the circumstances favor the offender's release on parole, further investigation (FI) is ordered with the following available voting options [~~in the following manner~~]; and impose[~~, upon release to parole,~~] all conditions of parole or release to mandatory supervision that the parole panel is required or authorized by law to impose as a condition of parole or release to mandatory supervision [~~are imposed~~];

(A) FI-1--Release the offender when eligible;

(B) FI-2 (Month/Year)--Release on a specified future date;

(C) FI-3 R (Month/Year)--Transfer to a TDCJ rehabilitation program. Release to parole only after program completion and not earlier than three months from specified date. Such TDCJ program may include either CHANGES/Lifeskills, Voyager, Segovia Pre-Release Center (Segovia PRC), or any other approved tier program;

(D) FI-4 (Month/Year)--Transfer to a Pre-Parole Transfer facility prior to presumptive parole date set by a board panel and release to parole supervision on presumptive parole date;

(E) FI-4 R (Month/Year)--Transfer to a TDCJ rehabilitation program. Release to parole only after program completion and not earlier than four months from specified date. Such TDCJ program shall be [~~either~~] the Sex Offender Education Program (SOEP) [~~or the Sex Offender Treatment Program (SOTP)~~];

(F) FI-5--Transfer to In-Prison Therapeutic Community Program. Release to aftercare component only after completion of IPTC program;

(G) FI-6--Transfer to a DWI Program. Release to continuum of care program as required by paragraph (5) of this section;

(H) FI-6 R (Month/Year)--Transfer to a TDCJ rehabilitation program. Release to parole only after program completion and no earlier than six months from specified date. Such TDCJ program may include the Pre-Release Therapeutic Community (PRTC), Pre-Release Substance Abuse Program (PRSAP), or In-Prison Therapeutic Community Program (IPTC), or any other approved tier program;

(I) FI-7 R (Month/Year)--Transfer to a TDCJ rehabilitation program. Release to parole only after program completion and not earlier than seven months from the specified date. Such TDCJ program shall be the Serious and Violent Offender Reentry Initiative (SVORI);

(J) FI-9 R (Month/Year)--Transfer to a TDCJ rehabilitation program. Release to parole only after program completion and not earlier than nine months from specified date. Such TDCJ program shall be the Sex Offender Treatment Program (SOTP-9);

(K) [~~(J)~~] FI-18 R (Month/Year)--Transfer to a TDCJ rehabilitation treatment program. Release to parole only after program completion and no earlier than 18 months from specified date. Such TDCJ program shall be either the Sex Offender Treatment Program (SOTP-18), or the InnerChange Freedom Initiative (IFI);

(5) any person released to parole after completing a TDCJ program as a prerequisite for parole, must participate in and complete any required post-release program. A parole panel shall require as a condition of release on parole or release to mandatory supervision that an offender who immediately before release is a participant in the program established under §501.0931, Government Code, participate as a

releasee in a drug or alcohol abuse continuum of care treatment program; or

(6) any offender receiving an FI vote, as listed in paragraph (4)(A) - (K) [(J)] of this section, shall be placed in a program consistent with the vote. If treatment program managers recommend a different program for an offender, a transmittal shall be forwarded to the parole panel requesting approval to place the offender in a different program.

§145.15. Action Upon Review; Extraordinary Vote.

(a) This section applies to any offender convicted of a capital offense under §§21.02, 21.11(a)(1) or 22.021, Penal Code, or who is required under §508.145(c), Government Code, to serve 35 calendar years before becoming eligible for parole review. All members of the board shall vote on the release of an eligible offender. At least two-thirds of the members must vote favorably for the offender to be released to parole. Members of the board shall not vote until they receive and review a copy of a written report from the department on the probability of the offender committing an offense after being released.

(1) Upon review, use of the full range of voting options is not conducive to determining whether two-thirds of the board considers the offender ready for release to parole.

(2) If it is determined that circumstances favor the offender's release to parole the board has the following voting options available:

(A) FI-1--[÷] Release the offender when eligible; [or]

(B) FI-4 R (Month/Year)--[÷] Transfer to a TDCJ rehabilitation program. Release to parole only after program completion and not earlier than four months from specified date. Such TDCJ program shall be [either] the Sex Offender Education Program (SOEP); [or the Sex Offender Treatment Program (SOTP).]

(C) FI-9 R (Month/Year)--Transfer to a TDCJ rehabilitation program. Release to parole only after program completion and not earlier than nine months from specified date. Such TDCJ program shall be the Sex Offender Treatment Program (SOTP-9); or

(D) [(C)] FI-18 R (Month/Year)--[÷] Transfer to a TDCJ rehabilitation treatment program. Release to parole only after program completion and no earlier than eighteen months from the specified date. Such TDCJ program may include the Sex Offender Treatment Program (SOTP-18). In no event shall the specified date be set more than three years from the current panel decision date.

(3) If it is determined that circumstances do not support a favorable action upon review, the following options are available:

(A) NR (Month/Year)--[÷] Deny release and set the next review date for 36 months following the panel decision date; or

(B) SA--[÷] The offender's minimum or maximum expiration date is less than 36 months away. The offender will continue to serve their sentence until that date.

(b) If the offender is sentenced to serve consecutive sentences and each sentence in the series is for an offense committed on or after September 1, 1987, the following voting options are available to the board panel:

(1) CU/FI (Month/Year-Cause Number)--[÷] A favorable parole action that designates the date an offender would have been released if the offender had been sentenced to serve a single sentence;

(2) CU/NR (Month/Year-Cause Number)--[÷] Deny release and set the next review date for 36 months following the panel decision date; or

(3) CU/SA (Month/Year-Cause Number)--[÷] Deny release and order serve-all if the offender is within 36 months of their maximum expiration date.

(c) Some offenders are eligible for consideration for release to Discretionary Mandatory Supervision if the sentence is for an offense committed on or after September 1, 1996. Prior to the offender reaching the projected release date, the voting options are the same as those listed in subsections (a) and (b) of this section. If TDCJ-CID determines that release of the offender will occur because the offender will reach the projected release date, the case shall be referred to a three-member parole panel within 30 days of the offender's projected release date for consideration for release to mandatory supervision using the following options:

(1) RMS--[÷] Release to mandatory supervision; or

(2) DMS (Month/Year)--[÷] Deny release to mandatory supervision and set for review on a future specific month and year. The next mandatory supervision review date shall be set one year from the panel decision date.

(d) Upon review of any eligible offender who qualifies for release to Medically Recommended Intensive Supervision (MRIS), the MRIS panel shall initially vote to either recommend or deny MRIS consideration. The MRIS panel shall base this decision on the offender's medical condition and medical evaluation, and shall determine whether the offender constitutes a threat to public safety.

(1) If the MRIS panel determines the offender does constitute a threat to public safety, no further voting is required.

(2) If the MRIS panel determines that the offender does not constitute a threat to public safety, the case shall be sent to the full board, which shall determine whether to approve or deny the offender's release to parole. The following voting options are available to the board:

(A) Approve MRIS--[÷] The board shall vote FI-1 and impose special condition "O" - "The offender shall comply with the terms and conditions of the MRIS program and abide by a Texas Correctional Office for Offenders with Mental or Medical Impairments (TCOOMMI)-approved release plan. At any time this condition is in effect, an offender shall remain under the care of a physician and in a medically suitable placement"; the board shall provide appropriate reasons for the decision to approve MRIS; or[.]

(B) Deny MRIS--[÷] The board shall provide appropriate reasons for the decision to deny MRIS.

(3) The decision to approve release to MRIS for an offender remains in effect until specifically withdrawn by the board.

(e) (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 December 20, 2010.

TRD-201007265
Bettie Wells
General Counsel
Texas Board of Pardons and Paroles
Earliest possible date of adoption: January 30, 2011
For further information, please call: (512) 406-5388

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CHAPTER 149. MANDATORY SUPERVISION
SUBCHAPTER C. HEARING FOR IMPOSITION OF SEX OFFENDER TREATMENT AND/OR SEX OFFENDER REGISTRATION

37 TAC §§149.40 - 149.55

The Texas Board of Pardons and Paroles proposes new rules to 37 TAC Chapter 149, Subchapter C, §§149.40 - 149.55 concerning a hearing for the imposition of sex offender treatment and/or sex offender registration. New §§149.40 - 149.55 are proposed to provide a procedure for panel members when considering the imposition of sex offender treatment and/or sex offender registration for releasees not convicted of a sex offense and were released to mandatory supervision for a sentence that was committed prior to September 1, 1996.

Rissie Owens, Chair of the Board, determined that for each year of the first five-year period the proposed new rules are in effect, no fiscal implications exist for state or local government as a result of enforcing or administering this section.

Ms. Owens also has determined that for each year of the first five years the proposed new rules are in effect, the public benefit anticipated as a result of enforcing the new rules will be to provide a releasee with written notice that sex offender and/or sex offender registration conditions may be imposed as a condition of his/her mandatory supervision; disclosure of the evidence being presented against the releasee; a hearing; and a written statement of the evidence relied upon and the reasons sex offender and/or sex offender registration were imposed as a condition of his/her mandatory supervision. There will be no effect on small businesses. There is no anticipated economic cost to persons required to comply with the new rules as proposed. No regulatory flexibility analysis required by HB 3430 is necessary.

Comments should be directed to Bettie Wells, General Counsel, Texas Board of Pardons and Paroles, 209 W. 14th Street, Suite 500, Austin, TX 78701, or by e-mail to bettie.wells@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this proposal.

The new rules are proposed under §§508.036, 508.0441, 508.045 and 508.147, Government Code. Section 508.036 authorizes the board to adopt rules relating to the decision-making processes used by the board and parole panels. Sections 508.0441 and 508.045 authorize the Board to adopt reasonable rules as proper or necessary relating to the eligibility of an offender for release to mandatory supervision and to act on matters of release to mandatory supervision. Section 508.147 authorizes parole panels to determine the conditions of release to mandatory supervision.

No other statutes, articles, or codes are affected by these new rules.

§149.40. Purpose.

This subchapter only applies to releasees not convicted of a sex offense, who were released to mandatory supervision for a sentence that was committed prior to September 1, 1996.

§149.41. Public Hearings.

(a) All hearings on matters not confidential or privileged by law, or both, shall be open to the public.

(b) Appropriate federal and state constitutional provisions, statutes, regulations, and judicial precedent establishing the confidential or privileged nature of information presented shall be given effect by the panel member.

(c) To effect this provision, the panel member shall have the authority to close the hearing to the extent necessary to protect against the improper disclosure of confidential and/or privileged information.

§149.42. Authority of a Panel Member.

(a) A panel member shall have the following authority:

(1) to administer oaths;

(2) to examine witnesses;

(3) to rule on the admissibility of evidence;

(4) to rule on motions and objections;

(5) to recess any hearing from time to time and place to place;

(6) to reopen, upon request of a panel member, or reconvene, or both, any hearing;

(7) to issue on behalf of the board subpoenas and other documents authorized by and signed by a board member in accordance with statutory authority;

(8) to maintain order and decorum throughout the course of any proceedings;

(9) to collect documents and exhibits comprising the record of the hearing;

(10) to prepare the report of the hearing to the parole panel for disposition of the case; and

(11) to determine the weight to be given to particular evidence or testimony and to determine the credibility of witnesses.

(b) If a panel member fails to complete an assigned case, another panel member may complete the case without the necessity of duplicating any duty or function performed by the previous panel member.

§149.43. Ex Parte Consultations.

Unless required for the disposition of matters authorized by law, the panel members assigned to render a decision in a matter may not communicate, directly or indirectly, in connection with any issue of fact or law with any party, except on notice and opportunity for all parties to participate.

§149.44. Motions.

Unless made during a hearing, motions shall be made in writing, set forth the relief or order sought, and shall be filed with the panel member assigned to conduct the hearing. Motions based on matters which do not appear of record shall be supported by affidavit.

§149.45. Witnesses.

(a) The panel member may determine whether a witness may be excused under the rule that excludes witnesses from the hearing.

(1) In no event shall the panel member exclude from the hearing a party under the authority of this section. For these purposes, the term "party" means the definition in §141.111 of this title (relating to Definition of Terms) and includes:

(A) the releasee;

(B) the releasee's attorney; and

(C) no more than one representative of the Texas Department of Criminal Justice-Parole Division (TDCJ-PD) who

has acted or served in the capacity of supervising, advising, or agent officer in the case.

(2) In the event that it appears to the satisfaction of the panel member that an individual who is present at the hearing and intended to be called by a party as a witness has no relevant, probative, noncumulative testimony to offer on any material issue of fact or law, then the panel member, in his sound discretion, may determine that such individual should not be placed under the rule and excluded from the hearing.

(b) All witnesses who testify in person are subject to cross-examination unless the panel member specifically finds good cause for lack of confrontation and cross-examination.

(c) Witnesses personally served with a subpoena and who fail to appear at the hearing, and upon good cause determined by the panel member, may present testimony by written statement.

§149.46. Opinion and Expert Testimony.
All witnesses who are testifying in the form of an opinion or inference shall submit a written report to the other party and the panel member in the manner prescribed by §149.47 of this title (relating to Evidence).

§149.47. Evidence.
(a) No later than five (5) days prior to the scheduled hearing, all parties shall submit all documents that will be introduced into evidence at the hearing to the other party and the panel member.

(b) All parties shall have an opportunity to present evidence in the form of testimony and written documentation. The panel member shall determine the order of presentation of evidence.

(c) The Texas Rules of Evidence shall apply. When necessary to ascertain facts not reasonably susceptible of proof under these rules, evidence not admissible there under may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs.

(d) The panel member shall give effect to the rules of privilege recognized by law.

(e) Relevant testimony shall be confined to the subject of the pending matter. In the event any party at a hearing shall pursue a line of questioning that is, in the opinion of the panel member, irrelevant, incompetent, unduly repetitious, or immaterial, such questioning shall be terminated.

(f) Relevant staff reports may be admitted as evidence in any hearing.

(g) Evidence may be stipulated by agreement of all parties.

(h) Objections may be made and shall be ruled upon by the panel member, and any objections and the rulings thereon shall be noted in the record.

§149.48. Record.
(a) The record in any case includes all pleadings, motions, and rulings; evidence received or considered; matters officially noticed; questions and offers of proof, objections, and rulings on them; all relevant TDCJ-PD documents, staff memoranda or reports submitted to or considered by the parole panel involved in making the decision; and any decision or order of the parole panel presiding at the hearing.

(b) All hearings shall be electronically recorded in their entirety, and at the board's option shall be either copied or transcribed upon the request and deposit of estimated costs by any party.

§149.49. Decisions.
(a) A final decision or order adverse to any party shall be in writing.

(b) Any party, as defined herein, shall be notified personally or by mail of any decision or order.

§149.50. Procedure after Waiver of Hearing.
The parole panel of the board may accept a waiver of the hearing provided that a waiver of the hearing includes the following:

(1) information that releasee was served with written notice of the following:

(A) notice of the right to a hearing, the purpose of which is to determine whether sex offender treatment and/or sex offender registration may be imposed as a special condition of the release;

(B) notice of the right to full disclosure of the evidence;

(C) notice that releasee has the opportunity to be heard in person and to present witnesses and documentary evidence;

(D) notice that the releasee has the right to confront and cross-examine witnesses unless the panel member specifically finds good cause is shown;

(E) notice that the matter will be heard by an impartial decision maker;

(F) opportunity to waive in writing the right to a hearing; and

(G) opportunity to retain an attorney.

(2) information TDCJ-PD relied upon to identify the releasee as a sex offender.

§149.51. Scheduling of Hearing.
Upon request, the panel member or his/her designee shall schedule the hearing unless:

(1) fewer than seven calendar days have elapsed from the time the offender received notice; or

(2) information has not been presented to the panel member or his/her designee the releasee was served with the following:

(A) notice of the right to a hearing, the purpose of which is to determine whether sex offender treatment and/or sex offender registration may be imposed as a special condition of the release;

(B) notice of the right to full disclosure of the evidence;

(C) notice that releasee has the opportunity to be heard in person and to present witnesses and documentary evidence;

(D) notice that the releasee has the right to confront and cross-examine witnesses unless the panel member specifically finds good cause is shown;

(E) notice that the matter will be heard by an impartial decision maker;

(F) opportunity to waive in writing the right to a hearing; and

(G) opportunity to retain an attorney.

§149.52. Hearing.
(a) The panel member shall conduct the hearing for the purpose of determining whether sex offender treatment and/or sex offender registration may be imposed as a special condition of release.

(b) The parole panel must determine, as shown by a preponderance of the evidence, the releasee constitutes a threat to society by reason of his/her lack of sexual control.

(c) At the close of the hearing, the panel member shall collect, prepare and forward to the other panel members:

(1) all documents;

(2) a summary report of the hearing with a written statement as to the evidence relied upon to make a finding or no finding that the releasee constitutes a threat to society by reason of his/her lack of sexual control; and

(3) and the recording of the hearing.

§149.53. Final Panel Disposition.

(a) After reviewing the evidence in the summary report of the hearing, the parole panel shall make final disposition of the case by taking one of the following actions:

(1) impose sex offender treatment program; or

(2) impose sex offender registration; or

(3) impose both sex offender treatment and sex offender registration; or

(4) deny imposition of sex offender treatment; or

(5) deny imposition of sex offender registration; or

(6) deny imposition of both sex offender treatment and sex offender registration.

(b) The releasee shall be notified in writing of the parole panel's actions and receive a copy of the summary report of the hearing.

§149.54. Releasee's Motion To Reopen Hearing.

(a) The releasee or releasee's attorney shall have 30 days from the date of the parole panel's decision to request a reopening of the case for any substantial error in the process. Substantial error does not include the parole panel's decision.

(b) A request to reopen the hearing submitted later than 30 days from the date of the parole panel's decision will not be considered unless under exceptional circumstances including but not limited to:

(1) judicial order requiring a hearing;

(2) initial decision was made without opportunity for a hearing or waiver.

(c) Any such request for reopening made under this section must be in writing and delivered to the board or placed in the United States mail and addressed to the Texas Board of Pardons and Paroles, General Counsel, 8610 Shoal Creek Blvd., Austin, Texas 78757.

(d) On transmittal, a parole panel designated by the chair other than the original parole panel shall dispose of the motion by:

(1) granting of the motion and ordering that the hearing be reopened for a stated specified and limited purpose;

(2) denial of the motion; or

(3) reversal of the parole panel decision previously entered.

(e) The releasee and attorney, if any, shall be notified in writing of the parole panel's decision.

§149.55. Procedure after Motion To Reopen Is Granted; Time; Rights of the Releasee; Final Disposition.

(a) When the parole panel disposes of a releasee's motion to reopen under §149.54 of this title (relating to Releasee's Motion To Reopen Hearing) by granting said motion to reopen the hearing, the case shall be disposed of or referred to a panel member for final disposition in accordance with this section and the previous disposition of the case made by the parole panel under §149.53 of this title (relating to Final Panel Disposition) shall be set aside and shall be of no force and effect.

(b) The purpose of the further proceedings before the panel member under this section shall be as specified by the parole panel in its order granting the releasee's motion to reopen pursuant to §149.54 of this title.

(c) When the panel member convenes the reopening of the hearing, he/she shall have before him/her the entire record previously compiled in the case, including:

(1) the record, report, and decision of the hearing (§149.52 of this title, relating to Hearing) collected or prepared by the panel member originally assigned to the case;

(2) any amendments, supplements, or modifications of the record, report, or decision as developed through prior reopenings of the case;

(3) the releasee's motion to reopen the hearing under §149.54 of this title; and

(4) any transmittal submitted to the parole panel with the recommendation from board staff. Any transmittal submitted to the parole panel by the general counsel constitutes legal advice which is confidential under law, and shall not be released to the public as part of the hearing packet.

(d) At the conclusion of the proceedings before the panel member, or within a reasonable time thereafter, the parole panel shall make final disposition of the case by taking one of the following actions in any manner warranted by the evidence:

(1) continue the parole panel's action; or

(2) withdraw the imposition of special condition.

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 December 20, 2010.

TRD-201007266
Bettie Wells
General Counsel
Texas Board of Pardons and Paroles
Earliest possible date of adoption: January 30, 2011
For further information, please call: (512) 406-5388

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PART 9. TEXAS COMMISSION ON JAIL STANDARDS

CHAPTER 259. NEW CONSTRUCTION RULES

SUBCHAPTER E. NEW MINIMUM SECURITY DESIGN, CONSTRUCTION AND FURNISHING REQUIREMENTS

37 TAC §259.413

The Texas Commission on Jail Standards proposes an amendment to §259.413, concerning Functions, in order to standardize language throughout the Texas Administrative Code and Occupations Code by replacing the term guard with jailer.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§259.413. Functions.

Minimum space allocations shall provide for the following.

(1) (No change.)

(2) Detention:

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

(D) jailer [~~guard~~] stations.

(3) - (4) (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 December 20, 2010.

TRD-201007215
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 30, 2011
For further information, please call: (512) 463-8236

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37 TAC §259.418

The Texas Commission on Jail Standards proposes an amendment to §259.418, concerning Control Rooms/Guard Stations, in order to standardize language throughout the Texas Administrative Code and Occupations Code by replacing the term guard with jailer.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§259.418. Control Rooms/Jailer [~~Guard~~] Stations.

A sufficient number of control rooms/jailer [~~guard~~] stations shall be provided on each floor where inmates are housed. Staff toilets and lavatories shall be in close proximity to control rooms and jailer [~~guard~~] stations.

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 December 20, 2010.

TRD-201007216
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 30, 2011
For further information, please call: (512) 463-8236

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37 TAC §259.453

The Texas Commission on Jail Standards proposes an amendment to §259.453, concerning Audible Communication, in order to standardize language throughout the Texas Administrative Code and Occupations Code by replacing the term corrections officer with jailer.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§259.453. Audible Communication.

Two-way voice communication shall be available at all times between inmates and jailers [~~corrections officers~~].

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 December 20, 2010.

TRD-201007217
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 30, 2011
For further information, please call: (512) 463-8236

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SUBCHAPTER F. TEMPORARY HOUSING--TENTS

37 TAC §259.514

The Texas Commission on Jail Standards proposes an amendment to §259.514, concerning Guard Stations, in order to standardize language throughout the Texas Administrative Code and Occupations Code by replacing the term guard with jailer.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§259.514. Jailer [~~Guard~~] Stations.

Jailer [~~Guard~~] stations shall be provided within sufficient proximity to inmate living and day room areas.

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 December 20, 2010.

TRD-201007219
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
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For further information, please call: (512) 463-8236

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37 TAC §259.520

The Texas Commission on Jail Standards proposes an amendment to §259.520, concerning Audible Communication, in order to standardize language throughout the Texas Administrative Code and Occupations Code by replacing the term corrections officer with jailer.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§259.520. Audible Communication.

Two-way voice communication shall be available at all times between inmates and jailers [~~corrections officers~~].

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 December 20, 2010.

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Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
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For further information, please call: (512) 463-8236

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SUBCHAPTER G. TEMPORARY HOUSING--BUILDINGS

37 TAC §259.614

The Texas Commission on Jail Standards proposes an amendment to §259.614, concerning Guard Stations, in order to standardize language throughout the Texas Administrative Code and Occupations Code by replacing the term guard with jailer.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§259.614. Jailer [~~Guard~~] Stations.

Jailer [~~Guard~~] stations shall be provided within sufficient proximity to inmate living and day room areas. They should be so arranged that visibility into the housing areas is provided.

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.

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TRD-201007221
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
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For further information, please call: (512) 463-8236

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37 TAC §259.620

The Texas Commission on Jail Standards proposes an amendment to §259.620, concerning Audible Communication, in order to standardize language throughout the Texas Administrative Code and Occupations Code by replacing the term corrections officer with jailer.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§259.620. Audible Communication.

Two-way voice communication shall be available at all times between inmates and jailers [~~corrections officers~~].

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 December 20, 2010.

TRD-201007222
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 30, 2011
For further information, please call: (512) 463-8236

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SUBCHAPTER H. NEW LONG-TERM INCARCERATION DESIGN, CONSTRUCTION AND FURNISHING REQUIREMENTS

37 TAC §259.715

The Texas Commission on Jail Standards proposes an amendment to §259.715, concerning Functions, in order to standardize language throughout the Texas Administrative Code and Occupations Code by replacing the term guard with jailer.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§259.715. Functions.

Minimum space allocations shall provide for the following.

(1) (No change.)

(2) Detention:

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

(D) jailer [~~guard~~] stations.

(3) - (4) (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 December 20, 2010.

TRD-201007223
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 30, 2011
For further information, please call: (512) 463-8236

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37 TAC §259.722

The Texas Commission on Jail Standards proposes an amendment to §259.722, concerning Control Rooms/Guard Stations, in order to standardize language throughout the Texas Administrative Code and Occupations Code by replacing the term guard with jailer.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§259.722. Control Rooms/Jailer [~~Guard~~] Stations.

A sufficient number of control rooms/jailer [~~guard~~] stations shall be provided on each floor where inmates are housed. Staff toilets and lavatories shall be within the security perimeter and in close proximity to control rooms and jailer [~~guard~~] stations. The design shall allow access to control rooms without requiring staff to enter inmate safety vestibules or inmate activity areas.

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 December 20, 2010.

TRD-201007224
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 30, 2011
For further information, please call: (512) 463-8236

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37 TAC §259.723

The Texas Commission on Jail Standards proposes an amendment to §259.723, concerning Perimeter Security, in order to standardize language throughout the Texas Administrative Code and Occupations Code by replacing the term guard with jailer.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§259.723. Perimeter Security.

An outside area fence shall be a minimum 12 foot high security fence. Fencing shall be installed within fence posts. The footing of the fence shall be sufficiently secured to preclude tunneling and hiding of contraband. When double security fences are utilized, they shall be separated by not less than ten feet. Jailer [~~Guard~~] towers and/or comparable electronic detection systems shall be utilized and towers shall be provided outside inmate occupied areas. Alternative design concepts are encouraged and comparable materials and methods approved by the commission may be utilized.

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 December 20, 2010.

TRD-201007225
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 30, 2011
For further information, please call: (512) 463-8236

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37 TAC §259.769

The Texas Commission on Jail Standards proposes an amendment to §259.769, concerning Audible Communication, in order to standardize language throughout the Texas Administrative Code and Occupations Code by replacing the term corrections officer with jailer.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§259.769. Audible Communication.

Two-way voice communication shall be available at all times between inmates and jailers [~~corrections officers~~].

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 December 20, 2010.

TRD-201007227
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 30, 2011
For further information, please call: (512) 463-8236

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CHAPTER 260. COUNTY CORRECTIONAL CENTERS

SUBCHAPTER B. CCC DESIGN, CONSTRUCTION AND FURNISHING REQUIREMENTS

37 TAC §260.113

The Texas Commission on Jail Standards proposes an amendment to §260.113, concerning Functions, in order to standardize language throughout the Texas Administrative Code and Occupations Code by replacing the term guard with jailer.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§260.113. Functions.

Minimum space allocations shall provide for the following:

(1) (No change.)

(2) Detention:

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

(C) jailer [~~guard~~] stations.

(3) - (4) (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 December 20, 2010.

TRD-201007228
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 30, 2011
For further information, please call: (512) 463-8236

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37 TAC §260.118

The Texas Commission on Jail Standards proposes an amendment to §260.118, concerning Guard Stations, in order to standardize language throughout the Texas Administrative Code and Occupations Code by replacing the term guard with jailer.

Adan Munoz, Executive Director, has determined that for the first five year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards

with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§260.118. Jailer [~~Guard~~] Stations.
A sufficient number of jailer [~~guard~~] stations shall be provided on each floor where inmates are housed. Staff toilets and lavatories shall be provided in close proximity to jailer [~~guard~~] stations.

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 December 20, 2010.

TRD-201007229
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 30, 2011
For further information, please call: (512) 463-8236

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37 TAC §260.161

The Texas Commission on Jail Standards proposes an amendment to §260.161, concerning Audible Communication, in order to standardize language throughout the Texas Administrative Code and Occupations Code by replacing the term corrections officers with jailers.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§260.161. Audible Communication.
Two-way voice communication shall be available at all times between offenders and jailers [~~corrections officers~~].

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 December 20, 2010.

TRD-201007230
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 30, 2011
For further information, please call: (512) 463-8236

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CHAPTER 261. EXISTING CONSTRUCTION RULES

SUBCHAPTER A. EXISTING MAXIMUM SECURITY DESIGN, CONSTRUCTION AND FURNISHING REQUIREMENTS

37 TAC §261.115

The Texas Commission on Jail Standards proposes an amendment to §261.115, concerning Functions, in order to standardize language throughout the Texas Administrative Code and Occupations Code by replacing the term guard with jailer.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§261.115. Functions.

Minimum space allocations should provide for, but not be limited to:

(1) (No change.)

(2) detention:

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

(D) jailer [~~guard~~] stations;

(3) - (4) (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 December 20, 2010.

TRD-201007231

Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 30, 2011
For further information, please call: (512) 463-8236

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37 TAC §261.122

The Texas Commission on Jail Standards proposes an amendment to §261.122, concerning Guard Stations, in order to standardize language throughout the Texas Administrative Code and Occupations Code by replacing the term guard with jailer.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§261.122. Jailer [~~Guard~~] Stations.

A sufficient number of jailer [~~guard~~] stations shall be provided on each floor where inmates are housed. Staff toilets and lavatories should be provided in close proximity to jailer [~~guard~~] stations.

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 December 20, 2010.

TRD-201007232
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 30, 2011
For further information, please call: (512) 463-8236

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37 TAC §261.167

The Texas Commission on Jail Standards proposes an amendment to §261.167, concerning Audible Communication, in order to standardize language throughout the Texas Administrative Code and Occupations Code by replacing the term corrections officers with jailers.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§261.167. Audible Communication.

Two-way voice communication shall be available at all times between inmates and jailers [~~corrections officers~~].

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 December 20, 2010.

TRD-201007233
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 30, 2011
For further information, please call: (512) 463-8236

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SUBCHAPTER B. EXISTING LOCKUP DESIGN, CONSTRUCTION AND FURNISHING REQUIREMENTS

37 TAC §261.215

The Texas Commission on Jail Standards proposes an amendment to §261.215, concerning Functions, in order to standardize language throughout the Texas Administrative Code and Occupations Code by replacing the term guard with jailer.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§261.215. Functions.

Minimum space allocations should provide for, but not be limited to:

(1) (No change.)

(2) detention:

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

(D) jailer [~~guard~~] stations;

(3) - (4) (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 December 20, 2010.

TRD-201007234
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 30, 2011
For further information, please call: (512) 463-8236

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37 TAC §261.222

The Texas Commission on Jail Standards proposes an amendment to §261.222, concerning Guard Stations, in order to standardize language throughout the Texas Administrative Code and Occupations Code by replacing the term guard with jailer.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§261.222. Jailer [~~Guard~~] Stations.

A sufficient number of jailer [~~guard~~] stations shall be provided on each floor where inmates are housed. Staff toilets and lavatories shall be provided in close proximity to jailer [~~guard~~] stations.

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 December 20, 2010.

TRD-201007235
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 30, 2011
For further information, please call: (512) 463-8236

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37 TAC §261.262

The Texas Commission on Jail Standards proposes an amendment to §261.262, concerning Audible Communication, in order to standardize language throughout the Texas Administrative Code and Occupations Code by replacing the term corrections officers with jailers.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§261.262. Audible Communication.

Two-way voice communication shall be available at all times between inmates and jailers [~~corrections officers~~].

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 December 20, 2010.

TRD-201007236
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 30, 2011
For further information, please call: (512) 463-8236

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SUBCHAPTER C. EXISTING MINIMUM SECURITY DESIGN, CONSTRUCTION AND FURNISHING REQUIREMENTS

37 TAC §261.312

The Texas Commission on Jail Standards proposes an amendment to §261.312, concerning Functions, in order to standardize language throughout the Texas Administrative Code and Occupations Code by replacing the term guard with jailer.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§261.312. Functions.

Minimum space allocations should provide for, but not be limited to:

(1) (No change.)

(2) Detention:

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

(D) jailer [~~guard~~] stations.

(3) - (4) (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 December 20, 2010.

TRD-201007237
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 30, 2011
For further information, please call: (512) 463-8236

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37 TAC §261.317

The Texas Commission on Jail Standards proposes an amendment to §261.317, concerning Guard Stations, in order to standardize language throughout the Texas Administrative Code and Occupations Code by replacing the term guard with jailer.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§261.317. Jailer [~~Guard~~] Stations.

A sufficient number of jailer [~~guard~~] stations shall be provided on each floor where inmates are housed. Staff toilets and lavatories should be provided in close proximity to jailer [~~guard~~] stations.

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 December 20, 2010.

TRD-201007238
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 30, 2011
For further information, please call: (512) 463-8236

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37 TAC §261.357

The Texas Commission on Jail Standards proposes an amendment to §261.357, concerning Audible Communication, in order to standardize language throughout the Texas Administrative Code and Occupations Code by replacing the term corrections officers with jailers.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§261.357. Audible Communication.

Two-way voice communication shall be available at all times between inmates and jailers [~~corrections officers~~].

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 December 20, 2010.

TRD-201007239
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 30, 2011
For further information, please call: (512) 463-8236

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 15. FINANCING AND CONSTRUCTION OF TRANSPORTATION PROJECTS

SUBCHAPTER E. FEDERAL, STATE, AND LOCAL PARTICIPATION

43 TAC §15.52

The Texas Department of Transportation (department) proposes amendments to §15.52, Agreements, concerning federal, state, and local participation.

EXPLANATION OF PROPOSED AMENDMENTS

Amendments to §15.52 expand the application of the rule and modify the current prohibition that prevents the department from entering agreements required by §15.52 (cost participation agreements) that provide for local governments to improve freeway mainlanes of the state highway system. Currently, cost participation agreements are not required for situations in which a local government or reservoir agency voluntarily provides financial assistance for a highway improvement project. This amendment requires the department and the local government or reservoir agency to enter into a cost participation agreement in such cases. In addition, the amendment would allow the executive director, or designee, to enter cost participation agreements that include the local government's performance of certain maintenance activities on the freeway mainlanes of the state highway system that do not alter the physical character of the roadway surface, such as sweeping and debris removal.

The change to §15.52(8)(B) adds new clause (ii) that clarifies the meaning of the phrase "projects that improve the freeway mainlanes on the state highway system" as used in paragraph (8)(B) as not including maintenance activities that do not alter the physical character of the roadway surface, such as sweeping and debris removal. The amendments redesignate existing clauses (ii) - (iv) as (iii) - (v), respectively.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Scott Burford, Director, General Services Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Mr. Burford has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be more efficient use of limited state resources and improved safety for the traveling public. There are no anticipated economic costs for persons required to comply with the section as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §15.52 may be submitted to Scott Burford, Director, General Services Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on January 31, 2011.

STATUTORY AUTHORITY

The amendments are proposed 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 department.

CROSS REFERENCE TO STATUTE

None.

§15.52. Agreements.

When a local government or reservoir agency will be [~~is responsible for~~] providing financial assistance for a highway improvement project, the department and the local government or reservoir agency shall enter into an agreement before any work is performed. The agreement will include, but not be limited to, the following provisions of this section.

(1) Right of entry. If the local government or reservoir agency is the owner of the project site, it shall permit the department or its authorized representative access to occupy the site to perform all activities required to execute the work.

(2) Right of way and/or utility relocation/adjustments. The local government will provide all necessary right of way and utility relocation/adjustments, whether publicly or privately owned, in accordance with §15.55 of this subchapter (relating to Construction Cost Participation). When specified, the reservoir agency will provide all necessary right of way and utility/relocation adjustments, whether publicly or privately owned. Existing utilities will be relocated and/or adjusted with respect to location and type of installation in accordance with the requirements of the department as specified in §21.21 of this title (relat-

ing to State Participation in Relocation, Adjustment, and/or Removal) and §21.31 et seq. of this title (relating to Utility Accommodation).

(3) Funding arrangement. The agreement will specify the type of funding share arrangement agreed upon by the department and the local government. The funding share arrangement shall include any adjustments required by §15.55 of this subchapter. The funding arrangement agreed upon by the department and the reservoir agency will be as specified under §15.54(e) of this subchapter (relating to Construction).

(A) Standard. The local government is responsible for all, or a specified percentage as shown in Appendix A of §15.55 of this subchapter [~~title (relating to Construction Cost Participation)~~], of the direct costs incurred by the department for preliminary engineering, construction engineering, construction, and right of way as well as the direct cost for any work included which is ineligible for federal or state participation. When specified, the reservoir agency is responsible for all of the direct costs incurred by the department for preliminary engineering, construction engineering, construction, and right of way as well as the direct cost for any work included which is ineligible for federal or state participation.

(B) Fixed price. A fixed price funding arrangement, based on the estimated cost of the work for which the funds are received, may be used if requested by the local government for projects that include state participation.

(i) Determination of lump sum. A local government is responsible for the lump sum price not subject to adjustment except:

(I) in the event of changed site conditions;

(II) if work requested by the local government is ineligible for federal participation; or

(III) as mutually agreed upon by the department and the local government.

(ii) Approval. In approving a request for a fixed price, the executive director will consider:

(I) requests by the local government to include work which is ineligible for federal or state participation;

(II) need for expeditious project completion;

(III) type of work proposed and the ability to accurately estimate its cost; and

(IV) any other considerations relating to the benefit of the state, the traveling public, and the operations of the department.

(C) Incremental.

(i) The department may approve a local government to make periodic payments of its funding share only if:

(I) the incremental payments sought are based on the estimated cost for the work for which the funds are received and payment is made in accordance with the schedule established in the funding agreement; and

(II) the local government does not have a delinquent obligation to the department, as defined in §5.10 of this title (relating to Collection of Debts).

(ii) In approving a request for incremental payments, the executive director will consider:

(I) inability of the local government to pay its total funding share prior to the department's scheduled date for contract letting, based upon population level, bonded indebtedness, tax base, and tax rate;

(II) past payment performance;

(III) need for expeditious project completion;

(IV) whether the project is located in a local government that consists of all or a portion of an economically disadvantaged county; and

(V) any other considerations relating to the benefit of the state, the public, and the operations of the department.

(D) Off-State Highway System Bridge Program. For projects funded in the Off-State Highway System Bridge Program, the local government is responsible for the specified percentage, as shown in Appendix A to §15.55 of this subchapter, of the estimated direct costs for preliminary engineering, construction engineering, and construction, and the actual direct costs for right of way and eligible utilities. The estimated direct costs are based on the department's estimate of the eligible work at the time of the agreement. The local government is responsible for the direct cost of any project cost item or portion of a cost item that is not eligible for federal participation under the Federal Highway Bridge Replacement and Rehabilitation Program under 23 U.S.C. §144 and 23 C.F.R. §650 Subpart D. The local government is also responsible for any cost resulting from changes made at the request of the local government, either during preliminary engineering or construction.

(4) Interest. The department will not pay interest on funds provided by the local government or the reservoir agency. Funds provided by the local government or the reservoir agency will be deposited into, and retained in, the state treasury.

(5) Amendments. In the case of significantly changed site conditions or other mutually agreed upon changes in the scope of work authorized in the agreement, the department and the local government or reservoir agency will amend the funding agreement, setting forth the reason for the change and establishing the revised participation to be provided by the local government or reservoir agency.

(6) Payment provision. The agreement will establish the conditions for payment by the local government or reservoir agency, including, but not limited to, the method of payment and the time of payment.

(A) Standard.

(i) Upon execution of the agreement or at a later date, if requested by the local government and as approved by the executive director, the local government or reservoir agency will pay, as a minimum, its funding share for the estimated cost of right of way and preliminary engineering for the project. Prior to the department's scheduled date for contract letting, the local government or reservoir agency will remit to the department an amount equal to the remainder of the local government's or reservoir agency's funding share for the project.

(ii) After the project is completed the final cost will be determined by the department, based on its standard accounting procedures. If it is found that the amount received is insufficient to pay the local government's or reservoir agency's funding share, then the department shall notify the local government or reservoir agency which shall transmit the required amount to the department. If it is found that the amount received is in excess of the local government's or reservoir agency's funding share, the excess funds paid by the local government or reservoir agency shall be returned.

(B) Fixed price. When a fixed price funding arrangement is used, the lump sum price is not subject to adjustment except as provided for in paragraph (3)(B) of this section.

(C) Incremental. After an incrementally paid project is completed, the final cost will be determined by the department based on its standard accounting procedures. If it is found that the amount received is insufficient to pay the local government's funding share, then the department shall notify the local government which shall transmit the required amount to the department. If it is found that the amount received is in excess of the local government's funding share, the excess funds paid by the local government shall be returned.

(D) Off-State Highway System Bridge Program. For projects funded in the Off-State Highway System Bridge Program, the department will determine the final cost after the project is completed, based on its standard accounting procedures. The department will notify the local government of any amount due for payment of costs related to any ineligible items and for changes made at the request of the local government. The local government shall promptly transmit the required amount to the department. The department will return excess funds paid by the local government if it is found that the amount received is in excess of the local government's funding share required by §15.55(c) of this subchapter.

(7) Termination. If the local government or reservoir agency withdraws from the project after the agreement is executed, it shall be responsible for all direct and indirect project costs incurred by the department for the items of work in which the local government or reservoir agency is participating.

(8) Responsibilities of the parties.

(A) Agreement. The agreement shall identify the responsibilities of each party, including, but not limited to, preparing or providing construction plans, construction performance, advertising for bids, awarding a construction contract, and construction supervision.

(B) Local performance and management of highway improvement projects.

(i) Request. If requested by a local government and approved by the department, an agreement with the governing body of a local government may provide for:

(I) the performance by employees under the direct control of the local government of a highway improvement project, other than a project to improve freeway mainlanes on the state highway system; or

(II) outsourcing preliminary project engineering and design for which reimbursement is requested, bid opening, award of construction to a contractor, and construction management by the local government or a consultant hired by the local government of a highway improvement project, other than a project to improve freeway mainlanes on the state highway system.

(ii) Maintenance activities. Maintenance activities that do not alter the physical character of the roadway surface, such as sweeping and debris removal, are not projects to improve freeway mainlanes for the purposes of clause (i) of this subparagraph.

(iii) [~~(ii)~~] Approval authority. The executive director may authorize a local government to perform an act described in clause (i) of this subparagraph. The executive director may delegate the authority to approve:

(I) the performance by employees of the local government of work on any facility not maintained by the department; and

(II) the performance by employees of the local government of projects or activities appurtenant to a state highway, including drainage facilities, surveying, traffic counts, driveway construction, landscaping, guardrails and other items incidental to the roadway itself, such as signing, pavement markings, signals, illumination, and traffic management systems.

(iv) [~~(iii)~~] Conditions. A local government may perform an act described in clause (i) of this subparagraph only if:

(I) the local government commits in the agreement to comply with all federal, state, and department requirements, standards, and specifications, and agrees to forfeit any claim to federal and/or state reimbursement if they fail to comply;

(II) the project is authorized by the commission in the current Unified Transportation Program or by a specific minute order;

(III) a project on the state highway system performed or managed by a local government is operationally beneficial to the state;

(IV) a roadway construction project requested by the local government that is to be on the state highway system, for which local management is proposed, is funded with at least 50% of the funds not coming from federal or state highway funding;

(V) the local government agrees to pay any cost overruns in addition to its local participation on an off-state highway system bridge program project for which local management is proposed; and

(VI) the department reviews and approves all plans, contract awards, and change orders.

(v) [~~(iv)~~] Approval. In approving a request, the executive director or designee will consider:

(I) previous experience of the local government in performing the type of work proposed;

(II) the capability of the local government to perform the type of work proposed or to award and manage a contract for that work in a timely manner, consistent with federal, state, and department regulations, standards, and specifications;

(III) need for expeditious project completion;

(IV) department resources available to perform or manage the highway improvement project in an efficient and timely manner;

(V) cost effectiveness of local performance of the work as compared to awarding the highway improvement project through the competitive bidding process; and

(VI) any other considerations relating to the benefit of the state, the traveling public, and the operations of the department.

(9) Acknowledgment. The local government or reservoir agency must acknowledge in the agreement that while not an agent, servant, nor employee of the state, it is responsible for its own acts and deeds and for those of its agents or employees during the performance of the work authorized in the contract.

(10) Local regulations. If any existing, future or proposed local ordinance, commissioners court order, rule, policy, or other direc-

tive, including, but not limited to, outdoor advertising or storm water drainage facility requirements, that is more restrictive than state or federal regulations, or any other locally proposed change, including, but not limited to, plats or re-plats, results in any increased cost to the department for a highway improvement project, the local government or reservoir agency must commit in the agreement to being responsible for all increased costs associated with the ordinance, order, policy, directive or 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 December 17, 2010.

TRD-201007155
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: January 30, 2011
For further information, please call: (512) 463-8683

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 2. DEPARTMENT OF ASSISTIVE AND REHABILITATIVE SERVICES

CHAPTER 108. DIVISION FOR EARLY CHILDHOOD INTERVENTION SERVICES

SUBCHAPTER F. SYSTEM OF FEES

40 TAC §108.617

Proposed new §108.617, published in the June 11, 2010, issue of the *Texas Register* (35 TexReg 4898), is withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on December 17, 2010.

TRD-201007177

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 354. MEDICAID HEALTH SERVICES

SUBCHAPTER A. PURCHASED HEALTH SERVICES

DIVISION 17. BIRTHING CENTER SERVICES

1 TAC §354.1261, §354.1262

The Texas Health and Human Services Commission (HHSC) adopts new §354.1261, concerning Benefits and Limitations, and new §354.1262, concerning Conditions for Participation, without changes to the proposed text as published in the October 1, 2010, issue of the *Texas Register* (35 TexReg 8833) and will not be republished.

Background and Justification

The new rules are the result of the Patient Protection and Affordable Care Act (Affordable Care Act), Public Law 111-148, Title II, Subtitle D, Section 2301, which added freestanding birthing center services to section 1905(a) of the Social Security Act and requires states to make payments directly to freestanding birth centers.

The new rules and the related reimbursement rule at 1 TAC §355.8181, Birthing Center Reimbursement, will bring HHSC into compliance with the Affordable Care Act by identifying birthing centers as eligible Medicaid providers and providing for direct payments to birthing centers.

Comments

The 30-day comment period ended November 2, 2010. During this period, which included a public hearing on November 2, 2010, no comments were received on the new rules.

Statutory Authority

The new rules are adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in 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 December 15, 2010.

TRD-201007128
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Effective date: February 1, 2011
Proposal publication date: October 1, 2010
For further information, please call: (512) 424-6900

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CHAPTER 355. REIMBURSEMENT RATES

SUBCHAPTER J. PURCHASED HEALTH SERVICES

DIVISION 10. BIRTHING CENTER SERVICES

1 TAC §355.8181

The Texas Health and Human Services Commission (HHSC) adopts new §355.8181, concerning Birthing Center Reimbursement, without changes to the proposed text as published in the October 1, 2010, issue of the *Texas Register* (35 TexReg 8838) and will not be republished.

Background and Justification

The adopted new rule is a result of the passage of the Patient Protection and Affordable Care Act (PPACA), Public Law 111-148, Title II, Subtitle D, Section 2301, which added freestanding birthing center services to section 1905(a) of the Social Security Act as a mandatory Medicaid state plan service. The new rule describes the reimbursement methodology for birthing center services, which will allow licensed birthing centers to receive direct Medicaid reimbursement for services provided in the facility.

Comments

The 30-day comment period ended November 1, 2010. During this period, HHSC did not receive any comments regarding the new rule.

Legal Authority

The new rule is adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

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 December 15, 2010.

TRD-201007129
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Effective date: February 1, 2011
Proposal publication date: October 1, 2010
For further information, please call: (512) 424-6900

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DIVISION 23. EARLY AND PERIODIC SCREENING, DIAGNOSIS, AND TREATMENT (EPSDT)

1 TAC §355.8441

The Texas Health and Human Services Commission (HHSC) adopts the amendment to §355.8441, concerning Reimbursement Methodologies for Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Services, without changes to the proposed text as published in the September 24, 2010, issue of the *Texas Register* (35 TexReg 8558) and will not be republished.

Background and Justification

EPSDT services, also known in Texas as Texas Health Steps (THSteps) and the THSteps Comprehensive Care Program (CCP), are delivered only to Medicaid clients under age 21. The amended reimbursement rule related to EPSDT services updates and clarifies existing rule language.

Comments

The 30-day comment period ended October 24, 2010. During this period, HHSC did not receive any comments regarding the proposed amendment to the rule.

Legal Authority

The amendment is adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

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 December 16, 2010.

TRD-201007145
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Effective date: February 1, 2011
Proposal publication date: September 24, 2010
For further information, please call: (512) 424-6900

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CHAPTER 356. MEDICAID AND CHIP ELECTRONIC HEALTH INFORMATION SUBCHAPTER A. MEDICAID ELECTRONIC HEALTH RECORD

1 TAC §356.101

The Texas Health and Human Services Commission (HHSC) adopts new Chapter 356, Subchapter A, §356.101, related to electronic health information and data for the Medicaid Eligibility and Health Information System (MEHIS). The new rule is adopted without changes to the proposed text as published in the October 1, 2010, issue of the *Texas Register* (35 TexReg 8839) and, therefore, the rule will not be republished.

Background and Justification

The adopted rule implements the MEHIS, a statewide system designed to replace the current paper Medicaid identification form with a permanent plastic card, automate Medicaid eligibility verification, provide an electronic health record (EHR) for all Medicaid clients, offer electronic prescribing functionality, and establish a foundation for future health information exchange for improved efficiency, continuity of care, and health outcomes. Information accessed through the EHR may include eligibility information, prescription drug history, claims and encounter data, immunization data, and other appropriate information.

Implementation of the MEHIS complies with the requirements of H.B. 1218, 81st Legislature, Regular Session, 2009, which directs HHSC to adopt rules specifying the information required to be included in the EHR. The MEHIS will maintain the confidentiality of patient health records in compliance with all applicable state and federal laws.

Comments

The 30-day comment period ended November 1, 2010. During this period, which included a public hearing on November 2, 2010, HHSC did not receive any comments regarding the new rule.

Statutory Authority

The new rule is adopted under Texas Government Code §531.905, et seq. which authorizes the Executive Commissioner of HHSC to adopt rules related to electronic health records, as well as under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in 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 December 17, 2010.

TRD-201007207
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Effective date: February 1, 2011
Proposal publication date: October 1, 2010
For further information, please call: (512) 424-6900

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SUBCHAPTER B. MEDICAID ELECTRONIC HEALTH RECORD INCENTIVE PAYMENT PROGRAM

1 TAC §356.201

The Texas Health and Human Services Commission (HHSC) adopts new Chapter 356, Subchapter B, §356.201, within Title 1, Part 15 related to general provisions of the electronic health record (EHR) incentive payment program. The new rule is adopted without changes to the proposed text as published in the October 1, 2010, issue of the *Texas Register* (35 TexReg 8840).

Background and Justification

Title IV of Division B of the American Recovery and Reinvestment Act of 2009 (ARRA) (Pub. L. 111-5) amends titles XVIII and XIX of the Social Security Act (the Act) by establishing a program to provide incentive payments to eligible professionals (i.e., physicians, dentists, nurse practitioners, certified nurse midwives, and physician assistants in rural health clinics) and eligible hospitals that participate in the Medicaid program to promote the adoption and meaningful use of certified electronic health record (EHR) technology. A certified EHR is an electronic record of health-related information on an individual that includes patient demographic and clinical health information, such as medical histories and problem lists, that has the capacity to provide clinical decision support; to support physician order entry; to capture and query information relevant to health care quality; and to exchange electronic health information and integrate such information from other sources.

HHSC is adopting this rule to establish an incentive program in Texas.

Comments

The 30-day comment period ended November 1, 2010. During this period, which included a public hearing on October 18, 2010, HHSC received no comments regarding the rule.

Statutory Authority

This new rule is adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Human Resources Code §32.0312.

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 December 17, 2010.

TRD-201007208
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Effective date: February 1, 2011
Proposal publication date: October 1, 2010
For further information, please call: (512) 424-6900

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TITLE 7. BANKING AND SECURITIES

PART 1. FINANCE COMMISSION OF TEXAS

CHAPTER 9. RULES OF PROCEDURE FOR CONTESTED CASE HEARINGS, APPEALS, AND RULEMAKINGS

The Finance Commission of Texas (commission) adopts amendments to 7 TAC §9.1, concerning Definitions and Interpretation; Severability; §9.11, concerning Notice and Initiation of Proceedings; §9.32, concerning Telephone Hearings; and §9.72, concerning Administrative Record. The commission adopts the amendments without changes to the proposed text as published in the October 29, 2010, issue of the *Texas Register* (35 TexReg 9586).

The commission received no written comments on the proposal.

In general, the purpose of the amendments is to implement changes resulting from the commission's review of Chapter 9 under Texas Government Code, §2001.039. The changes provide better clarity for litigants in the contested case hearings process. The notice of intention to review 7 TAC Chapter 9 was published in the September 10, 2010, issue of the *Texas Register* (35 TexReg 8410). The agency did not receive any comments on the notice of intention to review.

The amendments are technical in nature and provide clarification, reflect current practice, improve grammar and word choice, provide a more precise legal citation, and remove obsolete language and references. The individual purposes of the amendments to each section are provided in the following paragraphs.

The purpose of the amendments to §9.1, concerning Definitions and Interpretation; Severability, is to clarify the language within certain definitions outlined in subsection (b). In the definition of "Administrative law judge" contained in paragraph (1), the amendments reflect the fact that a hearings officer may be employed through a contract by an individual agency. The definitions of "Applicant," "Protestant," and "Respondent," found in paragraphs (4), (5), and (6), respectively, are being amended to incorporate the different types of authorizations granted by the different finance agencies. These definitions formerly included the terms "license, permit, or other action." The amendments add language to include a "registration" or "registrant," and a "charter" or "charter holder." In addition, regarding applicants, the following phrase has been added to §9.1(b)(4): "or to amend its authority under an existing license, registration, charter, or permit."

The purpose of the amendments to §9.11, concerning Notice and Initiation of Proceedings, is to provide more inclusive language concerning various authorizations granted by the finance agencies, improve grammar, and revise a legal citation. As in §9.1(b), the amendments to §9.11(a) also integrate terminology to include holders of registrations and charters. The changes are found in the third and fourth sentences of subsection (a). In conjunction with the added terminology, the beginning of the third sentence has been revised to improve grammatical structure. Additionally, in §9.11(b)(5)(C), a more precise citation to the Government Code has been provided.

The purpose of the amendments to §9.32, concerning Telephone Hearings, is to provide a more accurate word choice. In the last sentence of subsection (a), the verb "insure" has been replaced with the verb "ensure" to better reflect the context of the sentence.

The purpose of the amendments to §9.72, concerning Administrative Record, is to remove obsolete language. In the first sentence, the "General Services Commission" has been replaced with the "Office of the Attorney General," which is the agency currently responsible for the cost rates. In addition, the last sentence is being deleted, as the administrative law judge no longer prepares or certifies the record on behalf of an agency.

SUBCHAPTER A. GENERAL

7 TAC §9.1

The amendments are adopted pursuant to Government Code, §2001.004, which requires a state agency to adopt rules of practice stating the nature and requirements of all available formal and informal procedures. The amendments are also adopted under specific rulemaking authority contained in the substantive statutes administered by the finance agencies under the jurisdiction of the commission, including Finance Code, §§11.301, 11.302, 11.304, 11.306, 14.157, 31.003, 66.002, 96.002, 151.102, 154.051, 156.102, 180.061, 181.003, 201.003, 342.551, 351.007, 352.003, 348.513, 371.006, 394.214, and 396.051, Health and Safety Code, §711.012(a) and §712.008, and Tax Code, §32.06.

The statutory provisions affected by the adopted amendments are contained in Finance Code, Chapters 11, 12, 13, 14, 31, 35, 61, 66, 91, 96, 121, 151, 154, 156, 180, 181, 185, 201, 301, 341, 342, 348, 351, 352, 371, 394, 396, Health and Safety Code, Chapters 711 and 712, and Tax Code, §32.06 and §32.065.

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 December 20, 2010.

TRD-201007209
Leslie L. Pettijohn
Executive Director
Finance Commission of Texas
Effective date: January 9, 2011
Proposal publication date: October 29, 2010
For further information, please call: (512) 936-7621

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SUBCHAPTER B. CONTESTED CASE HEARINGS

7 TAC §9.11, §9.32

The amendments are adopted pursuant to Government Code, §2001.004, which requires a state agency to adopt rules of practice stating the nature and requirements of all available formal and informal procedures. The amendments are also adopted under specific rulemaking authority contained in the substantive statutes administered by the finance agencies under the jurisdiction of the commission, including Finance Code, §§11.301, 11.302, 11.304, 11.306, 14.157, 31.003, 66.002, 96.002, 151.102, 154.051, 156.102, 180.061, 181.003, 201.003, 342.551, 351.007, 352.003, 348.513, 371.006, 394.214, and 396.051, Health and Safety Code, §711.012(a) and §712.008, and Tax Code, §32.06.

The statutory provisions affected by the adopted amendments are contained in Finance Code, Chapters 11, 12, 13, 14, 31, 35, 61, 66, 91, 96, 121, 151, 154, 156, 180, 181, 185, 201, 301, 341, 342, 348, 351, 352, 371, 394, 396, Health and Safety Code, Chapters 711 and 712, and Tax Code, §32.06 and §32.065.

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 December 20, 2010.

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Leslie L. Pettijohn
Executive Director
Finance Commission of Texas
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For further information, please call: (512) 936-7621

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SUBCHAPTER D. COURT APPEALS

7 TAC §9.72

The amendments are adopted pursuant to Government Code, §2001.004, which requires a state agency to adopt rules of practice stating the nature and requirements of all available formal and informal procedures. The amendments are also adopted under specific rulemaking authority contained in the substantive statutes administered by the finance agencies under the jurisdiction of the commission, including Finance Code, §§11.301, 11.302, 11.304, 11.306, 14.157, 31.003, 66.002, 96.002, 151.102, 154.051, 156.102, 180.061, 181.003, 201.003, 342.551, 351.007, 352.003, 348.513, 371.006, 394.214, and 396.051, Health and Safety Code, §711.012(a) and §712.008, and Tax Code, §32.06.

The statutory provisions affected by the adopted amendments are contained in Finance Code, Chapters 11, 12, 13, 14, 31, 35, 61, 66, 91, 96, 121, 151, 154, 156, 180, 181, 185, 201, 301, 341, 342, 348, 351, 352, 371, 394, 396, Health and Safety Code, Chapters 711 and 712, and Tax Code, §32.06 and §32.065.

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PART 4. TEXAS DEPARTMENT OF SAVINGS AND MORTGAGE LENDING

CHAPTER 51. CHARTER APPLICATIONS

7 TAC §51.1

The Finance Commission of Texas (the "Commission") adopts an amendment to §51.1, concerning the form and content of applications to incorporate.

Section 51.1 is adopted without changes to the text as published in the October 29, 2010, issue of the *Texas Register* (35 TexReg 9589) and will not be republished.

In general, the purpose of the amendment is to conform the rule to the Department's current practice and to add clarification.

The 30-day comment period ended November 29, 2010, during which no comments were received on the proposed rule amendments.

The amendments are adopted pursuant to Texas Finance Code §11.302, which authorizes the Commission to adopt rules to enforce Title 3 of the Texas Finance Code.

The statutory provisions affected by the amendments are contained in Texas Finance Code, Chapter 62.

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.

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Douglas B. Foster
Commissioner
Texas Department of Savings and Mortgage Lending
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For further information, please call: (512) 475-1350

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CHAPTER 53. ADDITIONAL OFFICES

7 TAC §53.5

The Finance Commission of Texas (the "Commission") adopts an amendment to §53.5, concerning loan offices and administrative offices.

Section 53.5 is adopted without changes to the text as published in the October 29, 2010, issue of the *Texas Register* (35 TexReg 9590) and will not be republished.

In general, the purpose of the amendment is to conform the rule to the Department's current practice and to add clarification.

The 30-day comment period ended November 29, 2010, during which no comments were received on the proposed rule amendments.

The amendments are adopted pursuant to Texas Finance Code §11.302, which authorizes the Commission to adopt rules to enforce Title 3 of the Texas Finance Code.

The statutory provisions affected by the amendments are contained in Texas Finance Code, Chapter 62.

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.

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CHAPTER 57. CHANGE OF OFFICE LOCATION OR NAME

7 TAC §57.1

The Finance Commission of Texas (the "Commission") adopts an amendment to §57.1, concerning change of office location.

Section 57.1 is adopted without changes to the text as published in the October 29, 2010, issue of the *Texas Register* (35 TexReg 9590) and will not be republished.

In general, the purpose of the amendment is to conform the rule to the Department's current practice and to add clarification.

The 30-day comment period ended November 29, 2010, during which no comments were received on the proposed rule amendments.

The amendments are adopted pursuant to Texas Finance Code §11.302, which authorizes the Commission to adopt rules to enforce Title 3 of the Texas Finance Code.

The statutory provisions affected by the amendments are contained in Texas Finance Code, Chapter 62.

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CHAPTER 65. LOANS AND INVESTMENTS

7 TAC §65.19

The Finance Commission of Texas (the "Commission") adopts an amendment to §65.19, concerning investments in real property.

Section 65.19 is adopted without changes to the text as published in the October 29, 2010, issue of the *Texas Register* (35 TexReg 9591) and will not be republished.

In general, the purpose of the amendment is to conform the rule to the Department's current practice and to add clarification.

The 30-day comment period ended November 29, 2010, during which no comments were received on the proposed rule amendments.

The amendments are adopted pursuant to Texas Finance Code §11.302, which authorizes the Commission to adopt rules to enforce Title 3 of the Texas Finance Code.

The statutory provisions affected by the amendments are contained in Texas Finance Code, Chapter 64.

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.

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CHAPTER 67. SAVINGS AND DEPOSIT ACCOUNTS

7 TAC §67.16

The Finance Commission of Texas (the "Commission") adopts an amendment to §67.16, concerning overdraft protection.

Section 67.16 is adopted without changes to the text as published in the October 29, 2010, issue of the *Texas Register* (35 TexReg 9592) and will not be republished.

In general, the purpose of the amendment is to conform the rule to the Department's current practice and to add clarification.

The 30-day comment period ended November 29, 2010, during which no comments were received on the proposed rule amendments.

The amendments are adopted pursuant to Texas Finance Code §11.302, which authorizes the Commission to adopt rules to enforce Title 3 of the Texas Finance Code.

The statutory provisions affected by the amendments are contained in Texas Finance Code, Chapter 65.

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.

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CHAPTER 73. SUBSIDIARY CORPORATIONS

7 TAC §73.3

The Finance Commission of Texas (the "Commission") adopts an amendment to §73.3, concerning authorized subsidiary investments.

Section 73.3 is adopted without changes to the text as published in the October 29, 2010, issue of the *Texas Register* (35 TexReg 9592) and will not be republished.

In general, the purpose of the amendment is to conform the rule to the Department's current practice and to add clarification.

The 30-day comment period ended November 29, 2010, during which no comments were received on the proposed rule amendments.

The amendments are adopted pursuant to Texas Finance Code §11.302, which authorizes the Commission to adopt rules to enforce Title 3 of the Texas Finance Code.

The statutory provisions affected by the amendments are contained in Texas Finance Code, Chapter 66.

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.

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CHAPTER 75. APPLICATIONS

The Finance Commission of Texas (the "Commission") adopts amendments to Subchapter A, §75.1, the application for permission to organize a state savings bank; and Subchapter C, §75.34, concerning loan offices and administrative offices, and §75.38, concerning change of home or branch office locations.

Sections 75.1, 75.34, and 75.38 are adopted without changes to the text as published in the October 29, 2010, issue of the *Texas Register* (35 TexReg 9593) and will not be republished.

In general, the purpose of the amendments is to conform the rule to the Department's current practice and to add clarification.

The 30-day comment period ended November 29, 2010, during which no comments were received on the proposed rule amendments.

SUBCHAPTER A. CHARTER APPLICATIONS

7 TAC §75.1

The amendments are adopted pursuant to Texas Finance Code §11.302, which authorizes the Commission to adopt rules to enforce Title 3 of the Texas Finance Code.

The statutory provisions affected by the amendments are contained in Texas Finance Code, Chapter 92.

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.

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SUBCHAPTER C. ADDITIONAL OFFICES

7 TAC §75.34, §75.38

The amendments are adopted pursuant to Texas Finance Code §11.302, which authorizes the Commission to adopt rules to enforce Title 3 of the Texas Finance Code.

The statutory provisions affected by the amendments are contained in Texas Finance Code, Chapter 92.

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.

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CHAPTER 77. LOANS, INVESTMENTS, SAVINGS, AND DEPOSITS

SUBCHAPTER A. AUTHORIZED LOANS AND INVESTMENTS

7 TAC §77.73, §77.93

The Finance Commission of Texas (the "Commission") adopts amendments to Subchapter A, §77.73, concerning investment in banking premises and other real estate owned, and §77.93, concerning authorized subsidiary investments.

Section 77.73 and §77.93 are adopted without changes to the text as published in the October 29, 2010, issue of the *Texas Register* (35 TexReg 9594) and will not be republished.

In general, the purpose of the amendments is to conform the rule to the Department's current practice and to add clarification.

The 30-day comment period ended November 29, 2010, during which no comments were received on the proposed rule amendments.

The amendments are adopted pursuant to Texas Finance Code §11.302, which authorizes the Commission to adopt rules to enforce Title 3 of the Texas Finance Code.

The statutory provisions affected by the amendments are contained in Texas Finance Code, Chapter 94.

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.

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SUBCHAPTER B. SAVINGS AND DEPOSITS

7 TAC §77.113

The Finance Commission of Texas (the "Commission") adopts the new rule in Subchapter B, §77.113, concerning overdraft protection.

Section 77.113 is adopted without changes to the text as published in the October 29, 2010, issue of the *Texas Register* (35 TexReg 9595) and will not be republished.

In general, the purpose of the new rule is to conform to the Department's current practice and to add clarification.

The 30-day comment period ended November 29, 2010, during which no comments were received on the proposed new rule.

The new rule is adopted pursuant to Texas Finance Code §11.302, which authorizes the Commission to adopt rules to enforce Title 3 of the Texas Finance Code.

The statutory provisions affected by the new rule are contained in Texas Finance Code, Chapter 95.

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.

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER G. SUBMETERING

16 TAC §25.141, §25.142

The Public Utility Commission of Texas (commission) adopts an amendment to §25.141, relating to Central System or Non-submetered Master Metered Utilities, without changes and §25.142, relating to Submetering for Apartments, Condominiums, and Mobile Home Parks, with changes to the proposed text as published in the October 29, 2010, issue of the *Texas Register* (35 TexReg 9599). The amendments implement certain provisions of Texas House Bill 882, 81st Legislature (2009) (HB 882), which amended Texas Property Code §92.008(b) to provide that a landlord may not interrupt or cause the interruption of water, wastewater, gas, or electric service furnished to a tenant by the landlord as an incident of the tenancy or by other agreement unless the interruption results from bona fide repairs, construction, or an emergency. The amendments reflect that a landlord of an apartment house or landlord that leases mobile homes in a mobile home park can no longer disconnect electric service because of a tenant's nonpayment for that service.

No public hearing on the proposed amendments was requested by any person. The commission received one comment on the amendments, from the Texas Apartment Association. The amendments are adopted under Project Number 37684.

Comments

The Texas Apartment Association, which represents more than 10,500 members that own or manage more than 1.7 million rental units in Texas, supported the amendments to §25.141 and §25.142.

Commission Response

The commission appreciates the Texas Apartment Association's comments and adopts the amendments with changes to §25.142(f)(9)(A) and (f)(11) to clarify the references to American National Standards Institute (ANSI) standards.

These sections are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supp. 2010) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, and specifically, Texas Utilities Code §§184.011 - 184.014, which authorizes the commission to adopt rules relating to submetering of electricity by the owner, operator, or manager of an apartment house or mobile home park, and §§184.051 - 184.052, which authorizes the commission to adopt rules governing billing systems or methods used by an apartment house owner; and Texas Property Code §92.008(b), which prohibits a landlord or a landlord's agent from interrupting or causing the interruption of utility service, except in connection with repairs, construction or emergencies.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002, Texas Utilities Code §§184.011 - 184.014, §§184.051 - 184.052: and Texas Property Code §92.008(b).

§25.142. Submetering for Apartments, Condominiums, and Mobile Home Parks.

(a) Purpose. This section implements Texas Utilities Code §184.052.

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

(1) Apartment house--One or more buildings containing more than five dwelling units, each of which is rented primarily for non-transient use with rent paid at intervals of one week or longer. The term includes a rented or owner-occupied residential condominium.

(2) Dwelling unit--One or more rooms suitable for occupancy as a residence and that contain kitchen and bathroom facilities, or a mobile home in a mobile home park.

(3) Master meter--A meter used to measure, for billing purposes, all electric usage of an apartment house or mobile home park, including common areas, common facilities, and dwelling units.

(4) Month or monthly--The period between any two consecutive meter readings by the utility, either actual or estimated, at approximately 30-day intervals.

(5) Owner--Any owner, operator, or manager of any apartment house or mobile home park engaged in electric submetering.

(6) Electric submetering--Individual dwelling unit metering of electric service performed by the owner.

(c) Records and reports.

(1) The owner shall maintain and make available for inspection by the tenant the following records:

(A) the billing from the utility or retail electric provider to the apartment owner for the current month and the 12 preceding months;

(B) the calculation of the average cost per billing unit, i.e., kilowatt-hour for the current month and the 12 preceding months;

(C) all submeter readings and tenant billings for the current month and the 12 preceding months;

(D) all submeter test results for the current month and the 12 preceding months.

(2) Records shall be made available at the resident manager's office during reasonable business hours or, if there is no resident manager, at the dwelling unit of the tenant at the convenience of both the apartment owner and tenant.

(3) All records shall be made available to the commission upon request.

(d) Billing. All rental agreements between the owner and the tenants shall clearly state that the dwelling unit is submetered, that the bills will be issued thereon, that electrical consumption charges for all common areas and common facilities will be the responsibility of the owner and not of the tenant, and that any disputes relating to the computation of the tenant's bill and the accuracy of the submetering device will be between the tenant and the owner. Each owner shall provide a tenant, at the time the lease is signed, a copy of this section or a narrative summary as approved by the commission to assure that the tenant is informed of his rights and the owner's responsibilities under this section.

(1) Rendering and form of bill.

(A) Bills shall be rendered for the same billing period as that of the electric utility, generally monthly, unless service is rendered for less than that period. Bills shall be rendered as promptly as possible following the reading of the submeters. The submeters shall be read within three days of the scheduled reading date of the electric utility's master meter.

(B) The billing unit shall be that used by the electric utility in its billing to the owner.

(C) The owner shall be responsible for determining that the energy billed to any dwelling unit shall be only for that submetered and consumed within that unit.

(D) Submetered billings shall not be included as part of the rental payment or as part of billings for any other service to the tenant. A separate billing must be issued or, if issued on a multi-item bill, submetered billing information must be separate and distinct from any other charges on the bill and conform to information required in subparagraph (H) of this paragraph. The submetered bill must clearly state "submetered electricity."

(E) The bill shall reflect only submetered usage. Utility consumption at all common facilities will be the responsibility of the owner and not of the tenant. Allocation of central systems for air conditioning, heating and hot water is not prohibited by this section as set forth in §25.141 of this title (relating to Central System or Non-submetered Master Metered Utilities).

(F) The owner shall not impose any extra charges on the tenant over and above those charges which are billed by the retail electric provider or utility to the owner. The bill may not include a deposit, late penalty, reconnect charge, or any other charges unless otherwise provided for by these sections.

(i) A one-time penalty not to exceed 5.0% may be made on delinquent accounts. If the penalty is applied, the bill shall indicate the amount due if paid by the due date and the amount due if the late penalty is incurred. No late penalty may be applied unless agreed to by the tenant in a written lease which states the exact dollar or percentage amount of the late penalty.

(ii) In a mobile home park a reconnect fee may be applied for a mobile home not leased by the mobile home park owner if service to the pad site tenant is disconnected for non-payment of submetered bills in accordance with subsection (e)(1) of this section. Such reconnect fee shall be calculated based on the average actual cost to the owner for the expenses associated with the reconnection, but under no circumstances shall exceed $10. No reconnect charge may be applied unless agreed to by the tenant in a written lease which states the exact dollar amount of such reconnect charge.

(G) The tenant's submeter bills shall be calculated in the following manner: after the electric bill is received from the utility or retail electric provider, the owner shall divide the net total charges for electrical consumption, plus applicable tax, by the total number of kilowatt-hours to obtain an average cost per kilowatt-hour. The average kilowatt-hour cost shall then be multiplied by each tenant's kilowatt-hour consumption to obtain the charge to the tenant. The computation of the average cost per kilowatt-hour shall not include any penalties charged by the utility or the retail electric provider to the owner for disconnect, reconnect, late payment, or other similar service charges.

(H) The tenant's electric submeter bill shall show all of the following information:

(i) the date and reading of the submeter at the beginning and at the end of the period for which the bill is rendered;

(ii) the number of billing units metered;

(iii) the computed rate per billing unit;

(iv) the total amount due for electricity used;

(v) a clear and unambiguous statement that the bill is not from the utility or retail electric provider, which shall be named in the statement;

(vi) the name and address of the tenant to whom the bill is applicable;

(vii) the name of the firm rendering the submetering bill and the name or title, address, and telephone number of the person or persons to be contacted in case of a billing dispute;

(viii) the date by which the tenant must pay the bill; and

(ix) the name, address, and telephone number of the party to whom payment is to be made.

(2) Due date. The due date of the bill shall not be less than seven days after issuance. A bill for submetered service is delinquent if not received by the party indicated on the bill by the due date. The postmark date, if any, on the envelope of the bill or on the bill itself shall constitute proof of the date of issuance. An issuance date on the bill shall constitute proof of the date of issuance if there is no postmark on the envelope or bill. If the due date falls on a holiday or weekend, the due date for payment purposes shall be the next work day after the due date.

(3) Disputed bills. In the event of a dispute between the tenant and the owner regarding any bill, the owner shall promptly make an investigation as shall be required by the particular case, and report the results to the tenant. The investigation and report shall be completed within 30 days from the date the tenant notified the owner of the dispute.

(4) Tenant access to records. The tenants of any dwelling unit whose electrical consumption is submetered shall be allowed by

the owner to review and copy the master billing for the current month's billing period and for the 12 preceding months, and all submeter readings of the entire apartment house or mobile home park for the current month and for the 12 preceding months.

(5) Estimated bills. Estimated bills shall not be rendered unless the meter has been tampered with or is out of order, and shall be distinctly marked "estimated bill".

(6) Overbilling and underbilling. If submetered billings are found to be in error, the owner shall calculate a billing adjustment. If the tenant is due a refund, an adjustment shall be made for the entire period of the overcharges. If the tenant was undercharged, the owner may backbill the tenant for the amount which was underbilled. The backbilling is not to exceed six months unless the owner can produce records to identify and justify the additional amount of backbilling. If the underbilling is $50 or more, the owner shall offer to the tenant a deferred payment plan option, for the same length of time as that of the underbilling. However, in a mobile home park, the mobile home park owner may not disconnect electric service to a mobile home not leased by the mobile home park owner if the pad site tenant fails to pay charges arising from an underbilling more than six months prior to the date the tenant was initially notified of the amount of the undercharges and the total additional amount due. Furthermore, adjustments for usage by a previous tenant may not be backbilled to the current tenant.

(7) Level and average payment plans. An owner may offer a level payment plan or average payment plan consistent with this paragraph.

(A) The payment plan may be one of the following methods:

(i) A level payment plan allowing eligible tenants to pay on a monthly basis a fixed billing rate of one-twelfth of that tenant's estimated annual consumption at the appropriate rates, with provisions for quarterly adjustments as may be determined based on actual usage.

(ii) An average payment plan allowing tenants to pay on a monthly basis one-twelfth of the sum of that tenant's current month's consumption plus the previous 11 month's consumption (or an estimate thereof, for a new customer) at the appropriate customer class rates, plus a portion of any unbilled balance. Provisions for annual adjustments as may be determined based on actual usage shall be provided. If at the end of a year the owner determines that he has collected an amount different than he has been charged by the utility or retail electric provider, the owner must refund any overcollection and may surcharge any undercollection over the next year.

(B) Under either of the plans outlined in subparagraph (A) of this paragraph the owner is prohibited from charging the tenant any interest that may accrue. Any seasonal overcharges or undercharges will be carried by the owner of the complex.

(C) A mobile home park owner may disconnect service to a mobile home not leased by the mobile home park owner, pursuant to subsection (e) of this section, if the pad site tenant does not fulfill the terms of a level payment plan or an average payment plan.

(D) The owner may collect a deposit from all tenants entering into level payment plans or average payment plans; the deposit will not exceed an amount equivalent to one-sixth of the estimated annual billing. Notwithstanding any other provision in these sections, the owner may retain said deposit for the duration of the level or average payment plan; however, the owner shall pay interest on the deposit as is provided in §25.24 of this title (relating to Credit Requirements and Deposits).

(e) Discontinuance of electric service.

(1) Application. This subsection applies only to mobile homes in a mobile home park that are not leased by the mobile home park owner. Disconnection of any other dwelling unit by the owner is governed by Texas Property Code §92.008(b).

(2) Disconnection for delinquent bills.

(A) Electric service may be disconnected only for nonpayment of electric bills. A pad site tenant's electric service may be disconnected if a bill has not been paid within 12 days from the date of issuance and proper notice has been given. Proper notice shall consist of a separate mailing or hand delivery at least five days prior to a stated date of disconnection, with the words "termination notice" or similar language prominently displayed on the notice. The notice shall include the office or street address where a tenant can go during normal working hours to make arrangements for payment of the bill and for reconnection of service.

(B) Under these provisions, a pad site tenant's electric service may be discontinued only for nonpayment of electric service.

(3) Disconnection on holidays or weekends. Unless a dangerous condition exists, or unless the pad site tenant requests disconnection, electric service shall not be disconnected on a day, or on a day immediately preceding a day, when personnel of the mobile home park are not available for the purpose of making collections and reconnecting electric service.

(4) Disconnection under special circumstances.

(A) Disconnection of ill and disabled. A mobile home park owner shall not disconnect electric service to a pad site tenant when that tenant establishes that disconnection of electric service will cause some person residing at the tenant's mobile home to become seriously ill or more seriously ill;

(i) Each time a pad site tenant seeks to avoid disconnection of electric service under this subparagraph, the tenant must accomplish all of the following by the stated date of disconnection:

(I) have the person's attending physician (for purposes of this subsection, the term "physician" shall mean any public health official, including medical doctors, doctors of osteopathy, nurse practitioners, registered nurses, and any other similar public health official) call or contact the mobile home park owner by the stated date of disconnection;

(II) have the person's attending physician submit a written statement to the mobile home park owner; and

(III) enter into a deferred payment plan.

(ii) The prohibition against electric service termination provided by this subparagraph shall last 63 days from the issuance of the electric bill or a shorter period agreed upon by the mobile home park owner and the customer or physician.

(B) Disconnection of energy assistance clients. A mobile home park owner shall not disconnect electric service to a pad site tenant for a billing period in which the mobile home park owner receives a pledge, letter of intent, purchase order, or other notification that the energy assistance provider is forwarding sufficient payment to continue service; and

(C) Disconnection during extreme weather. A mobile home park owner shall not disconnect electric service to a pad site tenant on a day when:

(i) the previous day's highest temperature did not exceed 32 degrees Fahrenheit, and the temperature is predicted to re-

main at or below that level for the next 24 hours, according to the nearest National Weather Service (NWS) reports; or

(ii) the NWS issues a heat advisory for any county in which the mobile home park is located, or when such advisory has been issued on any one of the preceding two calendar days.

(f) Submeters.

(1) Submeter requirements.

(A) Use of submeter. All electrical energy sold by an owner shall be charged for by meter measurements.

(B) Installation by owner. Unless otherwise authorized by the commission, each owner shall be responsible for providing, installing, and maintaining all submeters necessary for the measurement of electrical energy to its tenants.

(2) Submeter records. Each owner shall keep the following records:

(A) Submeter equipment record. Each owner shall keep a record of all of its submeters, showing the tenant's address and date of the last test.

(B) Records of submeter tests. All submeter tests shall be properly referenced to the submeter record provided in this section. The record of each test made shall show the identifying number of the submeter, the standard meter and other measuring devices used, the date and kind of test made, by whom made, the error (or percentage of accuracy), and sufficient data to permit verification of all calculations.

(3) Submeter unit indication. Each meter shall indicate clearly the kilowatt-hours consumed by the tenant.

(4) Submeter tests on request of tenant. Each owner shall, upon the request of a tenant, and if the tenant so desires, in the tenant's or the tenant's authorized representative's presence, make a test of the accuracy of the tenant's submeter. The test shall be made during reasonable business hours at a time convenient to the tenant desiring to observe the test. If the submeter tests within the accuracy standards for self-contained watt-hour meters as established by the latest edition of American National Standards Institute, Incorporated, (ANSI), Standard C12 (American National Code for Electricity Metering), a charge of up to $15 may be charged the tenant for making the test. However, if the submeter has not been tested within a period of one year, or if the submeter's accuracy is not within the appropriate accuracy standards, no charge shall be made to the tenant for making the test. Following completion of any requested test, the owner shall promptly advise the tenant of the results of the test.

(5) Bill adjustment due to submeter error. If any submeter is found not to be within the accuracy standards in subsection (f)(4) of this section proper correction shall be made of previous readings. An adjusted bill shall be rendered in accordance with subsection (d)(6) of this section. If a submeter is found not to register for any period, unless bypassed or tampered with, the owner may make a charge for units used, but not metered, for a period not to exceed one month based on amounts used under similar conditions during periods preceding or subsequent thereto, or during the corresponding period in previous years.

(6) Bill adjustment due to conversion. If, during the 90-day period preceding the installation of meters or submeters, an owner increases rental rates, and such increase is attributable to increased costs of electric service, then such owner shall immediately reduce the rental rate by the amount of such increase and shall refund all of the increase that has previously been collected within the 90-day period.

(7) Location of submeters. Submeters, service switches, or cut-off valves in conjunction with the submeters shall be installed in accordance with the latest edition of ANSI, Standard C12, and will be readily accessible for reading, testing, and inspection, with minimum interference and inconvenience to the tenant.

(8) Submeter testing facilities and equipment.

(A) Qualified expert. Each owner engaged in electric submetering shall engage an independent qualified expert to provide such instruments and other equipment and facilities as may be necessary to make the submeter tests required by this section. Such equipment and facilities shall generally conform to the ANSI, Standard C12, unless otherwise prescribed by the commission, and shall be available at all reasonable times for the inspection by its authorized representatives.

(B) Portable standards. Each owner engaged in electrical submetering shall, unless specifically excused by the commission, provide or utilize a testing firm which provides portable test instruments as necessary for testing billing submeters.

(C) Reference standards. Each owner shall provide or have access to suitable indicating instruments as reference standards for insuring the accuracy of shop and portable instruments used for testing billing submeters.

(D) Testing of reference standards. All reference standards shall be submitted once each year or on a scheduled basis approved by the commission to a standardizing laboratory of recognized standing, for the purpose of testing and adjustment.

(E) Calibration of test equipment. All shop and portable instruments used for testing billing submeters shall be calibrated by comparing them with a reference standard at least every 120 days during the time such test instruments are being regularly used. Test equipment shall at all times be accompanied by a certified calibration card signed by the proper authority, giving the date when it was last certified and adjusted. Records of certifications and calibrations shall be kept on file in the office of the owner.

(9) Accuracy requirements for submeters.

(A) Limits. No submeter that exceeds the test calibration limits for self-contained watt-hour meters as set by the ANSI, Standard C12, shall be placed in service or left in service. All electrical current transformers, potential transformers, or other such devices used in conjunction with an electric submeter shall be considered part of the submeter and must also meet test calibration and phase angle limits set by the ANSI Standard C12 and the ANSI Standard C57.13 for revenue billing. A nameplate shall be attached to each transformer and shall include or refer to calibration and phase angle data and other information required by the ANSI Standard C12 and the ANSI Standard C57.13 for revenue billing. Whenever on installation, periodic, or other tests, an electric submeter or transformer is found to exceed these limits, it shall be adjusted, repaired, or replaced.

(B) Adjustments. Submeters shall be adjusted as closely as possible to the condition of zero error. The tolerances are specified only to allow for necessary variations.

(10) Submeter tests prior to installation. No submeter shall be placed in service unless its accuracy has been established. If any submeter is removed from actual service and replaced by another submeter for any purpose whatsoever, it shall be properly tested and adjusted before being placed in service again.

(11) Testing of electric submeters in service. Standard electromechanical single stator watt-hour meters with permanent braking magnets shall be tested in accordance with the ANSI Standard C12 for periodic, variable interval, or statistical sampling testing

programs. All other types of submeters shall be tested at least annually unless specified otherwise by the commission.

(12) Restriction. Unless otherwise provided by the commission, no dwelling unit in an apartment house or mobile home park may be submetered unless all dwelling units are submetered.

(13) Same type meters required. All submeters which are served by the same master meter shall be of the same type, such as induction or electronic.

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 December 17, 2010.

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CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

The Public Utility Commission of Texas (commission) adopts amendments to §25.214, relating to Terms and Conditions of Retail Delivery Service Provided by Investor Owned Transmission and Distribution Utilities (Tariff), and §25.272, relating to Code of Conduct for Electric Utilities and Their Affiliates, with changes to the proposed text as published in the October 15, 2010, issue of the *Texas Register* (35 TexReg 9200). The amendment to the Tariff makes changes to conform the Tariff to new §25.497, relating to Critical Care Customers, adopted by the commission in Project Number 37622, *Rulemaking to Amend Customer Protection Rules Relating to Designation of Critical Care Customers.* The amendment to §25.272 allows an electric utility to submit customer information upon request of the Texas Division of Emergency Management. The amendment to §25.497 provides additional protections to customers who have been designated as critical load customers, chronic condition residential customers, or critical care residential customers. The amendments are competition rules subject to judicial review as specified in Public Utility Regulatory Act (PURA) §39.001(e). The amendments are adopted under Project Number 38676.

The commission received comments on the proposed amendments from One Voice Texas (One Voice); AEP Texas Central Company, AEP Texas North Company, CenterPoint Energy Houston Electric, LLC, Oncor Electric Delivery Company LLC, and Texas-New Mexico Power Company (Joint TDUs); the Retail Electric Provider Coalition, which consists of the Alliance for Retail Markets (ARM), CPL Retail Energy LP, Direct Energy LP, Reliant Energy Retail Services LLC, Texas Energy Association for Marketers (TEAM), TXU Energy Retail Company LLC, and WTU Retail Energy LP; and Texas Industrial Energy Consumers (TIEC). The members of ARM that participated in the comments were Direct Energy LP, First Choice Power, Green Mountain Energy Company, Gexa Energy, LP, and Stream Energy. The members of TEAM that participated in the comments were Accent Energy, Amigo Energy, Bounce Energy, Cirro Energy, Green Mountain Energy Company, Hudson Energy Services, Just Energy, StarTex Power, Stream Energy, Tara Energy, and TriEagle.

The commission solicited comments on a question concerning the release of information to first responders. The Order Adopting the Repeal of §25.497 and New §25.497 in Project No. 37622, *Rulemaking Related to Critical Care Customers,* states:

"the commission concludes that the process for turning lists over to first responders should be more thoroughly considered in the compliance project, to be opened following adoption of this rulemaking. The commission is concerned that the current substantive rules addressing proprietary customer information, most notably §25.272(g)(1), relating to privacy of customer information, may prohibit a Transmission and Distribution Utility (TDU) from providing the list. Therefore, the commission finds that the upcoming project to develop the critical care form shall address these issues, as well as the Joint TDUs' concerns relating to how this information would be provided to the correct people."

The amendment to §25.272 in the current project allows the electric utility to provide customer information to a public safety first responder. The commission posed the following question in connection with the amendments:

Are there any hurdles in commission rules, the Public Utility Regulatory Act, or other law that would prevent a utility from sharing this information to a First Responder, even with customer consent?

TIEC recommended that critical load industrial customers should be excluded from the changes to §25.272(g)(1)(E). TIEC commented that it is unclear whether the commission intended to include critical load industrial customers. TIEC pointed out that the amendment and the question stem from comments presented by OPC and Texas One Voice, and the intent is to provide additional protections to residential customers. TIEC argued that the reasoning does not apply to critical load industrial facilities. TIEC further explained that critical load industrial facilities operate under extensive regulatory requirements and have telemetry and other systems in place to deal with emergencies involving power outages. TIEC concluded that including industrial customers in the changes is unnecessary and inappropriate. TIEC added that allowing proprietary information from critical load industrial customers to be released without stringent controls and safeguards could compromise the security of these facilities. The Joint TDUs agreed with TIEC on this issue.

Commission Response

The commission agrees with TIEC and the Joint TDUs that critical load industrial customers should be removed from the language in §25.272(g)(1)(E) and changes that subparagraph accordingly so that it applies only to critical care residential customers.

The REP Coalition noted that there may be compelling policy reasons supporting the utility's release of information to first responders. The REP Coalition stated that it is important to analyze the applicability of other law to determine whether a utility could share medical or health information with a first responder. Further, the REP Coalition pointed out that even if PURA and the commission's rules would appear to allow the release of such information with customer consent, other statutes that more di-

rectly address medical and health information could potentially act to prohibit such release.

The REP Coalition did not argue that utilities should be prohibited from releasing pertinent information to first responders. The REP Coalition highlighted the potential regulatory complexities raised by the preamble question. The REP Coalition commented that §159.002(c) of the Texas Occupations Code provides that a person who receives information from a confidential communication or record (i.e., a communication between a physician and a patient) may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained. The REP Coalition stated that as applied in this context, the information contained on the application, which is completed by the customer and his physician, could arguably be used only for purposes of determining critical care or chronic condition eligibility.

The Joint TDUs recommended against revising the application to ask customers whether they want their information provided to first responders. Joint TDUs opined that while at first blush this sounds like a positive idea, the difficult issues associated with implementation, the uncertainty with regard to whether first responders need or want the information, and the cost and potential liability for the TDU overshadow any potential benefit. They argued that it is inappropriate to burden the TDU with a costly task that is unrelated to the provision of electric delivery service that can better be performed by public service agencies.

The Joint TDUs provided several reasons for their opposition. First, Joint TDUs argued it should not be assumed that the release of information will be a simple, ministerial task that can easily be performed in conjunction with the other responsibilities assigned to them with regard to critical care customers. TDUs will be required to establish separate databases and will have to add the capability for putting an electronic flag on the account indicating whether the customer has opted in or opted out. Joint TDUs explained this will be a manual process and the TDU will incur costs in setting up this new system and for the ongoing staff time to maintain it.

Second, Joint TDUs pointed out that it is unclear what, if any, actual use will be made of this information, and it is unknown whether first responders would ever seek to use it. Outside of a hurricane in the Gulf Coast region, it is hard to conceive of any event that would occasion agencies to want this type of information, and a hurricane, flood, or tornado with this type of wide impact is a rare event. Third, because transferring the information from the application to the database (and possibly setting the flag) will be a manual process, human error could lead to incorrect assignment of the customer. Joint TDUs suggested this could result in liability for the TDU associated with giving out information that should have remained private or with failing to give out information regarding a customer who needed help.

Joint TDUs offered an alternative solution. They suggested that language could be added to the letter informing the customer of the designation and recommending that those applying for critical care status for purposes of their electric service consider calling the 2-1-1 Texas/United Way Helpline to register for available emergency services. This approach would provide the customer with information on an existing process for obtaining emergency assistance and is more appropriate than developing and setting up an entirely new process.

The Joint TDUs did not support the idea of providing electric customer information to first responders, either with or without customer consent. However, they added that if the commission determines that the information should be provided, the better approach is to allow the TDU to provide the entire critical care list, without asking for customer consent. This would limit the need for the TDU to develop and maintain a system for tracking customer consent. It would also decrease the TDU's potential liability for providing or not providing the correct information. In order to allow the TDU to provide the information without customer consent, §25.272(g)(1)(E) should be adopted but with the reference to the customer's consent removed.

The Joint TDUs explained that the TDU should not be required to make its own determination of the appropriate individuals or agencies to receive the list or in which events it should be released. Joint TDUs further argued that the categories of proposed recipients of the list, "state, federal, or local government Agency," are too broad. Joint TDUs commented that they are not equipped to make these kinds of decisions and should not be required to be the gatekeeper for deciding who gets the information and in what circumstances.

One Voice urged the commission to coordinate with the Texas Division of Emergency Management to share the list of Critical Care and Chronic Condition residential customers with disaster first responders in order to ensure their needs are met during a disaster. One Voice explained when there is a disaster, government agencies and nonprofit responders are coordinated through the Texas Division of Emergency Management. For people with disabilities and other health issues in need of assistance, first responders from the Texas Department of State Health Services, the Texas Department of Family and Protective Services (Adult Protective Services), and local emergency responders are deployed to assist with medical needs, food, and evacuation to safe areas.

The Joint TDUs responded that the suggestion by One Voice may be the better approach. They maintained that in either instance, the TDU should provide the information only upon the request of the agency or office, and customer authorization should not be required. Joint TDUs recommended that contact information for the Division of Emergency Management be added to the letter informing a customer of its critical care designation and a statement be included encouraging the customer to sign up for available services, and the TDU not be required to provide lists of critical care customers. This would mean that §25.272 need not be amended. If the commission does not agree with this recommendation, then the Joint TDUs recommended that §25.272 be amended to allow the TDU to provide information to the Division of Emergency Management, upon request, and without customer authorization.

Commission Response

The commission agrees that there would be additional administrative responsibility placed on the Joint TDU in tracking customer consent for critical care residential customers if information release were subject to customer or patient approval. The commission concludes that the recommendation by the Joint TDUs regarding the reference to the 2-1-1 Texas/United Way Helpline is reasonable and should be added in the letter sent to the customers by the TDU. The commission further concludes that the Joint TDUs should not be prohibited by commission rules from releasing critical care residential customer information to the Division of Emergency Management, if it is requested. The commission changes §25.272(g)(1)(E) accordingly.

Section 25.214(d)

Tariff section 4.3.9.1(1)

The REP Coalition proposed that this section be clarified to state that the TDU will notify the Competitive Retailer and Retail Customer of "the designation and any change in Retail Customer's designation." This change would make it clear that the customer and the REP are informed of an initial designation, a new REP is informed of the customer's designation if the customer switches providers, and the customer and REP are informed of any changes in designation.

Commission Response

The commission agrees with the REP Coalition's proposal and changes the section accordingly.

Tariff section 5.2.5

Joint TDUs pointed out that this section does not make it clear that an application for designation as critical care must be made following the procedures in §25.497, and a customer might assume that another method could be used to "notify the TDU" that it believes it qualifies for critical care status. The Joint TDUs requested that this subsection be changed to make it clear that customers must follow the procedures in §25.497.

Commission Response

The commission agrees with the Joint TDUs recommendation and changes the section accordingly.

Tariff section 5.3.7.4

Joint TDUs pointed out an additional issue in section 5.3.7.4(1)(E) and suggested clarification. As written, (1)(E) applies to any disconnection or suspension other than one "related to dangerous conditions, clearance requests, or move-out requests." It mandates that in all other instances, the procedures in §25.497 and §25.483 must be followed prior to disconnecting or suspending service to a critical care customer. The procedures in §25.483, however, are only applicable to disconnections for failure to pay, and there are no additional procedures mandated in §25.497. Joint TDUs concluded that section 5.3.7.4(1)(E) appears to conflict with §25.483 when it purports to make the procedures applicable to any type of suspension or disconnection of service other than dangerous conditions, clearance, or move out. As other sections of the tariff make clear, however, the instances in which the TDU may need to interrupt or suspend service are much broader than "dangerous conditions". For example, Tariff sections 4.3.8.1 and 5.3.7.1 allow the TDU not only to suspend service for a dangerous condition but also if authorized by Applicable Legal Authorities, as would be the case, for example, if ERCOT ordered rolling blackouts. If required to follow the procedures established for a disconnection for non-payment (DNP) before interrupting service in these circumstances, the TDU's hands would be tied. Joint TDUs therefore recommended that section 5.3.7.4(1)(E) be changed so that it does not appear that the procedures in §25.497 and §25.483 are applicable in all circumstances other than a "dangerous condition," a clearance, or move-out request. Joint TDUs stated that instead, this section should make clear that the DNP procedures must be followed only when the disconnection is authorized by the REP as a DNP.

Commission Response

The commission agrees with the Joint TDUs that this section should be clear that DNP procedures must be followed only when the disconnection is authorized by the REP as a DNP. The commission changes the section accordingly.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting the amendments, the commission makes other changes for the purpose of clarifying its intent.

SUBCHAPTER I. TRANSMISSION AND DISTRIBUTION

DIVISION 2. TRANSMISSION AND DISTRIBUTION APPLICABLE TO ALL ELECTRIC UTILITIES

16 TAC §25.214

(Editor's note: In accordance with Texas Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," the figure in 16 TAC §25.214 is not included in the print version of the Texas Register. The figure is available in the on-line version of the December 31, 2010, issue of the Texas Register.)

These amendments are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.001 (Vernon 2007 and Supp. 2010) (PURA), which provides the commission the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by PURA that is necessary and convenient to the exercise of that power and jurisdiction; §14.002, which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; §39.101(a), which requires that the commission ensure customers have safe, reliable, and reasonably priced electricity, including protection from disconnection in cases of medical emergency; §39.101(e), which provides the commission with the authority to adopt and enforce rules relating to the termination of service; and §39.203, which directs the commission to establish terms and conditions for transmission and distribution service.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.001, 14.002, 39.101(a), 39.101(e), and 39.203.

§25.214. Terms and Conditions of Retail Delivery Service Provided by Investor Owned Transmission and Distribution Utilities.

(a) Purpose. The purpose of this section is to implement Public Utility Regulatory Act (PURA) §39.203 as it relates to the establishment of non-discriminatory terms and conditions of retail delivery service, including delivery service to a Retail Customer at transmission voltage, provided by a transmission and distribution utility (TDU), and to standardize the terms of service among TDUs. A TDU shall provide retail delivery service in accordance with the terms and conditions set forth in this section to those Retail Customers participating in the pilot project pursuant to PURA §39.104 on and after June 1, 2001, and to all Retail Customers on and after January 1, 2002. By clearly stating these terms and conditions, this section seeks to facilitate competition in the sale of electricity to Retail Customers and to ensure reliability of the delivery systems, customer safeguards, and services.

(b) Application. This section, which includes the pro-forma tariff set forth in subsection (d) of this section, governs the terms and conditions of retail delivery service by all TDUs in Texas. The terms and conditions contained herein do not apply to the provision of transmission service by non-ERCOT utilities to retail customers.

(c) Tariff. Each TDU in Texas shall file with the commission a tariff to govern its retail delivery service using the pro-forma tariff in subsection (d) of this section. The provisions of this tariff are requirements that shall be complied with and offered to all REPs and Retail

Customers unless otherwise specified. TDUs may add to or modify only Chapters 2 and 6 of the tariff, reflecting individual utility characteristics and rates, in accordance with commission rules and procedures to change a tariff; however the only modifications the TDU may make to 6.1.2.1 are to insert the commission-approved rates. Additionally, in Company specific discretionary service filings, Company shall propose timelines for discretionary services to the extent applicable and practical. Chapters 1, 3, 4, and 5 of the pro-forma tariff shall be used exactly as written. These chapters can be changed only through the rulemaking process. If any provision in Chapter 2 or 6 conflicts with another provision of Chapters 1, 3, 4, and 5, the provision found in Chapters 1, 3, 4, and 5 shall apply, unless otherwise specified in Chapters 1, 3, 4, and 5.

(d) Pro-forma Retail Delivery Tariff. Tariff for Retail Delivery Service.

Figure: 16 TAC §25.214(d)

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 20, 2010.

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For further information, please call: (512) 936-7223

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SUBCHAPTER K. RELATIONSHIPS WITH AFFILIATES

16 TAC §25.272

These amendments are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.001 (Vernon 2007 and Supp. 2010) (PURA), which provides the commission the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by PURA that is necessary and convenient to the exercise of that power and jurisdiction; §14.002, which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; §39.101(a), which requires that the commission ensure customers have safe, reliable, and reasonably priced electricity, including protection from disconnection in cases of medical emergency; §39.101(e), which provides the commission with the authority to adopt and enforce rules relating to the termination of service; and §39.203, which directs the commission to establish terms and conditions for transmission and distribution service.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.001, 14.002, 39.101(a), 39.101(e), and 39.203.

§25.272. Code of Conduct for Electric Utilities and Their Affiliates.

(a) Purpose. The provisions of this section establish safeguards to govern the interaction between utilities and their affiliates, both during the transition to and after the introduction of competition, to avoid potential market-power abuses and cross-subsidization between regulated and unregulated activities.

(b) Application.

(1) General application. This section applies to:

(A) electric utilities operating in the State of Texas as defined in the Public Utility Regulatory Act (PURA) §31.002(6), and transactions or activities between electric utilities and their affiliates, as defined in PURA §11.003(2); and

(B) transmission and distribution utilities operating in a qualifying power region in the State of Texas as defined in PURA §31.002(19) upon commission certification of a qualifying power region pursuant to PURA §39.152, and transactions or activities between transmission and distribution utilities and their affiliates, as defined in PURA §11.003(2).

(2) No circumvention of the code of conduct. An electric utility, transmission and distribution utility, or competitive affiliate shall not circumvent the provisions or the intent of PURA §39.157 or any rules implementing that section by using any affiliate to provide information, services, products, or subsidies between a competitive affiliate and an electric utility or a transmission and distribution utility.

(3) Notice of conflict and/or petition for waiver. Nothing in this section is intended to affect or modify the obligation or duties relating to any rules or standards of conduct that may apply to a utility or the utility's affiliates under orders or regulations of the Federal Energy Regulatory Commission (FERC) or the Securities and Exchange Commission (SEC). A utility shall file with the commission a notice of any provision in this section that conflict with FERC or SEC orders or regulations. A utility that is subject to statutes or regulations in any state that conflict with a provision of this section may petition the commission for a waiver of the conflicting provision on a showing of good cause.

(c) Definitions. The following words and terms when used in this section shall have the following meaning unless the context clearly indicates otherwise:

(1) Arm's length transaction--The standard of conduct under which unrelated parties, each acting in its own best interest, would carry out a particular transaction. Applied to related parties, a transaction is at arm's length if the transaction could have been made on the same terms to a disinterested third party in a bargained transaction.

(2) Competitive affiliate--An affiliate of a utility that provides services or sells products in a competitive energy-related market in this state, including telecommunications services, to the extent those services are energy-related.

(3) Confidential information--Any information not intended for public disclosure and considered to be confidential or proprietary by persons privy to such information. Confidential information includes but is not limited to information relating to the interconnection of customers to a utility's transmission or distribution systems, proprietary customer information, trade secrets, competitive information relating to internal manufacturing processes, and information about a utility's transmission or distribution system, operations, or plans for expansion.

(4) Corporate support services--Services shared by a utility, its parent holding company, or a separate affiliate created to perform corporate support services, with its affiliates of joint corporate oversight, governance, support systems, and personnel. Examples of services that may be shared, to the extent the services comply with the requirements prescribed by PURA §39.157(d) and (g) and rules implementing those requirements, include human resources, procurement, information technology, regulatory services, administrative services, real estate services, legal services, accounting, environmental services,

research and development unrelated to marketing activity and/or business development for the competitive affiliate regarding its services and products, internal audit, community relations, corporate communications, financial services, financial planning and management support, corporate services, corporate secretary, lobbying, and corporate planning. Examples of services that may not be shared include engineering, purchasing of electric transmission facilities and service, transmission and distribution system operations, and marketing, unless such services are provided by a utility, or a separate affiliate created to perform such services, exclusively to affiliated regulated utilities and only for provision of regulated utility services.

(5) Proprietary customer information--Any information compiled by an electric utility on a customer in the normal course of providing electric service that makes possible the identification of any individual customer by matching such information with the customer's name, address, account number, type or classification of service, historical electricity usage, expected patterns of use, types of facilities used in providing service, individual contract terms and conditions, price, current charges, billing records, or any other information that the customer has expressly requested not be disclosed. Information that is redacted or organized in such a way as to make it impossible to identify the customer to whom the information relates does not constitute proprietary customer information.

(6) Similarly situated--The standard for determining whether a non-affiliate is entitled to the same benefit a utility offers, or grants upon request, to its competitive affiliate for any product or service. For purposes of this section, all non-affiliates serving or proposing to serve the same market as a utility's competitive affiliate are similarly situated to the utility's competitive affiliate.

(7) Transaction--Any interaction between a utility and its affiliate in which a service, good, asset, product, property, right, or other item is transferred or received by either a utility or its affiliate.

(8) Utility--An electric utility as defined in PURA §31.002(6) or a transmission and distribution utility as defined in PURA §31.002(19). For purposes of this section, a utility does not include a river authority operating a steam generating plant on or before January 1, 1999, or a corporation authorized by Chapter 245, Acts of the 67th Legislature, Regular Session, 1981 (Article 717p, Vernon's Texas Civil Statutes). In addition, with respect to a holding company exempt under the Public Utility Holding Company Act (PUHCA) §3(a)(2), the term "utility," as used in this section, means the division or business unit through which the holding company conducts utility operations and not the holding company as a legal entity.

(d) Separation of a utility from its affiliates.

(1) Separate and independent entities. A utility shall be a separate, independent entity from any competitive affiliate.

(2) Sharing of employees, facilities, or other resources. Except as otherwise allowed in paragraphs (3), (4), (5), or (7) of this subsection, a utility shall not share employees, facilities, or other resources with its competitive affiliates unless the utility can prove to the commission prior to such sharing that the sharing will not compromise the public interest. Such sharing may be allowed if the utility implements adequate safeguards precluding employees of a competitive affiliate from gaining access to information in a manner that would allow or provide a means to transfer confidential information from a utility to an affiliate, create an opportunity for preferential treatment or unfair competitive advantage, lead to customer confusion, or create significant opportunities for cross-subsidization of affiliates.

(3) Sharing of officers and directors, property, equipment, computer systems, information systems, and corporate support services. A utility and a competitive affiliate may share common officers and directors, property, equipment, computer systems, information systems, and corporate support services, if the utility implements safeguards that the commission determines are adequate to preclude employees of a competitive affiliate from gaining access to information in a manner that would allow or provide a means to transfer confidential information from a utility to an affiliate, create an opportunity for preferential treatment or unfair competitive advantage, lead to customer confusion, or create significant opportunities for cross-subsidization of affiliates.

(4) Employee transfers and temporary assignments. A utility shall not assign, for less than one year, utility employees engaged in transmission or distribution system operations to a competitive affiliate unless the employee does not have knowledge of confidential information. Utility employees engaged in transmission or distribution system operations, including persons employed by a service company affiliated with the utility who are engaged in transmission system operations on a day-to-day basis or have knowledge of transmission or distribution system operations and are transferred to a competitive affiliate, shall not remove or otherwise provide or use confidential property or information gained from the utility or affiliated service company in a discriminatory or exclusive fashion, to the benefit of the competitive affiliate or to the detriment of non-affiliated electric suppliers. Movement of an employee engaged in transmission or distribution system operations, including a person employed by a service company affiliated with the utility who is engaged in transmission or distribution system operations on a day-to-day basis or has knowledge of transmission or distribution system operations from a utility to a competitive affiliate or vice versa, may be accomplished through either the employee's termination of employment with one company and acceptance of employment with the other, or a transfer to another company, as long as the transfer of an employee from the utility to an affiliate results in the utility bearing no ongoing costs associated with that employee. Transferring employees shall sign a statement indicating that they are aware of and understand the restrictions and penalties set forth in this section. The utility also shall post a conspicuous notice of such a transfer on its Internet site or other public electronic bulletin board within 24 hours and for at least 30 consecutive calendar days. The exception to this provision is that employees may be temporarily assigned to an affiliate or non-affiliated utility to assist in restoring power in the event of a major service interruption or assist in resolving emergency situations affecting system reliability. Consistent with §25.84(h) of this title, however, within 30 days of such a deviation from the code of conduct, the utility shall report this information to the commission and shall conspicuously post the information on its Internet site or other public electronic bulletin board for 30 consecutive calendar days.

(5) Sharing of office space. A utility's office space shall be physically separate from that of its competitive affiliates, where physical separation is accomplished by having office space in separate buildings or, if within the same building, by a method such as having offices on separate floors or with separate access, unless otherwise approved by the commission.

(6) Separate books and records. A utility and its affiliates shall keep separate books of accounts and records, and the commission may review records relating to a transaction between a utility and an affiliate.

(A) In accordance with generally accepted accounting principles or state and federal guidelines, as appropriate, a utility shall record all transactions with its affiliates, whether they involve direct or indirect expenses.

(B) A utility shall prepare financial statements that are not consolidated with those of its affiliates.

(C) A utility and its affiliates shall maintain sufficient records to allow for an audit of the transactions between the utility and its affiliates. At any time, the commission may, at its discretion, require a utility to initiate, at the utility's expense, an audit of transactions between the utility and its affiliates performed by an independent third party.

(7) Limited credit support by a utility. A utility may share credit, investment, or financing arrangements with its competitive affiliates if it complies with subparagraphs (A) and (B) of this paragraph.

(A) The utility shall implement adequate safeguards precluding employees of a competitive affiliate from gaining access to information in a manner that would allow or provide a means to transfer confidential information from a utility to an affiliate, create an opportunity for preferential treatment or unfair competitive advantage, lead to customer confusion, or create significant opportunities for cross-subsidization of affiliates.

(B) The utility shall not allow an affiliate to obtain credit under any arrangement that would include a specific pledge of any assets in the rate base of the utility or a pledge of cash reasonably necessary for utility operations. This subsection does not affect a utility's obligations under other law or regulations, such as the obligations of a public utility holding company under §25.271(c)(2) of this title (relating to Foreign Utility Company Ownership by Exempt Holding Companies).

(e) Transactions between a utility and its affiliates.

(1) Transactions with all affiliates. A utility shall not subsidize the business activities of any affiliate with revenues from a regulated service. In accordance with PURA and the commission's rules, a utility and its affiliates shall fully allocate costs for any shared services, including corporate support services, offices, employees, property, equipment, computer systems, information systems, and any other shared assets, services, or products.

(A) Sale of products or services by a utility. Unless otherwise approved by the commission and except for corporate support services, any sale of a product or service by a utility shall be governed by a tariff approved by the commission. Products and services shall be made available to any third party entity on the same terms and conditions as the utility makes those products and services available to its affiliates.

(B) Purchase of products, services, or assets by a utility from its affiliate. Products, services, and assets shall be priced at levels that are fair and reasonable to the customers of the utility and that reflect the market value of the product, service, or asset.

(C) Transfers of assets. Except for asset transfers implementing unbundling pursuant to PURA §39.051, asset valuation in accordance with PURA §39.262, and transfers of property pursuant to a financing order issued under PURA, Chapter 39, Subchapter G, assets transferred from a utility to its affiliates shall be priced at levels that are fair and reasonable to the customers of the utility and that reflect the market value of the assets or the utility's fully allocated cost to provide those assets.

(D) Transfer of assets implementing restructuring legislation. The transfer from a utility to an affiliate of assets implementing unbundling pursuant to PURA §39.051, asset valuation in accordance with PURA §39.262, and transfers of property pursuant to a financing order issued under PURA, Chapter 39, Subchapter G will be reviewed by the commission pursuant to the applicable provisions of PURA, and any rules implementing those provisions.

(2) Transactions with competitive affiliates. Unless otherwise allowed in this subsection, transactions between a utility and its competitive affiliates shall be at arm's length. A utility shall maintain a contemporaneous written record of all transactions with its competitive affiliates, except those involving corporate support services and those transactions governed by tariffs. Such records, which shall include the date of the transaction, name of affiliate involved, name of a utility employee knowledgeable about the transaction, and a description of the transaction, shall be maintained by the utility for three years. In addition to the requirements specified in paragraph (1) of this subsection, the following provisions apply to transactions between utilities and their competitive affiliates.

(A) Provision of corporate support services. A utility may engage in transactions directly related to the provision of corporate support services with its competitive affiliates. Such provision of corporate support services shall not allow or provide a means for the transfer of confidential information from the utility to the competitive affiliate, create the opportunity for preferential treatment or unfair competitive advantage, lead to customer confusion, or create significant opportunities for cross-subsidization of the competitive affiliate.

(B) Purchase of products or services by a utility from its competitive affiliate. Except for corporate support services, a utility may not enter into a transaction to purchase a product or service from a competitive affiliate that has a per unit value of $75,000 or more, or a total value of $1 million or more, unless the transaction is the result of a fair, competitive bidding process formalized in a contract subject to the provisions of §25.273 of this title (relating to Contracts Between Electric Utilities and Their Competitive Affiliates).

(C) Transfers of assets. Except for asset transfers facilitating unbundling pursuant to PURA §39.051, asset valuation in accordance with PURA §39.262, and transfers of property pursuant to a financing order issued under PURA, Chapter 39, Subchapter G, any transfer from a utility to its competitive affiliates of assets with a per unit value of $75,000 or more, or a total value of $1 million or more, must be the result of a fair, competitive bidding process formalized in a contract subject to the provisions of §25.273 of this title.

(f) Safeguards relating to provision of products and services.

(1) Products and services available on a non-discriminatory basis. If a utility makes a product or service, other than corporate support services, available to a competitive affiliate, it shall make the same product or service available, contemporaneously and in the same manner, to all similarly situated entities, and it shall apply its tariffs, prices, terms, conditions, and discounts for those products and services in the same manner to all similarly situated entities. A utility shall process all requests for a product or service from competitive affiliates or similarly situated non-affiliated entities on a non-discriminatory basis. If a utility's tariff allows for discretion in its application, the utility shall apply that provision in the same manner to its competitive affiliates and similarly situated non-affiliates, as well as to their respective customers. If a utility's tariff allows no discretion in its application, the utility shall strictly apply the tariff. A utility shall not use customer-specific contracts to circumvent these requirements, nor create a product or service arrangement with its competitive affiliate that is so unique that no competitor could be similarly situated to utilize the product or service.

(2) Discounts, rebates, fee waivers, or alternative tariff terms and conditions. If a utility offers its competitive affiliate or grants a request from its competitive affiliate for a discount, rebate, fee waiver, or alternative tariff terms and conditions for any product or service, it must make the same benefit contemporaneously available, on a non-discriminatory basis, to all similarly situated non-affiliates.

The utility shall post a conspicuous notice on its Internet site or public electronic bulletin board for at least 30 consecutive calendar days providing the following information: the name of the competitive affiliate involved in the transaction; the rate charged; the normal rate or tariff condition; the period for which the benefit applies; the quantities and the delivery points involved in the transaction (if any); any conditions or requirements applicable to the benefit; documentation of any cost differential underlying the benefit; and the procedures by which non-affiliates may obtain the same benefit. The utility shall maintain records of such information for a minimum of three years, and shall make such records available for third party review within 72 hours of a written request, or at a time mutually agreeable to the utility and the third party. A utility shall not create any arrangement with its competitive affiliate that is so unique that no competitor could be similarly situated to benefit from the discount, rebate, fee waiver, or alternative tariff terms and conditions.

(3) Tying arrangements prohibited. Unless otherwise allowed by the commission through a rule or tariff prior to a utility's unbundling pursuant to PURA §39.051, a utility shall not condition the provision of any product, service, pricing benefit, or alternative terms or conditions upon the purchase of any other good or service from the utility or its competitive affiliate.

(g) Information safeguards.

(1) Proprietary customer information. A utility shall provide a customer with the customer's proprietary customer information, upon request by the customer. Unless a utility obtains prior affirmative written consent or other verifiable authorization from the customer as determined by the commission, or unless otherwise permitted under this subsection, it shall not release any proprietary customer information to a competitive affiliate or any other entity, other than the customer, an independent organization as defined by PURA §39.151, or a provider of corporate support services for the sole purpose of providing corporate support services in accordance with subsection (e)(2)(A) of this section. The utility shall maintain records that include the date, time, and nature of information released when it releases customer proprietary information to another entity in accordance with this paragraph. The utility shall maintain records of such information for a minimum of three years, and shall make the records available for third party review within 72 hours of a written request, or at a time mutually agreeable to the utility and the third party. When the third party requesting review of the records is not the customer, commission, or Office of Public Utility Counsel, the records may be redacted in such a way as to protect the customer's identity. If proprietary customer information is released to an independent organization or a provider of corporate support services, the independent organization or entity providing corporate support services is subject to the rules in this subsection with respect to releasing the information to other persons.

(A) Exception for law, regulation, or legal process. A utility may release proprietary customer information to another entity without customer authorization where authorized or requested to do so by the commission or where required to do so by law, regulation, or legal process.

(B) Exception for release to governmental entity. A utility may release proprietary customer information without customer authorization to a federal, state, or local governmental entity or in connection with a court or administrative proceeding involving the customer or the utility; provided, however, that the utility shall take all reasonable actions to protect the confidentiality of such information, including, but not limited to, providing such information under a confidentiality agreement or protective order, and shall also promptly notify the affected customer in writing that such information has been requested.

(C) Exception to facilitate transition to customer choice. In order to facilitate the transition to customer choice, a utility may release proprietary customer information to its affiliated retail electric provider or providers of last resort without authorization of those customers only during a period prescribed by the commission.

(D) Exception for release to providers of last resort. On or after January 1, 2002, a utility may provide proprietary customer information to a provider of last resort without customer authorization for the purpose of serving customers who have been switched to the provider of last resort.

(E) Exception for release to State of Texas' Division of Emergency Management. Beginning January 1, 2011, a utility may provide proprietary customer information to the State of Texas' Division of Emergency Management, upon that agency's request for purposes of identifying the customer as a critical care residential customer pursuant to §25.497 of this title (relating to Critical Load Industrial Customers, Critical Load Public Safety Customers, Critical Care Residential Customers, and Chronic Condition Residential Customers).

(2) Nondiscriminatory availability of aggregate customer information. A utility may aggregate non-proprietary customer information, including, but not limited to, information about a utility's energy purchases, sales, or operations or about a utility's energy-related goods or services. However, except in circumstances solely involving the provision of corporate support services in accordance with subsection (e)(2)(A) of this section, a utility shall aggregate non-proprietary customer information for a competitive affiliate only if the utility makes such aggregation service available to all non-affiliates under the same terms and conditions and at the same price as it is made available to any of its affiliates. In addition, no later than 24 hours prior to a utility's provision to its competitive affiliate of aggregate customer information, the utility shall post a conspicuous notice on its Internet site or other public electronic bulletin board for at least 30 consecutive calendar days, providing the following information: the name of the competitive affiliate to which the information will be provided, the rate charged for the information, a meaningful description of the information provided, and the procedures by which non-affiliates may obtain the same information under the same terms and conditions. The utility shall maintain records of such information for a minimum of three years, and shall make such records available for third party review within 72 hours of a written request, or at a time mutually agreeable to the utility and the third party.

(3) No preferential access to transmission and distribution information. A utility shall not allow preferential access by its competitive affiliates to information about its transmission and distribution systems.

(4) Other limitations on information disclosure. Nothing in this rule is intended to alter the specific limitations on disclosure of confidential information in the Texas Utilities Code, the Texas Government Code, Chapter 552, or the commission's substantive and procedural rules.

(5) Other information. Except as otherwise allowed in this subsection, a utility shall not share information, except for information required to perform allowed corporate support services, with competitive affiliates unless the utility can prove to the commission that the sharing will not compromise the public interest prior to any such sharing. Information that is publicly available, or that is unrelated in any way to utility activities, may be shared.

(h) Safeguards relating to joint marketing and advertising.

(1) Utility name or logo. Before September 1, 2005, a utility shall not allow the use of its corporate name, trademark, brand, or

logo by a competitive affiliate, on employee business cards or in any written or auditory advertisements of specific services to existing or potential residential or small commercial customers located within the utility's certificated service area, whether through radio or television, Internet-based, or other electronic format accessible to the public, unless the competitive affiliate includes a disclaimer with its use of the utility's corporate name, trademark, brand, or logo. Such disclaimer of the corporate name, trademark, brand, or logo in the material distributed must be written in a bold and conspicuous manner or clearly audible, as appropriate for the communication medium, and shall state the following: "{Name of competitive affiliate} is not the same company as {name of utility} and is not regulated by the Public Utility Commission of Texas, and you do not have to buy {name of competitive affiliate}'s products to continue to receive quality regulated services from {name of utility}."

(2) Joint marketing, advertising, and promotional activities.

(A) A utility shall not:

(i) provide or acquire leads on behalf of its competitive affiliates;

(ii) solicit business or acquire information on behalf of its competitive affiliates;

(iii) give the appearance of speaking or acting on behalf of any of its competitive affiliates;

(iv) share market analysis reports or other types of proprietary or non-publicly available reports, including, but not limited to, market forecast, planning, or strategic reports, with its competitive affiliates;

(v) represent to customers or potential customers that it can offer competitive retail services bundled with its tariffed services; or

(vi) request authorization from its customers to pass on information exclusively to its competitive affiliate.

(B) A utility shall not engage in joint marketing, advertising, or promotional activities of its products or services with those of a competitive affiliate in a manner that favors the affiliate. Such joint marketing, advertising, or promotional activities include, but are not limited to, the following activities:

(i) acting or appearing to act on behalf of a competitive affiliate in any communications and contacts with any existing or potential customers;

(ii) joint sales calls;

(iii) joint proposals, either as requests for proposals or responses to requests for proposals;

(iv) joint promotional communications or correspondence, except that a utility may allow a competitive affiliate access to customer bill advertising inserts according to the terms of a commission-approved tariff so long as access to such inserts is made available on the same terms and conditions to non-affiliates offering similar services as the competitive affiliate that uses bill inserts;

(v) joint presentations at trade shows, conferences, or other marketing events within the State of Texas; and

(vi) providing links from a utility's Internet web site to a competitive affiliate's Internet web site.

(C) At a customer's unsolicited request, a utility may participate in meetings with a competitive affiliate to discuss technical or operational subjects regarding the utility's provision of transmission or distribution services to the customer, but only in the same manner and to the same extent the utility participates in such meetings with unaffiliated electric or energy services suppliers and their customers. The utility shall not listen to, view, or otherwise participate in any way in a sales discussion between a customer and a competitive affiliate or an unaffiliated electric or energy services supplier.

(3) Requests for specific competitive affiliate information. If a customer or potential customer makes an unsolicited request to a utility for information specifically about any of its competitive affiliates, the utility may refer the customer or potential customer to the competitive affiliate for more information. Under this paragraph, the only information that a utility may provide to the customer or potential customer is the competitive affiliate's address and telephone number. The utility shall not transfer the customer directly to the competitive affiliate's customer service office via telephone or provide any other electronic link whereby the customer could contact the competitive affiliate through the utility. When providing the customer or potential customer information about the competitive affiliate, the utility shall not promote its competitive affiliate or its competitive affiliate's products or services, nor shall it offer the customer or potential customer any opinion regarding the service of the competitive affiliate or any other service provider.

(4) Requests for general information about products or services offered by competitive affiliates and their competitors. If a customer or potential customer requests general information from a utility about products or services provided by its competitive affiliate or its affiliate's competitors, the utility shall not promote its competitive affiliate or its affiliate's products or services, nor shall the utility offer the customer or potential customer any opinion regarding the service of the competitive affiliate or any other service provider. The utility may direct the customer or potential customer to a telephone directory or to the commission, or provide the customer with a recent list of suppliers developed and maintained by the commission, but the utility may not refer the customer or potential customer to the competitive affiliate except as provided for in paragraph (3) of this subsection.

(i) Remedies and enforcement.

(1) Internal codes of conduct for the transition period. During the transition to competition, including the period prior to and during utility unbundling pursuant to PURA §39.051, each utility shall implement an internal code of conduct consistent with the spirit and intent of PURA §39.157(d) and with the provisions of this section. Such internal codes of conduct are subject to commission review and approval in the context of a utility's unbundling plan submitted pursuant to PURA §39.051(e); however, such internal codes of conduct shall take effect, on an interim basis, on January 10, 2000. The internal codes of conduct shall be developed in good faith by the utility based on the extent to which its affiliate relationships are known by January 10, 2000, and then updated as necessary to ensure compliance with PURA and commission rules. A utility exempt from PURA Chapter 39 pursuant to PURA §39.102(c) shall adopt an internal code of conduct that is consistent with its continued provision of bundled utility service during the period of its exemption.

(2) Ensuring compliance for new affiliates. A utility and a new affiliate are bound by the code of conduct immediately upon creation of the new affiliate. Upon the creation of a new affiliate, the utility shall immediately post a conspicuous notice of the new affiliate on its Internet site or other public electronic bulletin board for at least 30 consecutive calendar days. Within 30 days of creation of the new affiliate, the utility shall file an update to its internal code of conduct and compliance plan, including all changes due to the addition of the

new affiliate. The utility shall ensure that any interaction with the new affiliate is in compliance with this section.

(3) Compliance Audits. No later than one year after the utility has unbundled pursuant to PURA §39.051, and, at a minimum, every third year thereafter, the utility shall have an audit prepared by independent auditors that verifies that the utility is in compliance with this section. The utility shall file the results of each audit with the commission within one month of the audit's completion. The cost of the audits shall not be charged to utility ratepayers.

(4) Informal complaint procedure. A utility shall establish and file with the commission a complaint procedure for addressing alleged violations of this section. This procedure shall contain a mechanism whereby all complaints shall be placed in writing and shall be referred to a designated officer of the utility. All complaints shall contain the name of the complainant and a detailed factual report of the complaint, including all relevant dates, companies involved, employees involved, and the specific claim. The designated officer shall acknowledge receipt of the complaint in writing within five working days of receipt. The designated officer shall provide a written report communicating the results of the preliminary investigation to the complainant within thirty days after receipt of the complaint, including a description of any course of action that will be taken. In the event the utility and the complainant are unable to resolve the complaint, the complainant may file a formal complaint with the commission. The utility shall notify the complainant of his or her right to file a formal complaint with the commission, and shall provide the complainant with the commission's address and telephone number. The utility and the complainant shall make a good faith effort to resolve the complaint on an informal basis as promptly as practicable. The informal complaint process shall not be a prerequisite for filing a formal complaint with the commission, and the commission may, at any time, institute a complaint against a utility on its own motion.

(5) Enforcement by the commission. A violation or series or set of violations of this section that materially impairs, or is reasonably likely to materially impair, the ability of a person to compete in a competitive market shall be deemed an abuse of market power.

(A) In addition to other methods that may be available, the commission may enforce the provisions of this rule by:

(i) seeking an injunction or civil penalties to eliminate or remedy the violation or series or set of violations;

(ii) suspending, revoking, or amending a certificate or registration as authorized by PURA §39.356; or

(iii) pursuing administrative penalties under PURA, Chapter 15, Subchapter B.

(B) The imposition of one penalty under this section does not preclude the imposition of other penalties as appropriate for the violation or series or set of violations.

(C) In assessing penalties, the commission shall consider the following factors:

(i) the utility's prior history of violations;

(ii) the utility's efforts to comply with the commission's rules, including the extent to which the utility has adequately and physically separated its office, communications, accounting systems, information systems, lines of authority, and operations from its affiliates, and efforts to enforce these rules;

(iii) the nature and degree of economic benefit gained by the utility's competitive affiliate;

(iv) the damages or potential damages resulting from the violation or series or set of violations;

(v) the size of the business of the competitive affiliate involved;

(vi) the penalty's likely deterrence of future violations; and

(vii) such other factors deemed appropriate and material to the particular circumstances of the violation or series or set of violations.

(6) No immunity from antitrust enforcement. Nothing in these affiliate rules shall confer immunity from state or federal antitrust laws. Sanctions imposed by the commission for violations of this rule do not affect or preempt antitrust liability, but rather are in addition to any antitrust liability that may apply to the anti-competitive activity. Therefore, antitrust remedies also may be sought in federal or state court to cure anti-competitive activities.

(7) No immunity from civil relief. Nothing in these affiliate rules shall preclude any form of civil relief that may be available under federal or state law, including, but not limited to, filing a complaint with the commission consistent with this subsection.

(8) Preemption. This rule supersedes any procedures or protocols adopted by an independent organization as defined by PURA §39.151, or similar entity, that conflict with the provisions of this rule.

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.

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 7. CORPORATE AND FINANCIAL REGULATION

SUBCHAPTER A. EXAMINATION AND FINANCIAL ANALYSIS

28 TAC §7.18

The Commissioner of Insurance (Commissioner) adopts amendments to §7.18, concerning the adoption by reference of the *Accounting Practices and Procedures Manual,* including new statements of statutory accounting principles. The section is adopted without changes to the proposed text published in the October 29, 2010, issue of the *Texas Register* (35 TexReg 9622).

REASONED JUSTIFICATION. The amendments to §7.18 are necessary to adopt by reference the March 2010 version of the *Accounting Practices and Procedures Manual* (Manual) as well as substantive and non-substantive updates to this version of the Manual issued by the National Association of Insurance Commissioners (NAIC) in calendar year 2010. The substantive updates include new statements of statutory accounting principles (SSAPs). The Manual, published and issued by the NAIC, is a comprehensive guide to statutory accounting principles and includes the SSAPs that have been adopted by the NAIC. The SSAPs provide guidance to insurers and health maintenance organizations (HMOs), including accountants employed or retained by these entities, on how to properly record business transactions for the purpose of accurate statutory reporting. These insurers and HMOs are referred to collectively as "carriers" in this adoption. SSAPs provide a nationwide standard method of accounting, which most carriers are required to use for statutory financial reporting guidance. Therefore, SSAPs provide for a more consistent reporting of financial information from carriers. However, SSAPs do not preempt individual state legislative or regulatory authority. SSAPs are adopted by the National Association of Insurance Commissioners (NAIC) through its maintenance of the statutory accounting principles process, which involves the developing and proposing of new SSAPs, and adoption by the NAIC in a series of public meetings with the opportunity for public comment. SSAPs provide the source of statutory accounting principles for the Department when analyzing financial reports and for conducting statutory examinations and rehabilitation of carriers licensed in Texas, except where otherwise provided by law. Except for new SSAP Nos. 5R and 35R, the March 2010 version of the Manual and the updates to it must be used to prepare all financial statements filed with the Department for reporting periods ending on or after December 31, 2010. SSAP Nos. 5R and 35R must be used to prepare all financial statements filed with the Department for reporting periods beginning on or after December 31, 2011, and January 1, 2011, respectively.

The following paragraphs provide a brief summary as well as an analysis of the reasons for the amendments.

Amendments to §7.18(a) replace the reference to the March 2008 Manual with the reference to the March 2010 Manual and replace the word "additions" with the word "modifications." These amendments are necessary to clarify that the March 2010 version of the Manual, including the exceptions and modifications specified in §7.18(c) and (d), will be utilized as the guideline for statutory accounting principles in Texas to the extent the Manual does not conflict with provisions of the Insurance Code or Department rules of the Department.

Under the amendments to §7.18(b), the Commissioner adopts by reference the March 2010 version of the Manual, with the exceptions and modifications specified in subsections (c) and (d), as the source of accounting principles for the Department when analyzing financial reports and for conducting statutory examinations and rehabilitations of insurers and HMOs licensed in Texas, except where otherwise provided by law. The amendments to §7.18(b) also provide that except for new SSAP Nos. 5R and 35R, the March 2010 version of the Manual, as well as the exceptions and modifications specified in subsections (c) and (d), are required to be (i) applied to examinations conducted as of December 31, 2010, and thereafter; and (ii) used to prepare all financial statements filed with the Department for reporting periods ending on or after December 31, 2010. Under the amendments to §7.18(b), SSAP Nos. 5R and 35R must be (i) applied to examinations conducted as of December 31, 2011, and January 1, 2011, respectively, and thereafter; and (ii) used to prepare all financial statements filed with the Department for reporting periods beginning on or after December 31, 2011, and on or after January 1, 2011, respectively. These amendments are necessary to clarify the purpose and application of the updated Manual.

Under the amendments to §7.18(c), the Commissioner adopts the exceptions and modifications to the Manual that are specified in §7.18(c)(1) and (2). The amendments provide that except for new SSAPs Nos. 5R and 35R, these exceptions and modifications must be (i) applied to examinations conducted as of December 31, 2010, and thereafter, and (ii) used to prepare all financial statements filed with the Department for reporting periods ending on or after December 31, 2010. Under the amendments to §7.18(c)(1)(A), the following substantively revised SSAPs are adopted by reference: SSAPs Nos. 5R, 35R, and 91R. SSAP No. 5R, which was adopted by the NAIC in October 2010, was revised to include guidance for accounting guarantees that are issued to other entities. SSAP No. 5R is adopted to be effective on December 31, 2011, and must be used to prepare all financial statements filed with the Department for reporting periods beginning on or after December 31, 2011. SSAP No. 35R, which was adopted by the NAIC in October 2010, was revised to eliminate the non-admission criteria for accrued guaranty fund assessments, to incorporate new disclosures for assets, and to include transition guidance for assets. SSAP No. 35R was adopted by the NAIC to be effective on January 1, 2011, and must be used to prepare all financial statements filed with the Department for reporting periods beginning on or after January 1, 2011. SSAP No. 91R, which was adopted by the NAIC in August 2010, specifies updated securities lending accounting, reporting, and disclosures. SSAP No. 91R is effective on December 31, 2010, and must be used to prepare all financial statements filed with the Department for reporting periods beginning on or after December 31, 2010. The amendments to §7.18(c)(1)(A) also delete references to SSAP Nos. 98 and 99 because SSAP Nos. 98 and 99 are included in the March 2010 version of the Manual. Additionally, a non-substantive amendment to §7.18(c)(1)(A) deletes from the existing rule the redundant phrase "filed with the Department." Under amendments to §7.18(c)(1)(B), the Commissioner adopts by reference non-substantive modifications to SSAP Nos. 9, 43R, 90, 100, and 10R, and Issue Paper No. 99 issued by the NAIC in calendar year 2010. These non-substantive modifications clarify language or change disclosures, appendices, or other material referenced in SSAPs already included in the March 2010 version of the Manual. The amendments to §7.18(c)(1)(B) also delete references to the non-substantive modifications to SSAP Nos. 5, 15, 21, 22, 26, 30, 32, 40, 41, 43, 48, 52, 54, 55, 63, 65, 68, 86, and 91, and to the Preamble section of the Manual because the March 2010 version of the Manual includes all of these with the non-substantive modifications. The amendments to §7.18(c)(1)(C) delete references to Actuarial Guidelines 43, 44, and 45, and revisions to Actuarial Guidelines 34 and 39 because these guidelines are included in the March 2010 version of the Manual.

Amendments to §7.18(a), (b), (c), and (c)(2) replace the word "additions" with the word "modifications." These amendments are necessary to classify more accurately the provisions adopted under §7.18(a), (b), (c), and (c)(2). An amendment to §7.18(c)(1) replaces the words "additions and exceptions" with the word "modifications." This amendment is necessary to classify more accurately the provisions adopted under §7.18(c)(1).

Additionally, amendments to §7.18(e) add the phrases "and obtain approval prior to using the accounting deviation in a financial statement" and "that is proposed to be." Therefore, §7.18(e) as adopted reads in pertinent part: "In the event a domestic insurer desires to deviate from the accounting guidance in a Texas statute or any applicable regulation, the insurer shall file a written request for a permitted accounting practice *and obtain approval prior to using the accounting deviation in a financial statement.* Such filing shall be made with the Senior Associate Commissioner of the Financial Program, Texas Department of Insurance,. . . at least 30 days before filing the financial statement *that is proposed to be* affected by the deviated accounting practice." These two amendments are necessary to clarify that a domestic insurer must both timely file a written request for a permitted practice and receive the Department's approval prior to using the accounting deviation in a financial statement. A third amendment to §7.18(e) also add the phrase "of the Financial Program" to clarify that written requests for a permitted practice must be filed with the Senior Associate Commissioner of the Financial Program.

HOW THE SECTION WILL FUNCTION. The amendments to §7.18(a) clarify that the purpose of this section is to adopt the March 2010 version of the Manual and the exceptions and modifications set forth in subsections (c) and (d) of this section with deference to Texas statutes and regulations. The amendments to §7.18(b) adopt by reference the March 2010 version of the Manual, with the exceptions and modifications set forth in subsections (c) and (d). Additionally, the amendments to §7.18(b) clarify the purpose and applicability of the updated Manual. The amendments to §7.18(b) provide that except for new SSAP Nos. 5R and 35R, the March 2010 version of the Manual, as well as the exceptions and modifications specified in subsections (c) and (d), are required to be (i) applied to examinations conducted as of December 31, 2010, and thereafter; and (ii) used to prepare all financial statements filed with the Department for reporting periods ending on or after December 31, 2010. Under the amendments to §7.18(b), SSAP Nos. 5R and 35R must be (i) applied to examinations conducted as of December 31, 2011, and January 1, 2011, respectively, and thereafter; and (ii) used to prepare all financial statements filed with the Department for reporting periods beginning on or after December 31, 2011, and on or after January 1, 2011, respectively. The adopted version of the Manual, combined with the SSAPs adopted by reference in subsection (c)(1), include substantially all SSAPs and modifications to the SSAPs adopted by the NAIC through December 31, 2010. Additionally, amendments to §7.18(a), (b), (c), (c)(1), and (c)(2) more accurately describe the provisions adopted under §7.18(a), (b), and (c) as "modifications." Also, amendments to §7.18(e) clarify that a domestic insurer must both timely file a written request for a permitted practice and receive the Department's approval prior to using the accounting deviation in a financial statement. Another amendment to §7.18(e) clarifies that written requests for a permitted practice must be filed with the Senior Associate Commissioner of the Financial Program.

SUMMARY OF COMMENTS AND AGENCY RESPONSE. The Department did not receive any comments on the published proposal.

STATUTORY AUTHORITY. The amendments are adopted under the Insurance Code Chapters 32, 401, 404, 421, 425, 426, 441, 802, 823, 841, 843, 861, 862, and §36.001. Sections 401.051 and 401.056 mandate that the Department examine the financial condition of each carrier organized under the laws of Texas or authorized to transact the business of insurance in Texas and adopt by rule procedures for the filing and adoption of examination reports. Section 404.005(a)(2) authorizes the Commissioner to establish standards for evaluating the financial condition of an insurer. Section 421.001(c) requires the Commissioner to adopt each current formula recommended by the NAIC for establishing reserves for each line of insurance. Section 425.162 authorizes the Commissioner to adopt rules, minimum standards, or limitations that are fair and reasonable as appropriate to supplement and implement the Insurance Code Chapter 425 Subchapter C. Section 426.002 provides that reserves required by §426.001 must be computed in accordance with any rules adopted by the Commissioner to adequately protect insureds, secure the solvency of the workers' compensation insurance company, and prevent unreasonably large reserves. Section 441.005 authorizes the Commissioner to adopt reasonable rules as necessary to implement and supplement Chapter 441 of the Insurance Code (Supervision and Conservatorship). Section 32.041 requires the Department to furnish to the companies the required financial statement forms. Section 802.001 authorizes the Commissioner, as necessary to obtain an accurate indication of the company's condition and method of transacting business, to change the form of any annual statement required to be filed by any kind of insurance company. Section 823.012 authorizes the Commissioner to issue rules and orders necessary to implement the provisions of Chapter 823 of the Insurance Code (Insurance Holding Company Systems). Section 843.151 authorizes the Commissioner to promulgate rules as are necessary to carry out the provisions of Chapter 843 of the Insurance Code (Health Maintenance Organizations). Section 843.155 requires a health maintenance organization to file an annual report with the Commissioner, which shall include a financial statement of the health maintenance organization certified by an independent public accountant. Sections 841.004(b), 861.255(b), and 862.001(c) authorize the Commissioner to adopt rules defining electronic machines and systems, office equipment, furniture, machines and labor saving devices, and the maximum period for which each such class may be amortized. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

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 December 20, 2010.

TRD-201007240
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
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Proposal publication date: October 29, 2010
For further information, please call: (512) 463-6327

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CHAPTER 21. TRADE PRACTICES
SUBCHAPTER KK. HEALTH CARE REIMBURSEMENT RATE INFORMATION

28 TAC §§21.4501 - 21.4507

The Commissioner of Insurance (Commissioner) adopts new Subchapter KK, §§21.4501 - 21.4507, concerning the collection and submission of aggregate health care reimbursement rate information by health benefit plan issuers. Sections 21.4501 - 21.4506 are adopted without changes to the proposed text published in the September 10, 2010, issue of the *Texas Register* (35 TexReg 8286). Form No. LHL616 (Health Care Claims Reimbursement Rate Report) is adopted by reference in §21.4507 with minor non-substantive changes, and that section will be republished.

REASONED JUSTIFICATION. This new subchapter implements SECTION 8 of Senate Bill (SB) 1731, enacted by the 80th Legislature, Regular Session, effective September 1, 2007. SECTION 8 of SB Bill 1731 adds new Insurance Code Chapter 38, Subchapter H, which authorize the Department to collect data concerning health benefit plan reimbursement rates by region. This bill authorize the Department to create a new data collection program to collect certain information related to the reimbursement rates and to organize this information in a specific fashion. The new rules apply to issuers of preferred provider benefit plans, health maintenance organization plans, and specified governmental employee plans under the Insurance Code Chapters 1551, 1575, 1579, and 1601. The Insurance Code §38.351 states that the purpose of the subchapter is to authorize the Department to collect data concerning health benefit plan reimbursement rates in a uniform format, and disseminate, on an aggregate basis for geographical regions in this state, information concerning health care reimbursement rates derived from the data. Section 38.352 defines the term *group health benefit plan,* but it is necessary that additional terms be defined for purposes of standardization and ease of implementation of new Chapter 38, Subchapter H, of the Insurance Code. These additional definitions are specified in §21.4503. Section 38.354 authorizes the Commissioner to adopt rules to implement the subchapter. Section 38.355 requires the Department to develop data submission requirements in a manner that allows collection of reimbursement rates as a dollar amount and not by comparison to other standard reimbursement rates. Section 38.353(e) authorizes the exclusion by rule of a type of health benefit plan from the requirements of the Insurance Code Chapter 38, Subchapter H, if the Commissioner finds that data collected in relation to the health benefit plan would not be relevant to accomplishing the purposes of the subchapter. Section §38.353(e) is implemented in §§21.4501 - 21.4507 by exempting health benefit plan issuers if the total number of covered lives offered by the issuer in Texas does not exceed 10,000 persons as of December 31 of the year preceding the report. The rules prescribe the data submission requirements and form for submission of data related to health care reimbursement rates by health benefit plan issuers, specify definitions to implement the Insurance Code Chapter 38, Subchapter H, and facilitate the Department's provision of aggregate health care reimbursement rate information derived from the data collected under this subchapter to the Department of State Health Services (DSHS) for publication. The new rules also implement the data collection requirements in the Insurance Code Chapter 38, Subchapter H. Pursuant to the Insurance Code §38.355, health benefit plan issuers are required to submit data for the period specified by the Department at the time and in the form and manner required by the Department. Section 38.355 further mandates that the data be submitted in a standardized format to permit comparison of health care reimbursement rates and that the submission requirements allow, to the extent feasible, for the collection of reimbursement rates as a dollar amount and not by comparison to other standard reimbursement rates, such as Medicare reimbursement rates. Further, the Insurance Code §38.357 requires the Department to provide aggregate health care reimbursement rate information derived from the data collected under the subchapter to DSHS for publication. The new rules will facilitate the provision of this information. The new rules also implement SECTION 19 of SB 1731. SECTION 19 mandates that the rules adopted to implement the Insurance Code Chapter 38, Subchapter H, require that each health benefit plan issuer subject to that subchapter make the initial submission of data under that subchapter not later than the 60th day after the effective date of the rules.

The Department held a preliminary stakeholder meeting February 28, 2009, to discuss concepts for implementation of Subchapter H. The Department posted an informal draft of this proposal on its website August 4, 2009, and invited further public comment. Originally set to expire August 12, the informal comment period was extended until August 17, 2009, at the request of stakeholders. The informal draft was additionally discussed at a second stakeholder meeting September 24, 2009. Using stakeholder feedback, the Department identified approximately 280 Current Procedural Terminology (CPT) codes, and 60 Medicare severity diagnosis related group (MS-DRG) codes for which data is to be collected in Form No. LHL616, entitled Health Care Claims Reimbursement Rate Report. The Department adopts Form No. LHL616 (Health Care Claims Reimbursement Rate Report) by reference in §21.4507. The codes represent commonly used or particularly expensive procedures for some categories of professional services, as well as outpatient and inpatient services by institutional providers. In selecting procedures for purposes of the data collection, the Department considered information and recommendations provided by members and representatives of the physician and institutional provider community and health insurers. The Department also considered: (i) reimbursement claims reports by the Centers for Medicare and Medicaid Services (CMS) under the Health Care Economics Program; (ii) inpatient and outpatient reports from the CMS National Claims History database; (iii) claims data reports from the Texas Department of State Health Services Inpatient Hospital Discharge Database; and (iv) claims experience data reports provided by the Texas Health Insurance Risk Pool.

The Department has determined that non-substantive changes to proposed Form No. LHL616 (Health Care Claims Reimbursement Rate Report) are necessary. These non-substantive changes do not materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice. The non-substantive changes include the addition of instructions to lines 1 and 12 in Section B of the proposed form, relating to the selection of only one type of plan per submission. This change is necessary for consistency with the adopted rules and for internal consistency of the form and to avoid ambiguity and confusion. Additionally, the data entry boxes for lines 8 and 9 in Section B of the proposed form have been changed in this adoption to include check boxes where "N/A" is the appropriate response. This change is necessary to provide that data entry fields are reserved for the reporting of numbers only for purposes of ensuring data integrity.

The following is a section-by-section summary of the new sections and the reasons for their adoption.

Section 21.4501 specifies the purposes of the new rules. The new rules prescribe the data collection and submission require-

ments and form for the submission of data related to health care reimbursement rates by health benefit plan issuers; specify the definitions necessary to implement the Insurance Code Chapter 38, Subchapter H; and facilitate the Department's provision of aggregate health care reimbursement rate information derived from the data collected under this subchapter to the DSHS for publication.

Section 21.4502 is necessary to address the applicability of the new rules, in accordance with Insurance Code §38.353. New §21.4502(a) and (b) specify the various types of issuers that are subject to the reporting requirements. New §21.4502(c) specifies the types of issuers that are not subject to the new rules. New §21.4502(d) provides issuers with the option to report data concerning reimbursement rates provided under Insurance Code Chapter 1507 in its submission of the §21.4506 report (relating to Submission of Report) for purposes of administrative convenience. This provision enables health benefit plan issuers that offer standard health benefit plans to avoid the possible expense of separating out claims data for those types of plans if such claims data is otherwise aggregated with the data that is required to be submitted.

Section 21.4503 provides definitions for terms used in the new rules, including *group health benefit plan, institutional provider, physician, provider,* and *reporting period. Group health benefit plan* is defined in §21.4503(1) as specified in the Insurance Code §38.352 to mean a *preferred provider benefit plan* as defined by the Insurance Code §1301.001, or an *evidence of coverage* for a health care plan that provides basic health care services as defined by the Insurance Code §843.002. The Insurance Code §1301.001(9) defines *preferred provider benefit plan* as a benefit plan in which an insurer provides, through its *health insurance policy,* for the payment of a level of coverage that is different from the basic level of coverage provided by the health insurance policy if the insured person uses a preferred provider. Section 1301.001(2) defines *health insurance policy* as a group or individual insurance policy, certificate, or contract providing benefits for medical or surgical expenses incurred as a result of an accident or sickness. The Insurance Code §843.002, in turn, defines *evidence of coverage* to mean any certificate, agreement, or contract, including a blended contract, that: (i) is issued to an enrollee; and (ii) states the coverage to which the enrollee is entitled. The term *group health benefit plan,* therefore, includes both group and individual coverage. Section 21.4503(1) further clarifies that the term *group health benefit plan* does not include a health maintenance organization plan providing routine dental or vision services as a single health care service plan or a preferred provider benefit plan providing routine vision services as a single health care service plan. As previously discussed, the Insurance Code §38.353(e) authorizes the exclusion by rule of a type of health benefit plan from the requirements of the Insurance Code Chapter 38, Subchapter H, if the Commissioner finds that data collected in relation to the health benefit plan would not be relevant to accomplishing the purposes of the subchapter. The routine dental or vision services provided under single health care service plans are not consistent with the general reimbursement data that will be collected under new Subchapter KK at this time. *Institutional provider* is defined in §21.4503(2) as an institution providing health care services, including but not limited to hospitals, other licensed inpatient centers, ambulatory surgical centers, skilled nursing centers and residential treatment centers. *Physician* is defined in §21.4503(3) as any individual licensed to practice medicine in this state and, with regard to a health maintenance organization, as defined in the Insurance Code §843.002(22). *Provider* is defined in §21.4503(4) as any practitioner, institutional provider, or other person or organization that furnishes health care services and that is licensed or otherwise authorized to practice in this state, other than a physician. *Reporting period* is defined in §21.4503(5) as the six-month interval of time for which a plan or health benefit plan issuer must submit data, beginning each January 1 and ending the following June 30.

Section 21.4504 designates geographic regions by ZIP Code for purposes of data collection. This designation is in accordance with the Insurance Code §38.351 and §38.355, which authorize the Department to collect and disseminate aggregated data for geographical regions in this state. The geographic regions in §21.4504 generally approximate the 11 Health Service Regions established by the Department of State Health Services for purposes not related to enactment of SB 1731 and are already familiar to most issuers. These regions include: (1) Region 1 - Panhandle, including Amarillo and Lubbock; (2) Region 2 - Northwest Texas, including Wichita Falls and Abilene; (3) Region 3 - Metroplex, including Fort Worth and Dallas; (4) Region 4 - Northeast Texas, including Tyler; (5) Region 5 - Southeast Texas, including Beaumont; (6) Region 6 - Gulf Coast, including Houston and Huntsville; (7) Region 7 - Central Texas, including Austin and Waco; (8) Region 8 - South Central Texas, including San Antonio; (9) Region 9 - West Texas, including Midland, Odessa, and San Angelo; (10) Region 10 - Far West Texas, including El Paso; and (11) Region 11 - Rio Grande Valley, including Brownsville, Corpus Christi, and Laredo.

Section 21.4505 is necessary to address the requirements in §38.355 of the Insurance Code to collect the requested data and to specify the time periods for which the submission is to be provided. Section 21.4505(a) requires health benefit plan issuers and plans to collect the underlying data necessary for submission of all information specified in Form No. LHL616, adopted by reference in §21.4507. Section §21.4505(b) addresses the time periods for which the information and data is to be provided. It provides that: (i) the six-month reporting period for the information and data requested in Form No. LHL616 is January 1 to June 30 of the applicable calendar year; and (ii) the enrollment data required in Form No. LHL616 is for the total number of lives covered under the plans for both December 31 of the year prior to the applicable reporting period and June 30 of the applicable reporting year. Section §21.4505(c) allows a health benefit plan issuer that is exempt pursuant to §21.4506(e) to collect and report information required in Form No. LHL616, Section B, to support an exemption rather than the full data indicated in Form No. LHL616.

Section 21.4506 is necessary to address the requirements and deadlines for the submission of the requested data. Section 21.4506(a) specifies the deadlines for the submission of the required data in annual reporting subsequent to the initial filing. Section §21.4506(b) specifies that the initial reporting date for the submission of the required data is 60 days from the effective date of the rule. This reporting date complies with SECTION 19 of SB 1731. Section 21.4506(c) specifies the procedures for electronic filing of the required information and data. Section §21.4506(d) identifies the procedure for accessing the report form, including acceptance of the End User Agreement concerning use of CPT codes. Section §21.4506(e) requires a health benefit plan issuer asserting an exemption to the reporting requirement specified in §21.4506(a) to submit an exemption statement and the data specified in Form No. LHL616 to support an exemption. Assertion of an exemption for either private mar-

ket preferred provider benefit plans or health maintenance organization plans requires certification by the health benefit plan issuer that the number of covered lives in Texas in the type of plan for which an exemption is sought does not meet or exceed 10,000 persons as of December 31 of the year preceding the report. As previously discussed, the Insurance Code §38.353(e) permits the exclusion by rule of a type of health benefit plan from the requirements of Chapter 38, Subchapter H, if the Commissioner finds that the data collected in relation to the health benefit plan would not be relevant to accomplishing the purposes of the subchapter. The Department anticipates that the inclusion of reimbursement data from health benefit plan issuers with enrollment that does not exceed 10,000 persons will not markedly affect the aggregate data that the Department is required to furnish to DSHS for publication as required in the Insurance Code §38.357. For this reason, the rules permit the exemption of such plans as specified in §21.4506(e). A representation of the End User Agreement included with Form No. LHL616 is provided in Figure: 28 TAC §21.4506(f). The End User Agreement facilitates the Department's use of procedural codes and descriptions to which the American Medical Association asserts copyright rights.

Section 21.4507 adopts by reference the form to be used in reporting the data required in the new rules (Form No. LHL616, entitled Health Care Claims Reimbursement Rate Report). Plans and health benefit plan issuers must utilize this form to submit to the Department summary company identification and contact information and to provide data to the Department on reimbursement rates for certain CPT and MS-DRG codes for each of the 11 geographic regions specified in §21.4504. Qualifying health benefit plan issuers must also use this form to certify to the Department that the health benefit plan issuer is exempt from certain of the reporting requirements. Section 21.4507 also provides a link for accessing the form on the Department's Internet website.

Form No. LHL616, adopted by reference in §21.4507, is comprised of Sections A - J. Section A of the form includes detailed instructions and definitions necessary for completion of each section of the form. Section B of the form is to be used to report company information, contact information for an individual representative of the health benefit plan, and data certification. The remaining sections of the form require the reporting of reimbursement rate data for each of several categories of claims: (i) professional services - general, in Section C; (ii) professional services - pathology, in Section D; (iii) professional services - anesthesiology, in Section E; (iv) professional services - radiology, in Section F; (v) professional services - neonatology critical care/newborn care, in Section G; (vi) professional services - outpatient health care claims, in Section H; (vii) institutional provider - outpatient health care claims, in Section I; and (viii) institutional provider - inpatient health care claims, in Section J. For each of these categories of claims, the form requires health benefit plan issuers and plans to provide aggregate reimbursement data for designated procedural and diagnostic codes for both in-network and out-of-network claims.

HOW THE SECTIONS WILL FUNCTION.

Section 21.4501 states the purpose of the new rules.

Section 21.4502 identifies the types of health benefit plans to which the new rules do and do not apply. Section 21.4502 also addresses and reiterates the Insurance Code §38.353, relating to applicability.

Section 21.4503 provides definitions for terms that health benefit plan issuers will use in implementing the new rules, including *group health benefit plan, institutional provider, physician, provider, and reporting period.*

Section 21.4504 designates geographic regions by ZIP Code for purposes of data collection. The geographic regions in §21.4504 generally approximate the 11 Health Service Regions established by the Department of State Health Services for purposes not related to enactment of SB 1731 and are already familiar to most issuers.

Section 21.4505 addresses the requirements in §38.355 of the Insurance Code to collect the requested data and to specify the time periods for which the submission is to be provided. Under §21.4505(a), health benefit plan issuers and plans are required to collect the underlying data necessary for submission of all information specified in Form No. LHL616, adopted by reference in §21.4507. Section §21.4505(b) addresses the time periods for which the information and data is to be provided. It provides that: (i) the six-month reporting period for the information and data requested in Form No. LHL616 is January 1 to June 30 of the applicable calendar year; and (ii) the enrollment data required in Form No. LHL616 is for the total number of lives covered under the plans for both December 31 of the year prior to the applicable reporting period and June 30 of the applicable reporting year. Under §21.4505(c), a health benefit plan issuer that is exempt pursuant to §21.4506(e) may collect and report information required in Form No. LHL616, Section B, to support an exemption rather than the full data indicated in Form No. LHL616.

Section 21.4506 sets forth the requirements and deadlines for issuers to submit the requested data. Section 21.4506(a) specifies the deadlines for the submission of the required data in annual reporting subsequent to the initial filing. Section §21.4506(b) specifies that the initial reporting date for the submission of the required data is 60 days from the effective date of the rule. Section 21.4506(c) specifies the procedures for electronic filing of the required information and data. Section §21.4506(d) outlines the procedure for accessing the report form, including acceptance of the End User Agreement concerning use of CPT codes. Under §21.4506(e), a health benefit plan issuer asserting an exemption to the reporting requirement specified in §21.4506(a) is required to submit an exemption statement and the data required in Form No. LHL616 to support the exemption. Assertion of an exemption for either private market preferred provider benefit plans or health maintenance organization plans requires certification by the health benefit plan issuer that the number of covered lives in Texas in the type of plan for which an exemption is sought does not meet or exceed 10,000 persons as of December 31 of the year preceding the report. Figure: 28 TAC §21.4506(f) provides a representation of the End User Agreement included with Form No. LHL616. The End User Agreement facilitates the Department's use of procedural codes and descriptions to which the American Medical Association asserts copyright rights.

Section 21.4507 adopts by reference the form to be used in reporting the data required in the new rules (Form No. LHL616, entitled Health Care Claims Reimbursement Rate Report). Plans and health benefit plan issuers must utilize this form to submit to the Department summary company identification and contact information and to provide data on reimbursement rates for certain CPT and MS-DRG codes for each of the 11 geographic regions specified in §21.4504. Qualifying health benefit plan issuers must also use this form to certify to the Department that the health benefit plan issuer is exempt from certain of the re-

porting requirements. Section 21.4507 also provides a link for accessing the form on the Department's Internet website. Form No. LHL616 is comprised of Sections A - J. Section A of the form includes detailed instructions and definitions necessary for completion of each section of the form. Under Section B of the form, health benefit plan issuers will report company information, contact information for an individual representative of the health benefit plan, and data certification. Under the remaining sections of the form, health benefit plan issuers must report reimbursement rate data for each of several categories of claim: (i) professional services - general, in Section C; (ii) professional services - pathology, in Section D; (iii) professional services - anesthesiology, in Section E; (iv) professional services - radiology, in Section F; (v) professional services - neonatology critical care/newborn care, in Section G; (vi) professional services - outpatient health care claims, in Section H; (vii) institutional provider - outpatient health care claims, in Section I; and (viii) institutional provider - inpatient health care claims, in Section J. For each of these categories of claim, health benefit plan issuers and plans must provide aggregate reimbursement data for designated procedural and diagnostic codes for both in-network and out-of-network claims.

SUMMARY OF COMMENTS AND AGENCY RESPONSE. The Department did not receive any comments on the published proposal.

STATUTORY AUTHORITY. The new sections are adopted under SECTION 19 of SB 1731, as enacted by the 80th Legislature, Regular Session, effective September 1, 2007, and the Insurance Code §§38.351, 38.352, 1301.001, 843.002, 38.353, 38.354, 38.355, 38.357, 38.358, and 36.001. SECTION 19 of SB 1731 mandates that the rules adopted to implement the Insurance Code Chapter 38, Subchapter H (hereafter Subchapter H) require that each health benefit plan issuer subject to that subchapter make the initial submission of data under that subchapter not later than the 60th day after the effective date of the rules. Section 38.351 provides that the purpose of Subchapter H, is to authorize the Department to: (i) collect data concerning health benefit plan reimbursement rates in a uniform format; and (ii) disseminate, on an aggregate basis for geographical regions in the state, information concerning health care reimbursement rates derived from the data. Section 38.352 provides that in Subchapter H, *group health benefit plan* means a preferred provider benefit plan as defined by §1301.001 or an evidence of coverage for a health care plan that provides basic health care services as defined by §843.002. Section 1301.001 provides at paragraph (9) that *preferred provider benefit plan* means a benefit plan in which an insurer provides, through its health insurance policy, for the payment of a level of coverage that is different from the basic level of coverage provided by the health insurance policy if the insured person uses a preferred provider. Section 1301.001 provides at paragraph (2) that *health insurance policy* means a group or individual insurance policy, certificate, or contract providing benefits for medical or surgical expenses incurred as a result of an accident or sickness. Section 843.002(9) provides that *evidence of coverage* means any certificate, agreement, or contract, including a blended contract, that: (i) is issued to an enrollee; and (ii) states the coverage to which the enrollee is entitled. Section 38.353(e) permits the Commissioner to exclude a type of health benefit plan from the requirements of Subchapter H if the Commissioner finds that data collected in relation to the health benefit plan would not be relevant to accomplishing the purposes of the subchapter. Section 38.354 grants the Commissioner authority to adopt rules as provided by the Insurance Code Chapter 36, Subchapter A, to implement Subchapter H. Section 38.355(a) requires each health benefit plan issuer to submit aggregate reimbursement rates by region paid by the health benefit plan issuer for health care services identified by the Department, in the form and manner and at the time required by the Department. Section 38.355(b) requires that the Department by rule establish a standardized format for the submission of the data submitted under the section to permit comparison of health care reimbursement rates. The subsection also requires the Department, to the extent feasible, to develop the data submission requirements in a manner that allows collection of reimbursement rates as a dollar amount and not by comparison to other standard reimbursement rates. Section 38.355(c) requires the Department to specify the period for which reimbursement rates must be filed. Section 38.357 requires the Department to provide to the Department of State Health Services for publication, for identified regions, aggregate health care reimbursement rate information derived from the data collected under Subchapter H. Section 38.357 also provides that the published information may not reveal the name of any health care provider or health benefit plan issuer and authorizes the Department to make the aggregate health care reimbursement rate information available through the Department's Internet website. Section 38.358 provides that a health benefit plan issuer that fails to submit data as required is subject to an administrative penalty under the Insurance Code Chapter 84. Further, each day the issuer fails to submit the data as required is a separate violation for purposes of penalty assessment. Section 36.001 authorizes the Commissioner to adopt any rules necessary and appropriate to implement the powers and duties of the Department under the Insurance Code and other laws of this state.

§21.4507. Report Form.

Form No. LHL616 (Health Care Claims Reimbursement Rate Report) is adopted by reference. The form:

(1) contains instructions for completion of the report and requires submission of information and data concerning group health benefit plan issuer identification and enrollment information;

(2) requires the submission of both contracted and out-of-network claim information for general professional services; pathology services; anesthesiology services; radiology services; neonatology services; outpatient professional and institutional provider services; and inpatient institutional provider services; and

(3) is available at http://www.tdi.state.tx.us/forms/form10accident.html.

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 December 20, 2010.

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Texas Department of Insurance
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PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

CHAPTER 180. MONITORING AND ENFORCEMENT

The Commissioner of Workers' Compensation (Commissioner), Texas Department of Insurance (Department), Division of Workers' Compensation (Division) adopts amendments to §§180.1 - 180.3, 180.8, 180.22, 180.24, 180.25, 180.27 and 180.28 of this title (relating to Definitions; Filing a Complaint; Compliance Audits; Notices of Violation; Notices of Hearing; Default Judgments; Health Care Provider Roles and Responsibilities; Financial Disclosure; Improper Inducements, Influence and Threats; Sanctions Process/Appeals/Restoration; Peer Review Requirements, Reporting, and Sanctions; respectively) and adopts new §180.26 of this title (relating to Criteria for Imposing, Recommending, and Determining Sanctions; Other Remedies) and §180.50 of this title (relating to Severability). Sections 180.1, 180.2, 180.8, 180.22, and 180.24 - 180.28 are adopted with changes to the proposed text published in the August 27, 2010, issue of the *Texas Register* (35 TexReg 7645) and will be republished. Sections 180.3 and 180.50 are adopted without changes and will not be republished.

The adopted rules conform the rules with various statutory amendments and generally concern the regulation and duties of system participants and provide an overall description of certain enforcement procedures such as filing a complaint. The adopted rules are necessary to implement and enforce statutory provisions of House Bill 7 (HB 7), enacted by the 79th Legislature, Regular Session, effective September 1, 2005; House Bill 34 (HB 34), House Bill 1003 (HB 1003), House Bill 1006 (HB 1006), and House Bill 2004 (HB 2004) enacted by the 80th Legislature, Regular Session, effective September 1, 2007; and House Bill 4290 (HB 4290), enacted by the 81st Legislature, Regular Session, effective September 1, 2009. The adopted rules are necessary to implement amendments to existing statutes and update existing rules, such as the rules that pertain to the approved doctor list that expired on September 1, 2007. The Division has also adopted the simultaneous repeal of existing §§180.6, 180.7, 180.10 - 180.18, 180.20, and 180.26 of this title (relating to guidelines for establishing evidence of patterns of practice, the schedule of administrative penalties for violations, and the Approved Doctors List (ADL)) which are published elsewhere in this issue of the *Texas Register.*

In accordance with Government Code §2001.033(a)(1), the Division's reasoned justification for these rules is set out in this order, which includes the preamble, which in turn includes the rules. The preamble contains a summary of the factual basis of the rules, a summary of comments received from interested parties, names of those groups and associations who commented and whether they were in support of or in opposition to adoption of the rules, and the reasons why the Division agrees or disagrees with some of the comments and recommendations.

The public hearing was held and the public comment period closed on September 27, 2010.

Changes to the Labor Code by HB 7 amended the Labor Code to enhance the enforcement authority of the Division. Labor Code §401.011 expanded the definition of "sanction" to include penalties (fines) or other punitive actions or remedies imposed by the Commissioner of Workers' Compensation (Commissioner) for violations of decisions of the Commissioner. Labor Code §401.011 added the definition of "violation" to mean an administrative violation subject to penalties and sanctions as provided by the Texas Workers' Compensation Act, Labor Code, Title 5, Subtitle A (Act) and expanded the definition of "administrative violation" to include a violation of an order or decision of the Commissioner that is subject to penalties and sanctions as provided by the Act. Labor Code §401.011 replaced the definition of "commission" with a definition for "commissioner" to mean "the commissioner of workers' compensation." Labor Code §401.011 added a definition for "department" to mean "the Texas Department of Insurance." Labor Code §401.011 added a definition for "division" to mean "the division of workers' compensation of the department." Labor Code §401.011 added a definition for "health care reasonably required" to mean "health care that is clinically appropriate and considered effective for the injured employee's injury and provided in accordance with best practices consistent with evidence-based medicine; or if that evidence is not available, generally accepted standards of medical practice recognized in the medical community." Labor Code §401.021 was amended to apply to the Division. Labor Code §402.001 was amended to provide that except as provided by Labor Code §402.002, the Texas Department of Insurance is the state agency designated to oversee the workers' compensation system of this state and the Division of Workers' Compensation is established as a division within the Texas Department of Insurance to administer and operate the workers' compensation system as provided by Labor Code, Title 5.

Labor Code §402.00111 was added and describes the relationship between the Commissioner of Insurance and the Commissioner of Workers' Compensation, the separation of authority, and rulemaking authority. Labor Code §402.00128 was added and provides the general powers and duties of the Commissioner. Labor Code §402.0016 was added and describes the duties and powers of the Commissioner as the Division's chief executive and administrative officer. Labor Code §402.023 was amended and states that the Commissioner shall adopt rules regarding the filing of a complaint under the Act against an individual or entity subject to regulation under the Act; and ensure that information regarding the complaint process is available on the Division's Internet website. The Division is required to, at a minimum, ensure that the rules adopted by the Division clearly define the method for filing a complaint; and define what constitutes a frivolous complaint under the Act. The Division is also required to develop and post on the Division's Internet website a simple standardized form for filing complaints under the Act and information regarding the complaint filing process. Labor Code §402.0235 requires the Division to assign priorities to complaint investigations under the Act based on risk. In developing priorities, the Division is required to develop a formal, risk-based complaint investigation system that considers the severity of the alleged violation; whether the alleged violator showed continued or willful noncompliance; and whether a Commissioner's order has been violated. Labor Code §402.0235 also provides that the Commissioner may develop additional risk-based criteria as determined necessary.

Labor Code §402.024(b) requires the Division to comply with federal and state laws related to program and facility accessibility. Labor Code §402.061 requires the Commissioner to adopt rules as necessary for the implementation and enforcement of the Act. Labor Code §402.072 provides that the Division may impose sanctions against any person regulated by the Division

under the Act and a sanction imposed by the Commissioner is binding pending appeal. Labor Code §402.073 requires that in a case in which a hearing is conducted in conjunction with Labor Code §§402.072, 407.046, or 408.023, and in other cases under the Act that are not subject to Labor Code §402.073(b), the administrative law judge who conducts the hearing for the State Office of Administrative Hearings shall propose a decision to the Commissioner for final consideration and decision by the Commissioner.

Labor Code §402.075 was added and provides the requirements for rules that pertain to incentives and performance-based oversight.

Labor Code §408.0041 provides additional requirements related to designated doctor examinations. Labor Code §408.023 applies to the Division and provides requirements for doctors who contract with workers' compensation health care networks certified under Insurance Code Chapter 1305; for the expiration of the approved doctor list effective September 1, 2007; for requirements that the Commissioner may establish by rule for doctors and other health care providers; and for requirements that doctors and insurance carriers must comply with. Labor Code §408.0231 has been amended to apply to the Division and requires the Commissioner to adopt rules regarding doctors who perform peer review functions under the Act. Labor Code §408.0231(g) authorizes the Commissioner to adopt rules regarding doctors who perform peer review functions for insurance carriers, such as, standards for peer review, sanctions against doctors performing peer review functions (including restriction, suspension, or removal of the doctor's ability to perform peer reviews) and other issues important to the quality of peer review. Labor Code §408.1225 was amended and provides the Commissioner with additional authority to ensure the quality of designated doctor decisions and reviews through active monitoring of decisions and reviews and to take action as necessary to restrict the participation of a designated doctor or remove a doctor from inclusion on the Division's list of designated doctors. Labor Code §408.1225(a) requires the Division to develop qualification standards and administrative policies pertaining to the doctors who serve on the designated doctor list. Labor Code §408.1225(d) requires the Division to develop rules to ensure that a designated doctor has no conflict of interest in serving as a designated doctor in performing examinations.

Labor Code §413.002 requires the Division to monitor health care providers, insurance carriers, independent review organizations, and workers' compensation claimants who receive medical services, to ensure the compliance of those persons with rules adopted by the Division relating to health care, including medical policies and fee guidelines. Labor Code §413.002(b) requires that in monitoring designated doctors under Labor Code, Chapter 408, and Independent Review Organizations (IRO) who provide services described by Labor Code, Chapter 413, the Division is to evaluate compliance with the Act and with rules adopted by the Commissioner relating to medical policies, fee guidelines, treatment guidelines, return-to-work guidelines, and impairment ratings and the quality and timeliness of decision made under Labor Code §§408.0041, 408.122, or 413.031. Labor Code §413.022 has been added and provides requirements for the return-to-work reimbursement pilot program for small employers. Labor Code §413.031 pertains to medical dispute resolution and was amended to require that the decision of an IRO under Labor Code §413.031(d) is binding during the pendency of a dispute. Labor Code §413.032 provides requirements regarding the content of IRO decisions for reviews conducted under Labor Code, Chapter 413. Labor Code §413.041 requires Commissioner to define "financial interest" for the purpose of the section as provided by analogous federal regulations and to adopt the federal standards that prohibit the payment or acceptance of payment in exchange for health care referrals relating to fraud, abuse, and anti-kickbacks. Labor Code §413.044 provides additional sanctions that may be imposed on designated doctors. Labor Code §413.0511 requires that the Medical Advisor shall make recommendations regarding the adoption of rules and policies to monitor the quality and timelines of decisions made by designated doctors and independent review organizations, and the imposition of sanctions regarding those decisions. Labor Code §413.0512 requires that the medical quality review panel shall recommend to the Medical Advisor appropriate action regarding independent review organizations. Labor Code §413.052 requires the Commissioner to establish by rule procedures to enable the Division to compel production of documents.

Labor Code §§414.002 - 414.003 and 414.005 - 414.007 pertain to the Division's monitoring duties, compilation and maintenance of statistical and other information, investigative duties, referral of persons to appropriate authorities, medical review, and investigation of alleged violations. Labor Code §414.002 includes health care providers as persons to be monitored by the Division. Labor Code §414.003 includes the provision that the Division shall also compile and maintain statistical and other information as necessary to detect practices or patterns of conduct by persons subject to monitoring under Labor Code, Chapter 414 that violate a rule, order or decision of the Commissioner. Labor Code §414.005 includes the provision that the Division shall maintain an investigation unit to conduct investigations relating to alleged violations of a rule, order, or decision of the Commissioner. HB 7 amendments to Labor Code §414.006 deleted the provision that the Division may refer persons involved in a case subject to investigation to the division of hearings. Labor Code §414.007 includes the provision that the Division shall review information concerning an alleged violation regarding the provision of medical benefits, or a rule, order or decision of the Commissioner.

The HB 7 amendments to §§415.001 - 415.0035 modified various provisions related to violations under the Act. The HB 7 amendments to Labor Code §§415.005, 415.006, and 415.024 delete the classification of the violations as either class A, B, or C violations. Labor Code §415.021 was amended to delete the provision which stated an administrative penalty should not exceed $10,000, and Labor Code §415.021 now permits the Division to assess administrative penalties of up to $25,000 per violation in addition to any other sanctions authorized by the Act. Labor Code §415.021 also states that each day of noncompliance constitutes a separate violation and subsection (c) lists the factors the Division must use when determining penalty amounts. Labor Code §415.025 provides that a reference in the Labor Code or other law, or in rules of the former Texas Workers' Compensation Commission or the Commissioner, to a particular class of violation, administrative violation, or penalty shall be construed as a reference to an administrative penalty and, except as otherwise provided by Labor Code, Title 5, Subtitle A, an administrative penalty may not exceed $25,000 per day per occurrence and each day of noncompliance constitutes a separate violation. One example of other sanctions that may be imposed under Labor Code, Title 5, are found in Labor Code §408.0231(b). Labor Code §415.023(b) and §402.072 also provide authority for the Division to impose sanctions. HB 7 amended Labor Code §415.024 by deleting the classification

of the penalty to be imposed as a Class A violation and now provides that a violation of the statute is an administrative violation. Labor Code §415.031 and §415.032 were amended to delete "director", "compliance and practices" and "commission." Labor Code §415.032 also requires that not later than the 20th day after the date on which notice of violation is received by a charged party, the charged party shall remit the amount of the penalty to the Division or submit to the Division a written request for a hearing. Labor Code §415.033 requires that if without good cause a charged party fails to respond as required under Labor Code §415.032, the penalty is due and the Division shall initiate enforcement proceedings. Labor Code §504.053 was amended to provide requirements for political subdivisions that self-insure that relate to workers' compensation.

House Bill 34 added Labor Code §415.0036 which applies to an insurance adjustor, case manager, or other person who has authority under Labor Code, Title 5 to request the performance of a service affecting the delivery of benefits to an injured employee or who actually performs such a service, including peer reviews, performance of required medical examinations, or case management. A person described by this statute commits an administrative violation if the person offers to pay, pays, solicits, or receives an improper inducement relating to the delivery of benefits to an injured employee or improperly attempts to influence the delivery of benefits to an injured employee, including through the making of improper threats.

House Bill 1003 added Labor Code §413.031(e-2) to require that IROs that use doctors to perform reviews of health care services provided under Labor Code, Title 5 only use doctors licensed to practice in this state.

House Bill 1006 amended Labor Code §408.023(h) to require that a utilization review agent or an insurance carrier that uses a doctor to perform reviews of health care services provided under Labor Code, Title 5, Subtitle A, including utilization review, only use doctors licensed to practice in this state.

House Bill 2004 added Labor Code §408.0043. Labor Code §408.0043(a) applies to doctors, other than chiropractors or dentists, who perform health care services under Labor Code, Title 5 as doctors performing peer reviews, utilization reviews, independent reviews, required medical examinations, or who serve on the medical quality review panel or as designated doctors for the Division. Labor Code 408.0043(b) requires that a doctor described by Labor Code §408.0043(a), other than a chiropractor or dentist, who reviews a specific workers' compensation case must hold a professional certification in a health care specialty appropriate to the type of health care that the injured employee is receiving.

House Bill 2004 added Labor Code §408.0044 which pertains to dentists who perform dental services under Labor Code, Title 5 for peer reviews, utilization reviews, independent reviews, or required dental examinations. Labor Code §408.0044(b) requires that a dentist who reviews a dental service in conjunction with a specific workers' compensation case must be licensed to practice dentistry. House Bill 2004 added Labor Code §408.0045 which pertains to chiropractors who perform chiropractic services under Labor Code, Title 5 for peer reviews, utilization reviews, independent reviews, required medical examinations, or who serve on the medical quality review panel or as designated doctors providing chiropractic services for the Division. Labor Code §408.0045(b) requires that a chiropractor who reviews a chiropractic service in conjunction with a specific workers' compensation case must be licensed to engage in the practice of chiropractic.

House Bill 2004 added Labor Code §408.0046 and states that the Commissioner may adopt rules as necessary to determine which professional health practitioner specialties are appropriate for treatment of certain compensable injuries and must require an entity requesting a peer review to obtain and provide to the doctor providing the peer review services all relevant and updated medical records.

House Bill 4290 amended Insurance Code §4201.002(13) which provides that "utilization review" includes a system for prospective, concurrent, or retrospective review of the medical necessity and appropriateness of health care services and a system for prospective, concurrent, or retrospective review to determine the experimental or investigational nature of health care services; the term does not include a review in response to an elective request for clarification of coverage. Insurance Code §4201.002(1) was amended by HB 4290 and provides that "adverse determination" means a determination by a utilization review agent that health care services provided or proposed to be provided to a patient are not medically necessary or are experimental or investigational. Additionally, Labor Code §413.014 requires a determination of medical necessity for experimental or investigational services. Insurance Code §1305.004 was amended to include within the meaning of independent review, a final review by an independent review organization of the experimental or investigational nature of health care services provided, proposed to be provided, or that have been provided to an injured employee. Insurance Code §1305.351, as amended by HB 4290, provides that a utilization review agent or insurance carrier that uses doctors to perform reviews of health care services provided under Insurance Code, Chapter 1305, including utilization review, or peer reviews under Labor Code §408.0231(g), may only use doctors licensed to practice in this state.

The Division has changed some of the proposed language in the text of the rule as adopted in response to public comments received. The Division has also made some changes for clarification and editorial reasons. The changes, however, do not materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice.

The Division received comments recommending that the Division should delete the language "shall have the following meaning, unless the context clearly indicates otherwise" because it may be confusing. In response, the Division has not adopted the language in §180.1(a).

The Division received comments recommending that the Division should modify the definition for peer review in §180.1 because it is overly broad and inconsistently used by the Division. In response the Division revised the definition for peer review in §180.1(a)(19) of this title to mean an administrative review by a health care provider performed at the insurance carrier's request without a physical examination of the injured employee.

The Division received a comment recommending that the Division should not include a definition for utilization review in §180.1 because it is redundant and unnecessary since Insurance Code Chapter 4201 defines utilization review. In response the Division has not adopted the definition in these rules because the definition in Labor Code §401.011(42-a), which references Insurance Code Chapter 4201, will be utilized.

The Division received a comment recommending that the Division should delete §180.1(b) because it is confusing. In re-

sponse, the Division has not adopted subsection (b) of adopted §180.1.

The Division received comments recommending that the Division should modify §180.2 to remove the provisions for anonymous complaints. In response the Division has modified §180.2 of this title and removed provisions for anonymous complaints.

The Division received comments recommending that the Division should clarify §180.8 and the statutory authority and jurisdiction of the Division to review or modify decisions issued by an ALJ from SOAH. In response the Division has clarified §180.8(f) of this title by adding the language "or the entity having the final decision making power" and also clarified §180.8(g) and (h) of this title by adding the language "the entity having the final decision making power." Each determination will be made on a case by case basis.

The Division received a comment requesting that the Division change §180.22(a) to clarify that subsection (a) pertains to health care providers "as defined in subsections (c) - (e)." In response, the Division has adopted the language in §180.22(a).

The Division received a comment requesting that the Division change §180.22(c) to clarify that among the duties and responsibilities of treating doctors is the duty to perform examinations on injured employees to determine a date of maximum medical improvement and to assign impairment ratings. In response, the Division has clarified adopted §180.22(c) to include that a duty and responsibility of the treating doctor is to examine the injured employees to determine a date of maximum medical improvement and assign impairment ratings as and when appropriate.

The Division received a comment requesting that the Division change §180.22(e) so that it synchronizes with the timeframe for referral doctors to submit a timely report in §129.5(d) - (f) and §133.20(h) of this title. In response the Division has clarified §180.22(e)(2) of this title to require that the referral doctor shall timely report the injured employee's status to the treating doctor and insurance carrier as required by applicable Division rules.

The Division received comments recommending that the Division modify and strike portions of §180.22(g)(1) - (2). In response the Division has clarified §180.22(g) of this title to mean that a peer reviewer is a health care provider who performs an administrative review at the insurance carrier's request without a physical examination of the injured employee.

The Division received comments recommending that the Division clarify §180.22(i) because it was confusing. In response the Division clarified §180.22(i) of this title by including dentists and deleting the citation to Labor Code §413.0512.

The Division received comments requesting that the Division modify §180.24(b) to require a 30 day deadline for filing disclosures outside of those required annually. In response the Division has kept the current rule language in this subsection unchanged which requires the health care practitioner to file a disclosure with the division within 30 days of the date the first referral is made unless the disclosure was previously made.

The Division has made a non-substantive change to adopted §180.25(a) by adding "examinations by designated doctors." Labor Code §415.0036 applies to persons who have authority under Labor Code, Title 5 to request the performance of a service affecting the delivery of benefits to an injured employee or who actually perform such a service. Labor Code §415.0036(a) contains a list that is not an exhaustive list of those persons to whom the section applies. Designated doctors perform examinations of injured employees that affect the delivery of benefits to injured employees and therefore must comply with the statute.

The Division received comments requesting that the Division modify §180.26(a) to clarify that workers' compensation insurance carriers do not render medical treatment in the Medicare or Medicaid programs nor do they bill for medical services within the Medicare or Medicaid programs and therefore cannot be sanctioned for adverse findings by the Medicare or Medicaid programs. In response the Division has modified adopted §180.26(a) by deleting the list of acts in that subsection. The Division has, for clarity, replaced that list with a statutory reference in adopted §180.26(b) to Labor Code §408.0231(c) which is the statute upon which the list in proposed §180.26(a) was based.

The Division received comments recommending that the Division delete or modify §180.26(e). In response, the Division has modified §180.26(e)(6) to provide that evidence of heightened awareness of the person's legal duty to comply with the Act and Division rules shall be considered when the Division determines which sanction and the severity of the sanction to impose.

The Division received comments recommending that the Division delete or modify §180.26(g) relating to warning letters. In response, the Division has modified §180.26(g) to state that as an alternative to imposing a sanction such as an administrative penalty on a charged system participant, the division may, at its discretion, provide formal notice of the violation through a Warning Letter and the Warning Letter shall include a summary of the duty that the division believes that the charged system participant failed to fulfill or timely fulfill; identify the facts that establish that a violation occurred; and inform the charged system participant that subsequent noncompliance of the same sort may be deemed to be a repeated administrative violation or matter of practice any of which will be subject to sanction. The language has been recodified from prior rule §180.8(f). The term "pattern of practice" has been replaced with the term "matter of practice" because the term "matter of practice" appears in Labor Code §415.023 and is defined in adopted §180.26(c) to implement that statute.

The Division received a comment that the Division should more closely track the language from Labor Code §408.0231(d)(2) in §180.27(d). In response to the comment, the Division has clarified adopted §180.27(d) to provide that in accordance with Labor Code §408.0231(d)(2) a doctor, other than a doctor to which Labor Code §408.023(r) applies may apply for the restoration of a doctor privilege removed under Labor Code §408.0231 by sending a letter of consideration to the Medical Advisor.

The Division received comments recommending that the Division remove or modify the requirement in §180.28(a) that the peer reviewer's report shall include the name and professional license number of all health care providers related to the treatment under review, the requirement to list all documents reviewed related to the claim, and a full clinical history. In response the Division modified §180.28(a) of this title by deleting §180.28(a)(7) and (a)(8) which required "the name and professional license number of all health care providers whose treatment, review, or any other service related to the claim is the subject of the review" and "for return-to-work, compensability, extent of injury, or other related issues, the name and professional license number of the injured employee's treating doctor."

Section 180.1 of this title sets forth the definitions of the terms used in the rules. Section 180.2 outlines the method for filing a complaint with the Division and explains what constitutes

a frivolous complaint. Section 180.3 sets out the Division's process for compliance audits. Section 180.8 establishes the Division's procedures for issuing notices of violation, notices of hearing, and processing default judgments. Section 180.22 describes and sets forth health care provider roles and responsibilities. Section 180.24 sets forth the Division's financial disclosure requirements for health care providers and defines terms that are used within the section. Section 180.25 sets forth the acts that the Division deems to be improper inducements, attempts to influence or threat, and violations of applicable federal standards by system participants that are administrative violations. Section 180.26 sets forth the criteria for imposing, recommending and determining sanctions or other remedies, and establishes the use and purpose of warning letters. Section 180.27 sets forth the procedure for the Commissioner to modify, amend, or change a recommended finding of fact or conclusion of law or order of the ALJ and the procedure for doctors to apply for restoration of practice privileges removed by the Division. Section 180.28 sets forth requirements for peer review reports, requests for peer review, maintenance of records related to peer reviews by insurance carriers and peer reviewers, sanctions against health care providers performing peer review, submission of peer review reports, and submission of medical records to doctors providing peer review. Section 180.50 is the severability clause for the chapter.

Comment: A commenter is concerned that the proposed rule amendments do not incorporate the PBO concept into each element of the Division's and Department's workers' compensation compliance and enforcement processes. It is the commenter's position that the Division's compliance monitoring and audit programs along with the Department's workers' compensation enforcement programs must incorporate the PBO concept. It is also the commenter's opinion that regulatory oversight efforts should solely focus on insurance carriers and health care providers identified as poor performers through the PBO process; and that efforts to bring action against insurance carriers and health care providers not identified as poor performers through the PBO process should be discontinued.

Agency Response: The Division disagrees. The Act allows for sanctions against insurance carriers and health care providers regardless of whether the system participant is a poor performer through the PBO process. PBO performance is one of many factors considered when taking enforcement action and is included in adopted §180.26(e). PBO performance does not excuse improper conduct but will be considered when determining administrative actions to be taken and sanctions.

Comment: A commenter states "...rule changes with regard to doctor lists, licensed in the state only approvals, and Title 5 with regard to approved doctors to conduct peer reviews, utilization reviews, IRO appears to be increasingly difficult to manage."

Agency Response: The Division acknowledges commenter's concerns, however, the Division is required to implement statutory changes.

Comment: A commenter summarizes that changes to the complaint process includes a formal, risk-based complaint investigation system which appears to be more comprehensive than in the past. The commenter is unsure how this may impact insurance carriers.

Agency Response: The language of the adopted rule conforms with the statutory changes made by HB 7 that took effect in 2005 and continues to fulfill the legislative intent.

Comment: A commenter states the Division is authorized to collect, compile and maintain statistical and other information as necessary to detect patterns and practices under Labor Code §414.003, but that it is unclear if this includes additional reporting requirements for insurance carriers. The commenter further states that the proposal preamble describes data collection for the possible use of evaluating patterns and practices and the repeals remove guidelines to establish patterns of practices along with the resulting schedule of penalties. The commenter is of the opinion that the repeal of guidelines to establish patterns of practices along with the resulting schedule of penalties may be a favorable change to insurance carriers. However, the commenter finds it unclear if new data requirements offset the benefits from the repeal of guidelines that establishes patterns of practices along with the resulting schedule of penalties. The commenter also asks what type of new data may be required.

Agency Response: The Division cannot speculate on data that may be required in the future; however, nothing in this adopted rule is intended to limit the Division's ability to collect data.

Comment: A commenter states that the description of Labor Code §402.075 in the preamble does not make clear the statutory requirements for the rules for performance based oversight (PBO) or if there will be any changes to the current Division rules for PBO.

Agency Response: Section 180.19 of this title is not a rule amended by this proposal and is beyond the scope of this proposal. Adopted §180.26(e) provides that a PBO assessment is a factor the Division shall consider when determining which sanction to impose against a system participant and the severity of that sanction.

Comment: A commenter states the initial description of Labor Code §402.072 in the preamble is not clear in its application to the proposed amendments.

Agency Response: The Division disagrees with the comment but offers more clarification. Pursuant to Labor Code §402.072 the Division may impose sanctions against any person regulated by the Division under the Act. Only the Commissioner of Workers' Compensation may impose a sanction that deprives a person of the right to practice before the Division or of the right to receive remuneration under the Act for a period exceeding 30 days; or another sanction suspending for more than 30 days or revoking a license, certification, or permit required for practice in the field of workers' compensation. A sanction by the Division is binding pending appeal. This chapter applies to monitoring and enforcement and contains Division regulations related to sanctions of "persons regulated by the Division under the Act."

Comment: A commenter summarizes that in the preamble it is explained that HB 7 expanded the definition of sanctions in Labor Code §401.011 and that the definition of sanctions references violations. The commenter states that there is concern over fines, sanctions and violations, increasing from $10,000 to $25,000 per violation with each day of non-compliance constituting a separate violation. The commenter is unsure how this may impact insurance carriers.

Agency Response: The language of the adopted rule conforms with the statutory changes made by HB 7 that took effect in 2005 and continues to fulfill the legislative intent.

§180.1(a)

Comment: A Commenter states that language in proposed §180.1(a) "shall have the following meanings, unless the con-

text clearly indicates otherwise" is inappropriate and should be removed. The commenter states such a concept could lead to confusion about the regulatory definitions of specific terms. The commenter also asks why the Division would include a definition of a term in this section if it was not going to have a specific meaning as defined.

Agency Response: The Division agrees and has clarified adopted §180.1; however, the general rules of statutory and rule construction still apply.

Comment: A commenter suggests the addition of a definition for injured employee stating that many individuals initiate workers' compensation claims that are neither an employee and/or injured. The commenter suggests "injured employee" be defined as "any person who makes a claim for benefits pursuant to Labor Code, Title 5, because of an allegation that he or she has sustained a compensable injury."

Agency Response: The Division disagrees because it is unnecessary to add a definition for injured employee. The Act and Division rules provide regulation for claims.

§180.1(a) and §180.26(a)

Comment: Commenter states that the definition for "pattern of practice" was removed resulting in it not being defined for Chapter 180 of this title; however, the term is still used in the proposed rules. One commenter states that it appears that "a pattern of practice" will be equivalent to a single violation and requests the subsection be clarified to ensure a single action is not considered a "pattern of action". Commenter suggests the following language: "The division shall take into account in determining whether and the extent to which to impose sanctions whether there has been a willful violation of any law and may take into account whether there has been a pattern of practice of violations."

Agency Response: The Division disagrees with this comment and declines to define pattern of practice. Labor Code §415.021 provides that in addition to any other sanction, administrative penalty (fine), or other remedy authorized by Labor Code, Title 5, the Division may assess an administrative penalty against a person who commits an administrative violation. The Division also notes that the reference to "pattern of practice" referred to by the commenter has been deleted from adopted rule 180.26 and replaced with a statutory reference to Labor Code §408.0231(c), the statute upon which the proposed language was based. Labor Code §408.0231 does not, however, require the Division to find a "pattern of practice" as a threshold to demonstrating an administrative violation under that section and, therefore, a definition of the term is unnecessary.

§180.1(a)(4), (23) and (25)

Comment: Commenters request a modification to the definition for "agent" in §180.1.

One commenter states that definition is overly vague because insurance carriers are already required to pay penalties due to mistakes and/or errors of third party administrators (TPAs).

One commenter states that language should be removed because it could cause an agent to be assessed a fine or penalty two times; once by the principle and a second time by the Division.

Agency Response: The Division disagrees. The definition of "agent" is intentionally broad and includes any party that the system participant utilizes or contracts with. Labor Code §415.0036(b) broadens who may be viewed as a system participant and the agent may be held responsible for the agent's own violations pursuant to the statute. Labor Code §402.072(a) also states the Division may impose sanctions against any person regulated by the Division under the Act.

§180.1(a)(5), §180.22(f) - (h), and §180.28(e)(5)

Comment: Commenters request clarification and modification of the definition for "appropriate credentials."

One commenter states that the proposed definition is inconsistent with language previously adopted in §133.308(d) of this title relating to medical dispute resolution by independent review organizations related to HB 2004 specialty certification requirements, and suggests two alternative definitions as follows: "Pursuant to Labor Code §408.0046, a doctor must be one who would typically manage the medical or dental condition, procedure, or treatment under consideration for review and be qualified by the appropriate certification(s), education, training and experience to provide the health care reasonably required by the nature of the specific injury to treat the condition until further material recovery from or lasting improvement to the injury can no longer reasonably be anticipated."

Or, in the alternative: "Pursuant to Labor Code §408.0046, a doctor must be one who would typically manage the medical or dental condition, procedure, or treatment under consideration for review and be qualified by the appropriate licensure, certification(s), and the same or similar education, training and experience to provide the health care reasonably required by the nature of the specific injury including to both generally treat the condition and to provide expertise on the specific procedure and treatment being requested until further material recovery from or lasting improvement to the injury can no longer reasonably be anticipated."

One commenter states that the definition for appropriate credentials, as proposed, is subjective and suggests the addition of "scope of practice" to the proposed definition.

One commenter asks that the section be modified to remove the application of appropriate credentials to peer reviews, RMEs, and DD exams. The commenter states the proposed rule amendments in this subsection are an incorrect interpretation and application of the statutory amendments enacted by HB 2004. The commenter reasons that the Division does not have the statutory authority to apply the requirement of appropriate credentials to those reviewing health care for reasons other than medical necessity.

One commenter states that Labor Code §408.0046 is cited as the reason for this amendment; however, that peer reviewers do not provide treatment; and as such, the statutory authority for the Division to require peer reviewers to have appropriate credentials is not evident in Labor Code §408.0046. The commenter states the amendment needs to be clarified or removed.

One commenter summarizes that HB 2004 added Labor Code §408.0046 directing that the Commissioner may adopt rules to determine which professional health practitioner specialties are appropriate for treatment. The commenter has the opinion that "...this could create somewhat of a moving target and prove to be unmanageable."

Agency Response: The Division disagrees. The Division disagrees that the adopted definition of "appropriate credentials" conflicts with §133.308(d) of this title regarding professional specialty requirements, because the provisions serve different pur-

poses. The definition of "appropriate credentials" is a general definition that applies to many health care providers as described by these adopted rules. The professional specialty requirements of §133.308(d) of this title apply specifically to doctors performing reviews under that section and are in addition to the "appropriate credentials" requirements in Chapter 180 of this title. The Division also disagrees with commenters' concerns regarding the scope of application for the definition of "appropriate credentials." Labor Code §408.0043 requires that a peer review doctor, utilization review doctor, IRO doctor, designated doctor, RME doctor, or MQRP doctor that reviews a specific workers' compensation case must hold a professional certification in a health care specialty appropriate to the type of health care that the injured employee is receiving; therefore, the Division's definition of "appropriate credentials" must apply to all doctors described by that section to health care providers as described by these adopted rules. Furthermore, nothing in Labor Code §408.0043 limits its application to reviews of medical necessity, and, moreover, that section also includes designated doctors, who do not review medical necessity. The Division also disagrees that its definition of "appropriate credentials" definition should include a "scope of practice" requirement, because this requirement is sufficiently covered by the Division's adopted definition. Finally, the Division acknowledges the commenter's concerns regarding Labor Code §408.0046 but notes that the Division must comply with the statute.

§180.1(a)(11)

Comment: A commenter recommends that the definition of the term "conviction or convicted" in §180.1 be changed by deleting any reference to a "system participant entering a first-offender or other program and judgment of conviction has been withheld". This commenter is concerned with rule language that considers a person convicted when a court has withheld a conviction judgment.

Agency Response: The Division disagrees that subsection (a)(11) should be deleted because under Labor Code §408.0231(c) the criteria for recommending or imposing sanctions against a doctor or insurance carrier may include anything the Commissioner considers relevant.

§180.1(a)(19)

Comment: Several commenters request modification of the definition for peer review in §180.1 because it is overly broad and inconsistently used by the Division. Some commenters state that a health care provider cannot "provide treatment" without a physical examination; consequently, a health care provider that is providing treatment is not a peer review doctor. Some commenters state that the definition goes beyond the definition of UR found in Insurance Code Chapter 4201 and HB 4290. Some commenters also state that the Insurance Code and associated Department rules apply to UR in the workers' compensation system.

One commenter suggests that the proposed definition may lead to any consultation by the insurance carrier with a medical professional being defined as "peer review". One commenter states that current §180.22(g) contains an appropriately scope-restricted definition of peer review.

One commenter states that the proposed definition is different from the definition of the term recommended by the Department's Utilization Review Agent Advisory Committee to be included in the soon to be proposed §19.2003 definitions rule that is part of the planned overhaul of the utilization review agent rules. With the exception of the reference to IROs in the Department's Utilization Review Agent Advisory Committee draft rule, the definition of the term "peer review" should be the same in both sets of rules so as to avoid confusion among system stakeholders.

Some commenters suggest that the "for any issue" language be removed from the proposed definition because the relevant statutes address the administrative review *"of the medical necessity and appropriateness of health care services".* The relevant statutes do not apply to any issue related to health care.

Other commenters provide additional language options to restrict the definition's scope.

Agency Response: The Division disagrees but recognizes that the proposed definition of "peer review" caused confusion among system participants. In particular, the Division recognizes that the provision that stated health care providers were not required to perform treatment to perform peer review was confusing and did not communicate the Division's intended meaning, which is that the Labor Code definitions of "health care provider" and "health care practitioner" cannot be used to imply that health care providers that perform peer review must also render treatment. Therefore, the adopted definition of "peer review" is consistent with the peer review rule language in previous §180.22(g). Adopted §180.1 defines "peer review" as "An administrative review by a health care provider performed at the insurance carrier's request without a physical examination of the injured employee." The adopted definition continues to meet the intent of the previous rule which established that peer reviews were also performed for issues other than medical necessity and clarifies that the scope of the adopted rule applies to medical opinions rendered regarding any aspect of an injury claim as a result of an administrative review without a physical examination of the injured employee. The division agrees that the definition of "peer review" is broader than the definition of "utilization review" found in Insurance Code Chapter 4201. Chapter 4201 defines "utilization review" as "includes a system for prospective, concurrent, or retrospective review of the medical necessity and appropriateness of health care services and a system for prospective, concurrent, or retrospective review to determine the experimental or investigational nature of health care services. The term does not include a review in response to an elective request for clarification of coverage." Adopted §180.22(g) establishes that there are two types of peer reviews, those performed for the review of medical necessity and those performed for issues other than medical necessity. Only peer reviews performed for the review of medical necessity are utilization review. Therefore, the definition of "peer review" is broader than the definition of "utilization review." The Division also agrees that the definition of "peer review" in these adopted rules should be consistent with the Department's utilization review rules currently being amended and will take necessary steps to ensure this consistency.

§180.1(a)(26)

Comment: A commenter states that the definition for "utilization review" in §180.1 is redundant and unnecessary since Insurance Code Chapter 4201 defines "utilization review." The commenter alludes to the Legislature's amendment of the UR definition during the 2007 and 2009 sessions and reflects that the Department has, at this time, not incorporated Legislative amendments to §19.2003(33) of this title. Commenter suggests that defining UR in this rule may require that this rule be reopened to update the definition in the future. Commenter suggests, to the ex-

tent that a definition is required, that a reference to Labor Code §401.011(42-a) should be sufficient.

Agency Response: The Division agrees and the definition of "utilization review" as proposed is not included in adopted §180.1. The definition in Labor Code §401.011(42-a), which references Insurance Code Chapter 4201, will be utilized.

§180.1(b)

Comment: Commenters request that §180.1(b) be removed.

One commenter questions the inclusion of this subsection in a section that specifically provides definitions for Chapter 180 of this title and suggests that it would be more appropriate to include this subsection in a section that addresses the scope of the chapter.

One commenter states the subsection is "...somewhat unusual and strange" and that the language is entirely unnecessary and may only result in confusion.

Agency Response: The Division agrees and has not adopted §180.1(b).

§180.2

Comment: Commenters request §180.2 be modified to remove the provision for anonymous complaints. Commenters state that the Division does not have the statutory authority to provide for anonymous complaint filing. Commenters cite Labor Code Chapter 418 and §§402.023, 409.009, 411.082, 415.009, and 451.001 in support of the request to remove the provision for anonymous complaints. Commenters opine that the acceptance of anonymous complaints raises due process concerns since one of the fundamental principles of due process is to allow the accused to confront and cross-examine the accuser and allowance of anonymous complaints removes this due process protection.

One commenter states that the rule appears to be inconsistent with *GuideOne Ins. Co. v. Cupps,* 207 S.W.3d 900 (Tex. App. - Ft. Worth 2006, pet. denied) which held that a party is entitled to seek a hearing to determine whether an administrative violation has occurred based on allegedly fraudulent conduct and must do so prior to seeking judicial review over such conduct.

One commenter states that there is concern that anonymous complainants will be reviewed and may only be further pursued if the complaint has merit based on the subjective judgment of an investigator. The commenter states this process may lead to arbitrariness against system participants.

Agency Response: The Division agrees in part and disagrees in part. The Division has changed the adopted rule to remove language regarding the submission of anonymous complaints. However, Labor Code §402.092 requires investigation files maintained by the Division to remain confidential and provides the exceptions that apply. Division investigation files are not open records for the purposes of Government Code Chapter 552 and are governed by applicable statutory confidentially provisions.

§180.2(h)

Comment: A commenter has concern with the term "other risk-based criteria." The commenter is concerned that the lack of definition to this term will lead to rule making not subject to public comment.

Agency Response: The Division disagrees. Labor Code §402.0235 provides that the Division may develop risk based criteria. The statute does not require the Division to define "other risk-based criteria." The Division uses many indicators to determine the priority of complaint investigations, including new legislation.

§180.2(i)

Comment: A commenter recommends that this subsection be modified to specify that a person commits an administrative violation if a person "knowingly" submits a frivolous complaint. This modification is recommended to ensure that no one is discouraged from filing complaints in fear of being penalized for unknowingly filing an improper complaint, particularly those not familiar with the system.

Agency Response: The Division disagrees. Adding the word "knowingly" would be inconsistent with Labor Code §402.023.

§180.3(h)

Comment: A commenter disagrees with §180.3(h) and the decision to make publishing of the final audit report on the Division Internet website discretionary, particularly those that reflect non-compliance. The commenter states that making information public on system participants that are not in compliance with standards is a primary reason for conducting compliance audits and that the educational benefit to the system of audits exposing non-compliance will be muted if the non-compliance information is not provided publically. Commenter appreciates that posting the results of a follow-up audit permits a system participant to demonstrate its efforts to come into compliance. However, commenter does not believe that taking corrective action should result in excusing the original noncompliance, which will be the result if the findings of the original audit are not made public. Commenter believes that the system works best when system participants have access to complete information and that goal will be undermined if the results of the original audit demonstrating noncompliance are not published.

Agency Response: The Division disagrees. The language is not newly proposed language and is the current language in the rule with the exception of changing the word "commission" to "division." Final audit reports are releasable under the Texas Public Information Act with confidential information redacted and these reports have been released when requested. The Division believes that publishing final audit reports on the Internet will have a positive impact on compliance rates by motivating system participants and providing an incentive to perform better. The Division places public information on it website when it believes the information is of value to system participants.

§180.8

Comment: Commenters request clarification and modification of §180.8. Commenters question the non-response to the Notice of Violation (NOV) triggering the setting of a hearing at SOAH, the jurisdiction between the Division and SOAH once a hearing has been set, the statutory authority and jurisdiction that allows the Division to issue a default finding upon a non-response to the Notice of Hearing (NOH), the statutory authority and jurisdiction of the Division to review or modify decisions issued by an ALJ from SOAH, and the statutory authority and jurisdiction of the Division for the process to set aside findings. Commenters state that it is unclear if Chapters 415 and 402 of the Labor code apply to the processes and proceedings. Commenters go on to state that there is no authority for the Division or the Department to

collect a penalty through typical judicial types of means and that the only enforceable recourse is through revocation to practice within the system, suspension of the right to receive payments within the system, or suspension of a license, certification, or permit issued by TDI. Commenters cite Labor Code §§415.032, 415.033, 402.072, 402.073, 1 TAC Chapter 155, and Chapter 149 of this title in support of comments that request clarification and modification of proposed language around the Division's statutory authority and jurisdiction in this section.

Agency Response: The Division agrees in part and disagrees in part. The Division agrees that, pursuant to Labor Code §402.073, SOAH has jurisdiction to issue penalties upon a default; therefore, the Division has made a change to reflect this agreement. The Division disagrees, however, with the commenters' statement that the Division does not have the statutory authority to set a hearing at SOAH if the charged party does not respond to the NOV, because Labor Code §415.033 states that if, without good cause, a charged party fails to respond to an NOV as required under Labor Code §415.032, the Division shall initiate enforcement proceedings. The Division also disagrees with the assertion that it does not have the statutory authority to issue a default if a party fails to respond to an NOH. Government Code §2001.056, which applies to enforcement hearings pursuant to Labor Code §415.034, permits contested cases to be disposed of informally by default, and, therefore, this rule implements that authority. Lastly, the Division disagrees with commenters' concern that these default provisions conflict with the Division's memorandum of understanding with the State Office of Administrative Hearings, because these requirements are necessary to comply with the Labor Code and Government Code and supplement the MOU for the purposes of enforcement hearings.

§180.8(b)

Comment: Commenter requests that the cautionary language be included in the Notice of Violation (NOV) by rule to ensure that individuals clearly understand that a State Office of Administrative Hearings (SOAH) hearing will be set if there is not a response to the NOV.

Agency Response: The Division disagrees that any cautionary language need appear in the rule because it is not necessary. Stakeholders are on notice that a hearing will be set through adopted §180.8(c). Cautionary language will also appear in the NOV.

§180.8(c)

Comment: A commenter asks if the intent of §180.8(c) is to prohibit insurance carriers from requesting an extension beyond the 20 days.

Agency Response: Pursuant to Labor Code §415.032(b) not later than the 20th day after the date on which notice is received, the charged party shall remit the amount of the penalty to the Division or submit to the Division a written request for a hearing.

Comment: Commenters request a longer amount of time to respond to a Notice of Violation (NOV). One commenter states that 20 days is, at times and with certain state approved third party vendors, not enough time to coordinate responses in order to comply with §180.8.

Agency Response: The Division disagrees with the comment because Labor Code §415.032 requires that not later than the 20th day after the date on which the notice is received, the charged party shall remit the amount of the penalty to the division or submit to the division a written request for a hearing. However, the Division may negotiate an informal case disposition with charged parties prior to issuing a NOV and may negotiate a possible informal resolution if the charged party requests a hearing.

§180.8(c) and (d)

Comment: Commenter requests that the cautionary language be included in the Notice of Hearing (NOH) by rule to ensure that individuals clearly understand that a default judgment will occur if there is not a response to the NOH.

Agency Response: The Division disagrees because it is not necessary that cautionary language appear in the rule. However, cautionary language will appear in the NOH.

§180.8(e) and (f)

Comment: Commenter requests that the subsections be clarified to ensure individuals understand that a party will not receive a default judgment due to not responding to an NOV as long as the party attends the SOAH hearing that is triggered by the non-response to the NOV.

Agency Response: The Division disagrees because it is not necessary that cautionary language appear in the rule. Non-response to the NOV will trigger a hearing at SOAH and issuance of the Notice of Hearing. A party may be subject to a default judgment if the party does not file a written response to a Notice of Hearing or does not appear at the hearing.

§180.8(h)

Comment: Commenter recommends that this subsection clearly state the deadline for a party to file a motion to set aside a default order rather than stating that a party is required to file such a motion "prior to the time that the order of the commissioner becomes final pursuant to the provisions of the Government Code Chapter 2001" in order to limit the impact of the default provisions and to minimize the number of instances where administrative penalties are imposed without the benefit of a hearing.

Agency Response: The Division disagrees because it is not necessary that the rule specifically state a deadline. The APA generally sets out these requirements. Currently, several of these requirements are located in Government Code §§2001.144 - 2001.147.

§180.22(a)

Comment: A commenter states that there needs to be clarification around the term health care providers as it relates to RMEs, peer reviewers, designated doctors, members of the MQRP, and IROs in this subsection. The commenter states the need for clarification stems from the fact that none of the above health care providers provide treatment and the definition of a health care provider is to provide treatment. Commenter suggests the language be changed in §180.22(a) to state "...health care providers as defined in subsections (c) - (e) shall provide...".

Agency Response: The Division agrees to the change and has clarified adopted §180.22(a).

Comment: Commenters recommend that the language in this subsection track the precise statutory language in Labor Code §408.021.

Agency Response: The Division disagrees with the change because the language comports with Labor Code §408.021 and is not in conflict with the statutory language. The Division notes, however, that, for other reasons, a change has been made to

this subsection that limits its application to particular health care providers under §180.22 and that this may address the commenter's concerns.

§180.22(c)

Comment: Commenter requests an addition to this subsection. The commenter asks that a requirement for the treating doctor to examine the injured employee to certify a date of maximum medical improvement and assign an impairment rating or refer the injured employee to another authorized doctor to do so be clearly included in the responsibilities of the treating doctor. The commenter cites §130.2 of this title to support the request for the addition to this subsection and suggests that insurance carriers often take the position that this provision is only mandatory if there is not already a certification of MMI and IR from a designated doctor. Commenter states that if §180.22(c) were modified to establish that the treating doctor is required to perform this examination for the injured employee or refer the patient to another doctor, whether or not there is a certification from a designated doctor, then the rule language could be emphasized to either a treating doctor or an insurance carrier to demonstrate that the certification examination is required and, as such, the carrier is liable for the cost of that examination. Commenter recommends the addition of the following language to §180.22(c) and the treating doctor's responsibilities "examine an injured employee to determine a date of maximum medical improvement and to assign an impairment rating for any permanent impairment resulting from a compensable injury or refer the injured employee to another authorized doctor to perform the certification examination. The requirement that the treating doctor perform the certification examination or refer the injured employee to another authorized doctor for a certification examination continues even if the certification examination will occur after a designated doctor has already certified MMI and IR."

Agency Response: The Division disagrees because the specific concerns of the comment are beyond the scope of these rules and may be more appropriately addressed in other rules. However, in response to the comment, the Division clarifies in adopted §180.22(c), which describes the general duties and responsibilities of treating doctors, that a duty and responsibility of the treating doctor is to examine an injured employee to determine a date of maximum medical improvement and to assign impairment ratings as and when appropriate.

§180.22(e)

Comment: Commenters state that the proposed timeframe for referral doctors to submit a timely report contradicts requirements in §129.5(d) - (f) and §133.20(h) of this title and ask that the language in this subsection be synchronized with the cited sections.

Agency Response: The Division agrees and has clarified the language in the rule.

§180.22(g)

Comment: Commenters request the term "conflicts of interest" be defined because left undefined it is open to vastly different interpretations.

Agency Response: The Division disagrees because a potential conflict of interest will depend on individual facts and cannot be defined for every possible conflict.

Comment: Commenters recommend rule language be modified and striking portions of paragraphs (1) and (2) of subsection (g). Commenters state that the concepts of "peer review" and "peer reviewer" apply to administrative reviews of medical necessity and appropriateness of medical care for health care services that are under review and do not apply to all other issues in a workers' compensation claim. Commenters state the proposed rule language applies to reviews made by health care providers regardless of whether or not the health care provider is providing treatment and that a health care provider cannot "provide treatment" without a physical examination; consequently, a health care provider that is providing treatment is not a peer review doctor. Commenters further state that such an expansive definition could potentially endanger the health of the worker, undermine the handling of claims, and undermine the dispute resolution process administered by the Division. Commenters also state that the Insurance Code and associated Department rules apply to utilization review in the workers' compensation system. Commenters state that the definition goes beyond the definition of utilization review found in Insurance Code Chapter 4201 and HB 4290.

One commenter states that the proposed use of the term may lead to any consultation by the insurance carrier with a medical professional being defined as a "peer review".

One commenter states that the use of the term as proposed turns all treating doctors into peer review doctors.

One commenter states that the proposed definition is different from the definition of the term recommended by the Department's Utilization Review Agent Advisory Committee to be included in the soon to be proposed §19.2003 definitions rule that is part of the planned overhaul of the utilization review agent rules.

One commenter points to Labor Code §408.0044 and states that it applies to the review of dental services; and that Labor Code §408.0045 applies to the review of chiropractic services and that these statutes do not apply to "any issue other than medical necessity" and do not apply to "compensability" or "ability to return to work".

One commenter states that the Texas Labor Code does not require that this rule address the specialty of the peer review doctor nor does it require a specialist to specialist review.

Agency Response: The Division agrees that proposed subsection (g) created confusion among system participants. The Division clarifies that it was the intent of the proposed rule to follow the standards established by previous §180.22(g), which provided for two types of peer reviews. Previous §180.22(g)(1) established requirements for peer reviews for the "review of the medical necessity or reasonableness of health care"; and, previous §180.22(g)(2) established requirements for peer reviews for the "review for any issue other than medical necessity." The intent of the proposed language was to provide further clarification and not change the peer review process in place in the workers' compensation system. However, due to comments received adopted §180.22(g) is more consistent with previous rule language. Adopted §180.22(g) establishes that "A peer reviewer is a health care provider who performs an administrative review at the insurance carrier's request without a physical examination of the injured employee." The adopted rule continues to apply to all medical opinions rendered regarding any aspect of an injury claim as a result of an administrative review without a physical examination of the injured employee. The Division agrees that the Insurance Code and associated Department rules apply to utilization review in the workers' compensation system and

adopted §180.22(g)(1) establishes that peer reviews for the "review of the medical necessity or reasonableness of health care services" is utilization review and is subject to applicable provisions of Insurance Code Chapter 4201. The Division also agrees that the definition of "peer review" is broader than the definition of "utilization review" found in Chapter 4201. Chapter 4201 defines "utilization review" as "includes a system for prospective, concurrent, or retrospective review of the medical necessity and appropriateness of health care services and a system for prospective, concurrent, or retrospective review to determine the experimental or investigational nature of health care services. The term does not include a review in response to an elective request for clarification of coverage." Adopted §180.22(g) establishes that there are two types of peer reviews, those performed for the review of medical necessity and those performed for issues other than medical necessity. Only peer reviews performed for the review of medical necessity are utilization review. Therefore, the definition of "peer review" is broader than the definition of "utilization review." The Division also agrees that the definition of "peer review" in these adopted rules should be consistent with the Department's utilization review rules currently being amended and will take necessary steps to ensure this consistency. The Division disagrees that Labor Code §408.0044 and Labor Code §408.0045 do not apply to "any issue other than medical necessity", for example, Labor Code §408.0045(a)(6) applies to a chiropractor who serves as a member of the MQRP. Labor Code §408.0044 and §408.0045 establish that the provisions are applicable to "a doctor performing peer review." The Division also disagrees that the Labor Code does not require that this adopted rule address the specialty of the peer review doctor nor require a specialist-to-specialist review. Labor Code §408.0043 establishes that a doctor performing a peer review of a specific workers' compensation case must hold a professional certification in a health care specialty appropriate to the type of health care that the injured employee is receiving. Labor Code §408.0044 and §408.0045 establish similar provisions for dentists and chiropractors.

§180.22(i)

Comment: Commenters state this subsection is potentially confusing and request clarification. The commenters state that the first sentence of this subsection, taken out of context, suggests that chiropractors can serve on the MQRP without being subject to Labor Code §413.0512.

Agency Response: The Division has clarified adopted §180.22(i).

§180.24(a)

Comment: Commenter recommends a review of Government Code Chapter 573 to ensure statutory continuity.

Agency Response: The Division disagrees that Government Code, Chapter 573 is relevant to the adopted rule since it pertains to nepotism prohibitions applicable to public officials, candidates, district judges, and trading.

§180.24(b)

Comment: Commenters request clarification of when a disclosure must be filed apart from the annual filing requirement as new situations may arise in any given annual cycle. The commenters also request that a deadline for filing disclosures, outside of those required annually, be established by rules and suggest a 30 day deadline.

One commenter suggests that the proposed rule would not provide sufficient notice for the information to be useful and therefore is of no value since the purpose of the disclosure is, in important part, so that the carrier may evaluate the information on the question of medical necessity. Commenter believes the rule is based on the federal rules and the federal rules are concerned with unnecessary over-referrals to providers in which the doctor has financial interests. Commenter suggests a carrier may not learn of the financial interest for some 300+ days (because of newly acquired interests) if the reporting is annual and that may be too late for the carrier to request a refund if the information affected the appropriateness of the payment and cites §133.260 of this title (carrier shall request a refund *within 240 days* from date of service). Commenter recommends requiring an annual disclosure requirement of all interests and a "within 30-day requirement" for any new referrals to providers (in which there is a financial interest) not included in the original disclosure.

Agency Response: The Division agrees to keep the current language of this subsection unchanged which requires the health care practitioner to file a disclosure with the division within 30 days of the date the first referral is made unless the disclosure was previously made.

§180.24(c)(2)

Comment: A commenter requests clarification in the rule that timely submission of refunds is due and payable after a 45 day period from the day that the health care provider fails to file the required disclosure and requests additional information regarding interest calculations and deadlines.

Agency Response: The Division disagrees because the change is not necessary.

§180.25(b)

Comment: A commenter questions why the terms intentionally, knowingly, and willfully have been removed from rule language when the division is required to develop a formal, risk-based complaint investigation system that considers the severity of the alleged violation which includes determining if there was continued or willful non-compliance.

Agency Response: The Division disagrees. HB 7, 79th Legislature, Regular Session (2005) generally removed the requirement that the Division prove particular mental states in order for it to establish that an administrative violation occurred. Furthermore, Labor Code §415.0036, which was added by HB 34, 80th Legislature, Regular Session (2007), does not include a requirement that the Division prove that violations described in that section were performed intentionally, knowingly, or willfully. However, the Division notes that it may still consider factors such as whether the person remains in continued or willful noncompliance with the Act or a rule, order, or decision of the Commissioner when evaluating a complaint.

Comment: Commenters state that the proposed language of "any remuneration" goes beyond the statutory intent of Labor Code §413.0036 which contains language of "improper inducement" and ask that the language "any remuneration" be replaced with "improper inducement". Commenters state that many Texas workers' compensation carriers contract with outside vendors to assist in performing certain claim services including utilization review, case management, peer reviews, required medical examinations, and medical bill reviews. Commenters state that contracting for these services always involves solicitation to provide services and an offering to pay remuneration for services.

Commenters suggest that the statute does not prohibit soliciting or receiving any remuneration and does not prohibit offering or paying any remuneration. Commenters also suggest that the statute does prohibit offering or soliciting improper inducements for the delivery of those claims services. Commenters opine that the term "improper inducement" is not defined in the statute but it is reasonable to interpret that term to mean "kickback, bribe, or rebate" as found elsewhere in the rule and it is not reasonable to interpret "improper inducement" to mean "any remuneration" which would prohibit any payment for the services rendered.

Agency Response: The Division disagrees. Adopted subsection (a) pertains to Labor Code §415.0036 and Labor Code §413.041(b). Labor Code §415.0036(b) requires the Division to adopt the federal standards relating to fraud, abuse, and antikickbacks that prohibit the payment or acceptance of payment in exchange for health care referrals. An injured employee is entitled to all health care reasonably required. Providing fees for referrals creates an incentive to over-prescribe care and unnecessarily add costs to the workers' compensation system. Adopted subsections (b) - (d) generally adopts the federal provisions in Title 42, United States Code §1320a-7b (Antikickback Statute). Subsection (b) sets out the specific conduct that will be deemed to be an improper inducement, influence or threat. Subsection (b)(1) and (2) relate to the federal standards. They cover soliciting, receiving, offering, or paying any remuneration for referrals. The language is constructed in such a way that a third party is not permitted to engage in these activities either. The subsections focus on medical benefits. Subsection (b)(3) and (4) prohibit attempts to influence where an injured employee seeks medical care by offering financial or other incentives such as favorable medical opinions that could impact the injured employee's benefits or offering to keep the injured employee off of work. Subsection (b)(3) also prohibits providing such incentives to attempt to influence the injured employee to comply with the health care provider's treatment plans. It is just as improper to attempt to be selected as an RME doctor by promising reports that are favorable to the insurance carrier. In addition, the subsection prohibits threatening adverse actions as well. For example, doctors cannot threaten the injured employee with a low impairment rating if the injured employee refuses to comply with treatment. Subsection (b)(5) prohibits attempting to influence the opinion of a health care provider or insurance carrier by threatening to file a complaint or embroil them in other legal action. Medical benefit delivery is to be based solely upon the health care that is reasonably required by the nature of the injury as and when needed to cure or relieve the effects naturally resulting from the compensable injury, promote recovery, or enhance the ability of the injured employee to return to or retain employment.

§180.26(a)

Comment: Commenters ask that this subsection be modified to clarify that workers' compensation insurance carriers do not render medical treatment in the Medicare or Medicaid programs nor do they bill for medical services within the Medicare or Medicaid programs and therefore cannot be sanctioned for adverse findings by the Medicare or Medicaid programs.

One commenter states that there is no statutory authority to provide for this rule language under Labor Code §408.0231.

One commenter also suggests §180.26(a)(2) be "tweaked" to include all health care providers.

Agency Response: The Division agrees in part and disagrees in part. The Division has clarified proposed §180.26(a) by removing the list of sanctionable acts and replaced the list with a reference in §180.26(b) to the list of sanctionable acts in Labor Code §408.0231(c). Moreover, this change will clarify the possibly misleading outcome with regard to sanctions imposed against insurance carriers due to findings by Medicaid or Medicare. The Division disagrees that adopted §180.26(a)(2) must include all health care providers because Labor Code §408.0231(c)(3), the statute upon which the adopted language is based, only applies to doctors; however, proposed §180.26(a)(2) is part of the deleted language described above that the Division has replaced with a statutory reference in §180.26(b).

Comment: Commenters request this subsection be modified to clarify the "fair and reasonable" standard that may be utilized by the Commissioner in this subsection, particularly in relation to utilization review. Commenters state that there is no statutory authority that allows the Commissioner to individually make findings of "fair and reasonable" based on a single determination or a pattern of practice. Commenters also state that the proposed rule essentially makes the Commissioner the ultimate fact-finder, which would undermine the authority of the State Office of Administrative Hearings (SOAH) to make the final decision in enforcement cases pursuant to Labor Code §402.073(b). Commenters also cite Labor Code Chapter 413 to support the request for modification in this subsection. Commenters go on to state that the subsection does not explain how or why a utilization review practice might differ from those the Commissioner finds "fair and reasonable".

One commenter suggests that this subsection is ambiguous because it is not clear what the Division is attempting to regulate since the Department, not the Division, regulates utilization review agents (URAs).

Agency Response: The Division disagrees but has made a change for other reasons. Specifically, the Division has deleted the entire list of acts in §180.26(a) and replaced that list with a statutory reference in §180.26(b) to Labor Code §408.0231(c), the statute upon which the proposed language was based. The Division has made this change for reasons described in the response to another comment on this subsection. Though it has made a change, the Division disagrees with these comments. With regard to the "fair and reasonable" language, guidelines may not apply to all situations. Some flexibility is needed by the Division. The Commissioner has the discretion in Labor Code §408.0231(c)(3) to recommend or impose sanctions against an insurance carrier if evidence from the Division's medical records shows that the insurance carrier's utilization review practices are substantially different from those the Commissioner finds to be fair and reasonable based on either a single determination or a pattern of practice or against a doctor if the doctor's charges, fees, diagnoses, treatments, evaluations, or impairment ratings are substantially different from those the Commissioner finds to be fair and reasonable based on either a single determination or a pattern of practice. The Division agrees that the Department regulates URAs; however, the Act also requires regulation by the Division of health care providers that perform utilization review, insurance carrier's utilization review practices, and the practices or omissions of agents of insurance carriers with relation to utilization review. For example, Labor Code §415.0035 states an insurance carrier or its representative commits an administrative violation if that person denies preauthorization in a manner that is not in accordance with rules adopted by the Commissioner under Labor Code §413.014 and a health care

provider commits an administrative violation if that person fails or refuses to timely file required reports or records; further, an insurance carrier or health care provider commits an administrative violation if that person violates the Act or a rule, order, or decision of the Commissioner. Labor Code §415.003 states that a health care provider commits an administrative violation if the person violates a Commissioner rule or rails to comply with a provision of the Act. Labor Code §415.0036 applies to sanctions against insurance adjusters, case managers, or other persons who have the authority under the Act to request the performance of a service affecting the delivery of benefits to an injured employee or who actually performs such a service, including peer reviews, performance of required medical examinations, or case management - and to their agents.

§180.26(e) and (g)

Comment: Commenters request that this subsection be deleted or modified. Commenters cite Labor Code §415.021 for the factors that are to be used when the Commissioner considers sanctions and state that warning letters are not sanctions and do not constitute documentation that a violation occurred at any time. Some commenters also state that there is no statutory authority for the Commissioner to elevate warning letters to the level of a sanction by rule. Commenters go on to state that warning letters only document that there have been allegations that an administrative violation may have occurred, not that one did occur. Once commenter states concerns over "due process" if the language is adopted as proposed.

One commenter asks that a procedure for recipients to respond to warning letters be codified, along with a provision that the Division must maintain responses to warning letters on file. One commenter asks that if warning letters are to be used as part of the formula to assess sanctions that a "finding" of a violation must be included in the warning letter; the commenter alternatively suggests the use of educational letters if the Division is not going to find that a violation did occur. This commenter states that the use of warning letters for the proposed purpose is a large departure from the current use of warning letters.

One commenter suggests that a possible alternative is to issue a zero dollar fine which would make the "finding" of a violation concrete, but would still allow the Division flexibility to not issue a fine. The commenter notes that this would turn the warning letter into an NOV. This commenter also suggests the possible use of educational letters or some other type of letter in place of warning letters as they are proposed.

Agency Response: The Division agrees and disagrees in part. The Division has clarified the language in the rule. Adopted Subsection (e) lays out "other matters that justice may require" pursuant to Labor Code §415.021(c) and includes "evidence of heightened awareness of the legal duty to comply with the Act and Division rules." Warning letters are evidence that the Division made a system participant aware of the participant's noncompliance and its responsibilities under the Act and Division rules. The system participant may respond to the Division following receipt of a warning letter. In response to comments, adopted Subsection (g) has been modified to state that as an alternative to imposing a sanction such as an administrative penalty on a charged system participant, the division may, at its discretion, provide formal notice of the violation through a Warning Letter and the Warning Letter shall include a summary of the duty that the division believes that the charged system participant failed to fulfill or timely fulfill; identify the facts that establish that a violation occurred; and inform the charged system participant that subsequent noncompliance of the same sort may be deemed to be a repeated administrative violation or matter of practice any of which will be subject to sanction. Most of the language has been recodified from prior rule §180.8(f).

§180.27(a)

Comment: Commenters request that this subsection be modified to clarify what is meant by "the commissioner shall review the proposed decision of the administrative law judge". Commenters have concern that the proposed wording may be misleading as the Commissioner cannot alter a final decision issued by SOAH. Commenters site Labor Code §402.073 and §149.8 and §149.9 of this title to support the request to clarify this subsection.

Agency Response: The Division disagrees that any clarification is needed. Adopted §180.27 only states that the Commissioner may modify proposed decisions, not final orders, issued by SOAH. This language is consistent with the provisions of Labor Code §402.073(c). The Division does recognize, however, that the Commissioner may not modify the final orders issued by SOAH.

§180.27(d)

Comment: Commenter suggests that the rule proposes that the Commissioner may lift any sanction imposed under Labor Code §408.0231; however, the statute only provides for reinstatement to the approved doctor's list or restoration of a doctor's practice privileges under §408.0231(d) and nowhere provides for the lifting of the list of sanctions imposed under §408.0231(f) other than those also provided for under §408.0231(d).

Agency Response: The Division agrees in part and disagrees in part; however, the Division has clarified adopted §180.27(d) to more closely track the language of the statute. Labor Code §408.0231(d)(2) provides that the Commissioner by rule shall establish procedures under which a doctor may apply for restoration of doctor practice privileges removed by the Commissioner based on sanctions imposed under Labor Code §408.0231. Labor Code §408.0231(f) lists some of the sanctions that the Commissioner may recommend or impose against a doctor under Labor Code §408.0231 and is clearly a subsection of §408.0231 and falls within the meaning of those practice privileges to which §408.0231(d)(2) applies.

§180.28

Comment: Commenter states that most of the orthopedic physicians in the state of Texas are not seeing injured employees. Commenter also states that the Texas Orthopedic Association (TOA) statistics reflect a decrease of 50 percent in physician participation in the system since the late 90's. Also that TOA polling of members reflects a concern that orthopedic physicians are being brought into the system in a marginal fashion; meaning that their services are being brought into the surgical arena without consideration for the whole practice of orthopedic surgery. Commenter provides several examples of how adverse determinations affect injured employee care and RTW. Commenter recommends encouraging orthopedic surgeon participation in the system, UR and peer review on orthopedic surgery only be completed by orthopedic surgeons, and that the URs or peer reviewers have access to all necessary medical records.

One commenter suggests that the preeminent specialty in the musculoskeletal field of injuries is the orthopedic surgeon; musculoskeletal injuries comprised approximately 90% of all injured workers claims and the opinion of the orthopedic surgeon carries the predominant weight of professional authority. Commenter

recommends adding language to §180.28(g) that "a denial of any recommendation by an orthopedic surgeon should be made only by a peer orthopedic surgeon licensed and practicing in the State of Texas" and add to §180.28(h) that "any quality-of-care oversight at the MQRP level be similarly performed only by respected-peer-orthopedic surgeons, licensed and practicing in the State of Texas."

Agency Response: The Division disagrees and clarifies that increasing orthopedic physician participation in the workers' compensation system is outside the scope of these rules, which address medical benefit regulation. The Division also clarifies that these adopted rules address commenter's concern regarding utilization review and peer review of orthopedic surgeries by implementing Labor Code §408.0043, which requires a doctor (other than a chiropractor or a dentist) that performs peer review or utilization review of a health care service provided to an injured employee or serves on the MQRP hold a professional certification in a health care specialty appropriate to the type of health care that the injured employee is receiving. In addition, adopted §180.1(5) includes a definition for "appropriate credentials" to mean "the certification(s), education, training and experience to provide the health care that an injured employee is receiving or is requesting to receive."

§180.28(a)

Comment: Commenters state that the Division does not have the statutory authority to apply the requirement of appropriate credentials to peer reviewers reviewing health care for reasons other than medical necessity. That the rule proposed amendments in this subsection are an incorrect interpretation and application of the statutory amendments enacted by HB 2004 and should be removed. One commenter recommends §180.28(a)(2) be struck.

Agency Response: The Division disagrees that the Division does not have the statutory authority to apply the requirement of appropriate credentials to peer reviewers reviewing health care for reasons other than medical necessity. Labor Code §408.0231(g) authorizes the commissioner "to adopt rules regarding doctors who perform peer review functions" and adopted §180.22(g) establishes the functions of peer reviewers. Labor Code §§408.0043, 408.0044 and 408.0045 establish that the provisions of those sections are applicable to "a doctor performing peer review." Labor Code §408.0043 also establishes that a doctor performing a peer review of a specific workers' compensation case must hold a professional certification in a health care specialty appropriate to the type of health care that the injured employee is receiving.

Comment: A commenter recommends that the requirement to provide a peer review report should only apply in the case of retrospective review. The commenter supports the recommendation by citing the response timeframes established in §134.600 of this title for preauthorization and concurrent review and comparing those timeframes to those allowed for under Labor Code §408.027. The commenter also states there will be additional costs incurred for letter programming and postage for URAs if the requirements are not confined only to retrospective reviews.

Agency Response: The Division disagrees that the requirement to provide a peer review report should only apply in the case of retrospective review. Labor Code §§414.002 - 414.005 and 414.007 establish the Division's duties of monitoring, compilation and maintenance of statistical data, review of insurance carrier records, maintenance of an investigation unit, and medical review. Also, Labor Code §408.0231(g) provides that the Commissioner shall adopt rules regarding doctors who perform peer review functions for insurance carriers and those rules may include standards for peer review and imposition of sanctions on doctors performing peer review functions. For these reasons it would not be appropriate to have different reporting requirements for a peer review of retrospective health care services and a peer review of prospective health care services. Further, the Division clarifies that a peer review report and a report to deny preauthorization as required by §134.600 of this title (relating to Preauthorization, Concurrent Review, and Voluntary Certification of Health Care) may be the same report as long as the required elements of adopted §180.28(a) and §134.600 of this title are met.

Comment: A commenter states the inclusion of UR (preauthorization) within the proposed peer review process is not necessary. The commenter goes on to state that the Division has adequate monitoring and enforcement power to provide sufficient oversight to the preauthorization process. The commenter further states that defining utilization review as a peer review with the proposed additional administrative requirements does not increase the clinical value of the review itself; it simply increases URAs administrative costs with no parallel increase in the quality or benefit to the injured employee.

Agency Response: The Division agrees and disagrees in part. The Division clarifies that Insurance Code Chapter 4201, and not the Division, defines utilization review as "a system for prospective, concurrent, or retrospective review of the medical necessity and appropriateness of health care services..." Therefore, if the peer review is for the review of the medical necessity and appropriateness of health care services the peer reviewer is performing utilization review and must comply with Chapter 4201 and the applicable provisions of the Act and Division rules.

Comment: Commenters state peer review reports are not applicable to issues outside of medical necessity and appropriateness of medical care for health care services that are under review. Commenters state that there is no statutory authority for the requirement. One commenter, additionally, states that the proposal to apply the proposed requirements to return-to-work, compensability, extent of injury, or other related issues is a misinterpretation of the amendments made to the Labor and Insurance Codes by HB 2004. Some commenters state the requirements will discourage requests for peer reviews along with discouraging per reviewers from accepting requests. Some commenters ask the Division to consider the possible impact on dispute resolution.

Agency Response: The Division disagrees that peer review reports are not applicable to issues outside of medical necessity and appropriateness of care for health care services that are under review. Labor Code §§414.002 - 414.005 and 414.007 establish the Division's duties of monitoring, compilation and maintenance of statistical data, review of insurance carrier records, maintenance of an investigation unit, and medical review. Also, Labor Code §408.0231(g) provides that the Commissioner shall adopt rules regarding doctors who perform peer review functions for insurance carriers and those rules may include standards for peer review and imposition of sanctions on doctors performing peer review functions. For these reasons and to meet statutory requirements, it is necessary for the Division to be able to obtain all types of peer review reports.

Comment: Commenters state the subsection needs to be stricken or modified to align with current or future URA rules.

One commenter states that this subsection as proposed is in conflict with Department's URA Advisory Committee draft rule, another commenter states that the subsection as proposed conflicts with current URA rules.

One commenter states that the requirement for a report upon the denial of preauthorization is not contained within Labor or Insurance Code nor is it in the Division's or Department's rules and that there is no statutory authority for the requirement.

One commenter states that, as proposed the subsection, as written, does not affect peer report generation when there is denial of a preauthorization request. This commenter goes on to state that the denial of preauthorization must go though the UR process and that the additional requirement of a peer review report is unnecessary and overly burdensome.

One commenter suggests that a URA should not be denied the use of a peer review report because of a technical defect, ie absence of license number, if the given report otherwise provides valuable information; and that ultimately the URA is responsible for the determination and the URA is subject to regulation by the Department, not the Division.

One commenter states that the Legislature used each term, and that each term has a separate definition and that there is nothing in the Labor Code to suggest that the Legislature intended the two terms to be treated the same and neither the terms nor processes are interchangeable.

Agency Response: The Division disagrees that the adopted rule is in conflict with utilization review requirements of Chapter 4201. The Division clarifies that this adopted rule is to be applied in conjunction with the requirements of Chapter 4201 for peer reviews performed for the review of the medical necessity or reasonableness of health care. Labor Code §§414.002 - 414.005 and 414.007 establish the Division's authority and duties of monitoring, compilation and maintenance of statistical data, review of insurance carrier records, maintenance of an investigation unit, and medical review. Also, Labor Code §408.0231(g) provides that the Commissioner shall adopt rules regarding doctors who perform peer review functions for insurance carriers and those rules may include standards for peer review and imposition of sanctions on doctors performing peer review functions. Further, the Division clarifies that a peer review report and a report to deny preauthorization as required by §134.600 of this title (relating to Preauthorization, Concurrent Review, and Voluntary Certification of Health Care) may be the same report as long as the required elements of adopted §180.28(a) and §134.600 of this title are met.

Comment: Commenters state the requirements to provide the name and professional license number of all health care providers related to the treatment under review, the requirement to list all documents reviewed related to the claim, and a full clinical history either need to be removed entirely or modified. The commenters state that the requirements in this subsection are overly burdensome and will add cost to the system. Some commenters state that there is no statutory mandate to require this information; that it will be hard to meet; exposes peer reviewers, utilization review companies, and insurance carriers to enforcement situations; and serves no purpose other than to discourage doctors from performing peer reviews in the workers' compensation system which is fraught with over-utilization of medical care. Some commenters acknowledge that the information may be for Medical Quality Review Panel (MQRP) or other purposes, but state that either the information is available via the Division's medical data base or that the information will rarely be reviewed and the burden to provide the information far outweighs any possible benefit. Some commenters state that the requirements to provide the name and professional license number of all health care providers related to the treatment under review and the requirement to list all documents reviewed related to the claim has no beneficial effect on the report because the point is to determine if the peer reviewer has the appropriate credentials to review the health care under review.

One commenter states that the rule proposed amendments in this subsection are an incorrect interpretation and application of the statutory amendments enacted by HB 2004.

One commenter states that the requirements of §180.28(a)(4) that the report provide "a list of all medical records and other documents reviewed by the peer reviewer, including dates of those documents" unnecessarily drives up the cost of preparation of the report both from a clerical and a peer reviewer perspective due to the requirement of outlining each and every document. Commenter also states that the requirement of §180.28(a)(5) that the peer report contain a summary of the clinical history is unnecessary in most cases, overly burdensome, and needlessly drives up the cost of preparation of the report. Commenter suggests that at best, the rule should require a summary of only that portion of the clinical history relevant to the actual peer review. Commenter recommends that §180.28(a)(4) and §180.28(a)(5) be modified so that only those medical records most relevant to the actual peer review and the clinical history related to the peer review must be listed and summarized.

Agency Response: The Division disagrees and agrees in part. Proposed §180.28(a)(7) and (a)(8) which required "the name and professional license number of all health care providers whose treatment, review, or any other service related to the claim is the subject of the review" and "for return-to-work, compensability, extent of injury, or other related issues, the name and professional license number of the injured employee's treating doctor" have been deleted. However, the Division clarifies that the requirements to list all medical records and other documents reviewed by the peer reviewer, including dates of those documents and a summary of the clinical history are not new requirements and were established by previous §180.28. Labor Code §§414.002 - 414.005 and 414.007 establish the Division's authority and duties of monitoring, compilation and maintenance of statistical data, review of insurance carrier records, maintenance of an investigation unit, and medical review. Also, Labor Code §408.0231(g) provides that the Commissioner shall adopt rules regarding doctors who perform peer review functions for insurance carriers and those rules may include standards for peer review and imposition of sanctions on doctors performing peer review functions. Further, Labor Code §408.0046 requires the Division to adopt rules that require an entity requesting a peer review to obtain and provide to the doctor providing peer review services all relevant and updated medical records.

§180.28(c)

Comment: A commenter recommends the peer record also be provided to the Office of Injured Employee Counsel (OIEC) Ombudsman, if one is assisting the injured employee. The commenter recommends the language be modified to "person acting on behalf of the injured employee" from "injured employee's representative".

Agency Response: The Division disagrees. The commenter's suggested language is too broad and would include persons far

beyond an ombudsman. The adopted language conforms with the language in Labor Code §402.071.

§180.28(e)(1)

Comment: Commenter states that the following standard is vague and requires clarification - the commissioner may impose sanctions on peer reviews and may prohibit a doctor from conducting peer reviews for "applicable provisions of the Act, or a rule, order, or decision of the commissioner."

Agency Response: The Division disagrees. Labor Code §408.0231(g) clearly requires that the Commissioner shall adopt rules regarding doctors who perform peer review functions for insurance carriers. The adopted rule states that the Commissioner may impose sanctions on doctors performing peer reviews pursuant to Labor Code §408.0231 and §180.26 and §180.27 of this title (relating to Criteria for imposing, Recommending and Determining Sanctions; Other Remedies; and Sanctions Process/Appeals/Restoration, respectively) and other applicable provisions of the Labor Code and Division rules. The adopted rule also provides that the Commissioner may prohibit a doctor from conducting peer reviews for non-compliance with the provisions of §180.22 of this title (relating to Health Care Provider Roles and Responsibilities), this section, or applicable provisions of the Act, or a rule, order or decision of the Commissioner.

§180.28(f)

Comment: A commenter recommends adding injured employees to the list of those that may requests a peer review.

Agency Response: The Division disagrees. The Division does not have the authority to allow injured employees to request peer reviews and does not have the authority to monitor peer reviews requested by an injured employee. Labor Code §408.0231(g) provides that the Commissioner shall adopt rules regarding doctors who perform peer review functions for insurance carriers and those rules may include standards for peer review and imposition of sanctions on doctors performing peer review functions.

Comment: A commenter supports the requirement of this subsection stating it reinforces the need for insurance carriers to have timely access to medical records.

Agency Response: The Division acknowledges and appreciates the comment.

For, with changes: Property Casualty Insurers Association of America; Medtronic Spinal & Biologics/Texas Lobby Solutions; Insurance Council of Texas; American Insurance Association; CorVel Corporation; Flahive, Ogden & Latson; State Office of Risk Management; Office of Injured Employee Counsel; ACE Group; Texas Mutual Insurance Company

Against: None

SUBCHAPTER A. GENERAL RULES FOR ENFORCEMENT

28 TAC §§180.1 - 180.3, 180.8

The amendments are adopted under Labor Code §§401.011, 401.021, 402.001, 402.00128, 402.00111, 402.00116, 402.023, 402.0235, 402.024, 402.061, 402.072, 408.0043 - 408.0046, 408.023, 408.0231, 414.002, 414.007, 415.001 - 415.0036, 415.008 - 415.010, 415.021, 415.023, 415.031, 415.032, 415.034; Government Code §§2001.051, 2001.052, and 2001.056; and Insurance Code §1305.004(a)(10) and §4201.002(13).

Labor Code §401.011 defines certain terms that are used under Labor Code, Title 5, Subtitle A (the Act).

Labor Code §401.021(1) provides that except as otherwise provided by Labor Code, Title 5, Subtitle A, a proceeding, hearing, judicial review, or enforcement of a Commissioner order, decision, or rule is governed by the following subchapters and sections of Government Code, Chapter 2001: Subchapters A, B, D, E, G, and H, excluding §2001.004(3) and §2001.005; §§2001.051, 2001.052, and 2001.053; §§2001.056 - 2001.062; and §2001.141(c).

Labor Code §402.001 was amended to provide that except as provided by Labor Code §402.002, the Texas Department of Insurance is the state agency designated to oversee the workers' compensation system of this state and the Division of Workers' Compensation is established as a division within the Texas Department of Insurance to administer and operate the workers' compensation system as provided by Labor Code, Title 5.

Labor Code §402.00111 provides that except as otherwise provided by Labor Code, Title 5, the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority, under Labor Code, Title 5.

Labor Code §402.00116(a) provides that the Commissioner or Workers' Compensation is the Division's chief executive and administrative officer. The Commissioner shall administer and enforce Labor Code, Title 5, other workers' compensation laws of this state, and other laws granting jurisdiction to or applicable to the division or the Commissioner, except as otherwise specifically provided by Labor Code, Title 5, a reference in Labor Code, Title 5 to the "commissioner" means the Commissioner of Workers' Compensation.

Labor Code §402.00116(b) provides that the Commissioner has the powers and duties vested in the division by Labor Code, Title 5 and other workers' compensation laws of this state.

Labor Code §402.00128(b) provides that the Commissioner or the Commissioner's designee may investigate misconduct; hold hearings; issue subpoenas to compel the attendance of witnesses and the production of documents; administer oaths; take testimony directly or by deposition or interrogatory; assess and enforce penalties established under this title; enter appropriate orders as authorized by this title; institute an action in the Division's name to enjoin the violation of Labor Code, Title 5; initiate an action under Labor Code §410.254 to intervene in a judicial proceeding; prescribe the form, manner, and procedure for the transmission of information to the Division; correct clerical errors in the entry of errors; and exercise other powers and perform other duties as necessary to implement and enforce Labor Code, Title 5.

Labor Code §402.021(b)(6) states that it is the intent of the legislature that, in implementing the goals described by Subsection (a), the workers' compensation system of this state must promote compliance with this subtitle and rules adopted under this subtitle through performance-based incentives.

Labor Code §402.023(a) provides that "[t]he commissioner shall adopt rules regarding the filing of a compliant under this Labor Code, Title 5, against an individual or entity subject to regulation under this subtitle".

Labor Code §402.035 requires the Division to develop a risk based complaint investigation system and to consider the severity of the alleged violation, whether the alleged violator showed continued or willful noncompliance, whether a Commissioner order has been violated, and other necessary risk based criteria.

Labor Code §402.024(b) provides that the Division shall comply with federal and state laws related to program and facility accessibility.

Labor Code §402.061 provides that the Commissioner shall adopt rules as necessary for the implementation and enforcement of Labor Code, Title 5, Subtitle A.

Labor Code §402.072(a) provides that the Division may impose sanctions against any person regulated by the Division under Labor Code, Title 5, Subtitle A.

Labor Code §402.072(b) provides that the Commissioner may impose certain sanctions regarding the right to practice before the division or to suspend for 30 days a license, certification or permit required for practice in the workers' compensation system.

Labor Code §402.072(c) states that a sanction imposed by the Division is binding pending appeal.

Labor Code §408.0043(a) applies to doctors, other than chiropractors or dentists, who perform health care services under Labor Code, Title 5, as doctors performing peer reviews, utilization reviews, independent reviews, required medical examinations, or who serve on the medical quality review panel or as designated doctors for the Division.

Labor Code §408.0043(b) requires that a doctor described by Labor Code §408.0043(a), other than a chiropractor or dentist, who reviews a specific workers' compensation case must hold a professional certification in a health care specialty appropriate to the type of health care that the injured employee is receiving.

Labor Code §408.0044 pertains to dentists who perform dental services under Labor Code, Title 5 for peer reviews, utilization reviews, independent reviews, or required dental examinations.

Labor Code §408.0044(b) requires that a dentist who reviews a dental service in conjunction with a specific workers' compensation case must be licensed to practice dentistry.

Labor Code §408.0045 pertains to chiropractors who perform chiropractic services under Labor Code, Title 5 for peer reviews, utilization reviews, independent reviews, required medical examinations, or who serve on the medical quality review panel or as designated doctors providing chiropractic services for the Division.

Labor Code §408.0045(b) requires that a chiropractor who reviews a chiropractic service in conjunction with a specific workers' compensation case must be licensed to engage in the practice of chiropractic.

Labor Code §408.0046 states that the Commissioner may adopt rules as necessary to determine which professional health practitioner specialties are appropriate for treatment of certain compensable injuries and must require an entity requesting a peer review to obtain and provide to the doctor providing the peer review services all relevant and updated medical records.

Labor Code §408.023(h) requires that a utilization review agent or an insurance carrier that uses doctors to perform reviews of health care services provided under Labor Code, Title 5, Subtitle A, including utilization review, only use doctors licensed to practice in this state.

Labor Code §408.023(k) states that Labor Code §408.023(a) - (g) and (i) which developed the approved doctors list will expire September 1, 2007.

Labor Code §408.023(n) and §408.0231(g) require the Commissioner to adopt rules that apply to doctors and health care providers which relate to training, financial disclosure, monitoring, and peer review.

Labor Code §408.0231(g) authorizes the Commissioner to adopt rules regarding doctors who perform peer review functions for insurance carriers, such as, standards for peer review, sanctions against doctors performing peer review functions (including restriction, suspension, or removal of the doctor's ability to perform peer reviews) and other issues important to the quality of peer review.

Labor Code §408.0231(b) authorizes the Commissioner by rule to establish criteria for imposing sanctions on a doctor or an insurance carrier as provided by this section.

Labor Code §408.0231(c) states the criteria for recommending or imposing sanctions that the Commissioner may use (which may include anything the Commissioner considers relevant) including a sanction of the doctor for a violation of Labor Code, Chapter 413 or 415; a sanction by the Medicare or Medicaid program; evidence from the Division's medical records that an insurance carrier's utilization review practices or the doctor's charges, fees, diagnoses, treatments, evaluations, or impairment ratings are substantially different from those the Commissioner finds to be fair and reasonable based on either a single determination or a pattern of practice; professional failure to practice medicine or provide health care, including chiropractic care, in an acceptable manner consistent with the public health, safety, and welfare; or a criminal conviction.

Labor Code §408.0231(d) requires the Commissioner to establish rules for the restoration of doctor practice privileges removed by the Commissioner for sanctions imposed under Labor Code §408.0231.

Labor Code §408.0231(f) provides the sanctions the Commissioner may recommend or impose under this section which include reduction of allowable reimbursement; mandatory preauthorization of all or certain health care services; required peer review monitoring, reporting, and audit; deletion or suspension from the designated doctor list; restrictions on appointment under this chapter; conditions or restrictions on an insurance carrier regarding actions by insurance carriers and mandatory participation in training classes or other courses as established or certified by the Division under Labor Code, Title 5, Subtitle A, in accordance with a memorandum of understanding adopted under Labor Code §408.0231(e) regarding regulation of insurance carriers and utilization review agents.

Labor Code §413.017 states the following medical services are presumed reasonable: medical services consistent with the medical policies and fee guidelines adopted by the Commissioner; and medical services that are provided subject to prospective, concurrent, or retrospective review as required by the medical policies of the Division and that are authorized by an insurance carrier.

Labor Code §414.002 provides that the Division shall monitor for compliance with Commissioner rules; Labor Code, Title 5, Subtitle A; and other laws relating to workers' compensation the

conduct of persons subject to this subtitle. Persons to be monitored include persons claiming benefits under Labor Code, Title 5, Subtitle A; employers; insurance carriers; attorneys and other representatives of parties; and health care providers.

Labor Code §414.003(a) provides that the Division shall compile and maintain statistical and other information as necessary to detect practices or patterns of conduct by persons subject to monitoring under Labor Code, Chapter 414, that violate Labor Code, Title 5, Subtitle A, Commissioner rules, or a Commissioner order or decision, or otherwise adversely affect the workers' compensation system of this state.

Labor Code §414.003(b) provides that the Commissioner shall use the information compiled under this section to impose appropriate penalties and other sanctions under Labor Code, Chapters 415 and 416.

Labor Code §414.004(a) provides that the Division shall review regularly the workers' compensation records of insurance carriers as required to ensure compliance with Labor Code, Title 5, Subtitle A.

Labor Code §414.004(b) provides that each insurance carrier, the insurance carrier's agents, and those with whom the insurance carrier has contracted to provide, review, or monitor services under Labor Code, Title 5, Subtitle A, shall cooperate with the Division; make available to the Division any records or other necessary information; and allow the Division access to the information at reasonable times at the person's offices.

Labor Code §414.007 provides that the Division shall review information concerning alleged violations of Labor Code, Title 5, Subtitle A regarding the provisions of medical benefits, Commissioner rules, or a Commissioner order or decision, and, under Labor Code §414.005 and §414.006 and Labor Code, Chapters 415 and 416, may conduct investigations, make referrals to other authorities, and initiate administrative violation proceedings.

Amendments to Labor Code §§415.001 - 415.003, 415.0035, 415.009, and 415.010 deleted the requirement that the Division prove that a violation was committed willfully, intentionally, or knowingly in an enforcement action for an administrative violation brought against a system participant under those sections.

Labor Code §415.003 provides that a health care provider commits an administrative violation if the person submits a charge for health care that was not furnished, administers improper, unreasonable, or medically unnecessary treatment or services, makes an unnecessary referral, violates the Division's fee and treatment guidelines, violates a Commissioner rule, or fails to comply with a provision of this subtitle.

Labor Code §415.0035(a)(3) provides that an insurance carrier or its representative commits an administrative violation if that person denies preauthorization in a manner that is not in accordance with rules adopted by the Commissioner under Labor Code §413.014.

Labor Code §415.0035(b) provides that a health care provider commits an administrative violation if that person fails or refuses to timely file required reports or records, or fails to file with the Division the annual disclosure statement required by Labor Code §413.041.

Labor Code §415.0035(e) provides that an insurance carrier or health care provider commits an administrative violation if that person violates Labor Code, Title 5, Subtitle A, or a rule, order, or decision of the Commissioner.

Labor Code §415.0036 applies to an insurance adjustor, case manager, or other person who has authority under Labor Code, Title 5 to request the performance of a service affecting the delivery of benefits to an injured employee or who actually performs such a service, including peer reviews, performance of required medical examinations, or case management; a person described by this section commits an administrative violation if the person offers to pay, pays, solicits, or receives an improper inducement relating to the delivery of benefits to an injured employee or improperly attempts to influence the delivery of benefits to an injured employee, including through the making of improper threats.

Labor Code §415.0036(b) further provides that the same section applies to each person it describes who is a participant in the workers' compensation system of this state and to an agent of such a person.

Labor Code §415.008(a) provides that a person commits a violation if the person, to obtain or deny a payment of a workers' compensation benefit or the provision of a benefit for the person or another, knowingly or intentionally makes a false or misleading statement, misrepresents or conceals a material fact, fabricates, alters, conceals, or destroys a document, or conspires to commit an act described by Labor Code §415.008(a)(1), (a)(2), or (a)(3).

Labor Code §415.021 states that in addition to any sanctions, administrative penalty, or other remedy authorized by Labor Code, Title 5, Subtitle A, the Commissioner may assess an administrative penalty against a person who commits an administrative violation; the administrative penalty shall not exceed $25,000 per day per occurrence; each day of noncompliance constitutes a separate violation; and the authority of the Commissioner under chapter 415 is in addition to any other authority to enforce a sanction, penalty, fine, forfeiture, denial, suspension, or revocation otherwise authorized by law.

Labor Code §415.023(a) provides that a person who commits an administrative violation under Labor Code §§415.001, 415.002, 415.003, or 415.0035 as a matter of practice is subject to an applicable rule adopted under Labor Code §415.023(b) in addition to the penalty assessed for the violation.

Labor Code §415.023(b) provides that the Commissioner may adopt rules providing for a reduction or denial of fees; public or private reprimand by the Commissioner; suspension from practice before the Division; restriction, suspension, or revocation of the right to receive reimbursement under Labor Code, Title 5, Subtitle A; or referral and petition to the appropriate licensing authority for appropriate disciplinary action, including the restriction, suspension, or revocation of the person's license.

Labor Code §415.031 provides that any person may request the initiation of administrative violation proceedings by filing a written allegation with the Division.

Labor Code §415.032(a) provides that if investigation by the Division indicates that an administrative violation has occurred, the Division shall notify the person alleged to have committed the violation in writing of the charge, the proposed penalty, the right to consent to the charge and the penalty, and the right to request a hearing.

Labor Code §415.032(b) provides that not later than the 20th day after the date on which notice is received by the charged party, the charged party shall remit the amount of the penalty to the Division, or submit to the Division a written request for a

hearing. Government Code §2001.051 provides that in a contested case, each party is entitled to an opportunity for hearing after reasonable notice of not less than 10 days and to respond and to present evidence and argument on each issue involved in the case. Government Code §2001.056 provides that unless precluded by law, an informal disposition may be made of a contested case by stipulation, agreed settlement, consent order, or default. Insurance Code §1305.004(a)(10) provides that "independent review" means a system for final administrative review by an independent review organization of the medical necessity and appropriateness, or the experimental or investigational nature, of health care services being provided, proposed to be provided, or that have been provided to an injured employee.

Insurance Code §4201.002(13) states that "utilization review" includes a system for prospective, concurrent, or retrospective review of the medical necessity and appropriateness of health care services and a system for prospective, concurrent, or retrospective review to determine the experimental or investigational nature of health care services being provided or proposed to be provided to an individual in this state and the term does not include a review in response to an elective request for clarification of coverage.

Occupations Code §155.001 states that a person may not practice medicine in this state unless the person holds a license issued under Occupations Code, Title 3, Subtitle B (relating to Physicians).

§180.1. Definitions.
The following words and terms, when used in this chapter, shall have the following meanings.

(1) Accident Prevention Services Inspection--An inspection under Chapter 166 under this title (relating to Workers' Health and Safety Accident Prevention Services) that focuses on insurance carrier's duties to provide accident prevention services under Labor Code Chapter 411, Subchapter E and division rules.

(2) Act--The Texas Workers' Compensation Act, Labor Code, Title 5, Subtitle A.

(3) Administrative violation--A violation, failure to comply with, or refusal to comply with the Act, or a rule order, or decision of the commissioner. This term is synonymous with the terms "violation" or "violate."

(4) Agent--A person with whom a system participant utilizes or contracts with for the purpose of providing claims service or fulfilling duties under Labor Code, Title 5 and rules. The system participant who utilizes or contracts with the agent may also be responsible for the administrative violations of that agent.

(5) Appropriate credentials--The certification(s), education, training, and experience to provide the health care that an injured employee is receiving or is requesting to receive.

(6) Audit Violations--Violations discovered through a census or statistical sampling of the alleged violator.

(7) Commissioner--The commissioner of workers' compensation.

(8) Complaint--A written submission to the division alleging a violation of the Act or rules by a system participant.

(9) Compliance Audit (also Performance Review)--An audit of compliance with one or more duties under the Act and rules other than monitoring or review activities involving the Medical Advisor or the Medical Quality Review Panel. These audits are conducted using a census or statistical sampling to ensure that the findings of the audit are representative of overall performance in the area being audited.

(10) Controlled substances--"Controlled substance" as defined by the Texas Controlled Substances Act (Health and Safety Code, Chapter 481) or its successor and the Federal Controlled Substances Act (21 USCS §801 et seq.) or its successor.

(11) Conviction or convicted--

(A) A system participant is considered to have been convicted when:

(i) a judgment of conviction has been entered against the system participant in a federal, state, or local court;

(ii) the system participant has been found guilty in a federal, state, or local court;

(iii) the system participant has entered a plea of guilty or nolo contendere (no contest) that has been accepted by a federal, state, or local court;

(iv) the system participant has entered a first offender or other program and judgment of conviction has been withheld; or

(v) the system participant has received probation or community supervision, including deferred adjudication.

(B) A conviction is still a conviction until and unless overturned on appeal even if:

(i) it is stayed, deferred, or probated;

(ii) an appeal is pending;

(iii) the judgment of conviction or other record related to the conduct is expunged; or

(iv) the system participant has been discharged from probation or community supervision, including deferred adjudication.

(12) Department--Texas Department of Insurance.

(13) Division--Texas Department of Insurance, Division of Workers' Compensation.

(14) Emergency--As defined in §133.2 of this title (relating to Definitions).

(15) Frivolous--That which does not have a basis in fact or is not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

(16) Frivolous complaint--A complaint that does not have a basis in fact or is not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

(17) Immediate post-injury medical care--That health care provided on the date that the injured employee first seeks medical attention for the workers' compensation injury.

(18) Notice of Violation (NOV)--A notice issued to a system participant by the division when the division has found that the system participant has committed an administrative violation and the division seeks to impose a sanction in accordance with Labor Code, Title 5 or division rules.

(19) Peer Review--An administrative review by a health care provider performed at the insurance carrier's request without a physical examination of the injured employee.

(20) Performance Review--This term is synonymous with Compliance Audit, as defined in this section.

(21) Remuneration--Any payment or other benefit made directly or indirectly, overtly or covertly, in cash or in kind, including, but not limited to, forgiveness of debt.

(22) Sanction--A penalty or other punitive action or remedy imposed by the commissioner on an insurance carrier, representative, injured employee, employer, or health care provider, or any other person regulated by the division under the Act, for an administrative violation.

(23) SOAH--The State Office of Administrative Hearings.

(24) System Participant--A person or their agent subject to the Act or a rule, order, or decision of the commissioner.

§180.2. Filing a Complaint.

(a) Any person may submit a complaint to the division for alleged administrative violations.

(b) A person may submit a complaint to the division:

(1) through the division's website;

(2) through electronic correspondence;

(3) through written correspondence;

(4) through facsimile correspondence; or

(5) in person and the complaint will be reduced to writing.

(c) A complaint submitted on the form provided by the division or in any other written format shall contain the following information as applicable:

(1) complainant's name and contact information;

(2) name and contact information of the subject or parties of the complaint, if known;

(3) name and contact information of witnesses, if known;

(4) claim file information including, but, not limited to, the name, address, and date of injury of the injured employee, if known;

(5) the statement of the facts constituting the alleged violation including the dates or time period the alleged violation occurred;

(6) the nature of the alleged violation, including, the specific sections of the Act and division rules alleged to have been violated, if known;

(7) supporting documentation relevant to the allegation that may include, but, is not limited to, medical bills, Explanation of Benefits Statements, copy of payment invoices or checks, and medical reports as applicable;

(8) supporting documentation for alleged fraud may include photographs, video, audio, and surveillance recordings, and reports; and

(9) other sources of pertinent information, if known.

(d) Contact information may include, but, is not limited to, name, address, telephone number, facsimile number, email address, business name, business address, business telephone number, and websites.

(e) A complaint shall contain sufficient information for the division to investigate the complaint.

(f) Upon receipt of a complaint, the division will review, monitor and may investigate the allegation against a person or entity who may have violated the Act or division rules.

(g) The division will assign priorities to complaints being investigated based on a risk-based complaint investigation system that considers:

(1) the severity of the alleged violation;

(2) continued noncompliance of the alleged violation;

(3) whether a commissioner order has been violated; or

(4) other risk-based criteria the division determines necessary.

(h) A person commits an administrative violation if the person submits a complaint to the division that is:

(1) frivolous, as defined in §180.1 of this title (relating to Definitions);

(2) groundless or made in bad faith; or

(3) done specifically for competitive or economic advantage.

§180.8. Notices of Violation; Notices of Hearing; Default Judgments.

(a) A notice of violation (NOV) is a notice issued to a system participant when the division finds that the system participant has committed an administrative violation and the division seeks to impose a sanction under the Act or division rules.

(b) A NOV shall be in writing and include:

(1) the provision(s) of the Act, rule, order, or decision of the commissioner that the system participant violated;

(2) a summary of the facts that establish that the violation(s) occurred;

(3) a description of the proposed sanction that the division intends to impose;

(4) the right to consent to the charge and the proposed sanction(s);

(5) the right to request a hearing; and

(6) other information about the rights, obligations, and procedures for requesting a hearing.

(c) The charged party shall file a written answer to the NOV not later than the twentieth day after the day the notice is received. The answer shall either consent to the proposed sanction, and remit the amount of the penalty, if any, or request a hearing by being filed with the commission's chief clerk of proceedings. If the charged party fails to respond to the NOV within 20 days of receipt of the notice, the division shall schedule a hearing at SOAH and provide notice of hearing to the charged party that meets the requirements of §148.5 of this title (relating to Notice of Hearing).

(d) A charged party that receives a notice of hearing under subsection (c) of this section shall, within 20 days of the date on which the notice of hearing is provided to the party, file a written answer or other responsive pleading. Such response shall be filed in accordance with 1 TAC §155.101 (relating to Filing Documents) and §155.103 (relating to Service of Documents on Parties).

(e) For purposes of this section, events described in paragraphs (1) or (2) of this subsection constitute a default on the part of a charged party who receives a notice of hearing under subsection (c) of this section:

(1) failure of the charged party to file a written response as provided by subsection (d) of this section; or

(2) failure of the charged party to appear in person or by legal representative on the day and at the time set for hearing in a contested case, regardless of whether a written response has been filed.

(f) In the event that a charged party defaults as described by subsection (e) of this section, the division may seek informal disposition by default by the entity having the final decision making power as permitted by Government Code §2001.056.

(g) For purposes of this subchapter, "disposition by default" shall mean the issuance of an order against the charged party in which the allegations against the party in the notice of hearing are deemed admitted as true, upon the offer of proof to the entity having the final decision making power that proper notice was provided to the defaulting party. For purposes of this section, proper notice means notice sufficient to meet the provisions of the Government Code §2001.051 and §2001.052 and §148.5 of this title (relating to Notice of Hearing).

(h) After informal disposition of a contested case by default, a charged party may file a written motion to set aside the default order and reopen the record. A motion by the charged party to set aside the default order and reopen the record shall be granted if the charged party establishes that the failure to file a written response or to attend the hearing was neither intentional nor the result of conscious indifference, and that such failure was due to a mistake or accident. A motion to set aside the default order and reopen the record shall be filed with the entity having the final decision making power.

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.

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SUBCHAPTER B. MEDICAL BENEFIT REGULATION

28 TAC §§180.22, 180.24 - 180.28, 180.50

The amendments and new sections are adopted under Labor Code §§401.011, 401.021, 402.001, 402.00128, 402.00111, 402.00116, 402.021, 402.024, 402.061, 402.072, 402.073, 402.075, 408.0041, 408.0043 - 408.0046, 408.021, 408.023, 408.0231, 408.1225, 413.002, 413.014, 413.022, 413.031, 413.041, 413.044, 413.051, 413.0511, 413.0512, 414.002 - 414.007, 415.001 - 415.0036, 415.005, 415.006, 415.008 - 415.010, 415.021, 415.023 - 415.025, and 504.053; Government Code, §2001.051 and §2001.056; Insurance Code §§1305.004(a)(10), 1305.351(d), 4201.002(1), and 4201.002(13); and Occupations Code §155.001.

Labor Code §401.011 defines certain terms that are used under Labor Code, Title 5, Subtitle A (the Act). Labor Code §401.021(1) provides that except as otherwise provided by Labor Code, Title 5, Subtitle A, a proceeding, hearing, judicial review, or enforcement of a Commissioner order, decision, or rule is governed by the following subchapters and sections of Government Code, Chapter 2001: Subchapters A, B, D, E, G, and H, excluding §2001.004(3) and §2001.005; §§2001.051, 2001.052, and 2001.053; §§2001.056 - 2001.062; and Section 2001.141(c).

Labor Code §402.001 was amended to provide that except as provided by Labor Code §402.002, the Texas Department of Insurance is the state agency designated to oversee the workers' compensation system of this state and the Division of Workers' Compensation is established as a division within the Texas Department of Insurance to administer and operate the workers' compensation system as provided by Labor Code, Title 5.

Labor Code §402.00111 provides that except as otherwise provided by Labor Code, Title 5, the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority, under Labor Code, Title 5.

Labor Code §402.00116(a) provides that the Commissioner or Workers' Compensation is the Division's chief executive and administrative officer. The Commissioner shall administer and enforce Labor Code, Title 5, other workers' compensation laws of this state, and other laws granting jurisdiction to or applicable to the division or the Commissioner, except as otherwise specifically provided by Labor Code, Title 5, a reference in Labor Code, Title 5 to the "commissioner" means the Commissioner of Workers' Compensation.

Labor Code §402.00116(b) provides that the Commissioner has the powers and duties vested in the division by Labor Code, Title 5 and other workers' compensation laws of this state.

Labor Code §402.00128(b) provides that the Commissioner or the Commissioner's designee may investigate misconduct; hold hearings; issue subpoenas to compel the attendance of witnesses and the production of documents; administer oaths; take testimony directly or by deposition or interrogatory; assess and enforce penalties established under this title; enter appropriate orders as authorized by this title; institute an action in the Division's name to enjoin the violation of Labor Code, Title 5; initiate an action under Labor Code §410.254 to intervene in a judicial proceeding; prescribe the form, manner, and procedure for the transmission of information to the Division; correct clerical errors in the entry of errors; and exercise other powers and perform other duties as necessary to implement and enforce Labor Code, Title 5.

Labor Code §402.021(b)(6) states that it is the intent of the legislature that, in implementing the goals described by Subsection (a), the workers' compensation system of this state must promote compliance with this subtitle and rules adopted under this subtitle through performance-based incentives.

Labor Code §402.024(b) provides that the Division shall comply with federal and state laws related to program and facility accessibility. Labor Code §402.061 provides that the Commissioner shall adopt rules as necessary for the implementation and enforcement of Labor Code, Title 5, Subtitle A.

Labor Code §402.072(a) provides that the Division may impose sanctions against any person regulated by the Division under Labor Code, Title 5, Subtitle A, and Labor Code §402.072(c) states that a sanction imposed by the Division is binding pending appeal.

Labor Code §402.073(b) provides that in a case in which a hearing is conducted by the State Office of Administrative Hearings under Labor Code §§413.031, 413.055, or 415.034, the admin-

istrative law judge who conducts the hearing for the State Office of Administrative Hearings shall enter the final decision in the case after completion of the hearing.

Labor Code §402.073(c) provides that in a case in which a hearing is conducted in conjunction with Labor Code §§402.072, 407.046, or 408.023, and in other cases under Labor Code, Title 5, Subtitle A, that are not subject to Labor Code §402.073(b), the administrative law judge who conducts the hearing for the State Office of Administrative Hearings shall propose a decision to the Commissioner for final consideration and decision by the Commissioner.

Labor Code §402.075(a) provides that the Commissioner by rule shall adopt requirement that provide incentives for overall compliance in the workers' compensation system of this state, and emphasize performance-based oversight linked to regulatory outcomes.

Labor Code §402.075(b) provides that the Commissioner shall develop key regulatory goals to be used in assessing the performance of insurance carriers and health care providers. The goals adopted under this subsection must align with the general regulatory goals of the Division under Labor Code, Title 5, Subtitle A, such as improving workplace safety and return-to-work outcomes, in addition to goals that support timely payment of benefits and increased communication.

Labor Code §408.0041(b) requires that a medical examination requested under Labor Code §408.0041(a) be performed by the next available doctor on the Division's list of designated doctors whose credentials are appropriate for the issue in question and the injured employee's medical condition as determined by Commissioner rule.

Labor Code §408.0043(a) applies to doctors, other than chiropractors or dentists, who perform health care services under Labor Code, Title 5, as doctors performing peer reviews, utilization reviews, independent reviews, required medical examinations, or who serve on the medical quality review panel or as designated doctors for the Division.

Labor Code §408.0043(b) requires that a doctor described by Labor Code §408.0043(a), other than a chiropractor or dentist, who reviews a specific workers' compensation case must hold a professional certification in a health care specialty appropriate to the type of health care that the injured employee is receiving. Labor Code §408.0044 pertains to dentists who perform dental services under Labor Code, Title 5 for peer reviews, utilization reviews, independent reviews, or required dental examinations.

Labor Code §408.0044(b) requires that a dentist who reviews a dental service in conjunction with a specific workers' compensation case must be licensed to practice dentistry.

Labor Code §408.0045 pertains to chiropractors who perform chiropractic services under Labor Code, Title 5 for peer reviews, utilization reviews, independent reviews, required medical examinations, or who serve on the medical quality review panel or as designated doctors providing chiropractic services for the Division.

Labor Code §408.0045(b) requires that a chiropractor who reviews a chiropractic service in conjunction with a specific workers' compensation case must be licensed to engage in the practice of chiropractic.

Labor Code §408.0046 states that the Commissioner may adopt rules as necessary to determine which professional health practitioner specialties are appropriate for treatment of certain compensable injuries and must require an entity requesting a peer review to obtain and provide to the doctor providing the peer review services all relevant and updated medical records.

Labor Code §408.021 describes medical benefits and health care that an injured employee is entitled to.

Labor Code §408.023(h) requires that a utilization review agent or an insurance carrier that uses doctors to perform reviews of health care services provided under Labor Code, Title 5, Subtitle A, including utilization review, only use doctors licensed to practice in this state.

Labor Code §408.023(k) states that Labor Code §408.023(a) - (g) and (i) which developed the approved doctors list will expire September 1, 2007. Labor Code §408.023(n) and §408.0231(g) require the Division to monitor and adopt rules regarding doctors who perform peer review.

Labor Code §408.0231(g) authorizes the Commissioner to adopt rules regarding doctors who perform peer review functions for insurance carriers, such as, standards for peer review, sanctions against doctors performing peer review functions (including restriction, suspension, or removal of the doctor's ability to perform peer reviews) and other issues important to the quality of peer review.

Labor Code §408.0231(b) authorizes the Commissioner by rule to establish criteria for imposing sanctions on a doctor or an insurance carrier as provided by this section.

Labor Code §408.0231(c) states the criteria for recommending or imposing sanctions that the Commissioner may use (which may include anything the Commissioner considers relevant) including a sanction of the doctor for a violation of Labor Code, Chapter 413 or 415; a sanction by the Medicare or Medicaid program; evidence from the Division's medical records that an insurance carrier's utilization review practices or the doctor's charges, fees, diagnoses, treatments, evaluations, or impairment ratings are substantially different from those the Commissioner finds to be fair and reasonable based on either a single determination or a pattern of practice; professional failure to practice medicine or provide health care, including chiropractic care, in an acceptable manner consistent with the public health, safety, and welfare; or a criminal conviction.

Labor Code §408.0231(d) requires the Commissioner to establish rules for the restoration of doctor practice privileges removed by the Commissioner for sanctions imposed under Labor Code §408.0231.

Labor Code §408.0231(f) provides the sanctions the Commissioner may recommend or impose under this section which include reduction of allowable reimbursement; mandatory preauthorization of all or certain health care services; required peer review monitoring, reporting, and audit; deletion or suspension from the designated doctor list; restrictions on appointment under this chapter; conditions or restrictions on an insurance carrier regarding actions by insurance carriers and mandatory participation in training classes or other courses as established or certified by the Division under Labor Code, Title 5, Subtitle A, in accordance with a memorandum of understanding adopted under

Labor Code §408.0231(e) regarding regulation of insurance carriers and utilization review agents.

Labor Code §408.1225(a) requires the Division to develop qualification standards and administrative policies pertaining to the doctors who serve on the designated doctor list to implement the subsection and the Division may adopt rules as necessary.

Labor Code §408.1225(b) requires the Commissioner to ensure the quality of designated doctor decisions and reviews by active monitoring of decisions and reviews and to take action as necessary to restrict the participation of a designated doctor or remove a doctor from inclusion on the Division's list of designated doctors.

Labor Code §408.1225(d) requires the Division to develop rules to ensure that a designated doctor has no conflict of interest in serving as a designated doctor in performing examinations.

Labor Code §413.002 requires the Division to monitor health care providers, insurance carriers, independent review organizations, and workers' compensation claimants who receive medical services to ensure the compliance of those persons with rules adopted by the Division relating to health care, including medical policies and fee guidelines. In monitoring designated doctors under Labor Code, Chapter 408, and independent review organizations who provide services described by Labor Code, Chapter 413, Labor Code §413.002(b) requires the Division to evaluate compliance with Labor Code, Title 5, Subtitle A, and with rules adopted by the Commissioner relating to medical policies, fee guidelines, treatment guidelines, return-to-work guidelines, and impairment ratings and the quality and timeliness of decisions made under Labor Code §§408.0041, 408.122, 408.151, or 413.031.

Labor Code §413.014 requires the Commissioner by rule to specify which health care treatments and services require express preauthorization or concurrent review by the insurance carrier.

Labor Code §413.017 states the following medical services are presumed reasonable: medical services consistent with the medical policies and fee guidelines adopted by the Commissioner; and medical services that are provided subject to prospective, concurrent, or retrospective review as required by the medical policies of the Division and that are authorized by an insurance carrier.

Labor Code §413.022 provides requirements for the return-to-work reimbursement program for small employers.

Labor Code §413.031(e-2) requires that independent review organizations that use doctors to perform reviews of health care services provided under Labor Code, Title 5, only use doctors licensed to practice in this state.

Labor Code §413.041(a) provides that each health care practitioner shall disclose to the Division the identity of any health care provider in which the health care practitioner, or the health care provider that employs the health care practitioner, has a financial interest and the health care practitioner shall make the disclosure in the manner provided by Commissioner rule.

Labor Code §413.041(c) provides that a health care provider that fails to comply with this section is subject to penalties and sanctions as provided by Labor Code, Title 5, Subtitle A, including forfeiture of the right to reimbursement for services rendered during the period of noncompliance.

Labor Code §413.044 provides that in addition to or in lieu of an administrative penalty under Labor Code §415.021 or a sanction imposed under Labor Code §415.023, the Commissioner may impose sanctions against a person who serves as a designated doctor under Labor Code, Chapter 408 who, after an evaluation conducted under Labor Code §413.002(b), is determined by the Division to be out of compliance with this subtitle or with the rules adopted by the Commissioner relating to medical policies, fee guidelines, and impairment ratings, or the quality of decision made under Labor Code §408.0041 or Labor Code §408.122.

Labor Code §413.044(b) provides that the sanctions imposed under Labor Code §413.044(a) may include removal or suspension from the designated doctor list, or restrictions on the reviews made by the person as a designated doctor.

Labor Code §413.051(a) provides that in Labor Code §413.051, "health care provider professional review organization" includes an independent review organization. Labor Code §413.0511(b)(8) provides that the medical advisor shall make recommendation regarding the adoption of rules and policies to monitor the quality and timeliness of decision made by designated doctors and independent review organizations, and the imposition of sanctions regarding those decisions.

Labor Code §413.0512(c)(1) provides that the medical quality review panel shall recommend to the medical advisor appropriate action regarding doctors, other health care providers, insurance carriers, utilization review agents, and independent review organization; and the addition or deletion of doctors from the list of approved doctors under Labor Code §408.023 or the list of designated doctors established under Labor Code §408.1225.

Labor Code §414.002 provides that the Division shall monitor for compliance with Commissioner rules; Labor Code, Title 5, Subtitle A; and other laws relating to workers' compensation the conduct of persons subject to this subtitle. Persons to be monitored include persons claiming benefits under Labor Code, Title 5, Subtitle A; employers; insurance carriers; attorneys and other representatives of parties; and health care providers.

Labor Code §414.003(a) provides that the Division shall compile and maintain statistical and other information as necessary to detect practices or patterns of conduct by persons subject to monitoring under Labor Code, Chapter 414, that violate Labor Code, Title 5, Subtitle A, Commissioner rules, or a Commissioner order or decision, or otherwise adversely affect the workers' compensation system of this state.

Labor Code §414.003(b) provides that the Commissioner shall use the information compiled under this section to impose appropriate penalties and other sanctions under Labor Code, Chapters 415 and 416.

Labor Code §414.004(a) provides that the Division shall review regularly the workers' compensation records of insurance carriers as required to ensure compliance with Labor Code, Title 5, Subtitle A.

Labor Code §414.004(b) provides that each insurance carrier, the insurance carrier's agents, and those with whom the insurance carrier has contracted to provide, review, or monitor services under Labor Code, Title 5, Subtitle A, shall cooperate with the Division; make available to the Division any records or other necessary information; and allow the Division access to the information at reasonable times at the person's offices.

Labor Code §414.005 provides that the Division shall maintain an investigation unit to conduct investigations relating to alleged violations of Labor Code, Title 5, Subtitle A; Commissioner rules, or a Commissioner order or decision, with particular emphasis on violations of Labor Code, Chapters 415 and 416.

Labor Code §414.006 provides that for further investigation or the institution of appropriate proceedings, the Division may refer the persons involved in a case subject to an investigation to other appropriate authorities, including licensing agencies, district and county attorneys, or the attorney general.

Labor Code §414.007 provides that the Division shall review information concerning alleged violations of Labor Code, Title 5, Subtitle A regarding the provisions of medical benefits, Commissioner rules, or a Commissioner order or decision, and, under Labor Code §414.005 and §414.006 and Labor Code, Chapters 415 and 416, may conduct investigations, make referrals to other authorities, and initiate administrative violation proceedings. Amendments to Labor Code §§415.001 - 415.003, 415.0035, 415.009, and 415.010 deleted the requirement that the Division prove that a violation was committed willfully, intentionally, or knowingly in an enforcement action for an administrative violation brought against a system participant under those sections. The amendments to Labor Code §§415.005, 415.006, 415.021, 415.024, and 415.025 deleted the classification system within the sections for administrative violations (Classes A - D) and the authority and requirement that the commission (which pursuant to enactments by HB 7 is now the Texas Department of Insurance, Division of Workers' Compensation), by rule, adopt a schedule of specific monetary administrative penalties for specific violations of the Texas Workers' Compensation Act.

Labor Code §415.003 provides that a health care provider commits an administrative violation if the person submits a charge for health care that was not furnished, administers improper, unreasonable, or medically unnecessary treatment or services, makes an unnecessary referral, violates the Division's fee and treatment guidelines, violates a Commissioner rule, or fails to comply with a provision of this subtitle.

Labor Code §415.0035(a)(3) provides that an insurance carrier or its representative commits an administrative violation if that person denies preauthorization in a manner that is not in accordance with rules adopted by the Commissioner under Labor Code §413.014.

Labor Code §415.0035(b) provides that a health care provider commits an administrative violation if that person fails or refuses to timely file required reports or records, or fails to file with the Division the annual disclosure statement required by Labor Code §413.041.

Labor Code §415.0035(e) provides that an insurance carrier or health care provider commits an administrative violation if that person violates Labor Code, Title 5, Subtitle A, or a rule, order, or decision of the Commissioner.

Labor Code §415.0036 applies to an insurance adjustor, case manager, or other person who has authority under Labor Code, Title 5 to request the performance of a service affecting the delivery of benefits to an injured employee or who actually performs such a service, including peer reviews, performance of required medical examinations, or case management; a person described by this section commits an administrative violation if the person offers to pay, pays, solicits, or receives an improper inducement relating to the delivery of benefits to an injured employee or improperly attempts to influence the delivery of benefits to an injured employee, including through the making of improper threats.

Labor Code §415.0036(b) further provides that the same section applies to each person it describes who is a participant in the workers' compensation system of this state and to an agent of such a person.

Labor Code §415.008(a) provides that a person commits a violation if the person, to obtain or deny a payment of a workers' compensation benefit or the provision of a benefit for the person or another, knowingly or intentionally makes a false or misleading statement, misrepresents or conceals a material fact, fabricates, alters, conceals, or destroys a document, or conspires to commit an act described by Labor Code §415.008(a)(1), (a)(2), or (a)(3).

Labor Code §415.021 states that in addition to any sanctions, administrative penalty, or other remedy authorized by Labor Code, Title 5, Subtitle A, the Commissioner may assess an administrative penalty against a person who commits an administrative violation; the administrative penalty shall not exceed $25,000 per day per occurrence; each day of noncompliance constitutes a separate violation; and the authority of the Commissioner under chapter 415 is in addition to any other authority to enforce a sanction, penalty, fine, forfeiture, denial, suspension, or revocation otherwise authorized by law.

Labor Code §415.023(a) provides that a person who commits an administrative violation under Labor Code §§415.001, 415.002, 415.003, or 415.0035 as a matter of practice is subject to an applicable rule adopted under Labor Code §415.023(b) in addition to the penalty assessed for the violation.

Labor Code §415.023(b) provides that the Commissioner may adopt rules providing for a reduction or denial of fees; public or private reprimand by the Commissioner; suspension from practice before the Division; restriction, suspension, or revocation of the right to receive reimbursement under Labor Code, Title 5, Subtitle A; or referral and petition to the appropriate licensing authority for appropriate disciplinary action, including the restriction, suspension, or revocation of the person's license.

Labor Code §415.024 provides that a material and substantial breach of a settlement agreement that establishes a compliance plan is an administrative violation. In determining the amount of the penalty, the Commissioner shall consider the total volume of claims handled by the insurance carrier.

Labor Code §415.025 provides that a reference in this code or other law, or in rules of the former Texas Workers' Compensation Commission or the Commissioner, to a particular class of violation, administrative violation, or penalty shall be construed as a reference to an administrative penalty and, except as otherwise provided by Labor Code, Title 5, Subtitle A, an administrative penalty may not exceed $25,000 per day per occurrence and each day of noncompliance constitutes a separate violation.

Labor Code, Title 5, Subtitle C, §504.053(d)(3) provides that if the political subdivision or pool provides medical benefits in the manner authorized under Labor Code §504.0053(b)(2), the following standards apply - the political subdivision or pool must have an internal review process for resolving complaints relating to the manner of providing medical benefits, including an appeal to the governing body or its designee and appeal to an independent review organization.

Labor Code §504.053(b)(2) provides that if a political subdivision or a pool determines that a workers' compensation health care network certified under Insurance Code, Chapter 1305, is not available or practical for the political subdivision or pool, the political subdivision or pool may provide medical benefits to its injured employees or to the injured employees of the members

of the pool by directly contracting with health care providers or by contracting through a health benefits pool established under Local Government Code, Chapter 172.

Government Code §2001.051 provides that in a contested case, each party is entitled to an opportunity for hearing after reasonable notice of not less than 10 days and to respond and to present evidence and argument on each issue involved in the case. Government Code §2001.056 provides that unless precluded by law, an informal disposition may be made of a contested case by stipulation, agreed settlement, consent order, or default. Insurance Code §1305.004(a)(10) provides that "independent review" means a system for final administrative review by an independent review organization of the medical necessity and appropriateness, or the experimental or investigational nature, of health care services being provided, proposed to be provided, or that have been provided to an injured employee. Insurance Code §1305.351(d) provides that notwithstanding Insurance Code §4201.152, a utilization review agent or an insurance carrier that uses doctors to perform reviews of health care services provided under Insurance Code, Chapter 1305, including utilization review and retrospective review, or peer reviews under Labor Code §408.0231(g) may only use doctors licensed to practice in this state.

Insurance Code §4201.002(1) states an "adverse determination" means a determination by a utilization review agent that health care services provided or proposed to be provided to a patient are not medically necessary or are experimental or investigational.

Insurance Code §4201.002(13) states that "utilization review" includes a system for prospective, concurrent, or retrospective review of the medical necessity and appropriateness of health care services and a system for prospective, concurrent, or retrospective review to determine the experimental or investigational nature of health care services being provided or proposed to be provided to an individual in this state and the term does not include a review in response to an elective request for clarification of coverage. Occupations Code §155.001 states that a person may not practice medicine in this state unless the person holds a license issued under Occupations Code, Title 3, Subtitle B (relating to Physicians).

§180.22. Health Care Provider Roles and Responsibilities.

(a) Health care providers as defined in subsections (c) - (e) of this section shall provide all health care reasonably required by the nature of the injury as and when needed to:

(1) cure or relieve the effects naturally resulting from the compensable injury;

(2) promote recovery; or

(3) enhance the ability of the injured employee to return to or retain employment.

(b) In addition to the general requirements of this section, health care providers shall timely and appropriately comply with all applicable requirements under the Act and department and division rules, including, but not limited to:

(1) reporting required information;

(2) disclosing financial interests;

(3) impartially evaluating an injured employee's condition;

(4) correctly billing for health care provided;

(5) examine an injured employee to determine a date of maximum medical improvement and design impairment ratings as and when appropriate; and

(6) complying with all applicable provisions of the Americans with Disabilities Act.

(c) The treating doctor is the doctor primarily responsible for the efficient management of health care and for coordinating the health care for an injured employee's compensable injury. The treating doctor shall:

(1) except in the case of an emergency, approve or recommend all health care reasonably required that is to be rendered to the injured employee including, but not limited to, treatment or evaluation provided through referrals to consulting and referral doctors or other health care providers, as defined in this section;

(2) maintain efficient utilization of health care;

(3) communicate with the injured employee, injured employee's representative, if any, employer, and insurance carrier about the injured employee's ability to work or any work restrictions on the injured employee;

(4) make available, upon request, in the form and manner prescribed by the division:

(A) work release data;

(B) cost and utilization data; and/or

(C) patient satisfaction data, including comorbidity, patient outcomes, return-to-work outcomes, functional health outcomes, and recovery expectations; and

(5) examine the injured employee to determine a date of maximum medical improvement and assign impairment ratings as appropriate.

(d) The consulting doctor is a doctor who examines an injured employee or the injured employee's medical record in response to a request from the treating doctor, the designated doctor, or the division. The consulting doctor shall:

(1) perform unbiased evaluations of the injured employee as directed by the requestor including, but not limited to, evaluations of:

(A) the accuracy of the diagnosis and appropriateness of the treatment of the injured employee;

(B) the injured employee's work status, ability to work, and work restrictions;

(C) the injured employee's medical condition; and

(D) other similar issues;

(2) submit a narrative report to the treating doctor, the injured employee, the injured employee's representative (if any), the insurance carrier, and the division (if the requestor was the division);

(3) not make referrals without the approval of the treating doctor and when such approval is obtained, ensure that the health care provider to whom the consulting doctor is making an approved referral knows the identity and contact information of the treating doctor;

(4) initiate or provide treatment only if the treating doctor approves or recommends the treatment; and

(5) become a referral doctor if the doctor begins to prescribe or provide health care to an injured employee.

(e) The referral doctor is a doctor who examines and treats an injured employee in response to a request from the treating doctor. The referral doctor shall:

(1) supplement the treating doctor's care;

(2) timely report the injured employee's status to the treating doctor and the insurance carrier as required by applicable division rules; and

(3) not make referrals without the approval of the treating doctor and when such approval is obtained, ensure that the health care provider to whom the referral doctor is making an approved referral knows the identity and contact information of the treating doctor.

(f) The Required Medical Examination (RME) doctor is a doctor who examines the injured employee's medical condition in response to a request from the insurance carrier or the division pursuant to Labor Code §§408.004, 408.0041, or 408.151. The RME doctor shall:

(1) perform unbiased evaluations of the injured employee as directed by the RME notice issued by the division;

(2) not make referrals without the approval of the treating doctor and when such approval is obtained, ensure that the health care provider to whom the RME doctor is making an approved referral knows the identity and contact information of the treating doctor;

(3) initiate or provide treatment only if the treating doctor approves or recommends the treatment; and

(4) not evaluate, except following an examination by a designated doctor:

(A) the impairment caused by the injured employee's compensable injury;

(B) the attainment of maximum medical improvement;

(C) the extent of the injured employee's compensable injury;

(D) whether the injured employee's disability is a direct result of the work related injury;

(E) the ability of the injured employee to return to work; or

(F) issues similar to those described by subparagraphs (A) - (E) of this paragraph; and

(5) be a doctor licensed to practice medicine in Texas that holds the appropriate credentials as defined in §180.1 of this title (relating to Definitions);

(A) a dentist that performs dental services under the Act may review dental services that may lawfully be performed within the scope of the dentist's license to practice dentistry; or

(B) a chiropractor that performs chiropractic services under the Act may review chiropractic services that may lawfully be performed within the scope of the chiropractor's license to engage in the practice of chiropractic.

(g) A peer reviewer is a health care provider who performs an administrative review at the insurance carrier's request without a physical examination of the injured employee. The peer reviewer must not have any known conflicts of interest with the injured employee or the health care provider who has proposed or rendered any health care being reviewed.

(1) A peer reviewer who performs a prospective, concurrent, or retrospective review of the medical necessity or reasonableness of health care services (utilization review) is subject to the applicable provisions of the Labor Code; Insurance Code, Chapters 1305 and 4201; and department and division rules. A peer reviewer who performs utilization review must:

(A) be certified or registered as a utilization review agent (URA) by the department or be employed by or under contract with a certified or registered URA to perform utilization review;

(B) hold the appropriate professional license issued by this state; and

(C) hold the appropriate credentials as defined in §180.1 of this title.

(2) A peer reviewer who performs a review for any issue other than medical necessity, such as compensability or an injured employee's ability to return to work, must:

(A) hold the appropriate professional license issued by this state; and

(B) hold the appropriate credentials as defined in §180.1 of this title.

(h) The designated doctor is a doctor assigned by the division to recommend a resolution of a dispute as to the medical condition of an injured employee. At the request of an insurance carrier or an injured employee, or on the commissioner's own order, the commissioner may order a medical examination by a designated doctor in accordance with Labor Code §408.0041 and §408.1225. The credentials, qualifications, and responsibilities of a designated doctor are governed by §180.21 of this title (relating to Division Designated Doctor List), §180.1 of this title that defines "appropriate credentials", applicable provisions of the Act, and other rules providing for use of a designated doctor.

(i) A member of the MQRP is a health care provider chosen by the division's Medical Advisor under Labor Code §413.0512. All eligibilities, terms, responsibilities, and prohibitions shall be prescribed by contract, and the MQRP members shall serve on the MQRP as prescribed by contract. A health care provider must meet the performance standards specified in the contract to be eligible for selection by the Medical Advisor to serve on the MQRP. A member of the medical quality review panel, other than a chiropractor or dentist, who reviews a specific workers' compensation case is subject to Labor Code §408.0043. Doctors seeking membership on the MQRP must hold appropriate credentials as defined in §180.1 of this title. A chiropractor who serves on the MQRP and that reviews a chiropractic service under the Act must be licensed to engage in the practice of chiropractic pursuant to Labor Code §408.0045. A health care provider that serves on the MQRP may only review health care services or treatment that may lawfully be performed within the scope of the health care provider's license.

(j) Independent review organizations (IROs) must comply with the applicable provisions of Insurance Code, Chapter 4201; Labor Code, Title 5; and Chapters 12, 133 and 180 of this title (relating to Independent Review Organizations; General Medical Provisions; and Monitoring and Enforcement, respectively). The division or the department may initiate appropriate proceedings under applicable provisions of the Insurance Code, Chapter 4201; Labor Code, Title 5; and Chapters 12, 133 and 180 of this title.

§180.24. Financial Disclosure.

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

(1) Compensation arrangement--Any arrangement involving any remuneration between a health care practitioner (or a mem-

ber of a health care practitioner's immediate family) and a health care provider.

(2) Financial interest means:

(A) an interest of a health care practitioner, including an interest of the health care provider who employs the health care practitioner, or an interest of an immediate family member of the health care practitioner, which constitutes a direct or indirect ownership or investment interest in a health care provider; or

(B) a direct or indirect compensation arrangement between the health care practitioner, the health care provider who employs the referring health care practitioner, or an immediate family member of the health care practitioner and a health care provider.

(3) Immediate family member--Immediate family member or member of a doctor's immediate family means husband or wife; birth or adoptive parent, child, or sibling; stepparent, stepchild, stepbrother, or stepsister; father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law; grandparent or grandchild; and spouse of a grandparent or grandchild.

(b) Submission of Financial Disclosure Information to the division.

(1) If a health care practitioner refers an injured employee to another health care provider in which the health care practitioner, or the health care provider that employs the health care practitioner, has a financial interest, the health care practitioner shall file a disclosure with the division within 30 days of the date the first referral is made unless the disclosure was previously made. This annual disclosure shall be filed for each health care provider to whom an injured employee is referred and shall include the information in paragraph (2) of this subsection.

(2) The health care practitioner's disclosures in paragraph (1) of this subsection shall at a minimum include:

(A) the disclosing health care practitioner's name, business address, federal tax identification number, professional license number, and any other unique identification number;

(B) the name(s), business address(es), federal tax identification number(s), professional license number(s), and any other unique identification number of the health care provider(s) in which the disclosing health care practitioner has a financial interest as defined in subsection (a)(2) of this section; and

(C) the nature of the financial interest including, but not limited to, percentage of ownership, type of ownership (e.g., direct or indirect, equity, mortgage), type of compensation arrangement (e.g., salary, contractual arrangement, stock as part of a salary payment) and the entity with the ownership (disclosing health care practitioner, the health care provider who employs the health care practitioner, or an immediate family member of the health care practitioner).

(c) Failure to disclose. In addition to any sanctions provided by the Act and rules, failure to disclose a financial interest by a health care provider is an administrative violation and is subject to a penalty of forfeiture of the right to reimbursement for any services rendered on the claim during the period of noncompliance, regardless of whether the circumstances of the services themselves were subject to disclosure, and regardless of whether the services were medically necessary.

(1) Limitations on billing. A health care practitioner who rendered services on a claim during a period in which the practitioner was out of compliance with the disclosure requirements under this section for that claim, regardless of whether the circumstances of the services themselves were subject to disclosure, shall not present or cause to be presented a claim or bill to any individual, third party payer, or other entity for those services (regardless of whether the services were medically necessary).

(2) Refunds. If a health care practitioner collects any amounts that were billed for services on a claim provided during a period in which the practitioner was in noncompliance with the disclosure requirements of this section for that claim, regardless of whether the circumstances of the services themselves were subject to disclosure, the practitioner shall be liable to the individual or entity for, and shall timely refund, any amounts collected (regardless of whether the services were medically necessary).

(3) Rebuttable Presumption. A referral for services to a health care provider by a health care practitioner under circumstances which required a disclosure under this section, but which was not timely disclosed as required, creates a rebuttable presumption that the services were not medically necessary unless one of the statutory and regulatory exceptions that apply to referrals in Title 42, United States Code §1395nn(b)-(e) applies to the referral in question. Whenever one of these exceptions is revised and effective, the revised exception shall be effective for referrals made on or after the effective date of the revision.

§180.25. Improper Inducements, Influence and Threats.

(a) Pursuant to Labor Code §415.0036, offering, paying, soliciting, or receiving an improper inducement relating to the delivery of benefits to an injured employee is prohibited. Improper attempts to influence the delivery of benefits to an injured employee, including the making of improper threats. This section applies to all system participants in the workers' compensation system who have authority under Labor Code, Title 5 to request the performance of a service affecting the delivery of benefits to an injured employee or who actually performs such a service, including peer reviews, performance of designated doctor examinations, performance of required medical examinations, or case management.

(b) The following specific acts will be deemed to be an improper inducement, attempt to influence or threat:

(1) Soliciting or receiving any remuneration (including, but not limited to, any kickback, bribe, or rebate) in return for referring an injured employee to a person (either the person soliciting or receiving the inducement or another person):

(A) for the furnishing or arranging for the furnishing of any item, treatment, or service constituting a medical benefit for which payment may be made in whole or in part under Labor Code, Title 5 or rules; or

(B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, treatment or item constituting a medical benefit for which payment may be made in whole or in part under Labor Code, Title 5 or rules.

(2) Offering or paying any remuneration (including, but not limited to, any kickback, bribe, or rebate) in return for referring an injured employee to a person (either the person offering or paying the inducement or another person):

(A) for the furnishing or arranging for the furnishing of any item, treatment or service constituting a medical benefit for which payment may be made in whole or in part under the Labor Code, Title 5 or rules; or

(B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, treatment, or item constituting a medical benefit

for which payment may be made in whole or in part under Labor Code, Title 5 or rules.

(3) Providing any financial incentive or promising or threatening to provide injured employee evaluation reports or other medical opinions that could enhance or reduce the injured employee's income benefits or affect the injured employee's work release status as an inducement to have the injured employee treat with or be evaluated by the health care provider or comply with the health care provider's proposed treatment.

(4) Offering or soliciting an inducement in return for selecting a particular health care provider for the furnishing or arranging for the furnishing of any item, treatment, or service (including purchasing or leasing) for which payment may be made in whole or in part under Labor Code, Title 5 or rules; or offering or soliciting an inducement which may reasonably tend to cause a particular health care provider to be selected (excluding a convenience necessary to allow for the provision of health care, such as transportation to and from the health care provider's facility, translator services related to evaluation and treatment, providing claim filing forms or information on rights and responsibilities under the Labor Code, Title 5 and rules, if generally available to all patients). Such inducement is improper whether offered directly or indirectly, overtly or covertly, in cash or in kind.

(5) Making, presenting, filing, or threatening to make, present, or file any frivolous claim or assertion against a system participant, medical peer reviewer, or any other person performing duties arising under Labor Code, Title 5 or rules, with the division or any licensing, certifying, regulatory, or investigatory body.

(6) Making or causing to be made a threat against life, safety, or property directed to a system participant related to their performance of duties arising under Labor Code, Title 5 or rules.

(c) The exceptions that apply to subsection (b)(1) and (2) of this section are those that apply to analogous provisions in Title 42, United States Code §1320a-7b(3). The exceptions shall apply to subsection (b)(1) and (2) of this section.

(d) A violation of applicable federal standards that prohibit the payment or acceptance of payment in exchange for health care referrals relating to fraud, abuse, and antikickbacks is an administrative violation.

§180.26. Criteria for Imposing, Recommending and Determining Sanctions; Other Remedies.

(a) The division may impose sanctions on any system participant if that system participant commits an administrative violation.

(b) The division may impose the following sanctions against a doctor or insurance carrier for any reason listed in Labor Code §408.0231(c) or any other criteria the commissioner considers relevant.

(1) reduction of allowable reimbursement to a doctor (such as an automatic percentage reduction on all or some types of health care);

(2) mandatory preauthorization or utilization review of all or certain health care treatments and services (such as mandatory treatment plans);

(3) required supervision or peer review monitoring, reporting, and audit (by the insurance carrier, the division, or an independent auditor/reviewer);

(4) deletion or suspension from the designated doctor list;

(5) restrictions on appointments or reviews;

(6) conditions or restrictions on a insurance carrier regarding actions by insurance carriers under the Act and rules, that are not inconsistent with a memorandum of understanding adopted between the commissioner and the commissioner of insurance regarding the regulation of insurance carriers and utilization review agents as necessary to ensure that appropriate health care decision are reached under applicable regulations by the department and the division, the Act, and Chapter 4201, Insurance Code; and

(7) mandatory participation in training classes or other courses as established or certified by the division.

(c) In addition to a penalty or the other sanctions that may be imposed in accordance with other applicable provisions of the Act, the division may also impose the following sanctions pursuant to Labor Code §415.023(b) against an insurance carrier or its representative, a health care provider, or a representative of an injured employee or legal beneficiary if any of those parties commit an administrative violation as a matter of practice, meaning a repeated violation of the Act or a rule, order, or decision of the commissioner:

(1) a reduction or denial of fees;

(2) public or private reprimand by the commissioner;

(3) suspension from practice before the division;

(4) restriction, suspension, or revocation of the right to receive reimbursement under the Act; and

(5) referral and petition to the appropriate licensing authority for appropriate disciplinary action, including the restriction, suspension, or revocation of the person's license.

(d) In addition to, or in lieu of, the sanctions in subsections (b) and (c) of this section, the division may impose any other sanction or remedy allowed under the Act or division rules, including but not limited to assessing an administrative penalty of up to $25,000 per violation against a person who commits an administrative violation.

(e) When determining which sanction to impose against a system participant and the severity of that sanction, the division shall consider the factors listed in Labor Code §415.021(c) and other matters that justice may require, including but not limited to:

(1) Performance Based Oversight (PBO) assessment;

(2) the promptness and earnestness of actions to prevent future violations;

(3) self-report of the violation;

(4) the size of the company or practice;

(5) the effect of a sanction on the availability of health care; and

(6) evidence of heightened awareness of the legal duty to comply with the Act and Division rules.

(f) In an investigation where both an administrative violation and a criminal prosecution are possible, the division may, at its discretion, postpone action on the administrative violation until the related criminal prosecution is completed.

(g) As an alternative to imposing a sanction such as an administrative penalty on a charged system participant, the division may, at its discretion, provide formal notice of the violation through a Warning Letter. A Warning Letter shall:

(1) include a summary of the duty that the division believes that the charged system participant failed to fulfill or timely fulfill;

(2) identify the facts that establish that a violation occurred; and

(3) inform the charged system participant that subsequent noncompliance of the same sort may be deemed to be a repeated administrative violation or matter of practice any of which will be subject to sanction.

(h) The division may, at its discretion, enter into a consent order with the system participant. A consent order may be entered into before or after issuance of a NOV is issued under §180.8 of this title (relating to Notices of Violation; Notices of Hearing; Default Judgments).

§180.27. Sanctions Process/Appeals/Restoration.

(a) If a hearing was conducted in conjunction with Labor Code §§402.072, 407.046, 408.023, and in other cases under the Act that are not subject to Labor Code §402.073(b), the commissioner shall review the proposed decision of the administrative law judge (ALJ). If the commissioner modifies, amends, or changes a recommended finding of fact or conclusion of law, or order of the ALJ, the commissioner's final order shall state the legal basis and the specific reasons for the change.

(b) The division shall notify the person by issuing an order that describes the effects of the sanction. This order shall be delivered by verifiable means with a copy to the appropriate licensing or certification authority and, if the sanction is against a doctor, copies shall be delivered to those injured employees the division is aware are being treated by that doctor.

(c) Failure to comply with the sanction may result in further sanctioning by the division.

(d) In accordance with Labor Code §408.0231(d)(2) a doctor, other than a doctor to which Labor Code §408.023(r) applies, may apply for the restoration of a doctor privilege removed under Labor Code §408.0231 by sending a letter of consideration to the Medical Advisor.

(1) The request shall be evaluated by the Medical Advisor and /or members of the Medical Quality Review Panel. The requestor shall be liable for the cost of the review, which may include an audit of the records of the requestor.

(A) If, in the Medical Advisor's opinion, the doctor:

(i) has all the appropriate unrestricted licenses/certifications;

(ii) has overcome the conditions that resulted in the sanction;

(iii) meets all the division's qualification standards and conditions for restoration of some or all of the practice privileges removed; and

(iv) is not out of compliance with the Labor Code, Insurance Code, a department rule, or a rule, order, or decision of the commissioner the Medical Advisor may recommend that the commissioner lift the sanction(s) or restore some or all of the privileges removed or restricted by the sanction(s).

(B) If in the Medical Advisor's opinion, the doctor has not met all the requirements for restoration of privileges, the Medical Advisor shall notify the doctor by verifiable means of the intent to recommend to the commissioner that the sanctions not be lifted or that the privileges removed or restricted by the sanction(s) not be restored in whole or in part and the reasons for that recommendation. Within 15 days after receiving the notice, a doctor may file a response that addresses the reasons given in the recommendation to deny lifting the sanction(s) or restoration of some or all of privileges removed or restricted by the sanction(s). The Medical Advisor shall review the response and make a final recommendation to the commissioner. A copy of the requestor's response to the division shall be provided to the commissioner for consideration.

(2) The commissioner shall consider the matter and shall notify the requestor of the final decision by verifiable means, and may send a copy to the appropriate licensing or certification authority. If the commissioner does not lift the sanction, the commissioner may include in the final decision the conditions that the doctor must meet before the division will reconsider lifting the sanctions including, but not limited to, the amount of time that the doctor must wait prior to re-requesting lifting the sanction(s) or restoration of some or all of the privileges removed or restricted by the sanction(s).

§180.28. Peer Review Requirements, Reporting, and Sanctions.

(a) A peer reviewer's report, including a report used to deny preauthorization, shall document the objective medical findings and evidence-based medicine that supports the opinion and include:

(1) the peer reviewer's name and professional Texas license number;

(2) certification that the peer reviewer holds the appropriate credentials as defined in §180.1 of this title (relating to Definitions);

(3) a summary of the reviewer's qualifications;

(4) a list of all medical records and other documents reviewed by the peer reviewer, including dates of those documents;

(5) a summary of the clinical history; and

(6) an analysis and explanation for the peer review recommendation, including the findings and conclusions used to support the recommendations.

(b) The insurance carrier shall not request subsequent peer reviews regarding the medical necessity of health care for dates of services for which a peer review report has already been issued unless:

(1) the review is for a different health care service requiring review by a different peer review specialty;

(2) the insurance carrier needs clarification of the peer review opinion based on new medical evidence that has not been presented to the peer reviewer;

(3) the peer reviewer failed to fully address the questions submitted by the insurance carrier; or

(4) for purposes other than determining medical necessity of the health care.

(c) The insurance carrier shall submit a copy of a peer review report to the treating doctor and the health care provider who rendered or requested the health care, as well as the injured employee and injured employee's representative, if any, when the insurance carrier uses the report to deny the compensability or extent of the compensable injury or reduce or deny income or medical benefits of an injured employee.

(d) A peer reviewer and insurance carrier shall maintain accurate records to reflect information regarding requests, reports, and results for peer reviews. The insurance carrier and peer reviewer shall submit such information at the request of the division in the form and manner proscribed by the division. The division will monitor peer review use, activity, and decisions which may result in the initiation of a medical quality review or other division action.

(e) The commissioner may impose sanctions on health care providers performing peer reviews pursuant to §180.26 and §180.27 of this title (relating to Criteria for Imposing, Recommending and Determining Sanctions; Other Remedies; and Sanctions Process/Appeals/Restoration, respectively) and other applicable provisions of the

Labor Code and division rules. The commissioner may prohibit a doctor from conducting peer reviews for any of the following:

(1) non-compliance with the provisions of §180.22 of this title (relating to Health Care Provider Roles and Responsibilities), this section, or applicable provisions of the Act, or a rule, order, or decision of the commissioner;

(2) failure to consider all records provided for review;

(3) a history of improper or unjustified decisions regarding the medical necessity of health care reviewed;

(4) failure to hold the appropriate professional license issued by this state;

(5) review of health care without holding the appropriate credentials, as defined in §180.1 of this title, in a health care specialty appropriate to the type of health care reviewed; or

(6) any other violation of the Labor Code or division rules.

(f) In accordance with Labor Code §408.0046, an entity requesting a peer review must obtain and provide to the doctor providing peer review services all relevant and updated medical records.

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 December 20, 2010.

TRD-201007262
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Effective date: January 9, 2011
Proposal publication date: August 27, 2010
For further information, please call: (512) 804-4703

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CHAPTER 180. MONITORING AND ENFORCEMENT

The Commissioner of Workers' Compensation adopts the repeal of §§180.6, 180.7, 180.10 - 180.18, 180.20 and 180.26 of this title (relating to guidelines for establishing evidence of patterns of practice, the schedule of administrative penalties for violations, warning letters and the Approved Doctors List (ADL)) without changes to the proposal as published in the August 27, 2010, issue of the *Texas Register* (35 TexReg 7674).

The public hearing was held and the public comment period closed on September 27, 2010.

The repeal of these sections is necessary to conform Division rules to amendments made to the Labor Code by House Bill (HB) 7, enacted by the 79th Legislature, Regular Session, effective September 1, 2005 (HB 7). The repeal of §§180.6, 180.7, 180.10 - 180.12, and 180.14 - 180.18 is necessary because the rules were superseded by HB 7 amendments to Labor Code §415.021.

The repeal of §180.13 is necessary since the Division addresses warning letters in new §180.26 which is simultaneously adopted and published elsewhere in this issue of the *Texas Register.* The repeal of §180.20 is necessary because the ADL expired on September 1, 2007 pursuant to Labor Code §408.023(k) as amended by HB 7. The repeal of §180.26 is necessary to permit the simultaneous adoption of a new §180.26 that is also published in this issue of the *Texas Register.*

The repeal of the sections will eliminate obsolete sections and allow the simultaneous adoption of §180.26 published elsewhere in this issue of the *Texas Register.*

Comments

General: Insurance Council of Texas supports the repeal of 28 TAC §§180.6, 180.7, 180.10 - 180.18, 180.20 and 180.26.

Agency Response: The Division acknowledges and appreciates the support.

For: Insurance Council of Texas

Against: None

SUBCHAPTER A. GENERAL RULES FOR ENFORCEMENT

28 TAC §§180.6, 180.7, 180.10 - 180.18

The repeals are adopted pursuant to Labor Code §§415.021, 402.00111, 402.00116, and 402.061. Section 415.021 authorizes the Commissioner of Workers' Compensation to assess administrative penalties that shall not exceed $25,000 per day per occurrence. Section 402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority, under the Labor Code. Section 402.00116 grants the powers and duties of chief executive and administrative officer to the Commissioner and the authority to enforce Labor Code Title 5, and other laws applicable to the Division or Commissioner. Section 402.061 provides that the Commissioner of Workers' Compensation shall adopt rules as necessary for the implementation and enforcement of Labor Code Title 5.

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 December 20, 2010.

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Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
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For further information, please call: (512) 804-4703

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SUBCHAPTER B. MEDICAL BENEFIT REGULATION

28 TAC §180.20, §180.26

The repeals are adopted pursuant to Labor Code §§415.021, 408.023, 402.00111, 402.00116, and 402.061. Section 415.021 authorizes the Commissioner of Workers' Compensation to assess administrative penalties that shall not exceed $25,000 per day per occurrence. Section 408.023(k) states that the requirements of Subsections (a) - (g) and Subsection (i) expire September 1, 2007. Section 402.00111 provides that the Commissioner

of Workers' Compensation shall exercise all executive authority, including rulemaking authority, under the Labor Code. Section 402.00116 grants the powers and duties of chief executive and administrative officer to the Commissioner and the authority to enforce Labor Code Title 5, and other laws applicable to the Division or Commissioner. Section 402.061 provides that the Commissioner of Workers' Compensation shall adopt rules as necessary for the implementation and enforcement of Title 5, Labor Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Dirk Johnson
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Texas Department of Insurance, Division of Workers' Compensation
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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 30. OCCUPATIONAL LICENSES AND REGISTRATIONS

SUBCHAPTER F. MUNICIPAL SOLID WASTE FACILITY SUPERVISORS

30 TAC §§30.201, 30.207, 30.210 - 30.214

The Texas Commission on Environmental Quality (commission, TCEQ, or agency) adopts the amendments to §§30.201, 30.207, 30.210, and 30.212 - 30.214 and adopts new §30.211.

Sections 30.210 and 30.211 are adopted *with changes* to the proposed text as published in the August 13, 2010, issue of the *Texas Register* (35 TexReg 6932). Sections 30.201, 30.207, and 30.212 - 30.214 are adopted *without changes* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

Section 30.201(b) requires that at least one individual who supervises or manages the operation of a municipal solid waste (MSW) facility be licensed according to Chapter 30, Subchapter A, Administration of Occupational Licenses and Registrations.

Before September 27, 2007, any MSW supervisor licensee could operate any type of facility, unless that facility's permit specified the level of license required. However, in September 2007, the commission changed §30.213(a) to require that effective September 1, 2009, all MSW facilities would have to be operated by a supervisor who held the appropriate level of license necessary to operate the facility.

Additionally, Chapter 30 rules effective September 27, 2007, stated that MSW provisional or solid waste facility supervisor in training letters that were issued before the effective date of the rules shall remain in effect until their expiration date, and that no applications for provisional or solid waste facility supervisor in training letters would be accepted after September 1, 2008.

The regulated community contacted the agency and voiced concerns that the current rules limit the types of facilities that a class "A" MSW supervisor can oversee. Individuals who obtained their class "A" license prior to September 27, 2007, had to complete the training and pass the examination for the lower levels of licenses (progression method) prior to being issued a class "A" license. Therefore, these licensees would be qualified to supervise any level or type of MSW facility. The regulated community feels that the current rules are creating a hardship by requiring individuals who have a class "A" license to spend resources to obtain another license, when the class "A" should be sufficient.

Furthermore, the regulated community has concerns that the elimination of the provisional licenses from the current rules hampers its ability to fill vacated positions. The provisional license allowed individuals who did not meet all of the licensing qualifications (i.e. educational, work experience) to supervise an MSW facility while completing the necessary requirements for obtaining the standard license.

SECTION BY SECTION DISCUSSION

The commission adopts administrative changes throughout the rulemaking to reflect the agency's current practices and to conform to Texas Register and agency guidelines. Changes include updating agency references, updating cross-references, and correcting typographical, spelling, and grammatical errors. These changes are non-substantive and generally are not specifically discussed in this preamble.

§30.201, Purpose and Applicability

The adopted amendment to §30.201 removes existing subsections (c) and (d). This change was necessary because the dates referenced in the current rule provisions are outdated and are no longer applicable. The adopted amendment to §30.201 adds new subsection (c), which authorizes individuals who obtained a class "A" MSW Facility Supervisor license prior to September 27, 2007, to supervise any level or type of MSW facility. This change was necessary because individuals who obtained their class "A" license prior to September 27, 2007, had to complete the training and pass the examination for the lower levels of licenses (progression method) prior to being issued a class "A" license. Therefore, these licensees would be qualified to supervise any level or type of MSW facility. Additionally, the adopted amendment to §30.201 adds new subsection (d), which limits those individuals that obtained a class "A" license after September 27, 2007, by completing only the class "A" MSW facility supervisor course and passing the applicable examination, to supervising only those facilities requiring a class "A" licensed supervisor until the individual completes the class "B" MSW facility supervisor course. After completion of this course, the individual will be allowed to supervise facilities requiring either a class "A" or "B" license. This change was necessary because individuals who obtained their class "A" license after September 27, 2007, would have only taken the class "A" MSW facility supervisor course and would not have been required to complete the training and pass the examination for the lower levels of licenses (progression method) prior to being issued a class "A" license.

Therefore, these licensees would not be qualified to supervise any level or type of MSW facility.

§30.207, Definitions

The adopted amendment to §30.207 adds §30.207(1)(A)(i) and (ii), which defines the substitution of college credit hours for the experience requirements for the class "A" and "B" licenses. Additionally, the adopted amendment to §30.207 adds §30.207(1)(B), which defines the college credit hour disciplines that qualify for substitution of the experience requirements for the class "A" and "B" licenses. The adopted amendment to §30.207 also adds §30.207(3), which defines 'Manager of Landfill Operations' (MOLO) certification. These changes were necessary to add clarity and improve the readability of the rules.

§30.210, Qualifications for Initial License

The adopted amendment to §30.210 modifies the table that contains the education, work experience, and training requirements for each license class. The adopted amendment to §30.210 removes the class "C" license and the associated requirements to obtain that license. These changes were necessary because under this rulemaking, the class "C" license was eliminated. The adopted amendment to §30.210 also adds the examination requirement to the table to be consistent with Chapter 30, Subchapter A. This change was necessary to add clarity and conciseness to the rules. Further, the adopted amendment to §30.210 removes the requirement of having to complete the class "C" MSW facility supervisor course in order to obtain the class "A" and "B" licenses. This change was necessary because under this rulemaking, the class "C" license is being eliminated, and this course is no longer applicable. Additionally, the adopted amendment to §30.210 adds provisions to allow individuals who currently hold a MOLO certification issued by the Solid Waste Association of North America (SWANA) and who have completed a TCEQ approved MSW training course pertaining to Texas MSW regulations to obtain a class "A" MSW Facility Supervisor license without having to complete the class "A" MSW facility supervisor courses and pass the applicable examination. This change was necessary to assist the regulated community's abilities to fill vacated positions quickly by allowing individuals who have a current SWANA issued MSW facility supervision certification to obtain a TCEQ issued license without having to complete the class "A" MSW facility supervisor courses and pass the applicable examination. In response to public comment, the adopted amendment to §30.210 further modifies the table to require individuals who plan to supervise specialized MSW processing facilities (i.e. medical waste, composting) to complete a specialized training course that is applicable to that type of facility before being issued a standard class "B" license.

§30.211, Provisional Licenses

Adopted new §30.211 allows individuals who complete the required training, pass the applicable examination, and meet the minimum education requirements, but who lack the required experience; or individuals who pass the applicable examination, meet the education and experience requirements, but lack the required training to be issued a provisional license. This change was necessary to assist the regulated community's abilities to fill vacated positions by allowing individuals who did not meet all of the licensing qualifications (i.e. educational, work experience) to supervise an MSW facility while completing the necessary requirements for obtaining the standard license. Adopted new §30.211 also creates a validity period of two years and an application fee of $74.00 for the provisional licenses. This change was necessary to establish the validity period and the cost of the license.

§30.212, Qualifications for License Renewal

The adopted amendment to §30.212 changes the continuing education requirements contained in §30.212(2)(A) from 20 hours to 16 hours. This change was necessary to provide consistency with the other licensing programs administered by the agency whose continuing education requirements are the same among all the levels of licenses. The adopted amendment to §30.212 also removes §30.212(2)(C), continuing education requirements for a class "C" license. This change was necessary because under this rulemaking, the class "C" license was eliminated and renewal of the license is no longer applicable.

§30.213, Classification of Municipal Solid Waste Facilities and Level of License Required

The adopted amendment to §30.213 outlines the level of licenses required to supervise specific types of MSW facilities. Specifically, the amendment allows those MSW facilities that require a class "B" licensed supervisor to also be supervised by individuals that hold a class "A" license. This change was necessary because individuals who obtained their class "A" license had to complete the training and pass the examination for the lower levels of licenses (progression method) prior to being issued a class "A" license. Therefore, these licensees would be qualified to supervise any level or type of MSW facility. The adopted amendment to §30.213 also combines the Type I, Type IAE, and Type IV MSW facilities into the general category for landfills. This change was necessary to add clarity, provide consistency, and enhance enforceability of the rules. This adopted amendment also adds Type IVAE MSW facilities that were not previously included in the classification table in §30.213 to the general category of landfills. This change was necessary to add clarity, provide consistency, and enhance enforceability of the rules. The adopted amendment also requires that Type IV facilities (landfills), that currently require a class "B" supervisor to be supervised by a class "A" licensed supervisor. This change was necessary to ensure consistency with licensing requirements between the different types of landfills. The adopted amendment also requires Type VI (demonstration facilities), which currently requires a class "C" supervisor to be supervised by either a class "A" or "B" licensed supervisor. This change was necessary because under this rulemaking the class "C" license was eliminated. Additionally, the adopted amendment to §30.213(a) reclassifies Type VII (land application) and Type VIII (used or scrap tire facilities) so that they do not have to be supervised by an individual who holds an MSW facility supervisor license. This change was necessary because individuals who operate these types of facilities perform relatively low-risk MSW management activities which are outlined in detail by the facility's permit or registration. The adopted amendment to §30.213 also deleted §30.213(c). The deletion of §30.213(c) was necessary because the dates referenced in §30.213(c) are outdated and no longer applicable. The adopted amendments to §30.213 also repealed §30.213(d). The repeal of §30.213(c) was necessary because the dates referenced in §30.213(d) are outdated and no longer applicable.

§30.214, Exemptions

The adopted amendment to §30.214 exempts individuals who perform relatively low-risk MSW management activities that are related to Type VII land application and Type VIII used or scrap

tire facilities from the applicable licensing requirements. This change was appropriate because individuals who operate these types of facilities perform relatively low-risk MSW management activities and adequate controls are included in the rules and provisions of the facility's permit or registration.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed this rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the adopted rules are not subject to that statute. Texas Government Code, §2001.0225 applies only to rules that are specifically intended to protect the environment or reduce risks to human health from environmental exposure. The intent of the adopted rules is to provide consistency for MSW facility supervisor licensing requirements, improve readability and enhance enforceability of the rules, and make grammatical and punctuation corrections. Protection of human health and the environment may be a by-product of the adopted rules, but it is not the specific intent of the rules. Furthermore, the adopted rules implement new and amend existing regulations for the agency's MSW facility supervisor licensing program that are necessary to ensure more consistent operation and enforcement, and would not adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Thus, the adopted rules do not meet the definition of "a major environmental rule" as defined in Texas Government Code, §2001.0225(g)(3), and thus, do not require a full regulatory impact analysis.

Furthermore, the adopted rules do not meet any of the four applicability requirements listed in Texas Government, §2001.0225(a). Texas Government Code, §2001.0225 applies only to a major environmental rule which: 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) is adopted solely under the general powers of the agency instead of under a specific state law. There are no federal standards regulating occupational licensing. These rules do not exceed state law requirements, and state law requires their implementation, not federal law. There are no delegation agreements or contracts between the State of Texas and an agency or representative of the federal government to implement a state and federal program regarding occupational licensing. And finally, these rules are adopted under specific state laws, in addition to the general powers of the agency.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received regarding the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these adopted rules and performed an assessment of whether these adopted rules constitute a taking under Texas Government Code, Chapter 2007. The purpose of these adopted rules is to ensure consistency between the rules and their applicable statutes, to make grammatical and punctuation corrections, and to modify or add language to improve the readability of Chapter 30 and enhance its enforceability. Promulgation and enforcement of these adopted rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject adopted regulations do not affect a landowner's rights in private real property because this rulemaking does not burden nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. These adopted rules and the adopted revisions do not affect private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received regarding the coastal management program. The commission reviewed the adopted rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rules are not subject to the Texas Coastal Management Program.

PUBLIC COMMENT

The commission held a public hearing on September 7, 2010. The comment period closed on September 13, 2010. The commission received comments from Republic Services, Stericycle, Inc. (Stericycle), Texas Environmental Training & Compliance, LLC (TETC), and The Lone Star Chapter of the Solid Waste Association of North America (TXSWANA). Republic Services supported adoption of the rules as proposed. Stericycle requested that Type V, Medical Waste Processing Facilities be exempted from the requirement to be supervised by an individual holding an MSW facility supervisor license. TETC was supportive of the agency correcting and updating references, however, asked the agency to reconsider some of the language used in the proposed rules. TXSWANA was supportive of the proposed rules, however, requested that certain additional provisions be included in the rules.

RESPONSE TO COMMENTS

Comments to Subchapter F: Municipal Solid Waste Facility Supervisors

In regards to the proposed revisions to Subchapter F, Republic Services commented that it supported the commission's full adoption of the rules as published in the *Texas Register* on August 13, 2010.

The commission acknowledges support of the rules by Republic Services. The commission made no changes to the rules in response to this comment.

In regards to the proposed revisions to Subchapter F, Stericycle requested that Type V, Medical Waste Processing Facilities be exempted from the requirement to be supervised by an individual that holds an MSW facility supervisor license.

The commission acknowledges Stericycle's request that Type V, Medical Waste Processing Facilities be exempted from the requirement to be supervised by an individual that holds an MSW facility supervisor license. The commission believes that the requirements to have licensed supervisors for Type V Medical Waste Processing facilities are pertinent for the operation medical waste processing and will protect the environment and public health. Therefore, the commission respectfully does not support the exemption of these types of facilities from the supervisor li-

censing requirements. The commission made no changes to the rules in response to this comment.

In regards to the proposed revisions to Subchapter F, TXSWANA commented that it appreciates the changes which have already been incorporated into the rules as a result of stakeholder input and is especially supportive of the provisions in the proposed rules that re-establish the provisional license and the concept of the progressive method to obtain a license. TXSWANA commented that it was not requesting any language in the proposed rules be changed, but asked that certain additional provisions be included in the rules, that it appreciated the open mindedness and cooperation of the TCEQ staff with whom they have dealt during this rulemaking process, and that it trusted that TXSWANA's comments will be similarly well received and considered.

The commission acknowledges TXSWANA's comments and support of the rules. The commission made no changes to the rules in response to this comment.

In regards to the proposed revisions to Subchapter F, TETC commented that in the SECTION BY SECTION DISCUSSION in the preamble relating to used and scrap tires (Type VIII) MSW facilities, the term "low-risk MSW management activities" is not defined or explained. TETC commented that the Type VIII facilities are complex and are considered to be a solid waste facility as defined by the Texas Health and Safety Code (THSC). Therefore, the individuals operating these facilities should be required to be licensed.

The commission agrees with TETC that used and scrap tires are a solid waste and that the facilities that store or process this waste are MSW facilities. 30 TAC Chapters 328 and 330 establish procedures and requirements for the safe storage, transportation, processing, utilization, and disposal of used or scrap tires or tire pieces and many of which are contained in the facility's permit, registration, and site operating plan. Therefore, the commission believes that individuals who operate Type VIII facilities perform relatively low-risk MSW management activities and that adding the requirement of having the individual who operates the facility be licensed would not add to the protection being provided by the permit, registration, and site operating plan requirements. The commission made no changes in response to this comment.

In regards to the revisions to Subchapter F, TETC and TXSWANA suggested that the TCEQ consider establishing special courses or a section of courses specifically to address specialized MSW facilities, such as medical waste, compost, and material recovery facilities among others. TETC and TXSWANA recommended that in order to operate these specialized facilities, individuals should be required to obtain and maintain specialized certifications.

The commission acknowledges the comments and agrees that individuals who manage or supervise specialized MSW facilities, such as medical waste, compost, and material recovery facilities among others, should be required to complete specialized training that would be applicable to that facility. The individual would need to complete the training prior to the issuance of a standard class "B" MSW Facility Supervisor license. The individual would be issued a provisional class "B" license until completion of the specialized training. The commission has revised §30.210 to reflect the requirements for specialized training.

TETC commented in regards to the amendments to Subchapter F, that if a class "A" licensee will be supervising storage or processing facilities that requires a class "B" license, that the class "A" licensee obtain the proper endorsement prior to supervising those facilities.

The commission responds that the amendment to §30.201 adds new §30.201(d), which limits those individuals who obtained a class "A" license after September 27, 2007, by completing only the class "A" MSW facility supervisor course and passing the applicable examination, to supervising only those facilities that require a class "A" licensed supervisor until the individual completes the class "B" MSW facility supervisor course and specialized training courses if applicable. Currently, the class "B" MSW facility supervisor course is a prerequisite for obtaining a class "A" license. The commission made no changes to the rules in response to this comment.

TETC commented in regards to the amendments to Subchapter F, that the current rule proposal is diluting the requirements, especially for individuals who have the "boots on the ground" experience. TETC also commented that the cost to the solid waste industry is not prohibitive to provide good continuing education. TETC also commented that the TCEQ and the solid waste industry should view training as a proactive rather than a reactive approach to maintaining environmental compliance. Additionally, TETC commented that training courses ensure that the agency is doing its due diligence in meeting its mission statement of protecting the environment, welfare, health, and safety of the public.

The commission responds that the purpose of Chapter 30, Subchapter F is to establish qualifications for issuing and renewing licenses to individuals who supervise or manage the operation of municipal solid waste facilities. These requirements help ensure the protection of the environment, the welfare and health and safety of the public. This rulemaking does not relax any standard, or make the rules less stringent. By requiring specific training to obtain a license, and by updating the rules to conform to current industry standards and practices, the commission is taking a proactive approach to maintaining environmental compliance. The commission has no information to indicate that the cost for continuing education would or would not be cost prohibitive to the solid waste industry. The commission made no changes to the rules in response to this comment.

TXSWANA commented in regards to the amendments to Subchapter F, that TCEQ should accept the MOLO course completion as a basis for transitioning an individual from out of state, provided that the individual further couples his or her MOLO training with a the Texas short course which is yet to be developed. TXSWANA suggested the Texas short course be designed to address unique aspects of Texas Solid Waste Management, such as Type I AE and Type IV landfills. TXSWANA also suggested that the MOLO course be accepted for continuing education units (CEUs).

The commission responds that the amendment to §30.210 adds provisions to allow individuals who currently hold a MOLO certification, and who have completed a TCEQ approved MSW training course pertaining to Texas MSW regulations, to obtain a class "A" MSW Facility Supervisor license without having to complete the class "A" MSW facility supervisor courses and pass the applicable examination. Additionally, the commission responds that the MOLO course is and will continue to be accepted by the agency for MSW facility supervisor license renewal CEUs. The commission made no changes to the rules in response to this comment.

TXSWANA commented in regards to the amendments to Subchapter F, that TCEQ should consider the use of webinars as a method of providing continuing education. TXSWANA commented that webinars are used in a multitude of other industries and professions very effectively.

The commission agrees that webinars are an effective training tool used in a multitude of industries and professions. The TCEQ's occupational licensing section currently has a process for reviewing and approving webinar training. The commission made no changes to the rules in response to this comment.

TETC commented in regards to §30.201(b), that due to the vagueness and various interpretations from TCEQ central and regional offices this provision needs to clarify the amount of time a supervisor must be present or be on-site during the facility's operating hours. TETC suggested at least one licensed or certified individual needs to be on-site during operating hours. TETC suggested that this would ensure that there are individuals on-site daily who have had TCEQ approved training in the operation of an MSW facility.

The commission responds that the comment is beyond the scope of this rulemaking. However, the commission agrees that there should be consistency within the agency regarding information being disseminated to the regulated community. The comment has been forwarded to the MSW program area and field operation support division to formulate a uniformed response to be communicated to the regulated community regarding this issue. The commission made no changes to the rules in response to this comment.

TETC commented in regards to §30.201(b), that in addition to requiring those individuals who obtained their "A" license after September 2007, to attend and pass the "B" course and examination, the TCEQ should require those that obtained their "A" license prior to 2007 to take the TCEQ approved "B" course and examination. TETC commented that this addition is needed because the rules and training material pre-2007 are different from the rules and training material taught after the 2007 rule adoption.

The commission acknowledges the comment, however, it respectfully does not support the suggestion that individuals who obtained their "A" license prior to September 2007, be required to attend the "B" course and pass the examination. The commission agrees that the regulations and training material may have changed from that prior to 2007. However, the basic training for operations of an MSW facility has not changed dramatically. Additionally, individuals that were issued licenses prior to September 27, 2007, (under the progression method) would have had to renew their license by now and should have taken continuing education courses that cover the new training material and new regulations. Individuals that supervise MSW facilities are required to adhere to the TCEQ rules and regulations pertaining to MSW facilities. Failure to do so could result in an enforcement action against the facility and possibly the supervisor. Therefore, if a supervisor has not taken training to stay abreast of the rules, it would be dependent on the licensee or their employer to ensure that the individual took the applicable training that includes the updated training material that contains the current regulations. The commission made no changes to the rules in response to this comment.

TETC commented in regards to §30.207, that adding §30.207(4) would define solid waste technician as defined in the THSC, §361.003(37). TETC commented that this addition would provide consistency with the language found in THSC and the language contained in the TCEQ rules.

The commission responds that the comment is beyond the scope of this rulemaking because neither Chapter 330, nor Chapter 30, Subchapter F, reference solid waste technicians. Therefore, the definition is not necessary in Subchapter F. The commission made no changes to the rules in response to this comment.

TETC commented in regards to §30.210, the elimination of the class "C" license was made without explanation except that the "C" license would not be applicable under the proposed rules. TETC commented that the agency's elimination of the "C" license gives the appearance that the "C" license is unnecessary. TETC commented that allowing facilities to have a means of getting their employees licensed through the "C" program increases employees awareness, which in turn increases a facility's ability to remain compliant with the MSW regulations. TETC commented that the "C" license or certification should remain in effect.

The commission responds that during the rulemaking process, it was determined that MSW facilities be separated into two categories (landfills and processing/transfer stations); thus, requiring only two classes of licenses ("A" and "B"). Based on this, the "C" license was eliminated because there are no types of MSW facilities that require a "C" license. The commission maintains that requiring individuals to obtain and maintain a license or certification that is no longer applicable, would result in additional expenses for the employer and/or the holder of the license or certification, and it would not provide any authorization for the individual to supervise a MSW facility. The commission would recommend that individuals who currently hold a "C" license be encouraged to upgrade their license to the class of license that would qualify them to supervise the facility at which they are employed. The commission made no changes to the rules in response to this comment.

TETC commented in regards to §30.210 that a course be developed to act as an introductory to Texas MSW regulations that would be required for the solid waste technicians as suggested in §30.207.

TCEQ's MSW facility rules in Chapter 330 make no reference to solid waste technicians, therefore, it is unnecessary to develop a training course specifically for solid waste technicians. However, the commission would encourage a course to be developed to act as an introductory to Texas MSW regulations. The commission made no changes to the rules in response to this comment.

TXSWANA commented in regards §30.210, that if the class "C" license is discontinued, the "C" training course should continue. TXSWANA commented that a "C" course provides valuable basic introductory training for new employees and provides important refreshers for those employees who perform non-supervisory roles. TXSWANA commented that even if there is no "C" license, those individuals that take the "C" training course receive a certification for having done so.

The commission agrees that the "C" course should be replaced with a course developed to act as an introductory course to Texas MSW regulations. However, the course should not be referred to as the "C" course, as this would give the perception that a "C" license exists. The course would count towards CEU renewal requirements for individuals holding a class "A" or "B" MSW Facility Supervisor license. The commission agrees that such a course would provide valuable basic introductory training for new employees performing non-supervisory roles and would provide

refreshers for those employees holding licenses. However, completion of the course would not provide any authorization for those unlicensed employees performing non-supervisory roles to supervise an MSW facility. All MSW facility employees would not be required to take the training, because the commission only has the authority to require specific training for individuals who have or who are trying to obtain a license. It cannot require unlicensed individuals that are not in the process of obtaining a license to complete such training. It would be dependent on the employer to have the employee complete such training as a condition of their employment. The commission made no changes to the rules in response to this comment.

TETC commented in regards to §30.210, that the training developed for the "C" license or certification could also provide an avenue for those individuals with the MOLO certification to meet the requirements found in §30.201.

The commission responds that the amendment to §30.210 adds provisions to allow individuals that currently hold a MOLO certification, and who have completed a TCEQ approved MSW training course pertaining to Texas MSW regulations, to obtain a class "A" MSW Facility Supervisor license without having to complete the class "A" MSW facility supervisor course and pass the applicable examination. The commission made no changes to the rules in response to this comment.

TETC commented in regards to §30.210, that prior to the Chapter 30 rule revisions made in 2007, individuals had to obtain 120 hours of classroom training to obtain a class "A" license. Under the proposed rules, at the most 60 hours is required. TETC commented that the class "C" certification or license be retained and that the additional training for that license would qualify individuals wanting to obtain a class "A" or "B" license not to have to meet the experience or education requirements as proposed in §30.207.

The commission responds that prior to rules adopted in 2007, the core training courses required for obtaining each level of MSW facility supervisor license were 40 hours. Concerns were voiced during that rulemaking process that the courses were too lengthy and contained information that was not applicable to the duties being performed. The rules adopted in 2007 addressed those concerns by removing the number of hours required for those training courses. The 2007 adopted rules also required different types of MSW facilities to be supervised by individuals licensed at different levels. Because of those changes, revisions to the applicable training courses were made. Training courses were amended to remove unrelated information and to focus on specific requirements needed to operate specific types of facilities. By removing the requirements that the courses be 40 hours and requiring more focused training, the training course hours were decreased, but the courses still provided the necessary training needed to protect the environment and public health.

The commission respectfully does not support TETC's suggestion that the class "C" certification or license be retained because it has been determined that MSW facilities be separated into two categories, those being landfills and processing/transfer stations. This being the case, only two classes of licenses ("A" and "B") would be required; thus, the "C" license will no longer be applicable. Requiring individuals to obtain and maintain a license or certification that is not applicable would result in additional expenses for both the employer and the holder of the license or certification and it would not provide any authorization for an individual to supervise an MSW facility. The commission made no changes to the rules in response to this comment.

In regards to §30.211, TETC suggested the addition of the "C" license or certification in the proposed §30.211 to address those individuals meeting the "C" license or certification requirements as TETC has suggested in its comments regarding §30.207 and §30.210.

The commission responds that during the rulemaking process it was determined that MSW facilities could be separated into two categories, those being landfills and processing/transfer stations; thus requiring only two classes of licenses ("A" and "B"). Based on this determination, there are no types of MSW facilities that require a "C" license. Therefore, the "C" license was eliminated. Requiring individuals to obtain and maintain a "C" license or certification would result in additional expenses for both the employer and the holder of the license or certification and it would not provide any authorization for an individual to supervise an MSW facility. The commission made no changes to the rules in response to this comment.

In regards to §30.211, TETC suggested adding §30.211(a)(3) to include language that additional training hours may be substituted for required experience. TETC suggested that this would allow individuals who do not hold a high school diploma or equivalent the ability to obtain an "A" license without the currently required six years of experience. TETC also suggested that allowing the substitution would provide an incentive for individuals to obtain continuing education.

The commission acknowledges the suggestion that individuals not only be allowed to substitute additional training to meet the educational requirements (i.e. high school diploma or equivalent), but also be allowed to substitute additional training for experience requirements. By allowing the substitution for both the educational and experience requirements, an individual could obtain a license with little or no actual experience in the MSW field. Actual hands-on experience is essential for obtaining a license to supervise or manage MSW facilities, especially at a class "A" level. Therefore, the commission respectfully does not support the commenter's suggestion. The commission made no changes to the rules in response to this comment.

In regards to §30.212, TETC suggested that if the "C" license is eliminated from the rules, that it be replaced with a "C" certification. TETC suggested that the "C" certification should be maintained and renewed every three years by obtaining continuing education hours. TETC suggested that the continuing education hours needed for the renewal of the "C" certification be 16 hours.

The commission responds that during the rulemaking process it was determined that MSW facilities could be separated into two categories, those being landfills and processing/transfer stations; thus requiring only two classes of licenses ("A" and "B"). Based on this determination, there are no types of MSW facilities that require a "C" license. Therefore, the "C" license was eliminated. Requiring individuals to obtain and maintain a "C" license or certification would result in additional expenses for both the employer and the holder of the license or certification and it would not provide any authorization for an individual to supervise an MSW facility. The commission made no changes to the rules in response to this comment.

In regards to §30.213, TETC commented by supporting the proposed change to require that all landfill facilities (Type I, Type I AE, Type IV and Type IV AE) be required to be supervised by an individual who holds a class "A" license.

The commission acknowledges TETC's support of the rules. The commission made no changes to the rules in response to this comment.

In regards to §30.214, TETC commented that Type VIII (used and scrap tire) MSW facility supervisors or managers should be required to be licensed and not be exempted as in the proposed rules. TETC commented that mismanagement at these types of facilities can result in vector issues as well as tire fires. Additionally, TETC suggested that individuals that manage or supervise composting operations, used oil processing, recycling operations (materials recycling facilities and exempted operations) and fuel blenders be required to be licensed and not be exempted as in the proposed rules.

The commission agrees with TETC that used and scrap tires are a solid waste or a recyclable material and that the facilities that store or process tires are MSW facilities. Procedures and requirements for the safe storage, transportation, processing, utilization, and disposal of used or scrap tires or tire pieces are included in Chapters 328 and 330 and in the facility's permit, registration, or site operating plan. The commission decided not to require licenses because individuals who operate these types of facilities perform relatively low-risk MSW management activities and adequate controls are included in the rules and provisions of the facility's permit or registration or site operating plan. The commission made no changes to the rules in response to this comment.

STATUTORY AUTHORITY

These amendments and new section are adopted under Texas Water Code (TWC), §5.013, relating to the general jurisdiction of the commission; TWC, §5.102, relating to the general powers of the commission; and TWC, §5.103, relating to the commission's authority to adopt rules to carry out its powers and duties under the TWC and other laws of the State. These amendments and new section are also adopted under TWC, §§37.001 - 37.015, concerning: Definitions; Rules; License or Registration Required; Qualifications; Issuance and Denial of Licenses and Registrations; Renewal of License or Registration; Licensing Examinations; Training; Continuing Education; Fees; Advertising; Complaints; Compliance Information; Practice of Occupation; Roster of License Holders and Registrants; and Power to Contract. These amendments and new section are also adopted under Texas Health and Safety Code (THSC), §361.002, relating to the commission's policy to safeguard the health, welfare, and physical property of the people and to protect the environment; THSC, §361.011, relating to the commission's jurisdiction to manage solid waste; THSC, §361.022, relating to the commission's policy to eliminate the generation of municipal solid waste and municipal sludge to the maximum extent possible for the protection of public health and the environment; THSC, §361.024, relating to the commission's authority to adopt rules and establish minimum standards for the management and control of solid waste; and THSC, §361.027, relating to the commission's authority to license individuals who supervise the operation and maintenance of solid waste facilities. These amendments and new section are also adopted under THSC, §363.002, relating to the commission's policy to protect public health and the environment by encouraging proper management and reduction of solid waste; §363.021, relating to the commission's authority to adopt rules to implement the Comprehensive Municipal Solid Waste Management, Resource Recovery, and Conservation Act; and THSC, §363.022, relating to the commission's powers and duties to implement the Comprehensive Municipal Solid Waste Management, Resource Recovery, and Conservation Act.

These adopted amendments and new section implement TWC, §§5.013, 5.102, 5.103, and 37.001 - 37.015; and THSC, §§361.002, 361.011, 361.022, 361.024, 361.027, 363.002, 363.021 and 363.022.

§30.210. Qualifications for Initial License.

To obtain a license, an individual must have met the requirements of Subchapter A of this chapter (relating to Administration of Occupational Licenses and Registrations), and the following requirements for each class of license:
Figure: 30 TAC §30.210

§30.211. Provisional Licenses.

(a) A provisional license may be issued to an individual applying for a class "A" or "B" license who:

(1) has completed the required training, passed the applicable examination and met the minimum education requirements, but lacks the required experience; or

(2) has passed the applicable examination, met the education and experience requirements, but lacks the required training.

(b) A provisional license shall have:

(1) a validity period of two years; and

(2) an application fee of $74.00.

(c) Provisional licenses are not renewable.

(d) To continue to supervise a municipal solid waste (MSW) facility after the expiration date of a provisional license, the provisional license holder must:

(1) complete any missing requirements pertaining to the corresponding license originally applied for before the expiration date of the provisional license; and

(2) have been issued the class of license that is required for the type of MSW facility being supervised.

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 December 17, 2010.

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CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION

The Texas Commission on Environmental Quality (TCEQ or commission) adopts new §116.765 and the amendments to §§116.13, 116.710, 116.711, 116.715 - 116.718, 116.720, 116.721, 116.730, 116.740, and 116.750.

Sections 116.710, 116.711, 116.715, 116.716, 116.718, and 116.765 are adopted *with changes* to the proposed text as published in the July 2, 2010, issue of the *Texas Register* (35 TexReg 5729). Sections 116.13, 116.717, 116.720, 116.721, 116.730, 116.740, and 116.750 are adopted *without changes* and will not be republished.

The amended sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the State Implementation Plan (SIP) with the exception of §§116.711(2)(C)(iii), 116.715(f)(2)(A), 116.730, 116.740(b), and 116.765.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The Texas flexible permit program rules (Chapter 116, Subchapter G, Flexible Permits) first became effective on December 8, 1994. The flexible permit program was developed in response to direction from the commission at the January 21, 1994, policy agenda meeting. The flexible permit rules were developed after considering the positional papers presented by industry, environmental groups, and local government environmental programs under the supervision of Task Force 21, a regulatory negotiation committee of the Texas Water Commission and the Texas Natural Resource Conservation Commission (predecessor agencies of the TCEQ), which was comprised of representatives of legal and engineering professions, public utilities, business associations, local chambers of commerce, city and county government, consumer and environmental groups, and community organizations for the purpose of advising the agency on industrial air quality, water quality, and waste management issues. The rules created a new type of minor New Source Review (NSR) permit called a flexible permit, which functions as an alternative to the traditional preconstruction permits that are authorized in Chapter 116, Subchapter B, New Source Review Permits. Flexible permits were designed to exchange flexibility for emission reductions with the final goal being a well-controlled facility, without relaxation of any control requirements. At the time the flexible permit program was developed, the commission lacked the authority to require an air quality permit for grandfathered facilities. The flexible permit program was intended to provide grandfathered facilities with a voluntary authorization mechanism that would reduce emissions, and significant reductions were achieved that were otherwise not required by either state or federal law. Although that feature was environmentally beneficial, the program was not limited to use by grandfathered facilities.

Only one flexible permit can be issued for a particular plant or active account. However, multiple emission caps, multiple individual emission limits, or any combination thereof can be included in a flexible permit. The applicant for a flexible permit can combine existing facilities and new facilities into the flexible permit. The flexible permit then becomes the controlling authorization for some or all facilities included in the permit, succeeding any existing minor NSR permits that may have been applicable to some or all of the facilities. The flexible permit is not and has never been a substitute for or in lieu of major NSR permitting if major NSR review is triggered. Nor can the flexible permit be used to circumvent or ignore compliance with other federal requirements, such as a national emission standard for hazardous air pollutants (NESHAP). The flexible permitting program is intended to eliminate the need for owners or operators of participating facilities to submit an amendment application each time certain operational or physical changes are made at a permitted facility. This type of flexibility without backsliding of various requirements and without environmental harm provides owners and operators options for their operations. The environmental benefits of the flexible permit program have included the permitting of grandfathered facilities, substantial emission reductions from the installation of controls, and a comprehensive evaluation of emission impacts.

On September 23, 2009, the EPA published notice in the *Federal Register* (74 *FR* 48480) (hereafter "Notice") of its intent to disapprove the TCEQ flexible permit program rules that were first submitted to the EPA as a proposed SIP revision in 1994 as well as subsequent rule amendments that were submitted several times between 1998 and 2003. Although the Federal Clean Air Act (FCAA) requires that proposed revisions to the SIP be reviewed within 18 months after submittal *(See* 42 United States Code (USC) §7410(k)(1)(B) and (k)(2)), more than 15 years passed from the initial submittal before the EPA took any formal action, and did so only in response to litigation brought by holders of flexible permits *(see BCCA Appeal Group, et al v. United States EPA et al,* No. 3-08CV1491-G (N.D. Texas)). In the Notice, the EPA cited the following assertions as the basis for disapproval of the flexible permit program as a minor NSR revision: 1) The program is not clearly limited to use in minor NSR and does not clearly prevent circumvention of major NSR requirements; 2) The program does not require that an applicability determination for major NSR be made first for construction or modification that could potentially be subject to major NSR; 3) The program fails to meet the statutory and regulatory requirements for a SIP revision and is not consistent with guidance on SIP revisions; 4) The program lacks replicable, specific, established implementation procedures for establishing the emission cap in a minor NSR flexible permit; 5) The program is not an enforceable minor NSR permitting program; 6) The program allows the issuance of flexible permits that do not incorporate emission limitations and other requirements of the Texas SIP; and 7) The program lacks the necessary more specialized monitoring, recordkeeping, and reporting (MRR) requirements required for this type of minor NSR program, to ensure accountability and provide a means to determine compliance. The EPA also identified a number of related concerns with the Texas flexible permit program in correspondence to the commission dated March 12, 2008.

The commission maintains that its flexible permit program rules, as adopted and implemented prior to this rulemaking, are fully approvable as revisions to the SIP. In fact, the Texas flexible permit program is a minor NSR permit program which requires the application of best available control technology (BACT) to minor sources even though not required to do so under the FCAA. Texas law requires application of BACT to all permitted facilities for all air contaminants, and this is a part of Texas' SIP. The commission's executive director provided detailed comments in response to the Notice addressing each of the EPA assertions discussed earlier and demonstrating that, as written and administered by the commission, the flexible permit program rules are in full conformity with all applicable federal requirements *(see* Letter from M. Vickery, Executive Director, TCEQ to S. Spruiell, Air Permits Section (EPA Region 6), November 23, 2009, included in EPA's docket No. EPA-R06-OAR-2005-TX-0032). Additionally, permits issued under the flexible permit rules are consistent with the FCAA and EPA rules implementing NSR.

The EPA published final notice of disapproval of the flexible permits program in the *Federal Register* on July 15, 2010 (75 *FR* 41311), hereafter "Disapproval Notice." In the Disapproval Notice, the EPA disapproved the flexible permit program as both a minor NSR program and a major NSR program. The EPA's

grounds for disapproval as a minor NSR program were: 1) The program has no express regulatory prohibition clearly limiting its use to minor NSR and has no regulatory provision clearly prohibiting circumvention of major NSR; 2) The program is not an enforceable NSR permitting program because it lacks requirements necessary for enforcement and assurance of compliance, including specific up front methodologies to be able to determine compliance; 3) The program lacks the necessary more specialized MRR requirements, including the necessary applicable replicable procedures and adequate executive director discretion, required for this type of minor NSR program to ensure accountability and provide a means to determine compliance; 4) The program lacks replicable procedures for establishing an emissions cap; 5) The program fails to ensure that the terms and conditions of major NSR SIP permits are retained; 6) The program fails to meet the statutory and regulatory requirements for a minor NSR SIP revision and is not consistent with EPA policy and guidance on minor NSR SIP revisions; and 7) Due to these bases for disapproval, the EPA lacks sufficient information to determine that this new permitting program will not interfere with any applicable requirements concerning attainment and reasonable further progress or any other requirement of the FCAA.

The EPA's grounds for disapproval of the program as a major NSR program were: 1) The rules do not include express language stating that the program is clearly limited to minor NSR and prohibits circumvention of major NSR; 2) The program does not include a demonstration that shows how the program as a whole and how the use of "modification" is at least as stringent as the definition of "modification" in the EPA major NSR SIP program and meets the FCAA; 3) The program does not include a demonstration that shows how the program as a whole is at least as stringent as the EPA major NSR SIP program and meets the FCAA; 4) The program does not include the requirement to make major NSR applicability determinations based on actual emissions and on emissions increases and decreases (netting) that occur within a major stationary source; 5) The program fails to meet the statutory and regulatory requirements for a major NSR SIP revision and is not consistent with EPA policy and guidance on minor NSR SIP revisions; and 6) Due to these bases for disapproval, as well as some bases for disapproval as a minor NSR SIP revision, the EPA lacks sufficient information to determine that this new permitting program will not interfere with any applicable requirements concerning attainment and reasonable further progress or any other requirement of the FCAA.

Again, the commission maintains that the flexible permit rules as adopted and implemented are approvable as a minor NSR permit program revision to the Texas SIP. The commission now adopts amendments to the rules to provide even greater clarity that they operate as a minor NSR program in the state of Texas. In the Disapproval Notice, the EPA states that it acknowledges that the commission has undertaken this rulemaking, and will consider any rule changes if and when they are submitted to the EPA. EPA Region 6 timely submitted comments on some of the subsections of four of the proposed rules to be amended. And, although those comments were submitted after the publication of the Disapproval Notice, the EPA did not expressly comment on all of the issues which form the basis for its disapproval.

The EPA's comments for this rulemaking primarily concern the following issues: 1) the EPA's position that a major source cannot be subject to an emissions cap, and similarly that a flexible permit cannot authorize or be used for a major stationary source or major modification, and the emissions from facilities subject to Prevention of Significant Deterioration (PSD) BACT and nonattainment new source review (NNSR) Lowest Achievable Emission Rate (LAER) cannot be included in the summation of the flexible permit's emissions cap(s); 2) that each individual unit under an emissions cap must meet at the very least, its specific emission limitation derived from a federal applicable requirement; and 3) the use of terminology unique to the Texas SIP, namely the use of the SIP-approved terms "facility" and "account." The commission's responses to those comments are discussed elsewhere in this preamble. Notably, the EPA did not provide any comments that indicated its review of the proposed amendments found that the rules are inadequate for most of the reasons included in its Disapproval Notice.

As the EPA recognizes, under the applicable federal regulations, states have broad discretion to determine the scope of their minor NSR programs as needed to attain and maintain the national ambient air quality standards (NAAQS). The development of NSR requirements and procedures tailored for the air quality needs of each state is not only consistent with the FCAA, it is encouraged under the law and the EPA's implementing regulations (see 42 USC §7407(a) and 40 Code of Federal Regulations (CFR) §51.101(e) and (g); see also *Safe Air for Everyone v. United States EPA,* 488 F.3d 1088, 1092 (9th Cir. 2007)). States have significant discretion to tailor minor NSR requirements that are consistent with the requirements of 40 CFR Part 51 (Requirements for Preparation, Adoption, and Submittal of Implementation Plans), and may also provide a rationale for why the rules are at least as stringent as the Part 51 requirements where the revisions are different from Part 51. These amendments are intended to remove any doubt that the EPA might have, and to reaffirm the commission's position that the rules for the flexible permit program are environmentally beneficial and approvable as a minor NSR permitting program as part of the Texas SIP.

In response to the Disapproval Notice, and in support of these rule amendments, the commission provides the following information. The EPA did not find that the current rules actually are ambiguous on the commission's position that these rules are for a minor NSR permitting program. Rather, the EPA wants express language, despite the rule text that requires consideration of major NSR requirements. That part of the Disapproval Notice as well as the EPA's comments regarding this rulemaking not only ignore the current rule text, but also the commission's amendments which make this abundantly clear. The EPA also ignores the fundamental structure of the SIP-approved Texas permitting system, which requires a permit for all facilities, including a major NSR permit when applicable.

As originally developed and subsequently implemented by TCEQ in 1994, the Texas flexible permit program is a minor NSR program. The flexible permit does not substitute for PSD or NNSR. No provision of the Texas flexible permit program rules may be read to circumvent major NSR permitting or any state or federal permitting requirements. The rules expressly require compliance with all applicable requirements relating to nonattainment and PSD review.

That limitation, adopted in 1994 as §116.711(8) and (9), continues as §116.711(2)(H) and (I); *see also,* e.g., §§116.710(a)(5), 116.711(2)(C)(ii), and 116.718(b) and (c). The program does not supersede or negate federal requirements, nor allow circumvention of those requirements. The flexible permit program may not be used as a shield for protection or exemption from federal programs including major NSR permitting. Persons making changes under a flexible permit must maintain sufficient documentation to demonstrate that the project will comply with Sub-

chapter B, Division 5, Nonattainment Review Permits; Division 6, Prevention of Significant Deterioration Review; and Subchapter E, Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63). A major modification, as defined in §116.12, may not occur without first being subject to a Nonattainment and/or PSD review. Likewise, an owner or operator may not use flexible permit rules to avoid maximum achievable control technology (MACT) requirements for the construction or reconstruction of major sources of hazardous air pollutants (HAP) as they are described and addressed in the 40 CFR Part 63, National Emission Standards for Hazardous Air Pollutants (NESHAP) rules. If a proposed project is determined to be a major modification under NNSR and/or PSD rules, or meets the definition of construction or reconstruction under 40 CFR Part 63, the owner or operator must obtain a major NSR permit or major modification under the appropriate major NSR program, as well as a HAP permit to meet requirements of FCAA, §112(g) if case-by-case MACT applies; and a minor NSR permit amendment. Further, the flexible permit program does not impair the commission's authority to control the quality of the state's air and to take action to control a condition of air pollution if the commission finds that such a condition exists.

The EPA's concerns, expressed in its comments in this rulemaking, focus on ensuring PSD BACT and NNSR LAER are met. In its Disapproval Notice, the EPA stated that the flexible permits program fails to ensure that the terms and conditions of major NSR SIP permits are retained. The EPA fails to recognize that the flexible permits program is a minor NSR program, and that TCEQ's implementation of PSD and nonattainment permit requirements is not impaired by its choice to issue both a minor NSR permit and a major NSR permit in one document. That practice does not impair compliance with all applicable rules, nor does it allow a minor NSR permit to remove any major NSR permit requirements. Allowing major sources to operate under an allowable-based emission cap, while ensuring that any federal emissions limitation is not circumvented, is not prohibited under the FCAA. Emission caps are developed based on the potential to emit *after* the application of BACT or LAER emission controls, as applicable. This is exactly the same emission standard as required for other permitting. Further, allowable emission limits, expressed as a cap or for an individual facility, are expressed in terms of annual (tons per year) or short term (e.g., pounds per hour) units. BACT is typically expressed in terms of a mass emission calculation, such as pounds per million British thermal units (lb/MMBtu) or parts per million (ppm). Establishment of caps after application of the appropriate control technology necessarily does not relax the control technology, and therefore the EPA has no basis to prescribe exclusion of PSD and NNSR facilities from flexible permit authorization or the caps established by the flexible permit.

Control technology flexibility is available under the flexible permit program for existing facilities to the extent that an applicant may over-control one facility, i.e., with technology or practices that are more stringent than BACT in order to avoid additional controls at another facility, provided that the net sum of control technologies is equivalent to (or better than) BACT being applied to each facility. However, the flexible permit rules prohibit avoidance of controls required under PSD and NNSR, and such facility-specific requirements are included within the permit document. Operational flexibility is available under the flexible permit to the extent that an owner or operator may vary throughput rates, charge rates, firing rates, etc. as long as control requirements are met and compliance with emission caps and/or individual emission limits are maintained. New facilities authorized through the flexible permit process must meet BACT at initial issuance of the permit or at such time they are authorized by the flexible permit through subsequent amendments. For new facilities, BACT shall be demonstrated for that individual facility or affected source. Therefore, the existing facilities do not operate in violation of any BACT requirements. Similarly, because major NSR permitting is not circumvented, the flexible permit program is an approvable minor NSR program.

The rules are an enforceable NSR permitting program because they include requirements necessary for enforcement and assurance of compliance, including specific up front methodologies to support the determination of compliance. These requirements are found, for example, in §§116.711, 116.715, and 116.716.

The TCEQ includes specific MRR conditions in flexible permits issued under the current rules, as appropriate for the type of facilities and emissions authorized under a cap, and these MRR conditions are adequate for determining compliance. In addition, the permit file contains documentation about how caps are established in the permits. Regardless, more specific MRR requirements are in these amendments, are adopted to satisfy EPA's concerns about accountability, and the means of determining compliance are found in §116.715(d).

The commission has added text to ensure that the rules include replicable procedures for establishing an emissions cap; see §116.716.

The EPA stated that the program fails to meet the statutory and regulatory requirements for a minor NSR SIP revision and is not consistent with EPA policy and guidance on minor NSR SIP revisions. By requiring controls at least as stringent as BACT, the flexible permit program rules assure that the NAAQS are achieved and thereby satisfy the requirements of FCAA §110(a)(2)(C) and EPA's rules regarding minor NSR permitting. Moreover, Texas requires regulation of facilities that are broader in scope than the specific requirements for regulation of major stationary sources as required by FCAA, Title I, Parts C and D. Texas law, and its SIP, is broader, in terms of types of facilities and pollutants subject to regulation. The flexible permit program as it exists and as amended in this rulemaking action meets both the FCAA and the Texas Clean Air Act.

Finally, EPA provides no basis for its conclusion that the program is not consistent with EPA policy and guidance on minor NSR SIP revisions. The commission responds that these amendments ensure that the program meets applicable statutory and regulatory requirements and are approvable as revisions to the Texas SIP.

The executive director is preparing documentation consistent with §110(l) of the FCAA, in support of these rules for submission to EPA.

SECTION BY SECTION DISCUSSION

§116.13, Flexible Permit Definitions

The commission is adopting detailed MRR requirements in proposed §116.715(c)(5), (6) and (12) and (d); *see also* §116.711(2)(G). To support these MRR requirements, the commission is adopting definitions of continuous emission monitoring system (CEMS), continuous parameter monitoring system (CPMS), and predictive emissions monitoring system (PEMS) in §116.13. The definitions for these terms are derived from similar definitions established in 40 CFR §52.21, with

minor changes to account for their use in the flexible permit program. The changes relating to MRR are intended to address the EPA's comment that the Texas flexible permit program lacks the specialized MRR requirements necessary to enforce flexible permits.

The commission adopts amendments to the definition of "emission cap" and the definition of "individual emission limitation" under §116.13 to delete references to the "insignificant emissions factor." The commission has also removed the insignificant emission factor from other sections of Subchapter G as discussed in following sections of this preamble. The EPA identified the insignificant emissions factor as a concern in the March 12, 2008, correspondence to the commission. The elimination of the insignificant emissions factor would improve the accounting of emissions authorized under the flexible permit, and in part addresses the EPA's comments that the Texas flexible permit program lacks replicable, specific, established implementation procedures for establishing the emission cap, and does not sufficiently address major NSR requirements.

§116.710, Applicability

The commission adopts the amendment to §116.710(a)(5) to clarify and emphasize that any project that constitutes a new major stationary source or major modification that would trigger major NSR requirements must comply with Subchapter B, Division 5 or 6, as applicable. Amended §116.710(a)(5) also contains a statement to emphasize that Subchapter G cannot be used to circumvent applicable major NSR permit requirements, including those requirements which include retention of established limits. The adopted changes address the EPA's comments that the Texas flexible permit program is not clearly limited to minor NSR thereby allowing new major stationary sources to construct without a major NSR permit, and has no regulatory provisions clearly prohibiting the use of the program from circumventing the major NSR SIP requirements.

The commission also adopts minor editorial changes throughout §116.710 to correct outdated cross-references and obsolete terminology.

§116.711, Flexible Permit Application

The commission adopts amendments throughout §116.711 to restructure and renumber the contents of this section to provide improved readability and greater consistency with similar requirements in §116.111. The commission also adopts minor changes throughout this section to update terminology and correct cross-references.

The commission adopts the amendment to §116.711(2)(C)(i) to more clearly describe the application of BACT to new and existing facilities. New §116.711(2)(C)(i)(I) requires all new facilities are required to use BACT. New §116.711(2)(C)(i)(II) provides that facilities may be considered on a grouped basis, such that some facilities within the group may be controlled at a higher level than BACT in order to provide the emission reductions necessary so that other facilities within the group may be controlled to a lesser degree. In response to a comment, the rule has been revised to allow new facilities to employ controls exceeding BACT in order to provide emission reductions that could be used to balance a lower level of control on existing facilities, so long as the overall level of control is at least as good as BACT. The existing level of control may not be reduced for any facility from its current authorization.

The commission adopts the amendment to §116.711(2)(C)(ii), which contains language to clarify that projects which constitute a new major source or major modification that would be subject to federal PSD or nonattainment permitting must comply with applicable requirements of §§116.150, 116.151, or 116.160 to determine the necessary emission controls. This amendment is intended to ensure that applicants understand and comply with all applicable federal major NSR control requirements. This amendment addresses the EPA's comments that the flexible permit rules could be used to bypass the federal BACT or LAER control technology determination that is required for major PSD or NNSR projects. Compliance with control requirements established for facilities subject to PSD or NNSR and which are included in a cap in a flexible permit is discussed in the RESPONSE TO COMMENTS portion of this preamble.

The commission adopts the amendment to §116.711(2)(G), which requires that flexible permits shall specify requirements for initial compliance testing and methods of determining ongoing compliance. The EPA expressed a concern that the existing rule language, which contains the term "may" instead of "shall," is not sufficiently specific. Although flexible permits already specify appropriate compliance testing and compliance determination methods within the conditions of the permit, the commission has revised the rule language for greater clarity. This amendment, in combination with others in this proposal, addresses the EPA's comments that the flexible permit program is lacking in supporting MRR requirements, and is not sufficiently enforceable.

The commission adopts amended §116.711(2)(H) and (I), which specify that prior to applying the requirements of Subchapter G, the applicant must first perform an analysis to determine the applicability or nonapplicability of federal NNSR requirements or PSD requirements. These amendments address the EPA's comment that the flexible permit program could be used to exempt or shield changes from federal permitting requirements because the program does not require that first an applicability determination be made whether the construction or modification is subject to major NSR. In response to a comment, the word "separate" was deleted from the rule text as proposed, to clarify that the federal applicability determination analysis could be part of the permit application.

The commission adopts the amendment to §116.711(2)(J), which adds a requirement that any permit application for a new flexible permit, or permit amendment, shall include an air quality analysis to demonstrate that the proposed action will not interfere with attainment and maintenance of the NAAQS. This amendment addresses the EPA's comment that the flexible permit program does not sufficiently protect the NAAQS.

The commission adopts the amendment to §116.711(2)(M)(iv), which requires that permit applicants provide a complete description of the emission point numbers (EPNs) and facilities that will be included in an emissions cap. This amendment addresses the EPA's comment that flexible permits must be structured in such a way that they sufficiently identify which units are subject to emission caps and individual emission limits.

The commission adopts the amendment to §116.711(2)(M)(vi) to specify that calculations to determine the controlled emission rates from each facility shall be performed in accordance with TCEQ Air Permits Division guidance.

The commission adopts the amendment to §116.711(2)(M)(vii) to specify that the flexible permit application must identify any

terms, conditions, and representations in any Subchapter B permit or permits which will be superseded or incorporated under a flexible permit. The applicant shall include an analysis of how the conditions and control requirements of Subchapter B permits will be carried forward in the proposed flexible permit. This amendment addresses the EPA's comment that existing SIP permits' major and minor NSR terms, limits and conditions, must be tracked and accounted for.

The commission adopts an amendment to §116.711(2)(N). In response to a comment, the commission has deleted the term "unit" and replaced it with the more appropriate term "facility."

§116.715, General and Special Conditions

The commission adopts the amendments to restructure and renumber portions of §116.715, and adopts other minor changes to improve readability and update terminology and cross-references throughout the section. Other amendments to §116.715 address the EPA's comments that the flexible permit program lacked sufficient MRR to ensure accountability and determine compliance with flexible permits.

The commission adopts the amendment to §116.715(a) by deleting existing language concerning the executive director's ability to limit the use of standard permits or permits by rule in cases where the increase of a particular air contaminant could result in a significant impact on the air environment, or could cause the facility, group of facilities, or account to become subject to federal PSD or nonattainment permitting. This requirement has been reorganized and relocated to §116.715(f).

The commission adopts the amendment to §116.715(b) to clarify that a flexible permit may contain more than one emission cap for a specific air contaminant. The commission also adopts language to specify that a permit holder shall comply with any emission caps and individual emission limitations in the permit, and that an exceedance of a flexible permit emission cap(s) or individual emission limitations is a violation of the permit. These amendments are in response to comments in the EPA's correspondence to the commission dated March 12, 2008.

The commission adopts the amendments to §116.715(c)(5). Amended §116.715(c)(5)(A) requires that each flexible permit specify requirements for monitoring or demonstrating compliance with emission caps and individual emission limits in the flexible permit. Amended §116.715(c)(5)(B) requires that each flexible permit specify emission calculation methods for calculating annual and short term emissions for each pollutant. These amendments address the EPA's concerns that the flexible permit rules are not sufficiently specific concerning the monitoring and enforcement of flexible permit emission caps and individual emission limits.

The commission adopts the amendment to §116.715(c)(6). The amendment reorganizes the recordkeeping requirements applicable to flexible permits, and adds specific new recordkeeping requirements to address certain EPA comments in the Notice and in the March 12, 2008, correspondence from the EPA to the commission. The amended requirements require flexible permit applicants to maintain records of any other permit applications associated with the flexible permit; require specific recordkeeping to document compliance with annual and short term emission caps and individual emission limitations; and require that flexible permit holders maintain records for five years instead of two years, as suggested by the EPA's March 12, 2008, correspondence. In response to a comment, the commission has added a recordkeeping requirement under §116.715(c)(6)(A)(iv) to specify that permit holders shall maintain records of any air quality analyses performed under §116.718(c).

The commission adopts the amendments to §116.715(c)(7). In response to a comment, the commission has revised this paragraph to include references to "group of facilities" and "account."

The commission adopts amendments to §116.715(c)(8), concerning compliance with representations in a flexible permit application. The proposed language concerning representations was slightly revised in response to a comment.

The commission adopts the amendments to §116.715(c)(9). In response to a comment, the commission has replaced the term "unit" with the more appropriate term "facility."

The commission adopts the amendments to §116.715(c)(10). In response to a comment, the commission has revised this paragraph to include references to "group of facilities" and "account."

The commission adopts the amendments to §116.715(c)(12) and (d), which specify MRR procedures associated with emission caps in a flexible permit. The amendments require semiannual reporting relating to compliance with long and short term emission caps similar to the semiannual reporting suggested by the EPA's March 12, 2008, correspondence to the commission. The amendments include requirements to address absence of monitoring data, require revalidation of site generated data, and define minimum characteristics of the monitoring system. In response to a comment, the commission has added language to the revalidation requirements to clarify that if revalidation testing shows that emission factors have increased, the permit holder must obtain a permit alteration or amendment to adjust the factor and account for the increased emissions. Also in response to a comment, the commission has revised §116.715(c)(12)(A)(i)(IV) so that only data that is necessary to demonstrate compliance is required to be included in the semiannual report. The commission has also revised §116.715(c)(12)(A)(i)(VII) in response to a comment, to clarify that the term monitoring system means a system that is used for determining compliance with the emission cap or any individual emission limit of the permit. In response to comments, the commission has also revised §116.715(c)(12)(A)(i)(VIII) to correct an erroneous cross-reference, and to reference the six-month period for adjusting emission caps due to the shutdown of facilities. The commission has also revised §116.715(c)(12)(C) in order to clarify what action is needed in the event that revalidation testing demonstrates that emissions have increased.

In response to a comment, the commission also adopts an amendment to §116.715(d) which requires that the permit specify which of the monitoring options under §116.715(d)(2)(A)-(E) are designated as the method of determining compliance.

In response to comments, the commission has revised §116.715(d)(2)(D)(iii) to eliminate the proposed reference to the term "significant facility." The adopted rule maintains the validation testing requirement, but instead of applying to significant facilities as defined in §116.12, this requirement would apply to facilities that emit or have the potential to emit the relevant pollutant(s) in quantities that exceed PSD or NNSR significance levels.

The commission adopts the amendments to §116.715(e) and (f) without change from the proposed text.

§116.716, Emission Caps and Individual Emission Limitations

The commission has adopted changes throughout this section to improve readability and update terminology, and has restructured proposed changes in subsection (a) to now be located in subsections (a) - (c). Other amendments throughout §116.716 are intended to address the EPA's comment that the flexible permit program lacks replicable, specific, established implementation procedures for determining an emissions cap, and address several of the EPA's comments in the March 12, 2008, correspondence to the commission.

The commission is adopting an amendment to §116.716(a). In response to comments, the commission has revised the proposed language concerning like-kind facilities and a site-wide emission cap, and has restructured and rephrased subsection (a) to use more appropriate terminology which is consistent with definitions in Chapter 101, General Air Quality Rules, and to improve clarity. The adopted rule allows a permit applicant to establish an emission cap for all facilities at an account, which would include every facility at the account, or to establish an emission cap comprised of a designated group of facilities at the account. A designated group would logically be a subset of all of the facilities at an account. Account is defined in §101.1 as, "for those sources required to be permitted under Chapter 122 of this title (relating to Federal Operating Permits Program), all sources that are aggregated as a site. For all other sources, any combination of sources under common ownership or control and located on one or more contiguous properties, or properties contiguous except for intervening roads, railroads, rights-of-way, waterways, or similar divisions." The amended rule allows permit applicants full flexibility to designate facilities for inclusion in an emission cap as they see fit, without restriction on the type or location of the facility, as long as it complies with the definition of account. The rule still provides, as proposed in subsection (a)(1) and adopted in new subsection (b), that the executive director may exclude a proposed facility from an emissions cap if the executive director determines that the inclusion of the facility in the cap could interfere with the ability to monitor compliance with the permit, or determines that the inclusion of the facility in the cap could interfere with the protection of human health and the environment.

The commission adopts the amendment proposed to §116.716(a)(2), adopted as §116.716(c)(1), which contains requirements associated with the required application of controls for facilities under an emission cap. The amendment adds language to clarify and reinforce the application of federally-required control technology for any project that constitutes a major stationary source or major modification. This provision further addresses the EPA's stated concerns that the flexible permit program could allow a facility to avoid federally-required control technology.

The commission adopts the amendment proposed to §116.716(a)(3), adopted as §116.716(c)(2), which requires that facilities subject to LAER in accordance with Subchapter B, Division 5, must be included in a separate emissions cap or provided with individual emission limitations. This provision ensures that sources subject to LAER are fully controlled as required by federal NSR regulations and Subchapter B.

The commission adopted no changes to proposed §116.716(a)(4), but has renumbered this paragraph as §116.716(c)(3).

The commission adopts the amendment proposed to §116.716(a)(5), adopted as §116.716(c)(4), which specifies that a permit applicant may propose an emission cap that is lower than the emission cap determined by subsection (c)(3), if the permit applicant provides technical information to demonstrate that it is feasible to operate in compliance with the proposed emission cap.

The commission adopted no changes to proposed §116.716(b), but has renumbered it at adoption as §116.716(d).

The commission adopts the amendment proposed to §116.716(c), adopted as §116.716(e), which requires that each flexible permit clearly identify, by a table or other appropriate means, the facilities that are subject to an emission cap, and the facilities that are subject to individual emission limitations. This amendment addresses the EPA's comment that each flexible permit must be structured in such a manner that it will be clear which facilities are included under the permit and emission cap, and which facilities are subject to individual emission limitations.

The commission deletes existing §116.716(d), concerning the "insignificant emissions factor" which the EPA had identified as a concern.

The commission adopts the amendment proposed to §116.716(d), adopted as §116.716(f), which clarify how an emission cap is to be adjusted or determined for several situations. Section 116.716(f)(1) requires that an emission cap be adjusted downward to account for the shutdown of a facility for a period longer than six months. This would ensure that the emissions cap corresponds to the actual operation of the facilities under the cap and ensure that appropriate emission control is maintained even when some sources within the cap are not operating. The commission also adopts language to clarify how the emission cap is to be adjusted when a previously shut down facility is restored to operation.

Section 116.716(f)(2) is amended to clarify that a permit amendment is required to add a facility to a flexible permit emission cap. Section 116.716(f)(3) is also amended to further explain how the emission cap shall be adjusted when new facilities are added or when facilities in the cap are modified. The commission has rephrased and restructured §116.716(f)(3) in response to a comment relating to major NSR applicability. Subsection (f)(3) is further subdivided into subparagraphs (A) and (B) to provide clarity with regard to the types of facilities included in application for adjustment that is an increase in an emission cap.

The commission adopts the amendment proposed to §116.716(d)(4), adopted as §116.716(f)(4), concerning the adjustment of emission caps when facilities under a cap become subject to new rules or regulations that require emission reductions. The commission has added references to the terms "group of facilities" and "account" to this paragraph in response to a comment.

The commission adopts the amendment proposed to §116.716(e), adopted as §116.716(g), which requires that each emission cap or individual emission limitation have an annual emission limit, based on a 12-month rolling period. The adopted rule also requires that each emission cap or individual emission limitation include an appropriate short term (such as hourly) emission limit.

The commission adopts §116.716(h) which provides that when a cap is established or adjusted, major NSR requirements must be met prior to issuance, amendment, or alteration of the permit.

§116.717, Implementation Schedule for Additional Controls

The commission adopts the amendment to §116.717 to clarify that any control implementation schedule contained in a flexible permit is a requirement of the permit, such that if the schedule cannot be met, the permit holder must obtain a permit amendment or alteration to revise the control schedule in order to maintain compliance with the permit. The permit amendment or alteration would have to be approved by the executive director before the control schedule deadline specified in the permit passes. In addition, the commission has adopted language in this section to acknowledge and emphasize that certain federally-required controls, such as BACT or LAER required by PSD or NNSR, must be in place and operational before the permitted facility can begin operation. The amendment addresses the EPA's comments relating to implementation schedules in the March 12, 2008, correspondence from the EPA to the commission, and further ensures that the flexible permit program cannot be used to forestall or avoid major NSR control requirements.

§116.718, Significant Emission Increase

The commission adopts the amendment to §116.718(b) which includes several requirements related to major NSR review. Since proposal, the commission has subdivided the rule into six paragraphs for clarity and readability. This subsection clarifies that a physical or operational change under a flexible permit for any project that constitutes a federal major modification must comply with Subchapter B, Division 5 or 6. Adopted §116.718(b) further requires that the permit holder must document that any increases under this section are not major modifications. The amendment further addresses the EPA's comments that the flexible permit program could be used to avoid applicable major NSR requirements by specifying that when determining whether a change is a major modification as defined in §116.12, the project emissions increase and the project net shall be determined as specified as defined in §116.12, regardless of how the existing facilities are authorized. In addition, this subsection requires that for new facilities, or modified facilities under an emission cap for the pollutant where the permit holder elects to use potential to emit rather than projected actual emissions from the facility to determine the project emissions increase, the potential to emit shall be considered as the proposed emissions cap (unless the use of an alternate method is demonstrated).

The commission adopts the amendment to §116.718(c) which requires a permit holder to perform an air quality analysis to demonstrate that any increases under this section would not interfere with attainment and maintenance of the NAAQS. This amendment addresses the EPA's comment in the Notice that the flexible permit program does not contain sufficient assurances that the NAAQS will not be violated. In response to a comment, the commission has slightly revised the language to clarify that the air quality analysis is required if operational or physical changes cause an increase in emissions from *any* facility (even if there are emission decreases at other facilities). The commission has also revised §116.718(c) to include references to "group of facilities" and "account," as suggested by a comment.

§116.720, Limitation on Physical and Operational Changes

The commission adopts the amendment to §116.720, which consists of minor changes to improve readability.

§116.721, Amendments and Alterations

The commission adopts the amendment to §116.721 which clarifies under what circumstances a flexible permit amendment is required. The amendment to §116.721(a) includes language stating that any action that would relax emission controls, add a new facility or facilities, or would constitute a major modification requires the permit holder to obtain a permit amendment. Similar language has been added to §116.721(c) for the same purpose. These changes are intended to prevent "backsliding" of emission controls, and ensure that projects that constitute a major modification are subject to an appropriate review for applicable federal requirements. The commission also adopts minor editorial changes to this section to update terminology and improve readability.

§116.730, Compliance History

The commission adopts minor editorial changes to §116.730 to improve readability and update terminology.

§116.740, Public Notice and Comment

The commission adopts minor editorial changes to §116.740 to improve readability and correct outdated cross-references. In a separate action, the commission has adopted revised rules regarding public participation in Chapter 39, Public Notice, Subchapters H and K, and in Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment, Subchapter E. Some of these changes apply to flexible permit applications.

§116.750, Flexible Permit Fee

The commission adopts an amendment to §116.750 that revises how fees for flexible permits are determined. Since the inception of the flexible permit program in 1994, fees for flexible permits have been determined based on the quantity of emissions authorized, at a rate of $32 per ton (with a minimum fee of $900, and a maximum fee of $75,000). The amended rule requires that flexible permit fees be based on a percentage of project capital cost, rather than based on emission rate. The amendments make flexible permits subject to the existing fee system used for Subchapter B air permits, as specified in §116.141. The minimum fee of $900 and the maximum fee of $75,000 have been retained.

§116.765, Compliance Schedule

The commission adopts new §116.765 to specify that the rule changes in this action would not apply to permit applications or permit amendments until the date 60 days after the EPA publishes final approval of these sections as revisions to the Texas SIP. Until such time, the existing Subchapter G rules concerning flexible permitting would apply. The commission has eliminated the proposed alternate compliance date of December 1, 2012, in response to a comment. The commission has also revised the rule language so that this section specifies a compliance date, rather than an effective date for the rule. This change provides the commission with more flexibility to revise these rule sections, if necessary, in the future.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a major environmental rule as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a regulatory impact analysis.

A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, pro-

ductivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the adopted rules is to amend various sections of Subchapter G to address concerns expressed by the EPA regarding the agency's flexible permit program submitted by the commission as a revision to the SIP. These changes to established rules for the flexible permit program are necessary to ensure that the rules can be a federally-approved part of the Texas SIP. Specifically, these amendments: 1) include detailed MRR requirements; 2) provide replicable, specific, established implementation procedures for establishing the emission cap; 3) clearly limit the rules to minor NSR; 4) include regulatory provisions clearly prohibiting the use of the program from circumventing the major NSR permitting; 5) ensure that the rules cannot be used to bypass the federal BACT or LAER control technology determination that is required for major PSD or NNSR projects; 6) specify requirements for initial compliance testing and methods of determining ongoing compliance; 7) ensure that the NAAQS are sufficiently protected; 8) include requirements for clarity of which facilities are included under the permit and any emission cap, and that there are sufficient monitoring and enforcement requirements for the emission caps and individual emission limits; and 9) provide for a delayed compliance date.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking action does not meet any of these four applicability requirements of a "major environmental rule." Specifically, the amendments were developed to correct EPA-identified deficiencies in the commission's flexible permit program to ensure SIP approval by the EPA and thus meet a requirement of federal law. This rulemaking action does not exceed an express requirement of state law or a requirement of a delegation agreement, and was not developed solely under the general powers of the agency, but was specifically developed to meet the requirements of the Texas SIP, and the requirements of the FCAA and its associated regulations, and is authorized by specific sections of Texas Health and Safety Code, Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code, which are cited in the STATUTORY AUTHORITY section of this preamble.

Therefore, this rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b). The commission did not receive any comment on the DRAFT REGULATORY IMPACT ANALYSIS.

TAKINGS IMPACT ASSESSMENT

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or §17 or §19, Article I, Texas Constitution; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for this rulemaking action under Texas Government Code, §2007.043. The primary purpose of this rulemaking action, as discussed elsewhere in this preamble, is to amend the rules related to flexible permits to obtain federal approval of the rules into the Texas SIP. The rules will not create any additional burden on private real property. The rules will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The rules also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the adopted rules will not cause a taking under Texas Government Code, Chapter 2007.

The commission did not receive any comment regarding the Takings Impact Assessment.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.),* and commission rules in Chapter 281, Applications Processing, Subchapter B. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council and determined that the action is consistent with the applicable CMP goals and policies.

The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The adopted rules will benefit the environment by ensuring that the flexible permit program meets applicable federal requirements, and is adequately enforceable so that air quality is protected. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 CFR, to protect and enhance air quality in the coastal areas (31 TAC §501.32). Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Chapter 116 is an applicable requirement under Chapter 122, Federal Operating Permits Program. Owners or operators subject to the federal operating permit program must, consistent with the revision process in Chapter 122, upon the effective date of

the adopted rulemaking, revise their operating permit to include any new applicable Chapter 116 requirements.

PUBLIC COMMENT

The commission held a public hearing on the proposed rules in Austin on July 29, 2010, at 2:00 p.m., in Building E Room 201S, at the commission's central office located at 12100 Park 35 Circle. The comment period closed on August 2, 2010. The commission received comments from EPA Region 6, District 90 State Representative Lon Burnam (Rep. Burnam), The City of Houston, Environmental Integrity Project (EIP), Texas Chemical Council (TCC), Texas Industry Project (TIP), Texas Oil and Gas Association (TxOGA), and the United States Department of Energy Pantex Plant (Pantex).

RESPONSE TO COMMENTS

General Comments or Comments Covering Multiple Sections

The City of Houston commented that the proposed rules do not adequately address the EPA's concerns and do not ensure compliance with the FCAA, and that its comments support this conclusion.

The commission does not concur that the proposed rules do not address the EPA's concerns and do not ensure compliance with the FCAA. This is demonstrated by the rule text and accompanying preamble text.

TIP expressed support for the existing flexible permits program and stated that it has contributed toward significant air quality improvements over the last decade. TIP stated that they support revisions and clarifications to the program that further the goal of a federally-approved set of regulations.

The commission appreciates the support and concurs that the flexible permits program has contributed toward air quality improvements.

TxOGA stated that it supports the current flexible permits program and encouraged TCEQ to make only limited changes as necessary to address reasonable concerns of the EPA.

The commission appreciates the support, and in general, nearly all of the rule changes are directly or indirectly related to concerns identified by the EPA.

TxOGA indicated concurrence with the detailed comments submitted by TIP.

The commission has added a reference to TxOGA in association with detailed comments submitted by TIP.

TxOGA stated that it opposes redefining by rule major NSR applicability definitions and principles.

This rulemaking concerns the flexible permits program, which is a minor NSR permit program. It does not affect major NSR requirements. Rather, the amendments to §116.711(H) and (I) were added to reinforce the current rule requirement that major NSR review is always the first review conducted when an application is received.

Rep. Burnam expressed support for certain specific aspects of the proposed rulemaking (such as §116.710(a)(5), §116.718(b), §116.716(c), and the proposed deletion of §116.716(d), relating to the nine percent insignificant emission factor), but also expressed concern that the proposed changes as a whole do not go far enough toward addressing the EPA's fundamental concerns about the program. Rep. Burnam commented that the commission should not adopt the proposed flexible permitting program.

The commission appreciates Rep. Burnam's support for the referenced provisions. The commission does not concur that the proposed changes are not sufficient to address the EPA's fundamental concerns with the program. The proposed changes have addressed the EPA's major alleged deficiencies, in areas such as: practical enforceability (by improved MRR requirements); protection of air quality and NAAQS (by the proposed requirement for an air quality analysis for changes that could affect air quality); prevention of circumvention of major NSR requirements; replicable procedures for determining emission caps (by more explicit requirements concerning the determination of the emission cap and adjustments to the emission cap); and other changes. These are discussed more thoroughly elsewhere in this preamble, and the commission refers the commenter to that discussion.

Rep. Burnam commented that the proposed revisions do not address the shortcoming that a permit applicant may determine the emission cap using a potential-to-emit baseline. Rep. Burnam stated that starting from a high-end baseline allows for too lenient an emission standard. Rep. Burnam stated that actual emissions should be used to make applicability determinations.

Emission caps are developed based on the potential to emit after the application of BACT or LAER emission controls, as applicable. This is exactly the same emission standard as required for other permitting. The term "baseline" issued in determining the applicability of major NSR. The newly adopted rule makes these requirements more explicit in §116.711(H) and (I). This evaluation requires the use of actual emissions, not the potential to emit. TCEQ rules do not, and never have, allow the use of allowable emissions in lieu of actual emissions in this analysis.

The City of Houston stated that the proposed rules fail to adequately address 40 CFR §51.l65(a)(2)(ii), which requires that the flexible permits program include applicability determination procedures for major NSR applicability review that use the specific provisions of 40 CFR §51.165(a)(2)(ii)(A) - (F) unless the flexible permit regulations are at least as stringent in all respects as the federal provisions. The City of Houston also commented that the proposed rules do not adequately address 40 CFR §51.166(a)(7), which requires that the flexible permit regulations include the specific applicability determination procedures of §51.166(a)(7)(i) - (vi) for PSD applicability review.

Section 116.711(2)(H) and (I) of the flexible permit rules require that these applicability determinations be performed. The commission's rules regarding PSD review in Chapter 116, Subchapter B, Division 6 are approved as part of the Texas SIP. The most recent versions of the commission's rules regarding nonattainment review in Chapter 116, Subchapter B, Division 5, as adopted prior to 2006, were previously approved as part of the Texas SIP. The commission has proposed rule amendments, as published in the August 27, 2010, issue of the *Texas Register,* to address the EPA's concerns with the rules as amended in 2006, and is confident that these proposed amendments will be approved by the EPA as revisions to the SIP and are at least as stringent as the EPA's rules. Regardless, PSD and nonattainment applicability reviews are properly conducted for all permit applications.

The City of Houston commented that the proposed rules should require both air dispersion modeling and ambient air monitoring. The City of Houston stated that air monitoring could be used to

validate and verify the required dispersion modeling, and monitoring allows for background concentrations to be measured and considered to ensure that proposed emission increases will not interfere with the attainment and maintenance of the NAAQS.

No change was made in response to this comment. Although the commission agrees that ambient air monitoring is a useful tool, it is simply not practical, necessary, or economically feasible to require site-specific air monitoring, either before or after construction, for every project which results in an emission increase. The commission already conducts extensive air monitoring for purposes of monitoring regional air quality, and specialized air monitoring in targeted areas where emissions of certain pollutants are known to be a concern. Permits issued by the commission are demonstrated to be protective, so there is typically no justification to require monitoring in conjunction with the permit. It is possible that in specific cases, a flexible permit may include provisions for ambient air monitoring, but this would be decided on a case-by-case basis and would not be a generalized requirement for all flexible permits.

The City of Houston commented that the rule changes should include a requirement that the worst-case emissions from each individual source be included in the permit application, and that these limits from the permit application be included in the permit as an emission limit. Alternatively, the City of Houston stated that TCEQ should clarify in the rule, if only certain individual source's emission limitations are included in the permit and others are not, what the criteria are for individual source's emission limits being included in the permit. The City of Houston stated that the individual emission limitations of each source should be readily available in the permit document, in order to support compliance determinations.

No changes were made in response to this comment. The application must identify the facilities to be included in emission caps and the emissions at the maximum expected capacity; however, these rates may change if minor operational or physical changes are made after the permit is issued; of course, prior to these changes the review for major NSR determined that it was not triggered. Individual emission rate limits may be included in the permit if requested by the applicant. Other reasons for individual limits, separate caps, or subcaps may be to clearly specify a mode of operation (such as emission caps for maintenance, startup, and shutdown) or to limit emissions of a specific compound (such as benzene). The permit will clearly identify any sources subject to individual emission limitations, and will clearly identify the applicable emission limit for those sources.

The City of Houston commented that the rules should stipulate that all source-specific emission limitations that are based on BACT or LAER must be in the permit document.

Any source-specific emission rate limits must be shown in the permit regardless of whether they are based on BACT, LAER, or some other more stringent basis, such as off-property impacts concerns. Note that most, if not all, control technology requirements are independent of a facility's operating rate and are specified in the permit conditions. No change was made in response to this comment.

EIP acknowledged that certain aspects of the proposed rules included useful clarifications or positive changes relative to the existing flexible permit rules. EIP specifically noted the following proposed rule changes as being improvements: the language clarifying that the flexible permit program may not be used to circumvent, or be used in lieu of, the PSD or NNSR programs; the clarification that exceedances of flexible permit caps or individual emission limitations constitute violations; the requirement of proposed §116.715(c)(5) that the permit, itself, reflect most of the monitoring requirements and the algorithms (for limits that are not rather directly monitored); the requirement that application representations are conditions upon which a permit is issued; the requirement that terms of existing NSR permits - when superseded by, or incorporated into the terms of the flexible permit - be explicitly addressed in flexible permit applications; and, the proposed recordkeeping and production requirements of proposed §116.715(c)(6).

The commission appreciates the support for the cited portions of the proposed rule.

EIP commented that although the proposed rules may contain certain improvements, the proposed rule changes are not sufficient to resolve larger problems with the flexible permit program, including a lack of practical enforceability, and opportunities for permit applicants to circumvent NSR.

The commission does not agree that the rules lack practical enforceability, allow circumvention of applicable NSR requirements, or lack public participation. Specifically, the commission notes that there are several rule amendments that address practical enforceability issues, including, for example, the changes to §116.715(b), which specifies that the permit holder shall comply with all flexible permit emission caps and individual emission limitations; §116.715(c)(5),(6), and (12), regarding MRR requirements; §116.715(d), regarding specifications for monitoring systems; and §116.716(g), regarding specification of an annual emission limitation in tons per year and a practically enforceable short term emission limitation. This rulemaking also contains a number of amendments specifically addressing major NSR requirements, relating to applicability, circumvention, and appropriate control technology reviews for major NSR. No change was made in response to this comment.

EIP commented that there is a lack of public participation when changes are made at facilities covered by a flexible permit.

No change was made in response to this comment. Although the EPA formally disapproved the public participation rule in the flexible permit program, §116.740, the commission adopted new and amended rules in Chapters 39 and 55 on June 2, 2010 (as published in the June 18, 2010, issue of the *Texas Register)* that address concerns with and applicability of public participation requirements for flexible permit applications. Therefore, this comment is beyond the scope of this rulemaking.

EIP commented that the overhead for the permit applicant, TCEQ staff, and the public associated with adhering to (for the permit holder) and understanding and enforcing (for the staff and the public) a permit issued under the flexible permit program, and meshing the requirements for that permit with those for the PSD, NNSR and other minor NSR programs, outweighs the benefits the permit applicant receives from this program. EIP stated that if adopted, the proposed rules will continue to place Texas industry at risk of violating the FCAA, and will deny the public the protections offered by that federal law.

No changes were made to the rules in response to this comment. The commenter has not clearly explained what it means that the flexible permit program creates an "overhead" of requirements that outweigh the benefits of the program for applicants, the public, or TCEQ, and therefore the commission cannot provide a response that specifically addresses this comment. The flexible permit rules are for a separate minor NSR program, and are

developed to provide operational flexibility while ensuring that major NSR is not circumvented, and that practically enforceable permits are issued which meet requirements for control technology and are protective of public health and the environment. The EPA has consistently recognized that states have flexibility to develop their minor NSR programs, required by §110(a)(2)(C) of the FCAA. Texas has done this while meeting the applicable federal and state statutory and regulatory requirements. The amendments adopted in this rulemaking ensure that the practices of the commission in developing and issuing enforceable permits are adequately and thoroughly included in the rules for this minor NSR program. Over the prior years that this program has been in place, substantial air quality improvements have been made under the flexible permits program, and at the same time, flexible permit holders have benefited from the flexibility afforded by the program. The commission does not concur that the flexible permit program violates the FCAA, and it expressly finds that these rules meet the applicable requirements of the FCAA.

EIP commented that TCEQ should not approve the proposed flexible permit program rules because the flexible permit program is not approvable into the Texas SIP. EIP stated that the program can be an addition to federal SIP-approved requirements, but the program cannot be used in lieu of or replace the obligation of new sources of air pollution or modifications of existing sources to obtain NSR, including minor NSR, permits.

This comment is not specific as to why the flexible permit program is not approvable into the SIP. The flexible permits program does not replace or eliminate the obligation of new or modified sources to obtain NSR authorization, be they minor or major sources. The rules do not replace the major source permitting rules in Chapter 116, Subchapter B, Divisions 5 and 6. Further, these rules do not replace the minor NSR rules in Chapter 116, Subchapter B; rather, this is an additional minor NSR permit program that can be approved by the EPA as part of the Texas SIP. No change was made in response to this comment.

EIP commented that, based on the language of proposed §116.710(a)(5), §116.715(f), and §116.716(a)(2)(B), a PSD or NNSR source could obtain a flexible permit, and therefore all of the reasons the EPA stated for rejecting the current flexible permit program as not meeting substitute major NSR program requirements also apply to the proposed flexible permit program.

The commenter is correct that under the existing and proposed flexible permit rules, a project with facilities subject to PSD or NNSR can be included in a flexible permit, and can be included in a cap in a flexible permit; this is discussed in more detail elsewhere in this preamble. However, the flexible permit authorization is a minor NSR authorization only, and does not exempt any facilities from meeting all applicable major NSR requirements, such as appropriate federal BACT, or LAER, or other federal requirements. In summary, if there are facilities subject to PSD and/or NNSR requirements, a PSD and/or NNSR authorization is part of the same document that includes the minor NSR flexible permit authorization. No change was made in response to this comment.

EIP commented that the EPA disapproved the current flexible permit program because the MRR was not sufficient to satisfy the criteria of enforceability. EIP stated that the proposed changes (§116.715(c)(5), (6), and (12); (d); and §116.711(2)(G)) do not remedy this defect. EIP stated that proposed §116.715(c)(5)(A) requires monitoring or demonstrating compliance, thus, monitoring is not necessarily required. Furthermore, §116.715(c)(5)(C) provides that whatever monitoring is actually included in the permit can nevertheless be disregarded without any public review if the permittee requests it. EIP stated that similarly §116.715(d)(2)(E) also provides the executive director with wide latitude for picking a monitoring system regardless of the parameters set forth in §116.715(d)(2)(A) - (D).

The commission does not agree with the comment. The language in proposed §116.715(c)(5)(A) relating to monitoring or demonstrating compliance is a deliberate choice because in some cases direct monitoring of emissions or parameters may not be the only possible method of determining compliance. In addition, in some cases the permit may specify a method of monitoring plus additional methods or techniques related to determining compliance. Proposed §116.715(c)(5)(C) and (d)(2)(E) do allow for a permit holder to request an alternative method of monitoring or sampling, but these requests must be approved by the executive director prior to their use. The ability of the executive director to approve alternate methods is necessary because the rules and standard methods cannot address every possible fact situation, and at times a unique or creative approach is needed, or is more efficient than a standard method. Both rules adopted by the commission, such as §116.115(b)(2)(D) and §115.725(a)(4), and permits routinely provide the executive director with the authority to evaluate and approve alternate methods of testing and monitoring. No change was made in response to this comment.

EIP commented that, in disapproving the existing flexible permit program, the EPA found the rules fail to require specific recordkeeping sufficient to ensure that all terms and conditions of existing permits (including representations in the applications for such permits) that are incorporated into the flexible permit continue to be met. The rules lack adequate program requirements for the tracking of existing SIP permits' major and minor NSR terms, limits, and conditions, and whether such requirements are incorporated into a flexible permit or they remain outside the coverage of the flexible permit. Minor and major NSR permits, as well as minor NSR SIP permits by rule and standard permits, can be incorporated into a flexible permit without any program requirement in place that ensures the SIP permits' terms and conditions are included in the flexible permit, as published in the *Federal Register* (74 *FR* 48493). EIP stated that the proposed rules have the same problem. EIP stated that the proposal explains that the "flexible permit would then become the controlling authorization for all facilities included in the permit, succeeding any existing minor NSR permits that may have been applicable to all or part of the facilities."

No change was made in response to this comment. Section 116.711(2)(M)(vii) specifically requires applications that include currently authorized facilities issued under Chapter 116, Subchapter B must identify any terms, conditions, and representations in the Subchapter B permit or permits which will be superseded by or incorporated into the flexible permit. The applicant shall include an analysis of how the conditions and control requirements of Subchapter B permits will be carried forward in the proposed flexible permit. This will allow the commission to review the application to ensure there is no backsliding from existing requirements. Therefore, to be eligible for a flexible permit, applicants will have to maintain sufficient records to meet this specific requirement.

In addition, although an applicant can apply for a flexible permit to change the authorization for minor sources from authorization under Subchapter B, or from a standard permit to permit by rule, partial permitting is not allowed. As a result, facilities cannot

have both a Subchapter B minor NSR permit and a Subchapter G minor NSR permit. Facilities that are currently authorized by a permit by rule or a standard permit that are proposed to become authorized under a flexible permit must meet the requirements to be authorized under the Subchapter G rules.

The primary purpose of this rulemaking is to address deficiencies alleged by the EPA, as discussed elsewhere in this preamble. With regard to major sources, §116.710(a)(6) specifically provides that no person shall use the rules in Subchapter G to circumvent the requirements for major NSR permits that are in Chapter 116, Subchapter B, Divisions 5 and 6. This paragraph, together with §116.711(2)(H) and (I), ensure that major NSR is considered prior to issuance or amendment of a flexible permit, a minor NSR permit, and that any existing major NSR permit continues to comply with the applicable requirements. Therefore, there is no basis for adding additional requirements in the flexible permit rules for tracking major NSR permit terms in the Subchapter G minor NSR permit.

The EPA commented that the commission must delineate the definitions of "account," "facility" and "group of facilities" where used in Subchapter G. In addition, it is not clear how a "unit" relates to these terms. The EPA states that the use of these terms must be explained sufficiently so that it is clear why one (or more) of these terms is used in certain instances and not in others throughout Subchapter G.

The commission has revised the rules in response to this comment. As the EPA is aware, the cornerstone of the Texas air quality permitting program is a "facility." The term is defined in the Texas Clean Air Act, Texas Health and Safety Code, §382.009(3), and in commission rule in §116.10(4), and is approved as part of the Texas SIP. "Facility" is defined as "a discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment. A mine, quarry, well test, or road is not considered to be a facility." A facility may constitute or contain a stationary source - a point of origin of an air contaminant. The commission did not intend the use of the term "unit" and has replaced it with the most appropriate term "facility" in §116.711(2)(N) and §116.715(c)(9).

However, the commission has made no change with regard to the use of these three terms in Subchapter G, except as discussed elsewhere in this preamble relating to the EPA's comment concerning the use of the terms "account" and "group of facilities" in specific rule sections. A flexible permit is limited to facilities at one account, and can cover a group of facilities or all the facilities at that account. Further, the term "account" is defined in §101.1(1) as "for those sources required to be permitted under Chapter 122, all sources that are aggregated as a site. For all other sources, any combination of sources under common ownership or control and located on one or more contiguous properties, or properties contiguous except for intervening roads, railroads, rights-of-way, waterways, or similar divisions." An account can include multiple "sources," which, for these rules, is equivalent to multiple "facilities" under Texas minor NSR definitions. This definition, and the definition of "facility," are included in the commission's "General Rules" Chapter, and as such are applicable to all of the commission's rules for its air quality programs.

In its final disapproval of the flexible permit rules, the EPA stated that the definition of "account" is not limited to a single major stationary source and may include multiple major stationary sources, or in other circumstances, may include a subset of a major stationary source. The EPA approved the use of similar text in §116.111(2)(C) without a similar limitation. The commission cannot adopt a change to the definition of "account" because it was not proposed for change. Regardless, the commission declines to effectively limit the use of the term "account" in the Subchapter G rules because major sources can be included under a cap, as discussed elsewhere in this preamble. The flexible permit rules allow for different federal sources, which may have different primary Standard Industrial Classification (SIC) codes, located at the same account to be treated separately in the flexible permit if necessary to establish limits on potential to emit. This situation is expected to be rare as there are very few accounts that contain more than one federal source. Regardless, the sources are reviewed to determine major NSR applicability and the requirements are followed if triggered. Therefore, the EPA's concern is not warranted.

Inclusion of Major Sources in a Flexible Permit

The EPA submitted several comments relating to various portions of §§116.711, §116.716, and 116.718, stating that, as proposed, the rules could be interpreted as allowing nonattainment major stationary sources or major modifications to be authorized under a flexible permit. The EPA stated that the rules must be revised to ensure it is clear that a flexible permit cannot be used for a major stationary source or major modification. The EPA also stated that emissions from facilities subject to PSD BACT and/or NNSR LAER cannot be included in an emission cap. The EPA provided suggested rule language to clarify that a flexible permit application cannot include facilities authorized by a PSD or major NNSR permit.

The commission does not agree with the EPA's position that the flexible permit rules must categorically exclude major stationary sources and major modifications from coverage within a flexible permit or an emission cap. The commission emphasizes that projects that trigger major NSR requirements such as PSD review or NNSR are required to comply with applicable major NSR requirements, as specified under Chapter 116, Subchapter B, Division 5 or 6, as applicable, and under applicable federal regulations. These requirements include appropriate control technology determinations for major NSR BACT or LAER. The inclusion of a major stationary source or major modification in a cap established in a flexible permit does not negate or circumvent the application of applicable federal major source requirements any more so than the inclusion of such a project in a traditional NSR permit authorized under Chapter 116, Subchapter B. When facilities are to be placed under an emissions cap, the project is reviewed as a modification of those facilities, and if the project increase and the net emission increase are significant, it is reviewed as major. For changes under a cap that are subject to major NSR, the application is reviewed to determine whether the facilities are collocated on the basis of whether they are on contiguous or adjacent property, are under common control and ownership, and whether they are part of the same primary SIC code, just like changes to any facility or unit that is not under a cap. Otherwise, it is reviewed as a minor modification in the same manner as for a construction permit. For flexible permits which include major sources, as with all major NSR permits, the TCEQ does not aggregate or combine major stationary sources which have different primary SIC codes for purposes of major NSR.

Subsequent to the submittal of these comments, the executive director's staff held discussions with representatives of EPA's Region 6 Office, Office of Air Quality Planning and Standards,

and Office of General Counsel. The EPA representatives stated that major sources, subject to PSD or NNSR permitting requirements, can be included in and operate under a cap. However, EPA representatives also stated that those major sources (units) must still comply with all PSD or NNSR requirements, as applicable, including any requirements that were effective prior to the unit being included in a cap. For example, if a limit, such as a pound per hour or pound per million Btu, is established in a prior PSD permit, then the unit remains subject to such limit. Although an annual BACT limit is not required by EPA, if one has been established, the PSD unit must still comply with it also. In addition, EPA representatives also noted that if a unit is later modified and a new BACT determination is made without any annual limit, then it can remain in or be removed from the cap as long as the change is made using a SIP-approved process for PSD permits, including evaluation of BACT, preparation of an air quality analysis, and public notice.

In response to EPA's comments, the commission revised §116.710 by adding text that provides, that major NSR requirements, including retention of established limits must be included for issuance of a flexible permit. In addition, the commission added §116.716(h) from proposal that requires that when a cap is established or adjusted, major NSR requirements must be met prior to issuance, amendment or alteration of the permit.

The EPA stated that it must be clear that minor NSR BACT determinations are required to be at least as stringent as the federal applicable requirement, e.g. SIP rule, new source performance standards (NSPS), NESHAPS, and MACT.

The commission respectfully disagrees with the comment that minor NSR BACT determinations are required to be at least as stringent as federal requirements of the type listed in the comment. Section 116.711 of the flexible permit rules requires that any facilities authorized by the permit meet all of the requirements cited (such as NSPS, NESHAP, and MACT emission standards) in addition to BACT. The application of BACT is an additional requirement, not a replacement or substitute. Facilities which are subject to a combination of standards must comply with all applicable requirements, including whichever is most stringent. The commission notes that §116.715(10) provides that acceptance of a flexible permit by a permit applicant constitutes an acknowledgment and agreement that the holder will comply with all rules and orders of the commission and the conditions precedent to the granting of the permit. If more than one state or federal rule or regulation or flexible permit condition are applicable, then the most stringent limit or condition shall govern and be the standard by which compliance shall be demonstrated. No change was made in response to this comment.

The EPA commented that each individual unit under an emission cap must still meet at least its specific emission limitation derived from a federal applicable requirement, e.g., a SIP rule, Minor NSR SIP BACT determination, NSPS, MACT, or NESHAPS. The EPA stated that a unit cannot violate its federal applicable requirement. The EPA stated that an exception could be units that were previously grandfathered units not subject to any federal applicable requirement other than a Minor NSR SIP BACT determination made at the time of issuance of the original flexible permit.

Regardless of whether a unit is included in a flexible permit emission cap, any emission limitation originating from a federal requirement (such as major source BACT or LAER, NSPS, MACT, or NESHAPS) still applies. Compliance with federal requirements such as major source BACT or LAER, NSPS, NESHAPs, and MACT is required by §116.711(2)(C), (D), (E), and (F) respectively. No change was made in response to this comment.

The EPA stated that proposed §116.715(c)(7), last sentence, must include a reference to "account." The EPA also stated that proposed §116.715(c)(10) must include a reference to "account." The EPA stated that proposed §116.716(d)(4) and §116.718(c) must include references to "account" and "group of facilities."

As discussed in more detail in the Section by Section portion of this preamble for §116.716, the commission has revised the cited rules to include references to the terms "group of facilities" and "account" as requested by the EPA.

Comments on §116.13

The EPA stated that because the commission is proposing to eliminate the insignificant emissions factor, the reference to it in the definitions of "emissions cap" and "individual emission limitation" at §116.13 must be deleted.

These changes recommended by the EPA were already included in the proposed revisions to the referenced definitions in §116.13, as indicated by the bracketed text, so no further action is necessary.

Pantex commented that neither §§116.10, 116.12, nor 116.13 defines "significant level for that plant-wide applicability limit (PAL) pollutant." Pantex recommended that for clarity, §116.12 or §116.10 should contain a definition of "significant level for that PAL pollutant."

The rule has been revised to eliminate the reference to "significant facility" as defined in §116.12, which is the origin of the language that this comment references. Therefore, there is no longer a need for a definition of the referenced phrase in the adopted rules.

EIP stated that the CPMS definition in §116.13(2) should clarify when, if ever, what are thought to be abnormal readings may be discarded in the recording of the "average operational parameter values."

The definition for CPMS is consistent with the EPA's NSR rules and therefore the commission will not attempt to specify criteria for "abnormal readings" in this rule. The permits issued by the TCEQ typically require that all data be used except if the monitor is malfunctioning. No change was made in response to this comment.

TIP and TXOGA commented that the proposed definition of CPMS fails to specify the type of averaging period that will apply. TIP and TxOGA suggested adding the phrase "record in units of the applicable emission limit" to the definition, and allow for any further averaging period details to be specified in applicable permits as necessary.

The commission has not changed the rule in response to this comment. The addition of the suggested language to the definitions of CEMS, CPMS, and PEMS would complicate the definitions and add little new information. The relevant averaging period and any associated details will be specified in the permit.

TCC, TIP, and TxOGA commented on the proposed definitions of "continuous emission monitoring system" and "continuous parameter monitoring system" in §116.13. TCC stated that the commission's proposed definitions are modified versions of federal definitions of these terms, and that the commission revised these definitions for the purpose of the flexible permit program. TCC stated that the state and federal definitions should be con-

sistent to avoid confusion and promote clarity. TCC, TIP, and TxOGA also noted that the proposed definitions are different from the commission's definitions for "continuous monitoring" found in Chapter 115, Control of Air Pollution from Volatile Organic Compounds, and "CEMS" and "PEMS" found in Chapter 117, Control of Air Pollution from Nitrogen Compounds. TCC, TIP, and TxOGA recommended that TCEQ align these various definitions and place them in Chapter 101.

The commission has not changed the rule in response to this comment. TCC is correct that the commission adapted federal definitions of "continuous emission monitoring system" and "continuous parameter monitoring system" for use in §116.13. Although this did introduce minor differences between the definitions of these terms as stated in §116.13, and 40 CFR §52.21, these differences are minimal and administrative in nature and should not introduce any confusion. TCC is also correct that the proposed definitions in §116.13 are not the same as the definitions of "continuous monitoring", "CEMS", and "PEMS" in other TCEQ rule chapters such as Chapter 115or Chapter 117. Chapters 115 and 117 are rules intended to ensure that reasonably available control technology is applied to new and existing sources in specific areas in order to help those areas achieve and maintain attainment with the ozone NAAQS. The objectives, control technology requirements, implementation strategy, and underlying rule language is necessarily different when comparing a minor NSR authorization program such as the commission's flexible permits program, to rules such as those in Chapters 115 and 117. The definitions as proposed are more appropriate for use with the flexible permits program than are the existing definitions within Chapters 115 and 117. Revising the definitions in Chapters 115 and 117, or establishing new definitions within Chapter 101, would be beyond the scope of this rule change.

Comments on §116.711

TIP and TxOGA stated that proposed §116.711(2)(C)(i) appears to limit the ability to apply additional controls beyond BACT to only existing facilities. TIP and TxOGA stated that permit applicants should have the option to apply controls above BACT to both new and existing facilities. TIP and TxOGA stated that TCEQ should delete the term "existing" from the proposed rule.

The commission agrees that permit applicants should have the option to apply additional controls to new facilities as part of the flexible permit. The commission has revised the rule so that permit applicants would have the option to apply controls in excess of BACT to new facilities to offset or balance controls on existing facilities.

The City of Houston commented on §116.711(2)(G), stating that the proposed rule makes initial compliance testing with ongoing compliance as determined by engineering calculations, parametric or predictive monitoring, stack monitoring, or stack testing obligatory instead of an option within TCEQ's discretion. The City of Houston stated that emission estimates based on emission factors typically are a replication of what the emission limitations are based on, rendering the emission limitations meaningless, and the permit need only limit the relevant process variable. The City of Houston stated that compliance should be independently verified by measurement as part of the performance demonstration. The City of Houston stated that the performance demonstration should include continuous or periodic parametric or predictive monitoring, emissions monitoring, or stack testing, if engineering calculations based on process variables are used to determine ongoing compliance.

No change was made in response to this comment. Emission limitations for individual facilities are typically based on BACT, not on emission factors developed from stack testing. If technically feasible and economically warranted, a stack test will be required to determine actual emissions of pollutants from the facility. These results may be used to develop an emission factor which may be then used in determining and reporting actual emissions from the facility. For example, if fuel flow to a heater is monitored, emissions factors may be generated in terms of pounds of pollutant per cubic foot of natural gas flow firing the heater. There are other sources, such as tanks, where stack testing is not practical. In these cases, generally accepted calculation methods are used with measured parameters, such as throughput, to estimate actual emissions.

The City of Houston and EIP commented that proposed §116.711(2)(H) and (I) do not adequately address the EPA's applicability determination concern because they allow the permit applicant to conduct a separate analysis as the applicability review and submit it with the application. EIP stated that the proposed rules do not provide requirements for how the applicability determination is to be made; and do not state that the applicability determination must be based on actual emissions and on emissions increases and decreases that occur within a major stationary source. The City of Houston stated that allowing a regulated source to make applicability determinations is not consistent with federal NSR and PSD applicability review requirements. In addition, the City of Houston commented that the methodology prescribed by 40 CFR §51.165(a)(2)(ii) and §51.166(a)(7) is extensive, and the proposed rules fail to prescribe the specific applicability review requirements.

State and federal rules require that regulated sources complete applicability determinations in accordance with the applicable rules. The reviewing authority will then review the analysis submitted, require additional information, if necessary, and ultimately agree or disagree with the analysis. The commission respectfully disagrees that its rules, in §§116.12, 116.150, 116.151, and 116.160, fail to prescribe the specific applicability review requirements. No change was made in response to these comments.

The City of Houston and EIP commented that the proposed rules allow the applicant to self-evaluate for NSR and PSD applicability, without review by the state or the public, and that the proposed rules contain no mechanism to prevent an erroneous determination from being carried forward. The City of Houston commented that the applicability determination should be conducted by TCEQ and the analysis should be consistent with 40 CFR §51.165(a)(2)(ii) and §51.166(a)(7).

The federal rules cited do not require the reviewing authority to independently perform an analysis for federal NSR for every project contemplated by every regulated entity in the state. Rather, these rules require the permit program, though rules and implementation of those rules, specify the procedure identified (or equivalent). To require that every emission-related project be reviewed would be impractical. The proposed rule requires these analyses be submitted with any permit application, be submitted and approved before any physical change having a potential increase in actual emissions sufficient to require netting (§116.718(a)), and to identify any changes to facilities in the semiannual report, (116.715(c)(12)(A)(i)(V)). No change was made in response to these comments.

TIP and TxOGA commented that in proposed §116.711(2)(H) and (I), the commission introduces a requirement for a sepa-

rate analysis of applicability of federal PSD or nonattainment review. TIP and TxOGA expressed concerns that the proposed language is redundant of the existing requirement to ensure compliance with major NSR, and is not clear as to the scope of the "separate analysis" requirement. TIP and TxOGA commented that the major NSR applicability analysis is typically combined for one or more pollutants, and is typically integrated into a single application document with a discussion of each of the other rule requirements for a permit. TIP and TxOGA commented that the existing rule language is sufficient to establish the requirement to assure compliance with major NSR requirements, and objected to adding a new, separate documentation requirement.

While the commission understands TIP's and TxOGA's concern that other existing rules already require compliance with major NSR, the proposed requirement is necessary to satisfy the EPA's concern that the existing flexible permits program could be used to circumvent major NSR. The EPA specifically requested rule language to require that a federal applicability determination be conducted before the permit applicant could use the rules in Subchapter G. The commission agrees that the term "separate" may be misleading and is unnecessary, and it has been removed from the rule. This analysis is required prior to commencing any physical or operational change that may be a major modification.

Rep. Burnam and EIP commented that §116.711(2)(J) should require computer dispersion modeling. Rep. Burnam and EIP stated that assessing ambient impacts without computer dispersion modeling is no longer considered scientifically valid. In addition, should modeling be conducted, EIP stated that the regulation does not specify which computer dispersion modeling must be used. Rep. Burnam stated that some computer models are no longer favored. EIP stated that 40 CFR §51.160(f)(1) requires the proposed program to use the Guideline on Air Quality Modeling (40 CFR Part 51, Appendix W).

No change was made in response to this comment. There can be situations where computer dispersion modeling is not necessary to determine that a proposed change would interfere with the NAAQS or other impacts criteria. For example, it may be apparent through engineering judgment or calculations that a small increase at a site would not result in an impacts concern, especially if existing modeling was available demonstrating that the source before the proposed change was meeting applicable standards and effects screening levels by a significant margin. In addition, computer dispersion modeling carries substantial costs. The commission will retain the flexibility to determine which projects require computer dispersion modeling on a case-by-case basis. Although the commission generally concurs that dispersion modeling used to support permit actions should comply with the EPA's Guideline on Air Quality Modeling, this guideline is very general and may not adequately cover or address all source configurations or situations. In addition to 40 CFR Part 51, Appendix W, the TCEQ applies internally-developed guidance and procedures in the review of dispersion modeling. Therefore, the commission declines to add the suggested reference to 40 CFR Part 51, Appendix W to the rule.

EIP recommended that the rules require NAAQS impact modeling for all amendments or alterations to flexible permits for which dispersion modeling was not previously required. EIP commented that as written, proposed §116.711(2)(J) would not require this if the amendment or alteration did not increase an individual limit or the overall cap.

As stated previously, computer dispersion modeling is not necessary in every case in order to determine if a proposed change would interfere with maintenance or attainment of the NAAQS. The commission will retain the flexibility to require computer modeling on a case-by-case basis. No change was made in response to this comment.

TIP and TxOGA commented on proposed §116.711(2)(J), which requires the permit applicant to conduct an air quality analysis to demonstrate that the proposed action will not interfere with attainment of maintenance of the NAAQS. TIP and TxOGA stated that this proposed requirement is redundant with existing requirements, and appears to track FCAA, §110(l), a test that is not applicable to individual permit actions. TIP and TxOGA also stated that creating a separate obligation with regard to NAAQS could create confusion with regard to the air quality analysis that is more generally required under Chapter 116 permitting.

The commission acknowledges that existing rules already provide the commission with the authority to require modeling or monitoring to assess air quality impacts, but this more explicit requirement with respect to the NAAQS is necessary to address the EPA's concerns that the flexible permits program does not sufficiently protect against changes that could interfere with attainment or maintenance of the NAAQS. The NAAQS-related requirement is sufficiently clear as to not cause confusion with other analyses or reviews that are required for air permits. No change was made in response to these comments.

The EPA requested clarification of proposed §116.711(2)(M)(ii), (iv), and (vi), as to why the identification does not include "in an account." The EPA also asked for clarification as to why subparagraphs (ii) and (vi) should not require the identification of "each facility included in a 'group of facilities'."

The cited rules do not include the phrase "in an account" because a flexible permit may only authorize facilities at a single account, as required by §116.710(a)(4). Similarly, by logical extension of the same rule, an emission cap can only include facilities that are all under a single account. Adding the phrase "in an account" to the cited rules would be redundant and not convey any new information about the facility or emission cap. With respect to the phrase "each facility included in a group of facilities," the existing rule requires that the permit applicant identify each facility; this implicitly includes any facilities that are part of a group of facilities. The phrasing suggested by the EPA would not change the information provided by an applicant and would make the rule more confusing. The commission has not changed the rule in response to this comment.

TIP and TxOGA commented on §116.711(2)(M)(vii), which requires an analysis of how terms and conditions of prior Subchapter B permits will be carried forward in a flexible permit. TIP and TxOGA stated that the proposed provision is unworkable as permit conditions do not remain static, and not every condition can be maintained. TIP and TxOGA stated that the proposed rule should provide an opportunity for applicants to show how conditions from previously-issued permits changed, or are changing, in a flexible permit or permit amendment.

The commission has not changed the rule in response to this comment. The cited requirement is necessary so that the applicant and TCEQ can identify relevant terms and conditions of the existing Subchapter B permit and address them appropriately in the proposed flexible permit. The overall intent of this requirement is to ensure that the change to a flexible permit does not result in any backsliding of emission controls or any other applica-

ble requirements. An analysis must be completed for each condition explaining how the requirements will be included in the proposed flexible permit. The commission agrees that permit conditions and limits do not remain static, and may change based on subsequent applications presented to the agency. The analysis required by §116.711(2)(M)(vii) must justify changes and demonstrate that emission control requirements are not relaxed or eliminated with the issuance of a flexible permit. The rule does not require that the proposed flexible permit maintain identical terms, limits, and conditions compared to the original permit. Once a facility or facilities are authorized under the flexible permit, the terms and conditions of the previous permit would no longer apply but could be carried forward in the flexible permit.

EIP commented that TCEQ proposed §116.711(2)(M)(vii) to address the EPA's comment that existing SIP permits' major and minor NSR terms, limits and conditions, must be tracked and accounted for. However, §116.711(2)(M)(vii) is just a requirement of what needs to be the in an application, not a permit itself. EIP stated that, therefore, the proposed rule fails to address the EPA's concern.

The commission does not agree with the comment, and no change was made in response to this comment. The cited rule is necessary so that the applicant and TCEQ can identify relevant terms and conditions of the existing Subchapter B permit and address them appropriately in a subsequently issued flexible permit. The overall intent of this requirement is to ensure that the change to a flexible permit does not result in any backsliding of emission controls or any other applicable requirements. However, the permit terms, limits, and conditions may still change as part of this process. An analysis must justify changes and demonstrate that emission control requirements are not relaxed or eliminated with the issuance of a flexible permit. It would not be practical for the rule to require that the proposed flexible permit maintain identical terms, limits, and conditions compared to the original Subchapter B permit. To do so would not result in providing operational flexibility that is a feature of this permit program. The rules adequately address the issue of backsliding, and the ability to properly review any requested change.

EIP recommended that permit alteration or amendment materials for flexible permits should identify any terms, conditions, and representations of prior permits that will be superseded by or incorporated into the altered or amended flexible permit. EIP stated that a variation of proposed §116.711(2)(M)(vii) would accomplish this.

The commission has not changed the rule in response to this comment. In cases where the terms, conditions, or representations of existing permits have been incorporated or superseded into a flexible permit, an analysis of those terms and conditions would be performed and any changes justified. In any subsequent permit action, a similar justification would be required if those permit terms or conditions were to change.

Comments on §116.715

EIP commented that §116.715(c)(5), as proposed, would not require a permit statement of the emissions calculation that is used for compliance in those situations where there is continuous operating parameter monitoring but where CEMS are not measuring emissions levels. EIP stated that the method of converting the parameter measurements to emission estimates should be specified.

The commission agrees that the calculation methods should be identified for all pollutants and facilities, and has removed the cited exceptions from the rule language.

TIP and TxOGA commented that the proposed MRR requirements in §116.715 should not impose PAL requirements where they confuse or complicate the flexible permits program for sites that have not opted into the PAL program.

The commission acknowledges that the emission cap MRR requirements of proposed §116.715 are similar to requirements of the federal PAL program. The commission used the PAL requirements as the foundation for these MRR requirements because the use of existing federally-approved requirements should be acceptable to the EPA. Although these requirements may have originated from another program, these requirements are reasonable to support compliance with emission caps in the flexible permit program. Many of the requirements and elements of these proposed MRR rules cover the same or similar information that is already maintained under existing flexible permit rules or permit requirements. Although the implementation of these requirements may require some changes in flexible permits and in the practices of permit holders, these requirements can be implemented without unreasonable confusion or burden on the permit holder.

Pantex noted that proposed §116.715(c)(5)(B) requires that each flexible permit specify methods for calculating annual and short term emissions for each pollutant when continuous emission monitoring or continuous operating parameter monitoring is not required. Pantex further noted that §116.711 as proposed does not include any requirement for an applicant to represent the use of continuous emission monitoring or continuous operating parameter monitoring in the application. Pantex asked, with respect to §116.715, how would TCEQ determine if continuous emission monitoring or continuous operating parameter monitoring is to be included in the operation of the unit.

Several factors would be considered by both the permit applicant and TCEQ when making the determination as to whether continuous emission monitoring or continuous operating parameter monitoring would be required under the permit. The determination of the appropriate type of monitoring would be a case-by-case decision involving the nature of the facility and the nature of the pollutant(s) to be monitored. Certain processes, for example coatings operations, can accurately determine emissions using relatively straightforward material balance calculations. It would generally not be necessary to require continuous emission monitors for such a situation, unless other factors were a concern. However, if a process has emissions of pollutant(s) that cannot be predicted or calculated in a straightforward way, continuous emission monitoring or continuous emission parameter monitoring is more likely to be required, so that compliance with the permit can be confirmed. No change was made in response to this comment.

Pantex asked, with respect to the terms of proposed §116.715(c)(5)(B), whether the commission proposes incorporation by reference (to the permit application), or whether the commission extracts the methodologies from the application and incorporates them into the permit.

In many cases, the TCEQ will reference standardized methods (such as those used to determine emissions from tanks or loading). In other cases, the permit may specify how sample data is to be used to estimate actual emissions, such as for cooling water. The permit application may be referenced in a per-

mit condition, but it is unlikely that complex calculation methods would be reproduced in their entirety in the permit. In addition, §116.116(a) and §116.715(c)(8) provide that the conditions upon which a permit is issued include the representations with regard to construction plans and operation procedures in an application for a permit, as well as any general and special conditions attached to the permit. No change was made in response to this comment.

Pantex commented that proposed §116.715(c)(5)(B), (d)(1), and (2) appear to be redundant, or at least overlapping, regarding conditions that must be provided in the permit to be issued. Pantex commented that the provisions should be combined.

No change was made in response to this comment. Section 116.715(c)(5)(B) is intended to ensure that, in the general case, all flexible permits include appropriate calculation methods to determine emissions. Section 116.715(d)(1) and (2) contain more specific monitoring and calculation requirements that only apply to facilities that are subject to an emission cap. While these rules may appear to be overlapping, the commission has purposely identified which conditions will be applicable in every permit in §116.715(c), and which conditions will be required for facilities subject to caps in a flexible permit. The commission has determined that this organization makes this sufficiently clear.

EIP recommended that proposed §116.715(c)(8) regarding application representations should explicitly say that a violation of a condition on which a permit was issued is a permit violation. EIP expressed concern that the term "operation procedures" does not have a sufficiently agreed-upon connotation. EIP suggested that providing examples (e.g., design heat rate or average fluid residence time or tons per hour throughput) would help clarify the term.

The commission has rephrased §116.715(c)(8) to state that noncompliance with permit representations constitutes noncompliance with the permit. The term "operation procedures" has not been changed, as it has been used for many years in Chapter 116 rule language concerning permit representations, and the commission is not aware of any difficulties with the terminology.

TCC, TIP, and TxOGA opposed the proposed reporting requirements in §116.715(c)(12)(A)(i). TCC stated that the flexible permit program is a minor NSR program, and TCC stated that the burden of the reporting requirements is not justified for a minor NSR program. TIP and TxOGA stated that the reporting requirements were duplicative of other rules such as the Federal Operating Permits Program and Chapter 101, and were excessive and unduly burdensome. TCC stated that a requirement to keep records sufficient to show compliance is all that should be necessary.

No changes were made in response to this comment. The commission has determined that the reporting requirements are necessary as part of the changes needed to obtain EPA approval for the flexible permits program. The EPA's notices relating to disapproval of the program specifically referred to what it perceived as a lack of documentation and enforceability with respect to emission caps. The requirement for semiannual reporting will ensure that the owner or operator is attentive to how changes at the site may affect compliance with the emission cap, and ensures that the commission, and by extension the public, can readily determine whether or not the permit holder is maintaining compliance with the emission cap.

Pantex and TCC expressed concern relating to the requirement for "all data" in §116.715(c)(12)(A)(i)(IV). Pantex and TCC stated that a literal reading of the requirement could require a permittee to provide all quality assurance and quality control data for each source and parameter monitored, which could represent an immense and unwieldy amount of data. Pantex provided an example of a boiler that could have four or more parameters monitored; if the system maintains data points for every 15 minutes, this would be 11,520 data points for a 30-day month. This does not include the quality assurance and quality control span and zero-span checks that might be performed by a continuously monitored system. Pantex noted that while this language in §116.715(c)(12)(A)(i)(IV) replicates language in Chapter 116, Subchapter C, Plant-Wide Applicability Limits, literal compliance would inundate the TCEQ with detailed information that might never be reviewed, and the data could be provided in a format that the TCEQ might not be able to review. Pantex recommended that the term be replaced with "all pertinent data", "all data sufficient to demonstrate compliance," or a requirement that each permit provide case-by-case specification of data to be submitted.

The commission concurs with the commenters' recommendation and reasoning to use more specific terminology in the cited rule, and has therefore rephrased this requirement so that the permit holder is only required to submit such data as is necessary to demonstrate compliance.

TCC, TIP and TxOGA commented that the term "monitoring system" as used in §116.715(c)(12)(A)(i)(VII) is not defined. TCC stated that there should be more clarification of this term. TIP and TxOGA stated the term could be interpreted to mean equipment such as fuel flow meters or hydrogen sulfide analyzers as they are used to calculate actual emissions.

In §116.715(c)(12)(A)(i)(VII), the term "monitoring system" is intended to mean any device, system, or method that is used to determine compliance with an emission cap, as described under §116.715(d)(2)(A) - (D). The monitoring system could be a CEMS, PEMS, or a system that uses emission factors or mass balance calculations to determine emissions. The term is meant to encompass any systems providing an input into the emission rate determination. If equipment such as fuel flow meters or hydrogen sulfide analyzers are used as the basis for verifying compliance with the emission cap, then that equipment would be included in this requirement. The commission has revised the rule language to clarify that the term "monitoring system" as used in this rule applies only to systems that are used in determining compliance with the emission cap or any individual emission limit of the permit.

Pantex and TCC commented that proposed §116.715(c)(12)(A)(i)(VIII) referred to §116.716(e)(1), but there is no §116.716(e)(1) in the newly formatted regulations. Pantex and TCC suggested that the reference was meant to be §116.716(d)(1).

Pantex and TCC are correct that the reference to §116.716(e)(1) is an error. The citation has been corrected to refer to §116.716(f)(1).

Pantex, TIP, and TxOGA commented that §116.716(d)(1) refers to a shutdown lasting six months, while §116.715(c)(12)(A)(i)(VIII) refers to a one-week shutdown. The United States Department of Energy/National Nuclear Security Administration recommended use of a six-month time frame for adjusting emission caps for shutdown facilities. TIP and TxOGA opposed the proposed changes to the existing rule concerning

shutdowns, and stated that this aspect of the rule was not an EPA approval issue and the existing rule should be retained.

The reference to a one-week shutdown period in §116.715(c)(12)(A)(i)(VIII) is an error and has been corrected. The commission has maintained the proposed six-month timeframe for the adjustment of emission caps due to the shutdown of cap facilities. The six-month timeframe allows for a reasonable degree of operational flexibility, while ensuring the maintenance of appropriate emission controls on facilities subject to an emission cap.

Pantex recommended that the term "shut down" as used in §116.715(c)(12)(A)(i)(VIII) should be clarified. TIP and TxOGA also noted that the term "shut down" was not defined and could be read to include turnarounds and other routine maintenance activities. Pantex gave an example of a facility that produces products on a batch basis, where some units may be used to produce a specific product once annually or biennially. In this example, the unit has not been "shut down" as inferred by the use of the term nor to allow additional capacity to another unit. Pantex further stated that frequent adjustment of an emission cap due to temporary pauses in operation, or for units that are designed and managed on a campaign basis, may pose a significant opportunity for permittees to inadvertently find themselves in violation, if only administratively. Pantex recommended that the term "shut down" in this context be applied only in regard to continuously operated units.

No change was made in response to this comment. The term "shut down" as used in the proposed rule is not formally defined, but generally means the cessation of production or operation of a facility so that it is in an idle state and has no potential for emissions to the atmosphere. TCEQ uses the term "shutdown" in several different rules without an explicit definition, and the term is sufficiently clear within the context of the rules and the general understanding of the term. For Pantex's example of a batch facility that only operates one or two times in a given year, the TCEQ would consider that facility to be shut down when it is not in operation producing a product or otherwise performing its intended purpose, and it is also not producing air emissions. The commission does not concur that this requirement should only apply to continuously operated units, as other commission requirements relating to shutdowns (such as in Chapter 101, Subchapter F, Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities) do not distinguish between batch and continuous operation.

TCC, TIP, and TxOGA commented that the language in proposed §116.715(c)(12)(B) could potentially lead to a permit exceedance. TCC recommended that in those instances where there is an absence of monitoring data, facilities be allowed to utilize data substitutions rather than be required to use maximum potential emissions. TCC stated that Chapters 115 and 117 both provide for data substitution to address missing monitoring data. TIP and TxOGA commented that TCEQ should allow permit holders to use good engineering practices to address any absence of monitoring data. TCC also stated that facilities should be able to use an alternative method for determining emissions at a later point and not have to have that designated at the time the permit is written.

No change was made in response to this comment. During periods when monitoring data is not available, there is typically not enough information to determine the actual emission rate from the facility. During these periods, it is conservative to assume maximum emission rates unless another method has been established in the permit. The rule does not exclude permit holders from using another method to determine emissions, including methods based on good engineering practices, as long as the method is reviewed and approved in the permit. In order to provide maximum flexibility for choices in monitoring data collection, the regulated entity is encouraged to apply and obtain alternative (data substitution) methods written into the permit. It is beyond the scope of this rulemaking to attempt to list all current and future approvable data substitution methods as long as the permit review process allows for future review and approvals. The commission respectfully disagrees that data substitution methods should be allowed without approval as evidenced by their inclusion as a permit term.

TIP and TxOGA commented that instead of a wholesale incorporation of federal PAL provisions into the flexible permit regulations, the commission should consider drawing from other sources, such as the Texas NO_x and highly-reactive volatile organic compound (HRVOC) rules for provisions to address data issues. TIP and TxOGA stated that §117.340(c)(3) allows several methods that can be used as substitute emissions compliance data when NO_x monitors are offline. TIP and TxOGA noted that the HRVOC rule allows data substitution at "§115.764."

Although the Chapter 115 HRVOC cooling tower rule allows for specific data substitution techniques, it also provides for manual sampling as a backup to the required monitoring. The HRVOC cooling tower monitoring requirements are intended to apply to a specific type of source and specific pollutants. Similarly, the Chapter 117 NO_x rules are tailored for specific combustion sources and a specific pollutant. The proposed emission cap monitoring requirements are intended to be sufficiently general so that they are appropriate for virtually any type of source. Flexible permit applicants who seek an alternate method of demonstrating compliance with an emission cap during periods of monitoring system downtime can propose a different method, as allowed for under §116.715(c)(12)(B). This could include the use of data substitution or other methods if approved by the executive director. No change was made in response to these comments.

Pantex commented that the term "site generated test data" in §116.715(c)(12)(C) is ambiguous. Pantex noted that it is common for TCEQ to require performance testing of a source to demonstrate compliance with a permit. Pantex stated that if the intent of the TCEQ is to require performance testing of a source every five years, then the provision should state that the TCEQ will require the action in permits issued pursuant to Subchapter G. If not, then the TCEQ should define the term "site generated test data," and its expectations on what forms of "revalidation" will be considered as compliant.

Site generated test data, as used in the cited rule, means any data obtained by completing stack testing or sampling of site facilities, which is used to determine emissions. An emission factor generated from the testing may then be used with an operating parameter that will be continuously monitored during subsequent operation to estimate emissions. An example of this would be the use of stack sampling to measure the NO_x emission rate from a heater at known fuel firing rates, and determining an emission factor from the test data. The revalidation would require testing/sampling under conditions similar to those maintained in the original test, using TCEQ-approved testing or sampling methods. The commission has added language to clarify that if revalidation testing shows that emission factors have increased, the

permit holder must obtain a permit alteration or amendment to adjust the factor and account for the increased emissions.

EIP stated that the requirement in proposed §116.715(c)(12)(C) that revalidation of site generated test data must occur only every five years is too generous. EIP recommended that data be revalidated no less often than every three years, and if a year's results deviate more than some percentage, such as 10percent, from the original data (i.e., the data on which the permit was based), then the revalidations should occur annually for a period of years. EIP also stated that there should be a reporting requirement (e.g., §116.715(c)(12)(D)), requiring the permit holder to promptly forward to TCEQ the results of testing at the site that is directly relevant to determining emission rates or the character of emissions for covered facilities.

No change was made as a result of this comment. The proposed revalidation period of five years is consistent with, and derived from, federal regulations authorizing plant-wide applicability limits, which is conceptually similar to a flexible permit. The commission does not have sufficient justification to require all data to be subject to revalidation on a more frequent basis than these federal regulations; however, the rule does allow for a more stringent revalidation period on a case-by-case basis. The proposed rule requires that revalidation testing results be submitted to the executive director no later than three months after completion of such test, which is a reasonably limited period of time given that in many cases a substantial amount of analysis is needed to evaluate the test results and develop a report.

TCC commented that with regard to proposed §116.715(c)(12)(C), emissions testing at every facility every five years is impractical and too costly. TCC stated that often a site will test one facility to establish representative emissions for all similar facilities at the site. TCC stated that a requirement to retest all the facilities would be unduly burdensome and economically unreasonable. TCC stated that TCEQ should take time, resources, and cost considerations into account with regard to the revalidation requirements.

No changes were made in response to this comment. The commission does not agree that revalidation testing to confirm site-specific data every five years is unreasonable. This requirement is analogous to the revalidation requirements used under federal regulations relating to plant-wide applicability limits. The revalidation would require testing or sampling under conditions similar to those maintained in the original test. In those limited cases where it may be appropriate to sample one facility to establish representative emissions for similar facilities, the revalidation may be performed in a similar manner. Note that in cases such as this, it is likely that sampling would be required more often than every five years and would be rotated so that all facilities are sampled.

Pantex asked, with respect to §116.715(d), if a permittee desires to change the methodology for calculating or measuring emissions, what would be the appropriate permit action, an alteration, or amendment.

The commission understands that this comment is made regarding a desired change after a flexible permit is issued. If the change in methodology would result in a lower calculation or measurement of emissions, the change can usually be accomplished with a permit alteration. If the change would result in an increase in emissions, the change would require a permit amendment. No change was made in response to this comment.

EIP stated that the permit should specify which of the four monitoring options provided by proposed §116.715(d)(2) is used to determine the levels of emissions from each facility.

The commission has revised the rule to require that the permit identify which of the four monitoring options under §116.715(d)(2) is applicable to each facility. This change will help clarify applicable monitoring requirements for the permit holder and for the TCEQ or other air pollution control agencies with jurisdiction.

TCC stated that it does not understand the need for §116.715(d)(2)(D)(i) and (ii), and encouraged TCEQ to remove those requirements. TCC stated that if emissions factors are suggested by the applicant, the permit engineer will determine the appropriate factor based on the degree of uncertainty or limitation of the suggested factor and set an emissions limit. TCC stated that the permit holder then must operate that facility below that emissions limit to be in compliance. TCC stated that there is no need to have an "operating range" specified in the permit.

The commission has not changed the rule in response to this comment. Section 116.715(d)(2)(D)(i) allows for the permit to specify how an emission factor is to be adjusted in order to account for uncertainty or other limitations in the development of the factor. It is important that the factor being used to determine the emissions is clearly indicated in the permit so that compliance with the emission limit, including supporting calculations, can be verified. Section 116.715(d)(2)(D)(ii) is necessary because there could be situations where an emission factor is only valid for a certain range of operating parameters, and it would not be appropriate for a facility to use an emission factor as a monitoring or compliance method in operational circumstances where the factor is not reliable.

TIP and TxOGA commented on proposed §116.715(d)(2)(D)(i) and (ii), stating that the provisions that required permit holders to "adjust emission factors to account for the degree of uncertainty or limitations in the factor's development," and operate in the determined range, are unworkable. TIP and TxOGA recommended that owners or operators identify what the appropriate emission factor will be with the TCEQ permit engineer, and then operate below the resulting emissions rate.

The commission did not change the rule in response to this comment. Section 116.715(d) specifies requirements that must be implemented through the permit special conditions. Any potential uncertainties, limitations in development, and applicable ranges of proposed emission factors should be identified in the permit application. These should then be incorporated into the permit special conditions developed for the facility.

Pantex commented that the phrase "significant facility as defined in §116.12 of this title," in proposed §116.715(d)(2)(D)(iii), introduces ambiguity as to the intent of the proposed regulation. From the context of §116.715(d)(2)(D)(iii), this proposed regulation is intended to be applicable to all sources applying for a permit under Chapter 116, Subchapter G, with or without a PAL permit. In §116.12are terms applicable to permit review for major source construction and major source modification in nonattainment areas. Pantex commented if §116.715(d)(2)(D)(iii) is applicable only to permit reviews for major source construction and major source modification in nonattainment areas, then it should be so stated in the text of §116.715(d)(2)(D)(iii).

In order to reduce confusion with respect to the definition of "significant facility" and the references to PAL requirements in the

proposed rules, the commission has deleted the reference to this definition, and has revised the rule to directly refer to the significance levels for PSD or nonattainment review applicability, which are more relevant criteria for characterizing large facilities under NSR permits. The significant thresholds for nonattainment pollutants are contained in Table I of §116.12(18)(A), and the significant thresholds for PSD pollutants are located in 40 CFR §51.166(b)(23).

Pantex commented that proposed §116.715(d)(2)(D)(iii) is applicable to any significant facility as defined in §116.12. Section 116.12(33) defines "significant facility" as "a facility that emits or has the potential to emit a plant-wide applicability limit (PAL) pollutant in an amount that is equal to or greater than the significant level for that PAL pollutant." Pantex stated that if §116.715(d)(2)(D)(iii) is intended to be applicable only to permits that also have a PAL, then it should be so stated in the text of §116.715(d)(2)(D)(iii). Pantex also stated that if §116.715(d)(2)(D)(iii) is intended to be applicable to all sources applying for a permit under Subchapter G with or without a PAL, the proposed regulations need to be reworded to make the intent of the regulation clear and unambiguous. Pantex stated that if the proposed regulation contains terms that need to be defined (i.e. "significant facility" and "significant level") those terms need to be defined in §116.10 or §116.13 without using the term PAL.

The cited rule requirement, as proposed, is not intended to only apply to facilities that have a PAL. In order to reduce confusion with respect to the references to PAL requirements in the proposed rules, the commission has removed the term "significant facility" and has revised the rule to directly refer to the significance levels for PSD or nonattainment review applicability. The revised rule would apply to facilities with emissions (or potential to emit) exceeding the threshold levels specified in Table I of §116.12(18)(A), or 40 CFR §51.166(b)(23), as applicable.

Pantex commented on proposed §116.715(d)(2)(D)(iii), stating that the literal terms of this provision would require every valve, pump seal, vent of identical and like sources, relief valve, or other source to undergo performance testing, even though the emissions from these sources are well understood. Pantex noted that it is common for the TCEQ to require performance testing of a source to demonstrate that the source meets emission rates stated in the permit. Pantex stated that when a permit is issued that does not require the performance testing of a source, by the issuance of the permit, the executive director has determined that performance testing is not required. Pantex recommended that §116.715(d)(2)(D)(iii) should be revised to read: "The owner or operator of a major facility as defined in §116.12(16) of this title that relies on an emission factor to calculate pollutant emissions shall conduct validation testing to determine a site-specific emission factor within six months of permit issuance or start of operations of the facility, whichever is later, as prescribed in the issued permit."

As previously discussed, the commission has revised the rule to refer to facilities that emit, or have the potential to emit, the monitored pollutant in quantities that meet or exceed major NSR significance levels. None of the examples identified in this comment would be large enough to exceed the applicability criteria of the cited rule. The rule as proposed allows for the executive director to not require testing in appropriate circumstances. The permit conditions should specify where site generated test data is to be used as well as the frequency it is required to be obtained.

TIP and TxOGA commented on proposed §116.715(d)(2)(D)(iii), which states that "owners or operators of a significant facility as defined in §116.12" using emission factors to monitor emissions "shall conduct testing to determine a site-specific emission factor within six months of permit issuance or start of operation of the facility, whichever is later, unless the executive director determines that testing is not required." TIP and TxOGA stated that this requirement is unclear as to whether it applies only to facilities operating under a PAL permit, or if the definition of significant facility is meant to be applied to facilities that have the potential to emit pollutants that are regulated under a flexible permit emission cap. TIP and TxOGA also stated that the proposed rule is more stringent than the corresponding federal PAL rule, at 40 CFR §52.21(aa)(12)(vi)(C), which only requires site-specific testing of emission factors if it is "technically practicable."

In response to this and other comments on this subject, the commission has removed the term "significant facility" from the rule and has revised the rule to directly refer to the significance levels for PSD or nonattainment review applicability. The requirement in §116.715(d)(2)(D)(iii) does not depend on the applicability of PAL to the facility. The rule as proposed already allows the executive director the authority to not require testing. This includes situations where the executive director determines that testing would not be technically practicable.

TCC, TIP, and TxOGA expressed concerns with §116.715(d)(3)(A) - (B). TCC stated that having the executive director establish default values for determining compliance with the emissions cap based on the highest potential emissions is all that is needed when a correlation between monitored parameters and the pollution emissions rate at all operating points of the facility cannot be demonstrated. TCC, TIP, and TxOGA suggested that subparagraph (B) is unnecessary and should be removed from the rule language.

No changes were made in response to this comment. While its use is likely to be infrequent, there may be circumstances under which it is not possible to identify or agree upon a value based on the highest potential emissions. In these cases, limiting operation of the facility pursuant to §116.715(d)(3)(B) may be appropriate. These issues would be addressed in the development of a draft permit.

EIP recommended revising proposed §116.715(f) to make the "approval" requirement a mandatory condition of flexible permits. EIP stated that there should be a non-discretionary check on the impact of standard permit and permit by rule emission increases at sites where some or all facilities are covered by a flexible permit. EIP also stated that the phrase "significant impact on the air environment" is not a conventional term of art, so it should be defined.

The commission has not changed the rule in response to this comment. Standard permits employ BACT and are carefully reviewed for impacts during development of the standard permit. In addition, standard permits have restrictions, where appropriate, on the use of the standard permit in combination with other types of authorization, when necessary to ensure protection of human health and the environment. Permits by rule authorize insignificant emission increases. It is not reasonable to require all flexible permit holders to obtain written approval in advance of claiming or registering an applicable standard permit or permit by rule, nor is there any such requirement in the commission's existing SIP-approved minor NSR rules. The proposed language allows the executive director sufficient discretion to restrict the use of standard permits and permits by rule in those situations where

special attention to small emission increases is warranted. With respect to the commenter's concern over the phrase "significant impact on the air environment", this text has been used for many years in the SIP-approved rules supporting Subchapter B NSR permits. The commission declines to adopt a definition because, as written, the commission has the ability to make case-by-case determinations of what is significant for any given situation. For example, the commission establishes "air pollutant watch list areas" where specific air quality concerns have been identified. If the application concerned one of those air contaminants in or near a current or historical area of concern, the commission has the ability to address that very specific concern. Further, the commission has not provided the public with an opportunity for notice and comment on such a definition, and therefore declines to do so at this time without following that procedure.

Comments on §116.716

EIP and Rep. Burnam commented that the EPA disapproved the original flexible permit program because it lacked replicable, specific, established implementation procedures for establishing the emission cap in a minor NSR flexible permit. EIP commented that the proposed §116.716 does not sufficiently change this situation. First, EIP stated that "like-kind" facilities is not defined in the regulations, so it is an invitation for confusion and protracted litigation rather than provide for an enforceable cap. Second, EIP stated that proposed §116.716(a)(1) still allows site-wide caps, so it does not change anything. Rep. Burnam stated that the EPA requires the methodologies to be completely defined in the regulations so as to be independently replicable. Rep. Burnam stated that the proposed regulations do not provide enough specificity or information for agencies, courts, or the public to determine compliance.

The commission does not agree that the proposed rules lack adequate procedures for establishing an emission cap. An emission cap is, by design, intended to be flexible in nature such that the selection of facilities participating in the cap, and the level of individual controls applied to those facilities, is not necessarily something that can be explicitly defined by rule. Even in cases of similar facilities seeking a flexible permit, the owners or operators of those facilities may have substantially different approaches or objectives for the emission cap. The flexible permits program is structured so that permit applicants can propose and use an emission cap that allows their facilities an appropriate degree of operational flexibility, while at the same time protecting human health and the environment, and maintaining the required level of emission control for sources under the cap. However, in response to this and other comments that suggested proposed §116.716(a)(1) could cause confusion or would not be effective, the commission has revised the language to eliminate the references to "like-kind" and "site-wide" emission caps. The revised rule, in §116.716(a), allows a permit applicant to request and the executive director to establish an emission cap which includes every facility at the account, or to establish an emission cap for a designated group of facilities at an account. The revised language would maintain substantial flexibility for the construction of emission caps while using terminology that meets the regulatory purpose better than the use of the term "site." The commission respectfully disagrees with Rep. Burnam's comment that the rules do not provide enough specificity or information to allow a determination of compliance. As discussed elsewhere in more detail in this preamble, the rules require a comprehensive program of MRR requirements to support enforcement of flexible permits.

Rep. Burnam commented on proposed §116.716(a)(1), and stated that the proposed language was unclear. Rep. Burnam stated that a site-wide emission cap would presumably cover facilities that are not of like-kind. Rep. Burnam also stated that even if a permit does not include a site-wide cap, it was still unclear as to what facilities are included under a given emission cap, or even which facilities are "like-kind".

In response to this and other comments relating to the proposed language concerning site-wide emission caps and like-kind emission caps, the commission has revised the language for clarity, and has eliminated the references to "like-kind" and "site-wide" emission caps. The final rule will not restrict emission caps to like-kind units and will not require emission caps to apply site-wide. The revised rule allows a permit applicant request and the executive director to establish an emission cap which includes every facility at the account, or to establish an emission cap for a designated group of facilities at an account. The revised language maintains substantial flexibility for the construction of emission caps, while using more understandable terminology. An applicant can still request similar facilities at an account or all the facilities at an account be under a cap.

The EPA commented that proposed §116.716(a)(1) provides for a site-wide emission cap, and stated that the definition of site is too broad and provides broad discretion to delineate the boundaries of the emission cap. The EPA stated that under this definition, a site-wide emission cap could include all minor stationary sources and all minor modifications on a company's property.

In response to this and other comments regarding proposed §116.716(a)(1), the commission has revised the language to eliminate the references to "like-kind" and "site-wide" emission caps. The revised rule allows for a permit applicant to request and the executive director to establish an emission cap, or an emission cap made up of a subset of facilities at an account. The term "account" is more appropriate for use in a minor NSR program such as Subchapter G than the proposed use of "site." The use of the word "site" in §116.716 could possibly lead to some confusion because it is a defined term in the commission's federal operating permit program in §122.10(27). The term "account" is the appropriate term to use because the flexible permit program is designed to work within the commission's established, defined term "account." Account has been used in the flexible permit minor NSR context for purpose of delineating the scope of the flexible permit authorization. As discussed elsewhere in this preamble, the use of "account" provides a boundary for what can be included. Therefore, there is no executive director discretion as to the boundaries of what facilities that may be included in a flexible permit. One of the objectives of the flexible permit program is to allow the permit applicant substantial flexibility in designating the facilities that are to be included in an emission cap or caps, subject, of course, to commission approval. This could range from a small number of facilities or all facilities at the account as long as it is practically enforceable.

EIP stated that the cap calculation in proposed §116.716(a)(2)(A) relies on the definition of "expected maximum capacity" in §116.13(4). EIP commented that this allows the capacity value to be less than the physical and operational design value, if the "planned operation" of the facility were less than its physical and operational design. EIP stated that if the cap is to be calculated taking into consideration the "planned operation" of a facility at less than its physical and operational design, then the lesser level of operation needs to be specified

as a permit term. EIP stated that if that is not desirable, then the §116.13(4) definition needs to be amended to remove the "planned operation" relaxation.

The commission has not changed the rule, now located in §116.716(c)(1)(B), in response to this comment. The commenter has not explained why it is undesirable to establish a lower emission limit in a flexible permit emission cap. One key intent of the flexible permit program is to allow for potential increases in operating rate with no increase in emissions (increased emission control) provided the increased operating rate does not trigger major NSR.

EIP commented that TCEQ proposed §116.716(a)(2)(B) and (3) to address the EPA's concerns that the flexible permit program could allow a facility to avoid federally-required control technology. EIP stated that this section apparently means to discuss how the emission cap will be determined, even though it actually says it is determining "emissions." EIP stated that emissions have to be determined by monitoring, testing and recordkeeping. EIP further stated that even with the suggested correction, the section fails to achieve its objective because it does not discuss averaging times. EIP gave an example that if a BACT limit based on a one-hour averaging time is used to calculate an annual emission cap, the BACT limit is no longer being used because averaging time is a component of an emission limit. EIP stated that the proposed regulations do not require the emission cap to match the original emission limit and do not define the meaning of "short term." EIP also stated that any emission limit that is averaged into a cap with other emission limits from other emission points no longer exists if it is not applied to the specific unit for which it is meant. EIP stated that the same problems exist with proposed §116.716(a)(3)'s attempt to address LAER.

The commenter is correct that proposed §116.716(a)(2)(B) and (3), the text of which is adopted as §116.716(c)(1)(A) and (c)(2), are intended to describe how the emission cap itself will initially be determined. This rule is not intended to describe how compliance with the emission cap will be determined, which will be with some combination of testing, monitoring, and calculations. Facility-specific maximum allowable emission rate limits only reflect BACT at the design operating condition. If it were relied upon to ensure BACT was in place, operation at rates less than the design capacity would not be required to meet BACT. Due to this, control technology requirements are usually captured in permit conditions and not the maximum allowable emission rates. This ensures that BACT is applied throughout the operating range and not only at the maximum operating rate. Due to this, BACT can be maintained for facilities in caps. For example, if a heater is authorized by a permit, BACT for NO_x control may be identified as 0.01 lb/MMBtu in the permit conditions. NO_x emissions will be continuously monitored by a CEMS (also required by permit condition). If a heater is operated at 50 percent of its design firing rate, the permit condition will limit its NO_x emissions to 50 percent of the allowable emission rate. The allowable emission rate limit would allow NO_x emissions of up to 0.02 lb/MMBtu. No change was made in response to this comment.

TIP and TxOGA opposed the requirement in proposed §116.716(a)(3) that facilities subject to LAER review be included in separate emission caps. TIP and TxOGA stated that facilities subject to BACT, MACT, LAER, and other control levels are eligible for cap inclusion under the federal PAL rules. TIP and TxOGA stated that there seems to be no EPA-related rationale for segregating LAER-controlled facilities.

The commission has not changed the rule, the text of which is in adopted §116.716(c)(2), in response to this comment. The proposed rules are not intended to be the same as federal PAL rules in all respects. Emission caps in flexible permits have little to do with whether subsequent modifications are subject to major NSR, while that is exactly the purpose of PALs. In most cases, when an emission cap is established, the permit holder has to either demonstrate that creating the emission cap does not result in a major modification (not subject to major NSR), or perform a major NSR review of all facilities subject to the cap per §§116.150, 116.151, or 116.160, as applicable. The representations made when requesting an emission cap typically allow for the greatest operational flexibility. This is not the case if facilities with differing control requirements are included in the same emission cap. This is most clearly illustrated with an example. Typically, if tanks are to be authorized under an emission cap, the application may state that throughput could be through a single tank or through all tanks (consistent with a demonstration of acceptable off-site impacts). This is not a concern because all tanks are reviewed for BACT. If a number of new tanks are to be added to that permit and a nonattainment review is required, the new tanks would be subject to LAER and the project emission increase must be offset. If the new tanks were to be added to the existing emission cap, the cap could not be increased or all existing tanks would be modified as well (if there are no other limits, they could now emit at the higher emission cap rate), and be subject to LAER. If the new tanks were added to an unchanged emission cap, a subcap would be required for the new tanks to limit the project increase to less than the magnitude of emission cap. This would be more restrictive than establishing a separate LAER cap.

Pantex asked, with regard to proposed §116.716(b), if the permit has an emission cap for volatile organic compounds (VOC), and the application and permit identify all facilities which may emit VOC, whether that constitutes "inclusion" for all the chemicals that are considered VOC, and similarly, for all other "grouped" air contaminants (e.g., Ozone Depleting Substances, HAP).

If a flexible permit has an emission cap for VOC (or some other grouped pollutant category), and the emission cap includes all facilities which may emit that category of pollutant, then that would constitute "inclusion" of all VOC. However, in order to protect human health, there may be individual air contaminants that, while being a subset of VOC or other relevant contaminant category, have separate and distinct emission limits specified in the permit in addition to the emission cap for VOC.

EIP commented that the proposed requirements of §116.716(c) may help make flexible permits more practically enforceable, and specifically noted support for the proposed deletion of the nine percent insignificant emission factor.

The commission appreciates the support.

EIP commented on proposed §116.716(d)(1) and stated that the proposed six-month adjustment period relating to shutdowns effectively weakens an emission rate based on BACT, LAER or other requirements, at least for six months, when a facility that was used to calculate the emission cap is shut down. TIP, TxOGA, and TCC also commented on proposed §116.716(d)(1), stating there are several situations where, due to maintenance or a shutdown due to malfunction, weather events such as hurricanes, or market conditions, a facility subject to an emissions cap would be shut down for longer than six months. TIP, TxOGA, and TCC also stated that the EPA has not taken issue with the 12-month shutdown period in the existing rule, so the com-

mission should leave it unchanged. TIP and TxOGA stated that the EPA's reactivation policy contains a two-year presumption. TCC also stated that the commission should clarify that increasing the emissions cap back to its original amount when a facility is started back up requires only a permit alteration.

The commission has not changed the rule, located in adopted §116.716(f)(1), in response to these comments. The commission has maintained the proposed six-month timeframe relating to the shutdown of cap facilities. The commission acknowledges and understands that some maintenance programs or natural events may result in extended shutdowns. A six-month timeframe provides an appropriate balance between operational flexibility and the need to ensure that emission caps reasonably correspond with actual conditions at the permitted facilities. TCC is correct that restoring a facility to operation under §116.716(f)(1) only requires a permit alteration, as long as the original emission cap amount is not exceeded.

EIP commented that proposed §116.716(d)(2) allows the addition of new facilities via a flexible permit amendment but does not require a major source applicability determination and does not state that the new facility must be a minor modification.

No change was made in response to this comment. The addition of new facilities under adopted §116.716(f)(2) requires a permit amendment, and such a permit amendment would require a major source applicability determination under §116.711(2)(H) and (I). The new facility does not necessarily have to be a minor modification so long as the project complies with all applicable major NSR requirements.

TIP and TxOGA commented on proposed §116.716(d)(3), stating that the revised language is at odds with the Texas statutory definition of "modification" and with federal NSR applicability requirements established in several rounds of rulemaking, most recently NSR reform. TIP and TxOGA stated that the provision is unnecessary and redundant to other provisions that require compliance with major NSR. TIP and TxOGA objected to the establishment by rule of a special-purpose set of major NSR applicability definitions and principles, divorced from the statutory language and established requirements.

The commission respectfully disagrees that the rule, as proposed, does not comply with Texas or federal law. However, changes have been made in response to this comment to ensure that the requirements are clearly stated. The term "modification" is typically used in relation to changes to facilities or sources; however, Texas Clean Air Act §382.003(9) provides that "a modification of an existing facility" does not include a physical change in, or change in the method of operation of, a facility where the change is within the scope of a flexible permit. However, this does not mean that a flexible permit cannot be modified. A flexible permit is subject to requirements or an amendment when there is an emissions increase of the cap. Adding a new facility, or making a physical or operational change to an existing facility that results in an increase of an emission cap and/or an individual emission limitation, is considered to be a modification of a flexible permit, and an amendment application is required for consideration of a change to a flexible permit cap or individual emission limit. If there is a change to a facility but that change would not result in a change to the cap, then an alteration application is required. In addition, the state's definition of "modification" is much broader than the federal definition, and does not require any consideration of the status of the other facilities already under the cap. Therefore, because major NSR applicability must be determined first, the commission has revised and restructured the rule as adopted §116.716(f)(3) to ensure that the major modification analysis is conducted first for applications to add a facility to or modify a facility under the cap.

With regard to the portion of the comment regarding compliance with major NSR requirements, the commission respectfully disagrees that proposed §116.716 (d)(3), adopted as §116.716(f)(3), is at odds with federal applicability requirements. As TIP acknowledges, the federal definition of "modification" applies when the analysis is conducted for major NSR applicability. The use of the phrase "shall be considered modified" may be misunderstood. In the analysis of whether a change is a major modification, the commission properly assumes that, unless there are certain restrictions (specifically, a physical modification and a separate permit limit or physical constraint on the facility's potential to emit), all facilities could have an increased potential to emit by the addition of a new facility or the modification of a facility within the emission cap. This analysis doesn't result in a modification, which may be the confusion. Therefore, the rule was revised to provide that all facilities under the cap will be included in the evaluation for major NSR applicability. The use of the word "evaluation" indicates that no final decision has been made as to whether a modification has occurred.

Although the major NSR applicability text may be redundant of other changes made in this rulemaking, the commission has retained it in this paragraph to ensure that the procedures for cap adjustment are clearly listed.

EIP commented that the final sentence of proposed §116.716(d)(3) needs to be clarified. EIP asked, if a like-kind cap were being increased because of the modification of a covered unit (say, a physically-changed catalytic cracking unit), whether the rule would require that all other like-kind facilities under the cap be treated as though they too were modified, unless each one of them were, in fact, unmodified and had a unit-specific limit or potential to emit constraint. EIP asked whether all or some covered units that are not subject to separate permit limits will experience a change in their methods of operation, so as to realize the benefits of the physically-modified unit, but have not themselves had physical modifications, will those covered units be considered "not modified," even though their potential to emit had earlier been based on their "planned operation," rather than on their physical design limits. EIP stated that the re-calculation of the permit cap over time is important and difficult, and the rules for this need to be particularly clear. EIP suggested that at a minimum, the preamble language should include examples reflecting how the texts of proposed §§116.13, 116.711, and §116.716(d) interact.

As discussed elsewhere in this preamble, the commission has revised §116.716 so that references to like-kind and site-wide emission caps have been deleted. With this change, the rule does not differentiate between the type of units within an emission cap. Under adopted §116.716(f)(3), if a change or changes to facilities within an emission cap potentially constitute a major modification, all facilities within the cap will be evaluated for major NSR applicability. See also the discussion regarding how facilities that are subject to PSD or NNSR may be included in a cap in a flexible permit discussed earlier in this preamble.

TIP and TxOGA commented on proposed §116.716(e), which requires both long and short term emission limits in an emission cap. TIP and TxOGA stated that the commission should preserve the option for permit holders to establish annual emission caps, while retaining individual short term emission limits. TIP

and TxOGA explained that this approach allows a facility to be subject to a year-long rolling emission cap, while also being subject to a short term emission limit that is specific to the facility.

The commission has not changed the rule in response to this comment. Adopted §116.716(g), renumbered from §116.716(e), does not prohibit permit holders from using a short term facility-specific individual emission limit in combination with an annual emission cap.

TxOGA opposed the proposed rule requiring both long term and short term emission caps for a facility.

One aspect of the existing flexible permitting program that the EPA specifically identified as a concern was the lack of short term emission limitations for facilities under an emission cap. The commission attempted to address this in the proposed rule by stating that an emission cap must include long term and short term emission limits. However, the short term emission limitation may be in the form of a short term emission cap, or a short term individual emission limitation. No change was made in response to this comment.

Comments on §116.717

EIP commented that the proposed rule should clarify that a delay in the implementation of required emission controls is a relaxation of emission controls; EIP stated that the "alteration" language in proposed §116.717 might be read to imply that delays in required emission controls may be allowed by permit alteration.

The commission agrees with the commenter that a delay in the implementation of permit-required controls would generally be considered a relaxation of emission controls, and would therefore require a permit amendment, not an alteration. However, there may be other circumstances involving changes to the control schedule or other details relating to the required controls in which a permit alteration would be all that is required. The commission will maintain the proposed language to account for both possibilities.

TCC, TIP, and TxOGA commented on proposed §116.717, relating to the implementation schedule for controls. TCC stated that there are situations where the proposed rule would be problematic. TCC gave an example of a situation where a permit amendment for a phased construction project is issued, and the equipment is modified in sequential process and brought online in a phased manner over time. TCC and TIP stated that some project sequences may dictate that the under-controlled device come back online before the over-controlled device is brought back online. Therefore, TCC, TIP, and TxOGA stated that the implementation schedule must allow for phasing of emission controls.

If a minor project involves existing facilities, emission controls must be implemented such that modified facilities are not, on average, uncontrolled upon startup. It must be emphasized that the controls on modified facilities must always meet or exceed BACT, on average, and no backsliding of existing controls is authorized. If a project is subject to major NSR review, all new and modified facilities must have BACT or LAER, as applicable. The permit applicant should work with the permit engineer to develop permit conditions that allow the desired flexibility while meeting applicable requirements for controls. No change was made in response to these comments.

Comments on §116.718

EIP commented that proposed §116.718(b) attempts to rely on existing §116.12 and §116.121, but the relevant parts of those regulations are not SIP-approved. The EPA will have to rely on the SIP-approved version of these rules, which are not adequate for determining whether a major modification has occurred.

The commission has proposed some amendments to §116.12, and has proposed §116.121 be repealed and the text moved to a new §116.127. If the amendments are adopted by the commission, those sections will be presented to the EPA as revisions to the SIP. The commission respectfully disagrees that its rules are inadequate to determine whether a major modification has occurred. No change was made in response to this comment.

TIP and TxOGA stated that it is strongly opposed to the proposed revisions in §116.718(b). TIP and TxOGA stated that major NSR applicability principles are well established in rules and guidance, and the proposed special-purpose rules in this provision are at odds with those requirements. In particular, TIP and TxOGA referred to the language that stated that "... the potential to emit shall be considered as the proposed emissions cap unless a separate permit limit or physical constraint limits the facility's potential to emit...." TIP and TxOGA stated that this language was unclear and could be read to mean that each facility must have a physical constraint in order to avoid having a physical or operational change attributed to it with the potential to emit of one facility being set as the potential to emit of the entire emissions cap. TIP and TxOGA stated that the proposed language was inconsistent with the requirements and guidance related to physical or operational changes triggering major NSR.

Section 116.718(b) has been restructured from the proposed version to ensure clarity and readability. The commission respectfully disagrees with the assertion that this language is inconsistent with requirements and guidance to determine the applicability of major NSR. If there is not a permit limit or physical constraint limiting the potential to emit for a new or modified facility, it may emit as much as the cap allows. This is explained in the *Federal New Source Review Permits Applicability Determination* guidance document available on the TCEQ Air Permits Division web site, in which Example 3 states: "If the emission cap is increased, all the tanks under the cap are modified because they can all now emit up to ...the cap limit.., unless there are other operational limits in the permit conditions that would prevent them from emitting at that rate." The commission has added language to §116.718(b)(4) to clarify that, instead of potential to emit, an alternative method, if demonstrated, may be used to determine the emission cap.

EIP commented that the program fails to ensure that minor sources will not cause or contribute to a violation of NAAQS or increment in Texas or other states. EIP explained that proposed §116.718(c) lacks a requirement that minor sources demonstrate that they will not cause or contribute to a violation of NAAQS. EIP stated that proposed §116.718(c) only requires a source to submit its air quality analysis if off-site ambient concentrations may be greater than *de minimis.* EIP and Rep. Burnam commented that this proposed rule does not define *de minimis,* nor does Texas have a SIP-approved definition of *de minimis* for ozone, particulate matter less than 2.5 micrometers ($PM_{2.5}$), the new one-hour nitrogen dioxide (NO_2) primary NAAQS, or the new one-hour sulfur dioxide (SO_2) primary NAAQS. Rep. Burnam stated that the term *"de minimis"* is not an enforceable standard, and EIP stated that the proposed requirement is not enforceable as a practical matter.

The commission respectfully disagrees with the commenter's assertion that the rule does not ensure that minor sources will not cause or contribute to a violation of NAAQS. The flexible permit application requires, in §116.711(2)(J), an analysis demonstrating that there will be no interference with attainment of maintenance of the NAAQS. Further, the commission specifically proposed, and has adopted §116.718(c), which includes this type of analysis for the types of increases covered by this section. The review will also ensure that there is no violation of any control strategy to ensure that the permits will comply with the SIP and the requirements of the FCAA. The commission has revised the recordkeeping requirements to ensure that permit holders maintain records of any air quality analyses required by §116.718(c). Further, the term *"de minimis* impact" is defined in §101.1, and this definition is applicable to Chapter 116. The commission notes that the EPA has not established *de minimis* values for ozone, $PM_{2.5}$, the new one-hour NO_2 primary NAAQS, or the new one-hour SO_2 primary NAAQS.

EIP stated that proposed §116.718(c) should make an increase in off-site emission impacts, not an increase in facility emissions, the trigger for NAAQS impact modeling. EIP stated that especially for the new one-hour NO_2 standard, the locations within a site from which emissions originate can impact off-site NAAQS attainment, even in the absence of an overall increase in site criteria pollutant emissions.

The commission concurs with the comment that the specific location within a site from which emissions are released can influence off-site NAAQS attainment, even in cases where the overall site or cap emissions do not increase. However, it is not practical or economically reasonable to require a detailed impacts analysis for every change under a flexible permit. Using ambient impacts as the criteria or trigger for additional modeling would be substantially more complex than using an increase in emissions as the criteria. The commission has revised §116.718(c) to require that the permit holder must conduct an air quality analysis for any operational or physical change at facilities covered under a flexible permit, if the change may result in an increase in the emission rate from any facility under the flexible permit. This requirement would apply even if there are contemporaneous decreases in emissions at other facilities authorized by the flexible permit.

EIP commented that the proposed rules lack agency or public review for any analysis that an applicant believes shows impacts below the *de minimis* level. EIP commented that permit applicants' ambient impacts analysis routinely contain errors. EIP stated that without combined public and regulatory agency review, it will not be possible to determine if the applicant has validly concluded that sources will only cause *de minimis* ambient impacts.

The commission has revised the rule to specify that permit holders are required to maintain records of any air quality analyses required under §116.718(c). These records are to be made available upon request to the TCEQ or to any local air pollution control agency with jurisdiction. Upon request, the commission shall make any such records available to the public in a timely manner.

EIP commented that the variation or relocation of emissions under a flexible permit can result in sources creating or contributing to NAAQS or increment violations. EIP gave an example where emissions were increased at a source with a short stack located near the fenceline, and decreased at a source with a tall stack located farther from the fenceline. EIP noted that this could substantially change the impacts from the site, and could result in NAAQS or increment exceedances.

The commission acknowledges that the impacts of a source can vary dramatically depending on the location and characteristics of the emission point(s). However, the air quality analysis impacts review for a flexible permit should take into account any reasonable possibility that emissions from the sources under an emissions cap may vary from source to source. The impacts review is based on conservative assumptions that make it unlikely that the facility would interfere with the NAAQS or other standards or criteria. Further, §116.718(c) requires that the permit holder perform an air quality analysis in such a case and, depending on the results, maintain records of the analysis or submit it to the TCEQ for review. The commission has slightly revised §116.718(c) to clarify that the air quality analysis is required for any change that results in an emission increase at any existing facility, regardless of location. Finally, depending on the details, such a change could be considered a variation from a representation in a flexible permit application, requiring an alteration request be submitted to TCEQ and demonstration of compliance with §116.711.

Comments on §116.721

EIP commented on proposed §116.721(a), which defines "a significant increase in emissions" as a trigger for the requirement of a permit amendment. EIP stated that this phrase needs to be defined, or there needs to be a reference to a definition stated elsewhere. EIP also stated that the phrase should clearly refer to actual, as opposed to allowable, emissions. EIP commented that the trigger should specify that the determination of an emissions increase be a determination based on actual typical short term or typical annual emissions. EIP recommended that the phrase be restated as: "a significant increase in actual emissions under any typical short term or annual operating conditions."

The commission has not changed the rule in response to this comment. In §116.721(a), the phrase "a significant increase in emissions" means an increase that is not insignificant as determined under §116.718. Any increase that fails to meet the criteria of §116.718(a) or (b) is a significant emission increase. When determining whether an emission increase is significant or insignificant, the increased actual emissions are compared to the allowable emissions under the applicable emission cap or individual emission limitation. The commission declines to use the language suggested by the commenter because the existing terminology is well understood and sufficient.

EIP commented that the proposed rules suffer from persistent problems regarding permit alterations. EIP stated that proposed §116.740(a) does not require public notice and comment on flexible permit alterations. EIP stated that permit alterations have been widely abused by applicants seeking to make modifications, emissions increases, or removing previously enforceable important application representations. EIP stated that TCEQ has routinely allowed permit alterations when emissions increases are expected as long as emissions are not expected to exceed allowable limits. EIP also stated that TCEQ has routinely granted permit alterations when emissions could increase, on the theory that emissions will not, under all operating scenarios, increase. EIP stated that TCEQ has routinely allowed permit alterations that would never be allowed under federal rules or longstanding EPA policies. EIP stated that TCEQ allows permit alterations to remove existing operational restraints such as increasing hours of operation, removing throughput or heat input limitations, or increasing emissions so long as there is no increase in allowables.

EIP stated that for these reasons, the commenters oppose alterations to flexible permits when the alteration lacks public notice or opportunity for comment.

Section 116.721(b) requires a flexible permit alteration for any variation from a representation in a flexible permit application or a general or special provision of a flexible permit that does not require a flexible permit amendment. This requirement precludes the use of alterations for changes that would change the method of control or character of emissions, would relax emission controls, would add a new facility or facilities, would result in a significant increase in emissions, or would constitute a major modification as defined by §116.12. Note that in the case of flexible permits, it would be possible to make changes through alteration that may increase actual emissions as long as the change did not result in emissions greater than any emission cap or limit, did not involve construction of a new facility, did not involve a change in method of control, or a relaxation of control. With the exception of this, the commission respectfully disagrees with EIP's characterizations of past permit changes made through permit alteration, made without any specific supporting examples or data, as abuses of the rules or process. EIP's comments fail to acknowledge that the commission's minor NSR SIP-approved program is an allowable-based program.

The commission respectfully disagrees that the alteration rule in Subchapter B allows changes that would never be allowed under federal rules or longstanding EPA policies. This is because the EPA's rules prescribe requirements for major stationary sources and major modifications, for which the alteration rule does not violate. The EPA's very broad and general rules applicable to minor NSR do not prohibit the types of permit actions that are covered by the commission's alteration rule. Furthermore, the commission's alteration rule, §116.116(c), is an approved part of the Texas SIP. Finally, as discussed elsewhere in this preamble, the commission recently amended its public participation rules, and alterations for flexible permits or for permits issued under Chapter 116, Subchapter B are not subject to the public notice requirements in Chapter 39 of the commission's rules. No change was made in response to this comment.

EIP stated that the language of §116.721(c) plainly supports the EPA's concern that a flexible permit can allow changes to SIP permit terms such as limits on throughput and fuel type. Therefore, the proposed flexible permit program continues to fail to meet applicable requirements.

If a SIP permit contains conditions that restrict throughput or fuel type, those conditions would be carried through into the flexible permit if justified, and under §116.721(c), a permit amendment would be required to make a change that conflicts with an existing permit condition. No change was made in response to this comment.

Comments on §116.765

TIP and TxOGA expressed support for proposed §116.765, which provides a delayed effective date for the proposed rules; however, TIP and TxOGA recommended deleting the portion of the rule that would establish December 1, 2012 as an earlier effective date. TIP and TxOGA's recommended change would mean that the rules would only go into effect after final approval by the EPA.

The commission agrees with this comment and has revised the rule as suggested by the commenters to eliminate the alternate compliance date of December 1, 2012. Under the requirements of the FCAA, the EPA has 18 months from receipt of the SIP submittal to take final action on this rulemaking. Allowing the EPA its fully allotted time to act, including publication of its final rulemaking and effective date 30 - 60 days later would be close to December 1, 2012. Until the EPA acts, the rule provides that the current rules remain in effect. If the commission is successful of its challenge of the EPA's disapproval of the existing rules in Subchapter G and requests the EPA to re-review them, then the rules will be available for the EPA's review. If the EPA approves the rules, then the effective date will be timely for applicants to use these rules for permit actions.

SUBCHAPTER A. DEFINITIONS

30 TAC §116.13

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the Texas Water Code; §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.003, concerning Definitions; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue a permit by rule for types of facilities that will not significantly contribute air contaminants to the atmosphere; §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions; and §382.0514, concerning Sampling, Monitoring, and Certification.

This rulemaking implements THSC, §§382.002, 382.003, 382.011, 382.012, 382.051, 382.0513, and 382.0514.

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 December 17, 2010.

TRD-201007205
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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Proposal publication date: July 2, 2010
For further information, please call: (512) 239-2548

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SUBCHAPTER G. FLEXIBLE PERMITS

30 TAC §§116.710, 116.711, 116.715 - 116.718, 116.720, 116.721, 116.730, 116.740, 116.750, 116.765

STATUTORY AUTHORITY

The amendments and new rule are adopted under Texas Water Code, §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the Texas Water Code; §5.103, concerning Rules, §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and §7.101, concerning Violation, which provides that a person may not violate a statute or rule under the commission's jurisdiction; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendments are also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.003, concerning Definitions; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue a permit by rule for types of facilities that will not significantly contribute air contaminants to the atmosphere; §381.0511, concerning Permit Consolidation and Amendment; §382.0512, concerning Modification of Existing Facility, which restricts what the commission may consider in determining a facility modification; §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions; §382.0514, concerning Sampling, Monitoring, and Certification; §382.0515, concerning Application for Permit, §382.0517, concerning Determination of Administrative Completion of Application, §382.0518, concerning Preconstruction Permit, which authorizes the commission to require a permit before a facility is constructed or modified; §382.056, concerning Notice of Intent to Obtain Permit or Permit Review; Hearing; and §382.062, concerning Application, Permit, and Inspection Fees.

This rulemaking implements THSC, §§382.002, 382.003, 382.011, 382.012, 382.051, 381.0511, 382.0512; 382.0513, 382.0514, 382.0515, 382.0517, 382.0518, 382.056 and 382.062.

§116.710. Applicability.

(a) Flexible permit. A person may obtain a flexible permit which allows for physical or operational changes as provided by this subchapter as an alternative to obtaining a new source review permit under §116.110 of this title (relating to Applicability), or in lieu of amending an existing permit under §116.116 of this title (relating to Amendments and Alterations). A person may obtain a flexible permit under §116.711 of this title (relating to Flexible Permit Application) for a facility, group of facilities, or account before any actual work is begun, provided however:

(1) only one flexible permit may be issued for an account;

(2) modifications to existing facilities included in a flexible permit may be authorized by the amendment of an existing flexible permit;

(3) a new facility may be authorized by the amendment of a flexible permit;

(4) a flexible permit may not cover facilities at more than one account; and

(5) a flexible permit application, review, and issued permit used to authorize any facility, group of facilities, or any change to existing facilities at an account that constitutes a new major stationary source or major modification as defined by §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions), shall be completed in accordance with Subchapter B, Division 5 or 6 of this chapter (relating to Nonattainment Review Permits; and Prevention of Significant Deterioration Review, respectively), including retention of established limits where there has been no subsequent modification. No person shall use this subchapter to circumvent applicable requirements of Subchapter B, Division 5 or 6 of this chapter.

(b) Change in ownership. The new owner of a facility, group of facilities, or account shall comply with §116.110(e) of this title, provided however, that all facilities authorized by a flexible permit must change ownership at the same time and to the same person, or both the new owner and existing permit holder must obtain a permit alteration allocating the emission caps or individual emission limitation prior to the transfer of the permit by the commission. After the sale of a facility, or facilities, but prior to the transfer of a permit requiring a permit alteration, the original permit holder remains responsible for ensuring compliance with the existing flexible permit and all rules and regulations of the commission.

(c) Submittal under seal of Texas licensed professional engineer. All applications for a flexible permit or flexible permit amendment shall comply with §116.110(f) of this title.

(d) Responsibility for flexible permit application. The owner of the facility, group of facilities, or account or the operator of the facility, group of facilities, or account who is authorized to act for the owner is responsible for complying with this section, except as provided by subsection (b) of this section.

§116.711. Flexible Permit Application.

In order to be granted a flexible permit or flexible permit amendment, the owner or operator of the proposed facility shall submit a permit application which must include:

(1) a completed Form PI-1 General Application signed by an authorized representative of the applicant. All additional support information specified on the form must be provided before the application is complete;

(2) information which demonstrates that emissions from the facility, including any associated dockside vessel emissions, meet all of the following:

(A) Protection of public health and welfare.

(i) The emissions from the proposed facility, group of facilities, or account as determined under §116.716 of this title (relating to Emission Caps and Individual Emission Limitations), will comply with all applicable rules of the commission and with the intent of the TCAA, including protection of the health and physical property of the people.

(ii) In considering the issuance of a flexible permit for construction or modification of any facility, group of facilities, or account within 3,000 feet or less of an elementary, junior high/middle, or senior high school, the commission shall consider any possible adverse short-term or long-term side effects that an air contaminant or nuisance odor from the facility, group of facilities, or account may have on the individuals attending these school facilities.

(B) Measurement of emissions. The proposed facility, group of facilities, or account will have provisions for measuring the emission of air contaminants as determined by the executive director. This may include the installation of sampling ports on exhaust stacks and construction of sampling platforms in accordance with guidelines in the "Texas Natural Resource Conservation Commission Sampling Procedures Manual."

(C) Best available control technology (BACT).

(i) All facilities authorized by the flexible permit shall utilize BACT consistent with the following:

(I) All new facilities must utilize BACT.

(II) Existing facilities must utilize BACT with consideration given to the technical practicability and economic reasonableness of reducing or eliminating the emissions. Control technology that is more stringent than BACT may be used on certain facilities to provide the emission reductions necessary to comply with this requirement on a group of existing facilities, provided however, that the existing level of control may not be lessened for any facility from its current authorization.

(ii) For pollutants from new or modified facilities that constitute a new major stationary source or major modification as defined by §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions), control technology shall be demonstrated as required by §§116.150, 116.151, or 116.160 of this title (relating to New Major Source or Major Modification in Ozone Nonattainment Areas; New Major Source or Major Modification in Nonattainment Area Other Than Ozone; and Prevention of Significant Deterioration Requirements, respectively), as applicable, for each new or modified facility.

(iii) For new facilities and proposed affected sources (as defined in §116.15(1) of this title (relating to Section 112(g) Definitions)) subject to Subchapter E of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)), the use of BACT shall be demonstrated for the individual facility or affected source.

(D) New Source Performance Standards (NSPS). The emissions from each affected facility as defined in 40 Code of Federal Regulations (CFR), Part 60 will meet at least the requirements of any applicable NSPS as listed under Title 40 CFR Part 60, promulgated by the EPA under authority granted under the FCAA, §111, as amended.

(E) National Emission Standards for Hazardous Air Pollutants (NESHAPS). The emissions from each facility as defined in 40 CFR Part 61 will meet at least the requirements of any applicable NESHAPS, as listed under 40 CFR Part 61, promulgated by EPA under authority granted under the FCAA, §112, as amended.

(F) NESHAPS for source categories. The emissions from each affected facility shall meet at least the requirements of any applicable maximum achievable control technology (MACT) standard as listed under 40 CFR Part 63, promulgated by the EPA under FCAA, §112 or as listed under Chapter 113, Subchapter C of this title (relating to National Emissions Standards for Hazardous Air Pollutants for Source Categories (FCAA, §112, 40 CFR 63)).

(G) Performance demonstration. The proposed facility, group of facilities, or account will achieve the performance specified in the flexible permit application. The applicant may be required to submit additional engineering data after a flexible permit has been issued in order to demonstrate further that the proposed facility, group of facilities, or account will achieve the performance specified in the flexible permit. In addition, initial compliance testing with ongoing compliance determined through engineering calculations based on measured process variables, parametric or predictive monitoring, stack monitoring, or stack testing shall be required as specified in each flexible permit.

(H) Nonattainment review. If the proposed facility, group of facilities, or account is located in a nonattainment area, each facility shall comply with all applicable requirements concerning nonattainment review in this chapter. Prior to the application of this subchapter to a proposed facility, group of facilities, or account; or any change at an existing facility, group of facilities, or account; an analysis shall be made for the project to determine the applicability or nonapplicability of federal Nonattainment New Source Review requirements.

(I) Prevention of Significant Deterioration (PSD) review. If the proposed facility, group of facilities, or account is located in an attainment area, each facility shall comply with all applicable requirements in this chapter concerning PSD review. Prior to the application of this subchapter to a proposed facility, group of facilities, or account; or any change at an existing facility, group of facilities, or account; an analysis shall be made for the project to determine the applicability or nonapplicability of federal PSD review.

(J) Air dispersion modeling or ambient monitoring. Any permit application for a new flexible permit, or permit amendment to increase a flexible permit emission cap or individual emission limitation, shall include an air quality analysis to demonstrate that the proposed action will not interfere with attainment and maintenance of the National Ambient Air Quality Standards. Computerized air dispersion modeling and/or ambient monitoring may be required by the commission's Air Permits Division to determine the air quality impacts from the facility, group of facilities, or account. In conducting a review of a permit application for a shipbuilding or ship repair operation, the commission will not require and may not consider air dispersion modeling results predicting ambient concentrations of non-criteria air contaminants over coastal waters of the state. The commission shall determine compliance with non-criteria ambient air contaminant standards and guidelines at land-based off-property locations.

(K) Federal standards of review for constructed or reconstructed major sources of hazardous air pollutants. If the proposed source is an affected source (as defined in §116.15(1) of this title), it shall comply with all applicable requirements under Subchapter E of this chapter.

(L) Mass cap and trade allocations. If subject to Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program) the proposed facility, group of facilities, or account must obtain allocations to operate.

(M) Application content. In addition to other requirements of this chapter, the applicant shall:

(i) identify each air contaminant for which an emission cap is desired;

(ii) identify each facility to be included in the flexible permit;

(iii) identify each source of emissions to be included in the flexible permit and for each source of emissions identify the Emission Point Number (EPN) and the air contaminants emitted;

(iv) for each emission cap, identify all associated EPNs and facilities (including description, common name, and facility identification number) and provide emission rate calculations based on the expected maximum capacity and the proposed control technology;

(v) for each individual emission limitation, identify the EPN and provide emission rate calculations based on the expected maximum capacity and the proposed control technology;

(vi) include calculations used to determine the controlled emission rates from each facility performed in accordance with TCEQ Air Permits Division guidance; and

(vii) if the flexible permit application includes facilities currently authorized by a permit issued under Subchapter B of this chapter (relating to New Source Review Permits), the applicant shall identify any terms, conditions, and representations in the Subchapter B permit or permits which will be superseded by or incorporated into the flexible permit. The applicant shall include an analysis of how the conditions and control requirements of Subchapter B permits will be carried forward in the proposed flexible permit.

(N) Proposed control technology and compliance demonstration. The applicant shall specify the control technology proposed for each facility and demonstrate compliance with all emission caps at expected maximum production capacity.

§116.715. General and Special Conditions.

(a) Flexible permits may contain general and special conditions. The holders of flexible permits shall comply with any and all such conditions.

(b) A pollutant specific emission cap or individual emission limitations shall be established for each air contaminant for all facilities authorized by the flexible permit. A flexible permit may contain more than one emission cap for a specific air contaminant. The holder of a flexible permit shall comply with all flexible permit emission cap(s) and individual emission limitations. An exceedance of the flexible permit emission cap(s) or individual emission limitations is a violation of the permit.

(c) The following general conditions shall be applicable to every flexible permit.

(1) Applicability. This section does not apply to physical or operational changes allowed without an amendment under §116.721 of this title (relating to Amendments and Alterations).

(2) Construction progress. The permit holder shall report the start of construction, construction interruptions exceeding 45 days, and completion of construction to the appropriate regional office of the commission not later than 15 working days after occurrence of the event.

(3) Start-up notification.

(A) The permit holder shall notify the appropriate regional office of the commission and any local program having jurisdiction prior to the commencement of operations of the facilities authorized by the permit in such a manner that a representative of the commission may be present.

(B) The permit holder shall provide a separate notification for the commencement of operations for each unit of phased construction, which may involve a series of facilities commencing operations at different times.

(C) Prior to beginning operations of the facilities authorized by the permit, the permit holder shall identify to the Air Permits Division the source or sources of allowances to be utilized for compliance with Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program).

(4) Sampling requirements.

(A) If sampling is required, the flexible permit holder shall contact the commission's appropriate regional office prior to sampling to obtain the proper data forms and procedures.

(B) All sampling and testing procedures must be approved by the executive director and coordinated with the appropriate regional office of the commission.

(C) The flexible permit holder is also responsible for providing sampling facilities and conducting the sampling operations or contracting with an independent sampling consultant.

(5) Monitoring, Calculations, and Equivalency of Methods.

(A) Each flexible permit shall specify requirements for monitoring or demonstrating compliance with emission caps and individual emission limits in the flexible permit.

(B) Each flexible permit shall specify methods for calculating annual and short term emissions for each pollutant for a given type of facility.

(C) The flexible permit holder must demonstrate or otherwise justify the equivalency of emission control methods, sampling or other emission testing methods, and monitoring or calculation methods proposed as alternatives to methods indicated in the conditions of the flexible permit. Requests for alternative emission control, sampling, monitoring, or calculation methods must be submitted in writing for review and approval by the executive director prior to their use in fulfilling any requirements of the permit.

(6) Recordkeeping. The permit holder shall:

(A) maintain a copy of the flexible permit (and any permit applications associated with the flexible permit) along with information and data sufficient to demonstrate continuous compliance with the emission caps and individual emission limitations contained in the flexible permit. This information and data shall include, but is not limited to:

(i) emission cap and individual emission limitation calculations based on a 12-month rolling basis;

(ii) emission cap and individual emission limitation calculations corresponding to any short term emission limitation;

(iii) Production records and operating hours; and

(iv) Records of any air quality analysis required under §116.718(c) of this title (relating to Significant Emission Increase). These records shall be maintained for at least five years following the date that the analysis was performed.

(B) keep all required records in a file at the plant site. If, however, the facility site normally operates unattended, records must be maintained at an office within Texas having day-to-day operational control of the facility site;

(C) make the records available at the request of personnel from the commission or any local air pollution control agency having jurisdiction over the site, which, upon request, the commission shall make any such records of compliance available to the public in a timely manner;

(D) comply with any additional recordkeeping requirements specified in special conditions in the permit; and

(E) retain information in the file for at least five years following the date the information or data is obtained.

(7) Maximum allowable emission rates. A flexible permit covers only those sources of emissions and those air contaminants

listed in the table entitled "Emission Sources, Emissions Caps and Individual Emission Limitations" in the flexible permit. Each flexible permitted facility, group of facilities, or account is limited to the emission limits and other conditions specified in the table in the flexible permit.

(8) Representations. The representations with regard to construction plans and operation procedures in an application for a permit or permit amendment are the conditions upon which a flexible permit or permit amendment is issued. Noncompliance with these representations constitutes noncompliance with the permit.

(9) Emission cap readjustment. If a schedule to install additional controls is included in the flexible permit and a facility subject to such a schedule is taken out of service, the emission cap contained in the flexible permit will be readjusted for the period the facility is out of service to a level as if no schedule had been established. Unless a special condition specifies the method of readjustment of the emission cap, a permit alteration shall be obtained.

(10) Maintenance of emission control. Each facility, group of facilities, or account authorized by the flexible permit shall not be operated unless all air pollution emission capture and abatement equipment is maintained in good working order and operating properly during normal facility operations. Notification for emissions events and scheduled maintenance shall be made in accordance with §101.201 and §101.211 of this title (relating to Emissions Event Reporting and Recordkeeping Requirements; and Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements).

(11) Compliance with rules. Acceptance of a flexible permit by a permit applicant constitutes an acknowledgment and agreement that the holder will comply with all applicable Rules and Orders of the commission issued in conformity with the Texas Clean Air Act and the conditions precedent to the granting of the permit. If more than one state or federal rule or regulation or flexible permit condition are applicable, then the most stringent limit or condition shall govern and be the standard by which compliance shall be demonstrated. Acceptance of the permit includes consent to the entrance of commission employees and agents into the permitted premises at reasonable times to investigate conditions relating to the emission or concentration of air contaminants, including compliance with the flexible permit.

(12) Emissions Caps. The following requirements apply to facilities with emissions subject to emission caps.

(A) Recordkeeping and reporting.

(i) A semiannual report shall be submitted to the appropriate regional office within 30 days of the end of each reporting period that contains:

(I) the identification of the owner and operator and the permit number;

(II) total annual emissions (in tons per year) based on a 12-month rolling total for each month in the reporting period;

(III) the identification of any exceedances of a short-term emission cap during the reporting period;

(IV) any data relied upon, including, but not limited to, quality assurance or quality control data, in calculating the monthly and annual emission cap pollutant emissions, and short-term emission cap pollutant emissions, to the extent necessary to demonstrate compliance;

(V) a list of any facility modified as defined in §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions) during the preceding six-month period and the documentation required by §116.718(b) of this title;

(VI) the number, duration, and cause of any deviations or monitoring malfunctions (other than the time associated with zero and span calibration checks), and any corrective action taken. For facilities that are subject to the federal operating permits program in Chapter 122 of this title (relating to Federal Operating Permits Program) this may be satisfied by referencing the flexible permit number in the semiannual report for the site submitted under §122.145 of this title (relating to Reporting Terms and Conditions);

(VII) a notification of a shutdown of any monitoring system used in determining compliance with the emission cap or any individual emission limit of the permit, whether the shutdown was permanent or temporary, the reason for the shutdown, the anticipated date that the monitoring system will be fully operational or replaced with another monitoring system, whether the facility monitored by the monitoring system continued to operate, and the calculation of the emissions of the pollutant or the emissions determined by method included in the permit;

(VIII) the readjusted emission cap for each pollutant if a facility subject to an emission cap is shut down for a period longer than six months as required by §116.716(f)(1) of this title (relating to Emission Caps and Individual Emission Limitations); and

(IX) a signed statement by the owner or operator certifying the truth, accuracy, and completeness of the information provided in the report.

(ii) The reporting period for the semiannual report required under this section shall begin on the earliest date any facilities in an emission cap commence operation under the cap.

(iii) The owner or operator shall submit the results of any revalidation test or method to the executive director within three months after completion of such test or method.

(B) Absence of monitoring data. A facility owner or operator shall record and report maximum potential emissions without considering enforceable emission limitations or operational restrictions for a facility during any period of time that there is no monitoring data, unless another method for determining emissions during such periods is specified in the flexible permit special conditions.

(C) Revalidation. Any site generated test data used to determine the emission rates for facilities under the cap must be revalidated through performance testing or other scientifically valid means approved by the executive director. Such testing must occur at least once every five years after the facility has been added to an emission cap. Emission rate factors shall be adjusted through a permit alteration or amendment if the revalidation test results determine that the emission rate factor has increased.

(d) Each permit with emission caps must include special conditions that satisfy the following requirements for facilities subject to those caps. The permit shall specify which of the monitoring options under paragraph (2)(A) - (E) of this subsection, shall be used to determine compliance for facilities subject to monitoring under this subsection. These requirements do not apply to facilities that are not subject to an emission cap.

(1) The monitoring system must accurately determine all emissions of the pollutants in terms of mass per unit of time. Any monitoring system authorized for use in the permit must be based on sound science and meet generally acceptable scientific procedures for data quality and manipulation.

(2) The monitoring system must employ one or more of the general monitoring approaches meeting the minimum requirements as described in subparagraphs (A) - (D) of this paragraph.

(A) An owner or operator using mass balance calculations to monitor pollutant emissions from activities using coating or solvents shall meet the following requirements:

(i) provide a demonstrated means of validating the published content of the pollutant that is contained in, or created by, all materials used in or at the facility;

(ii) assume that the facility emits all of the pollutant that is contained in, or created by, any raw material or fuel used in or at the facility, if it cannot otherwise be accounted for in the process; and

(iii) where the vendor of a material or fuel that is used in or at the facility publishes a range of pollutant content from such material, the owner or operator shall use the highest value of the range to calculate the pollutant emissions unless the executive director determines that there is site-specific data or a site-specific monitoring program to support another content within the range.

(B) An owner or operator using a continuous emission monitoring system (CEMS) to monitor pollutant emissions shall meet the following requirements.

(i) The CEMS must comply with applicable performance specifications found in 40 Code of Federal Regulations Part 60, Appendix B.

(ii) The CEMS must sample, analyze, and record data at least every 15 minutes while the emissions unit is operating.

(C) An owner or operator using a continuous parameter monitoring system (CPMS) or a predictive emission monitoring system (PEMS) to monitor pollutant emissions shall meet the following requirements:

(i) The CPMS or the PEMS must be based on current site-specific data demonstrating a correlation between the monitored parameter(s) and the pollutant emissions across the range of operation of the facility; and

(ii) Each CPMS or PEMS must sample, analyze, and record data at least every 15 minutes or at another less frequent interval approved by the executive director, while the facility is operating.

(D) An owner or operator using emission factors to monitor pollutant emissions shall meet the following requirements:

(i) All emission factors must be adjusted as specified by the permit, if appropriate, to account for the degree of uncertainty or limitations in the factors' development;

(ii) The facility must operate within the designated range of use for the emission factor, if applicable; and

(iii) The owner or operator of a facility which emits or has the potential to emit the pollutant in an amount equal to or greater than the prevention of significant deterioration or nonattainment as applicable, significant level for that pollutant, provided in Table I of §116.12(18)(A) of this title for nonattainment pollutants and in 40 Code of Federal Regulations §51.166(b)(23) for those subject to prevention of significant deterioration review, and which relies on an emission factor to calculate pollutant emissions, shall conduct validation testing to determine a site-specific emission factor within six months of permit issuance or start of operation of the facility, whichever is later, unless the executive director determines that testing is not required.

(E) An alternative monitoring system must meet the requirements in paragraph (1) of this subsection and be approved by the executive director.

(3) Where an owner or operator of a facility cannot demonstrate a correlation between monitored parameter(s) and the pollutant emissions rate at all operating points of the facility, the executive director shall:

(A) establish default value(s) for determining compliance with the emission cap based on the highest potential emissions reasonably estimated at such operating point(s); or

(B) determine that operation of the facility during operating conditions when there is no correlation between monitored parameter(s) and the pollutant emissions is a violation of the emission cap.

(e) There may be additional special conditions included in a flexible permit upon issuance or amendment of the permit. Such conditions in a flexible permit may be more restrictive than the requirements of this title.

(f) The executive director may require as a special condition that the permit holder obtain written approval before constructing a source under a standard permit under Subchapter F of this chapter (relating to Standard Permits) or a permit by rule under Chapter 106 of this title. Such written approval may be required if the executive director specifically finds that an increase of a particular pollutant could either:

(1) result in a significant impact on the air environment, or

(2) cause the facility, group of facilities, or account to become subject to review under:

(A) Subchapter E of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)); or

(B) the provisions in Subchapter B, Divisions 5 and 6 of this chapter (relating to Nonattainment Review Permits; and Prevention of Significant Deterioration Review, respectively).

§116.716. Emission Caps and Individual Emission Limitations.

(a) Emission caps. To establish a cap for a pollutant, the executive director will develop an emission cap for:

(1) all facilities at an account; or

(2) a designated group of facilities at an account.

(b) Notwithstanding subsection (a) of this section, the executive director reserves the right to exclude any facility from an emissions cap if necessary to ensure compliance with the permit or to ensure the protection of human health and the environment.

(c) Emissions will be calculated for each facility within an emission cap as follows:

(1) Determination of control technology:

(A) if the permit is used to authorize any facility, group of facilities, or account, or any change to existing facilities, that constitutes a new major stationary source or major modification for the pollutant as defined by §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions), emissions shall be based on control technology determined in accordance with Subchapter B, Division 5 or 6 of this chapter (relating to Nonattainment Review Permits; and Prevention of Significant Deterioration Review, respectively) as applicable, at expected maximum capacity; or

(B) based on application of best available control technology as defined in §116.10 of this title (relating to General Definitions), at expected maximum capacity.

(2) pollutants emitted from facilities subject to lowest achievable emission rate review in accordance with Subchapter B, Division 5 of this chapter must be included in a separate emissions cap or listed as individual emission limitations.

(3) the calculated emissions for all facilities within an emission cap will be summed.

(4) a lower emission cap than that determined by paragraph (3) of this subsection may be proposed by the permit applicant if technical information is provided to demonstrate that it is feasible to operate in compliance with the proposed emission cap.

(d) Individual emission limitations. An individual emission limitation will be established in the same permit for each pollutant not included in an emission cap for facilities authorized by the flexible permit. In addition, an individual emission limitation may be established for a pollutant included in an emission cap when the expected capacity of a facility is less than the expected maximum capacity to prevent a facility from exceeding emission levels appropriate for the proposed controls.

(e) The permit shall clearly identify, by a table or other appropriate means, the facilities that are subject to an emission cap, and the facilities that are subject to individual emission limitations. A facility may be subject to both an emission cap and an individual emission limitation.

(f) Adjustment of emission cap. To ensure caps are practically enforceable, the executive director will use the following criteria and procedures for adjustment of a cap.

(1) If a facility subject to an emission cap is shut down for a period longer than six months, the emission cap shall be adjusted by lowering the emission cap by an amount that the shut down facility contributed to the original calculation of the emission cap. If a shut down facility is returned to operation, the emission cap shall be adjusted by increasing the emission cap by the amount that the facility contributed to the original calculation of the emission cap; however, the emission cap cannot be increased beyond the original emission cap amount.

(2) If a facility is to be added to the flexible permit, a permit amendment is required to establish a revised emission cap.

(3) If an existing emission cap is to be increased as a result of adding a new facility or the modification of a facility within the emission cap, an amendment application is required. In considering the application, the commission shall:

(A) Determine whether an increase in the emission cap constitutes a major modification for the pollutant as defined by §116.12 of this title. For purposes of this determination, all facilities under that cap shall be included in the evaluation; and

(B) for facilities that are not major modifications as determined by the analysis in paragraph (3)(A) of this subsection, increase the emission cap by the sum of the emissions from each of the new or modified facilities determined in accordance with subsection (c) of this section and decrease the emission cap by the sum of the previous emission cap contributions from the facilities to be modified.

(4) An emission cap will be adjusted downward for any facility, group of facilities, or account authorized by a flexible permit if that facility becomes subject to any new state or federal rule or regulation which would lower emissions or require an emission reduction. The adjustment will be made the next time the flexible permit is amended or altered. If an amendment to a flexible permit is not required to meet the new requirement, then within 60 days of making the change, the permittee must submit a request to alter the permit and include information describing how compliance with the new requirement will be demonstrated.

(g) Each emission cap or individual emission limitation shall specify an annual emission limitation in tons per year, based on a rolling 12-month period. Each emission cap or individual emission limitation shall also specify a practically enforceable short term emission limitation.

(h) When a cap is established or adjusted, major new source review requirements as referenced in §116.711(2)(H) or (I) of this title (relating to Flexible Permit Application) must be met for the new or modified sources prior to issuance, amendment, or alteration of the permit.

§116.718. Significant Emission Increase.

(a) An increase in emissions from operational or physical changes at an existing facility authorized by a flexible permit is insignificant, for the purposes of minor new source review under this subchapter, if the increase does not exceed either the emission cap or individual emission limitation. This section does not apply to an increase in emissions from a new facility nor to the emission of an air contaminant not previously emitted by an existing facility.

(b) For purposes of major new source review, determination of a significant increase in emissions that does not result in an increase to the emission cap includes evaluation of the following:

(1) An increase in emissions from operational or physical changes or series of related changes that would constitute a major modification as defined by §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions) must comply with Subchapter B, Division 5 or 6 of this chapter (relating to Nonattainment Review Permits; and Prevention of Significant Deterioration Review, respectively).

(2) Unless a plant-wide applicability limit has been established for the pollutant under Subchapter C of this chapter (relating to Plant-wide Applicability Limits), the permit holder shall document that the change is not a major modification as defined in §116.12 of this title, and maintain the documentation required by Subchapter B, Division 1 of this chapter (relating to New Source Review Permits) concerning actual to projected actual emission increases.

(3) When determining whether a change is a major modification as defined in §116.12 of this title, the project emissions increase and the project net shall be determined as specified as defined in §116.12 of this title, regardless of how the existing facilities are authorized.

(4) For new facilities, or modified facilities under an emission cap for the pollutant where the permit holder elects to use potential to emit rather than projected actual emissions from the facility to determine the project emissions increase, the potential to emit shall be considered as the proposed emissions cap unless an alternate method is demonstrated.

(5) A separate permit limit or physical constraint may be established to limit the facility's potential to emit for facilities that are under a cap or have individual emission limits.

(6) If the project emission increase is such that a *de minimis* threshold test (netting) is required for a pollutant, the analysis shall be submitted to the commission for review and approval prior to making the change. If netting is not required, the information shall be submitted with the next permit amendment or renewal application.

(c) The permit holder shall complete an air quality analysis to demonstrate that the proposed action will not interfere with attainment and maintenance of the National Ambient Air Quality Standards if there may be an increase in emissions from operational or physical changes at any existing facility, group of facilities, or account authorized by a flexible permit and the area is not designated as nonattainment for the pollutant. If the emission increase may result in ambient concentrations greater than *de minimis* for that pollutant, the air quality analysis shall be submitted to the executive director for review and approval prior to making the change.

§116.765. Compliance Schedule.

(a) Any application for a permit or permit amendment under this subchapter submitted on or after the compliance date specified by subsection (b) of this section shall comply with the amendments to §§116.710, 116.711, 116.715 - 116.718, 116.720, 116.721, 116.730, 116.740 and 116.750 of this title (relating to Applicability, Flexible Permit Application, General and Special Conditions, Emission Caps and Individual Emission Limitations, Implementation Schedule for Additional Controls, Significant Emission Increase, Limitation on Physical and Operational Changes, Amendments and Alterations, Compliance History, Public Notice and Comment, and Flexible Permit Fee; respectively) adopted by the commission on December 14, 2010.

(b) The compliance date is 60 days after publication in the *Federal Register* of the final approval by the United States Environmental Protection Agency of these sections as revisions to the Texas State Implementation Plan.

(c) Until the compliance date specified by subsection (b) of this section, applications for flexible permits are governed by §§116.710, 116.711, 116.715 - 116.718, 116.720, 116.721, 116.730, 116.740 and 116.750 of this title, as they existed immediately before January 5, 2011, and those rules are continued in effect for that purpose. All other sections in this subchapter remain applicable to applications for flexible 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 December 17, 2010.

TRD-201007206
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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CHAPTER 291. UTILITY REGULATIONS
SUBCHAPTER H. UTILITY SUBMETERING AND ALLOCATION

30 TAC §291.126

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the repeal of §291.126 *without changes* as published in the September 10, 2010, issue of the *Texas Register* (35 TexReg 8299).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

In September 1987, the submetering program was transferred by the legislature from the Public Utility Commission (PUC) to the Texas Water Commission, a predecessor agency of the TCEQ. While at the PUC, the submetering program adopted rules to allow an owner to disconnect a tenant's water utility service for non-payment to conform to other PUC rules. When the submetering program was transferred, the Texas Water Commission adopted rules similar to the PUC's, including the provision allowing an owner to disconnect a tenant's water utility service for non-payment. The TCEQ's current rules still contain this provision in Chapter 291, Subchapter H, Utility Submetering and Allocation, §291.126, Discontinuation of Service.

In 1995, the 74th Legislature amended Texas Property Code, §92.008, by passing House Bill (HB) 2803. In 2009, Texas Property Code, §92.008 was amended again when the 81st Legislature passed HB 882. Currently, Texas Property Code, §92.008(b) states that a landlord may not interrupt or cause interruption of water, wastewater, gas, or electric service furnished to a tenant by the landlord as an incident of tenancy or by other agreement unless the interruption results from bona fide repairs, construction, or an emergency. Non-payment is not a reason for interruption of service under Texas Property Code, §92.008. Therefore, the commission proposes this rulemaking to ensure that the commission's rules conform with the Texas Property Code.

SECTION DISCUSSION

The commission adopts the repeal to §291.126. Section 291.126 provided that a tenant's water utility service may be disconnected if payment was not received by the due date, and the owner issues a disconnection notice after the due date at least ten days prior to a stated date of disconnection. Texas Property Code, §92.008(b), does not allow a landlord to interrupt water services furnished to a tenant by the landlord as an incident of tenancy or by other agreement unless the interruption results from bona fide repairs, construction, or emergency. Until now, the commission held that its rule did not conflict with the Texas Property Code. However, recent legal analysis by the commission has resulted in the determination that the rule is not consistent with the statute. Specifically, since Texas Property Code, §92.008, only allows for the disconnection of water services that are provided to a tenant by the landlord as an incident of tenancy or by other agreement for the three previous reasons listed, the commission's rule that allows for disconnection due to non-payment was in conflict with this section. To ensure that the commission's rules and the Texas Property Code conform, the commission adopts this repeal.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the Texas Administrative Procedure Act. A "major environmental rule" is a rule that is specifically intended to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

This rulemaking does not meet the statutory definition of a "major environmental rule" because it is not the specific intent of the rule repeal to protect the environment or reduce risks to hu-

man health from environmental exposure. The specific intent of the adopted rulemaking is to ensure that the TCEQ rule on disconnection of submetered water utilities conforms with the Texas Property Code on disconnection. Section 291.126 allowed an owner to disconnect submetered or allocated water utility service for non-payment of that service. Texas Property Code, §92.008(b), states that a landlord may not interrupt water service furnished to a tenant by the landlord as an incident of tenancy or by other agreement unless the interruption results from bona fide repairs, construction, or an emergency. Non-payment is not a reason for interruption of service under this statute.

Further, the rulemaking does not meet the statutory definition of a "major environmental rule" because the adopted rule repeal will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The cost of complying with the adopted repeal is not expected to be significant with respect to the economy.

Furthermore, the adopted rulemaking is not subject to Texas Government Code, §2001.0225 because it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). There are no federal standards governing submetering in the State of Texas. Second, the adopted rulemaking does not exceed an express requirement of state law. Third, the adopted rulemaking does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. Finally, the rulemaking is adopted pursuant to the commission's specific authority in Texas Water Code, Chapter 13, Subchapter M. Therefore, the repeal is not adopted solely under the commission's general powers.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. The commission did not receive any comments regarding the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted repeal of §291.126 and performed an assessment of whether the adopted repeal constituted a taking under Texas Government Code, Chapter 2007. The primary purpose of the adopted rulemaking is to ensure that TCEQ rules conform with the Texas Property Code. The adopted rule repeal substantially advances this purpose by repealing §291.126 to accomplish this conformity.

Promulgation and enforcement of this adopted rule repeal would be neither a statutory nor a constitutional taking of private real property. The adopted repeal does not affect a landowner's rights in private real property because this rulemaking does not relate to or have any impact on an owner's rights to property. The adopted rule repeal will primarily affect those owners who have tenants with submetered or allocated water utility service; this would not be an effect on real property. Therefore, the adopted rulemaking would not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted repeal and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted repeal is not subject to the Texas Coastal Management Program.

The commission invited public comment regarding consistency with the coastal management program during the public comment period. The commission did not receive any comments regarding the consistency with the coastal management program.

PUBLIC COMMENT

The commission held a public hearing for this rule on October 5, 2010 in Austin, Texas. At the hearing, the commission received a comment from the Texas Apartment Association. The comment period closed on October 11, 2010. The commission received no written comments.

RESPONSE TO COMMENT

The Texas Apartment Association commented that they support the rule.

The commission acknowledges the comment in support of the rule.

STATUTORY AUTHORITY

The repeal is adopted under Texas Water Code (TWC), §5.102, which provides the commission the general powers to carry out its duties under the TWC; and §5.103, which provides the commission with the authority to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state. Additionally, TWC, §13.503 states that the commission shall adopt rules and standards under which owners of properties that are not individually metered for water may install submetering equipment for each rental or dwelling unit for the purpose of fairly allocating the cost of each individual rental or dwelling unit's water consumption. Therefore, the TWC authorizes rulemaking that repeals §291.126, which allows an owner to disconnect submetered or allocated water utility service for non-payment of that service.

The adopted repeal implements TWC, §13.503.

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.

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Robert Martinez
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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 1. ORGANIZATION AND ADMINISTRATION

SUBCHAPTER X. TECHNOLOGY POLICY

37 TAC §1.291

The Texas Department of Public Safety (the department) adopts new §1.291, concerning Technology Policy, without changes to the proposed text as published in the November 5, 2010, issue of the *Texas Register* (35 TexReg 9860).

This new section is necessary to implement Texas Government Code, §411.0043, which requires the department to have a technology policy and utilize appropriate technological solutions to improve the department's ability to perform its functions.

No comments were received regarding the adoption of this new section.

The new section 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 Government Code, §411.0043 which authorizes the commission to implement a policy requiring the department to use appropriate technological solutions to improve the department's ability to perform its functions.

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.

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CHAPTER 6. LICENSE TO CARRY HANDGUNS

SUBCHAPTER B. ELIGIBILITY AND APPLICATION PROCEDURES

37 TAC §6.11, §6.12

The Texas Department of Public Safety (the department) adopts amendments to §6.11 and §6.12, concerning Eligibility and Application Procedures, without changes to the proposed text as published in the November 5, 2010, issue of the *Texas Register* (35 TexReg 9860).

The amendments to §6.11 are necessary to provide consistency with changes made by 81st Legislature, 2009 to Texas Government Code, §411.177(a) which removed references to the proficiency certificate requirement. In addition, amendments clarify that the department will establish by policy the required method and form of proof of proficiency.

The amendments to §6.12 are intended to articulate the department's policy of automating the application process to include: encouraging online application, requiring submission of fingerprints in an electronic format, and adopting the use of photographs through the department's driver license system or other electronic means.

No comments were received regarding the adoption of these 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; Texas Government Code, §411.174(a)(1), which authorizes the department to determine the form in which applications are submitted; and Texas Government Code, §411.197, which authorizes the department to adopt rules to administer Texas Government Code, Subchapter H, relating to License to Carry a Concealed Handgun.

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.

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SUBCHAPTER G. CERTIFIED HANDGUN INSTRUCTORS

37 TAC §§6.71 - 6.73, 6.78, 6.83, 6.84, 6.87

The Texas Department of Public Safety (the department) adopts amendments to §§6.71 - 6.73, 6.78, 6.83, 6.84, and 6.87, concerning Certified Handgun Instructors, without changes to the proposed text as published in the November 5, 2010, issue of the *Texas Register* (35 TexReg 9863).

The amendments to §§6.71, 6.72, and 6.78 are necessary to implement the requirement that concealed handgun license instructor's training be offered through an online format for the initial renewal and on alternate subsequent renewals as required by Texas Government Code, §411.190.

The amendments to §6.73 are necessary to delete the requirement that any non-semi-automatic weapon used to qualify be at least .38 caliber, and to clarify that the prohibition against optical enhancers is applicable to all applicants for concealed handgun licenses, and not only applicants for instructor certifications.

The amendments to §6.83 are necessary to delete the current rule-based requirement of range certification. The certification requirement is without specific statutory authority. Moreover, there are no statutory standards for range safety, nor any statutory basis for establishing such standards. "Certifying" the range facilities creates unsupported expectations of public safety and exposes the department to potential liability for range accidents. It also appears to create a license without statutory authority and without statutory guidance regarding eligibility or disciplinary action.

The amendments to §6.84 provide consistency with the adopted amendments to §6.83. As such, the amendments to §6.84 are adopted in a manner consistent with the adopted amendments to §6.83, by deleting the references to "range number," and adding the requirement that the range be identified by name.

The amendments to §6.87 are necessary to provide consistency with changes made by the 81st Legislature, 2009 to Texas Government Code, §411.177(a) which removed references to proficiency certificate requirements.

No comments were received regarding the adoption of these 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 Government Code, §411.197, which authorizes the department to adopt rules to administer Texas Government Code, Subchapter H, relating to License to Carry a Concealed Handgun.

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.

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37 TAC §6.89

The Texas Department of Public Safety (the department) adopts the repeal of §6.89, concerning Proficiency Certificates, without changes to the proposal as published in the November 5, 2010, issue of the *Texas Register* (35 TexReg 9865).

The repeal of §6.89 is necessary to provide consistency with changes made by the 81st Legislature, 2009 to Texas Government Code, §411.177(a) which removed references to proficiency certificate requirements.

No comments were received regarding the repeal of this section.

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 Government Code, §411.197, which authorizes the department to adopt rules to administer Texas Government Code, Subchapter H, relating to License to Carry a Concealed Handgun.

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.

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CHAPTER 28. DNA, CODIS, FORENSIC ANALYSIS, AND CRIME LABORATORIES
SUBCHAPTER L. MISCELLANEOUS

37 TAC §28.191

The Texas Department of Public Safety (the department) adopts new §28.191, concerning Sexual Assault Evidence in Cases Without Law Enforcement Reporting, without changes to the proposed text as published in the November 5, 2010, issue of the *Texas Register* (35 TexReg 9865).

This section is adopted pursuant to 81st Legislature, 2009, House Bill 2626, which added Code of Criminal Procedure, Article 56.065 titled "Medical Examination For Sexual Assault Victim Who Has Not Reported Assault; Costs." This new article requires the department to pay appropriate fees for the forensic portion of the medical examination and for the evidence collection kit in specified circumstances, in addition to authorizing the department to develop procedures regarding the submission, transfer, and preservation of evidence collected under the article.

No comments were received regarding the adoption of this section.

The new section 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 Code of Criminal Procedure, Article 56.065(i), which provides that the department shall adopt rules as necessary to implement this article.

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.

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CHAPTER 37. SEX OFFENDER REGISTRATION

37 TAC §37.1, §37.2

The Texas Department of Public Safety (the department) adopts new §37.1 and §37.2, concerning Sex Offender Registration,

without changes to the proposed text as published in the November 5, 2010, issue of the *Texas Register* (35 TexReg 9866).

The sections are necessary to clarify the method by which a social networking site may request and receive online identifiers maintained by the department that relate to a person required to register as a sex offender under Code of Criminal Procedure, Chapter 62.

No comments were received regarding the adoption of these sections.

The new sections 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; Code of Criminal Procedure, Article 62.0061(b), which authorizes the department to establish a procedure through which a commercial social networking site may request online identifiers; and Code of Criminal Procedure, Article 62.010, which authorizes the department to adopt any rule necessary to implement Code of Criminal Procedure, Chapter 62.

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.

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 1. MANAGEMENT

SUBCHAPTER C. OTHER ENTITIES' INTERNAL ETHICS AND COMPLIANCE PROCEDURES

43 TAC §1.8, §1.9

The Texas Department of Transportation (department) adopts the repeal of §1.8, Internal Ethics and Compliance Program, and §1.9, Effect of Contractor's Internal Ethics and Compliance Program, concerning other entities' internal ethics and compliance procedures. The repeal of §1.8 and §1.9 are adopted in association with the adoption of 43 TAC Chapter 9, new Subchapter G and 43 TAC new Chapter 10. The repeal of §1.8 and §1.9 are adopted without changes to the proposal as published in the September 10, 2010, issue of the *Texas Register* (35 TexReg 8302) and will not be republished.

EXPLANATION OF ADOPTED REPEALS

Title 43, Texas Administrative Code (43 TAC), §1.8, Internal Ethics and Compliance Program, and §1.9, Effect of Contractor's Internal Ethics and Compliance Program, became effective February 19, 2009. Section 1.8 establishes, for an entity that is required by Texas Transportation Commission (commission) rule to have an internal ethics and compliance program, the minimum requirements of such a program, and requires the entity to certify that it has adopted and enforces compliance with the program. Section 1.9 provides that a contractor's adoption and enforcement of compliance with an internal ethics and compliance program that meets the requirements of §1.8 may be considered in determining a sanction that may be imposed on the contractor.

The substance of §1.8 is transferred to 43 TAC §9.106, which is applicable to entities participating in highway improvement contracts, and new 43 TAC §10.51, which is applicable to other entities doing business with the department, in separate rules that are being adopted by the commission.

The substance of §1.9 is integrated into 43 TAC Chapter 9, Contract and Grant Management, and new Chapter 10, Ethical Conduct by Entities Doing Business with the Department. Under §9.110, before imposing a sanction against a contractor, the executive director will consider whether the contractor has adopted a compliance program that satisfies §9.106, and if so, whether the program is being enforced. Under new §10.154, before imposing a score reduction on an individual or entity that provides engineering, architectural, or surveying services, the executive director will consider, as a mitigating factor, the adoption and enforcement of an internal ethics and compliance program that satisfies the requirements of new §10.51. Finally, under §10.254 the executive director will consider the adoption and enforcement of an internal ethics and compliance program that satisfies the requirements of §10.51 as a mitigating factor before imposing a sanction on a person doing business with the department other than a person that provides engineering, architectural, or surveying services.

COMMENTS

No comments on the proposed repeals were received.

STATUTORY AUTHORITY

The repeals are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

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.

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Bob Jackson
General Counsel
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For further information, please call: (512) 463-8683

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CHAPTER 9. CONTRACT AND GRANT MANAGEMENT

SUBCHAPTER G. HIGHWAY IMPROVEMENT CONTRACT SANCTIONS

The Texas Department of Transportation (department) adopts the repeal of §§9.100 - 9.117 and simultaneous new §§9.101 - 9.115, Subchapter G, Highway Improvement Contract Sanctions. These repeals and new sections are adopted in association with new 43 TAC Chapter 10, Ethical Conduct by Entities Doing Business with the Department. The repeal of §§9.100 - 9.117 and simultaneous new §§9.101 - 9.107, 9.109, 9.111, 9.113 and 9.114 are adopted without changes to the proposed text as published in the September 10, 2010, issue of the *Texas Register* (35 TexReg 8303) and will not be republished. New §§9.108, 9.110, 9.112, and 9.115 are adopted with changes to the proposed text as published in the September 10, 2010, issue of the *Texas Register* (35 TexReg 8303).

EXPLANATION OF ADOPTED REPEALS AND NEW SECTIONS

In its effort to emphasize transparency, accountability, and high ethical standards, the department is restructuring its sanction process for violations by highway improvement contractors. This action is taken in conjunction with the proposal of new 43 TAC Chapter 10. To streamline this process the department is repealing the rules relating to the existing sanction process and simultaneously proposing new sections.

The new rules set forth ethical and other requirements that, if violated, may lead to sanctions. The sanction process is changed to be consistent with other department sanctioning processes. Additionally, the new rules create a fair process with more notice of what is considered a violation that could lead to sanction and more opportunity for appeal of a sanction than is provided under the current process.

New §9.101, Purpose and Application of Subchapter, sets forth the purpose of the subchapter, which is to ensure that only responsible contractors are eligible to bid on, enter, and subcontract under highway improvement contracts and that those contracts are fully performed in an efficient and timely manner. The language of existing §9.100 is maintained, as the underlying purpose of protecting the health, welfare, and safety of the traveling public and the state's substantial investment in its system of state highways is unchanged. The new rules further this purpose by improving the sanction process to allow for more notice and opportunity for appeal. Added language stating that the sanctions provided by this subchapter are in addition to other actions and remedies available to the department gives notice that the department is not forfeiting any options legally available.

New §9.102, Definitions, maintains some definitions, alters some definitions, removes some definitions, and adds other definitions to those in current §9.101 in order to correlate with the revised sanction process. The definitions of "commission" and "highway improvement contract" are incorporated without change from existing §9.101. The definitions of "affiliated entity," "assistant executive director," "department," and "reprimand" are added. The definition of "bidding capacity" in current §9.101 is removed because it is no longer relevant to the revised sanction process. The definitions of "contractor," "debarment," "executive director," "sanction," and "suspension" are revised from current §9.101. The definition of "internal compliance process" in current §9.101 is removed from the definitions section, revised, and added to new §9.106, Compliance Program, to give emphasis to its substantive requirements.

New §9.103, Notification of Rules, is incorporated without change from current §9.103.

New §9.104, Delivery of Written Notice or Requests to the Department, clarifies proper methods of delivery of written notices, disclosures, or requests to the department, which are by mail and hand delivery. This ensures timely receipt of written communications to the department.

New §9.105, Act of Individual or Entity Imputed to Contractor, incorporates language from existing §9.106, Responsibility for Acts of Others, but limits when the acts of those acting on behalf of a contractor may be imputed to the contractor. Only conduct of an individual or entity acting on behalf of a contractor that seriously and directly affects the contractor's responsibility to the department may be imputed to the contractor. The purpose of this section is to give notice that a contractor may be sanctioned for acts of those acting on behalf of the contractor, but only in situations where those acts seriously and directly affect the contractor's responsibility to the department.

New §9.106, Compliance Program, incorporates, with changes, the requirements of existing Subchapter G. In the interest of consistency of what is considered an acceptable compliance program to the department, the language of new 43 TAC §10.51, Internal Ethics and Compliance Program, is incorporated into new §9.106.

New §9.107, Grounds for Sanction, provides the grounds for which sanctions may be imposed under the subchapter. New §9.107(1), relating to failure to execute a highway improvement contract after a bid is awarded, and new §9.107(2), relating to rejection by the Texas Transportation Commission (commission) of two or more bids due to bidder error, incorporate the language from existing §9.102(4) and (5), respectively, without change. New §9.107(3) is based on existing §9.102(7) but clarifies that a sanction may be based on the department's declaring a contractor in default on a highway improvement contract, rather than on the contractor's declaration of default.

New §9.107(4) states that sanctions may be imposed for violation of new 43 TAC §10.101, relating to required conduct by entities doing business with the department. New §10.101, concurrently adopted with these rules, sets forth ethical requirements that apply to all entities doing business with the department. The inclusion of violation of this ground for sanction is in line with the department's emphasis on ethical behavior and responsible business conduct.

New §9.108, Procedure, details the method by which sanctions will be imposed. The executive director may impose a sanction on a contractor if a ground for a sanction exists and will impose sanctions in accordance with §9.111(c). Section 9.108(a) and (b) limit the executive director's discretion on when and how to impose a sanction and give notice to contractors of the same. The citation to §9.112(g) is changed from the proposed version of the rule to correctly reference subsection §9.112(f). Section 9.108(c) incorporates the substantive content of existing §9.111, Contractual Obligations Unaffected, and specifies that the imposition of a sanction on a contractor does not affect the contractor's obligations under an agreement with the department or limit the department's remedies under the agreement. This preserves the integrity of contractual agreements with the department. Finally, §9.108(d) states that the executive director, concurrent with the delivery of the notice of a sanction other than a reprimand, may

suspend a contractor without a prior hearing. This incorporates the substantive content of existing §9.110, Suspension. Suspension may be used to protect department resources from being irresponsibly allocated before a sanction is finally imposed. In order to ensure that a suspension is not unnecessarily imposed, the executive director will consider all relevant circumstances before imposing a suspension, including the severity and willfulness of the conduct, the likelihood of immediate harm to the public, and whether there has been a pattern of inappropriate conduct.

New §9.109, Notice of Sanction, describes the contents of the notice that will be sent to a contractor receiving a sanction. New §9.109 incorporates, with changes, language from existing §9.109. To ensure timely notification, the department will notify the contractor by certified mail within five working days after the date of the executive director's decision to issue a sanction. The notice will state the sanction and the period of the sanction, summarize the facts and circumstances underlying the sanction, explain how the sanction was selected, inform the contractor of the imposition of a suspension if applicable, and finally state that the contractor may appeal the sanction. In the interest of transparency, it is the department's intent for a sanctioned contractor to have full knowledge of the basis of the sanction and how the sanction was decided.

New §9.110, Available Sanctions, describes the sanctions available to the department and also identifies factors that will be considered in imposing the sanction. Available sanctions, in order of increasing severity, are a reprimand, prohibition from participating in a specified agreement, a limit on the contract amount or amount of funds that may be awarded or paid to the contractor, or debarment of the contractor for a period of not more than 36 months. The range of sanctions available allows the department to appropriately address various levels of violations. New §9.110, incorporates, with changes, language from existing §9.104, Referral to Executive Director, and from existing §9.105, Determinations Related to Sanctions, which both discuss factors that will be considered in issuing the sanction. New §9.110 states that factors that will be considered include the seriousness and willfulness of the act or omission, whether and when the contractor has committed similar acts or omissions, whether the department has been fully compensated for any damages, and mitigating factors including the contractor's adoption and enforcement of an internal ethics and compliance program, the contractor's cooperation with the department in the investigation of ethical violations, and the contractor's disassociation from individuals and firms that have been involved in the ethical violation. Allowing the department to consider a range of factors ensures that all aspects of a particular situation can be assessed in assigning a sanction to a violation.

New §9.111, Application of Sanction, sets forth guidelines for application of a sanction by assigning, for specific violations, the sanctions available to the executive director and taking into consideration the factors described in §9.110(b). New §9.111 replaces existing §9.107, Sanction Levels, and §9.108, Application of Sanctions, in describing how the executive director will select and apply a sanction. The guidelines are set forth in a chart format that ties specific sanctions to specific violations based on varying factors. The chart is designed to show the most severe sanction allowable for a specific violation. The executive director may assign a lesser sanction than recommended for a specific violation, but may not assign a more severe sanction than recommended.

New §9.112, Appeal of Sanction, describes the procedure for appeal of a sanction other than a reprimand. A sanction may be appealed to the executive director for an informal hearing. This provision incorporates the informal hearing described in existing §9.112, Opportunity for Informal Hearing. The informal hearing option allows the contractor the opportunity to appeal a sanction in an informal setting that requires minimal time and resource investment. If the contractor is unsatisfied with the decision of the executive director, the contractor may pursue a contested case hearing in the State Office of Administrative Hearings (SOAH). This provision incorporates the formal hearing described in existing §9.114, Opportunity for Formal Hearing. The contested case hearing option offers the contractor a judicial proceeding through which it may present evidence and offer testimony in support of its appeal. Following the contested case hearing, the administrative law judge's proposal for decision is presented to the commission at a regularly scheduled open meeting for a determination based on the proposal for decision. The commission may consider oral presentations. The commission's determination on the proposal for decision will be adopted by minute order. The executive director will issue a final order on the sanction based on the commission's determination, or if an appeal to SOAH is not requested, the determination of the informal hearing. This multi-step process for appeal ensures due process in the application of a sanction and allows a contractor the opportunity to appeal a sanction to a party not involved in the decision to sanction.

Section 9.112(e) also specifies that a reprimand may be appealed by delivering to the executive director a written notice of appeal and written documentation disputing the reprimand. The executive director will make the determination on an appeal and issue a final order. Because a letter of reprimand is the least severe sanction and has minimal implications for a contractor, a more limited opportunity to appeal is appropriate.

Finally, §9.112 states that a sanction is automatically stayed from the date that the department receives the notice of appeal until a final order is entered by the executive director. This provision incorporates the substantive content of existing §9.115, Stay of Sanctions. On entry of a final order by the executive director imposing the sanction, the full term of the sanction will be imposed on the date of the final order unless the executive director expressly orders that a lesser sanction be imposed. Staying a sanction during the pendency of an appeal makes certain that a sanction is not unjustly imposed in a situation in which an appeal results in a reversal of a sanction. The automatic stay provided in §9.112(f) does not apply to a suspension or a reprimand.

An order of the executive director under §9.112 is final and not subject to judicial review, unless otherwise provided by law.

New §9.113, Indirect Sanction on an Affiliated Entity, incorporates, with changes, language from existing §9.113, Informal Hearing on Indirect Sanction. The section states that a sanction imposed on a contractor under this subchapter will also be imposed as an indirect sanction on an affiliated entity of the contractor. The affiliated entity will receive notice that states the sanction, summarizes the underlying facts and circumstances, explains how the sanction was selected, informs the affiliated entity of the imposition of a suspension if applicable, and states that the entity may appeal the indirect sanction. The process for an informal hearing before the executive director is incorporated without substantive change from existing §9.113. However, new §9.113 adds the opportunity for an entity to request a hearing before the commission at a regularly scheduled open meeting. The

commission may consider oral presentations and written documents presented by the department and interested parties. The chair will set the hearing and the amount of time allowed for presentation. The commission's determination of the appeal will be adopted by minute order, and the executive director will issue a final order on the indirect sanction based on the commission's determination. The opportunity for an appeal to the commission increases due process in the application of a sanction to an affiliated entity, and ensures that the entity is given adequate recourse to refute its status as an affiliated entity.

New §9.114, Lessening or Removal of Sanction, incorporates, with changes, language from existing §9.117. The new section allows a contractor or affiliated entity to request that the executive director reduce or remove a sanction once in a 12-month period. This provision ensures that the executive director will have the ability to lessen or remove a sanction if the circumstances underlying the sanction change and promotes a continuing effort by a sanctioned contractor to address the issues that led to the sanction in the effort to have the sanction lessened or removed.

New §9.115, List of Debarred or Suspended Contractors, incorporates, with changes, language from existing §9.116. New §9.115 states that the department will provide on its website a list of the names of the contractors and their known affiliates and principals who are subject to a sanction other than a reprimand. The name of a contractor and its known affiliates and principals will be added to the list when a final order is issued and will be removed from the list as soon as practicable after the date on which the application of the sanction ends or is removed. The purpose of this section is to inform non-sanctioned contractors and local governments of the contractors that have been sanctioned.

COMMENTS

Comments were received from the Associated General Contractors of Texas (AGC).

Comment: The commenter suggested that suspensions should not be imposed without a prior hearing and opportunity to respond. A show cause notice should be used before issuance of a suspension, with at least 45 days built in for an informal hearing. A contractor facing a suspension should be allowed to review and copy all evidence relied upon in imposing the proposed suspension, and suspensions should be limited to certain enumerated offenses.

Response: The department agrees that suspensions should not be imposed except when immediate action is required to protect the public interest, and §9.108(d) has been changed to add that requirement. The department disagrees with the remainder of the comment because a prior hearing is not feasible for suspensions. The purpose of suspension is to avoid immediate harm to the public interest that may result from continuing to do business with a company that has demonstrated that it is not responsible. Furthermore, the circumstances under which a contractor would be suspended are such that it is virtually impossible for a potential suspension to come as a surprise to a contractor. A contractor finding itself in a position to be suspended is free at any time to submit information for the department's consideration. The department will continue to provide copies of evidence relied upon in imposing proposed suspensions on request as allowed by law.

Comment: The maximum term of a debarment should be three years rather than five.

Response: The department agrees with this comment, and §9.110 has been changed to establish a 36-month limit on both bid capacity reductions and debarments.

Comment: Only the actions of an entity owner and its officers should be imputed to the contractor. The actions of employees and subcontractors should not be imputed to the contractor unless management has knowledge of the act.

Response: The department disagrees with this comment because an employee acting within the scope of his or her employment acts as the agent of the employer. The department will, of course, consider this type of evidence in deciding whether to take action against a firm.

Comment: The time limit for notice of appeal should be at least 20 days, to allow for investigation of facts by the contractor.

Response: The department agrees with this comment, and §9.112(a) and (e) have been changed to reflect 15 working days rather than 10 working days.

Comment: The rules should prohibit TxDOT personnel from threatening sanctions in a dispute over performance or in a claim asserted by a contractor.

Response: The department disagrees with this suggestion. This issue can be handled as a management issue within the department and need not be the subject of rulemaking.

Comment: The commenter stated that requiring an audit of a contractor's internal compliance program (ICP) is overly burdensome for smaller contractors. Annual review of the program should suffice. Further, making a violation of a contractor's ICP a separate ground for sanction will deter contractors from adopting ICP's.

Response: The department disagrees with this comment. The rules do not require the audit of an entity's ICP, they require that an ICP include a system, such as auditing, to detect noncompliance. Violation of a contractor's own ICP is only a violation if it seriously and directly affects the entity's responsibility to the department.

In addition, a change is made in §9.115(b) to reflect correction of a typographic error in the citation to §9.112.

43 TAC §§9.100 - 9.117

STATUTORY AUTHORITY

The repeals are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

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.

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43 TAC §§9.101 - 9.115

STATUTORY AUTHORITY

The new sections are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

§9.108. Procedure.

(a) The executive director may impose a sanction on a contractor if a ground for a sanction under §9.107 of this subchapter (relating to Grounds for Sanction) exists. The executive director will impose sanctions under this subchapter in accordance with §9.111(c) of this subchapter (relating to Application of Sanction).

(b) Except as provided in §9.112(f) of this subchapter (relating to Appeal of Sanction), a sanction is effective on the date specified in the notice of sanction under §9.109 of this subchapter (relating to Notice of Sanction).

(c) The imposition of a sanction on a contractor does not affect the contractor's obligations under an agreement with the department or limit the department's remedies under the agreement.

(d) The executive director, concurrent with the delivery of the notice of a sanction other than a reprimand, may suspend a contractor without a prior hearing when immediate action is necessary to protect the public interest. Before imposing a suspension, the executive director will consider all relevant circumstances, including the severity and willfulness of the conduct, the likelihood of immediate harm to the public, and whether there has been a pattern of inappropriate conduct. The suspension terminates when a final order is entered under §9.112(d) or (e) of this subchapter.

§9.110. Available Sanctions.

(a) The available sanctions, in order of increasing severity, are:

(1) a reprimand;

(2) prohibition from participating in a specified agreement, whether the agreement was previously awarded or to be awarded or whether funds under the agreement have been paid or are to be paid;

(3) a limit on the contract amount or amount of funds that may be awarded or paid to the contractor for a period of not more than 36 months; or

(4) debarment of the contractor for a period of not more than 36 months.

(b) Before imposing a sanction, the executive director will consider:

(1) the seriousness and willfulness of the act or omission;

(2) whether the contractor has committed similar acts or omissions and if so, when those acts or omissions were committed;

(3) whether the contractor, or a third party on behalf of the contractor, has fully compensated the department for any damages suffered by the department as a result of the contractor's acts or omissions; and

(4) any mitigating factors.

(c) For the purposes of subsection (b)(4) of this section, the following are mitigating factors:

(1) the contractor's adoption and enforcement of an internal ethics and compliance program that satisfies the requirements of §9.106 of this subchapter (relating to Compliance Program);

(2) the contractor's cooperation with the department in the investigation of ethical violations, including the provision of a full and complete account of the contractor's involvement; or

(3) the contractor's disassociation from individuals and firms that have been involved in the ethical violation.

§9.112. Appeal of Sanction.

(a) A sanction, other than a reprimand, and unless ordered or directed by the federal government, may be appealed to the executive director by delivering to the executive director a written notice of appeal within 15 working days after the effective date of the sanction as specified in the notice of sanction. If the notice of appeal is timely delivered, the contractor will be given the opportunity for an informal hearing before the executive director. The executive director will set a time for the hearing at the executive director's earliest convenience. The executive director will set time allowed for oral presentations and written documents presented by the contractor. The executive director will notify the contractor in writing within 5 working days of the executive director's determination on the appeal.

(b) If the contractor is dissatisfied with the determination of the executive director, the contractor may request an administrative hearing under §1.21 et seq. of this title (relating to Procedures in Contested Case). To be effective the request must be received by the executive director within 10 working days after the date that the executive director mails the notification of determination under subsection (a) of this section.

(c) The administrative law judge's proposal for decision resulting from the administrative hearing will be presented to the commission at a regularly scheduled open meeting. The commission may consider oral presentations. The commission will make a determination based on the proposal for decision. The commission's determination on the proposal for decision will be adopted by minute order and reflected in the minutes of the meeting.

(d) If an appeal to the executive director or by an administrative hearing, as appropriate, is not timely requested under this section, the executive director will issue a final order imposing the sanction when the deadline for requesting an appeal has passed. If an appeal is timely requested, the executive director will issue a final order based on one of the following:

(1) the executive director's determination under subsection (a) of this section; or

(2) the commission's determination under subsection (c) of this section.

(e) If the only sanction being imposed is a reprimand, the contractor may appeal the reprimand by delivering to the executive director a written notice of appeal and written documentation disputing the reprimand within 15 working days after the effective date of the sanction as specified in the notice of sanction. The executive director will make the determination on an appeal and issue a final order under this subsection.

(f) A sanction, other than a suspension or a reprimand, is automatically stayed from the date that the department receives the notice of appeal until a final order is entered by the executive director. On entry of a final order by the executive director imposing the sanction, the full term of the sanction will be imposed on the date of the final order unless the executive director expressly orders that a lesser sanction be imposed.

(g) The order of the executive director issued under subsection (e) of this section is final and not subject to judicial review, except as required by law.

§9.115. List of Debarred or Suspended Contractors.

(a) The department will provide on its website a list of the names of the contractors and their known affiliates and principals who are subject to a sanction other than a reprimand under this subchapter.

(b) The name of a contractor and its known affiliates and principals will be added to the list when a final order is issued under §9.112(d) or (e) of this subchapter (relating to Appeal of Sanction) and will be removed from the list as soon as practicable after the date on which the application of the sanction ends or is removed.

(c) The name of a contractor and its known affiliates and principals will be added to the list immediately after the executive director suspends a contractor under §9.108(d) of this subchapter (relating to Procedure).

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.

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CHAPTER 10. ETHICAL CONDUCT BY ENTITIES DOING BUSINESS WITH THE DEPARTMENT

The Texas Department of Transportation (department) adopts new Chapter 10, Ethical Conduct by Entities Doing Business with the Department, Subchapter A, General Provisions, new §§10.1 - 10.7, Subchapter B, Other Entities' Internal Ethics and Compliance Procedures, new §10.51, Subchapter C, Required Conduct by Entities Doing Business with the Department, new §10.101 and §10.102, Subchapter D, Score Reduction for Ethical Violations by Architectural, Engineering, and Surveying Service Providers, new §§10.151 - 10.160, Subchapter E, Removal of Precertification of Architectural, Engineering, and Surveying Service Providers for Ethical Violations, new §§10.201 - 10.206, and Subchapter F, Sanctions for Ethical Violations by Other Entities, new §§10.251 - 10.257. These new sections are adopted in association with new 43 TAC §§9.101 - 9.115. New §§10.1 - 10.7, 10.51, 10.102, 10.151 - 10.155, 10.157 - 10.158, 10.160, 10.201 - 10.206, 10.252 - 10.254, and 10.257 are adopted without changes to the proposed text as published in the September 10, 2010, issue of the *Texas Register* (35 TexReg 8310) and will not be republished. New §§10.101, 10.156, 10.159, 10.251, 10.255 and 10.256 are adopted with changes to the proposed text as published in the September 10, 2010, issue of the *Texas Register* (35 TexReg 8310).

EXPLANATION OF ADOPTED NEW CHAPTER

In its effort to emphasize transparency, accountability, and ethical standards, the department adopts new rules to establish conduct requirements for entities that do business with the department and to describe what measures may be taken in response to violations.

The new rules set forth ethical and other requirements that, if violated, may lead to disciplinary actions and sanctions. They create enforcement provisions that correspond with different types of violations to provide clear notice of what an action's consequences will be and also describe how to appeal the enforcement action.

The sections will only apply to agreements signed or extended on or after the effective date of the rules.

New §10.1, Purpose, sets forth the purpose of the subchapter, which is to prescribe the ethical conduct required of entities that do business with the department and to describe how violations will be enforced. Enforcement provisions for ethical violations by a contractor who is subject to 43 TAC Chapter 9, Subchapter G, Highway Improvement Contract Sanctions are provided under that chapter rather than under new Chapter 10. Chapter 10 does not apply to the federal government. The requirements and enforcement measures of the chapter supplement other applicable provisions. The latter provision gives notice that the department may use all remedies legally available to it.

New §10.2, Definitions, provides definitions for terms associated with conduct requirements and enforcement provisions. The definition of debarment is among those provided in the section, and states that debarment is disqualification of an entity from bidding on or entering into a contract with the department, from participating as a subcontractor under a contract with the department, and from participating as a supplier of materials or equipment to be used under a contract with the department, so that debarment applies to an entity no matter what function the entity is attempting to undertake in an agreement with the department.

New §10.3, Delivery of Written Notice, Disclosures, or Requests to the Department, clarifies the proper methods of delivery of written notices, disclosures, and requests to the department, which are by mail and hand delivery. This ensures timely receipt of written communications to the department.

New §10.4, Act of Individual Imputed to Entity, limits when acts of those acting on behalf of an entity may be imputed to the entity. Only conduct of an individual acting on behalf of an entity that seriously and directly affects the entity's responsibility to the department may be imputed to the entity. The purpose of this section is to give notice that an entity may be sanctioned for acts of those acting on behalf of the entity, but only in situations where those acts seriously and directly affect the entity's responsibility to the department.

New §10.5, Benefit, defines a benefit as anything that is reasonably regarded as financial gain or advantage, including something given to another person in whose welfare the beneficiary has a direct interest. It also describes what items are not considered benefits for purposes of the chapter. In order to protect

the integrity of department agreements, it is the department's intent that its employees not be influenced by being offered things described as a benefit under this section.

New §10.6, Conflict of Interest, describes a conflict of interest as a circumstance arising out of an entity's existing or past activities, business interests, contractual relationships, or organizational structure, or a familial or domestic living relationship between a department employee and an employee of the entity, that affects or may affect the entity's objectivity in performing the scope of work sought by the department, or that provides or may reasonably appear to provide an unfair competitive advantage to an entity or a third party in the entity's performance of services for the department or participation in an agreement with the department. As stewards of public resources, the department has a vested interest in ensuring that both impropriety and the perception of impropriety are avoided.

New §10.7, Delegation of Authority, describes how and to whom the executive director and assistant executive director may delegate the authority given to them under this chapter. The executive director may delegate to AN assistant executive director any authority provided to the executive director under this chapter, unless otherwise provided. The assistant executive director may delegate to an employee of the department who is not below the level of district engineer, division director, or office director any authority provided to the assistant executive director under this chapter, unless otherwise provided.

New §10.51, Internal Ethics and Compliance Program, is adopted without change from existing §1.8, Internal Ethics and Compliance Program. In the interest of organization, the section has been removed from 43 TAC Chapter 1, Subchapter C, Other Entities' Internal Ethics and Compliance Procedures, and inserted into new Chapter 10. This allows for easy subject matter reference and location of the rules.

New §10.101, Required Conduct, lists requirements to which entities must adhere. Entities must disclose conflicts of interest, refrain from offering benefits to department employees or commissioners, and obey all applicable laws. An entity must also maintain good standing with the state's comptroller of public accounts, and must notify the department of, as well as adequately address, a business-related conviction or judgment against the entity, debarment for a reason related to business integrity or department rules, or the entity's internal compliance program if that violation seriously and directly affects the entity's responsibility to the department. This section provides notice as to exactly what ethical standards of conduct the department requires entities follow. High ethical standards are essential in promoting transparency, accountability, and responsible use of department resources.

New §10.102, Grounds for Sanctions, provides that an entity's violation of the conduct requirements is a ground for an enforcement action. Allowing the department to impose an enforcement action on an entity ensures that the required conduct will be adhered to by entities doing business with the department.

New §10.151, Definitions, provides definitions for Subchapter D, Score Reduction for Ethical Violations by Architectural, Engineering, and Surveying Service Providers.

New §10.152, Score Reduction for Ethical Violations, states that if a service provider violates the conduct requirements, the executive director may reduce the provider's points total under 43 TAC Chapter 9, Subchapter C, Contracting for Architectural, Engineering, and Surveying Services. This section states the manner in which enforcement action will be taken against service providers. The section also states that this action is in addition to other actions available to the department. The latter provision gives notice that the department is not forfeiting any options legally available.

New §10.153, Member Score Reduction Applied to Team, provides that if any member of a team has the member's score reduced under this subchapter, then the score reduction applies to all submissions made by the team under 43 TAC Chapter 9, Subchapter C, Contracting for Architectural, Engineering, and Surveying Services. Holding a team accountable for the actions of its team members provides an additional level of protection of the department's interest in doing business with ethical providers.

New §10.154, Factors Considered in Imposing Score Reduction, describes the factors that the executive director will consider in imposing a score reduction. Factors to be considered include the seriousness and willfulness of the act or omission, whether and when the provider has committed similar acts or omissions, whether the department has been fully compensated for any damages, and mitigating factors including the provider's adoption and enforcement of an internal ethics and compliance program, the provider's cooperation with the department in the investigation of ethical violations, and the provider's disassociation from individuals and firms that have been involved in the ethical violation. Allowing the department to consider a range of factors ensures that all aspects of a particular situation can be assessed in imposing a score reduction in response to a violation.

New §10.155, Account and Period of Score Reduction, sets forth guidelines for application of a score reduction by recommending, for specific violations, the percentage and period of a score reduction available to the executive director, taking into consideration the mitigating factors described in §10.154(b). The guidelines are set forth in a chart format that ties recommended score reduction percentages and lengths of time to specific violations based on varying factors. The chart is designed to show the most severe score reduction allowable for a specific violation. The executive director may assign a lesser score reduction than recommended for a specific violation, but may not assign a more severe score reduction than recommended. The process provides notice as to a provider's recommended reduction while also granting limited discretion to the department.

New §10.156, Notice of Score Reduction, describes the contents of the notice that will be sent to a service provider receiving a score reduction. In order to ensure timely notification, the department will notify the provider by certified mail within five working days after the date of the assistant executive director's decision to issue a sanction. The notice will state the percentage of score reduction and the period during which it will be imposed, summarize the facts and circumstances underlying the reduction, explain how the percentage of score reduction and time period of the reduction were determined using Figure: 43 TAC §10.155(b), inform the provider of the imposition of a suspension if applicable, and state that the provider may appeal the score reduction. In the interest of transparency, it is the department's intent for a sanctioned service provider to have full knowledge of the basis of the score reduction and how the score reduction and period of imposition were decided.

Section 10.156 also states that the executive director, concurrent with the delivery of the notice of a score reduction, may suspend a service provider. Suspension protects department resources from being irresponsibly allocated before a score reduction is

finally imposed. In order to ensure that a suspension is not unnecessarily imposed, the executive director will consider all relevant circumstances before imposing a suspension, including the severity and willfulness of the conduct, the likelihood of immediate harm to the public, and whether there has been a pattern of inappropriate conduct. The suspension terminates when a final order imposing the score reduction is entered.

Finally, §10.156 specifies that the imposition of a score reduction on a service provider does not affect the provider's obligations under an agreement with the department or limit the department's remedies under the agreement. This provision preserves the integrity of contractual agreements with the department.

New §10.157, Application of Score Reduction, provides that the score reduction will be applied to each letter of interest submittal under 43 TAC Chapter 9, Subchapter C, Contracting for Architectural, Engineering, and Surveying Services. It states that the score reduction will be applied at the earliest of the following steps in the selection process: (1) on assignment of the score at the long list evaluation; (2) on assignment of the score at the short list proposal evaluation; (3) on assignment of the score at the interview evaluation; or (4) on preparation of a contract evaluation summary. This procedure allows the department to consider an ethical violation at the earliest possible step after which it is decided to impose a score reduction.

New §10.158, Appeal of Score Reduction, describes the procedure for appeal of a score reduction. A score reduction may be appealed to the executive director for an informal hearing. This option allows the provider the opportunity to appeal a score reduction in an informal setting that requires minimal time and resource investment. If the provider is unsatisfied with the decision of the executive director, the provider may pursue a contested case hearing in the State Office of Administrative Hearings (SOAH). This option offers the provider a judicial proceeding through which it may present evidence and offer testimony in support of its appeal. Following the contested case hearing, the administrative law judge's proposal for decision is presented to the commission at a regularly scheduled open meeting for a determination based on the proposal for decision. The commission may consider oral presentations. The commission's determination on the proposal for decision will be adopted by minute order. The executive director will issue a final order on the score reduction based on the commission's determination, or if an appeal to SOAH is not requested, the determination of the informal hearing. This multi-step process for appeal ensures due process in the application of a score reduction and allows a provider the opportunity to appeal a sanction.

Finally, §10.158 states that a score reduction is automatically stayed from the date that the department receives the notice of appeal until a final order is entered by the executive director. On entry of a final order by the executive director imposing the score reduction, the full term of the score reduction will be imposed on the date of the final order unless the executive director expressly orders that a lesser score reduction be imposed. Staying a score reduction during the pendency of an appeal makes certain that a score reduction is not unjustly imposed in a situation in which an appeal results in a reversal of a score reduction. An order of the executive director under §10.158 is not subject to judicial review unless otherwise provided by law.

New §10.159, Lessening or Removal of Score Reduction, allows a provider to request that the executive director reduce or remove a score reduction by demonstrating changes in circumstances that were described in the notice of score reduction under §10.156. The executive director will consider a provider's request not more than once in a 12-month period. This provision ensures that the executive director will have the ability to lessen or remove a score reduction if the circumstances underlying the score reduction change and promotes a continuing effort by a sanctioned provider to address the issues that led to the score reduction in the effort to have the score reduction lessened or removed. This section also allows the executive director to remove a score reduction and replace it with a reprimand at the provider's request.

New §10.160, Publication of Names of Providers Receiving Score Reductions, provides that the department will publish a list on its website of the names of providers who are subject to score reductions. The names will be added when the reduction becomes effective and will be removed as soon as practicable after the date on which the score reduction imposition ends. This provision allows the public to know which service providers have been found to have engaged in unethical conduct and illustrates the department's commitment to holding its providers accountable to a high standard of conduct.

New §10.201, Purpose, sets forth the purpose of Subchapter E, Removal of Precertification of Architectural, Engineering, and Surveying Service Providers for Ethical Violations, which is to provide a procedure by which an architectural, engineering, or surveying service provider's precertification can be removed by the assistant executive director if a ground for removal under §10.101 exists. This procedure ensures that only responsible persons are precertified to enter into certain contracts with the department.

New §10.202, Factors Considered in Removing Precertification, describes the factors that the assistant executive director will consider before removing a person's precertification. Factors that will be considered include the seriousness and willfulness of the act or omission, whether and when the person has committed similar acts or omissions, whether the department has been fully compensated for any damages, and mitigating factors including the person's cooperation with the department in the investigation of ethical violations, and the person's disassociation from individuals and firms that have been involved in the ethical violation. The department's consideration of multiple factors means that all aspects of a particular situation can be assessed before a person's precertification is removed.

New §10.203, Time Period of Prohibition from Reapplying for Precertification, sets forth guidelines for application of a certain period during which a person is prohibited from reapplying for precertification. The guidelines are set forth in a chart format that ties specific periods of prohibition to specific violations based on varying factors. The chart is designed to show the most severe period of prohibition from reapplying for precertification that is allowable for a specific violation. The assistant executive director may prohibit a person from reapplying for precertification for a lesser period than recommended for a specific violation, but may not prohibit reapplication for a longer period than recommended. The process provides notice as to a provider's recommended period of prohibition while also granting limited discretion to the department.

New §10.204, Notice of Removal of Precertification, describes the contents of the notice that will be sent to a person whose precertification is removed. In order to ensure timely notification, the department will notify the person by certified mail within five working days after the date of the assistant executive director's decision to remove precertification. The notice will state the

period during which the person is prohibited for applying for precertification, summarize the facts and circumstances underlying the removal of precertification, explain how the period of prohibition was determined using Figure: 43 TAC §10.203, and state that the person may appeal the removal of precertification. It is the department's intent to promote transparency by ensuring that a person has full knowledge of the basis of a precertification removal and how the period of prohibition was decided.

Section 10.204 also states that the executive director, concurrent with the delivery of the notice of a precertification removal, may suspend a person from participating in agreements with the department. Suspension protects department resources from being irresponsibly allocated before precertification is finally removed. In order to ensure that a suspension is not unnecessarily imposed, the assistant executive director will consider all relevant circumstances before imposing a suspension, including the severity and willfulness of the conduct, the likelihood of immediate harm to the public, and whether there has been a pattern of inappropriate conduct. The suspension terminates when a final order removing the precertification is entered.

Finally, §10.204 specifies that removal of precertification does not affect the provider's obligations under an agreement with the department or limit the department's remedies under the agreement. This preserves the integrity of contractual agreements with the department. Additionally, unless the person is suspended, precertification removal does not prevent the person from participating in agreements with the department in a capacity that does not require precertification status. This clarifies that a person is not prohibited from participating in agreements with the department, but if the person does participate in an agreement with the department, it must be in a capacity that does not require precertification.

New §10.205, Appeal of Removal of Precertification, describes the procedure for appeal of precertification removal. Removal may be appealed to the executive director by submitting documentation with the notice for appeal or by requesting an in-person meeting with the executive director. At the meeting, the person may present written documentation and oral testimony, and may answer questions from the executive director. The executive director will issue a final order after considering all documentation and testimony. The final order is not subject to judicial review, except as required by law. Additionally, the executive director may not delegate authority under this section. Providing for appeal to the executive director ensures that a person has the ability to contest the removal of precertification if the person so desires, and that the executive director may change the removal of precertification if the situation so dictates.

New §10.206, Eligibility to Reapply for Precertification, allows a person to request that the assistant executive director reduce or remove a period of prohibition for precertification by demonstrating changes in the circumstances that were described in the notice of score reduction The assistant executive director will consider a provider's request not more than once in a 12-month period. This provision ensures that the assistant executive director will have the ability to lessen or remove a period of prohibition if there is a change in the circumstances that led to precertification removal and encourages persons to remedy the problems that led to precertification removal in the effort to have a period of prohibition lessened or removed.

New §10.251, Application of Subchapter, provides that Subchapter F, Sanctions for Ethical Violations by Other Entities, only applies to entities or individuals doing business with the department that are subject to Chapter 10 but are not subject to Subchapter E of Chapter 10, relating to Score Reduction for Ethical Violations by Architectural, Engineering, and Surveying Service Providers. Additionally, the section states that sanctions provided by this subchapter are in addition to other actions and remedies available to the department. The latter provision gives notice that the department is not forfeiting any options legally available to it.

New §10.252, Procedure, details the method by which sanctions will be imposed. The executive director may impose a sanction on an entity if a ground for a sanction exists. If the executive director decides to impose a sanction, it will be imposed in accordance with Figure: 43 TAC §10.255(c). These provisions limit the executive director's discretion on when and how to impose a sanction and give notice to entities of these limits. The section also states that a sanction is effective on the date specified in the notice, unless it is stayed pending an appeal. The section specifies that the imposition of a sanction on an entity does not affect the entity's obligations under an agreement with the department or limit the department's remedies under the agreement. This provision preserves the integrity of contractual agreements with the department. Finally, this section states that the executive director, concurrent with the delivery of the notice of a sanction other than a reprimand, may suspend an entity without a prior hearing. This protects department resources from being irresponsibly allocated before a sanction is finally imposed. In order to ensure that a suspension is not unnecessarily imposed, the executive director will consider all relevant circumstances before imposing a suspension, including the severity and willfulness of the conduct, the likelihood of immediate harm to the public, and whether there has been a pattern of inappropriate conduct.

New §10.253, Notice of Sanction, describes the contents of the notice that will be sent to an entity receiving a sanction. In order to ensure timely notification, the department will notify the entity by certified mail within five working days after the date of the executive director's decision to issue a sanction. The notice will state the sanction and the period of the sanction, summarize the facts and circumstances underlying the sanction, explain how the sanction was selected, inform the entity of the imposition of a suspension if applicable, and state that the entity may appeal the sanction. To encourage transparency, it is the department's intent for a sanctioned entity to have full knowledge of the basis of the sanction and how the sanction was decided.

New §10.254, Available Sanctions, describes the sanctions available to the department and also identifies factors that will be considered in imposing the sanction. Available sanctions, in order of increasing severity, are a reprimand, prohibition from participating in a specified agreement, a limit on the contract amount or amount of funds that may be awarded or paid to the entity, or debarment of the entity for a period of not more than 60 months. The range of sanctions available allows the department to appropriately address various levels of violations. Factors that will be considered in imposing the sanction include the seriousness and willfulness of the act or omission, whether and when the entity has committed similar acts or omissions, whether the department has been fully compensated for any damages, and mitigating factors, including the entity's adoption and enforcement of an internal ethics and compliance program, the entity's cooperation with the department in the investigation of ethical violations, and the entity's disassociation from individuals and firms that have been involved in the ethical violation. The department's consideration of a range of factors guarantees that all aspects of a particular situation can be evaluated in assigning a sanction to a violation.

New §10.255, Application of Sanction, sets forth guidelines for application of a sanction by assigning, for specific violations, the sanctions available to the executive director and taking into consideration the factors described in §10.254(b). The guidelines are set forth in a chart format that ties specific sanctions to specific violations based on varying factors. The chart is designed to show the most severe sanction allowable for a specific violation. The executive director may assign a lesser sanction than recommended for a specific violation, but may not assign a more severe sanction than recommended. Additionally, if an entity commits multiple violations arising out of separate occurrences, the executive director may impose multiple sanctions. The process provides notice as to an entity's recommended sanction while also granting limited discretion to the department.

New §10.256, Appeal of Sanction, describes the procedure for appeal of a sanction other than a reprimand. A sanction may be appealed to the executive director for an informal hearing. This option allows the entity the opportunity to appeal a sanction in an informal setting that requires minimal time and resource investment. If the entity is unsatisfied with the decision of the executive director, the entity may pursue a contested case hearing in the State Office of Administrative Hearings (SOAH). This option offers the entity a judicial proceeding through which it may present evidence and offer testimony in support of its appeal. Following the contested case hearing, the administrative law judge's proposal for decision is presented to the commission at a regularly scheduled open meeting for a determination based on the proposal for decision. The commission may consider oral presentations. The commission's determination on the proposal for decision will be adopted by minute order. The executive director will issue a final order on the sanction based on the commission's determination, or if an appeal to SOAH is not requested, the determination of the informal hearing. This multi-step process for appeal ensures due process in the application of a sanction and allows an entity the opportunity to appeal a sanction.

Section 10.256(e) specifies that a reprimand may be appealed by delivering to the executive director a written notice of appeal and written documentation disputing the reprimand. The executive director will make the determination on an appeal and issue a final order. Because a reprimand is the least severe sanction and has minimal implications on an entity, a more limited opportunity to appeal is appropriate.

Section 10.256(f) states that a sanction is automatically stayed from the date that the department receives the notice of appeal until a final order is entered by the executive director. On entry of a final order by the executive director imposing the sanction, the full term of the sanction will be imposed on the date of the final order unless the executive director expressly orders that a lesser sanction be imposed. Staying a sanction during the pendency of an appeal makes certain that a sanction is not unjustly imposed in a situation in which an appeal results in a reversal of a sanction. The automatic stay provided by subsection (f) does not apply to a suspension or a reprimand. An order of the executive director under §10.256 is not subject to judicial review unless otherwise provided by law.

New §10.257, Lessening or Removal of Sanction, provides that an entity may request that the executive director reduce or remove a sanction once in a 12-month period. This provision ensures that the executive director will have the ability to lessen or remove a sanction if the circumstances underlying the sanction change and is intended to motivate entities to improve the issues that originally led to the sanction in the effort to have the sanction reduced or removed.

COMMENTS

Comments were received from the Texas Council of Engineering Companies (CEC) and the Associated General Contractors of Texas (AGC).

Comment: CEC commented that it is not necessary to require the adoption of an internal ethics and compliance program, and suggested that Subchapter B be deleted or revised to require only that a firm acting as a prime consultant must certify that it has and enforces an internal ethics and compliance program.

Response: Neither Subchapter B nor any other provision of Chapter 10 requires the adoption of an internal ethics and compliance program. Sections 10.154 and 10.254 provide that in considering the imposition of sanctions under Subchapters D and F, respectively, the adoption and enforcement of an internal ethics and compliance program that complies with Subchapter B will be considered by the executive director as a mitigating factor.

Comment: AGC commented that violation of an entity's own internal compliance program should not be grounds for sanctions because that could discourage entities from electing to adopt internal compliance programs.

Response: The department agrees with this comment and has omitted this ground for sanction from §10.101.

Comment: Rather than requiring a firm to disclose a conflict of interest as that term is defined in the rules, CEC recommended that the department require disclosure only of certain delineated relationships, and that the department itself determine whether those relationships result in a conflict of interest. The requirement should be to disclose any business, familial, domestic, or investment relationship because of which a person would be unable or potentially unable to render impartial assistance.

Response: The department disagrees with this comment because it would unnecessarily limit disclosures to the department.

Comment: AGC commented that the definition of conflict of interest is too broad because it encompasses activities that are otherwise perfectly acceptable, such as acquiring material sites ahead of time. The recommendation is that only actual, illegal conflicts should be included, not perceived conflicts.

Response: The department disagrees that the definition is too broad, because the activities it covers are still limited by principles of objectivity and fairness. Further, the perceived conflict standard is not broader than the one imposed by state law on state officers and employees.

Comment: AGC commented that the language regarding familial relationships is not limited enough. As written, the rules would deny a contractor the opportunity to contract based on a family relationship, when recusal should suffice.

Response: The department disagrees with this comment. The rules provide for a sanction only if the contractor fails to disclose and remedy a conflict of interest, including one created by a familial relationship. In most cases, recusal would be the appropriate remedy.

Comment: CEC commented that the score reductions in the tables are too harsh because even a ten percent reduction will prevent a firm from winning any work. Chapter 10 should include the option of a reprimand for engineers and architects.

Response: The department agrees with this comment and has added an option to §10.159 for a provider to request that the executive director replace a score reduction with a reprimand.

Comment: CEC suggested that imputing the acts of an individual to a firm should include a provision that a firm is not responsible for actions of individuals who provide false information to their employer.

Response: The department disagrees with this comment because an employee acting within the course and scope of his or her employment is the agent of the employer. However, the department will consider this type of evidence in deciding whether to take action against a firm.

Comment: CEC recommended limiting the ability to suspend a provider pending appeal to those violations that are egregious, or based on a pattern or history of violations.

Response: The department agrees that the ability to suspend a provider pending appeal should not be unlimited, and has added language to §10.156 to allow suspension only when immediate action is necessary to protect the public interest.

Comment: AGC commented that it is unclear which provisions of Chapter 10 actually apply to highway improvement contractors.

Response: Section 10.251 has been amended to clarify that Subchapter F does not apply to highway improvement contractors.

SUBCHAPTER A. GENERAL PROVISIONS

43 TAC §§10.1 - 10.7

STATUTORY AUTHORITY

The new sections 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 department.

CROSS REFERENCE TO STATUTE

None.

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.

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Bob Jackson
General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463-8683

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SUBCHAPTER B. OTHER ENTITIES' INTERNAL ETHICS AND COMPLIANCE PROCEDURES

43 TAC §10.51

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 department.

CROSS REFERENCE TO STATUTE

None.

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SUBCHAPTER C. REQUIRED CONDUCT BY ENTITIES DOING BUSINESS WITH THE DEPARTMENT

43 TAC §10.101, §10.102

STATUTORY AUTHORITY

The new sections 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 department.

CROSS REFERENCE TO STATUTE

None.

§10.101. Required Conduct.

An entity that does business with the department is required to:

(1) disclose to the department in writing the existence of a conflict of interest involving an agreement between the entity and the department and adequately remedy the conflict:

(A) before the effective date of the agreement; or

(B) if the conflict of interest arises after the effective date of the agreement, within five working days after the date that the entity knows or should have known of the conflict;

(2) refrain from offering, giving, or agreeing to give a benefit to a member of the commission or to a department employee;

(3) adhere to all civil and criminal laws related to business;

(4) maintain good standing with the comptroller, other state agencies, states, and agencies of the federal government with which the entity has had a business relationship;

(5) notify the department in writing within five working days after the date that the entity knows or should have known of the existence of, and must adequately address:

(A) a conviction of, a plea of guilty or nolo contendere to, a civil judgment for or a public admission to a crime or offense related to business by the entity;

(B) debarment of the entity by the comptroller, another state agency, another state, or an agency of the federal government for a ground related to business integrity; or

(C) any behavior of the entity that seriously and directly affects the entity's responsibility to the department and that is also a violation of:

(i) the law; or

(ii) the department's rules that relate to the entity's dealing with 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.

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SUBCHAPTER D. SCORE REDUCTION FOR ETHICAL VIOLATIONS BY ARCHITECTURAL, ENGINEERING, AND SURVEYING SERVICE PROVIDERS

43 TAC §§10.151 - 10.160

STATUTORY AUTHORITY

The new sections 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 department.

CROSS REFERENCE TO STATUTE

None.

§10.156. Notice of Score Reduction.

(a) If the executive director imposes a score reduction under this section, the department will notify the provider by certified mail within five working days after the date of the executive director's decision. The notice will:

(1) state the percentage of score reduction and the period during which the reduction will be imposed;

(2) summarize the facts and circumstances underlying the reduction;

(3) explain how the percentage of score reduction and the time period of the score reduction were determined using Figure: 43 TAC §10.155(b) as a basis for explanation;

(4) if applicable, inform the provider of the imposition of a suspension under subsection (b) of this section; and

(5) state that the provider may appeal the reduction in accordance with §10.158 of this subchapter (relating to Appeal of Score Reduction).

(b) The executive director, concurrent with the delivery of the notice of a score reduction, may suspend a provider when immediate action is necessary to protect the public interest. Before imposing a suspension, the executive director will consider all relevant circumstances, including the severity and willfulness of the conduct, the likelihood of immediate harm to the public, and whether there has been a pattern of inappropriate conduct. The suspension terminates when a final order is entered under §10.158(d) of this subchapter.

(c) The imposition of a score reduction or a suspension on a provider does not affect the provider's obligations under an agreement with the department or limit the department's remedies under the agreement.

§10.159. Lessening or Removal of Score Reduction.

(a) A provider may request the lessening or removal of an imposed score reduction by delivering to the executive director the request in writing and written documentation in support of the request demonstrating changes in the circumstances that were described in the notice of score reduction under §10.156 of this subchapter (relating to Notice of Score Reduction).

(b) The executive director, at the executive director's sole discretion, may decide to lessen or remove the imposed score reduction. The executive director will send a written notice of the decision to the provider.

(c) A provider may request that a score reduction be removed and replaced with a reprimand under §10.254 of this chapter (relating to Available Sanctions). Upon receipt of a request, the executive director may, at the executive director's sole discretion, remove the imposed score reduction and issue a reprimand to the provider.

(d) The executive director will consider not more than one request for an entity under this section during any 12-month period.

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.

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SUBCHAPTER E. REMOVAL OF PRECERTIFICATION OF ARCHITECTURAL, ENGINEERING, AND SURVEYING SERVICE PROVIDERS FOR ETHICAL VIOLATIONS

43 TAC §§10.201 - 10.206

STATUTORY AUTHORITY

The new sections 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 department.

CROSS REFERENCE TO STATUTE

None.

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.

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SUBCHAPTER F. SANCTIONS FOR ETHICAL VIOLATIONS BY OTHER ENTITIES

43 TAC §§10.251 - 10.257

STATUTORY AUTHORITY

The new sections 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 department.

CROSS REFERENCE TO STATUTE

None.

§10.251. Application of Subchapter.

(a) This subchapter applies only to an individual or entity doing business with the department that is subject to this chapter but not subject to either Subchapter D, Score Reduction for Ethical Violations by Architectural, Engineering, and Surveying Service Providers, of this chapter or Chapter 9, Subchapter G of this title (relating to Highway Improvement Contract Sanctions).

(b) The sanctions provided by this subchapter are in addition to other actions and remedies available to the department.

§10.255. Application of Sanction.

(a) The executive director, at the executive director's sole discretion, may impose a sanction that is less severe, but not more severe, than the sanction recommended under §10.254(c) of this subchapter (relating to Available Sanctions).

(b) If an entity commits multiple violations arising out of separate occurrences, the executive director may impose multiple sanctions in accordance with subsection (c) of this section.

(c) Figure: 43 TAC §10.255(c) sets forth guidelines for application of a sanction by assigning for specific violations of §10.101 of this chapter (relating to Required Conduct), the sanctions available to the executive director as described in §10.254(a) of this subchapter, taking into consideration the factors described in §10.254(b) of this subchapter.
Figure: 43 TAC §10.255(c)

§10.256. Appeal of Sanction.

(a) A sanction, other than a reprimand, and unless ordered or directed by the federal government, may be appealed to the executive director by delivering to the executive director a written notice of appeal within 10 working days after the effective date of the sanction as specified in the notice of sanction. If the notice of appeal is timely delivered, the entity will be given the opportunity for an informal hearing before the executive director. The executive director will set a time for the hearing at the executive director's earliest convenience. The executive director will set time the maximum allowed for oral presentations and the procedure for written documents to be presented by the entity. The executive director will notify the entity in writing within 5 working days of the executive director's determination on the appeal.

(b) If the entity is dissatisfied with the determination of the executive director, the entity may request an administrative hearing under §1.21 et seq. of this title (relating to Procedures in Contested Cases). To be effective the request must be received by the executive director within 10 working days after the date that the executive director mails the notification of determination under subsection (a) of this section.

(c) The proposal for decision will be presented to the commission at a regularly scheduled open meeting. The commission may consider oral presentations. The commission will make a determination based on the proposal for decision. The commission's determination on the proposal for decision will be adopted by minute order and reflected in the minutes of the meeting.

(d) If an appeal to the executive director or by an administrative hearing, as appropriate, is not timely requested under this section, the executive director will issue a final order imposing the sanction when the deadline for requesting an appeal has passed. If an appeal is timely requested, the executive director will issue a final order based on one of the following:

(1) the executive director's determination under subsection (a) of this section; or

(2) the commission's determination under subsection (c) of this section.

(e) If the only sanction being imposed is a reprimand, the entity may appeal the reprimand by delivering to the executive director a written notice of appeal and written documentation disputing the reprimand within 10 working days after the effective date of the sanction as specified in the notice of sanction. The executive director will make the determination on an appeal and issue a final order under this subsection.

(f) A sanction, other than a suspension or a reprimand, is automatically stayed from the date that the department receives the notice of appeal until a final order is entered by the executive director. On entry of a final order by the executive director imposing the sanction, the full term of the sanction will be imposed on the date of the final order unless the executive director expressly orders that a lesser sanction be imposed.

(g) The order of the executive director issued under subsection (e) of this section is final and not subject to judicial review, except as required by law.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-201007171

Bob Jackson
General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463-8683

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CHAPTER 15. FINANCING AND CONSTRUCTION OF TRANSPORTATION PROJECTS
SUBCHAPTER H. TRANSPORTATION CORPORATIONS

43 TAC §15.92

The Texas Department of Transportation (department) adopts an amendment to §15.92, Miscellaneous Powers and Duties of Corporations. The amendment to §15.92 is adopted without changes to the proposed text as published in the September 10, 2010, issue of the *Texas Register* (35 TexReg 8322) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Title 43, Texas Administrative Code (43 TAC), §1.8, Internal Ethics and Compliance Program, which became effective February 19, 2009, establishes for an entity that is required by Texas Transportation Commission (commission) rule to have an internal ethics and compliance program the minimum requirements of such a program and requires the entity to certify that it has adopted and enforces compliance with the program.

In separate rules adopted by the commission concurrently with this rule, §1.8 is repealed and the substance of that rule is transferred to new §10.51. The amendment to §15.92(c) merely changes the reference from §1.8 to the new §10.51 to reflect that change.

COMMENTS

No comments on the proposed amendment were received.

STATUTORY AUTHORITY

The amendment is adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

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.

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Bob Jackson
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CHAPTER 21. RIGHT OF WAY
SUBCHAPTER J. LEASING OF HIGHWAY ASSETS FOR TRANSPORTATION FACILITY

43 TAC §§21.301 - 21.311

The Texas Department of Transportation (department) adopts new Subchapter J, Leasing of Highway Assets for Transportation Facility, new §§21.301 - 21.311. New §21.301 is adopted with changes to the proposed text as published in the October 15, 2010, issue of the *Texas Register* (35 TexReg 9218). New §§21.302 - 21.311 are adopted without changes to the proposed text as published in the October 15, 2010, issue of the *Texas Register* (35 TexReg 9218) and will not be republished.

EXPLANATION OF ADOPTED NEW SECTIONS

In Texas, freight traffic has experienced significant growth, and forecasts indicate that it will continue to grow in the future. While this growth represents economic opportunity for the state, it has also resulted in increased congestion on the state's transportation infrastructure. In many areas, truck traffic of freight contributes significantly to highway congestion, leading to lost time for drivers, increased energy consumption, and increased air emissions. Much of this traffic also translates into operational and maintenance costs for state and local governments. Furthermore, there is concern over the impact of emissions on air quality conditions.

In response to these issues, the department is considering ways to foster viable and sustainable solutions for freight transportation across the state by encouraging more efficient strategies. One option is to explore how underutilized state assets, like highway right of way, can be used to encourage implementation of alternative freight transportation services and potentially provide another source of revenue to address transportation needs. The department previously sought ideas for creating new transportation facilities through a Request for Information - Concepts for New, Low Carbon Emitting, Freight Transportation Facilities, which was published in the December 19, 2008, issue of the *Texas Register* (33 TexReg 10385).

New §21.301, Purpose, sets forth the purpose of the subchapter, which is to establish the procedure for leasing department right of way for transportation facilities to reduce highway congestion and improve air quality. The right of way may not be leased for a pipeline, an electric transmission line, or another utility facility. The procedure provided by this subchapter is in addition to the procedure established under 43 TAC Chapter 21, Subchapter L (relating to Leasing of Highway Assets).

New §21.302, Definitions, provides definitions for "commission," "department," and "executive director."

New §21.303, Request for Proposals, describes how the department may solicit proposals for the lease of right of way for low emission alternative freight transportation facilities. This section states the information that proposers must include in the proposal and provides that the department may set geographic limitations on right of way to be leased. The request for proposal will set out in detail the specific evaluation criteria that the department establishes for the project under §21.305. It also describes how the department will give notice of the request for proposals. These provisions ensure that the procurement process is con-

ducted efficiently and inform entities on how to participate in the process.

New §21.304, Proposals, describes the information a proposer must submit to the department in response to a request for proposals. The required information includes a description of the facility, description of the technology to be used, a financial plan, and right of way to be leased. The information must include information on air emissions. It must show the facility's effects on the state highway system. It must show the proposer's qualifications and the proposed business terms.

New §21.305, Selection of Entity, describes how the department will select an entity. The department will evaluate proposals based on the criteria that the department reasonably determines are relevant for the project, including among other factors, the comparative value of estimated emissions reductions generated by the proposed transportation facility, the revenue potential to the state, the current viability of proposed technology, or the financial viability of the proposer. In the request for proposal for a project, the department will set out in detail the specific evaluation criteria that the department has established for that project. The department may select more than one proposer. Alternatively, the department may reject all proposals. This allows the department to determine if any proposals merit further consideration but does not obligate the department to select a proposal if none would be beneficial to the department. The department will submit its recommendations to the commission which will select a proposal if the commission determines that: (1) at least one alternative for moving freight available that has lower emissions than by truck for an equivalent load and distance; (2) a suitable part of the right of way of, the airspace above, or the underground space below a highway on the state highway system will not be needed for a highway purpose during the term of the lease; (3) the use of that property for the alternative facility is not inconsistent with applicable highway use; and (4) the lease of that property would be economically beneficial to the department, considering the receipt of lease payments and any resulting reduced maintenance costs on the state highway system.

New §21.306, Negotiation with Selected Entity, provides that the department will attempt to negotiate an agreement with a selected entity to lease right of way from the department. The department may end negotiations with the entity if an acceptable agreement cannot be negotiated or if it appears that the entity's proposal will not offer the apparent best value. If the department ends negotiations, it may choose to reject all proposals, modify the request for proposals and reinitiate the procurement process, or if authorized by the commission, attempt to negotiate a lease agreement with the proposer of the next most highly ranked proposal.

New §21.307, Agreement, describes an agreement between the department and a selected entity. The agreement must be in writing, executed by the executive director, and approved by the Federal Highway Administration. An agreement may not impair the state's right to use the right of way for a highway purpose if necessary. The section identifies certain subjects that must be covered in an agreement, for example, term, lease payments, and bond requirements. The agreement will also identify certain subjects that the selected entity is responsible for, for example, obtaining any environmental approvals.

New §21.308, Termination of Agreement, identifies the conditions under which an agreement may be terminated and the terms that must be included in the agreement concerning termination. The agreement may provide the department and the selected entity with specified rights to terminate an agreement. Additionally, the department may terminate the agreement on the failure of the selected entity to comply with the agreement, but only after notice of and an opportunity to correct the deficiency. The agreement also will specify that on termination the selected entity must either take certain actions to dismantle and remove the facility from the right of way or provide for the improvement of the facility to comply with the hand-over provisions in the agreement.

New §21.309, Payment, establishes the basic requirements for the lease payments. The lease payments will include both a fair market value payment for use of the right of way, unless the commission authorizes an exception to those charges under Transportation Code, §202.052(d), and may include an administrative cost component to reimburse the department for expenses associated with the contract administration. All funds associated with this contract would be deposited into the state highway fund. This ensures that the department obtains a reasonable price for its assets and is compensated for additional expenses it incurs.

New §21.310, Sublease, provides that a sublease of the lease must be approved by the department. If a sublessee is a utility provider, the facility must comply with the department's utility accommodation rules.

New §21.311, General Requirements, describes miscellaneous requirements for and restrictions on an agreement. The department may not convey or sever from the real property an improvement constructed on the leased area. The lessee is prohibited under the lease from providing outdoor advertising, and it is responsible for any common carrier obligation associated with the transportation facility. The lessee's use of the leased right of way does not constitute abandonment of the property by the department.

COMMENTS

Comments on the proposed new sections were received from Lamar Advertising Company, Texas Transportation Institute, Union Pacific Company, and BNSF Railway Company.

Comment: Lamar Advertising Company commented that the ban on outdoor advertising found in §21.311 is not necessary. It noted that outdoor advertising is permitted on privately owned railroad right of way. Advertising on train platforms would be seen only by commuters. The company suggested that allowing outdoor advertising on train platforms may help subsidize the cost of high-speed rail.

Response: The rules concern the development of a freight transportation facility, and so there would be no train platforms for commuters. The rules also do not concern the development of a high-speed rail facility. The department believes the nature of a freight project under the rules would prevent outdoor advertising. The facility would be in highway right of way where the appropriate signs would be for traffic control, not advertising. The department's policy is to prohibit outdoor advertising signs within the right of way of a public roadway, as codified at 43 TAC §21.148.

Comment: Texas Transportation Institute, Union Pacific Company, and BNSF Railway Company submitted a joint comment, suggesting the addition of wording that would disallow the lease of department right of way for purposes of "heavy freight railroad transportation." The commenters requested the prohibition say-

ing the rules otherwise would adversely impact the interests of private railroads.

Response: Based on this comment, the department has made changes to §21.301(b) in order to prohibit the use of the subchapter for leasing highway right of way for rail lines that are part of the general system of rail transportation, as those terms are used in federal law. The department agrees with the concern that the operation of freight trains would pose a great number of engineering challenges because the highway rights of way were not originally designed to handle freight trains. Also, the requirements for grade separation would be so onerous as to be impracticable.

STATUTORY AUTHORITY

The new sections 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 department, and more specifically, Transportation Code, §202.052 and §202.053, which authorize the department to lease a highway asset.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 202, Subchapter C.

§21.301. Purpose.

(a) This subchapter establishes the procedure to be used for leasing state-owned right of way for freight movement to reduce congestion on the state highway system and to improve air quality when the commission authorizes such a lease for a specified project.

(b) This subchapter may not be used for the lease of right of way for the purposes of a pipeline, electric transmission line, or other utility facility. Additionally, this subchapter may not be used for the lease of right of way for rail lines that are part of the general system of rail transportation and require a certificate from the United States Surface Transportation Board under 49 U.S.C. §10901.

(c) The procedure provided by this subchapter is separate from and in addition to the procedure established under Subchapter L of this chapter (relating to Leasing of Highway Assets).

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.

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Bob Jackson
General Counsel
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CHAPTER 23. TRAVEL INFORMATION

The Texas Department of Transportation (department) adopts amendments to §23.1, Purpose, §23.2, Definitions, §23.10, Travel Literature, §23.12, Texas Official Travel Map, and §23.14, Display of Travel Literature in the Texas Travel Information Centers. The amendments to §§23.2, 23.10, and 23.12 are adopted without changes to the proposed text as published in the October 15, 2010, issue of the *Texas Register* (35 TexReg 9222) and will not be republished. The amendments to §23.1 and §23.14 are adopted with changes to the proposed text as published in the October 15, 2010, issue of the *Texas Register* (35 TexReg 9222).

EXPLANATION OF ADOPTED AMENDMENTS

Transportation Code, Chapter 204 directs the department to advertise and attract traffic to the highways of this state by publishing the state's travel literature containing information on public parks, recreational areas, scenic areas, and other public places and objects of interest and value to the public and highway users, and by periodically publishing the state highway map. The chapter also requires the department to operate Texas Travel Information Centers at the principle gateways to this state to provide highway information, travel guidance, and descriptive material designed to assist the traveling public and stimulate travel to and within the state.

Amendments to §23.1, Purpose, and §23.2, Definitions, change the name of the division from the "Travel Division" to the "Travel Information Division" to better describe the division's functions. Changes from the initial proposal add capitalization to the words "Travel Information Centers."

Amendments to §23.10, Travel Literature, clarify subject matter that may be included in the department's travel literature by specifying that subject matter must appeal to a broad spectrum of tourists, not just to a general audience, and must highlight the assets of the state of Texas. The amendments also clarify examples of a routine commercial service which cannot be included in the department's travel literature. Large outlet malls and Texas wineries are exempted from that exclusion. The amendments also clarify subject matter that cannot be included in the department's travel literature by excluding municipal amenities such as parks, golf courses, and pools that primarily serve only a community and its surrounding residents. These changes more accurately reflect the goal of appealing to a broad spectrum of tourists and not just a general audience.

Amendments to §23.12, Texas Official Travel Map, clarify the items that are depicted on the map by adding the Texas Travel Information Centers. The amendments change the criteria for a city or town to be included on the map by deleting the requirement that a city or town have a United States post office and by deleting the requirement that a city or town have an auto repair service available in the area and requiring that a city or town be located on the state maintained highway system, have a population of 50 or more, and be near a significant park or recreational area, or an historical, recreational, or scenic tourist interest facility that is open to the public continuously or on a regular seasonal basis rather than meeting only one of the above criteria. Post offices are closing across the country, so the requirement that a town have a post office is no longer a fair requirement. The Travel Information Division does not have the resources to determine what towns have auto repair services, so that requirement is also being removed. The three requirements that remain better qualify a community for inclusion on the map because they are reasonable requirements collectively but still allow the map to include only Texas towns that are generally well traveled by the public.

The amendments also add spurs, loops, and business routes that provide access to widely recognized parks, lakes, tourist attractions, or recreational areas to the examples of roadways that may be depicted on the map. The current rules include only

FM, RM, or RR, but department roadways include spurs, loops, and business routes; the purpose of adding these routes to the rules is for clarification.

The amendments to §23.14, Display of Travel Literature in the Texas Travel Information Centers, clarify the types of literature and other promotional items that may be distributed at Travel Information Centers by including information about performing arts theaters and specialty shopping facilities that are tourist attractions. Performing arts theaters and specialty shopping facilities are destinations that appeal to tourists. Changes from the initial proposal add capitalization to the words "Travel Information Centers," and change "%" symbols to the word "percent" at §23.14(c)(1)(B) and (e)(7)(A).

COMMENTS

No comments on the proposed amendments were received.

SUBCHAPTER A. GENERAL PROVISIONS

43 TAC §23.1, §23.2

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 department, and more specifically, Transportation Code, Chapter 204, which requires the department to promote travel and tourism in the state by operating the Travel Information Centers and publishing the state's travel literature, including the Texas Official Travel Map.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 204.

§23.1. Purpose.

This chapter prescribes the policies and procedures for operation of the Travel Information Division of the Texas Department of Transportation. The division directly serves the Texas Transportation Commission and the department's administration by administering public information and travel and tourism programs. Public information activities consist of preparing and disseminating information of public interest concerning road conditions, litter reduction, highway beautification, and information on Texas' travel opportunities. The travel and tourism functions, as authorized by Transportation Code, Chapter 204, include operation of the state's network of Texas Travel Information Centers, production and dissemination of the state's travel and tourism literature, and publication of *Texas Highways* magazine, the state's official travel magazine.

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.

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Bob Jackson
General Counsel
Texas Department of Transportation
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SUBCHAPTER B. TRAVEL INFORMATION

43 TAC §§23.10, 23.12, 23.14

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 department, and more specifically, Transportation Code, Chapter 204, which requires the department to promote travel and tourism in the state by operating the Travel Information Centers and publishing the state's travel literature, including the Texas Official Travel Map.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 204.

§23.14. Display of Travel Literature in the Texas Travel Information Centers.

(a) Purpose. This section establishes the policies and procedures governing the acceptance, display, and distribution of travel literature and other promotional items by the department's Travel Information Centers.

(b) Definition. For purposes of this section the term "travel literature" includes descriptive materials, pamphlets, booklets, videos, photos, icons, and promotional items.

(c) Policy for racks and display cases.

(1) General. Travel literature accepted and displayed in a Travel Information Center:

(A) must be approved for display by the director or the director's designee;

(B) must be 100 percent travel and tourism-oriented;

(C) must be of a professional quality; and

(D) may contain coupons, prizes, or contests related to travel and tourism.

(2) Subject matter. Travel literature must contain subject matter relating to:

(A) recreation;

(B) scenic areas;

(C) historic sites;

(D) the arts, including museums and performing arts theaters;

(E) fairs, festivals, or special events of public interest;

(F) accommodations, including, but not limited to, bed and breakfasts and guest ranches;

(G) restaurants;

(H) shopping centers, malls, or outlet stores, or specialty shopping facilities that serve as tourist attractions;

(I) RV parks and campgrounds;

(J) city, county, state, and national parks;

(K) travel maps or public transportation information; or

(L) traveler safety.

(3) Size. Travel literature must meet size criteria established by the division.

(d) Policy specific to display cases.

(1) Acceptance. An organization or individual may submit a proposal for the use of promotional graphics, photographs, icons, and other promotional items in a display case to promote Texas travel and tourism opportunities. Proposals will be accepted on a first-come, first-served basis. Displays will be rotated and a waiting list will be established.

(2) Agreement. Prior to the department accepting materials for use in a display case, the individual or organization must enter into a written agreement with the department for a period of not less than six months.

(3) Content. Display case materials shall focus on promoting tourism that stimulates travel to a metropolitan area or specific region, and shall not contain:

(A) dated material; or

(B) special events, promotions, or facilities that are only open to groups and not individuals.

(4) Cost. Materials for display cases must be provided to the department free of charge.

(5) Specifications. An individual or organization submitting materials approved for display shall provide:

(A) five horizontal transparencies which are 16 inches high and 20 inches wide;

(B) six horizontal transparencies which are 11 inches high and 14 inches wide; and

(C) three vertical transparencies which are 11 inches wide and 14 inches high.

(e) Unacceptable travel literature. In addition to the requirements of subsections (c) and (d) of this section, the department will not accept travel literature that:

(1) is solely for the purpose of selling a single, tangible item, including, but not limited to, a brochure selling a tape, CD, magazine, or cookbook, with the exception of *Texas Highways*, the state's official travel magazine;

(2) is solely for the purpose of selling a membership;

(3) is solely for the purpose of promoting facilities or other subjects not directly related to travel and tourism;

(4) contains terminology, advertising, or pictures that are adult or sexually-oriented or are otherwise not directly related to family-oriented travel or tourism;

(5) promotes or describes in-state locations, destinations, facilities, accommodations, or attractions not regularly accessible (open) to the general public year-round except for attractions or destinations that open seasonally because of weather conditions;

(6) is for display on the wall, including, but not limited to, a poster or banner; or

(7) is for the purpose of promoting out-of-state travel and tourism activities, destinations, facilities, attractions, and services that do not augment Texas travel and tourism, unless the travel literature:

(A) is regional and contains 51 percent or more information on Texas travel and tourism;

(B) is an accommodation guide which has hotel/motel information on Texas properties along with hotel/motel information on other states; or

(C) concerns the City of Texarkana, which is located in both Texas and Arkansas and shares a single chamber of commerce, and produces a combined information brochure.

(f) Display and distribution.

(1) Display. Private sector travel literature will be:

(A) displayed in a manner which the Travel Information Center supervisor believes is the most efficient and informative for the visitor;

(B) displayed in a manner which gives more exposure to destinations near the Travel Information Center or to destinations in high demand;

(C) displayed in season, if it is of a seasonal nature; and

(D) rotated periodically to provide exposure for all travel interests.

(2) Updating travel literature. New private sector travel literature will replace the old travel literature on display when a new date appears on the brochure or when substantial changes have been made to the item. Outdated travel literature will not be sent back to the original establishment, but will be disposed of through a recycling program or the most appropriate manner.

(3) Promotional items. Promotional posters or items will not be accepted for display or distribution without the written approval of the director or the director's designee.

(g) Vending machines. The sale of souvenirs and other related commercial items is prohibited at the Travel Information Centers. In accordance with Title 23, Code of Federal Regulations, Part 752, the department may permit vending machines in centers for the purposes of dispensing food, drink, and other articles that it determines appropriate and desirable. No charge to the public may be made for goods and services except for telephone and articles dispensed by such vending machines. The Texas Department of Assistive and Rehabilitative Services, Division for Blind Services has first right of refusal to operate vending machines in Travel Information Centers.

(h) Non-department use of Travel Information Centers.

(1) Request. An organization or individual wanting to do an on-site promotion at a Travel Information Centers rest area must submit a request in writing. Requests will be accepted on a first-come, first-served basis.

(2) Agreement. Prior to the department allowing on-site promotions, the organization or the individual must enter into a written agreement with the department agreeing to abide by the requirements of this subsection.

(3) Activity.

(A) Rest stop activities shall be conducted in a manner which will cause the least interference with the Travel Information Center's operation and picnic or rest area.

(B) Alcoholic beverages are prohibited.

(C) All non-alcoholic refreshments and promotional items offered at the rest stop must be free of charge to visitors.

(D) All promotional items must meet requirements of subsections (c) and (e) of this section and be offered free of charge to visitors.

(4) Signs.

(A) The organization or individual shall prominently display a sign indicating that all drinks, refreshments, services, and items provided are free of charge.

(B) Any signs associated with the refreshment rest stop, with the exception of those stated in subparagraph (A) of this paragraph, shall be limited to only those necessary to identify the organization and normal ownership signs permanently affixed to trailers, vehicles, tents, and other equipment directly associated with the operation of the rest stop.

(C) Any signs to be used or installed for the refreshment rest stop, including advance signs advising motorists of the refreshment rest stop, must receive prior approval of the director or the director's designee. An approved sign may not be attached to or interfere with the Travel Information Center's operation or highway signs.

(5) Services. The department will not furnish utilities, except where explicitly designed to be provided for this purpose.

(6) Cleanup. Cleanup of the facilities used for the refreshment rest stop during and immediately afterward is the responsibility of the organization.

(7) Compliance. The department will monitor or check periodically for compliance with the requirements of this subsection. Noncompliance may call for immediate cancellation of refreshment rest stop activities and may be the basis for refusing future requests.

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.

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Bob Jackson
General Counsel
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CHAPTER 26. REGIONAL MOBILITY AUTHORITIES
SUBCHAPTER F. MISCELLANEOUS OPERATION PROVISIONS

43 TAC §26.56

The Texas Department of Transportation (department) adopts an amendment to §26.56, Required Internal Ethics and Compliance Program. The amendment to §26.56 is adopted without changes to the proposed text as published in the September 10, 2010, issue of the *Texas Register* (35 TexReg 8322) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Title 43, Texas Administrative Code (43 TAC), §1.8, Internal Ethics and Compliance Program, which became effective February 19, 2009, establishes for an entity that is required by Texas Transportation Commission (commission) rule to have an internal ethics and compliance program the minimum requirements of such a program and requires the entity to certify that it has adopted and enforces compliance with the program.

In separate rules adopted by the commission concurrently with this rule, §1.8 is repealed and the substance of that rule is transferred to new §10.51. The amendment to §26.56(a) merely changes the reference from §1.8 to the new §10.51 to reflect that change.

COMMENTS

No comments on the proposed amendment were received.

STATUTORY AUTHORITY

The amendment is adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

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.

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CHAPTER 27. TOLL PROJECTS
SUBCHAPTER E. FINANCIAL ASSISTANCE FOR TOLL FACILITIES

43 TAC §27.53

The Texas Department of Transportation (department) adopts an amendment to §27.53, Request. The amendment to §27.53 is adopted without changes to the proposed text as published in the September 10, 2010, issue of the *Texas Register* (35 TexReg 8323) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Title 43, Texas Administrative Code (43 TAC), §1.8, Internal Ethics and Compliance Program, which became effective February 19, 2009, establishes for an entity that is required by Texas Transportation Commission (commission) rule to have an internal ethics and compliance program the minimum requirements of such a program and requires the entity to certify that it has adopted and enforces compliance with the program.

In separate rules adopted by the commission concurrently with this rule, §1.8 is repealed and the substance of that rule is transferred to new §10.51. The amendment to §27.53(a)(3) merely changes the reference from §1.8 to the new §10.51 to reflect that change.

COMMENTS

No comments on the proposed amendment were received.

STATUTORY AUTHORITY

The amendment is adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

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For further information, please call: (512) 463-8683

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CHAPTER 31. PUBLIC TRANSPORTATION SUBCHAPTER D. PROGRAM ADMINISTRATION

43 TAC §31.39

The Texas Department of Transportation (department) adopts an amendment to §31.39, Required Internal Ethics and Compliance Program. The amendment to §31.39 is adopted without changes to the proposed text as published in the September 10, 2010, issue of the *Texas Register* (35 TexReg 8324) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Title 43, Texas Administrative Code (43 TAC), §1.8, Internal Ethics and Compliance Program, which became effective February 19, 2009, establishes for an entity that is required by Texas Transportation Commission (commission) rule to have an internal ethics and compliance program the minimum requirements of such a program and requires the entity to certify that it has adopted and enforces compliance with the program.

In separate rules adopted by the commission concurrently with this rule, §1.8 is repealed and the substance of that rule is transferred to new §10.51. The amendment to §31.39 merely changes the reference from §1.8 to the new §10.51 to reflect that change.

COMMENTS

No comments on the proposed amendment were received.

STATUTORY AUTHORITY

The amendment is adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

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 December 17, 2010.

TRD-201007167
Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: January 6, 2011
Proposal publication date: September 10, 2010
For further information, please call: (512) 463-8683

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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Texas Water Development Board

Title 31, Part 10

The Texas Water Development Board will review 31 Texas Administrative Code Part 10, Chapter 360, Designation of River and Coastal Basins, in accordance with Texas Government Code §2001.039.

The Board will accept comments and make a final assessment regarding whether the reason for adopting each of the rules in 31 TAC Chapter 360 continues to exist. The comment period will end at 5:00 p.m., 30 days after this notice is published in the *Texas Register.*

Comments regarding this rule review may be submitted by email to *rulescomments@twdb.state.tx.us*, by fax at (512) 475-2053, or by mail addressed to Legal Services, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231.

TRD-201007148
Kenneth Petersen
General Counsel
Texas Water Development Board
Filed: December 16, 2010

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Adopted Rule Reviews

Office of Consumer Credit Commissioner

Title 7, Part 5

The Finance Commission of Texas (commission) has completed the review of Texas Administrative Code, Title 7, Part 5, Chapter 86, concerning Retail Creditors, pursuant to Texas Government Code, §2001.039. Chapter 86 contains Subchapter A, concerning Registration of Retail Creditors. Subchapter A is comprised of §86.101, concerning Consumer Notifications, and §86.102, concerning Annual Registration Fees.

Notice of the review of 7 TAC Part 5, Chapter 86 was published in the September 10, 2010, issue of the *Texas Register* (35 TexReg 8410), as required. The commission received no comments in response to that notice.

The commission believes that the reasons for initially adopting the rules contained in this chapter continue to exist, and readopts this chapter in accordance with the requirements of Texas Government Code, §2001.039.

This concludes the review of 7 TAC Part 5, Chapter 86.

TRD-201007212
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: December 20, 2010

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General Land Office

Title 31, Part 1

In accordance with the notice of proposed rule review published in the June 25, 2010, issue of the *Texas Register* (35 TexReg 5583), the Texas General Land Office (GLO) has reviewed and considered for readoption, revision or repeal Title 31, Part 1, Chapter 3, concerning General Provisions. The rule review was conducted under the GLO's rule review plan published in the April 23, 2010, issue of the *Texas Register* (35 TexReg 3297), as required by Texas Government Code §2001.039.

No public comments were received on the proposed rule review.

The GLO considered, among other things, whether the reasons for adoption of these rules continue to exist. As a result of the review, the GLO determined that the rules in Title 31, Part 1, Chapter 3, Subchapter A, concerning Property Accountability, Subchapter B, concerning Training and Education of Employees, Subchapter C, concerning Services and Products, and Subchapter D, concerning Purchasing, are still necessary, with revisions necessary to reflect recent legislative changes and agency practices. The GLO, therefore, readopts Title 31, Part 1, Chapter 3, of the Texas Administrative Code. A Notice of Proposed Rulemaking to amend Chapter 3, Subchapter B concerning Training and Education of Employees, and Subchapter C, §3.30 concerning Historically Underutilized Business Program is published elsewhere in this issue. A notice to replace and amend Subchapter C, §3.31 concerning Fees is also published elsewhere in this issue. Finally, a Notice of Proposed Rulemaking to repeal Chapter 3, Subchapter B, §3.22 concerning Employee Obligation, §3.23 concerning Training and Education Materials, and §3.24 concerning No Effect on At-Will Employment Status is published elsewhere in this issue.

This completes the GLO's review of Title 31, Part 1, Chapter 3, concerning General Provisions.

TRD-201007248
Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
Filed: December 20, 2010

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TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are 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: 30 TAC §30.210

License Type	Education Requirements	Experience as defined in 30 TAC §30.207(1)	Exam Required	Training Requirements
Class B	With High School Diploma (HSD) or equivalent*	2 years	Class 'B' municipal solid waste (MSW) Facility Supervisor Licensing Exam	Class 'B' MSW Facility Supervisor Course; and if applicable, specialized training.**
	Without HSD or equivalent	4 years		
Class A	With HSD or equivalent*	4 years	Class 'A' MSW Facility Supervisor Exam	Class 'A' MSW Facility Supervisor Course; and Class 'B' MSW Facility Supervisor Course; and if applicable, specialized training.**
	Without HSD or equivalent	6 years		
Class A	Applicants that hold a current "Manager of Landfill Operations" (MOLO) certification issued by Solid Waste Association of North America (SWANA); **and** complete the Class 'B' MSW Facility Supervisor Course and a TCEQ recognized Texas MSW regulation training course will not be required to complete the Class 'A' MSW Facility Supervisor course or take and pass the Class 'A' MSW Facility Supervisor licensing exam. However, the applicants must meet the required education and experience requirements outlined above.			

*HSD or equivalent may be substituted by completing an additional 20 hours of MSW training.

**Individuals managing or supervising medical waste or compost facilities requiring an MSW registration or permit, shall complete a TCEQ recognized or approved specialized training course that is applicable to that facility before being issued a standard class 'B' MSW Facility Supervisor license. Individuals completing the class 'B' MSW facility supervisor course, passing the examination, but not completing the specialized course will be issued a provisional class 'B' license. The completion of the specialized course must be before the expiration date of the provisional license.

Figure: 37 TAC §35.93

VIOLATION	VIOLATION DESCRIPTION	FINE AMOUNT
UNI - Uniform violation	Failed to have last name identification on outermost garment except plastic raingear	$25.00
UNI - Uniform violation	Failed to have the word "Security" on outermost garment except plastic raingear	$50.00
UNI - Uniform violation	Failed to have company name on outermost garment except plastic raingear	$50.00
FPPC- Failure to present pocket card	Failure to present pocket card upon request	$100.00
PCV - Pocket card violation	Failed to have a color photograph affixed to the pocket card	$50.00
PCV - Pocket card violation	Failed to have signature on the back of the pocket card	$25.00
RECV - Employee records violation	Full name of employee	$25.00
RECV - Employee records violation	Position of employee	$25.00
RECV - Employee records violation	Current residence of the security officer as reported by security officer	$25.00
RECV - Employee records violation	Date of employment when performing a regulated service	$25.00
RECV - Employee records violation	Address of employee as reported by employee	$25.00
RECV - Employee records violation	Social security number	$25.00
RECV - Employee records violation	Last date of employment	$25.00
RECV - Employee records violation	Date of birth	$25.00
RECV - Employee records violation	Place of birth	$25.00
RECV - Employee records violation	One color photograph	$25.00
RECV - Employee records violation	Failed to keep employee records two years from termination	$100.00
RECV - Employee records violation	Commission only - current duty assignment and location	$50.00
DT - RECV - Drug testing record violation	Failure to comply with drug free workplace policy within 10 working days of notice from the Private Security Bureau (PSB)	$500.00 per quarter
OPSL - Operating while license suspended	Failure to maintain current insurance	$500.00 every 14 days
OPSI - Operating outside scope insurance	Operating outside the scope of insurance coverage	$500 per violation
OPWI - Operating without insurance	Operating without insurance	$500 per violation
FPPI- Failure to provide proof of insurance	Failure to provide requested proof of insurance within 10 working days of notice from PSB	$100 per day
OPEL -Operating while license expired	Operating with an expired license	$500.00 every 14 days
REG - Registration violation	Failure to register employee within 5 days of employee actually beginning work	$200.00
ADDR - Address change violation	Failure to notify PSB within 14 days of change of address	$350.00
CON - Other contract violation	Licensee failure to provide requested written report within 7 days	$500.00
DISP - Consumer sign violation	Failure to display the consumer sign in a prominent place	$100.00
POST - Failure to post license	Failed to post the license	$100.00
CON - Other contract	Licensee failure to provide requested written contract within 7 days	$500.00
ADV - Advertising violation	Failed to have company name as stated in board records	$100.00
ADV - Advertising violation	Failed to have company address as stated in board records	$100.00
ADV - Advertising violation	Failed to have license number as issued by the board	$100.00
PRNT - Fingerprint violation	Failed to obtain fingerprints prior to placing on post	$250.00
BRNC - Failure to notify establishment of branch office	Failed to notify board within 14 days of opening branch office	$500.00
BRNT - Failure to notify closing of branch office	Failed to notify board within 14 days of closing of branch office	$350.00
CHNG - Failure to notify board of change of license name	Failure to notify board of a change in business name	$500.00
FLAG - Business use of flag of Texas	Licensee using the state flag of Texas	$500.00
MGRQ - Failure to qualify a manager	Failed to qualify a manager within 60 days	$500.00 every 14 days
MGRS - Manager failing to control business	Manager failing to control business	$3,000.00
MGRT - Failing to notify board of manager term within 14 days	Failed to notify board of manager term within 14 days	$500.00
OPS - Failure to notify board of a change of ownership	Failed to notify change of ownership within 14 days	$500.00 every 14 days
SEAL - Using state seal or DPS seal	Using state seal of Texas or DPS seal	$500.00
MGRS - Manager controlling excessive businesses	Manager controlling more than 3 companies and 2 schools	$3,000.00

Figure: 43 TAC §10.255(c)

Guidelines for Application of Sanction based on Grounds and Factors

Ground for Sanction	Sanction			
	Reprimand	Prohibition from entering into a specified agreement	Limit on contract amount	Debarment
§10.101(4) relating to maintaining good standing	allowable with written explanation of justification	allowable with written explanation of justification	allowable with written explanation of justification	recommended
§10.101(3) relating to adherence to civil and criminal laws	allowable with written explanation of justification	allowable with written explanation of justification	recommended only if: • the entity meets all mitigating factors listed in §10.254(c), and • the entity has not committed similar acts or omissions and • the seriousness and willfulness of the act or omission is not severe, and • the entity, or a third party on behalf of the entity, has fully compensated the department for any damages suffered by the department as a result of the entity's acts or omissions	recommended if: • the entity does not meet all mitigating factors listed in §10.254(c), or • the entity has committed similar acts or omissions, or • the seriousness and willfulness of the act or omission is severe, or • the department has not been fully compensated for any damages suffered by the department as a result of the entity's acts or omissions
§10.101(2) relating to offering, giving, or agreeing to give a benefit; or §10.101(1) relating to conflicts of interest	allowable with written explanation of justification	recommended only if: • the entity meets all of the mitigating factors of §10.254(c), and • the entity has not committed similar acts or omissions, and • the seriousness and	recommended only if: • the entity meets some of the mitigating factors of §10.254(c), and • the entity has not committed similar acts or omissions, and	recommended if: • the entity meets no mitigating factors listed in §10.254(c), or • the entity has committed similar acts or omissions, or • the seriousness and

		willfulness of the act or omission is not severe, and • the entity, or a third party on behalf of the entity, has fully compensated the department for any damages suffered by the department as a result of the entity's acts or omissions	• the seriousness and willfulness of the act or omission is not severe, and • the entity, or a third party on behalf of the entity, has fully compensated the department for any damages suffered by the department as a result of the entity's acts or omissions	willfulness of the act or omission is not severe, or • the department has not been fully compensated for any damages suffered by the department as a result of the entity's acts or omissions
§10.101(5) relating to notifying the department	recommended only if: • the entity meets all mitigating factors listed in §10.254(c), and • the entity has not committed similar acts or omissions, and • the seriousness and willfulness of the act or omission is not severe, and • the entity, or a third party on behalf of the entity, has fully compensated the department for any damages suffered by the department as a result of the entity's acts or omissions	recommended only if: • the entity meets some of the mitigating factors of §10.254(c), and • the entity has not committed similar acts or omissions, and • the seriousness and willfulness of the act or omission is not severe, and • the entity, or a third party on behalf of the entity, has fully compensated the department for any damages suffered by the department as a result of the entity's acts or omissions	recommended if: • the entity has committed similar acts or omissions, or • the seriousness and willfulness of the act or omission is severe, or • the department has not been fully compensated for any damages suffered by the department as a result of the entity's acts or omissions	recommended only if: • the entity has committed similar acts or omissions, and • the seriousness and willfulness of the act or omission is severe, and • the department has not been fully compensated for any damages suffered by the department as a result of the entity's acts or omissions

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 issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Texas Department of Agriculture

Notice Regarding Percentage Volume of Texas Grapes Required by Texas Alcoholic Beverage Code, Section 16.011

Texas Alcoholic Beverage Code, Section 16.011 (Section 16.011), establishes an exception to the bar on the sale of alcoholic beverages in dry areas for wineries that sell or dispense wine that contains seventy five percent (75%), by volume, of Texas grown grapes or fruit. Texas Agriculture Code, Section 12.039 (Section 12.039), provides that the commissioner of agriculture may reduce the percentage by volume of fermented juice of grapes or other fruit grown in this state that wine containing that particular variety of grape or other fruit must contain under Section 16.011. The commissioner has received a report from the Texas Wine Marketing Research Institute (TWMRI), Texas Grape Production and Demand Report 2010 (Report), as provided for in Section 12.039. The Report issued by the TWMRI is based in part on responses to surveys sent to Texas wineries, and other research. The Report does not include information from the annual United States Department of Agriculture (USDA) grape production report, which is issued in January of each year. Upon review of the TWMRI Report, and the recommendation made in the Report, the commissioner has determined that there is sufficient information to set the percentage of Texas grown grapes and fruit that is required to be in wine produced by wineries located in dry areas of Texas at seventy-five percent (75%), the percentage required by Section 16.011, to for the 2011 calendar year. The setting of the percentage requirement at the statutory seventy five percent (75%) is based upon several factors, although data is limited. First, the Report indicates that, of wineries responding to the TWMRI survey statewide, approximately 58% of wine grapes processed in Texas are Texas grapes. To maintain the intent of the statutory prohibition of locally-determined dry area alcohol sales, combined with the limited exception enacted for wines meeting a high threshold of Texas grape content, the established level for dry area wineries should be higher than what is already being met by wineries statewide. Second, the level established in previous years was based in part on grape production factors limited by weather or natural causes. The Report indicates that there were no similar circumstances this year due to growth in production and few adverse weather conditions, resulting in a very good production year. It was also noted that, while some wineries are having difficulties obtaining Texas grapes, citing cost of Texas grapes and availability of certain varieties, most wineries were able to obtain sufficient Texas grapes to meet their needs. Third, as noted below, for situations where a winery is not able to obtain enough Texas grapes to meet their needs, the commissioner will review individual appeals for reduction of the level set for calendar year 2011. Because the TWMRI Report does not include the annual USDA grape production information, the commissioner has again requested that Tim Dodd, the Director of the TWMRI, review the USDA report when it becomes available and submit to the commissioner at that time a recommendation for any needed adjustments to the 75% rate, as a result of the USDA data. The commissioner will review any such request and make adjustments to the rate, as deemed necessary. Any change to the rate will be published in the *Texas Register* and posted on the Texas Department of Agriculture website.

In accordance with Section 12.039(g), if a winery in a dry area of Texas finds that a particular variety of grape or other fruit is not available to a level sufficient for the winery to meet the winery's planned production for the relevant year, the winery may submit documentation or other information requested by the commissioner substantiating that the winery has not been able to acquire those grapes or other fruit grown in this state in an amount sufficient to meet the winery's production needs and to comply with requirements of Section 16.011. If the commissioner determines that there is not a sufficient quantity of that variety of grapes or other fruit grown in this state to meet the needs of that winery, the commissioner may reduce the percentage requirement for wine bottled during the remainder of the calendar year that contains that variety of grape or fruit.

TRD-201007226
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Filed: December 20, 2010

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Office of the Attorney General

Texas Health and Safety and Texas Water Code Settlement Notice

Notice is hereby given by the State of Texas of the following proposed resolution of an environmental enforcement lawsuit under the Texas Health and Safety Code, and Texas Water Code. Before the State may settle a judicial enforcement action under the Texas Water Code, the State shall permit the public to comment in writing on the proposed judgment. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreed judgment if the comments disclose facts or considerations that indicate that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Code.

Case Title and Court: *Harris County, Texas and the State of Texas acting by and through the Texas Commission on Environmental Quality, a Necessary and Indispensable Party v. E.R. Carpenter, L.P., a.k.a Carpenter Co. and/or Carpenter Chemical Co., and Carpenter Urethanes I, LLC;* Cause No. 2010-62270; in the 333rd Judicial District Court, Harris County, Texas.

Nature of Defendants' Operations: Defendants operate a facility in Harris County, Texas from which they had an unauthorized emission of ethylene chloride.

Proposed Agreed Final Judgment: The Agreed Final Judgment orders the Defendants to collectively pay $5,000 in civil penalties to Harris County and to the State of Texas. Both Harris County and the State of Texas will receive $1,000 in attorney's fees from the Defendants.

For a complete description of the proposed settlement, the complete proposed Agreed Final Judgment should be reviewed. Requests for copies of the judgment, and written comments on the proposed settlement, should be directed to Anthony W. Benedict, Assistant Attorney General, Environmental Protection and Administrative Law Division, Office of the Texas Attorney General, P.O. Box 12548, Austin, Texas

78711-2548, (512) 463-2012, facsimile (512) 320-0911. Written comments must be received within 30 days of publication of this notice to be considered.

For information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.

TRD-201007197
Jay Dyer
Deputy Attorney General
Office of the Attorney General
Filed: December 17, 2010

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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. Requests for federal consistency review were deemed administratively complete for the following project during the period of December 4, 2010, through December 15, 2010. 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 extends 30 days from the date published on the Coastal Coordination Council's web site. The notice was published on the web site on December 22, 2010. The public comment period for this project will close at 5:00 p.m. on January 21, 2011.

FEDERAL AGENCY ACTIONS:

Applicant: G&H Towing Company; Location: The project is located within the Galveston Ship Channel, at 200 Pennzoil Road, on Pelican Island in Galveston, Galveston County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Galveston, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 15; Easting: 326692; Northing: 3244855. Project Description: The applicant proposes to mechanically dredge, to a depth of 24 feet below mean sea level, approximately 25,000 cubic yards of material from an existing basin. The existing basin was previously dredged to a depth of 18 feet below mean sea level. The dredged material will be placed on uplands depicted on sheet 4 of the plans. The applicant also proposes to install a bulkhead behind the existing bulkhead and above the high tide line. CMP Project No.: 11-0199-F1. Type of Application: U.S.A.C.E. permit application #SWG-2010-00688 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403).

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 or activity 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 on the application listed above, including a copy of the consistency certifications or consistency determinations for inspection may be obtained from Kate Zultner, Consistency Review Specialist, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or via email at kate.zultner@glo.texas.gov. Comments should be sent to Ms. Zultner at the above address or by email.

TRD-201007204
Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: December 17, 2010

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Comptroller of Public Accounts

Notice of Award

The Comptroller of Public Accounts (Comptroller), State Energy Conservation Office, announces this notice of contracts awarded in connection with the Request for Applications #AF-G1-2010 for the alternative fuel and hybrid vehicle grants program.

Comptroller announces that contracts were awarded to the following:

City of El Paso, Two Civic Center Plaza, El Paso, Texas 79901. The total amount of the contract is not to exceed $100,000. The term of this contract is July 19, 2010 through May 31, 2011;

City of San Antonio, P.O. Box 839977, San Antonio, Texas 78283. The total amount of the contract is not to exceed $100,000. The term of the contract is September 20, 2010 through May 31, 2011;

City of Austin, 1190 Hargrave Street, Austin, Texas 78702. The total amount of the contract is not to exceed $100,000. The term of the contract is October 21, 2010 through May 31, 2011; and

City of Houston, 901 Bagby Street, City Hall, 3rd Floor, Houston, Texas 77002. The total amount of the contract is not to exceed $48,000. The term of the contract is December 6, 2010 through October 31, 2011.

The notice of request for applications (RFA #AF-G1-2010) was published in the March 19, 2010, issue of the *Texas Register* (35 TexReg 2327).

TRD-201007172
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: December 17, 2010

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Notice of Award

The Comptroller of Public Accounts (Comptroller) State Energy Conservation Office announces this notice of loan contracts awarded in connection with the Notice of Loan Funding Availability and Request for Applications #BE-AG1-2010 for building energy efficiency revolving loans.

Comptroller announces that loan contracts were awarded to the following:

The University of Texas Health Science Center - San Antonio, 7703 Floyd Curl Drive, San Antonio, Texas 78229. The total amount of the loan is not to exceed $1,239,304. The term of the contract is April 29, 2010 until repayment of the loan, in full;

Stephen F. Austin State University, 1936 North Street, Nacogdoches, Texas 75962. The total amount of the loan is not to exceed $9,817,961. The term of this contract is April 30, 2010 until repayment of the loan, in full;

The University of Texas at Arlington, 219 West Main Street, Arlington, Texas 76010. The total amount of the loan is not to exceed $9,901,000. The term of the contract is May 3, 2010 until repayment of the loan, in full;

Texas A&M University, 1371 TAMU, College Station, Texas 77843. The total amount of the loan is not to exceed $10,000,000. The term of the contract is May 5, 2010 until repayment of the loan, in full;

Nueces County, 901 Leopard, Corpus Christi, Texas 78401. The total amount of the loan is not to exceed $7,930,497. The term of the contract is May 6, 2010 until repayment of the loan, in full;

The City of Leon Valley, 6400 El Verde, Leon Valley, Texas 78238. The total amount of the loan is not to exceed $114,220. The term of the contract is May 11, 2010 until repayment of the loan, in full;

Brooks Development Authority, 1BDA Crossing, Suite 100, San Antonio, Texas 78235. The total amount of the loan is not to exceed $1,657,000. The term of the contract is May 21, 2010 until repayment of the loan, in full;

The City of El Paso, 2 Civic Center Plaza, El Paso, Texas 79901. The total amount of the loan is not to exceed $2,824,000. The term of the contract is May 26, 2010 until repayment of the loan, in full;

Texas State Technical College - Waco, 3801 Campus Drive, Waco, Texas 76705. The total amount of the loan is not to exceed $6,413,548. The term of the contract is June 24, 2010 until repayment of the loan, in full; and

La Marque Independent School District, 1727 Bayou Road, La Marque, Texas 77568. The total amount of the loan is not to exceed $1,450,752. The term of the contract is July 22, 2010 until repayment of the loan, in full.

The notice of request for applications (RFA #BE-AG1-2010) was published in the October 30, 2009, issue of the *Texas Register* (34 TexReg 7684).

TRD-201007173
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: December 17, 2010

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Notice of Award

The Comptroller of Public Accounts (Comptroller) State Energy Conservation Office announces this notice of loan contracts awarded in connection with the Notice of Loan Funding Availability and Request for Applications #BE-AG2-2010 for building energy efficiency retrofit program.

Comptroller announces that loan contracts were awarded to the following:

Stephen F. Austin State University, 1936 North Street, Nacogdoches, Texas 75962. The total amount of the loan is not to exceed $7,427,500. The term of this contract is June 24, 2010 until repayment of the loan, in full;

Texas A&M University, VP Finance and CFO, 1181 TAMU, College Station, Texas 77843-1181. The total amount of the loan is not to exceed $5,135,166. The term of the contract is July 8, 2010 until repayment of the loan, in full;

Brooks Development Authority, 1BDA Crossing, Suite 100, San Antonio, Texas 78235. The total amount of the loan is not to exceed $3,782,615. The term of the contract is July 21, 2010 until repayment of the loan, in full; and

Lake Dallas Independent School District, 315 E. Hundley Drive, P.O. Box 548, Lake Dallas, Texas 75065. The total amount of the loan is not to exceed $1,357,155. The term of the contract is September 29, 2010 until repayment of the loan, in full.

The notice of request for applications (RFA #BE-AG2-2010) was published in the March 5, 2010, issue of the *Texas Register* (35 TexReg 2066).

TRD-201007174
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: December 17, 2010

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Notice of Award

The Comptroller of Public Accounts (Comptroller) State Energy Conservation Office announces this notice of grant agreements awarded in connection with the Request for Applications #RE-G1-2010 for the renewable energy grants program.

Comptroller announces that contracts were awarded to the following:

Texas State Technical College West Texas, 300 Homer K Taylor Drive, Sweetwater, Texas 79556. The total amount of the contract is not to exceed $162,000. The term of this contract is October 6, 2010 through August 31, 2011;

Boerne Independent School District, 123 Johns Road, Boerne, Texas 78006. The total amount of the contract is not to exceed $164,000. The term of the contract is October 21, 2010 through August 31, 2011;

The University of Texas at Austin, 1 University Station C2200, Austin, Texas 78712. The total amount of the contract is not to exceed $195,000. The term of the contract is October 25, 2010 through August 31, 2011;

City of Laredo Environmental Services Department, 619 Reynolds Street, Laredo, Texas 78040. The total amount of the contract is $30,000. The term of the contract is October 28, 2010 through August 31, 2011;

City of Laredo Environmental Services Department, 619 Reynolds Street, Laredo, Texas 78040. The total amount of the contract is $145,000. The term of the contract is October 28, 2010 through August 31, 2011;

Texas Engineering Experiment Station/TAMUS, 1470 W.D. Fitch Parkway, College Station, Texas 77845. The total amount of the contract is $162,000. The term of the contract is October 28, 2010 through August 31, 2011; and

City of Presidio, P.O. Box 1899, Presidio, Texas 79845. The total amount of the contract is not to exceed $162,000. The term of the contract is November 3, 2010 through August 31, 2011.

The notice of request for applications (RFA #RE-G1-2010) was published in the April 9, 2010, issue of the *Texas Register* (35 TexReg 2884).

TRD-201007175
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: December 17, 2010

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Notice of Award

The Comptroller of Public Accounts (Comptroller) State Energy Conservation Office announces this notice of grant agreements awarded in connection with the Request for Applications #GJ-AG1-2010 for the Energy Sector Training Center Grants, of the State Energy Program.

Comptroller announces that contracts were awarded to the following:

Austin Community College District, 5930 Middle Fiskville Road, Austin, Texas 78752. The total amount of the contract is not to exceed $343,277. The term of this contract is May 4, 2010 through December 31, 2011, with option for one additional one-year term;

North Central Texas College, 1525 California Street, Gainesville, Texas 76240. The total amount of the contract is not to exceed $123,850. The term of the contract is May 4, 2010 through December 31, 2011, with option for one additional one-year term;

Amarillo College, P.O. Box 447, Amarillo, Texas 79178. The total amount of the contract is not to exceed $414,397. The term of the contract is May 5, 2010 through December 31, 2011, with option for one additional one-year term;

Clarendon College, 1122 College Drive, Clarendon, Texas 79226. The total amount of the contract is $300,000. The term of the contract is May 5, 2010 through December 31, 2011, with option for one additional one-year term;

Eastfield College, 3737 Motley Drive, Mesquite, Texas 75150. The total amount of the contract is $56,695. The term of the contract is May 5, 2010 through December 31, 2011, with option for one additional one-year term;

Ranger College, 1100 College Circle, Ranger, Texas 76470. The total amount of the contract is $410,182. The term of the contract is May 5, 2010 through December 31, 2011, with option for one additional one-year term;

Tarrant County College District, 1500 Houston Street, Fort Worth, Texas 76102. The total amount of the contract is $497,070. The term of the contract is May 5, 2010 through December 31, 2011, with option for one additional one-year term;

Texas State Technical College Harlingen, 1902 North Loop 499, Harlingen, Texas 78550. The total amount of the contract is $468,876. The term of the contract is May 5, 2010 through December 31, 2011, with option for one additional one-year term;

Texas State Technical College - Waco, 3801 Campus Drive, Waco, Texas 76705. The total amount of the contract is $70,800. The term of the contract is May 5, 2010 through December 31, 2011, with option for one additional one-year term;

McLennan Community College, 1400 College Drive, Waco, Texas 76708. The total amount of the contract is $197,183. The term of the contract is May 6, 2010 through December 31, 2011, with option for one additional one-year term;

Houston Community College System, 3100 Main Street, Houston, Texas 77002. The total amount of the contract is $460,480. The term of the contract is May 13, 2010 through December 31, 2011, with option for one additional one-year term;

Northeast Texas Community College, P.O. Box 1307, Mount Pleasant, Texas 75455. The total amount of the contract is $200,485. The term of the contract is May 14, 2010 through December 31, 2011, with option for one additional one-year term;

Odessa College, 201 W. University Blvd., Odessa, Texas 79764. The total amount of the contract is $79,066. The term of the contract is June 17, 2010 through December 31, 2011, with option for one additional one-year term;

Texas State Technical College - West Texas, 300 Homer K. Taylor Drive, Sweetwater, Texas 79556. The total amount of the contract is $273,850. The term of the contract is May 26, 2010 through December 31, 2011, with option for one additional one-year term;

Cedar Valley College, 3030 N. Dallas Avenue, Suite A115, Lancaster, Texas 75134. The total amount of the contract is $334,250. The term of the contract is June 2, 2010 through December 31, 2011, with option for one additional one-year term;

Alamo Community College District, 563 SW 40th, San Antonio, Texas 78237. The total amount of the contract is $142,304. The term of the contract is June 2, 2010 through December 31, 2011, with option for one additional one-year term; and

Lone Star College System, 5000 Research Forest Drive, The Woodlands, Texas 77381. The total amount of the contract is not to exceed $406,100. The term of the contract is July 22, 2010 through December 31, 2011, with option for one additional one-year term.

The notice of request for applications (RFA #GJ-AG1-2010) was published in the February 12, 2010, issue of the *Texas Register* (35 TexReg 1361).

TRD-201007176
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: December 17, 2010

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Credit Union Department

Application to Amend Articles of Incorporation

Notice is given that the following application has been filed with the Credit Union Department (Department) and is under consideration:

An application for a name change was received from Carroll Childers Credit Union, Houston, Texas. The credit union is proposing to change its name to Norman Mathis 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. 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 Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-201007202
Harold E. Feeney
Commissioner
Credit Union Department
Filed: December 17, 2010

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Application to Expand Field of Membership

Notice is given that the following application has been filed with the Credit Union Department (Department) and is under consideration:

An application was received from Right Choice Credit Union, Houston, Texas to expand its field of membership. The proposal would permit employees of Erwin McGowan State Farm Insurance Agency located at 1315 Lockwood Drive, Houston, Texas 77020, 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 or downloading the form at http://www.tcud.state.tx.us/applications.html. 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 Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-201007201
Harold E. Feeney
Commissioner
Credit Union Department
Filed: December 17, 2010

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Notice of Final Action Taken

In accordance with the provisions of 7 TAC §91.103, the Credit Union Department provides notice of the final action taken on the following applications:

Application to Expand Field of Membership - Withdrawn

GECU, El Paso, Texas - See *Texas Register* issue dated September 24, 2010.

Applications to Expand Field of Membership - Vacated Order

Texas Dow Employees Credit Union (#2), Lake Jackson, Texas - See *Texas Register* issue dated August 29, 2008.

Texas Dow Employees Credit Union (#6), Lake Jackson, Texas - See *Texas Register* issue dated August 29, 2008.

TRD-201007203
Harold E. Feeney
Commissioner
Credit Union Department
Filed: December 17, 2010

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Employees Retirement System of Texas

Request for Applications Texas Employees Group Benefits Program Health Maintenance Organizations

In accordance with Sections 1551.213 and 1551.214 of the Texas Insurance Code, the Employees Retirement System of Texas ("ERS") is issuing a Request for Application ("RFA") from qualified Health Maintenance Organizations ("HMOs") to provide services within their approved service areas in Texas under the Texas Employees Group Benefits Program ("GBP"), during Fiscal Year 2012, beginning September 1, 2011 through August 31, 2012. The locations in Texas for which Applications may be made are included in the RFA. HMOs shall provide the level of benefits required in the RFA and meet other requirements.

An HMO wishing to submit an Application to this request must meet at least the following minimum qualifications: 1) have a current Certificate of Authority from the Texas Department of Insurance, 2) have been providing managed care services in the service area for which the Application is made at least since March 1, 2009, and 3) demonstrate that it has a provider network in the proposed service area, as of the due date of the Application, adequate to provide health care to GBP Participants. The services requested and described in the RFA have been broken out into two (2) separate Plan Administrations: a) an HMO, and b) Medicare Advantage HMO. HMOs may submit an Application and bid response materials to provide services for one or both programs.

The RFA will be available on or after January 6, 2011 from the ERS' website, and all applications must be received at ERS by 12:00 Noon (CT) on February 10, 2011. To access the RFA from the website, qualified HMOs shall email their request to the attention of IVendor Mailbox at: ivendorquestions@ers.state.tx.us. The email request shall include the HMO's full legal name, street address, as well as phone and fax numbers of an immediate HMO contact. Upon receipt of your emailed request, a user ID and password will be issued to the requesting HMO that will permit access to the secured RFA.

General questions concerning the RFA and/or ancillary bid materials should be sent to the IVendor Mailbox where responses, if applicable, are updated frequently.

The ERS Board of Trustees is not required to select the lowest bid but shall take into consideration other relevant criteria, including ability to service contracts, past experience, and financial ability. ERS reserves the right to select none, one, or more than one HMO per service area when it is determined that such action would be in the best interest of ERS, the GBP, its Participants or the state of Texas.

ERS reserves the right to reject any or all Applications and call for new Applications if deemed by ERS to be in the best interests of ERS, the GBP, its Participants or the state of Texas. ERS also reserves the right to reject any application submitted that does not fully comply with the RFA's instructions and criteria. ERS is under no legal requirement to execute a contract on the basis of this notice or upon issuance of the RFA and will not pay any costs incurred by any entity in responding to this notice or the RFA or in connection with the preparation thereof. ERS specifically reserves the right to vary all provisions set forth in the RFA and/or contract at any time prior to execution of a contract where ERS deems it to be in the best interest of ERS, the GBP, its Participants or the state of Texas.

TRD-201007214
Paula A. Jones
General Counsel and Chief Compliance Officer
Employees Retirement System of Texas
Filed: December 20, 2010

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **January 31, 2011.** Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a

proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-2545 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on January 31, 2011.** Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing.**

(1) COMPANY: 8 Mile Park, L.P.; DOCKET NUMBER: 2009-1829-MWD-E; IDENTIFIER: RN101614212; LOCATION: Brazoria County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 Texas Administrative Code (TAC) §305.125(1), Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0013796001, Effluent Limitations and Monitoring Requirements Numbers 1 and 6, and the Code, §26.121(a), by failing to comply with permit effluent limits for biochemical oxygen demand (BOD), total suspended solids (TSS), and dissolved oxygen; 30 TAC §319.4 and TPDES Permit Number WQ0013796001, Effluent Limitations and Monitoring Requirements Number 2, by failing to collect and analyze samples for chlorine residual; 30 TAC §305.125(17) and TPDES Permit Number WQ0013796001, Sludge Provisions, by failing to submit the annual sludge report; 30 TAC §305.125(5) and TPDES Permit Number WQ0013796001, Operational Requirements Number 1, by failing to maintain operations and maintenance records; 30 TAC §305.125(5) and §317.4(g) and TPDES Permit Number WQ0013796001, Operational Requirements Number 1, by failing to properly operate and maintain all facilities and systems of treatment and control; 30 TAC §30.350(d) and §305.125(1) and TPDES Permit Number WQ0013796001, Other Requirements Number 1, by failing to employ a certified operator at the facility a minimum of five days per week; 30 TAC §305.125(1) and §319.7(a) and (c) and TPDES Permit Number WQ0013796001, Monitoring and Reporting Requirements Number 3.b and c, by failing to have all required monitoring and reporting records available for review upon request; 30 TAC §317.7(e), by failing to provide an intruder-resistant fence and hazard signage; and 30 TAC §317.4(a)(8), by failing to provide a reduced pressure zone backflow prevention device or air gap on the main potable water line; PENALTY: $39,998; ENFORCEMENT COORDINATOR: Steve Villatoro, (512) 239-4930; REGIONAL OFFICE: 5412 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(2) COMPANY: 50's Group Properties, Limited; DOCKET NUMBER: 2010-1455-IWD-E; IDENTIFIER: RN101517597; LOCATION: San Angelo, Tom Green County; TYPE OF FACILITY: meat packing; RULE VIOLATED: 30 TAC §305.125(1) and TCEQ Permit Number WQ0003574000, Part V, Special Provisions L, by failing to provide the soil analyses for the sodium adsorption ratio constituent parameters; and 30 TAC §305.125(1), TCEQ Permit Number WQ0003574000, Part IV. Conditions of the Permit, and the Code, §26.121(a), by failing to comply with permitted effluent limits; PENALTY: $3,375; ENFORCEMENT COORDINATOR: Samuel Short, (512) 239-5363; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7035, (325) 655-9479.

(3) COMPANY: Jerry Lynn Cooper dba A Sanitech Grease Services; DOCKET NUMBER: 2010-1319-MSW-E; IDENTIFIER: RN100632173; LOCATION: Houston, Harris County; TYPE OF FACILITY: liquid waste transfer station; RULE VIOLATED: 30 TAC §330.7(a), by failing to obtain a permit or other authorization prior to conducting storage, processing, or disposal of municipal solid waste; PENALTY: $5,000; ENFORCEMENT COORDINATOR: Wallace Myers, (512) 239-6580; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(4) COMPANY: Aqua Utilities, Inc.; DOCKET NUMBER: 2010-1412-MWD-E; IDENTIFIER: RN101612406; LOCATION: Houston, Harris County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0013619001, Effluent Limitations and Monitoring Requirements Numbers 1 and 2, and the Code, §26.121, by failing to comply with permitted effluent limits for TSS and chlorine; PENALTY: $10,175; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5800; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(5) COMPANY: Atchison Trucking, LLC; DOCKET NUMBER: 2010-1140-WQ-E; IDENTIFIER: RN105944441; LOCATION: Brazoria County; TYPE OF FACILITY: sand pit; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 Code of Federal Regulations §122.26(c), by failing to obtain authorization to discharge storm water associated with industrial activities; PENALTY: $750; ENFORCEMENT COORDINATOR: Heather Brister, (254) 751-0335; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(6) COMPANY: EOG Resources, Inc.; DOCKET NUMBER: 2010-1964-WR-E; IDENTIFIER: RN106017080; LOCATION: Nacogdoches County; TYPE OF FACILITY: water rights; RULE VIOLATED: the Code, §11.081 and §11.121, by impounding, diverting, or using state water without a required permit; PENALTY: $875; ENFORCEMENT COORDINATOR: Jordan Jones, (512) 239-2569; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(7) COMPANY: Irzum Business, Inc. dba Alexander Food Store; DOCKET NUMBER: 2010-1230-PST-E; IDENTIFIER: RN101575710; LOCATION: Baytown, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.42(i), by failing to inspect all sumps, manways, overspill containers, or catchment basins associated with an underground storage tank (UST) system; 30 TAC §115.246(4), by failing to maintain proof and documentation of Stage II training for all employees; 30 TAC §115.242(3) and Texas Health and Safety Code (THSC), §382.085(b), by failing to maintain the Stage II vapor recovery system in proper operating condition; 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; and 30 TAC §334.7(d)(3), by failing to notify the agency of any change or additional information regarding the USTs; PENALTY: $5,356; ENFORCEMENT COORDINATOR: Carlie Konkol, (512) 239-0735; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(8) COMPANY: City of Missouri City; DOCKET NUMBER: 2010-0659-MWD-E; IDENTIFIER: RN102178282; LOCATION: Fort Bend County; TYPE OF FACILITY: wastewater treatment system; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ013873001, Interim Effluent Limitation and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with permitted effluent limits for carbonaceous biochemical oxygen demand, *E. coli*, flow, and ammonia nitrogen; PENALTY: $54,000; Supplemental Environmental Project (SEP) offset amount of $54,000 applied to *Friends of the Rive San Bernard Natural Area Acquisition and Conservation Program;* ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE:

5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(9) COMPANY: S.S.G. FUEL SERVICE, INC. dba King Shell; DOCKET NUMBER: 2010-1466-PST-E; IDENTIFIER: RN101268472; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; 30 TAC §115.246(4) and (6) and THSC, §382.085(b), by failing to maintain Stage II records at the station and make them immediately available for inspection upon request by agency personnel; and 30 TAC §334.51(a)(6) and the Code, §26.3475(c)(2), by failing to ensure that all spill and overfill prevention equipment is properly operated and maintained; PENALTY: $9,056; ENFORCEMENT COORDINATOR: Michael Meyer, (512) 239-4492; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(10) COMPANY: Southwest Shipyard, L.P.; DOCKET NUMBER: 2010-1536-AIR-E; IDENTIFIER: RN100248749; LOCATION: Channelview, Harris County; TYPE OF FACILITY: ship cleaning and repair plant; RULE VIOLATED: 30 TAC §106.452(2)(A) and §122.143(4), Permit by Rule Registration Number 35353, Federal Operating Permit Number O-01260, Special Terms and Conditions Number 12A, and THSC, §382.085(b), by failing to operate within the abrasive usage rate limits of 150 tons per year, 15 tons per month, and one ton per day; PENALTY: $46,900; SEP offset amount of $18,760 applied to Barbers Hill Independent School District-Alternative Fueled Vehicle and Equipment Program; ENFORCEMENT COORDINATOR: Kimberly Morales, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

TRD-201007213
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: December 20, 2010

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Texas Ethics Commission

List of Late Filers

Listed below are the names of filers from the Texas Ethics Commission who did not file reports, or failed to pay penalty fines for late reports in reference to the listed filing deadline. If you have any questions, you may contact Robbie Douglas at (512) 463-5800.

Deadline: Semiannual Report due July 15, 2010 for Candidates and Officeholders

Ismael 'Kino' Flores, 1405 Enchanted Circle, Palmview, Texas 78572-1956

Deadline: 30-Day Pre-Election Report due October 4, 2010 for Candidates and Officeholders

David W. Scott, 32222 Edgewater Dr., Magnolia, Texas 77354-2656

Deadline: 30-Day Pre-Election Report due October 4, 2010 Committees

Farhan Shamsi, The Fort Bend County Democratic Party (CEC), 4207 Maily Meadow Lane, Katy, Texas 77450

Vanessa R. Stewart, Texas Independent Ginners Assn. PAC, P.O. Box 1182, Brownwood, Texas 76804

Deadline: Monthly Report due October 5, 2010 for Committees

Ronal Callender, Ellis County Sheriff's Officers Association Political Action Committee, 101 Pecan Creek, Red Oak, Texas 75154

Deadline: 8-Day Pre-Election Report due October 25, 2010 for Candidates and Officeholders

James M. Foreman, 3431 Monarch Meadow Lane, Pearland, Texas 77581

Kathleen M. Shaw, 812 Parkside Dr., Cedar Hill, Texas 75104

Gena N. Slaughter, 3109 Knox St. #313, Dallas, Texas 75205

Gary Louis Wilson Jr., 810 11th Ave. North, Texas City, Texas 77590

Deadline: Lobby Activities Report due July 12, 2010

Jamie Demericas, Texas SBA Inc., 100 Congress Ave., Ste. 2095, Austin, Texas 78701

Deadline: Lobby Activities Report due August 10, 2010

Ray Hymel, P.O. Box 90561, Austin, Texas 78709

Deadline: Lobby Activities Report due October 10, 2010

John Kroll, 301 Congress Ave., Ste. 1700, Austin, Texas 78701

Deadline: Personal Financial Statement due February 16, 2010

Eric L. Baumgart, P.O. Box 613, Nome, Texas 77629

James M. Foreman, 3431 Monarch Meadow Lane, Pearland, Texas 77581

TRD-201007147
David A. Reisman
Executive Director
Texas Ethics Commission
Filed: December 16, 2010

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Texas Forensic Science Commission

Notice of Major Consulting Services Contract

In accordance with the provisions of Texas Government Code, Chapter 2254, the Texas Forensic Science Commission ("FSC") has entered into a contract, dated December 14, 2010, with Lynn M. Robitaille ("Consultant") for purposes of providing legal services to the FSC. The total amount of the project shall not exceed $133,329.96.

Consultant's legal services will include but not be limited to the following:

1. Represent and advise the FSC members and staff on legal questions;

2. Work with consultants and FSC members in drafting contracts for services;

3. Work with hotels and the Commission Coordinator ("CC") in drafting contracts and agreements for meeting space and overnight rooms;

4. Serve as the signature authority for all FSC activities and agreements;

5. Ensure maintenance of public information act compliance;

6. Ensure maintenance of open meetings act compliance;

7. Act as liaison between different FSC stakeholders;

8. Continue development of policies and procedures protecting the integrity of the FSC and individual investigations;

9. Work with the Legislative Development Committee in the development of legislative initiatives that will advance the use and reliability of forensic science in the Texas criminal justice system;

10. Draft preliminary reports for Investigation Panels as necessary;

11. Coordinate with staff on conducting research for Complaint Screening Committees;

12. Draft reports for Complaint Screening Committees as necessary;

13. Develop initiatives for reporting to Forensic Development Committee;

14. Work with Attorney General's office and CC on PIA requests;

15. Develop an electronic system for expedient delivery of FSC documents responsive to PIA requests;

16. Work with CC on maintaining a list of deadlines for investigations;

17. Delegate and respond to media inquiries;

18. Communicate with FSC members on assignments and activities;

19. Work with CC on maintaining and updating the Complaint Assignment Table;

20. Conduct preliminary investigative activities as assigned by FSC members;

21. Participate in document development as assigned by FSC Chair;

22. Monitor FSC and forensic development articles; and

23. Develop information on the legal side of forensic sciences for use and reference by lawyers and judges on the FSC website.

The purpose of this engagement is for Consultant to provide professional legal analysis and counsel to FSC members on all FSC projects and cases in accordance with the FSC's statutorily mandated duties.

Consultant's business address is as follows:

210 Lee Barton Drive

Austin, Texas 78704

Parties interested in more information regarding the Contract shall contact the FSC at:

Leigh M. Tomlin

Sam Houston State University

College of Criminal Justice

Texas Forensic Science Commission

Box 2296

816 17th Street

Huntsville, Texas 77341

Telephone: 1-888-296-4232

Fax: 1-888-305-2432

E-mail: info@fsc.state.tx.us

TRD-201007199
John Bradley
Commission Chair
Texas Forensic Science Commission
Filed: December 17, 2010

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Texas Health and Human Services Commission

Public Notice

The Texas Health and Human Services Commission (HHSC) intends to submit to the Centers for Medicare and Medicaid Services an amendment to the Texas Home Living (TxHmL) waiver, which is a Medicaid home and community-based services waiver program under the authority of 1915(c) of the Social Security Act. The TxHmL waiver program is currently approved for the five-year period beginning March 1, 2007, and ending February 29, 2012. The proposed effective date for the amendment is September 1, 2010.

The TxHmL waiver program provides essential community-based services and supports to individuals with mental retardation living in their own homes or with their families instead of in an institution. TxHmL waiver program services include case management, prescription medications, adaptive aids, employment assistance, minor home modifications, audiology, speech and language pathology, occupational therapy, physical therapy, dietary services, behavioral supports, dental treatment, nursing, dietary assistance, residential assistance, community support, respite, supported employment, and day habilitation. Day habilitation provides assistance with acquiring, retaining, or improving self-help, socialization, and adaptive skills necessary to reside successfully in home and community-based settings.

This amendment will implement an optional program that offers additional funds to providers to pass on to their community support staff through salaries, wages, benefits, and mileage. Providers who choose to participate in this program are required to meet certain requirements and are required to submit documentation verifying they have met these requirements. This amendment will increase the overall cost ceiling of the TxHmL from $15,000 annually to $17,000 annually.

HHSC requests that the waiver amendment be approved for the period from September 1, 2010, through February 29, 2012. This amendment maintains cost neutrality for waiver years 2010 through 2012.

To obtain copies of the proposed waiver amendment, interested parties may contact Christine Longoria by mail at Texas Health and Human Services Commission, P.O. Box 85200, Mail Code H-620, Austin, Texas 78708-5200, telephone (512) 491-1152, fax (512) 491-1953, or by e-mail at Christine.Longoria@hhsc.state.tx.us.

TRD-201007180
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: December 17, 2010

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Public Utility Commission of Texas

Notice of Application for Amendment to Certificated Service Area Boundary

Notice is given to the public of an application filed on December 13, 2010, with the Public Utility Commission of Texas for an amendment to a certificated service area boundary in Bandera County, Texas.

Docket Style and Number: Application of Hill Country Telephone Cooperative, Inc. for an Amendment to a Certificate of Convenience and Necessity for Service Area Boundary Change. Docket Number 38972.

The Application: The minor boundary amendment is being filed to realign the boundary between the Medina exchange of Hill Country, and the Bandera exchange of AT&T Texas. The amendment will transfer a portion of AT&T Texas' serving area in the Bandera exchange to Hill Country's Medina exchange. AT&T Texas has provided a letter of concurrence endorsing this proposed change.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas by January 7, 2011, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. 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. All comments should reference Docket Number 38972.

TRD-201007152
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 17, 2010

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Notice of Application for Designation as an Eligible Telecommunications Carrier and Eligible Telecommunications Provider

Notice is given to the public of an application filed with the Public Utility Commission of Texas on December 13, 2010 for designation as an eligible telecommunications provider (ETP) and eligible telecommunications carrier (ETC) pursuant to P.U.C. Substantive Rules §26.417 and §26.418, respectively.

Docket Title and Number: Application of Telrite TX LLC d/b/a Life Wireless for Designation as an Eligible Telecommunications Carrier Pursuant to P.U.C. Substantive Rule §26.418 and Eligible Telecommunications Provider Pursuant to P.U.C. Substantive Rule §26.417 on a Wireless Basis (Low Income Only). Docket Number 38971.

The Application: The company requests ETC/ETP designation to be eligible for federal and state universal service funds to assist it in providing universal service in Texas. Pursuant to P.U.C. Substantive Rules §26.417 and §26.418, the commission, designates qualifying common carriers as ETCs and ETPs for service areas designated by the commission. The company seeks ETC/ETP designation in the entire non-rural portions of the State of Texas for the purpose of receiving federal universal service support for wireless services. It will not seek access to funds from the federal Universal Service Fund for the purpose of providing service to high cost areas. Telrite seeks only Lifeline and Link-Up support from the low-income program and does not seek any high-cost support. A list of each exchange for which the company is requesting ETC/ETP status in the State of Texas is attached to the application as Exhibit A.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. The deadline for intervention in this proceeding is January 20, 2011. 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. All comments should reference Docket Number 38971.

TRD-201007151
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 17, 2010

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Notice of Application for Service Area Exception

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on December 13, 2010, for an amendment to certificated service area for a service area exception within Irion County, Texas.

Docket Style and Number: Application of Southwest Texas Electric Cooperative, Inc. to Amend a Certificate of Convenience and Necessity for Electric Service Area Exception within Irion County. Docket Number 38973.

The Application: Southwest Texas Electric Cooperative, Inc. (SWTEC) filed an application for a service area boundary exception to allow SWTEC to provide service to a specific customer located within the certificated service area of Concho Valley Electric Cooperative, Inc. (CVEC). CVEC has provided a letter of concurrence for the proposed change.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas no later than January 7, 2011 by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. 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. All comments should reference Docket Number 38973.

TRD-201007153
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 17, 2010

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Notice of Application to Amend a Certificate of Convenience and Necessity for a Proposed Transmission Line

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on December 16, 2010, to amend a certificate of convenience and necessity for a proposed transmission line in Gaines County, Texas.

Docket Style and Number: Application of Southwestern Public Service Company to Amend a Certificate of Convenience and Necessity for a Proposed Transmission Line within Gaines County. Docket Number 38974.

The Application: The application of Southwestern Public Service Company for a proposed 115-kV transmission line in Gaines County, Texas is designated as the Johnson Draw 115-kV Transmission Line Project. The proposed project is presented with a preferred route and five alternate routes. Any route presented in the application could, however, be approved by the commission. Depending on the route chosen, the proposed line will be approximately 4 to 6 miles in length. The proposed project will be constructed on single-pole double-circuit steel structures. The total estimated cost for the project is $7,754,273.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. The deadline for intervention in this proceeding is January 31, 2011. 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. All comments should reference Docket Number 38974.

TRD-201007154
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 17, 2010

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San Antonio-Bexar County Metropolitan Planning Organization

Request for Proposals - South Texas Medical Center Transportation Analysis

The San Antonio-Bexar County Metropolitan Planning Organization (MPO) is seeking proposals from qualified firms to conduct a Transportation Analysis of the South Texas Medical Center.

A copy of the Request for Proposals (RFP) and attachments may be downloaded from the MPO's website at www.sametroplan.org, by e-mailing sabcmpo@sametroplan.org, or by calling the MPO at (210) 227-8651. Anyone wishing to submit a proposal must do so by 12:00 p.m. (CST), Tuesday, February 1, 2011 to:

Isidro "Sid" Martinez

Director

San Antonio-Bexar County Metropolitan Planning Organization

825 South Saint Mary's

San Antonio, Texas 78205

The contract award will be made by the MPO's Transportation Policy Board based on the recommendation of the project's oversight committee. The oversight committee will review the proposals based on the evaluation criteria listed in the RFP.

Funding for this study, in the amount of $65,000 is contingent upon the availability of Federal transportation planning funds.

TRD-201007249
Jeanne Geiger
Deputy Director
San Antonio-Bexar County Metropolitan Planning Organization
Filed: December 20, 2010

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Texas Department of Transportation

Aviation Division - Request for Proposal for Professional Engineering Services

The City of Weslaco, through its agent the Texas Department of Transportation (TxDOT), intends to engage an aviation professional engineering firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional aviation engineering design services described below.

The following is a listing of proposed projects at the Mid Valley Municipal Airport during the course of the next five years through multiple grants.

Current Project: City of Weslaco. TxDOT CSJ No.: 1121WESLA. Extend, overlay and mark Runway 13-31; extend parallel taxiway; rehabilitate east side hangar access taxiway; overlay east side taxiway; rehabilitate terminal apron; extend medium intensity runway light Runway 13; relocate lead in lighting system; relocate precision approach path indicator-4 Runway 13; relocate utilities; improve drainage; and install fence.

The DBE goal for the current project is 8%. TxDOT Project Manager is Ed Mayle.

Future scope work items for engineering/design services within the next five years may include the following:

1. Overlay and mark tiedown apron east side
2. Rehabilitate and mark parallel taxiway to runway 13-31
3. Rehabilitate hangar access Taxiway
4. Rehabilitate Taxiway on West Side
5. Rehabilitate stub Taxiway East

The City of Weslaco reserves the right to determine which of the above scope of services may or may not be awarded to the successful firm and to initiate additional procurement action for any of the services above.

To assist in your proposal preparation the criteria, 5010 drawing, project description, and most recent Airport Layout Plan are available online at www.txdot.gov/avn/avninfo/notice/consult/index.htm by selecting "Mid Valley Municipal Airport." The proposal should address a technical approach for the current scope only. Firms shall use page 4, Recent Airport Experience, to list relevant past projects for both current and future scope.

Interested firms shall utilize the latest version of Form AVN-550, titled "Aviation Engineering Services Proposal." The form may be requested from TxDOT Aviation Division, 125 East 11th Street, Austin, Texas 78701-2483, phone number, 1-800-68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT web site at http://www.txdot.gov/business/projects/aviation.htm. The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. A prime provider may only submit one proposal. If a prime provider submits more than one proposal, that provider will be disqualified. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-550, firms are encouraged to download Form AVN-550 from the TxDOT website as addressed above. Utilization of Form AVN-550 from a previous download may not be the exact same format. Form AVN-550 is a PDF Template.

Please note:

Five completed, unfolded copies of Form AVN-550 **must be received** by TxDOT Aviation Division at 150 East Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than January 25, 2011, 4:00 p.m. Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Becky Vick.

The consultant selection committee will be composed of Aviation Division staff members and one voting member from the city. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluation of engineering proposals can be found at http://www.txdot.gov/business/projects/aviation.htm. All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

Please contact TxDOT Aviation for any technical or procedural questions at 1-800-68-PILOT (74568). For procedural questions, please contact Becky Vick, Grant Manager. For technical questions, please contact Ed Mayle, Project Manager.

TRD-201007144

Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: December 16, 2010

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Notice of Intent - Border Highway Extension - East, El Paso, Texas

Pursuant to 43 TAC §2.5(e)(2), the Texas Department of Transportation (department), in cooperation with the Federal Highway Administration, is issuing this notice to advise the public that an Environmental Impact Statement (EIS) will be prepared for a proposed transportation project. The proposed project area for the Border Highway Extension - East (BHE) would begin at Loop 375 (Americas Avenue) near the Zaragoza International Port of Entry and extend approximately 20 miles in the southeasterly direction to the vicinity of the Fabens International Port of Entry (future Tornillo-Guadalupe International Port of Entry). The proposed alignment would be located between the Rio Grande and Farm-to-Market 258 (FM 258) (Socorro Road) except near Fabens by Island Tornillo Road. The project would potentially include eight connections between BHE and Interstate 10 (I-10).

The EIS will evaluate potential impacts from construction and operation of the project, including, but not limited to, the following: impacts or potential displacements to residents and businesses; detours; air and noise impacts from construction equipment, and operation of the project; water quality impacts from the construction area and from roadway storm water runoff; impacts to waters of the United States; impacts to historic and archeological resources; impacts to floodplains and irrigation canals; impacts to socio-economic resources (including environmental justice and limited English proficiency populations); indirect impacts; cumulative impacts; land use; vegetation; wildlife; and aesthetic and visual resources. The project could result in potential significant impacts to the cultural resources (archeological and historical) present within the project area that relate to, among others, the Spanish Colonial, Mexican American, and agricultural contexts. The EIS will evaluate the impacts to the water canal owned and operated by the El Paso County Water Improvement District No. 1. The canal was listed in the National Register of Historic Places in 1997.

The department will consider several alternatives intended to satisfy the identified need and purpose. The alternatives will include the no-build alternative, Transportation System Management/Transportation Demand Management, mass transit, and roadway build alternatives. The roadway build alternatives may range from a two-lane road to a six-lane road, may include limited access and non-limited access (arterial) designs, and toll and non-toll lanes.

The project may require the following approvals by the federal government: Section 106 (Antiquities), Section 401/404 (Clean Water Act), and Section 10(a) (Endangered Species Act). The actual approvals required may change after the department completes field surveys and selects the alignment for the project.

A scoping meeting is an opportunity for participating agencies, cooperating agencies, and the public to be involved in defining the need and purpose for the proposed project, to assist in determining the range of alternatives for consideration in the draft EIS, and to comment on methodologies to evaluate alternatives. The department will publish notice that scoping meetings will be held. The notice will be published in newspapers of general circulation in the project area at least 30 days prior to the meetings, and again approximately 10 days prior to the meetings.

The department will complete the procedures for public participation and coordination with other agencies as described in one or both the National Environmental Policy Act and state law. In addition to any scoping meetings, the department will hold a series of meetings to solicit public comment during the environmental review process. They will be held during appropriate phases of the project development process. Public notices will be given stating the date, time, and location of the meeting or hearing and will be published in English as well as Spanish. Provisions will be made for those with special communication needs, including translation if requested. The department will also send correspondence to federal, state, and local agencies, and to organizations and individuals who have previously expressed or are known to have an interest in the project, which will describe the proposed project and solicit comments. The department invites comments and suggestions from all interested parties to ensure that the full range of issues related to the proposed project are identified and addressed. Comments or questions should be directed to the department at the address set forth below.

A proposed schedule for completion of the environmental review process is not available.

Agency Contact: Comments or questions concerning this proposed action and the EIS should be sent to Raimundo Dovalina, Jr., P.E., Deputy District Engineer, Texas Department of Transportation, 13301 Gateway Boulevard West, El Paso, Texas 79928-5410; phone (915) 790-4200.

TRD-201007252
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: December 20, 2010

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Pass-Through Toll Finance Program Call - 2011

In accordance with Minute Order 112526 approved by the Texas Transportation Commission (commission) on December 16, 2010, and pursuant to Transportation Code, §222.104(b), and Title 43, Texas Administrative Code (43 TAC), Chapter 5, Subchapter E, the Texas Department of Transportation (department) issues this 2011 Program Call for highway projects to be developed on the state highway system under a pass-through toll agreement. Pursuant to 43 TAC §5.54, the commission determined that (i) monies available that can be allocated among all proposals selected under this program call will be limited to an estimated total of $250 million in Category 12 funds; (ii) only the following category of project costs described in 43 TAC §5.53(a)(11) will be considered as eligible for reimbursement under this program call: construction cost, exclusive of construction engineering cost, and in the case of a pass-through toll project submitted as a design-build project, the construction cost, exclusive of construction engineering costs must be broken out separately as one component of the total project cost (The cost categories of design, development (including environmental clearance, right of way acquisition, utility adjustment, contingencies), financing, maintenance, and operation are specifically excluded and are not eligible for reimbursement); (iii) proposals for a new location facility or realignment of an existing roadway will only be considered if a commission minute order exists at the time of submission that designates the new location or realignment as part of the state highway system; (iv) the value of development and implementation services and products for the project, including but not limited to environmental studies and mitigation, right-of-way acquisition, engineering, and construction inspection services that have been or will be provided by the department, will be deducted from the eligible reimbursement amounts; and (v) federal and state funding that is otherwise programmed for or committed to a proposed pass-through toll project will

not be considered as part of the proposer's contribution, nor may it be reimbursed under the program.

The department will accept proposals from both public and private entities that are submitted in accordance with the terms of this notice, Minute Order 112526, and 43 TAC Chapter 5, Subchapter E. The due date for acceptance of proposals is 3:00 p.m., Tuesday, March 1, 2011. The submission must be an electronic copy of the proposal in Adobe PDF format on a labeled compact disk, along with one hard copy, addressed to John Barton, P.E., Assistant Executive Director for Engineering Operations, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701. An additional electronic copy of the proposal, along with one hard copy, should be addressed to the local District Office where the proposed project will be located. The addresses of the district offices are available on the department's internet website, www.txdot.gov.

The department will evaluate the submitted proposals using the items of criteria set forth in 43 TAC §5.55 and present its analyses to the commission. Based on the staff's analysis and the commission's evaluation of the proposals, the commission may select the proposals that provide the best value to the state and direct the department staff to attempt to negotiate the financial terms of a potential pass-through toll agreement with the selected public entity proposers, and will solicit competitive proposals under 43 TAC §5.56 for the selected private entity proposers.

In the event that an alternative funding source or a significant increase in Category 12 funding becomes available for use in the program prior to August 31, 2011, or any extended date, the commission may authorize an additional deadline period for submitting proposals to be in compliance with conditions specific to the new period, in accordance with the requirements of 43 TAC §5.54. Provided further, that in the event a critical transportation need arises which can be addressed with a pass-through toll agreement, or an alternative funding source becomes available for a specific transportation project, the commission may, at any time and irrespective of the limitations set forth in this program call, authorize acceptance of an individual proposal for development of a pass-through toll project to meet that need or utilize those funds, provided that the proposal otherwise complies with 43 TAC Chapter 5, Subchapter E.

Information regarding the proposal application guidelines for pass-through toll financing of highway projects will be available electronically on the department's website, www.txdot.gov/business/, and at the following address: Texas Department of Transportation, Attn: Mark E. Tomlinson, P.E., 125 East 11th Street, Austin, Texas 78701, (512) 936-0903, on or after December 31, 2010.

TRD-201007251
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: December 20, 2010

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Texas Water Development Board

Applications for December 2010

Pursuant to Texas Water Code §6.195, the Texas Water Development Board provides notice of the following applications:

1. Project ID #21511, Angelina and Neches River Authority, P.O. Box 387, Lufkin, Texas 75902, received October 17, 2010, to waive the ten year early purchase provisions in the First Amended Master Agreement regarding State Participation in the Lake Columbia Regional Water Supply Reservoir Project, thereby allowing an early purchase of a portion of the TWDB's ownership interest in the Project.

2. Project ID #21702, Panhandle Groundwater Conservation District, P.O. Box 737, White Deer, Texas 79097, received November 10, 2010, for a loan in the amount of $1,000,000 from the Agricultural Water Conservation Program to provide financing for an agricultural water conservation program.

3. Project ID #73523, Village of Vinton, 436 E. Vinton Road, Vinton, Texas 79821, received August 5, 2010, for a loan in the amount of $1,210,000 from the Clean Water State Revolving Fund - Disadvantaged Communities Program to finance wastewater system improvements, utilizing the pre-design funding option.

4. Project ID #21693, Cypress Creek Water Supply Corporation, P.O. Box 536, Woodville, Texas 75979, received September 14, 2010, for a loan in the amount of $495,000 from the Rural Water Assistance Fund to finance water system improvements, utilizing the pre-design funding option.

5. Project ID #21694, City of Nassau Bay, P.O. Box 58448, Nassau Bay, Texas 77002, received September 27, 2010, for a loan in the amount of $2,445,000 from the Texas Water Development Fund to finance wastewater system improvements, utilizing the pre-design funding option.

6. Project ID #21695, City of San Angelo, 72 West College Avenue, San Angelo, Texas 76901, received October 21, 2010, for a loan in the amount of $120,000,000 from the Water Infrastructure Fund to finance a water supply project, utilizing the pre-design funding option.

7. Project ID #21642, San Antonio Water System on behalf of the City of San Antonio, P.O. Box 2449, San Antonio, Texas 78298, received July 30, 2010, for a loan in the amount of $24,550,000 from the Water Infrastructure Fund to finance a water supply project, utilizing the pre-design funding option.

8. Project ID #21697, City of Corpus Christi, 1201 Leopard Street, Corpus Christi, Texas 78401, received October 20, 2010, for a loan in the amount of $1,855,000 from the Water Infrastructure Fund, deferred payment option, to finance development costs for a water supply project, utilizing the pre-design funding option.

9. Project ID #21698, Guadalupe Blanco River Authority, 933 E. Court Street, Seguin, Texas 78155, received October 15, 2010, for a loan in the amount of $4,400,000 from the Water Infrastructure Fund, deferred payment option, to finance development costs for a water supply project, utilizing the pre-design funding option.

10. Project ID #21699, Guadalupe Blanco River Authority, 933 E. Court Street, Seguin, Texas 78155, received October 15, 2010, for a loan in the amount of $2,500,000 from the Water Infrastructure Fund, deferred payment option, to finance development costs for a water supply project, utilizing the pre-design funding option.

11. Project ID #21696, Montgomery County Municipal Utility District No. 8, 1001 McKinney Street, Suite 1000, Houston, Texas 77002, received October 25, 2010, for a loan in the amount of $645,000 from the Water Infrastructure Fund, deferred payment option, to finance development costs for a water supply project, utilizing the pre-design funding option.

12. Project ID #21696, Montgomery County Municipal Utility District No. 9, 1001 Fannin, Suite 2500, Houston, Texas 77002, received October 25, 2010, for a loan in the amount of $645,000 from the Water Infrastructure Fund, deferred payment option, to finance development costs for a water supply project, utilizing the pre-design funding option.

13. Project ID #21700, West Harris County Regional Water Authority, 3200 Southwest Freeway, Suite 2600, Houston, Texas 77027, received October 19, 2010, for a loan in the amount of $11,195,000 from the

Water Infrastructure Fund, deferred payment option, to finance development costs for a water supply project, utilizing the pre-design funding option.

14. Project ID #10380, Polk County Fresh Water Supply District No. 2, P.O. Box 2250, Onalaska, Texas 77360, received November 19, 2010, for a grant in the amount of $193,000 from the Economically Distressed Areas Program for the planning, acquisition and design costs for a project to extend wastewater services to unserved areas.

15. Project ID #10045, City of Laredo, 1110 Houston Street, Laredo, Texas 75201, received September 17, 2010, to amend TWDB Resolution No. 00-97, as amended by TWDB Resolution No. 07-111, relating to the allocation of EDAP funding for hook-ups and capacity buy-in, and a change to the EDAP grant commitment amount.

16. Project ID #61217, City of Cockrell Hill, 4125 West Clarendon, Dallas, Texas 75211, received September 15, 2010, affirming the commitment made in TWDB Resolution Nos. 06-43 and 07-80 after environmental review, and approving release of funds for design and construction from the $1,875,000 Drinking Water State Revolving Fund loan for water system improvements.

17. Project ID #61424, Hidalgo County Municipal Utility District #1, 5000 W. Military Hwy., Suite 100, McAllen, Texas 78503, received September 14, 2010, affirming the commitment made in TWDB Resolution No. 08-43 after environmental review, and approving release of funds for design and construction from the $5,645,000 Drinking Water State Revolving Fund loan for water system improvements.

TRD-201007135
Kenneth Petersen
General Counsel
Texas Water Development Board
Filed: December 15, 2010

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Requests for Statements of Qualifications for Water Research

Pursuant to 31 Texas Administrative Code §355.3, the Texas Water Development Board (TWDB) requests the submission of Statements of Qualifications leading to the possible award of a contract examining bay salinity patterns and limits to *Rangia* populations in Texas estuaries. The project should take no more than one year to complete. Guidelines for Statements of Qualifications, which include an application checklist, will be supplied by the TWDB upon request.

Description of Research Objectives

The research study will develop an explicit spatial linkage between the frequency and duration of salinity zones and the distribution of *Rangia*, specifically *Rangia cuneata*, in Texas estuaries. *Rangia* are native species and are ecologically important, because they filter detritus and phytoplankton from the water and serve as an important food source for fish, crustaceans, and water fowl. Texas Parks and Wildlife Department (TPWD) data show that *Rangia* are more abundant in upper estuary zones, where salinity typically is less than 15ppt. According to scientific literature, freshwater inflow events, which cause rapid decreases in salinity, can trigger spawning by *Rangia* (Hopkins et al. 1973). However, in order for larvae to settle and mature, salinities must be sustained at low levels (<10ppt) for approximately one month immediately after a spawning event. As distance from the source of freshwater inflow (i.e., river mouth) increases, *Rangia* abundance tends to decrease. Therefore, it is probable that *Rangia* populations are limited by the lack of reoccurring favorable salinity conditions as distance increases from the mouth of rivers or as the volume of freshwater inflow declines. Therefore, this study will thoroughly document the frequency and duration of reoccurring salinity patterns, which may limit *Rangia* distributions in Texas estuaries. The goal is to achieve a better understanding of long-term patterns of salinity and the potential ecological impacts of altering historic patterns of freshwater inflows to the estuaries.

The approach will be to utilize hydrodynamic model output (i.e., simulated salinities) generated by the TWDB's TxBLEND salinity transport and circulation model to determine salinity-duration frequencies and the spatial extent of salinity zones as a function of freshwater inflow. These results then will be compared to the distribution of *Rangia*. *Rangia* occur in several of the major bays along the Texas coast; however, analyses may be applied to only one or two bays which will be selected by mutual agreement between the contractor and TWDB.

Analysis of salinity-duration frequency of simulated salinities should include evaluation of salinity in 5ppt intervals, ranging from 0 - 35ppt. Duration of salinity should be evaluated for one-week, two-week, and one-month intervals, while frequencies of reoccurrence should consider one-year, two-year, five-year, 10-year, and 15-year intervals.

Rangia data collected by TPWD should be characterized for spatial trends in distribution, size, and estimated age classes. Data then will be combined with results from the salinity-duration frequency analysis to infer limitations on the distribution of *Rangia*, given historic freshwater inflow patterns.

The deliverable will be a summary report including maps and graphics demonstrating salinity-duration frequencies and *Rangia* distribution for the estuary (or estuaries) analyzed.

The TWDB website site includes (1) guidelines for the Statements of Qualifications, (2) copies of the attachments, (3) a list of Statement of Qualifications Review Criteria, and (4) some supporting material: http://www.twdb.state.tx.us/publications/requestforproposals/requestforproposals_index.asp

The Statement of Qualifications shall not be more than 15 pages in length, excluding qualifications and experience of project staff. Applicants should be knowledgeable in analyzing patterns of salinity-zonation with respect to biological populations and should have experience analyzing salinity output from the TxBLEND hydrodynamic and salinity transport model. The applicant should also have experience with analyzing patterns of freshwater inflows to Texas estuaries.

Description of Funding Consideration

Up to $29,069 has been identified for this research study from the TWDB's Research and Planning Fund. Following the receipt and evaluation of all Statements of Qualifications, oral presentations may be required as part of qualification review. However, invitation for oral presentation is not an indication of probable selection. Up to 100 percent funding may be provided to individual applicants; however, applicants are encouraged to contribute matching funds or services, and funding will not include reimbursement for indirect expenses incurred by political subdivisions of the state or other state and federal agencies. In the event that acceptable Statements of Qualifications are not submitted, the TWDB retains the right to not award funds for the contracts.

Deadline, Review Criteria, and Contact Person for Additional Information

Six double-sided copies of a complete Statement of Qualifications, including the required attachments, must be filed with the TWDB prior to 12:00 noon, Friday, January 21, 2011. Statements of Qualifications must be directed either in person to Mr. David Carter, Texas Water Development Board, Stephen F. Austin Building, 1700 North Congress Avenue, Austin, Texas; or by mail to Mr. David Carter, Texas Water Development Board, P.O. Box 13231-Capitol Station, Austin, Texas 78711-3231. Statements of Qualifications will be evaluated according to 31 Texas Administrative Code §355.5 and the Statements

of Qualifications Review Criteria rating form included in the TWDB's Guidelines for Water Research Grants. Research shall not duplicate work planned or underway by state agencies. All potential applicants may contact the TWDB to obtain these guidelines or visit the TWDB website at http://www.twdb.state.tx.us/publications/requestforproposals/requestforproposals_index.asp.

Requests for information, the TWDB's rules covering the Research and Planning Fund, detailed evaluation criteria, more detailed research topic information, and the guidelines may be directed to Mr. David Carter at the preceding address or by calling (512) 936-6079.

TRD-201007146
Kenneth Petersen
General Counsel
Texas Water Development Board
Filed: December 16, 2010

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The Texas A&M University System

Renewal of a Major Consulting Contract

In accordance with the provisions of Texas Government Code, Chapter 2254, The Texas A&M University System has renewed an existing a consulting contract for benefits consulting services. The consultant will assist with management of the A&M System's health, benefit, retirement, and Workers' Compensation (WCI) insurance plans.

The Name and Address of Consultant is as follows: Gallagher Benefits Services, Inc, 6399 S. Fiddler's Green Circle, Ste. 200, Greenwood Village, CO 80111.

The A&M System will pay an amount of $24,000.00. The contract will begin on December 15, 2010 and shall terminate in one year unless renewed for additional years up to October 31, 2014.

If any, the consultant will submit documents, films, recordings, or reports compiled by the consultant under the contract to TAMUS, no later than one year after completion of services.

Any questions regarding this posting should be directed to: Don Barwick, HUB and Procurement Manager, Office of HUB and Procurement Programs, The Texas A&M University System, 200 Technology Way, Ste. 1273, College Station TX 77845, Voice: (979) 458-6410, E-mail: dbarwick@tamu.edu.

TRD-201007250
Don Barwick
HUB and Procurement Manager
The Texas A&M University System
Filed: December 20, 2010

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University of Houston System

Request for Proposal for Library Consulting Services

PURPOSE. Pursuant to Texas Government Code, Chapter 2254, the University of Houston (University) solicits proposals (Proposals) from qualified consultants to provide advice and consultation to University related to the library consulting services described in this RFP. Offers must be received by University no later than 3:00 p.m. Central Standard Time, January 15, 2011 (Deadline).

CEO FINDING OF FACT. Pursuant to Texas Government Code, §2254.028(c), University's Chancellor/President made a finding that the consulting services contemplated by this RFP are necessary. While University has a substantial need for the consulting services, University does not currently have staff with expertise or experience with the consulting services and University cannot obtain such consulting services through a contract with another state governmental entity.

SCOPE OF WORK. The selected consultant will advise and assist University related to its operations at M.D. Anderson library and satellite libraries on the University campus. The selected consultant will be expected to provide a comprehensive study of the technical services functions and "selection-to-access" activities of the University Libraries. The study is to include M.D. Anderson Library and the branch libraries (Music, Art and Architecture, and Optometry).

The selected consultant will be expected undertake a complete analysis of the selection-to-access workflows in the technical services operations of the University Libraries with regard to general collections, music, art and architecture, optometry, and government documents. The goal of this project is to establish a high level of efficiency in the technical services operations of the University Libraries, while maintaining a focus on library user preferences and high quality service to users. This study will include the review of work processes in collection development, acquisitions, serials, electronic resource management, and cataloging activities (including Special Collections and the Digital Library), and will encompass both print and electronic resources.

The selected consultant's report should include a complete review of existing workflows in the technical services operations and in units that work directly with the technical services units (primarily materials selectors). The selected consultant will be expected to work with University Libraries' staff in the appropriate departments to gather data and develop a complete understanding of existing policies and procedures.

The detailed review of existing policies and practices should precede a comprehensive analysis of activities susceptible to streamlining, restructuring, or outsourcing. The selected consultant will then provide a comprehensive set of recommendations for improving efficiency, productivity, and cost effectiveness in these functional areas. This should include recommendations of modifications of policies, procedures, and organizational structure, as appropriate. The report should include an analysis of the feasibility of using third party services, where appropriate. The selected consultant report should also include an analysis of the human resources needs to undertake the "selection to access" workflows, with recommendations for changes in staffing levels and job descriptions.

The selected consultant's report should specifically address special issues of acquiring, managing, and deploying electronic resources in a research library.

Prior to presentation of the final report, the selected consultant must provide the Dean of Libraries with the initial results and recommendations of the study and be available to review and discuss the preliminary findings by telephone or teleconference with the Dean or her designee(s). The selected consultant will be required to meet with the Universities Libraries' staff at the beginning of the project to explain the project to the Libraries' employees. The selected consultant may also be required to present the final results of the study to the University Libraries' staff at the conclusion of the project.

The University Libraries will provide to the selected consultant data on volume of technical services activities, budgets, procedures, and the systems currently used by the University Libraries, including the integrated library system (ILS), the electronic resources manager (ERM), and bibliographic utilities.

For general information about the University Libraries please visit the following address: http://info.lib.uh.edu/.

CONTRACT TERM. University anticipates entering into a contract with the selected consultant with a term beginning on or about April 1, 2011 and ending August 1, 2011.

GENERAL INSTRUCTIONS. Submit one (1) original and five (5) copies of your Proposal in a sealed envelope to: Dean of Libraries, University of Houston, 114 University Libraries, Houston, Texas 77204-2000 on or before the Deadline. The original and all copies must be clearly legible. Proposals must be specific and responsive to the criteria set forth in this RFP. Further technical information can be obtained from John Lehner at (713) 743-9801 or jlehner@uh.edu.

COMPLIANCE WITH RFP REQUIREMENTS. By submitting a Proposal, consultant agrees to be bound by the requirements set forth in this RFP. University may in its sole discretion disqualify a Proposal from consideration if University determines such Proposal is non-responsive and/or non-compliant with such requirements.

REQUIRED INFORMATION. Consultants responding to this RFP must provide the following information, at a minimum: (1) description of the consultant's qualifications for performing the services; (2) names, experience, technical expertise and licenses currently held by each staff person who may be assigned to work on such matters, and the availability of the lead person and others assigned to the project; (3) demonstration of specialization related to the services; (4) listing of recent, relevant project names/locations, project sizes and references (with contact information); (5) a brief description of the management report demonstrating the format that will be utilized, containing sample results, findings, values, etc.; (6) hourly billing rates for staff who would be assigned to perform services, flat fees or other fee arrangements directly related to the achievement of specific goals, and billable expenses; (7) confirmation of willingness to comply with: (i) University's policies, directives and guidelines; and (ii) all federal and Texas state laws; (8) State of Texas corporate filings, DBA name (if applicable), registration and tax identification number; (9) sufficient description of the proposed methodology and tasks the consultant will utilize to achieve the goals of the project set forth in the RFP; and (10) certification that neither consultant nor any professionals employed by consultant are currently: (i) a defendant in any criminal proceedings, (ii) under criminal investigation, (iii) subject of any administrative action, including state and/or federal regulatory agency proceeding, which could result in censure, suspension or revocation of any licenses (if unable to make the certification set forth in this subsection, please include a detailed explanation).

REQUESTS FOR CLARIFICATION. University may request clarification of any information contained in or related to a Proposal.

CONSULTANT CERTIFICATION. The Proposal must be signed and dated by a representative of consultant who is authorized to bind consultant to the terms and conditions contained in this RFP and to compliance with the information submitted in the Proposal. By submitting a Proposal, consultant certifies to both: (i) the completeness, veracity and accuracy of the information provided in the Proposal; and (ii) the authority of the individual whose signature appears on the Proposal to bind consultant to the terms and conditions set for in this RFP. Proposals submitted without the required signature will be disqualified.

PROPOSAL OWNERSHIP. All Proposals become the property of University upon receipt.

USE/DISCLOSURE OF INFORMATION. Consultant acknowledges that University is an agency of the State of Texas and is required to comply with the Texas Public Information Act. If a Proposal includes proprietary data, trade secrets or information the consultant wishes to except from public disclosure, then consultant must specifically label such data, secrets or information as follows: "PRIVILEGED AND CONFIDENTIAL--PROPRIETARY INFORMATION." To the extent permitted by law, information labeled as such will be used by University only for purposes related to or arising out of the (i) evaluation of Proposals, (ii) selection of a consultant pursuant to the RFP process, and (iii) negotiation and execution of a contract with the selected consultant.

TERMINATION OF RFP. This RFP does not obligate University to purchase any services related to this RFP unless confirmed by a definitive written contract signed by University and a selected consultant. University may terminate the RFP process without penalty or obligation at any time and for any reason prior to signing such definitive contract.

RESCISSION OF PROPOSAL. Consultant may withdraw its Proposal from consideration at any time prior to the Deadline by providing a written notification to Dean of Libraries, University of Houston, 114 University Libraries, Houston, Texas 77204-2000.

HUB PARTICIPATION. It is the University's policy to make a good faith effort to include participation of Historically Underutilized Businesses (HUB) certified firms in its contracts.

COMMUNICATIONS WITH UNIVERSITY PERSONNEL. Except as provided in this RFP and as is otherwise necessary for the conduct of ongoing University business operations, consultants are prohibited from communicating with University personnel who are involved with: (i) reviewing and/or evaluating Proposals; (ii) selecting a consultant; and/or (iii) negotiating or formalizing a contract. If consultant engages in conduct or communications that University determines is contrary to the instructions set forth in this RFP, University may, in its sole discretion, disqualify the consultant and withdraw the consultant's Proposal from consideration.

EVALUATION OF PROPOSALS. The Proposals will be reviewed in accordance with the criteria set forth in this RFP. Proposals that are: (i) incomplete; (ii) not properly certified and signed; (iii) not in the required format; or (iv) otherwise non-compliant with any of the requirements set forth in this RFP may be disqualified by University.

DISCUSSIONS WITH CONSULTANTS. University may conduct discussions and/or negotiations with any consultant that appears to be eligible for award (Eligible Consultant) pursuant to the selection criteria set forth in this RFP. In conducting discussions and/or negotiations, University will not disclose to third parties information derived from Proposals submitted by competing consultants, except as required by law.

MODIFICATION OF PROPOSALS. All Eligible Consultants will be afforded the opportunity to submit best and final Proposals if: (i) negotiations with any other consultant result in a material alteration to the RFP; and (ii) such material alteration has a cost consequence that could alter the consultant's quoted pricing.

SELECTION OF CONSULTANT. University will select the Proposal that provides best value and is most advantageous to University according to the evaluation criteria set forth in this RFP. Consultant acknowledges that University is not bound to accept the lowest-priced Proposal.

EVALUATION OF PROPOSALS. By submitting a Proposal, consultant: (i) accepts the evaluation process and other terms and conditions set forth in this RFP; and (ii) acknowledges that University will make subjective judgments in the Proposal evaluation process.

EVALUATION CRITERIA. Evaluation of Proposals and award to the selected consultant will be based on the following factors and weights: (i) Experience and reliability of the Respondent organization, with an emphasis on experience with analysis of technical services operations of major academic and research libraries, and qualifications

of the personnel who would perform requirements of the RFP (40%); (ii) Background and skills of the firm's assigned team (25%); (iii) Respondent's written proposal, which demonstrates the method or manner in which the Respondent will satisfy requirements of the RFP and reflects a thorough understanding of technical services operations in research libraries (25%); (iv) Fee schedule and total cost (10%). Consideration may also be given to any additional information and comments if they should increase the benefits to the University. Upon completion of the initial review and evaluation of the proposals submitted, selected Respondents may be invited to participate in oral presentations.

CONSIDERATION OF ADDITIONAL INFORMATION. University reserves the right to request and consider any additional information its deems relevant related to this RFP and any Proposals.

COSTS INCURRED BY CONSULTANT. Consultant will be solely responsible for the costs it incurs related to this RFP.

INFORMATION ABOUT THE UNIVERSITY. The University of Houston is Texas' largest institution of higher education located in an urban, metropolitan environment. As a premier research and teaching institution, our campus serves more than 38,700 students. The university has 12 academic colleges and an interdisciplinary Honors College and offers a host of undergraduate, graduate, and professional degree programs in a variety of disciplines. Courses are conducted throughout most of the calendar year. The university has a large international student presence, with international students comprising 8.5 percent of the student body. Approximately 89% of the students come from within the state of Texas. Moreover, of our student body, approximately 57% come from Harris County, which is the county in which the University of Houston is located.

TRD-201007150
Kristen R. Gibson
Associate General Counsel/Executive Director
University of Houston System
Filed: December 16, 2010

How to Use the Texas Register

Information Available: The 14 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 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.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

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 35 (2010) is cited as follows: 35 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 "35 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 35 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 at: 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 website information, call the Texas Register at (512) 463-5561.

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 and Parts (using Arabic 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 (800-356-6548), and West Publishing Company (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 ***Index of Rules***. The *Index of Rules* is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register***. If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with the ***Texas Register*** page number and a notation indicating the type of filing (emergency, proposed, withdrawn, or adopted) as shown in the following example.

TITLE 1. ADMINISTRATION
Part 4. Office of the Secretary of State
Chapter 91. Texas Register
40 TAC §3.704.....950 *(P)*