TEXAS REGISTER

IN THIS ISSUE

Volume 20, Number 85 November 14, 1995 *Page 9315-9403*

Proposed Sections

Texas Department of Agriculture

Pesticides

Texas Boll Weevil Eradication Foundation

Organic Cotton Regulations

Finance Commission of Texas

Banking Section

Texas Department of Banking

Trust Companies

Lending Limits

Loans and Investments

Orders of Commissioner

Corporate Activities

Prepaid Funeral Contracts

Part I - Volume 20, Number 85

Contents Continued Inside

Texas Register

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How to Use the Texas Register

Information Available: The 11 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following a 30-day public comment period.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Open Meetings - notices of open meetings.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

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 20 (1995) is cited as follows: 20 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 "20 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 20 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.

Texas Administrative Code

The ***Texas Administrative Code*** (***TAC***) is the official 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***. West Publishing Company, the official publisher of the ***TAC***, publishes on an annual basis.

The ***TAC*** volumes are arranged into Titles (using Arabic numerals) and Parts (using Roman numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency. The ***Official TAC*** also is available on WESTLAW, West's computerized legal research service, in the TX-ADC database.

To purchase printed volumes of the ***TAC*** or to inquire about WESTLAW access to the ***TAC*** call West: **1-800-328-9352.**

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15:

1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 21, April 15, July 12, and October 11, 1994). In its second issue each month the ***Texas Register*** contains a cumulative ***Table of TAC Titles Affected*** for the preceding month. If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).

Update by FAX: An up-to-date ***Table of TAC Titles Affected*** is available by FAX upon request. Please specify the state agency and the TAC number(s) you wish to update. This service is free to ***Texas Register*** subscribers. Please have your subscription number ready when you make your request. For non-subscribers there will be a fee of $2.00 per page (VISA, MasterCard). (512) 463-5561.

Texas Commission on Fire Protection

Standards for Certification

Fire Suppression

Fees

Examinations for Certification

Standards for State Fire Marshal Inspections

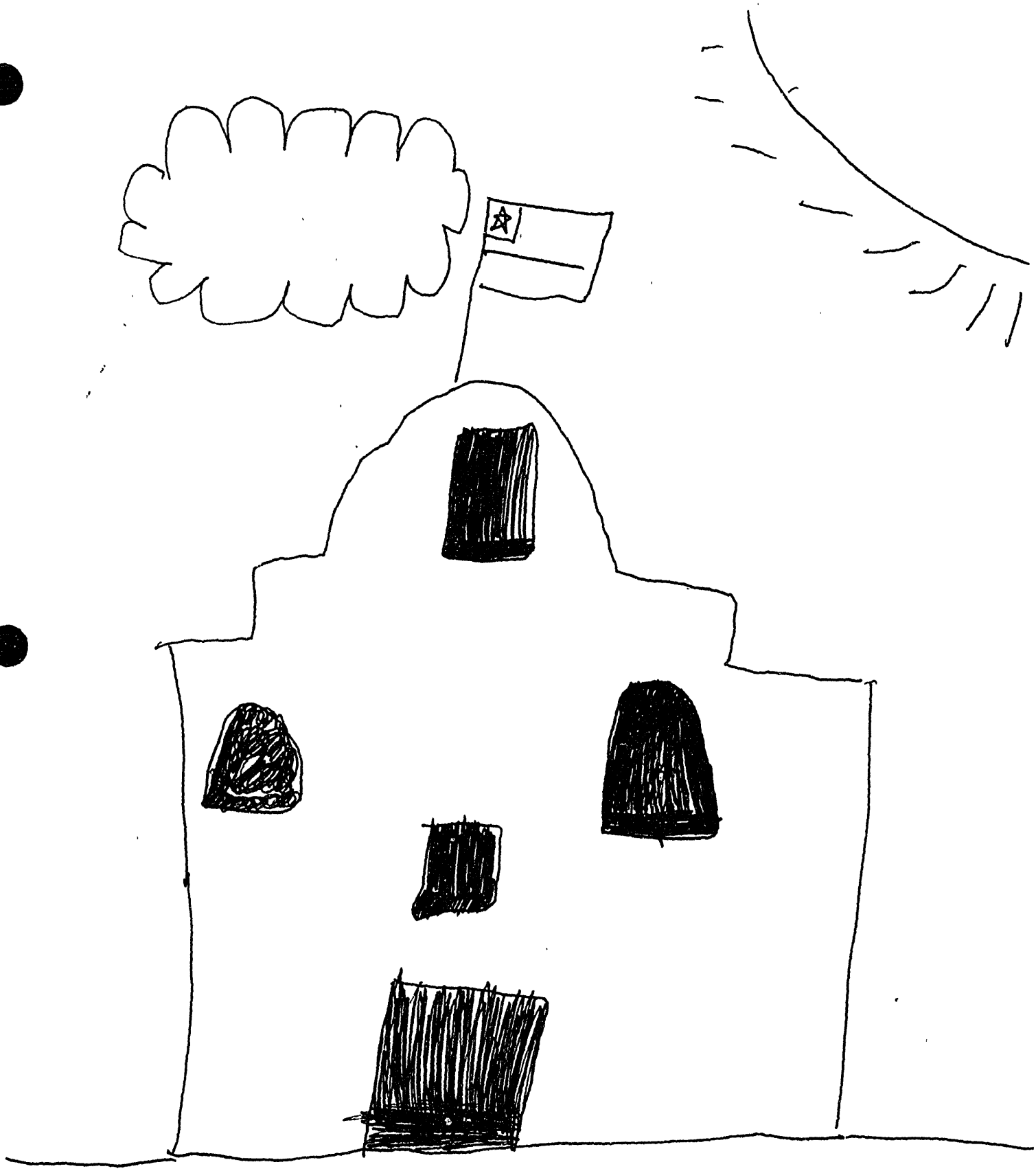
Texas Department of Insurance

Withdrawn Sections

Texas Department of Banking

Trust Companies

Prepaid Funeral Contracts



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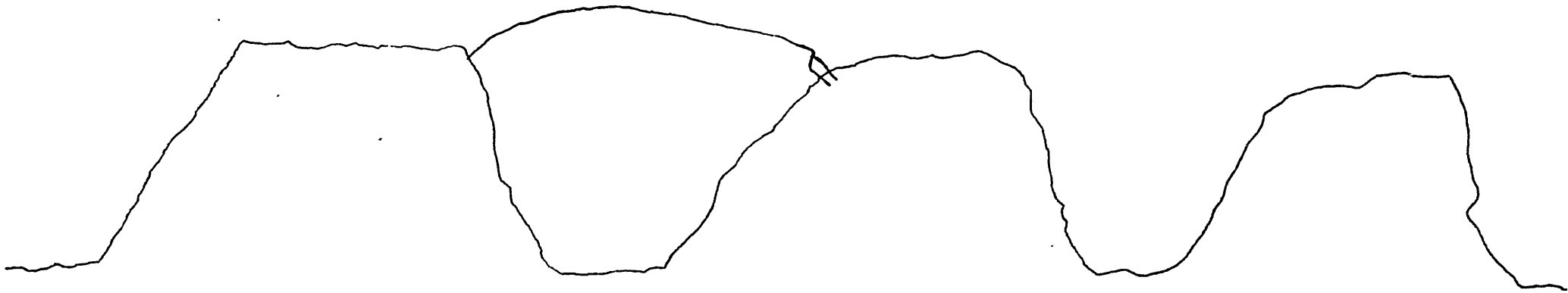

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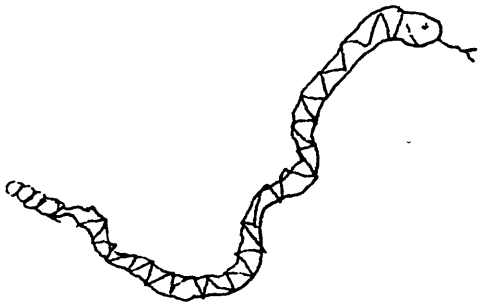

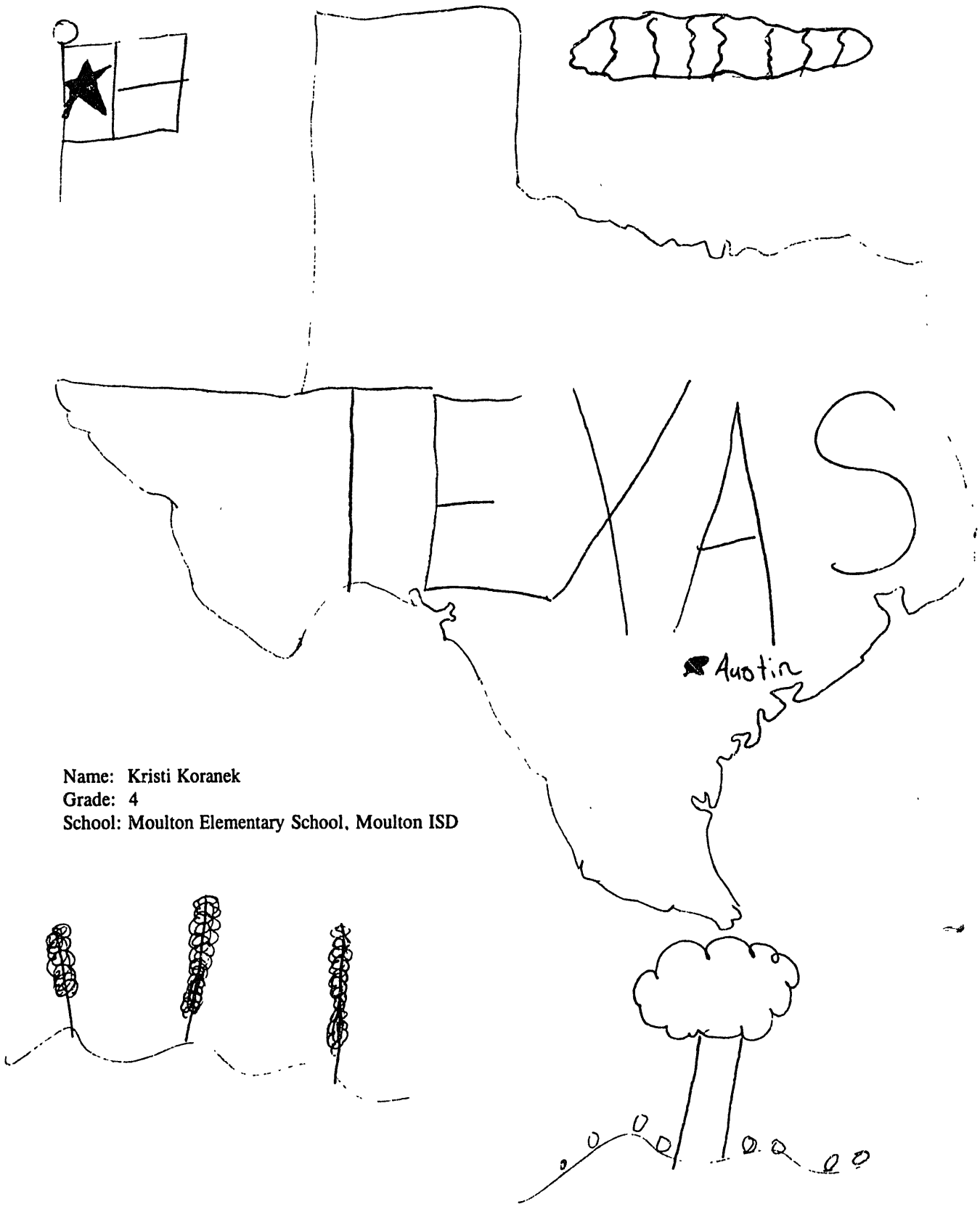

Name: Kristi Koranek
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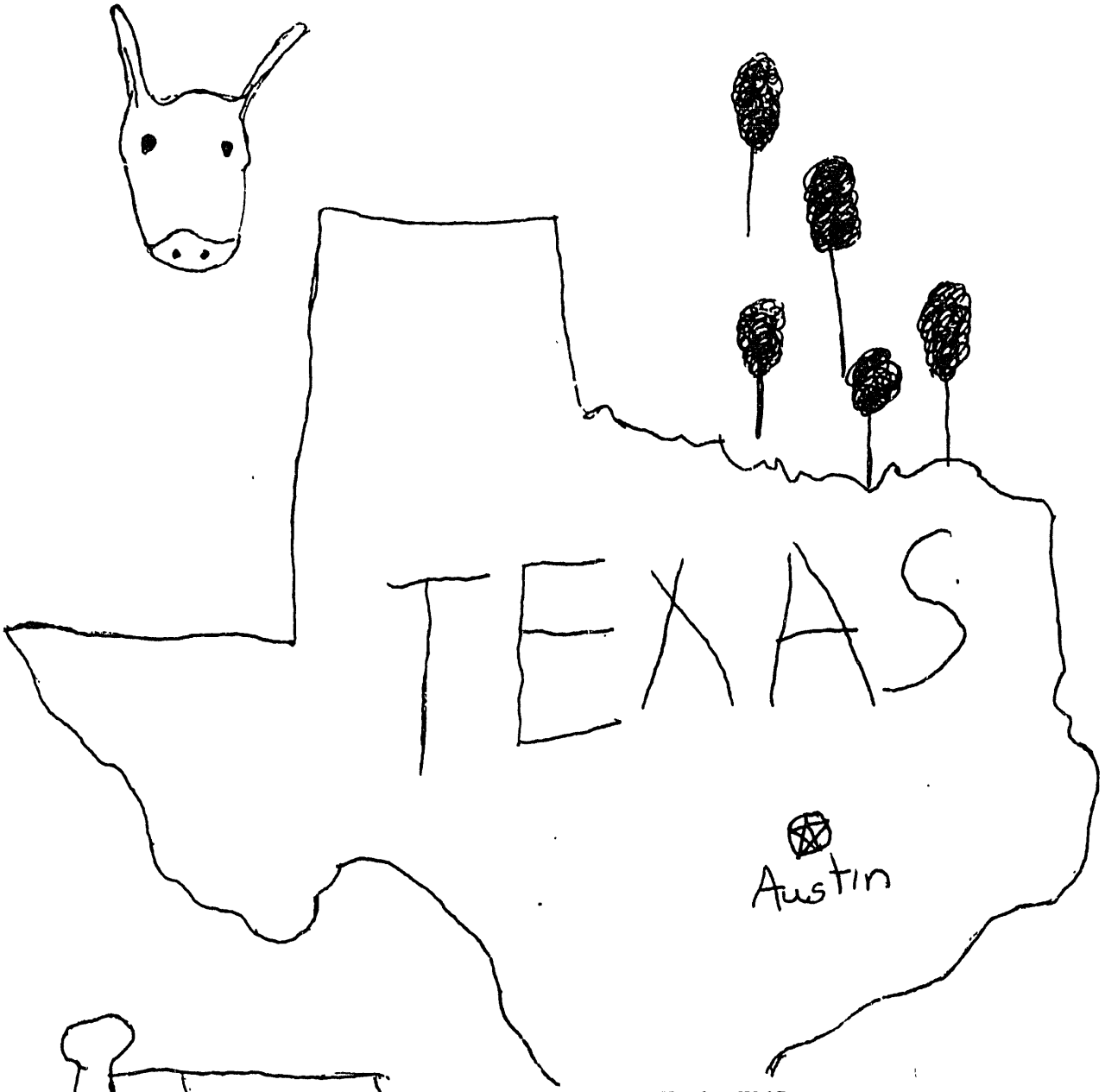

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Grade: 4
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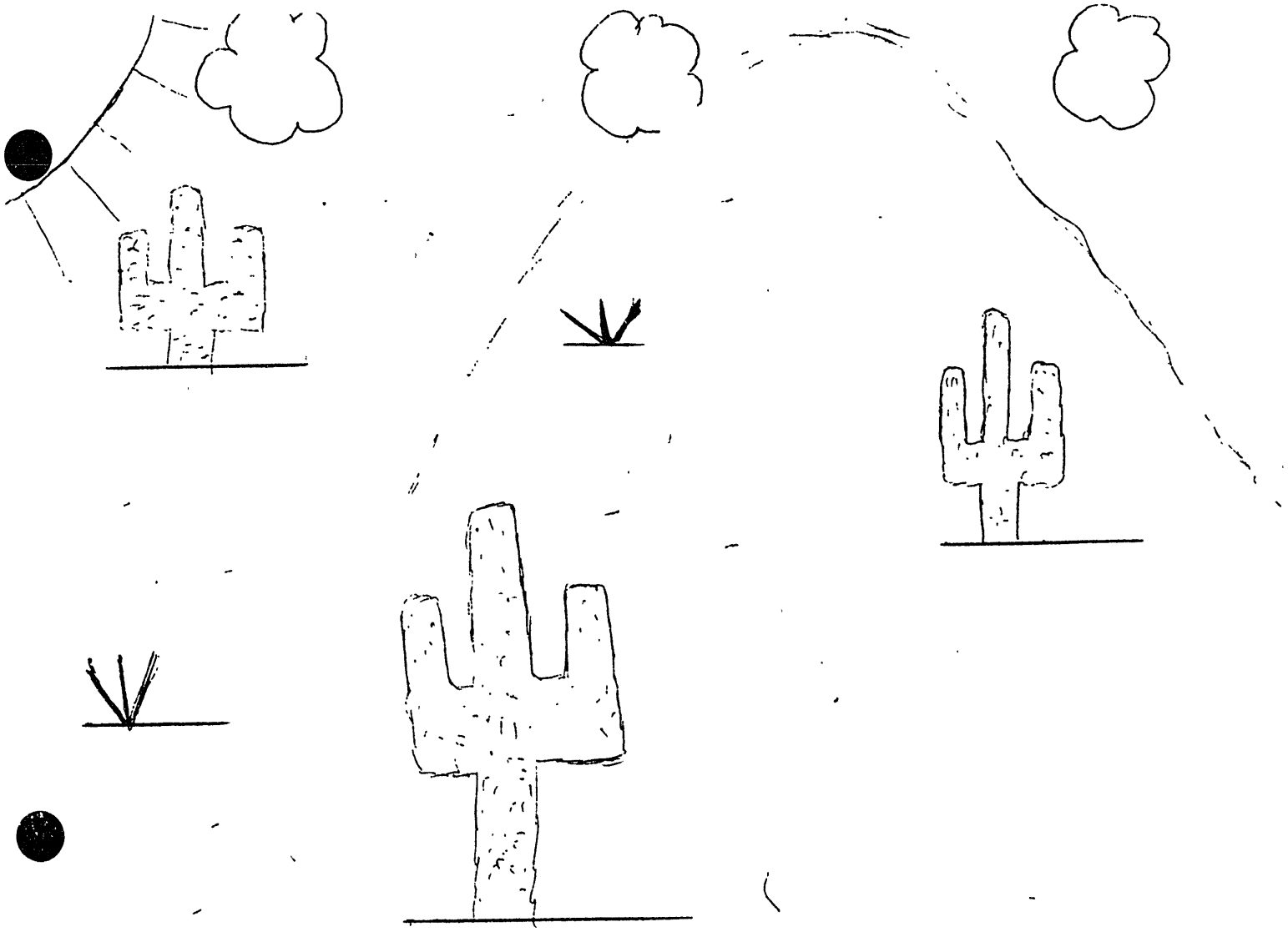

Name: Kyndall Maresh
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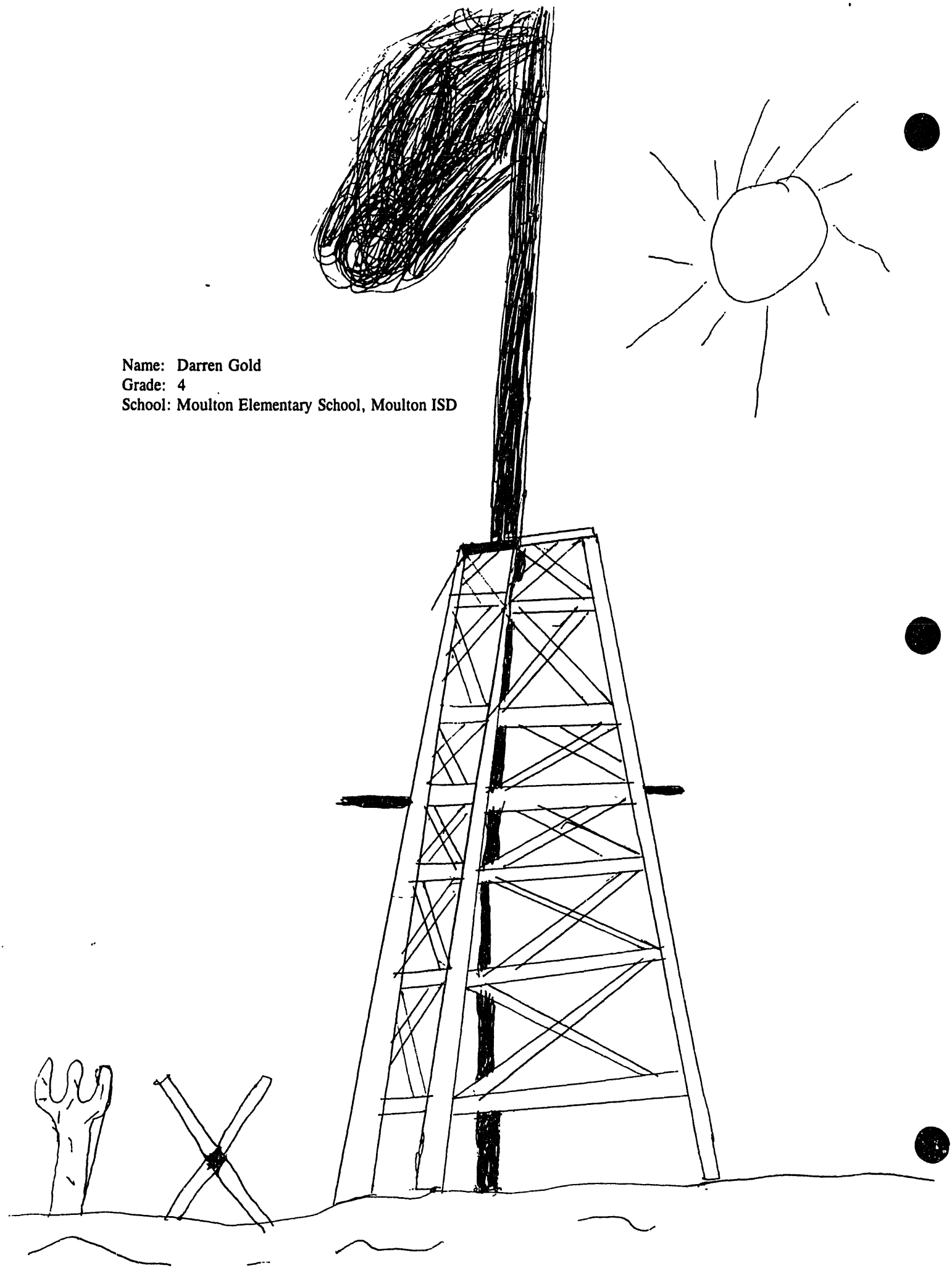

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PROPOSED RULES

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

Symbology in proposed amendments. New language added to an existing section is indicated by the use of **bold text.** [Brackets] indicate deletion of existing material within a section.

TITLE 4. AGRICULTURE

Part I. Texas Department of Agriculture

Chapter 7. Pesticides

• 4 TAC §§7.1, 7.3-7.5, 7.7

The Texas Department of Agriculture (the department) proposes amendments to §§7.1, 7.5, and 7.7; and new §7.3 and §7.4, concerning pesticides. The amendments and new sections are being proposed in order to be consistent with changes made by the Texas Legislature during the Sunset process of the department. The proposed amendments are also made in order to clarify existing regulations. The proposed amendment to §7.1 will change the definition and term "custom mix" to "custom blend" in order to use a more common term. The amendment will also change the definition for Texas Agriculture Extension Service from Service to "TAEX" to be consistent with general terminology. The proposed amendment to §7.5 changes the title of the section from "Custom Mixes" to "Custom Blends" to use common terminology. Language has been added that better defines "custom blends" and requirements of a custom blender. This language tracks federal requirements as well. Section 7.7 has been amended for purposes of clarification and to state the period of time covered by the registration fee. Section 7.3 and §7.4 have been repealed under a separate submission and are now being proposed as new sections so that the regulations flow in the order in which the registrant would read them. Portions of these two sections have been deleted since they restate statutory requirements and do not need additional clarification in the regulations. Further, in §7.3, new language was added to explain the biennial registration process and the requirements of this section.

Steve Bearden, assistant commissioner for pesticide programs, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result or enforcing or administering the sections.

Mr. Bearden also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be beneficial as the registration will be processed in a timely manner allowing for better review of labels as the workload will be spread over a two-year period. This system will allow department staff to plan work to provide a more efficient and higher quality service. This will ensure that the public is protected and serviced by the department. There will be no effect on small or large businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Comments on the proposal may be submitted to Steve Bearden, Assistant Commissioner for Pesticide Programs, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*. The department plans to hold public hearings to receive public comment on the proposal. Notice of these hearings will be published in the *Texas Register*.

The amendments and new sections are proposed under the Texas Agriculture Code, §76.004, which provides the Texas Department of Agriculture with the authority to regulate the use of pesticides and authorizes the department to adopt rules for carrying out the provisions of Chapter 76.

The Texas Agriculture Code, Chapter 76 is affected by this proposal.

§7.1. Definitions. In addition to the definitions set out in the Texas Agriculture Code, §76.001, the following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

Custom **blend** [mix]-A pesticide formulation produced on special request for a specific customer.

TAEX [Service]-Texas Agriculture Extension Service.

§7.3. Registration of Pesticides.

(a) In addition to the requirements contained in the Act, Subchapter C (concerning registration), the application for registration of a pesticide shall include:

(1) a material safety data sheet (MSDS) which complies with the provisions set forth in 29 Code of Federal Regulations, §1910.1200(g);

(2) an EPA-stamped accepted label and any applicable comments for a pesticide that must be federally registered under the Federal Insecticide, Fungicide and Rodenticide Act, §3; and

(3) a fee of $200 per product registered for a two-year period. This fee may be prorated in accordance with §7.3(h) of this section.

(b) Product registration may be denied and the registration fee forfeited if the application is incomplete or inaccurate.

(c) If the registrant distributes a pesticide under more than one brand name or more than one formulation, each brand or formulation must be registered as a separate product.

(d) It shall be a violation to continue to distribute a pesticide for which a renewal application, including the required fee, has not been received on the last day of the current registration. It is the responsibility of the registrant to obtain and submit an application for registration of a pesticide before the renewal date as prescribed in subsection (g) of this section.

(e) Any pesticide distributed in this state must have a current registration as long as the product remains in the channels of trade. It shall be the registrant's responsibility to insure that the registration of the pesticide product remains in effect.

(f) Late fees will be assessed on renewal applications postmarked after the renewal date as prescribed in subsection (g) of this section as provided by the Texas Agriculture Code, §12.024.

(g) Beginning January 1, 1996, the department will use the following schedule for registering pesticide products by registrant. The first letter of the company name determines the appropriate renewal date according to the schedule below. All pesticide products registered by that registrant must be renewed by the scheduled renewal date. Any new product registered by a registrant will be prorated by quarter so that the registration will expire at the same time as all other registrant pesticide products.

Figure 1: 4 TAC §7.3(g)
Beginning January 1, 1998, all pesticide companies will renew on a two-year schedule from the above renewal dates as provided for in the schedule for calendar year 1997 renewals.

(h) Fees are prorated by quarter when registered for less then the two-year registration period.

(i) Any FIFRA 2(ee) recommendations must be approved by the department prior to being released into the channels of trade.

§7.4. Label Requirements. In addition to the labeling requirements contained in the Act, Subchapter B, every pesticide distributed within this state must be prominently labeled with the following information:

(1) an ingredient statement giving:

(A) the accepted common name and/or chemical name of all active ingredients;

(B) the percentage by weight of each active ingredient and the percentage by weight of inert ingredients;

(C) a trademark or trade name may not be used as the name of an ingredient unless it has become the common name;

(D) the sliding scale method of expressing percentages shall not be used (example: active ingredient name-6.0% to 8.0%);

(2) complete directions for all uses of the pesticide shown on the label or labeling that are necessary for effecting the purpose for which the product is intended, including but not limited to:

(A) application rates of product to be applied;

(B) proper mixing procedures;

(C) application methods;

(D) application limitations;

(E) restricted entry and preharvest intervals;

(F) clean-up, storage, and disposal instructions;

(3) the net weight or measure of contents, exclusive of wrappers, or other materials:

(A) the net weight or measure of contents shall be the average contents unless explicitly stated as a minimum quantity;

(B) if the pesticide is a liquid, the net content statement shall be in terms of liquid measure at 68 degrees Fahrenheit (20 degrees Celsius) and shall be expressed in conventional American units of fluid ounces, pints, quarts, and gallons;

(C) if the pesticide is a solid or semisolid, viscous or pressurized, or is a mixture of liquid and solid, the net content statement shall be in terms of weight expressed as avoirdupois pounds and ounces;

(D) in all cases, net content shall be stated in terms of the largest suitable units (for example: "one pound, 10 ounces," not "26 ounces");

(E) in addition to the required units, specific net content may be expressed in metric units;

(F) variation above or below minimum content or around an average is permissible only to the extent that it represents deviation unavoidable in good and workman like manufacturing practice;

(4) numbers or other symbols to identify the manufacturer's lot and batch may be stamped on the pesticide container any place where they can be readily seen; provided, however, it shall be unlawful to have more than one lot or batch number in a single package; and

(5) after initial registration of a product, registrants shall provide the department the most current pesticide product labeling for that product that the registrant intends to change. Before releasing it into the channels of trade the registrant must have department approval.

*§7.5. Custom **Blends** [Mixes].*

(a) Custom **blends** [mixes] shall **only be distributed or prepared according to the following criteria:** [sold only to those whose name appears on the label or labeling of the pesticide container and shall not be placed on the shelf for resale].

(1) the custom blend is prepared to the order of the customer and is not held in inventory by the blender;

(2) the custom blend is to be used on the customer's property (including leased or rented property);

(3) the pesticide(s) used in the custom blend bears end-use labeling directions which do not prohibit use of the product in such a custom blend;

(4) the custom blend is prepared with registered pesticides;

(5) the custom blend is delivered or distributed to the customer along with a copy of the end-use labeling of each pesticide used in the blend and a statement specifying the composition of the mixture; and

(6) no other pesticide production activity is performed at the establishment excluding bulk repackaging.

(b) **If a restricted-use or state-limited-use pesticide is used in the custom blend, the establishment must be licensed as a pesticide dealer in accordance with Chapter 76, Subchapter D and §7.8 of this title (relating to Authorized Pesticide Users and Pesticide Dealers).** [Pesticide containers of custom mix pesticides shall bear an ingredient statement as required by §7.3 of this title (relating to Label Requirements), and a copy of the applicable pesticide label must accompany the custom mix.]

(c) Any pesticide containers used in preparing a custom blend, in which a partial amount(s) is still contained within the container, must be prominently identified as a pesticide to be used by that establishment only in a custom blend or in a commercial application made by that establishment.

§7.7. Experimental Use Permits.

(a) Application for experimental use permits **(EUP)** shall contain the following information:

(1)-(8) (No change.)

(b) A pesticide registration fee of **$100 per year from the effective date of the EUP** shall accompany each **EUP** [experimental use permit] application if the pesticide is not currently registered for other uses in the state.

(c) The holder of an **EUP** [experimental use permit] shall, as soon as possible, submit to the appropriate regulatory agency the results of the experimentation for which the permit was issued.

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

Issued in Austin, Texas, on November 6, 1995.

TRD-9514278

Dolores Alvarado Hibbs
Chief Administrative Law Judge
Texas Department of Agriculture

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 463-7583

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• 4 TAC §7.3, §7.4

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

The Texas Department of Agriculture (the department) proposes the repeal of §7.3 and §7.4, concerning label requirements and registration of pesticides. The sections will be replaced by completely new sections in order to clarify language and to explain the biennial registration process.

Steve Bearden, assistant commissioner for pesticide programs, has determined that for the first five-year period the repeals are in effect there will be no fiscal implications for state or local government as a result or enforcing or administering the repeals.

Mr. Bearden also has determined that for each year of the first five years the repeals are in effect the public benefit anticipated as a result of enforcing the repeals will be beneficial as the registration will be processed in a timely manner allowing for better review of labels as the workload will be spread over a two-year period. This system will allow department staff to plan work to provide a more efficient and higher quality service. This will ensure that the public is protected and serviced by the department. There will be no effect on small or large businesses. There is no anticipated economic cost to persons who are required to comply with the repeals as proposed.

Comments on the proposal may be submitted to Steve Bearden, Assistant Commissioner for Pesticide Programs, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*. The department plans to hold public hearings to receive public comment on the proposal. Notice of these hearings will be published in the *Texas Register*.

The repeals are proposed under the Texas Agriculture Code, §76.004, which provides the Texas Department of Agriculture with the authority to regulate the use of pesticides and authorizes the department to adopt rules for carrying out the provisions of Chapter 76.

The Texas Agriculture Code, Chapter 76 is affected by this proposal.

§7.3. Label Requirements.

§7.4. Registration of Pesticides.

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

Issued in Austin, Texas, on November 6, 1995.

TRD-9514277 Dolores Alvarado Hibbs
Chief Administrative Law Judge
Texas Department of Agriculture

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 463-7583

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Part X. Texas Boll Weevil Eradication Foundation

Chapter 195. Organic Cotton Regulations

• 4 TAC §§195.1-195.5

The Texas Boll Weevil Eradication Foundation (the Foundation) proposes new §§195.1-195.5, concerning organic cotton regulations. The proposed new sections establish requirements and procedures governing boll weevil control in organic cotton fields.

Frank Myers, executive director of the Foundation, and Rick Smathers, deputy director, agri-systems, Texas Department of Agriculture, have determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Myers also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be an increase in organic certification opportunities by eliminating this major cotton pest. There will be no effect on small businesses. There may be an economic cost to persons who are required to comply with the proposal. In the short term there may be a decrease in the amount of organic production on cotton acreage in the program area. However this would be offset by an increase in certification opportunities after eradication.

Comments on the proposal may be submitted to Frank Myers, Texas Boll Weevil Eradication Foundation, P.O. Box 5089, Abilene, Texas 79608-5089 and must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*.

The new sections are proposed under the Texas Agriculture Code, §74.125, which provides the Texas Boll Weevil Eradication Foundation with the authority to adopt rules setting criteria for organic cotton producers in an eradication zone.

The Code sections that will be affected by the proposal are the Texas Agriculture Code, Chapter 74, Subchapter D.

§195.1. Statement of Authority for Regulating Organic Producers. Senate Bill 30, 73rd Legislature, 1993 (now codified at Texas Agriculture Code, Chapter 74, Subchapter D), provides for the establishment of the Texas Boll Weevil Eradication Foundation, Incorporated (the Foundation) to establish and implement a boll weevil eradication program for Texas. The Code, Chapter 74, §74.125, provides for the Foundation to eradicate boll weevils from all cotton, including organically grown cotton. The Texas Boll Weevil Eradication Foundation, Incorporated, shall work with the Texas Department of Agriculture and growers of organic cotton to protect the eligibility of organic and transitional certified cotton production in an eradication zone while ensuring the ultimate success of the boll weevil eradication program in the state of Texas.

§195.2. Notification of Organic Production. Each producer of transitional and certified organic cotton production (an "organic grower") within an established eradication zone that has conducted an assessment referendum shall notify the Foundation in writing of the number of acres on which the organic grower intends to plant organic cotton at least 30 days prior to planting. In addition, the Foundation shall receive timely updates from the department regarding the location and status of organic production in such a zone. The department shall provide written notice of reporting requirements to each grower of organic or transitional cotton at the time of organic certification by the department.

§195.3. Payment of Assessment. The Foundation shall require all organic growers to pay the assessment, as approved by cotton growers in the zone and established annually by the Foundation Board, in the same manner as those growers with traditionally grown cotton in the zone.

§195.4. Zone Flexibility for Organic Certified Cotton Production.

(a) Activities prior to crop planting. After an organic grower has notified the Foundation of intent to plant, the Foundation shall determine, as soon as feasible, through trapping or consideration of other biological factors, the probability for those organic acres reaching the pre-determined trigger point for treatment during the cotton growing year. The Foundation shall notify the organic grower as soon as practicable of this probability. The organic grower may decide to plant alternate crops to protect certification. Upon making a decision to plant alternate crops, an organic grower shall notify the Foundation and the department.

(b) Activities after crop planting. The Foundation will trap under its normal program for the zone. The Foundation will notify an organic grower of the continuing

status of his cotton acres and surrounding cotton acres as to boll weevil status. The Foundation will confer with an organic grower to determine measures that might be taken to attempt to keep all or a portion of the crop acreage below trigger levels for required treatment. If acres do reach trigger levels for required treatment, the Foundation will confer with the organic grower to formulate a plan to best attempt to avoid all or part of the acreage from loss of certification and crop destruction. If the organic grower chooses to use conventional methods of treatment, the Foundation will proceed accordingly. If the organic grower chooses to use a non-conventional method which is acceptable to the Foundation, the Foundation shall pay the costs of conventional treatment to the organic grower to be applied to the costs of non-conventional methods used by the organic grower. If the organic grower chooses to use plow-up as the method to meet eradication program requirements, the Foundation shall pay the costs it would otherwise incur in the Foundation conventional spraying program to the organic grower to help offset the cost of plow-up.

§195.5. Indemnity Funds. The Foundation, within a specific zone, may employ indemnity provisions in order to reduce the burden of crop destruction when such destruction appears to be the only alternative to spraying. For each zone the Foundation may set up a fund to be designated for the purpose of funding programs to retain certification of organic acres and organic markets and to provide offsets to conventional spraying by organic growers. The fund shall be set in an amount by the Foundation Board after receipt of notice of proposed planting of organic acres. The fund may be disbursed during the year for specific non-conventional programs approved by the Board and at the end of the year to organic growers who have justified indemnity payments due to destruction of their crop.

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

Issued in Austin, Texas, on November 8, 1995.

TRD-9514449 Franklin D. Myers
Executive Director
Texas Boll Weevil
Eradication Foundation

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 463-7583

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TITLE 7. BANKING AND SECURITIES

Part I. Finance Commission of Texas

Chapter 3. Banking Section

Subchapter A. Securities Activities and Subsidiaries

• 7 TAC §3.6

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

The Finance Commission of Texas (the commission) proposes the repeal of §3.6, concerning state-chartered bank purchase of stock issued by corporations organized solely for the purpose of making agriculture loans.

The repeal is necessary because §3.6 has been superseded by the Texas Banking Act (the Act), §5.105(a)(2), as enacted by Act of May 18, 1995, 74th Legislature, Chapter 914, §1, 1995 Texas Session Law Service 4451, 4493, which renders the section obsolete.

Sharon Gillespie, Assistant General Counsel, Texas Department of Banking, has determined that, for the first five-year period the repeal as proposed will be in effect, there will be no fiscal implications for state or local government or small businesses as a result of enforcing or administering the repeal.

Ms. Gillespie also has determined that, for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing or administering this section is that this obsolete section has been eliminated.

Comments on the proposed repeal may be submitted in writing to Sharon Gillespie, Assistant General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705-4294.

Repeal of this section is proposed pursuant to rulemaking authority under the Act, §1.012(a)(1), which authorizes the commission to adopt rules necessary or reasonable to implement and clarify the Act. As required by the Act, §1.012(b), the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state bank system, and allow for economic development within this state.

No statutes or rules are affected by the proposed repeal.

§3.6. Purchase by State-Chartered Bank of Stock Issued by Corporations Organized Solely for the Purpose of Making Agriculture Loans.

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

Issued in Austin, Texas, on November 7, 1995.

TRD-9514370 Everette D. Jobe
General Counsel
Finance Commission of
Texas

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 475-1300

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• 7 TAC §§3.36-3.38

The Finance Commission of Texas (the commission) proposes new §§3.36-3. 38, concerning the imposition and collection of ratable and equitable fees from banks and foreign bank agencies, to provide for recovery of the cost of maintenance and operation of the Texas Department of Banking (the department) and the cost of enforcing the Texas Banking Act (the Act), enacted by Act of May 18, 1995, 74th Legislature, Chapter 914, §1, 1995 Texas Session Law Service 4451. Existing §3.37 and §3.38 are proposed for repeal in this issue of the *Texas Register.*

The fee system as proposed is substantially similar to the assessment system currently in use by the department and is merely being reduced to rule format as directed by the Act. The department revised its fee structure for the 1993-1995 biennium to incorporate a straight assessment basis, collected in installments. This system has advantages for both the department, banks and foreign bank agencies, in that it allows banks and foreign bank agencies to accrue for the amount due the department for its supervisory responsibility; provides a structure by which banks and foreign bank agencies pay their equitable costs of supervision; eliminates erratic and needed fluctuations in the department's receipts that result from a per examination billing method; allows the department to more accurately predict cash flows; allows the department to more properly schedule much-needed training and more adequately provide for staff educational requirements; and avoids the inordinate accumulation of excess funds. One difference from the system currently in use by the department is the provision for a reduction in fees for banks on a 18-month examination schedule.

Proposed §3.36 provides that the department will make assessments on an annual basis (September 1-August 31). Assessments will be calculated on a total of on-book and off-book assets. Because off-book assets generally require additional time and resources to examine, the assessment base includes both on-book and off-book assets to more equitably distribute the cost of bank regulation to those banks that require more resources to examine. Off-balance sheet items may fluctuate widely and proposed §3.36(c) provides that the average balance of off-balance sheet items reflected in four sequential quarterly call reports, the last of which is the most

recent March 31st call report, will be added to on-book assets to derive the assessment base for the next year. The assessment will be billed annually effective September 1 of each year and will be due in quarterly installments billed on the first day of September, December, March, and June. Section 3.36(e) requires the department to review all appropriations and expenditures and present the information to the Finance Commission no less frequently than once each biennium.

The department, under §3.36(f), may adjust assessments for an individual bank or foreign bank, which during a year, falls into a different examination frequency. The department may adjust the annual assessment of a bank or foreign bank agency in the event of an acquisition or merger in subsections (f) or (g). The annual assessment will be based on combined assets on the date of the acquisition or merger. The department will make the adjustment during the quarter of the change in asset size. A financial institution converting to a state charter will pay an assessment beginning the quarter of conversion. Each bank or foreign bank agency, on the due date of the installment, must pay the full quarterly installment without proration for any reason.

Section 3.36(g) provides that, after reviewing the results of actual expenditures to date and projected expenditures for the remainder of the fiscal year, the commissioner may lower the amount of any quarterly installment due from banks or foreign bank agencies, without Finance Commission approval.

Section 3.36(h) provides that the department also will be able to charge for special examinations and investigations in addition to any other examinations at the rate of $500 per examiner day. The bank or foreign bank agency must also pay to the department an amount to cover actual travel expenses incurred by examiners. The commissioner may lower the uniform rate without Finance Commission approval.

The Finance Commission, in subsection (i), may approve a special assessment to cover material expenditures, such as facilities repair and improvements and other extraordinary expenses.

Proposed new §3.37 and §3.38 establish bank and foreign bank agency assessment schedules. These sections enable each bank and foreign bank agency to calculate their annual assessment with predictability.

A bank's annual assessment is calculated using three factors: (1) a base assessment amount; (2) an incremental percentage rate; and, (3) the examination frequency. A foreign bank agency's annual assessment is calculated using a base assessment amount and an incremental percentage rate.

The Office of the Comptroller of the Currency bases its assessments for national banks solely on asset size. The department believes that the use of a factor based on the frequency of a bank's examination schedule more accurately reflects the use of departmental resources related to the examination function. Banks that fall into an 18-month examination frequency, which consume fewer departmental resources, are therefore, subject to a factor that reduces their annual assessment. This advantage for smaller, well-managed banks is not available in the national bank system.

In determining the percentage rate, the department had two goals. First, to keep costs the same or reduce costs to banks and foreign bank agencies. For example, in the fiscal year ending 1995, the department forgave one quarterly installment and reduced another. The department intends to continue to allow banks and foreign bank agencies to benefit from departmental cost reduction. Secondly, the department attempted to quantify the reduction in use of the departmental staff and resources by those banks that the department examines less frequently. Employee salaries, benefits and travel expenses account for approximately 85% of the department's expenditures. For this reason, the department conducted an extensive review of current and projected staffing needs in accordance with the statutory mandate to periodically examine banks and foreign bank agencies and to safeguard the safety and soundness of the state banking system. The department reviewed each division and its statutory responsibilities, revised application and other fees, and developed a system to provide that each of the department's supervisory programs become self-funding. The percentage rate also includes an historical overhead factor, which has remained unchanged for four years. The department will review this factor in 1996 for any necessary adjustments.

State-chartered banks in Texas vary in size, complexity, nature of services and products offered to the public, nature of business locations, and degree of supervision required if the bank exhibits problem characteristics. For these reasons, state-chartered banks are placed into one of three examination frequencies: six-month, twelve-month, and 18-month. Any individual bank's placement in a specific examination frequency is the result of a combination of these factors. The criteria for placement in one examination frequency or another are currently set forth in the Commissioner's Examination Frequency Memorandum, Commissioner Numbered Memo 95-03, dated April 24, 1995. These criteria are subject to change, and the banking commissioner may reissue a pronouncement on examination frequencies.

David Speer, Director, Budget and Planning Division, Texas Department of Banking, has determined that for the first five-year period the sections as proposed will be in effect, there will be no fiscal implications for local government as a result of enforcing or administering these sections. Mr. Speer estimates that the amount of revenue the sections will generate for state government, assuming the department fully utilizes its spending authority for the 1995-1997 fiscal biennium and that its spending authority in future bienniums is unchanged, for each of the first five fiscal years the proposed sections are in effect, will be $9,493,767 for 1996, $9,430,955 for 1997, $9, 180,956 for 1998, $9,674,235 for 1999, and $9,674,235 for 2000.

Mr. Speer also has determined that, for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing these sections is the economic self-sufficiency of the department with respect to regulation of the banking industry. Because the proposed fee system is substantially similar to the assessment system currently used by the department, no difference will exist between the cost of compliance for small businesses and the cost of compliance for the largest businesses affected by these sections.

Comments on the proposal may be submitted in writing to Everette D. Jobe, General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705-4294.

The new sections are proposed under the Act, §1.012(a)(4), as added by Act of May 18, 1995, 74th Legislature, Chapter 914, §1, 1995 Texas Session Law Service 4451, 4461, which authorizes the commission to adopt rules to provide for the recovery of the cost of maintenance and operation of the department and the cost of enforcing the Act through the imposition and collection of ratable and equitable fees for notices, applications, and examinations. The Act, §2.008(b) and §9.002(b), specifically provide that each bank or foreign bank agency must pay the cost of examination, the equitable or proportionate cost of maintenance and operation of the department, and the cost of enforcement of the Act through the imposition and collection of fees established by the commission under the Act, §1.012(a)(4).

As required by the Act, §1.012(b), in proposing these sections, the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state bank system, and allow for economic development within this state.

Texas Banking Act, §§2.008, 3.004(b), 3.502(c), and 9.002(b) are affected by these proposed new sections.

§3.36 Annual Assessments and Specialty Examination Fees.

(a) Authority. The assessment schedule contained in this section is made under the authority contained in the Texas Banking Act, §§1.012(a)(4), 2.008(b), and 9.002(b), as added by Act of May 18, 1995, 74th Legislature, chapter 914, §1, 1995 Texas Session Law Service 4451, at 4461 and 4465.

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

(1) Assessable assets-The sum of on-book assets and average off-book assets of a bank or foreign bank agency.

(2) Average off-book assets-The average of the off-balance sheet

items reported by a bank in its most recent March 31st call report and the three immediately preceding call reports, as adjusted under subsection (c) of this section and pursuant to the instructions accompanying the assessment form applicable to and submitted by the bank or foreign bank agency.

(3) Call report-The quarterly, consolidated report of condition and income (including domestic and foreign subsidiaries) promulgated in a form by the Federal Financial Institutions Examination Council and prepared and filed by a bank or foreign bank agency under state and federal law.

(4) Examination frequency-The frequency of which a bank is subject to examination by the department. The criteria for placement into one of three examination frequencies are set forth in Commissioner Numbered Memo 95-03.

(5) On-book assets-The total assets reported by a bank on the balance sheet contained in its most recent March 31st call report.

(c) Calculation of Average Off-Book Assets. A bank must calculate a four-quarter average of off-book assets, as adjusted under this subsection, using the most recent March 31st call report and the three preceding call reports, as a component of assessable assets. In general, the bank must sum all line items for which values are included on "Schedule RC-L-Off-Balance Sheet Items," with the exception of:

(1) Amount of financial standby letter of credit conveyed to others;

(2) Amount of performance standby letter of credit conveyed to others;

(3) Participations in acceptances conveyed to others by the reporting bank; and

(4) Gross commitments to sell.

(d) Annual Assessment. The department will establish the annual assessment for each bank and foreign bank agency effective September 1 of each year. Each bank and foreign bank agency must pay to the department the annual assessment fee, in quarterly installments as billed effective September 1, December 1, March 1, and June 1 of each year, except that an installment may be adjusted under subsections (f) and (g) of this section. Assessments will be calculated on the total assessable assets. The assessment will be calculated on the basis of the factors identified in and in the manner described in §3. 37 of this title (relating to Calculation of Annual Assessment for Banks) or §3.38 of this title (relating to Calculation of Annual Assessment for Banks).

(e) Review of Assessment Factors. The department will review all appropriations authorities, expenditure patterns, and other costs related to bank or foreign bank agency examination and supervision functions, and present to the Finance Commission no less frequently than once each biennium such information and a calculation chart that sets forth the annual assessment factors.

(f) Interim Adjustments.

(1) If a bank or foreign bank agency's size, condition, or other characteristics change sufficiently during a year to cause the bank or foreign bank agency to fall into a different examination frequency, the department will adjust the annual assessment in the quarter of the change to reflect only the quarter or quarters of the year in which the bank or foreign bank agency falls into a different examination frequency.

(2) In the event of an acquisition or merger involving a surviving state bank or foreign bank agency, the department will adjust the annual assessment in the quarter of the acquisition or merger to reflect only the quarter or quarters of the year in which the bank or foreign bank agency falls into a different asset group as a result of the acquisition or merger. The asset group will be calculated on the basis of the combined assessable assets, including branches, of the surviving bank or foreign bank agency.

(3) In the event a financial institution converts to a state bank, it shall pay to the department an assessment beginning in the quarter of the conversion to reflect only the quarter or quarters of the year in which the financial institution is a state bank.

(4) Each bank or foreign bank agency, on the due date of an assessment installment, must pay to the department the full quarterly installment of the assessment for the next three-month period without proration for any reason.

(g) Adjustment of an Installment. The commissioner may, after review and consideration of actual expenditures to date and projected expenditures for the remainder of the fiscal year, lower the amount of an installment due from banks or foreign bank agencies, without Finance Commission approval.

(h) Specialty Examination Fees.

(1) Examinations of fiduciary activities and other special examinations and investigations, including but not limited to examinations of representative offices of foreign bank agencies, affiliates, and third-party contractors, are subject to a separate charge to cover the cost of time and expenses incurred in these examinations.

(2) The bank or foreign bank agency shall pay to the department a fee for examination under this subsection calculated at a uniform rate of $500 per examiner per day to cover the cost of the examinations including the salary expense of examiners plus a proportionate share of department overhead allocable to the examination function. The commissioner may lower the uniform rate without Finance Commission approval.

(3) In connection with an examination under this subsection, a bank or foreign bank agency shall also pay to the department an amount for actual travel expenses incurred by the examiners, including mileage, public transportation, food, and lodging, in addition to paying the examination fee set forth in paragraph (2) of this subsection.

(i) Special Assessments. The Finance Commission may approve a special assessment to cover material expenditures, such as major facility repairs and improvements and other extraordinary expenses.

§3.37. Calculation of Annual Assessment for Banks. The annual assessment for a state bank is calculated as described in §3.36 of this title, based on the values in the following table:
Figure 1: 7 TAC §3.37

§3.38. Calculation of Annual Assessment for Banks. The annual assessment for a foreign bank agency is calculated as described in §3. 36 of this title, based on the values in the following table:
Figure 2: 7 TAC §3.38

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

Issued in Austin, Texas, on November 7, 1995.

TRD-9514367 **Everette D. Jobe**
General Counsel
Finance Commission of Texas

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 475-1300

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Subchapter B. General

• 7 TAC §3.37

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

The Finance Commission of the State of Texas (the commission) proposes the repeal of §3.37, concerning application fees and recovery of investigative costs. This section is proposed to be re-titled, proposed in this is-

sue of the *Texas Register*. Proposed §15.2 is included in new Chapter 15 which will serve as the repository of rules regarding corporate activities, proposed in this issue of the *Texas Register*.

Sammie K. Glasco, Assistant General Counsel, Texas Department of Banking, has determined that, for the first five-year period the repeal is in effect there will be no fiscal implications for state or local government or small businesses as a result thereof. No economic cost will result to entities as a result of the repeal of this section.

Comments on the proposed repeal may be submitted in writing to Sammie K. Glasco, Assistant General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705-4294.

Repeal of these sections is proposed pursuant to rulemaking authority under the Act, §1.012(a)(1), which authorizes the commission to adopt rules necessary or reasonable to implement and clarify the Act. As required by the Act, §1.012(b), the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state bank system, and allow for economic development within this state.

The statutes affected by this proposed repeal are the Act, §§3.003, 3. 004, 3.203, 4.002(a), 9.004 and 9.006. The Texas Banking Act, §2,006(c).

§3 37. Application Fees and Cost Deposits.

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

Issued in Austin, Texas, on November 7, 1995.

TRD-9514368 Everette D. Jobe
General Counsel
Finance Commission of Texas

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For further information, please call: (512) 475-1300

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• 7 TAC §3.38

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

The Finance Commission of Texas (the commission) proposes the repeal of §3.38, concerning conversion between a state banking association and a limited banking association.

Repeal is necessary because the Texas Banking Act, §3.502, enacted by Act of May 18, 1995, 74th Legislature, Chapter 914, §1, 1995 Texas Session Law Service 4451, 4480-4481), incorporates the provisions of §3.38, rendering the section obsolete.

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

Mr. Jobe also has determined that for each year of the first five years the repeal is in effect the public benefit anticipated as a result of enforcing the repeal are elimination of regulation of the naming and advertising of bank branch facilities.

Comments on the proposed repeal may be submitted in writing to Everette D. Jobe, General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705-4294.

Repeal of this section is proposed pursuant to rulemaking authority under the Texas Banking Act, §1.012(a)(1), which authorizes the commission to adopt rules necessary or reasonable to implement and clarify the Texas Banking Act. As required by the Texas Banking Act, §1.012(b), the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state bank system, and allow for economic development within this state.

No statutes or rules are affected by the proposed repeal.

§3.38. Conversion of a State Banking Association to a Limited Banking Association, or a Limited Banking Association to a State Banking Association.

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

Issued in Austin, Texas, on November 7, 1995.

TRD-9514369 Everette D. Jobe
General Counsel
Finance Commission of Texas

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 475-1300

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Subchapter E. Banking House and Other Facilities

• 7 TAC §3.91

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

The Finance Commission of Texas (the commission) proposes the repeal of §3.91, concerning establishment and closing of a branch facility. A new §15.42 in this title is proposed in this issue of the *Texas Register* to address establishment and closing of a branch facility.

The repeal is necessary because of changes made regarding branch facilities by the enactment of the Texas Banking Act by Act of May 18, 1995, 74th Legislature, Chapter 914, §1, 1995 Texas Session Law Service 4451, and the proposed adoption of a new chapter governing corporate activities, published for comment in this issue of the *Texas Register*.

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

Mr. Jobe also has determined that for each year of the first five years the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be the elimination of conflict with the Texas Banking Act and new proposed sections governing branch facilities.

Comments on the proposed repeal may be submitted in writing to Everette D. Jobe, General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705-4294.

Repeal of this section is proposed pursuant to rulemaking authority under the Texas Banking Act (the Act), §1.012(a)(1), which authorizes the commission to adopt rules necessary or reasonable to implement and clarify the Act. As required by the Act, §1.012(b), the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state bank system, and allow for economic development within this state.

The statute affected by the proposed repeal is Texas Banking Act, §3.203.

§3.91. Establishment and Closing of a Branch Facility.

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

Issued in Austin, Texas, on November 7, 1995.

TRD-9514371 Everette D. Jobe
General Counsel
Finance Commission of Texas

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 475-1300

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Subchapter E. Banking House and Other Facilities

• 7 TAC §3.92

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

The Finance Commission of Texas (the commission) proposes the repeal of §3.92, concerning Naming and Advertising of Branch Facilities. A new §3.92 is proposed in this issue of the *Texas Register*, concerning a different subject, security at unmanned teller machines.

The repeal is necessary because Texas Civil Statutes, Article 342-917, the statute that underlies §3.92, was repealed effective September 1, 1995, in connection with the enactment of the Texas Banking Act by Act of May 18, 1995, 74th Legislature, chapter 914, §1, 1995 Texas Session Law Service 4451. No provision similar to Article 342-917 is contained in the Texas Banking Act, although the commission may have adequate authority to regulate identification of bank facilities should it choose to do so.

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

Mr. Jobe also has determined that for each year of the first five years the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be the elimination of regulation of the naming and advertising of bank branch facilities.

Comments on the proposed repeal may be submitted in writing to Everette D. Jobe, General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705-4294.

Repeal of this section is proposed pursuant to rulemaking authority under the Texas Banking Act, §1.012(a)(1), which authorizes the commission to adopt rules necessary or reasonable to implement and clarify the Texas Banking Act. As required by the Texas Banking Act, §1.012(b), the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state bank system, and allow for economic development within this state.

No statutes or rules are affected by the proposed repeal in that the statute underlying this section has been repealed.

§3.92. Naming and Advertising of Branch Facilities.

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

Issued in Austin, Texas, on November 7, 1995.

TRD-9514373 Everette D. Jobe
General Counsel
Finance Commission of Texas

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 475-1300

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• 7 TAC §3.92

The Finance Commission of Texas (the commission) proposes new §3.92 concerning user safety at unmanned teller machines, sometimes referred to as automated teller machines or ATMs. Existing §3.92 concerned a different subject and is proposed for repeal in this issue of the *Texas Register*.

Texas Civil Statutes, Article 342-903d (referred to as the ATM User Safety Act), as enacted by Act of May 27, 1995, 74th Legislature, Chapter 647, 1995 Texas Session Law Service 3528, governs user safety at unmanned teller machines. Provisions in the ATM User Safety Act purport to cross-reference to other provisions of the Texas Banking Code, Texas Civil Statutes, Articles 342-101 et seq, for definitional purposes, but the Texas Banking Code was in large part repealed by Act of May 18, 1995, 74th Legislature, Chapter 914, §26, 1995 Texas Session Law Service 4451, 4551, in connection with the adoption of the Texas Banking Act. Proposed §3.92(a) therefore contains definitions designed to facilitate understanding of these cross-references to repealed statutes.

The commission is aware that physical security of customers, employees, and property is of great concern to financial institutions and has been federally regulated by the Bank Protection Act of 1968 (12 United States Code, §1882) and Regulation P (12 Code of Federal Regulation, §§216.1 et seq). The ATM User Safety Act expands these requirements by specifying detailed requirements for unmanned teller machine security procedures, and further requires the commission to adopt rules to implement it. Accordingly, the proposed section provides additional clarification in those areas in which the ATM User Safety Act is not already explicit or is otherwise ambiguous. Safety procedures at ATMs must be in place no later than September 1, 1996, and required notices to customers must occur no later than January 1, 1996 and annually thereafter.

In developing the proposed section, the commission was mindful of trends relating to the Bank Protection Act. That federal statute was implemented by extremely detailed regulations with specifications relating to security cameras and specific requirements for all manner of equipment and procedures. Over a period of time, the regulation became outdated on a more and more frequent basis so that the requirements of the regulation did not keep pace adequately with changes in the security field. As a result, in 1991 the regulatory scheme was amended to provide a broad framework with each financial institution expected to implement the security requirements as fit the institution, its community, changes in technology, and other relevant factors. In developing the proposed section, the commission expects the same sort of procedure to be used by affected institutions. In other words, only a broad framework is established by the proposed section.

Proposed §3.92(b) clarifies that candle foot power of lighting is to be measured under normal conditions, i.e., without complicating factors such as fog, rain, snow, sand or duststorm. Special procedures for addressing noncompliance by landlords or owners of leased property on which ATMs are located is addressed by proposed §3.92(c). Annual safety evaluations are required in proposed §3.92(d). Financial institutions should notify landlords who fail to follow recommendations to improve the safety of an access area. The requirement of ATM User Safety Act, §5, that customers be notified of basic safety precautions, is set forth in proposed §3.92(e), including required timing and recommended content of the notice.

The ATM User Safety Act, §7(b)(1), grants authority to the commission to require video surveillance equipment at ATM sites. The commission has determined that video surveillance equipment at ATM sites has limited utility and practicality, and may in fact lead a customer into a false sense of security. Accordingly, the commission declines to require video surveillance equipment at all ATM sites. Whether video surveillance equipment, alarm systems, or security officers are appropriate at a particular ATM sites will depend on the safety evaluation of the owner or operator of the ATM that is required under the ATM User Safety Act, §4. The owner or operator may determine that unconnected or fake video surveillance equipment is appropriate. If the owner or operator determines that working video surveillance equipment is appropriate, the owner or operator must provide for selecting, testing, operating, and maintaining appropriate equipment. Proposed §3.92(g) indicates that the ATM User Safety Act applies to ATMs located in a bank vestibule if there is 24 hour access from outside the building. Proposed §3. 92(h) requires that the security officer of a financial institution certify compliance with the ATM User Safety Act and this subchapter on an annual basis.

D'Ann Johnson, Assistant General Counsel, Texas Department of Banking has determined that for the first five year period the new section as proposed will be in effect, there will be no fiscal implications for state and local government as a result of enforcing or administering this section.

Ms. Johnson also has determined that for the first five years the proposed section is in effect, no economic costs will affect regulated entities as a result of complying with the proposed section. No difference will exist between the cost of compliance for small businesses and the cost of compliance for the largest businesses affected by these sections.

Comments on the proposed section may be submitted in writing to D'Ann Johnson, Assistant General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705-4294.

The section is proposed under Texas Civil Statutes, Article 342-903d, §7(a), as enacted by Act of May 27, 1995, 74th Legislature, Chapter 647, 1995 Texas Session Law Service 3528, 3530, which requires the commission to adopt rules regarding enforcement and implementation of that statute.

Texas Civil Statutes, Article 342-903d, as enacted by Act of May 27, 1995, 74th Legislature, Chapter 647, 1995 Texas Session Law Service 3528 is affected by the new section.

§3.92. User Safety at Unmanned Teller Machines

(a) Definitions. Words and terms used in this subchapter that are defined in the ATM User Safety Act, §1, have the same meanings as defined in the ATM User Safety Act. The following words and terms when used in this subchapter shall have the following meanings, unless the context clearly indicates otherwise.

(1) Access device-A card, code, or any combination thereof, or other means of access, to a customer's account at a financial institution, that may be used by the customer to initiate a transaction at an ATM.

(2) ATM-A machine, sometimes referred to as an unmanned teller machine, other than a telephone or customer convenience terminal, as defined in paragraph (4) of this subsection, capable of being operated solely by a customer, by which a customer may communicate to the financial institution:

(A) a request to withdraw money directly from the customer's account or from the customer's account pursuant to a line of credit previously authorized by the financial institution for the customer;

(B) an instruction to deposit funds into the customer's account with the financial institution;

(C) an instruction to transfer funds between one or more accounts maintained by the customer with the financial institution but not as between the customer's account and an account maintained in the financial institution or in some other financial institution by some other customer;

(D) an instruction to apply funds against an indebtedness of the customer to the financial institution;

(E) a request for information concerning the balance of the account of the customer with the financial institution; or

(F) any other form of transaction a customer may conduct at an ATM using an access card.

(3) ATM User Safety Act-Texas Civil Statutes, Article 342-903d, as enacted by Act of May 27, 1995, 74th Legislature, chapter 647, 1995 Texas Session Law Service 3528.

(4) Customer convenience terminal-A particular kind of unmanned teller machine, the use of which does not involve personnel of a financial institution by which:

(A) a customer of a financial institution can authorize and effect the electronic transfer of funds from the customer's account at the financial institution in order to obtain cash or purchase or rent or pay for goods or services or both; and

(B) the merchant can ascertain that the transaction has been completed and the funds have been or will be transferred to the merchant's account at the merchant's financial institution.

(5) Department-The Texas Department of Banking.

(b) Measurement of Candle Foot Power. For purposes of measuring compliance with the ATM User Safety Act, §3, candle foot power should be determined under normal, dry weather conditions, without complicating factors such as fog, rain, snow, sand or duststorm, or other similar condition.

(c) Leased Premises.

(1) Noncompliance by Landlord. Pursuant to the ATM User Safety Act, §3(c), the landlord or owner of property is required to comply with the safety procedures of the ATM User Safety Act if an access area or defined parking area for an ATM is not controlled by the owner or operator of the ATM. If an owner or operator of an ATM on leased premises is unable to obtain compliance with safety procedures from the landlord or owner of the property, the owner or operator shall notify the landlord in writing of the requirements of the ATM User Safety Act and of those provisions for which the landlord is in noncompliance.

(2) Enforcement. Noncompliance with safety procedures required by the ATM User Safety Act by a landlord or owner of property after receipt of written notification from the owner or operator constitutes a violation of the Act, which may be enforced by the Texas Attorney General.

(d) Safety evaluations.

(1) The owner or operator of an ATM shall evaluate the safety of each machine on a basis no less frequently than annually.

(2) The safety evaluation shall consider at the least the factors identified in the ATM User Safety Act, §4.

(3) The owner or operator of the ATM may provide the landlord or owner of the property with a copy of the safety evaluation if an access area or defined parking area for an ATM is not controlled by the owner or operator of the machine.

(e) Notice.

(1) Existing Accounts. No later than January 1, 1996, an issuer of access devices shall furnish its customers with a notice of basic safety precautions that each customer should employ while using an ATM. The notice may be included as a statement stuffer with another mailing or may be delivered personally or mailed to each customer whose mailing address is in this state and who has been issued an access device.

(2) New Access Devices. An issuer of access devices shall furnish its customer with a notice of basic safety precautions at the time the initial disclosure of terms and conditions is provided to such customer.

(3) Annual Notice. After January 1, 1996, an issuer of access devices shall furnish its customers with a notice of basic safety precautions on a basis no less frequently than annually.

(4) Content. The notice of basic safety precautions required by this subsection must be provided in written form which can be retained by the customer and may include recommendations or advice regarding:

(A) security at walk-up ATMs;

(B) security at drive-up ATMs;

(C) protection of code or personal identification numbers;

(D) procedures for lost or stolen cards;

(E) reaction to suspicious circumstances;

(F) safekeeping and disposition of ATM receipts, such as the inadvisability of leaving an ATM receipt near the ATM;

(G) the inadvisability of surrendering information about the customer's access device over the telephone;

(H) safeguarding and protecting of the customer's access device, such as a recommendation that the customer treat the access device as if it was cash;

(I) protection against ATM fraud, such as a recommendation that the customer compare ATM receipts against the customer's monthly statement; and

(J) other recommendations that the issuer reasonably believes are appropriate to facilitate the security of its ATM customers.

(f) Video Surveillance Equipment. Video surveillance equipment is not required to be installed at all ATMs. The owner or operator must determine whether video surveillance or unconnected video surveillance equipment should be installed at a particular ATM site, based on the safety evaluation required under the ATM User Safety Act, §4. If an owner or operator determines that video surveillance equipment should be installed, the owner or operator must provide for selecting, testing, operating, and maintaining appropriate equipment.

(g) ATMs Located in a Bank Vestibule. The provisions of the ATM User Safety Act and this section are applicable to an ATM located in a bank vestibule if there is 24 hour access to the vestibule from outside the building.

(h) Certification of Compliance. The security officer of each depository shall certify compliance with the ATM User Safety Act and this regulation on a basis no less frequently than annually.

(i) Mandatory Compliance Date. Subject to the exemption provided by ATM User Safety Act, §6, compliance with the safety requirements of the ATM User Safety Act and this section is required not later than September 1, 1996.

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

Issued in Austin, Texas, on November 7, 1995.

TRD-9514372 Everette D. Jobe
General Counsel
Finance Commission of Texas

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 475-1300

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• 7 TAC §3.93

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

The Finance Commission of Texas (the commission) proposes the repeal of §3.93, concerning loan production offices.

The repeal is necessary because §3.93 has been superseded by the Texas Banking Act, §3.205 and §8.003, as enacted by Act of May 18, 1995, 74th Legislature, Chapter 914, §1, 1995 Texas Session Law Service 4451, 4477 and 4529, which render the section obsolete.

Sharon Gillespie, Assistant General Counsel, Texas Department of Banking, has determined that for the first five-year period the repeal is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeal.

Ms. Gillespie also has determined that for each year of the first five years the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be possible conflict between this section and the Texas Banking Act has been eliminated.

Comments on the proposed repeal may be submitted in writing to Sharon Gillespie, Assistant General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705-4294.

Repeal of this section is proposed pursuant to rulemaking authority under the Texas Banking Act, §1.012(a)(1), which authorizes the commission to adopt rules necessary or reasonable to implement and clarify the Texas Banking Act. As required by the Texas Banking Act, §1.012(b), the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state bank system, and allow for economic development within this state.

No statutes or rules are affected by the proposed repeal.

§3.38. Loan Production Offices.

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

Issued in Austin, Texas, on November 7, 1995.

TRD-9514374 Everette D. Jobe
General Counsel
Finance Commission of Texas

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 475-1300

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Part II. Texas Department of Banking

Chapter 10. Trust Companies

• 7 TAC §10.5

The Finance Commission of Texas (the commission) reproposes new §10.5, regarding the investment of corporate assets of trust companies, due to a substantive change to the originally proposed §10.5 published in the August 8, 1995, issue of the *Texas Register* (20 TexReg 5975). Former §10.5 was proposed for repeal in the August 8, 1995, issue of the *Texas Register* (20 TexReg 5975), and the proposed repeal remains outstanding.

The proposed rule is directly in response to a petition for rulemaking filed by a regulated trust company seeking clarification of existing §10.5 and the meaning of "readily marketable investments." Other flaws were noted in existing §10.5 and the section is therefore proposed for repeal and replacement.

Under the proposed section, a trust company is required to maintain a measure of liquidity by maintaining an amount at least equal to 40% of its capital and certified surplus in readily marketable investments, defined to include insured certificates of deposit, investment securities in which state banks can invest without limitation, publicly traded corporate debt or equity securities, or another investment that can be converted to cash within four business days. The remainder of a trust company's corporate assets may be invested at the discretion of the trust company except that a trust company may not invest an amount in excess of 15% of its capital and certified surplus in the securities of a single issuer without the prior written consent of the banking commissioner. The provision, not included in the prior proposed §10. 5, authorizes the commissioner, on application and in the exercise of discretion, to reduce the amount of investments in readily marketable investments from the 40% restriction.

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

Mr. Jobe also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be increased certainty of compliance in the trust company industry as well as greater investment flexibility for trust companies. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Comments on the proposal to be considered by the commission should be submitted in writing within 30 days after publication of the proposed section in the *Texas Register* to Everette D. Jobe, General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705-4294.

The new section is proposed under Texas Civil Statutes, Article 342-1108(b), which authorize the commission to adopt general rules

and regulations as may be necessary to accomplish the purposes of trust company regulation, and Texas Banking Act, §1.012(a)(2), enacted by Act of May 18, 1995, 74th Legislature, Chapter 914, §1, 1995 Texas Session Law Service 4451, which authorizes the commission to adopt rules to preserve the safety and soundness of trust companies. The Texas Banking Act, §1.012, is applicable to trust companies by virtue of Texas Civil Statutes, Article 342-1102, §1, as amended by the Act of May 18, 1995, 74th Legislature, Chapter 914, §2(b), 1995 Texas Session Law Service 4451. As required by the Texas Banking Act, §1.012(b), the commission has considered the the need to promote a stable trust company environment, provide the public with convenient, safe, and competitive trust services, and allow for economic development within this state.

Texas Civil Statutes, Article 342-1101, §2(a), and the Texas Banking Act, §5.001 and §5.101 are affected by this new section.

§10.5. Authorized Investments.

(a) A trust company shall maintain an amount equal to 40% of its capital and surplus as defined in §10.1 of this chapter (relating to Trust Companies) in investments that are readily marketable and can be converted to cash within four business days, including:

(1) federally insured certificates of deposit issued by a depository institution;

(2) securities in which state banks can invest without limitation under the Texas Banking Act, §5.101 (as added by Act of May 18, 1995, 74th Legislature, Chapter 914, §1, 1995 Texas Session Law Service 4451); or

(3) corporate debt or equity securities registered or approved for registration and traded on a national securities exchange or authorized for quotation on an automated quotation system sponsored by a registered securities association.

(b) The banking commissioner may, on application and in the exercise of discretion consistent with protecting safety and soundness, reduce the amount of investments required under subsection (a) of this section.

(c) Subject to subsection (a) of this section, a trust company may invest its corporate assets in any investment permitted by law. Without the prior written consent of the banking commissioner, a trust company may not invest an amount in excess of 15% of its capital and certified surplus in the securities of a single issuer except as otherwise provided in the Texas Banking Act.

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

Issued in Austin, Texas, on November 7, 1995.

TRD-9514384 Everette D. Jobe
General Counsel
Texas Department of Banking

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 475-1300

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Chapter 12. Lending Limits

• 7 TAC §§12.1-12.7

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

The Finance Commission of Texas (the commission) proposes the repeal of the entirety of Chapter 12 of Title 7, specifically 7 TAC §§12.1-12.7, concerning lending limits applicable to state banks. The sections proposed for repeal will be replaced with new §§12.1-12.11, proposed for comment in this issue of the *Texas Register*.

The sections proposed for repeal were last revised in 1988, and amendments in law made by the Texas Banking Act (the Act), §5.201, as enacted by Act of May 18, 1995, 74th Legislature, Chapter 914, §1, 1995 Texas Session Law Service 4451, 4494-4496, require that the existing sections be rewritten. Revisions are sufficiently extensive to require repeal and replacement by new sections.

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

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

Comments on the proposed repeals may be submitted in writing to Everette D. Jobe, General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705-4294.

The repeals are proposed under the Act, §1.012(a), which authorizes the commission to adopt rules necessary or reasonable to implement and clarify the Act, preserve or protect the safety and soundness of state banks, and grant the same rights and privileges to state banks that are or may be granted to national banks domiciled in this state. As required by the Act, §1.012(b), the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state bank system, and allow for economic development within this state.

Texas Banking Act, §5.201 and §5.203 is affected by these proposed repeals.

§12.1. Authority, Purpose, and Scope.

§12.2. Definitions.

§12.3. General Limitation.

§12.4. Combining Loans to Separate Borrowers and Attributing Loans to Persons Other than the Maker.

§12.5. Discount of Consumer Paper.

§12.6. Other Real Estate and the Applicability of the Legal Loan Limit.

§12.7. Emergency Lending Authority.

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

Issued in Austin, Texas, on November 7, 1995.

TRD-9514385 Everette D. Jobe
General Counsel
Texas Department of Banking

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 475-1300

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Chapter 12. Loans and Investments

Subchapter A. Lending Limits

• 7 TAC §§12.1-12.11

The Finance Commission of Texas (the commission) proposes new §§12.1-12. 11, to constitute all of Chapter 12, Subchapter A, regarding legal lending limits applicable to state banks and trust companies. Chapter 12 is proposed to be retitled "Loans and Investments" and Subchapter A is proposed to be titled "Lending Limits." All existing sections of Chapter 12 are proposed to be repealed in this issue of the *Texas Register*, although the repeal will not be adopted until and unless the new proposed sections are adopted.

The proposed sections do not substantially change the existing law established by the existing sections of Chapter 12 as reorganized and modified to account for changes in

law made by the Texas Banking Act (the Act), §5. 201, as enacted by Act of May 18, 1995, 74th Legislature, Chapter 914, §1, 1995 Texas Session Law Service 4451, 4494-4496, and for existing regulatory determinations and other changes in law made since the legal lending limit rules were last revised in 1988. The proposed sections articulate and expand upon exceptions to the statutory legal lending limit and create several exceptions not addressed by the Act or existing sections of Chapter 12, both to improve clarity and answer frequently asked questions. The proposed sections also implement parity with national banks in several respects, and the staff of the department of banking closely compared the proposal to the national bank lending limits adopted by the Office of the Comptroller of the Currency (OCC) on February 15, 1995, published in the *Federal Register* at 60 FedReg 8526, and codified at 12 Code of Federal Regulations (CFR), §§32.1-32.6, while attempting to preserve the lending limit scheme set forth in the Act. Percentage limits imposed by the OCC have been adjusted upward in appropriate circumstances to create parity in light of the smaller calculation base under the Act.

Proposed §12.1 restates the public policy underlying legal lending limits and addresses the scope of the proposed subchapter. References are specifically made to federal law that creates additional restrictions on state banks. The reader is further specifically cautioned that legal lending limits are designed to limit the bank's exposure to one borrower or source of repayment and to encourage diversification in the bank's loan portfolio, and do not address the application of prudent lending standards and safe and sound banking practices. The obligation to engage in prudent lending is the overriding standard.

Proposed §12.2 sets forth definitions of the "Act" and "borrower" to be applicable to the entire subchapter. Proposed §12.3 extensively analyzes the term "loans or extensions of credit" as used in the Act, setting forth specific inclusions in the term as well as specific exclusions. The power of a state bank to act as surety or guarantor is specifically set forth in §12. 2(a)(2)(B).

Proposed §12.3(b)(1) permits a bank to advance funds to protect its collateral without such advance being considered a loan or extension of credit, provided that any such advances must be considered as outstanding indebtedness in evaluating whether the bank can fund a new loan or extension of credit to the same borrower. Examples include advances for taxes, insurance, utilities, security, and maintenance expenses, but only if necessary to preserve the value of the real property or other collateral security and consistent with safe and sound banking practices. Under federal law, the OCC has also included advances for operating expenses within the exception, see 12 CFR, §32.2(j)(2)(I). The department feels strongly that advances for operating expenses should be considered a new loan or extension of credit and is not reasonably related to preservation of collateral. Comment is specifically requested on this issue, and commenters are encouraged to provide examples of how advances related to operating expenses can aid in preservation of collateral.

As is the case under prior law, accrued and discounted interest is excluded from loans and extensions of credit under proposed §12.3(b)(2). The OCC has also excluded interest that has been capitalized from prior notes and interest that has been advanced under a loan agreement, under 12 CFR, §32.2(j)(2)(ii). The OCC suggests that such an addition assists primarily large banks with loans to foreign governments and also grants more flexibility to banks in working out troubled loans. The department believes inclusion of the provision on capitalized and advanced interest is contrary to safe and sound banking practices for most state banks, but solicits comments regarding whether additional safeguards could be proposed to address the concern of the department. The department also believes that state banks will enjoy even greater flexibility under proposed §12.8(a), which permits the banking commissioner, on application, to grant exceptions to the lending limit on a case by case basis.

Proposed §12.2(b)(5) excludes "an advance against uncollected funds in the normal course of collection pursuant to Regulation CC (12 CFR, §§229.1 et seq), including the amount of an item that must be credited to the customer under Regulation CC but remains uncollected and unreturned because of a delay or defect in the collection system" from loans or extensions of credit.

Proposed §12.4 elaborates on the subject of loan commitments, a source of considerable confusion in prior years. In the view of the department, no change in law or policy is made by proposed §12.4.

Proposed §12.5(a) sets out the general standard for legal lending limits, and clarifies that the sum of capital and certified surplus, as a measurement device, must be reduced in the event undivided profits is sufficiently negative to cause equity capital of a bank to be less than capital and certified surplus. In the view of the department, no change in law or policy is made by the inclusion of proposed §12.5(a). The remainder of proposed §12.5 sets out in detail the circumstances under which the general limit of §12.5(a) can be exceeded, although banks are reminded that prudent lending standards are always applicable. The increased lending limits generally are cumulative; i.e., the section is drafted in such a way that the limit expressed is in addition to the general 25% limit and any other special limit applicable to a transaction with the same borrower except as otherwise specifically provided. Proposed §12.5(b)-(d) implement and clarify statutory exceptions. Proposed §12.5(e)-(g), however, create several new exceptions on the basis of parity with national banks.

Proposed §12.5(e) implements an increased lending limit for livestock under the commission's authority to add exceptions by rule, as a matter of parity with national banks. The department, unlike the OCC in 12 CFR, §32. 3(b)(3)(I), has not included horses and mules within "livestock" for purposes of this exception because a daily and reliable market does not exist for these animals. Comment is requested regarding the ease of marketability of horses and mules and why an increased lending limit is appropriate consistent with safety and soundness.

Also with respect to livestock loans, the OCC addresses a potential lien conflict regarding livestock loans resulting from a lien for pasturage statutorily imposed in certain states on livestock by imposing an apparently complex requirement on the lending bank to, among other steps, obtain assignment and perfection of that lien, see 12 CFR, §32.3(b)(3)(iii). Under Property Code, §70.003, an owner or lessee of a pasture with whom an animal is left for grazing has a lien on the animal for the amount of charges for the grazing. Case law appears to hold that the lien is inferior to a prior recorded lien if the prior lienor did not have knowledge of or consent to the pasturage lien. However, the pasturage lien may be superior with respect to charges accrued before the bank's lien is recorded. Comment is requested on the risk posed to banks lending on livestock by pasturage liens under Property Code, §70.003.

Proposed §12.5(f) implements an increased lending limit for dairy cattle paper under the commission's authority to add exceptions by rule.

Proposed §12.5(g) implements an increased lending limit for additional advances to complete project financing, under the commission's authority to add exceptions by rule. The section is intended to permit a bank to renew a loan commitment for purposes of completing the original intended funding under the commitment, to enable a project to be finished rather than force the unfinished property into foreclosure, if certain conditions are met.

Proposed §12.6 clarifies certain exemptions under the Act, §5.201, for which no limits are specified and are without significant change from prior law and regulatory interpretations. Proposed §12(c) and (d) are intended to exempt a loan to a governmental entity of this state or to a federal agency that would constitute a purchase of an investment security under the Act, §5. 101(d)(1), if the obligation were marketable.

The specialized area of lease financing is addressed by proposed §12.7, which defines the structure of a financed lease sufficient to allow the bank to look to the lessee and not the lessor as borrower.

Proposed §12.8 specifies the process of obtaining an exemption upon application as well as obtaining emergency relief from the banking commissioner in the situation of a legal lending limit that has become too low to allow a bank to adequately serve its community. The department believes the ability to obtain an exemption on the facts of a particular case provides a significant advantage for state banks over national banks, although comment is requested regarding whether such an approval has implications under 12 United States Code (USC), §1831a and 12 CFR, §§362.1 et seq (relating to limiting certain state bank activities to those permissible for national banks).

Aggregation and attribution of loans, the process of determining the consolidated risk or exposure of the lending bank to a single source of repayment, is addressed in proposed §12.9 and, with one exception, is substantially unchanged from existing law

although reorganized for clarity. The OCC has imposed a separate limit on loans to corporate groups (generally defined as a group of business entities under common control, including forms of business entities other than corporations) in 12 CFR, §32.5(d). Proposed §12.9(e) seeks to impose the same requirement in recognition of the inherent risk in loans to a controlled group of business entities and to simplify application of the attribution rules in that context.

Nonconforming loans, i.e., loans made on or after September 1, 1995, that were within a bank's legal lending limit when made but no longer comply because of specified reasons, are governed by proposed §12.10. Such loans will be cited as nonconforming loans but not as violations of the legal lending limit if they are nonconforming by reason of a decline in the bank's capital and certified surplus or equity capital, subsequent merger or affiliation of borrowers in such a way as to invoke aggregation of previously separate loans, subsequent changes in lending limit or capital definitions or standards after the effective date of proposed Chapter 12, or a decline in value of collateral securing a loan or extension of credit that causes noncompliance with a special lending limit or exception. In the last case, a bank must take action to restore collateral value within 30 days after the nonconformity is discovered or risk being cited for violation of the applicable lending limit. In other cases of nonconformity, the bank is obligated to use best efforts to bring the credit into compliance, and in some circumstances may renew or restructure the loan.

Proposed §12.11 addresses transition from the Texas Banking Code to the Texas Banking Act regarding treatment of loans in existence on the effective date of the Act, primarily by providing an exemption based on specified standards, including standards for renewing and restructuring a loan if necessary. Subject to satisfaction of the specified standards, loans subject to proposed §12.11 will not be cited as violations of lending limits or as nonconforming loans.

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

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

Comments on the proposed sections may be submitted in writing to Everette D. Jobe, General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705-4294.

The new sections are proposed under the Act, §5.201(d), which authorizes the commission to adopt rules to administer and carry out the Act, §5.201, regarding legal lending limits, including rules to define or further define terms used in the statute, or establish limits, requirements, or exemptions other than specified by the statute for particular classes or categories of loans or extensions of credit. The sections are also proposed under the Act, §1.012(a), which authorizes the commission to adopt rules necessary or reasonable to implement and clarify the Act, preserve or protect the safety and soundness of state banks, and grant the same rights and privileges to state banks that are or may be granted to national banks domiciled in this state. As required by the Act, §1.012(b), in proposing these sections, the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state bank system, and allow for economic development within this state.

Texas Banking Act, §5.201 and §5.203 is affected by these new sections.

§12.1. Purpose and Scope

(a) Purpose. The purpose of this subchapter is to administer and carry out the objectives of the Texas Banking Act (the Act), §5.201, as enacted by Act of May 18, 1995, 74th Legislature, Chapter 914, §1, 1995 Texas Session Law Service 4451, 4494-4496, to protect the safety and soundness of state-chartered banks by preventing excessive loans to one person or a relatively small group of persons who are financially interdependent, and to promote diversification of loans to reduce portfolio and credit risk. Notwithstanding the provisions of the Act, §5.201, and this subchapter, loans and extensions of credit by state banks and their operating subsidiaries remain subject to the exercise of prudent lending standards and safe and sound banking practices.

(b) Scope.

(1) This subchapter applies to all loans and extensions of credit made by a state bank and its operating subsidiaries on or after September 1, 1995. This subchapter does not apply to loans made by a state bank and its domestic operating subsidiaries to the bank's "affiliates," as that term is defined in 12 USC, §371c(b)(1), pursuant to the Act, §5.201(a)(13), or to loans made by a state bank to the bank's operating subsidiaries, pursuant to the Act, §5.201(a)(14). Except as otherwise provided, this subchapter does not apply to other loans specifically exempted from the lending limit pursuant to the Act, §5.201(a).

(2) Loans and extensions of credit to officers, directors, and principal shareholders of state banks, and their related interests, are subject to the limits prescribed by 12 USC, §375a and §375b and Regulation O (12 CFR, §§215.1 et seq), in addition to the lending limits established by the Act, §5.201, and this subchapter.

(3) The lending limits in this subchapter are separate and apart from the investment limits set forth in the Act, §5.101, and regulations adopted to govern investment limits. A state bank may make loans or extensions of credit to one borrower up to the full amount permitted by this subchapter and also purchase and hold eligible investment securities issued by the same obligor up to the full amount permitted under the Act, §5.101.

§12.2. General Definitions. Words and terms used in this subchapter that are defined in the Act, §1.002, have the same meanings as defined in the Act. The following words and terms when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

Act-The Texas Banking Act, as enacted by Act of May 18, 1995, 74th Legislature, Chapter 914, §1, 1995 Texas Session Law Service 4451.

Borrower-a person who is named as a borrower, obligor, or debtor in a loan or extension of credit, or any other person, including but not limited to a drawer, endorser, or guarantor who is considered to be a borrower under the direct benefit, source of repayment, or common enterprise tests set forth in §12.9 of this title (relating to Aggregation and Attribution).

§12.3. Loans and Extensions of Credit.

(a) Loans or extensions of credit for purposes of the Act, §5.201, and this subchapter include:

(1) an overdraft, regardless of whether such overdraft was pre-arranged, other than an overdraft for which payment or deposit is received by the bank before the time at which the bank closes its accounting records for the business day on which the funds were advanced;

(2) a contractual obligation to advance funds to or on behalf of a person, including a bank's obligation to:

(A) make payment, directly or indirectly, to a third party contingent upon default by a bank customer of the bank in performing an obligation owed to the third party or upon another stated condition;

(B) guarantee or act as surety for the benefit of a person; provided a bank may bind itself as a surety to indemnify another, or otherwise become a guarantor, only if it has a substantial interest in the

performance of the transaction involved or has a segregated deposit sufficient in amount to cover the bank's total potential liability;

(C) advance funds under a legally binding commitment to lend; or

(D) advance funds under a standby letter of credit, a put, or other similar arrangement, however named or described, that represents an obligation to the beneficiary on the part of the issuing bank to repay money borrowed by or advanced to or for the account of the account party, make payment on account of any indebtedness undertaken by the account party, or make payment on account of a default by the account party in the performance of an obligation, but not including a bank's obligation under a commercial letter of credit or similar instrument if the issuing bank reasonably expects the beneficiary to draw on the issuer and the instrument neither guarantees payment nor provides for payment in the event of a default by a third party;

(3) a maker or endorser's obligation arising from the discount of commercial paper;

(4) third-party paper purchased to the extent it is subject to an agreement that the seller will repurchase the paper, including an obligation to repurchase the paper upon default or at the end of a stated period, less any applicable dealer reserves held by the bank as collateral security;

(5) loans or extensions of credit that have been charged off on the books of the bank, in whole or part, unless the loan or extension of credit:

(A) has become unenforceable by reason of discharge in bankruptcy;

(B) is no longer legally enforceable because of the expiration of the statute of limitations or judicial decision; or

(C) is no longer legally enforceable for any other reason, provided the bank maintains sufficient records to demonstrate that the loan is unenforceable;

(6) lease financing transactions made pursuant to the Act, §5.203, unless otherwise exempt under §12.7 of this title (relating to Lease Financing); and

(7) nonrecourse or limited recourse loans or extensions of credit.

(b) Loans or extensions of credit for purposes of the Act, §5.201, and this subchapter do not include:

(1) funds advanced to or for the benefit of a borrower by a bank for taxes or insurance associated with collateral security for a loan or extension of credit, as well as funds advanced for utilities, security, and maintenance expenses associated with real property securing a loan or extension of credit, but only if necessary to preserve the value of the real property or other collateral security and consistent with safe and sound banking practices, except that such advances must be included in loans and extensions of credit thereafter until repaid for the purpose of determining whether additional loans or extensions of credit to the same borrower may be made within applicable lending limits;

(2) accrued and discounted interest on an existing loan or extension of credit;

(3) that portion of a loan or extension of credit sold as a participation by a bank on a nonrecourse basis, provided the participation results in a pro rata sharing of credit risk proportionate to respective interests of the originating and participating lenders, except that:

(A) if the participation agreement provides that repayment must be applied first to the portions sold, a pro rata sharing will be considered to exist only if the participants share in all subsequent repayments and collections in proportion to their percentage participation in the event of default or comparable event provided in the agreement, at the time of the occurrence of the event; and

(B) if the originating bank funds the entire loan, the participants must remit their portion to the bank before the close of business (the time at which the bank closes its accounting records for the business day) on the next business day of the originating bank or its portion funded by the originating bank will be considered a loan by the originating bank to the borrower;

(4) an advance against uncollected funds in the normal course of collection pursuant to Regulation CC (12 CFR, §§229.1 et seq), including the amount of an item that must be credited to the customer under Regulation CC but remains uncollected and unreturned because of a delay or defect in the collection system; or

(5) the sale of federal funds, i.e., a transaction between depository institutions involving the transfer of immediately available funds resulting from credits to deposit balances at a Federal Reserve Bank or from credits to new or existing deposit balances due from a correspondent depository institution, with a maturity of less than one week, or the sale of federal funds under a continuing contract.

§12 4. Loan Commitments. A commitment to lend, when combined with all other loans or extensions of credit to a borrower, must be within the bank's legal lending limit at the time the commitment becomes binding. In determining whether a commitment to lend is within a bank's lending limit when made, the bank may deduct from the amount of the commitment the amount of each legally binding loan participation agreement executed concurrently with the bank's commitment that would be excluded from a loan or extension of credit under §12.3(b)(3) of this title (relating to Loans and Extensions of Credit).

§12.5. Percentage Lending Limits.

(a) General Lending Limit. Generally, a bank's total outstanding loans and extensions of credit to one borrower, as provided in the Act, §5.201, may not exceed 25% of the lesser of the bank's capital and certified surplus or the bank's total equity capital. However, certain loans or extensions of credit are subject to special lending limits as set forth in this section. These special lending limits are cumulative of one another and of the general lending limit under this subsection except as otherwise provided.

(b) Loans Secured by Title to Readily Marketable Goods.

(1) Pursuant to the Act, §5.201(a)(3), loans to one borrower secured by a bill of lading, bonded warehouse receipt, or similar document transferring or securing title to readily marketable goods may not exceed 50% of the lesser of the bank's capital and certified surplus or the bank's total equity capital, in addition to the amount for that borrower allowed under the bank's general lending limit for loans and extensions of credit other than as provided by this subsection, provided the bank's interest in the collateral is adequately insured against loss if it is customary to do so. The market value of the goods securing the loan must at all times equal at least 115% of the amount of the outstanding loan that exceeds the general lending limit. The duration of the loan or extension of credit may not exceed six months if secured by goods that are refrigerated or frozen, or ten months if secured by nonperishable goods.

(2) The holder of the bonded warehouse receipts, order bills of lading, documents of title (as defined under the Business and Commerce Code), or other similar documents must have control and be able to obtain immediate possession of the goods so that the bank is able to sell the underlying goods and promptly transfer title to the buyer if default were to occur on a loan secured by such documents. The requirement under applicable law for a brief

notice period or other similar procedural condition prior to disposal of the goods will not affect the eligibility of the instruments for this special lending limit.

(3) For purposes of this subsection, readily marketable goods are articles of commerce or industry in the form of fungible units that are easy to sell in a market with sufficiently frequent price quotations, and includes basic metals, such as tin, copper, or lead, consumer goods, and packaged processed foods, including refrigerated or frozen foods. The exact price must be easy to determine and the article itself must be easy to sell at any time at a price that would not be considerably less than the amount at which it is valued as collateral. Whether an article qualifies as readily marketable goods is determined on the basis of the conditions existing at the time the loan or extension of credit secured by the article is made. Whether goods are nonperishable must be determined on a case-by-case basis because of the differences in types of goods and differences in the shipping, handling, and storing of goods.

(c) Loans secured by Liens on Stored Agricultural Products.

(1) Pursuant to the Act, §5.201(a)(4), loans to one borrower secured by liens on agricultural products in secure and properly documented storage in bonded warehouses or elevators may not exceed 50% of the lesser of the bank's capital and certified surplus or the bank's total equity capital, in addition to the amount for that borrower allowed under the bank's general lending limit for loans and extensions of credit other than as provided by this subsection, provided the bank's interest in the collateral is adequately insured against loss. The market value of the agricultural products securing the loan must at all times equal at least 125% of the amount of the outstanding loan. The duration of the loan or extension of credit may not exceed six months if secured by agricultural products that are refrigerated or frozen, or exceed ten months if secured by nonperishable agricultural products.

(2) The bank must have control and be able to obtain immediate possession of the agricultural products so that the bank is able to sell the underlying products and promptly transfer title to the buyer if default were to occur on a loan secured by such products. The requirement under applicable law for a brief notice period or other similar procedural condition prior to disposal of the products will not affect the eligibility of the products for this special lending limit.

(3) Field warehouse receipts are an acceptable form of collateral when issued by a duly bonded and licensed grain elevator or warehouse having exclusive possession and control of the agricultural products even though the grain elevator or warehouse is maintained on the premises of the owner of the products. Warehouse receipts issued by the borrower-owner that is a grain elevator or warehouse company, duly bonded and licensed and regularly inspected by state or federal authorities, may be considered eligible collateral under this provision only when the receipts are registered with an independent registrar whose consent is required before the products may be withdrawn from the warehouse.

(4) Agricultural products are any product of agriculture, excluding livestock but not the products of livestock, and includes wheat and other grains, cotton, wool, flowers, eggs, and milk. Whether agricultural products are nonperishable must be determined on a case-by-case basis because of the differences in types of agricultural products and differences in the shipping, handling, and storing of agricultural products.

(d) Loans Secured by Readily Marketable Collateral.

(1) Pursuant to the Act, §5.201(a)(12), loans or extensions of credit to one borrower may exceed the bank's general lending limit by an additional 15% of the lesser of the bank's capital and certified surplus or the bank's total equity capital if the amount that exceeds the bank's general lending limit is fully secured by readily marketable collateral. The bank must properly perfect its security interest in the collateral to qualify for this added special lending limit and the collateral at all times must have a market value of at least 100% of the amount of the loan or extension of credit that exceeds the bank's general lending limit.

(2) For purposes of this subsection, readily marketable collateral must be financial instruments or bullion that can be promptly sold under ordinary market conditions at a fair market value determined by reliable and continuously available price quotations based upon actual transactions on an auction or similarly available daily bid and ask price market. Financial instruments are stocks, bonds, notes, and debentures traded on a national securities exchange, over-the-counter margin stocks as defined in Regulation U (12 CFR, §§221.1 et seq), commercial paper, negotiable certificates of deposit, bankers' acceptances, and shares in a money market mutual fund of the type that issues shares in which banks may perfect a security interest, but not including individual mortgages. Financial instruments may be denominated in foreign currencies that are freely convertible into United States dollars.

(e) Loans Secured by Documents Covering Livestock.

(1) Pursuant to the Act, §5.201(b)(2), loans or extensions of credit to one borrower secured by shipping documents or instruments that transfer or secure title to or grant a first lien security interest in livestock may not exceed 15% of the lesser of the bank's capital and certified surplus or the bank's total equity capital, in addition to the amount allowed under the bank's general lending limit. The market value of the livestock securing the loan must at all times equal at least 115% of the amount of the outstanding loan that exceeds the general lending limit.

(2) The bank must maintain in its files an inspection and valuation for the livestock pledged that is reasonably current, taking into account the nature and frequency of turnover of the livestock to which the documents relate, but in no event more than 12 months old.

(3) For purposes of this subsection, livestock includes dairy and beef cattle, hogs, sheep, goats, poultry, and fish, whether or not held for resale.

(f) Loans Secured by Dairy Cattle Paper. Pursuant to the Act, §5. 201(b)(2), loans and extensions of credit to one borrower arising from the discount by dealers in dairy cattle of paper given in payment for the cattle may not exceed 15% of the lesser of the bank's capital and certified surplus or the bank's total equity capital, in addition to the amount allowed under the bank's general lending limit. To qualify, the paper must carry the full recourse endorsement or unconditional guarantee of the seller and must be secured by the cattle sold, pursuant to liens that allow the bank to maintain a perfected security interest in the cattle under applicable law.

(g) Additional Advances to Complete Project Financing. Pursuant to the Act, §5.201(b)(2), a state bank may renew a commitment to lend and complete funding under that commitment to one borrower in circumstances where the renewed commitment would exceed the bank's current, general lending limit if:

(1) The completion of funding is consistent with safe and sound banking practices and is made to protect the position of the bank;

(2) The completion of funding will enable the borrower to complete the project for which the original commitment to lend was made; and

(3) The amount of the additional funding does not exceed the unfunded portion of the bank's original commitment to lend.

§12.6. Loans Not Subject to Lending Limits

(a) Loans Arising from the Discount of Commercial or Business Paper.

(1) Pursuant to the Act, §5.201(a)(1), loans or extensions of credit arising from the discount of negotiable commercial or business paper that evidences an obligation to the person negotiating the paper are not subject to the lending limits of the Act, §5.201, or this subchapter, provided that.

(A) the paper is given in payment of the purchase price of commodities purchased for resale, fabrication of a product, or another business purpose that may reasonably be expected to provide funds for payment of the paper; and

(B) the paper bears the full recourse endorsement of the owner of the paper, except that paper discounted in connection with export transactions may be transferred without recourse or with limited recourse if supported by an assignment of appropriate insurance, acceptable to the banking commissioner, covering the political, credit, and transfer risks applicable to the paper, such as insurance provided by the Export-Import Bank.

(2) A default in the payment of principal or interest on commercial or business paper when due does not disqualify the exception under this subsection or result in a loan or extension of credit to the maker or endorser of the paper that is subject to lending limits, provided that the amount of such defaulted paper must be included in loans and extensions of credit thereafter until the default is remedied for the purpose of determining whether additional loans or extensions of credit to the same borrower may be made within applicable lending limits.

(b) Bankers' Acceptances. Pursuant to the Act, §5.201(a)(2), acceptance of drafts eligible for rediscount under 12 USC, §372 and §373, or a bank's purchase of acceptances created by other banks that are eligible for rediscount under those sections, is not subject to the limits of the Act, §5.201, or this subchapter. Bankers' acceptances within this exception do not include.

(1) acceptance of drafts ineligible for rediscount, thereby resulting in a loan from the bank to the customer for whom the acceptance was made, in the amount of the draft;

(2) purchase of ineligible acceptances created by other banks, thereby resulting in a loan from the purchasing bank to the accepting bank, in the amount of the purchase price; or

(3) a bank's purchase of its own acceptances, thereby resulting in a loan to the bank's customer for whom the acceptance was made, in the amount of the purchase price.

(c) Obligations of State or Local Government. Pursuant to the Act, §5.201(b)(2), a loan or extension of credit to this state or an agency or political subdivision of this state, including a county or municipality or an agency or political subdivision of a county or municipality, is not subject to the limitations of the Act, §5.201, or this subchapter to the extent the loan or extension of credit constitutes a legally created general obligation of the borrower, if the lending bank has obtained an opinion of counsel that the loan or extension of credit is a valid and enforceable general obligation of the borrower.

(d) Loans Secured by U.S. Obligations. Pursuant to the Act, §5.201, a loan or extension of credit to a borrower is not subject to the limitations of the Act, §5.201, or this subchapter if the bank perfects a security interest in the collateral under applicable law and the bank is fully secured by the current market value of:

(1) bonds, notes, certificates of indebtedness, or Treasury bills of the United States or by similar obligations fully and unconditionally guaranteed as to principal and interest by the United States; or

(2) loans to the extent unconditionally guaranteed as to repayment of principal by the full faith and credit of the United States, as further described by subsection (f) of this section.

(e) Loans to a Federal Agency. Pursuant to the Act, §5.201(b)(2), a loan or extension of credit to an agency or instrumentality of the United States including a department, agency, bureau, board, commission, or establishment of the United States, or any corporation wholly owned directly or indirectly by the United States, is not subject to the limitations of the Act, §5.201, or this subchapter.

(f) Government Guaranteed Loans. Pursuant to the Act, §5.201(a)(8), a loan or extension of credit to a borrower is not subject to the limitations of the Act, §5.201, or this subchapter to the extent secured by unconditional takeout commitments, insurance, or guarantees of a governmental entity described in subsection (c) or (e) of this subsection, provided the commitment or guarantee is payable only in cash or its equivalent within 60 days after demand for payment is made. The lending bank must obtain an opinion of counsel that the unconditional takeout commitment, insurance, or guarantee is unconditional if the purchasing, insuring, or guaranteeing entity is described in subsection (c) of this section. A takeout commitment, insurance, or guarantee is considered unconditional if the protection afforded the bank is not substantially diminished or impaired if loss should result from factors beyond the bank's control. Protection against loss is not materially diminished or impaired by procedural requirements such as an agreement to take over only in the event of default, including default over a specific period of time, a requirement that notification of default be given within a specific period after its occurrence, or a requirement of good faith on the part of the bank.

(g) Loans Secured by Segregated Deposit Accounts. Pursuant to the Act, §5.201(a)(10), loans or extensions of credit are not subject to the limitations of the Act, §5.201, and this subchapter to the extent secured by a segregated deposit account in the lending bank, provided that:

(1) the lending bank has perfected its security interest in the deposit under applicable law;

(2) if the deposit is eligible for withdrawal before the secured loan matures, the bank establishes internal procedures to prevent release of the security without the lending bank's prior consent;

(3) if the deposit is denominated and payable in a currency other than that of the loan or extension of credit that it secures, the deposit currency is freely convertible to U.S. dollars, except that only that portion of the loan or extension of credit that is fully secured by the U.S. dollar value of the deposit qualifies for exception and only if the lending bank establishes procedures to periodically revalue foreign currency deposits to ensure that the loan or extension of credit remains fully secured at all times.

(h) Discount of Installment Consumer Paper.

(1) Loans and extensions of credit to one borrower arising from the discount of negotiable or nonnegotiable installment consumer paper that carries a full recourse endorsement or unconditional guarantee of payment by the person transferring the paper to the bank is considered a loan or extension of credit to the transferor, as well as the maker, and subject to the general lending limit, except that the loan or extension of credit will not be considered made to the transferor to the extent the bank has met the requirements of the Act, §5.201(a)(11), and this subsection. If the transferor of the paper offers only partial recourse to the bank, the exception provided by the Act, §5.201(a)(11), and this subsection is available only to the extent of the total amount of paper the transferor may be obligated to repurchase or has guaranteed. An unconditional guarantee may be in the form of a repurchase agreement, separate guarantee agreement, or other agreement having the same effect. A condition reasonably within the power or control of the bank to perform will not render conditional an otherwise unconditional guarantee.

(2) In order to claim the installment consumer paper exception under the Act, §5.201(a)(11), and this subsection, the bank must demonstrate its reliance on the maker of the paper by maintaining records supporting the bank's independent credit analysis of the maker's ability to repay the loan or extension of credit, maintained by the bank or a third party that is contractually obligated to make those records available for examination purposes, and a written certification by an officer of the bank, specifically designated by the board of the bank for this purpose, that the bank is relying primarily on the maker for repayment of the loan or extension of credit and not on a full recourse endorsement or unconditional guarantee by the transferor. If installment consumer paper is purchased in substantial quantities, the required records, evaluation, and certification must be in a form appropriate for the class and quantity of paper involved. The bank may use sampling techniques, or other appropriate methods, to independently verify the reliability of the credit information supplied by the seller.

(3) As used in this subsection, a consumer is the end user of a product, commodity, good, or service, whether leased or purchased, but not a person who purchases products or commodities for the purpose of resale or fabrication into goods for sale. Consumer paper is paper relating to the lease or purchase of automobiles, mobile homes, residences, office equipment, household items, tuition fees, insurance premiums, and similar consumer items. Consumer paper also includes paper relating to the lease or purchase of equipment for use in manufacturing, farming, construction, or excavation, if the bank is neither the lessor nor owner of the property.

(4) A bank may purchase and temporarily hold mortgages for sale to investors in the secondary market, and consider the purchases as loans to individual mortgagors rather than a mortgage warehouse facility, by purchasing without recourse to the transferor or, if purchased with recourse, by complying with this subsection. Whether an actual purchase is considered to occur depends on both the nature of the relationship established between the bank and other parties to the contractual arrangements and on assessment of the economic substance of the transaction. In determining whether the economic substance of a transaction constitutes a purchase, the department will consider whether:

(A) provisions of the contractual arrangements governing the mortgage transfers consistently reflect a relationship of buyer and seller between the bank and the transferor, and whether the bank in fact acts as the owner of the mortgages;

(B) the bank obtains possession or control of the bearer instruments conveying ownership, including the original note, deed of trust, assignment from the transferor, and a power of attorney from the transferor for instruments endorsed in blank, provided that possession or control may also be established through safekeeping or custodial arrangements between the bank and a third party agent or bailee;

(C) the bank takes possession or control of underlying underwriting documents, provided that possession or control of the underwriting documents by the investor is not inconsistent with characterization of the bank as a purchaser and owner of the mortgages;

(D) the bank receives and controls the sales proceeds when remitted from the investor;

(E) the bank demonstrates reliance on the maker by reviewing the credit quality and documentation underlying a mortgage prior to committing to make the purchase, provided that a bank purchasing mortgages in significant quantities may use sampling techniques or other appropriate methods to independently verify the reliability of the credit information supplied by the transferor;

(F) recourse and repurchase obligations of the transferor are subject to conditions outside the control of the transferor, such as a commitment to repurchase the mortgage if rejected by the investor for reasons other than fraud or underwriting deficiency; and

(G) the bank earns interest on the mortgages according to the interest rate on the face of each note rather than at a rate separately negotiated with the transferor.

§12.7. Lease Financing

(a) Loans to Industrial Development Authorities. Pursuant to the Act, §5.201(b)(2), a loan or extension of credit to an industrial development authority or similar public entity created to construct and lease a plant facility, including a health care facility, to an industrial occupant is considered a loan to the lessee, provided that:

(1) the bank documents the basis for its reliance on the industrial occupant as the primary source of repayment before the loan is extended to the authority;

(2) the authority's liability on the loan is limited solely to whatever interest it has in the particular facility;

(3) the authority's interest is assigned to the bank as security for the loan or the industrial occupant issues a promissory note to the bank that provides a higher order of security than the assignment of a lease; and

(4) the industrial occupant's lease rentals are assigned and paid directly to the bank.

(b) Loans to Leasing Companies. Pursuant to the Act, §5.201(b)(2), a loan or extension of credit to a leasing company for the purpose of purchasing equipment for lease is considered a loan to the lessee, provided that:

(1) the bank documents the basis for its reliance on the lessee as the primary source of repayment before the loan is extended to the leasing corporation;

(2) the loan is without recourse to the leasing corporation;

(3) the bank receives a security interest in the equipment and, in the event of default, may proceed directly against the equipment and the lessee for any deficiency resulting from the sale of the equipment;

(4) the leasing corporation assigns all of its rights under the lease to the bank;

(5) the lessee's lease payments are assigned and paid to the bank directly by the lessee; and

(6) the lease terms are subject to the same limitations that would apply to a state bank acting as a lessor under the Act, §5.203.

§12.8. Other Exceptions.

(a) By Application. The banking commissioner in the exercise of discretion may grant an exception to any legal lending limit in the Act, §5. 201, or this subchapter, based on extenuating facts and circumstances. To be considered, an application for exception must be submitted by the bank in writing and include a detailed description of:

(1) the proposed transaction or type of transaction for which the exemption is sought;

(2) how the requested exception would affect the capital adequacy of the requesting bank if the borrower should default;

(3) how the requested exception would affect the loan portfolio diversification of the requesting bank by categories reasonably designed to communicate the extent of exposure to the requested exception;

(4) the extenuating facts and circumstances that warrant an exception; and

(5) such other information as the banking commissioner requires.

(b) Emergency Lending Limits. In the event that a bank's capital and certified surplus or equity capital declines sufficiently to seriously impair the bank's ability to effectively operate in its marketplace or serve the needs of its customers or the community in which it is located, the banking commissioner may, upon written application, grant the bank temporary permission to fund loans or extensions of credit in excess of the bank's legal lending limit. The banking commissioner in the exercise of discretion may limit emergency lending authority under this section to particular types or classes of loans or extensions of credit.

§12.9 Aggregation and Attribution.

(a) General Rule. A loan or extension of credit to one borrower is attributed to another person, and each person will be considered a borrower, if:

(1) proceeds of the loan or extension of credit are to be used for the direct benefit of the other person, to the extent of the proceeds so used, as provided by subsection (b) of this section;

(2) a common enterprise is deemed to exist between the persons as provided by subsection (c) of this section; or

(3) the expected source of repayment for each loan or extension of credit is the same for each person as provided by subsection (d) of this section; or

(4) the banking commissioner determines that a loan should be attributed to another person pursuant to the Act, § 5.201(c).

(b) Direct Benefit. The proceeds of a loan or extension of credit to a borrower is considered used for the direct benefit of another person and attributed to the other person if:

(1) the proceeds, or assets purchased with the proceeds, are transferred in any manner to or for the benefit of the other person, other than in a bona fide arm's length transaction where the proceeds are used to acquire property, goods, or services; or

(2) a direct benefit exists as determined by the banking commissioner pursuant to the Act, §5.201(c), based on an evaluation of all the facts and circumstances of particular transactions.

(c) Common Enterprise.

(1) A common enterprise is considered to exist and loans to separate borrowers will be aggregated in the case of:

(A) loans or extensions of credit made to borrowers who are related directly or indirectly through common control, or made to a borrower directly or indirectly controlled by another borrower, if substantial financial interdependence exists between or among the borrowers;

(B) loans made to separate persons for the purpose of acquiring more than 50% of the voting securities or voting interests of a business enterprise, in which case the acquisition loans are aggregated and attributed to the business enterprise; or

(C) a common enterprise exists as determined by the banking commissioner pursuant to the Act, §5.201(c), based on an evaluation of all the facts and circumstances of particular transactions.

(2) For purposes of paragraph (1)(A) of this subsection, substantial financial interdependence exists if 50% or more of one borrower's gross receipts or gross expenditures (on an annual basis) are derived from transactions with the other borrower and is presumed to exist if 25% or more of one borrower's gross receipts or gross expenditures (on an annual basis) are derived from transactions with the other borrower. Gross receipts and expenditures include gross revenues and expenses, intercompany loans, dividends, capital contributions, and similar receipts or payments.

(d) Source of Repayment. The expected source of repayment for each loan or extension of credit is considered the same if:

(1) the primary source of repayment is the same for each borrower. An employer will not be considered a primary source of repayment under this subsection solely because of wages and salaries paid to an employee; or

(2) the expected source of repayment is the same as determined by the banking commissioner, pursuant to the Act, §5.201(c), based on an evaluation of all the facts and circumstances of particular transactions.

(e) Loans to a Corporate Group. Pursuant to the Act, §5.201(b)(c), loans or extensions of credit by a bank to a corporate group may not exceed 75% of the lesser of the bank's capital and certified surplus or the bank's total equity capital. This limitation applies only to loans subject to the general lending limit. For purposes of this subsection, a corporate group is comprised of a person and all of its subsidiaries, and a corporation or other entity. Loans or extensions of credit to a person and its subsidiary, or to other members of the corporate group are not aggregated or attributed to other members of the corporate group unless either the direct benefit, common enterprise, or source of repayment test is met.

(f) Loans to Partnerships.

(1) A loan or extension of credit to a partnership, joint venture, or association is considered to be a loan or extension of credit to each member of the partnership, joint venture, or association unless the partners or members, by the terms of the partnership or membership agreement, are not held generally liable for the debts or actions of the partnership, joint venture, or association, and those provisions are valid against third parties under applicable law.

(2) Loans to Partners. A loan or extension of credit to a member of a partnership, joint venture, or association is generally not attributed to the partnership, joint venture, or association, or to other members of the partnership, joint venture, or association, provided that a loan or extension of credit is made to a member of a partnership, joint venture or association and such partnership, joint venture or association, for the purpose of purchasing an interest in the partnership, joint venture or association, is attributed to the partnership, joint venture or association.

§12.10. Nonconforming Loans.

(a) A loan or extension of credit, within a bank's legal lending limit when made, will not be considered a violation of the applicable lending limit but will be cited as nonconforming if the loan no longer complies with the bank's legal lending limit because:

(1) the bank's capital and certified surplus or equity capital has declined;

(2) borrowers have merged or otherwise become affiliated in such a way as to invoke aggregation under §12.9 of this title (relating to Aggregation and Attribution);

(3) the lending limit or capital definitions or standards have changed after the effective date of this subchapter; or

(4) collateral securing the loan or extension of credit to satisfy the requirements of a special lending limit or lending limit exception has declined in value.

(b) A bank must exercise best efforts to bring a loan or extension of credit that is nonconforming as a result of circumstances described in subsection (a)(1)-(3) of this section into conformity with the legal lending limit, consistent with safe and sound banking practices. As a last resort, a bank may renew or restructure an existing, nonconforming loan or extension of credit as a new, nonconforming loan or extension of credit without violating the Act or this subchapter, unless:

(1) additional funds are advanced by the bank to the borrower;

(2) the original borrower is replaced by a new borrower; or

(3) the banking commissioner determines that the renewal or restructuring of the loan or extension of credit is designed to evade the bank's lending limit.

(c) A bank must bring a loan or extension of credit that is nonconforming as a result of the circumstance described in subsection (a)(4) of this section into conformity with the legal lending limit on or before the 31st day after the nonconformity is discovered unless judicial proceedings, regulatory action, or other extraordinary circumstances beyond the bank's control prevent the bank from taking action. After that, it is a violation.

§12.11. Transition Rules.

(a) This subchapter applies to loans or extensions of credit made on or after September 1, 1995. A loan or extension of credit existing prior to September 1, 1995, that was within a bank's legal lending limit when made, is not a violation of the Act, §5.201, and this subchapter, and is considered a conforming loan.

(b) A bank may renew, extend the maturity of, or restructure an existing loan or extension of credit that is exempt under this section if the bank makes a reasonable effort, consistent with safe and sound banking principles, to bring the credit into conformance with the Act, §5.201, and this subchapter, unless:

(1) additional funds are advanced by the bank to the borrower except as permitted by §12.5(e) of this title (relating to Percentage Lending Limits);

(2) a new borrower replaces the original borrower; or

(3) the banking commissioner determines that the renewal, extension, or restructuring of the loan or extension of credit is designed to evade the bank's lending limit.

(c) An extension, if any, of the maturity of the loan or extension of credit, in the aggregate, may not exceed the lesser of the original term of the loan or one year.

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

Issued in Austin, Texas, on November 7, 1995.

TRD-9514386 Everette D. Jobe
General Counsel
Texas Department of Banking

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 475-1300

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Chapter 15. Orders of Commissioner

• 7 TAC §15.1, §15.2

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

The Finance Commission of Texas (the commission) proposes the repeal of the entirety of Title 7, Chapter 15, specifically §15.1 and §15.2, concerning removal orders and appeal of supervisor and conservator decisions, respectively. Chapter 15 is proposed to be retitled to serve as the repository of rules regarding corporate activities, proposed in this issue of the *Texas Register*.

Section 15.1 established a procedure for review of conservator or supervisor actions, and is now obsolete in that such review procedures are incorporated into the Texas Banking Act (the Act), §6.110, as enacted by Act of May 18, 1995, 74th Legislature, §1, 1995 Texas Session Law Service 4451, 4506. Section 15.2 construed the law with respect to two conflicting sections of Texas Civil Statutes, Article 342-412, and clarified that the banking section of the commission no longer existed and references to the banking section should be understood to be references to the commission. Those difficulties are also eliminated by the Act, §§6.003-6.012, rendering this section obsolete.

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

Mr. Jobe also has determined that for each year of the first five years the repeals are in effect the public benefit anticipated as a result of enforcing the repeals, which, on the whole, are duplicative or contradictory of statutory law, will be eliminated. No economic cost will result to entities as a result of the repeal of these sections.

Comments on the proposed repeals may be submitted in writing to Everette D. Jobe, General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705-4294.

The repeals are proposed pursuant to rulemaking authority under the Act, §1.012(a)(1), which authorizes the commission to adopt rules necessary or reasonable to implement and clarify the Act. As required by the Act, §1. 012(b), the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state bank system, and allow for economic development within this state.

No statute or rule are affected by the proposed repeals in that the statutes underlying these sections have been repealed.

§15.1. Supervision and Conservation: Request for Review.

§15.2. Removal from Office.

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

Issued in Austin, Texas, on November 7, 1995.

TRD-9514390 Everette D. Jobe
General Counsel
Texas Department of Banking

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 475-1300

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Chapter 15. Corporate Activities

The Finance Commission of Texas (the commission) proposes new Chapter 15, comprised of §§15.1-15.6 (Subchapter A); §15.23 and §15.24 (Subchapter B) ; §15.41 and §15.42 (Subchapter C); and §15.61 and §15.62 (Subchapter D), concerning corporate activities. Each proposed subchapter is published separately as required by the *Texas Register*, preceded by this common preamble. Existing §15.1 and §15.2 are proposed for repeal in this issue of the *Texas Register*, as are other sections in this title that the proposed sections would replace, as noted further in the following discussion.

With some exceptions, the proposed sections represent rewrites of existing sections to conform regulations on corporate activities to the new Texas Banking Act (the Act), enacted by Act of May 18, 1995, 74th Legislature, Chapter 914, §1, 1995 Texas Session Law Service 4451. Pursuant to the Act, the State Banking Board is eliminated effective September 1, 1995, and its powers and duties transferred to the Banking Commissioner of Texas (banking commissioner) and the commission. The substantive provisions of Chapter 31 of this title (relating to the State Banking Board) that have continuing vitality are rewritten and proposed to be adopted as new sections in Chapter 15, and all sections of Chapter 31 are proposed for repeal in this issue of the *Texas Register*. Existing §3.37 of this title (relating to Application Fees and Cost Deposits) and §3.91 of this title (relating to Establishment and Closing of a Branch Facility) are also proposed for repeal in this issue of the *Texas Register*, to be replaced by proposed new sections in Chapter 15.

Subchapter A (relating to Fees and Other Provisions of General Applicability)

In Subchapter A, proposed §15 1 is the definitions section for Chapter 15; proposed §15.2 is a rewrite of existing §3 37; proposed §15 3 is new for the purpose of providing expedited application handling for certain banks and trust companies, proposed §15.4 is new for the purpose of providing for disposition of abandoned applications; and proposed §15 5 is new setting out general guidelines and requirements for the contents and confirmation of public notices in newspapers of general circulation Finally, proposed §15 6 is a rewrite of existing §31.4 of this title (relating to Applications to Engage in Certain Businesses· Notices to Applicants; Application Processing Times, Appeals)

Proposed §15.1 (relating to Definitions)

Section 15 1 is the general definitions section for the chapter

Proposed §15.2 (relating to Filing Fees and Cost Deposits)

The purpose of the commission in adopting existing §3 37 was to reduce the heavy reliance of the Texas Department of Banking (the department) on examination fees and to impose appropriate application and filing fees and cost deposits to make identifiable services self-sustaining to the extent possible Since §3.37 became effective in November of 1993, the need for changes in the fee structure has become apparent as a result of passage of the Act, changes in the banking and trust industries, policy changes made within the department, and inadvertent omissions made when existing §3 37 was first adopted

The current §3.37 does not set a fee for an application for authorization to purchase assets and assume liabilities. The department incurs material costs in processing such applications. In addition, a significant shift in assets is occurring in the banking industry, and the department anticipates the number of purchase of assets and assumption of liabilities transactions will increase, straining the resources of the department. Proposed new §15 2 sets a $4,000 fee for purchase of assets and assumption of liabilities transactions.

Proposed §15.2 also increases the fee for applications involving acquisition of control (change of control) to $5,000 because these applications consume a great deal of staff time in reviewing the applications for the purpose of making recommendations for decision. In comparison, the Office of the Comptroller of the Currency charges a fee of $10,200 for processing a change of control application, and the Texas Savings and Loan Department recently revised its rules to require a $10,000 fee for change of control applications The fee for holding company filings is also increased in the proposed §15.2 to $500 for transactions involving both bank and non-bank subsidiaries because processing costs continue to rise, largely due to the complexity of the transactions. Standard branch application filing fees will remain at $1,500 under the proposed section, although under certain conditions this fee may be lowered to $500 for eligible institutions. Because Texas Civil Statutes, Article 3921, was repealed by the 74th Legislature in connection with adoption of the Act, the additional filing fee for amendments to the articles of association, expressed as a percentage of any increase in authorized capital, is deleted in the proposed new section

Proposed §15.3 (relating to Expedited Filings)

Proposed §15.3 establishes a procedure in which an eligible bank may file an expedited branch application (relating to the establishment and closing of a branch facility) or an expedited application for branch or home office relocations less than one mile with no abandonment of the community. Section 15.3 will also allow eligible trust companies to file an expedited application for home office relocations where there is no abandonment of the community. Subject to certain exceptions set out in the section, eligible bank and trust companies will be allowed to file less detailed applications which will reduce department processing time which will, in turn, reduce expense to the department. The filing fee for expedited applications, as proposed, is $500.

Proposed §15.4 (relating to Required Information and Abandoned Filings).

Section 15 4 as proposed is a new section. This section authorizes the department to investigate and evaluate facts related to submitted filings (applications, requests, notices, and protests) and to require the submission of additional information including an opinion of counsel or an opinion, review or compilation prepared by a certified public accountant. In addition, §15.4, as proposed, would permit the department to deem as abandoned submitted or accepted filings which are not complete within the established time periods or submitted or accepted filings in which the necessary filing fees are not timely paid. The department has found that in many instances submitted filings are unnecessarily delayed because of failure to pay necessary fees or to provide requested information in a timely manner This is a counterproductive situation because it is important that applications and other filings be processed based on current information. In addition, submitted filings that are not accompanied by the necessary fees strain the resources of the department and utilize processing time which could be expended on submitted filings which are in full compliance.

Proposed §15.5 (relating to Public Notices)

Proposed §15.5 is the general section related to required public notices. This section as proposed sets out, in general, the required contents of public notices. The new §15.5, would prohibit the publication of the required notice solely in specialized newspapers which are directed to a specific interest group or occupation, such as legal or court related newspapers.

Proposed §15.6 (relating to Applications to Engage in Certain Businesses: Notices to Applicants; Application Processing Times; Appeals)

Proposed §15.6 is based on existing §31.4, proposed for repeal in this issue of the *Texas Register*. Promulgation of procedural rules for processing permit applications and issuing permits is required by Government Code, §2005 003 Although proposed §15.6 is a version of existing §31.4 edited to conform to the Act, no significant changes are proposed

Subchapter B (relating to Bank and Trust Company Charters)

The two proposed sections of proposed Subchapter B are based on two of the three existing sections in Chapter 31, Subchapter B, of this title (relating to Bank Applications), all sections of which are proposed for repeal in this issue of the *Texas Register*. Because of the elimination of the State Banking Board, all sections in Chapter 31 are rewritten and proposed as part of Chapter 15. The commission anticipates additional rulemaking under Subchapter B and therefore reserves the numbers for §15.21 and §15.22 for future expansion. Proposed §15.23 is a rewrite of existing §31.20 without significant change except to conform to the Act and to this chapter as proposed. Proposed §15.24 is a rewrite of existing §31.21, also without significant change except to conform to the Act and to this proposed chapter

Subchapter C (relating to Bank Offices)

Proposed Subchapter C contains two proposed sections, §15.41 and §15 42 Proposed §15.41 is based on existing §31.22 (relating to Applications for Change of Domicile) and is substantially similar to existing §31 22 as rewritten to adapt to changes made in law by the Act. Proposed §15.42 is based on existing §3.91 (relating to Establishment and Closing of a Branch Facility) without substantive changes except to conform to the Act and to this chapter as proposed.

Subchapter D (relating to Trust Company Applications)

Proposed Subchapter D is based on Chapter 31, Subchapter C, of this title (relating to Trust Company Applications), all sections of which are proposed for repeal in this issue of the *Texas Register*. Proposed §15 61 is based on existing §31.40 and to this chapter, as proposed. Proposed §15.62 is based on existing §31.41. This section adopts the language of existing §31.41 but is edited to conform to the Act and to this chapter as proposed. Proposed §15.62 also adds a new subsection requiring that an exempt trust company seeking nonexempt status comply with all requirements for a new charter application.

Lynda Drake, Director, Corporate Activities Division, Texas Department of Banking, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Ms. Drake also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections is the economic self-sufficiency of the department with respect to processing certain applications and filings. The proposed §15.2 will result in an increase in revenue from application and other filing fees based on a projected increase in applications processed. The increased revenue will decrease the amount of departmental operational expenses that must be recouped from the banking and trust industries through assessment and examination fees. This will more closely match costs incurred for pro-

cessing services performed by the department to the expense to regulated entities actually utilizing staff time and other department resources. Ms. Drake estimates although there will be an increase in the amount of total revenue from application fees, some qualified institutions will be able to take advantage of an expedited and less expensive filing procedure which will amount to a net savings to industry of approximately $16,500 in each year for the first five years proposed §15.2 is in effect. Ms Drake further estimates that the cost of compliance with the chapter for small businesses will be $20,000, primarily because of the $100 fee for a request for "no objection" letter under proposed §15 2 No difference will exist between the cost of compliance for small businesses and the cost of compliance for the largest businesses affected by the proposed charter.

Comments on the proposed sections may be submitted in writing to Sammie K. Glasco, Assistant General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705-4294.

Subchapter A. Fees and Other Provisions of General Applicability

- **7 TAC §§15.1-15.6**

The new sections are proposed under the Texas Banking Act (the Act), §1. 012(a)(1), which authorizes the commission to adopt rules necessary or reasonable "to implement and clarify" the Act, and under Texas Civil Statutes, Article 342-1106(b), which authorizes the commission to adopt general rules and regulations as may be necessary to accomplish the purposes of trust company regulation. In addition, the sections are proposed under the Act, §1. 012(a)(4) and §2.006(b), which provides the commission with the authority to establish reasonable and necessary fees for the maintenance and administration of the Act. Additional statutory authority for certain fees can be found in the Act, §3.003(a) (bank charter fees and costs), §3.004(b) (expenses for charter investigation), §4.002(a) (fees and costs for review of acquisition of control), §9.004(a) (registration fees for foreign bank agencies), and §9.006(a) (registration fees for foreign bank representative offices). With respect to application of the proposed sections to trust companies, Texas Civil Statutes, Article 342-1102, specifically makes selected provisions of the Act applicable to trust companies.

As required by the Act, §1.012(b), the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state bank system, and allow for economic development within this state.

Texas Banking Act, §§3.002-3.006, 3.101, 3.104, 3.202, 3.203, 3.301, 3. 401, 3.502, 4.002(a), 5.103, 8.004, 8 301, 8.304, 9.004, and 9.006; Texas Civil Statutes, Articles 342-1101 through 342-1103, and 7 TAC §§3.7, 3.61, 3. 37, 3.91, 15.1-15.2, 31.1-31.4, 31.20-31.22, and 31.40-31.41 are affected by these new sections.

§15 1. Definitions. Words and terms used in this chapter that are defined in the Texas Banking Act (the Act), §1.002, as enacted by Act of May 18, 1995, 74th Legislature, Chapter 914, §1, 1995 Texas Session Law Service 4451, have the same meanings as defined in the Act. The following words and terms have the following meanings when used in this chapter.

Accepted filing-Includes any application, request, notice, or protest filed under the Act, this chapter or any rule or regulation adopted pursuant to the Act in which the banking commissioner has received sufficient information to reach an informed decision, the appropriate fee has been paid pursuant to §15.2 of the chapter, and the banking commissioner has notified the person or entity who submitted the filing, in writing, that the submission is complete and has been accepted for filing.

Community-The area delineated by a state bank as the local community or communities that comprise a state bank's entire community pursuant to the Community Reinvestment Act (CRA), 12 United States Code (USC), §§2901 et seq and any rules or regulations adopted pursuant to CRA The community may include the delineated area for the purposes of CRA in which the person or entity that is required or authorized to publish public notice proposes to engage in business, is currently engaged in business, or wishes to abandon.

Day-A calendar day.

Eligible bank-A state bank that:

(A) possesses tangible equity capital in excess of 6.0% of tangible assets or is operating in compliance with a capital plan approved in writing by the banking commissioner;

(B) received a composite rating of either 1 or 2 as defined by the Uniform Financial Institutions Rating System at the most recent examination by the department or federal regulatory agencies;

(C) received a Community Reinvestment Act (12 USC, §§2901 et seq) rating of either outstanding or satisfactory at the bank's most recent inspection by the appropriate federal regulatory agency;

(D) is not presently operating in violation of a regulatory condition or commitment letter; and

(E) is not presently operating under a memorandum of understanding; determination letter or other notice of determination; order to cease and desist, or other state or federal administrative enforcement order.

Eligible trust company-A Texas chartered trust company that:

(A) possesses capital and surplus that equals or exceeds current minimum statutory or regulatory requirements;

(B) received a composite rating of either 1 or 2 as defined by the Uniform Financial Institution Rating System at the most recent examination by the department or federal regulatory agencies;

(C) is not presently operating in violation of a regulatory condition or commitment letter, and

(D) is not presently operating under a memorandum and understanding, determination letter or other notice of determination, order to cease and desist, or other state or federal administrative enforcement order.

General interest items-Include, but are not limited to, local and international news, weather, sports, features, comics, entertainment and advertisements directed to the general public.

Newspaper of general circulation-A newspaper that:

(A) devotes not less than 25% of its total column lineage to general interest items, provided that a newspaper of general circulation does not include a specialized newspaper or other periodical directed to a specific interest group or occupation, such as a legal notice or court related newspaper;

(B) is published at least once a week;

(C) is entered as second class postal matter in the county where published; and

(D) has been published regularly and continuously for at least 12 months before the applicant, protesting party or other entity publishes notice, provided that a weekly newspaper is considered to have been published regularly and continuously if the newspaper omits not more than three issues in a twelve month period.

Public Notice-Any matter including an application, request, notice, or protest, whether by proclamation or declaration, required or authorized to be published in a newspaper of general circulation by the Act,

this chapter, or any rule or regulation adopted pursuant to the Act, or required to be published by the banking commissioner.

Submitted filing-Includes any initial application, request, notice, or protest filed under the Act, this chapter or any rule or regulation adopted pursuant to the Act, that is neither an accepted filing nor been abandoned.

§15.2. Filing Fees and Cost Deposits.

(a) Basis of Fees. The filing fees set forth in subsection (b) of this section are either set by statute or, when added to required investigative cost reimbursement under subsection (e) of this section, approximate the department's cost of processing the application, including any associated review, investigation and examination.

(b) Filing Fees. Simultaneously with any submitted filing, an applicant shall pay to the department the filing fee established in the following schedule of fees: Figure 1: 7 TAC §15.2(b)

(c) Fee for Protest Filing. A person or entity filing a protest to the application of another person or entity shall pay a fee of $2,500 simultaneously with such protest filing. The purpose of the fee required under this subsection is to partially offset the department's increased cost of processing and reduce the costs incurred by the applicant resulting solely from the protest.

(d) Fees Nonrefundable. All filing fees must be paid at the time of filing and are nonrefundable. Except for fees established by statute, the banking commissioner may reduce or waive any filing fee.

(e) Required Reimbursement of Investigative Costs. In addition to the filing fees set forth in subsection (b) of this section, an applicant for a bank or trust company charter or conversion to a state bank or limited banking association, or other application or submitted filing if required by the banking commissioner, shall pay costs incurred in the investigation, review, or examination considered appropriate by the department at the rate established by the banking commissioner. Such costs must be paid by the applicant upon written request of the department. Failure to pay a bill for investigative costs in addition to the application fee constitutes grounds for denial of the submitted or accepted filing. The banking commissioner may, in the exercise of discretion, reduce or waive payment of any costs.

(f) Severability. If any fee or cost recovery set forth in this section is finally determined by a court of competent jurisdiction to be invalid that fee or cost recovery shall be severed from this section and the remainder of this section shall remain fully enforceable.

§15.3. Expedited Filings.

(a) Eligible banks may file an expedited filing according to forms and instructions provided by the department solely for the following matters:

(1) branch applications pursuant to the Act, §3.203, and §15.42 of this title (relating to Establishment and Closing of a Branch Facility);

(2) branch relocations less than one mile with no abandonment of the community pursuant to the Act, §3.203; and

(3) home office relocations less than one mile with no abandonment of the community pursuant to the Act, §3.202(c).

(b) Eligible trust companies may file an expedited filing according to forms and instructions provided by the department solely for home office relocations where there is no abandonment of the community pursuant to the Act, §3.202(b) and (c) (applicable to trust companies pursuant to Texas Civil Statutes, Article 342-1102, §1).

(c) Notwithstanding another provision of this section, the banking commissioner may deny expedited filing treatment to an eligible bank or eligible trust company, in the exercise of discretion, if the banking commissioner finds that the filing involves one or more of the following:

(1) the proposed transaction involves significant policy, supervisory, or legal issues;

(2) approval of the proposed transaction is contingent on additional statutory or regulatory approval by the banking commissioner or another state or federal regulatory agency;

(3) the proposed transaction will result in a fixed asset investment in excess of the limitation contained in the Act, §5.001(b);

(4) the proposed transaction requires the approval of the banking commissioner under the Act, §4.107(b);

(5) the proposed transaction involves an issue of parity between state and national banks pursuant to the Act, §3.010;

(6) the proposed transaction significantly impacts the strategic plan of the bank or trust company;

(7) the proposed transaction will result in a decrease in the tangible leverage capital ratio of a state bank below 6.0% of assets or, in the case of a trust company, would cause capital and surplus to fall below current minimum statutory or regulatory requirements;

(8) the proposed transaction will result in an abandonment of the community pursuant to the Act, §3.202(d); or

(9) the proposed transaction involves an issue of regulatory concern as determined by the banking commissioner in the exercise of discretion.

(d) The filing fee for an expedited filing is $500.

(e) The department shall notify the applicant within 14 days after receipt of the application if expedited filing treatment is not available under this section. Such notification must be in writing and must indicate the reason why expedited treatment is not available. Notification is effective when mailed by the department and is not subject to appeal.

§15.4. Required Information and Abandoned Filings.

(a) Required Information. The banking commissioner may investigate and evaluate facts related to a submitted filing or accepted filing to the extent necessary to reach an informed decision. The banking commissioner may require any person or entity connected with the matter to which the submitted or accepted filing pertains to submit additional information, including, but not limited to, an opinion of counsel or an opinion, review or compilation prepared by a certified public accountant.

(b) Time Limit For Providing Required Information. Unless otherwise provided for in the Act, this chapter or rules and regulations adopted pursuant to the Act, all required information necessary for the banking commissioner to declare that a submission is an accepted filing shall be provided to the department within 60 days of the date of the initial submission of the filing. A person or entity may request an automatic 30-day extension of time to submit required information if the request is in writing and is received by the department prior to the end of the initial 60-day period provided for in this subsection. An additional extension may be requested in writing if such request is received prior to the expiration of the automatic extension. The additional extension shall be granted only if there is a finding of good and sufficient cause, in the banking commissioner's discretion, to grant an extension. Notice of the decision of the banking commissioner shall be mailed to the person or entity seeking the extension within ten days of the receipt of the request by the department.

(c) Abandoned Filing. The banking commissioner may determine any submitted or accepted filing to be abandoned, without prejudice to the right to refile, if the information required by the Act, this chapter, or any rule or regulation adopted pursuant to the Act, or additional requested information, is not furnished within the time period specified by subsection (b) of this section or as requested by the banking commissioner

in writing to the person or entity making the submission. The banking commissioner may determine a submitted or accepted filing for which fees required by the Act or by this chapter are not paid within 30 days of receipt of the initial submission to be abandoned.

(d) Notice. The banking commissioner shall give written notice of any submitted or accepted filing considered to be abandoned. Notice of abandonment shall be effective upon mailing by the department. Fees paid related to an abandoned filing are nonrefundable.

§15.5. Public Notice.

(a) General. A person or entity required or authorized to file public notice including a person or entity requesting authorization for a merger, purchase of assets, a conversion or an applicant for a foreign bank agency shall publish notice in a newspaper of general circulation in its specified community and in such other locations as may be required by the banking commissioner.

(b) Contents. The public notice must state that a filing is being made; the date (or expected date) of the filing; sufficient information describing the proposed transaction, and other related information required by the Act, this chapter, or rules and regulations adopted pursuant to the Act; and any other information as may be required by the banking commissioner. In addition, the notice must include substantially the following text as a separately stated paragraph: "Any person wishing to comment on this application, either for or against, may file written comments with the Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705-4294 on or before the 14th day after the date of this publication. Such comments will be made a part of the record before and considered by the banking commissioner. Any person wishing to formally protest and oppose (describe type of application in general terms) and participate in the application process may do so by filing a written notice of protest with the Texas Department of Banking on or before the 14th calendar day after the date of this publication accompanied by a protest filing fee of $2,500. The protest fee may be reduced or waived by the banking commissioner upon a showing of substantial hardship."

(c) Publisher's Affidavit. A person or entity required to file public notice under this section shall file with the banking commissioner a copy of the notice and a publisher's affidavit attesting to the date of publication.

(d) One Publication Sufficient. Unless otherwise required by the Act or rules and regulations adopted pursuant to the Act, one public notice publication per submitted or accepted filing in each community specified by the banking commissioner is sufficient if in substantial compliance with this section and chapter and with the Act, as determined by the banking commissioner. The banking commissioner reserves the right to require additional publication based on a determination that a particular publication is insufficient or is otherwise not in compliance.

(e) Other Acceptable Public Notice. The banking commissioner may determine that public notice required by another regulatory agency satisfies the public notice requirements of this section.

§15.6. Applications for Bank and Trust Charter: Notices to Applicants; Application Processing Times; Appeals.

(a) Form of Application. An application to engage in a business under the Act, §3.003, or Texas Civil Statutes, Article 342-1101, must be filed on a form prescribed by the banking commissioner.

(b) Notice to Applicant. The banking commissioner shall issue a written notice within fourteen days of receiving an application to obtain a state bank, trust company, or interim bank charter, or an application for conversion of a financial institution to a state bank, informing the applicant either that the application is complete and accepted for filing, or that the application is deficient and specific additional information is required.

(c) Action on Applications. The banking commissioner shall approve or deny an application for a state bank or trust company charter or an application for conversion of a financial institution to a state bank on or before the 180th day after the date the application is accepted for filing, unless extended by written agreement between the applicant and the banking commissioner; provided that, if the application is protested, the banking commissioner shall convene a hearing on or before the 90th day after the date the protest is received and shall render a decision in accordance with Chapter 9 of this title (relating to Rules of Procedure).

(d) Violation of Processing Times. If an application is not protested nor a hearing convened, an applicant may appeal directly to the banking commissioner for a timely resolution of a dispute arising from a violation of a processing period set forth in this section. An applicant may appeal by filing a written request with the banking commissioner on or before the 30th day after the date the decision is made on the application, requesting review by the banking commissioner to determine whether the established period for the granting or denying of the application has been exceeded. The decision on the appeal shall be based on the written appeal filed by the applicant, any response by the department, and any agreements between the parties. The banking commissioner may convene a hearing to take evidence on the matter.

(e) Decision on Appeal. The banking commissioner shall decide the appeal in the applicant's favor if the banking commissioner determines that the time periods established in this section have been exceeded and the department has failed to establish good cause for the delay. The banking commissioner shall issue a written decision to the applicant on or before the 60th day after the filing of an appeal. If an appeal is decided in an applicant's favor, the department will reimburse the application fee paid by the applicant. A decision in favor of the applicant under this subsection does not affect a decision to grant or deny the application based on applicable substantive law without regard to whether the application was timely processed.

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

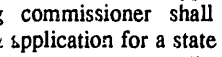
Issued in Austin, Texas, on November 7, 1995.

TRD-9514391

Everette D Jobe
General Counsel
Texas Department of Banking

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 475-1300



Subchapter B. Bank Charters

• 7 TAC §15.23, §15.24

The new sections are proposed under the Texas Banking Act (the Act), §1. 012(a)(1), which authorizes the commission to adopt rules necessary or reasonable "to implement and clarify" the Act, and under Texas Civil Statutes, Article 342-1106(b), which authorize the commission to adopt general rules and regulations as may be necessary to accomplish the purposes of trust company regulation. In addition, the sections are proposed under the Act, §1.012(a) (4) and §2.006(b), which provides the commission with the authority to establish reasonable and necessary fees for the maintenance and administration of the Act. Additional statutory authority for certain fees can be found in the Act, §3.003(a) (bank charter fees and costs), §3.004(b) (expenses for charter investigation), §4.002(a) (fees and costs for review of acquisition of control), §9.004(a) (registration fees for foreign bank agencies), and §9.006(a) (registration fees for foreign bank representative offices). With respect to application of the proposed sections to trust companies, Texas Civil Statutes, Article 342-1102, specifically makes selected provisions of the Act applicable to trust companies.

As required by the Act, §1.012(b), the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state bank system, and allow for economic development within this state.

Texas Banking Act, §§3.002-3.006, 3.101, 3.104, 3.202, 3.203, 3.301, 3. 401, 3.502, 4.002(a), 5.103, 8.004, 8.301, 8.304, 9.004, and 9.006; Texas Civil Statutes, Articles 342-1101 through 342-1103, and 7 TAC §3.7, 3.61, 3. 37, 3.91, 15.1-15.2, 31.1-31.4, 31.20-31.22, and 31.40-31.41 are affected by these new sections.

§15.23. Application For Interim Bank Charters.

(a) General. The banking commissioner may issue an interim state bank charter solely for the purpose of facilitating the acquisition, reorganization, or merger of a pre-existing bank, if the resulting bank will engage in the business of banking in substantially the same markets. The applicant must submit the application for an interim bank charter on a form prepared and prescribed by the banking commissioner and tender the required filing fee pursuant to §15.2 of this chapter (relating to Filing Fees and Cost Deposits) . The applicant must describe in detail the entire transaction in which the interim bank charter is proposed to be used and identify the resulting bank after completion of the transaction.

(b) Public Notice. Upon submission of application, the applicant shall publish notice as required by §15.5 of this chapter (relating to Public Notice) and in the community where the resulting bank is to be located.

(c) Public Comment. No hearing will be held regarding the issuance of an interim bank charter unless the banking commissioner, in the exercise of discretion, sets and convenes a hearing. Persons or entities submitting comments will not be entitled to further notice of or participation in the interim bank charter application proceedings.

(d) Adequacy of Capital. The banking commissioner shall determine the adequacy of capital for a proposed interim bank charter, except that an interim bank may not be chartered with a capital less than $5,000.

§15.24. Option to Withhold Identity of Officers. An applicant for a state bank or trust charter may, at its option, withhold the identity of prospective officers until such time as the banking commissioner issues a final order on the application. Approval of the application will be conditional upon the applicant's submitting resumes of qualified proposed officers to the banking commissioner. Upon receipt of the resumes, the banking commissioner shall review and investigate the qualification of the proposed officers and deliver the certificate of authority pursuant to the Act, §3. 006, if the banking commissioner finds that the proposed officers meet the requirements of the Act, §3.003(b)(4).

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

Issued in Austin, Texas, on November 7, 1995.

TRD-9514392 Everette D. Jobe
General Counsel
Texas Department of Banking

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 475-1300

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Subchapter C. Bank Offices

• 7 TAC §15.41, §15.42

The new sections are proposed under the Texas Banking Act (the Act), §1. 012(a)(1), which authorizes the commission to adopt rules necessary or reasonable "to implement and clarify" the Act, and under Texas Civil Statutes, Article 342-1106(b), which authorizes the commission to adopt general rules and regulations as may be necessary to accomplish the purposes of trust company regulation. In addition, the sections are proposed under the Act, §1. 012(a)(4) and §2.006(b), which provides the commission with the authority to establish reasonable and necessary fees for the maintenance and administration of the Act. Additional statutory authority for certain fees can be found in the Act, §3.003(a) (bank charter fees and costs), §3.004(b) (expenses for charter investigation), §4.002(a) (fees and costs for review of acquisition of control), §9.004(a) (registration fees for foreign bank agencies), and §9.006(a) (registration fees for foreign bank representative offices). With respect to application of the proposed sections to trust companies, Texas Civil Statutes, Article 342-1102, specifically makes selected provisions of the Act applicable to trust companies.

As required by the Act, §1.012(b), the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state bank system, and allow for economic development within this state.

Texas Banking Act, §§3.002-3.006, 3.101, 3.104, 3.202, 3.203, 3.301, 3. 401, 3.502, 4.002(a), 5.103, 8.004, 8.301, 8.304, 9.004, and 9.006; Texas Civil Statutes, Articles 342-1101 through 342-1103, and 7 TAC §3.7, 3.61, 3. 37, 3.91, 15.1-15.2, 31.1-31.4, 31.20-31.22, and 31.40-31.41 are affected by these new sections.

§15.41. Written Notice or Applications for Change of Home Office.

(a) General. A state bank may change its home office to one of its previously established branch locations pursuant to the Act, §3.202(b), by filing a written notice with and in the form prescribed by the banking commissioner and submitting the required filing fee pursuant to §15.2 of this chapter (relating to Filing Fees and Cost Deposits). A state bank desiring to change its home office to any other location pursuant to the Act, §3.202(c), must file an application with and in the form prescribed by the banking commissioner along with appropriate filing fee pursuant to §15.2 of this chapter. Eligible banks may file an expedited application pursuant to §15.3 of this chapter (relating to Expedited Filing).

(b) Public Notice.

(1) Within 14 days of the initial submission of a written application under the Act, §3.202(c), the applicant shall publish notice of the submission, as required by §15.5 of this chapter (relating to Public Notice). Notice shall be published in the community where the current home office of the bank is located and in the community of proposed home office.

(2) The notice must comply with the content requirements of §15.5(b) of this chapter and shall also include the current location and the proposed home office location.

(c) Public Comment and Protest. For a period of 14 days after publication of notice or such longer period as the banking commissioner may allow for good cause shown, the public may submit written comments or protests regarding an application under the Act, §3.202(c). Persons submitting comments shall not be entitled to further notice of or participation in the proceedings. In the event of a properly filed protest, each protesting party has the rights and responsibilities of a protesting party to a new bank charter application, and the banking commissioner may convene a hearing with notice to the applicant and all protesting parties. In the absence of a properly filed protest, the banking commissioner may act on the application without holding a hearing.

§15.42. Establishment and Closing of a Branch Office.

(a) Forms. A state bank that desires to establish and operate a branch office must complete and file a branch application

on forms prescribed by the department. Eligible banks may file an expedited application pursuant to §15. 3 of this chapter.

(b) Filing. The banking commissioner shall advise the applicant when a branch application has been reviewed and determined to be an accepted filing pursuant to §15.4 of this chapter (relating to Required Information and Abandoned Filings). The banking commissioner will accept a branch application for filing after it has determined that the application is complete pursuant to §15.4 of this chapter and accompanied by the proper application fee as set forth in §15.2 of this chapter.

(c) Public Notice.

(1) Within 14 days of the following initial submission of its application, the applicant shall publish notice of the application as required by §15.5 of this chapter. Notice shall be published in the community of the proposed branch.

(2) The notice must comply with the content requirement of §15.5(b) of this chapter and shall also include the proposed location of the branch or service area.

(d) Public Comment and Protest. For a period of 14 days after publication of notice or such longer period as the banking commissioner may allow for good cause shown, the public may submit written comments or protests regarding the application. Persons submitting comments will not be charged any fees or costs, but will not be entitled to further notice of or participation in the branch application proceedings. Each protesting party has the rights and responsibilities set forth in subsections (f) and (g) of this section.

(e) Criteria for branch approval: "Significant supervisory or regulatory concerns."

(1) In concluding whether the banking commissioner should have significant supervisory concerns regarding a proposed branch, the banking commissioner will consider the financial condition of the applicant, the financial effect of the branch on the applicant, the management abilities of the applicant, and the history and prospects of the applicant and its affiliates regarding fulfillment of responsibilities to regulatory agencies and to the public, including, but not limited to, the responsibility of the applicant to meet the credit needs of its entire community pursuant to the Community Reinvestment Act (CRA), 12 United States Code, §§2901 et seq. An application will ordinarily be denied if the applicant is in less than satisfactory financial condition as of its most recent examination or has a less than satisfactory rating regarding compliance with CRA.

(2) In concluding whether the banking commissioner should have significant regulatory concerns regarding a proposed branch, the banking commissioner will consider the need to maintain a sound banking system. The banking commissioner will follow the principles that the marketplace normally is the best regulator of economic activity, and that healthy competition promotes a sound and more efficient banking system that serves customers well. Accordingly, absent significant supervisory concerns, the general policy of the banking commissioner is to approve applications to establish and operate branches, provided that approval would not otherwise violate the provisions of federal or state law (including any requirements for federal banking agency approval).

(3) In evaluating whether the banking commissioner should have significant supervisory or regulatory concerns as set forth in paragraphs (1) and (2) of this subsection, the banking commissioner will consider written material in the record, including the application, comments on file, protests on file, and any replies of the applicant, the department's files as they relate to the current financial condition of the applicant, and any data that the banking commissioner may properly officially notice. Specifically, the banking commissioner shall approve a branch if the following considerations are met:

(A) the department's files do not indicate significant regulatory concerns as they relate to the current financial condition of the applicant, including but not limited to its capital, asset quality, management, earnings and liquidity (these files are confidential pursuant to Texas Banking Act, Chapter 2, Subchapter B, and such rules and regulations adopted pursuant to the Act, are not open or available to either the applicant or a protesting party or to the public);

(B) the costs of establishing the proposed branch office, including costs of purchasing or leasing the branch site, necessary furnishings, staffing and equipment and the effect of these costs do not significantly affect the operations of the applicant as a whole;

(C) the projected earnings appear reasonable and sufficient to support expenses attributable to the branch without jeopardizing the safety and soundness of the applicant;

(D) the depth and quality of management of the applicant and the proposed branch is sufficient to justify a belief that the bank will operate in compliance with the Act;

(E) the bank has demonstrated compliance with CRA as determined by the rating assigned in the applicant's most recent CRA evaluation;

(F) the applicant has demonstrated a responsiveness to recommendations made in past state and federal bank examination reports and the applicant has generally been operated in substantial compliance with all applicable state and federal laws, and

(G) there are no areas of general supervisory concern as determined by the banking commissioner in the exercise of discretion.

(4) The banking commissioner will direct the department to assemble, evaluate, and make a recommendation regarding all relevant documentation and data as set forth in this subsection within 30 days after the later of the date the application is complete and accepted for filing, or expiration of the period for filing a comment, protest, response or reply, whichever is the last to occur; provided, however, that if a hearing is granted pursuant to subsection (g) of this section, the banking commissioner will request the administrative law judge for the Finance Commission of Texas (administrative law judge) to discharge this function through the hearings process. Portions of the record so assembled that are confidential pursuant to Texas Banking Act, Chapter 2, Subchapter B, shall be segregated and clearly marked as confidential.

(5) The banking commissioner shall either approve, conditionally approve or deny the application on or before the 30th day after receipt of the department's recommendation in the event no hearing is to be held.

(f) Protest.

(1) A protest may be initiated by notifying the department in writing of the intent to protest the application within the time period allowed by subsection (d) of this section, accompanied by the filing fee as set forth in §15.2 of this chapter. If the protest is untimely, the filing fee will be returned to the protesting party. If the protest is timely, the department will notify the applicant of the protest and mail or deliver a complete copy of the non-confidential sections of the application to the protesting party on or before the 14th day after receipt of the protest or the application, whichever occurs later.

(2) The protesting party shall file a detailed protest responding to each substantive statement contained in the non-confidential sections of the application within 20 days after receipt of the application. The protesting party's response must

indicate with regard to each such statement whether it is admitted or denied. The applicant shall file a written reply to the detailed response on or before the tenth day after the response is filed. Both the detailed response and the reply thereto must be verified by affidavit and must contain a certificate of service on the opposing party. When applicable, statements in the response and in the reply may be supported by references to data available in sources of which official notice may properly be taken. Comments received by the department and any replies of the applicant to such comments will also be made available to the protesting party.

(3) The banking commissioner may extend any time period set forth in this subsection for good cause shown. Good cause includes, but is not limited to, failure of the department to furnish required documentation, forms or information within a reasonable time to permit its effective use by the recipient, or failure of a party to timely serve a filed document on an opposing party. The filing date is the date the document is actually received by the department and not the date of mailing. Failure to timely file a required document is considered an abandonment of the application or protest, as applicable.

(g) Hearing.

(1) Pursuant to Texas Banking Act, §3.203, the banking commissioner may not be compelled to hold a hearing prior to granting or denying approval to establish a branch.

(2) In the exercise of discretion, the banking commissioner may consider granting a hearing on a branch application at the request of either the applicant or a protesting party. The banking commissioner may order a hearing even if no hearing has been requested by the parties. A party requesting a hearing must indicate with specificity what issues are involved that cannot be determined on the basis of the record compiled pursuant to subsection (e) of this section and why the issues cannot be so determined. The request for hearing and the banking commissioner's decision with regard to granting a hearing will be made a part of the record.

(3) If a hearing is not requested or if a request for hearing is denied, the banking commissioner will consider the application in the manner set forth in and solely on the basis of the written record established pursuant to subsection (e) of this section.

(4) If a hearing is granted, the administrative law judge shall enter appropriate order(s) and conduct the hearing within 30 days after the date the hearing was granted, or as soon thereafter as is reasonably possible, under Chapter 9 of this title (relating to Rules of Procedure) and the Administrative Procedure Act (Texas Government Code, Chapter 2001). Issues will be limited to those on which testimony is absolutely necessary, and the administrative law judge may require testimony to be submitted in written form and prefiled. No evidence will be received on matters that are not in dispute. No issues or evidence will be considered that are not relevant to the standards set forth in subsection (e) of this section or that are not supported by the application, response, or reply.

(5) A proposal for decision, exceptions and replies to such proposal for decision, the final decision of the banking commissioner, and motions for rehearing are governed by Chapter 9 of this title (relating to Rules of Procedure).

(h) Beginning Operations. Any activity approved pursuant to this section must commence within 18 months from the date of approval unless the banking commissioner extends that date in writing. Approval will automatically expire 18 months from the date of approval if no extension is granted.

(i) Emergency Branches. The procedures set forth in subsections (c), (d) , (f), and (g) of this section do not apply to branch applications made as a part of a transaction for the purpose of assuming all or a portion of the assets and liabilities of any financial institution deemed by the banking commissioner to be in hazardous condition. The banking commissioner may authorize banks to establish temporary branch locations in the event of an emergency as defined by the Act, §8.201. The procedures set forth in subsections (c), (d), (f), and (g) of this section do not apply to situations in which the banking commissioner has authorized a temporary branch location because of an emergency.

(j) Branch Relocation. A bank may, with prior written approval of the banking commissioner, relocate an approved branch. The bank shall file an application to relocate a branch accompanied by the required application fee pursuant to §15.2 of this chapter. The bank shall also publish notice pursuant to §15.5 of this chapter. Notice shall be published in the community, of the current branch and of the proposed branch.

(k) Closing a Branch. Before closing an approved branch, a bank shall comply with the notice requirements of federal law, and shall provide the department with a copy of the branch closing notice filed with the appropriate federal banking regulator simultaneously with its filing. Once the branch has been closed, the bank cannot thereafter reopen the branch except upon application for a new branch in compliance with this section.

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

Issued in Austin, Texas, on November 7, 1995.

TRD-9514393 Everette D. Jobe
General Counsel
Texas Department of Banking

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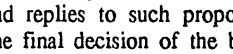
For further information, please call: (512) 475-1300



Subchapter D. Trust Company Applications

• 7 TAC §15.61, §15.62

The new sections are proposed under the Texas Banking Act (the Act), §1. 012(a)(1), which authorizes the commission to adopt rules necessary or reasonable "to implement and clarify" the Act, and under Texas Civil Statutes, Article 342-1106(b), which authorize the commission to adopt general rules and regulations as may be necessary to accomplish the purposes of trust company regulation. In addition, the sections are proposed under the Act, §1.012(a) (4) and §2.006(b), which provides the commission with the authority to establish reasonable and necessary fees for the maintenance and administration of the Act. Additional statutory authority for certain fees can be found in the Act, §3.003(a) (bank charter fees and costs), §3.004(b) (expenses for charter investigation), §4.002(a) (fees and costs for review of acquisition of control), §9.004(a) (registration fees for foreign bank agencies), and §9.006(a) (registration fees for foreign bank representative offices). With respect to application of the proposed sections to trust companies, Texas Civil Statutes, Article 342-1102, specifically makes selected provisions of the Act applicable to trust companies.

As required by the Act, §1.012(b), the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state bank system, and allow for economic development within this state.

Texas Banking Act, §§3.002-3.006, 3.101, 3.104, 3.202, 3.203, 3.301, 3. 401, 3.502, 4.002(a), 5.103, 8.004, 8.301, 8.304, 9.004, and 9.006; Texas Civil Statutes, Articles 342-1101 through 342-1103, and 7 TAC §3.7, 3.61, 3. 37, 3.91, 15.1-15.2, 31.1-31.4, 31.20-31.22, and 31.40-31.41 are affected by these new sections.

§15.61. Applicability of Texas Banking Act.

(a) Applications for state trust company charters shall be made pursuant to Texas Civil Statutes, Article 342-1101, the

Act, §§3.003-3.006 and §15.6 of this chapter (relating to Applications for Bank and Trust Charter). A trust company is required to incorporate and may not organize as a limited banking association.

(b) A trust company may not change its home office without prior approval from the banking commissioner pursuant to the Act, §3.202(c). A trust company that desires to change its home office shall file an application with and in the form prescribed by the banking commissioner in accordance with §15.41 of this chapter (relating to Written Notice or Applications for Change of Home Office).

§15.62. Exempt Trust Companies.

(a) Texas Civil Statutes, Article 342-1103, §6, state that a trust company that has been granted an exemption by the banking commissioner remains subject to certain provisions of the Texas Banking Code, including "Articles 5 and 14, Chapter III of this code (Texas Civil Statutes, Articles 342-305 and 342-314)." Such statutory references are to provisions regarding the granting of charters, currently the Act, §§3.003-3.006, and change of home office, currently the Act, §3.202, as they were numbered prior to renumbering and rearrangement by Acts 1993, 73rd Legislature, Chapter 765, effective August 30, 1993, and repeal and re-enactment by Act of May 18, 1995, 74th Legislature, Chapter 914, §1, 1995 Texas Session Law Service 4451, effective September 1, 1995. The Act, §§3.003-3.006 and §3.202, will be applied to exempt trust companies as if correctly referenced in Texas Civil Statutes, Article 342-1103, §6.

(b) An approval granted to an exempt trust company for a change of home office without proof of the factors listed in the Act, §3.003(b), is conditioned upon the trust company maintaining its exempt status. An exempt trust company that is granted such a conditional change of home office may not transact business with the general public from its new home office, regardless of a change in its exempt status, until and unless the banking commissioner affirmatively makes the findings listed in the Act, §3.003(b).

(c) No approval will be granted to an exempt trust company for a change to nonexempt trust company status, until and unless the banking commissioner affirmatively makes the findings listed in the Act, §3.003. The exempt trust company must comply with the provisions of the Act, §§3.003-3.006 and with the provisions of this chapter.

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

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TRD-9514394 Everette D. Jobe
General Counsel
Texas Department of Banking

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For further information, please call: (512) 475-1300

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Chapter 25. Prepaid Funeral Contracts

Subchapter B. Regulation of Licenses

• 7 TAC §25.25

The Texas Department of Banking (the department) proposes new §25.25, concerning the conversion of prepaid funeral contracts from trust funded benefits to insurance funded benefits, as provided for under Texas Civil Statutes, Article 548b (the Act), §1A. A prior proposal was published in the September 2, 1994, issue of the *Texas Register* (19 TexReg 6881), and was administratively withdrawn in the March 10, 1995, issue of the *Texas Register* (20 TexReg 1747), and another proposal was published in the June 6, 1995, issue of the *Texas Register* (20 TexReg 4111). That proposal was withdrawn in the August 1, 1995, issue of the *Texas Register* (20 TexReg 5663), and the new section was proposed in the same issue. As a result of comments received in writing and at a hearing held on September 18, 1995, proposed new §25.25, as it appears in this issue, contains substantial changes from the previous proposal. Prior proposed §25.25 is withdrawn in this issue of the *Texas Register*.

The conversion of prepaid funeral contracts to insurance funded benefits from trust funded benefits is permissible under the Act, §1A, if the insurance funded arrangement will safeguard the rights and interests of the individual prepaid funeral contract purchasers to at least the same degree as the trust funded arrangement. In the past, the department has reviewed insurance conversion applications and based its determination on the quality and extent of benefits under the insurance policy, as well as the status and condition of the applicant funeral home and the insurer, as a way of determining whether the proposed insurance funded arrangement would safeguard the rights and interests of the individual prepaid funeral contract purchasers to at least the same degree as provided under the existing trust funded arrangement. See Texas Attorney General's Opinion Number MW-336 (1981). While relatively few insurance companies have been involved in these conversions in the past, interest in insurance conversions has grown among insurers in Texas.

The department proposes new §25.25 in order to more clearly outline and refine the basic requirements for an application for conversion under the Act, §1A. Proposed new §25.25 further defines the standards for approval of the conversion application and the required documentation that must accompany an application for conversion, as well as information relevant to requesting a hearing on an application prior to final denial by the department. In addition, this proposal deletes all references to life insurance policies because the Texas Department of Insurance has determined that the funding of prepaid funeral benefits contracts with a life insurance policy in a conversion does not meet its definition of life insurance and, further, adds information that must be included in the post-conversion summary. Other changes to new §25.25 as proposed are for purposes of clarification to better enable the examination and conversion processes to flow efficiently and effectively and to safeguard the rights and interests of the individual prepaid funeral contract purchasers as required by the Act.

At a public hearing held on September 18, 1995, three speakers commented on various provisions of the proposed new §25.25 published in the August 1, 1995, issue of the *Texas Register* (20 TexReg 5663). In addition, the department received six sets of written comments. Numerous comments were made with respect to the proposal; Funeral Directors Life Insurance Company and related company, Funeral Agency, Inc., as well as Texas Funeral Directors Association and Directors Succession Planning, Inc., expressly opposed adoption of the section as a whole. In addition to changes to the proposed new section that resulted from comments the department received, changes were made to this section for clarification and for consistency.

The following comments resulted in changes to the proposed new section:

1. An individual commenting on behalf of the Texas Department of Insurance (TDI) stated that life insurance was an inappropriate vehicle for conversions from trust funded to insurance funded prepaid funeral benefits. After examining TDI's explanation, the department agrees with its position and has eliminated life insurance from the definition of "insurance policy" in subsection (b) of the section.

2. TDI noted that subsection (d)(2)(A) of this section appears to address only initial cash surrender values of converted contracts. TDI also suggested that this section should clarify that minimum cash values and average death benefits must continue to grow with every premium dollar paid. The department agrees and has modified the section to delete the term "initial" and to require a growth rate of 100% of premiums collected.

3. An individual commenting on behalf of The Mission Plan (TMP) requested that subsection (d)(2)(A) of this section be clarified to provide that, on cancellation of a prepaid funeral contract at the initiative of the contract purchaser, the post conversion permit holder must remit to the purchaser the cash surrender value of the contract purchaser's annuity contract. The department agrees that this proposed new section is needed to clarify this aspect of cancellation benefits and has changed proposed subsection (d)(2)(A) of this section accordingly.

4. TMP also requested the addition of a provi-

sion clarifying that the death benefit under the policy is paid to the funeral home that provides goods and services under the contract. The department has added such a provision to subsection (d)(2)(D) of this section.

5. An individual commenting on behalf of Funeral Directors Life Insurance Company (FDLIC), an individual commenting on behalf of SCI Management Corporation (SCIMC), an individual commenting on behalf of Service Corporation International (SCI), and an individual commenting on behalf of Texas Funeral Directors Association (TFDA), Directors Succession Planning, Inc. (DSP) and Funeral Agency, Inc. (FA), objected to terminology indicating that rights and interests of prepaid funeral contract purchasers must be protected not only to "the same degree as," but also, in the alternative, to "a greater degree than" they were safeguarded with trust funded benefits. The department agrees that, unlike the former requirement, the latter is not statutorily imposed and has revised the section as necessary to eliminate the inference.

6. SCIMC commented that subsection (c)(1)(D) of this section should specifically require that, as of the applicant's last examination [or, with respect to subsection (d)(2)(H) of this section, within the 24-month period preceding the application], the applicant for conversion should have no violations or should have corrected all violations "relating to sales under Article 548b." SCI commented that the department should specify which laws it intends to be covered by this provision, whatever they may be. The department has chosen to broaden the specificity to violations that relate to the Act and the Texas Insurance Code.

7. SCIMC requested that the word "protection" appearing in subsection (c)(2) of this section be replaced with the term "safeguard" to parallel the Act. The department has changed this subsection accordingly.

The proposed new section also received certain comments which the department has determined were in support of provisions of the new section as proposed and, therefore, required no changes or which, after thorough examination, the department rejected without making the requested changes:

1. An individual commenting on behalf of the Office of Public Insurance Counsel (OPIC) announced support for subsections (c)(3)(B)(ii), (c)(3)(J), (d) (2)(C), and (d)(2)(A) of this section. The first three of these subsections are re-proposed in the same form as that on which comments were received. Changes to subsection (d)(2)(A) of this section, heretofore discussed, are for clarification only and did not result from this comment.

2. OPIC stated concern that the standard of an applicant's proof in an application hearing should be stricter than the preponderance of the evidence standard contained in subsection (g) of this section. The department rejected this comment. This standard of proof is commonly associated with civil cases and administrative hearings.

3. FDLIC objected to including the prepaid funeral contract cancellation benefit in the insurance policy on various grounds. The department rejected each of FDLIC's arguments. The department is of the opinion that the insurance policy must contain the cancellation benefit in order to afford purchasers whose contracts are converted to insurance funding with at least the same degree of protection that they had with trust funding.

4. FDLIC, TFDA, DSP and FA also objected to the provision in subsection (d) (2)(E) of this section requiring that an insurer provide for guaranteed growth in the contract as being unfairly discriminatory to insurance companies and without statutory basis. The department disagrees that this subsection is discriminatory and has chosen to retain it. The department has the duty to ensure that funding will exist in at least the same amount as the trust would have provided to cover the costs of a funeral purchased under a prepaid funeral contract.

5. FDLIC, TFDA, DSP and FA requested that the insurance funded benefit arrangement, rather than the insurance policy, state the cancellation benefit. Various arguments were made in support of this position, including the argument that TDI is not authorized to approve a special policy form for conversions. The department has rejected industry's request. The department believes the policy itself should be required to safeguard purchaser rights. Furthermore, including the cancellation benefit in the policy provides better notice to consumers and thereby more effectively safeguards their individual rights.

6. FDLIC, TFDA, DSP and FA raised an issue regarding unfair discrimination under the Texas Insurance Code, Article 21.21, §4(7)(a), in the application of cash surrender values to contract purchasers affected by a conversion. The Department of Insurance has concluded that the cash surrender value standards in the proposed new section do not result in unfair discrimination.

7. SCIMC questioned the necessity of notice to affected prepaid funeral contract purchasers under both subsection (c)(3)(F) and (c)(3)(I) of this section. The department believes it is important for purchasers to receive notice from both the insurance company, which provides the purchasers with its address, phone number and other relevant information, as well as from the funeral home, which reassures the purchaser that the prepaid funeral contract will be honored as originally contracted.

8. SCIMC expressed its desire for treating purchasers of contracts that are paid in full differently from those with an unpaid contract balance. SCIMC feels that the permit holder should be allowed to exclude those purchasers with unpaid balances from the conversion process. The department disagrees. Conversions are commonly used as a vehicle to relinquish a permit They would no longer serve this purpose if the post-conversion permit holder were allowed to select certain prepaid funeral contract purchasers to be included in the conversion process while excluding others from it; all contract purchasers should be treated equally and allowed access to this process once it is initiated.

9. SCIMC asked that the seven-year period specified in subsection (d)(2)(E) of this section be shortened for insurers that have not been issuing "similar insurance policies" and, therefore, cannot show the required 3.0% annual average death benefit growth rate. The department declines to make this change: for the protection of the contract purchaser, the insurer must be able to prove such a growth rate and commit to the guaranteed growth rate set out in this section.

10. SCIMC also requested that specific language be added to this section to permit the conversion of irrevocable trust funded contracts to insurance funded contracts that are not revocable. The conversion of a trust funded contract to insurance funding is not a type of cancellation that is available to a contract subject to an irrevocable trust.

11. TDI stated that it is inappropriate for a third party with no insurable interest to purchase an insurance policy on behalf of an individual without benefit of a trust and that a trust is the only logical vehicle for a conversion agreement in view of the manner in which conversions are handled. The department believes the concepts embodied in this comment would be more appropriately handled in a rule promulgated by TDI.

12. TFDA, DSP and FA requested that the department adopt the version of this section published in the June 6, 1995, issue of the *Texas Register* (20 TexReg 4111). The department rejected this proposition insofar as the changes in this section as re-proposed better protect the rights and interests of the prepaid funeral contract purchaser, provide clarity and consistency throughout this section, and better enable the examination and conversion processes to flow efficiently and effectively.

13. TFDA, DSP and FA indicated that certain existing plans were covered by the grandfather clause insofar as the department approved them under the Act, §1a, as it existed prior to September 1, 1993. The department has determined that no such grandfather exemption is available under this section.

Stephanie Newberg, Director, Special Audits Division, Texas Department of Banking, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Ms. Newberg also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be the clarification and streamlining of the conversion application process under the Act, §1A, enhanced protection of the rights and interests of the prepaid funeral contract purchaser, and more efficient and effective examination and conversion processes. This should enhance the orderly administration of the Act and ensure that the purposes of the Act, as they relate to the conversion of prepaid funeral contracts from trust funded benefits to insurance funded benefits, are substantially fulfilled.

There will be no greater economic cost to persons who choose to apply for conversion under the Act, §1A. Proposed §25.25 should

shorten the time period required to process and approve or reject an application by establishing the requirements for applications and the standards against which those applications will be measured.

Comments on the proposal may be submitted to Stephanie Newberg, Director, Special Audits, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705-4294.

The new section is proposed under Texas Civil Statutes, Article 548b, §2, which authorize the department to prescribe reasonable rules and regulations concerning all matters incidental to the enforcement and orderly administration of Article 548b.

Texas Civil Statutes, Article 548b, is affected by the newly proposed §25. 25.

§25.25. Conversion From Trust to Insurance Funded Benefits.

(a) Purpose. Existing prepaid funeral contracts that utilize trust funded prepaid funeral benefits may be converted to an insurance funded prepaid funeral benefits arrangement pursuant to the Act, §1A(d). Application for conversion must be made on forms acceptable to the department that meet the requirements of the Act and this section.

(b) Definitions. The words and terms used in this section, shall be defined according to Texas Civil Statutes, Article 548b (the Act), §1(b), and §25.23(a) of this title (relating to application fees) and §25.24(a) of this title (relating to examination costs and assessment fees), unless otherwise defined herein or unless the context clearly indicates otherwise.

(1) Applicant-A permit holder under the Act who files an application with the department to convert its trust funded prepaid funeral benefits under existing contracts to insurance funded prepaid funeral benefits.

(2) Cash surrender value-The net amount due the policy owner from the insurer upon surrender of an insurance policy which will never be less than the amount of principal transferred at conversion plus all future premiums received.

(3) Insurance policy-An annuity contract relating to an insurance conversion application.

(4) Load-Any commission, allowance, surrender charge or other compensation, expense load, premium expense, administrative charge or expense, policy fees, or other fee or expense paid to a Texas Department of Insurance licensed agent associated with or occurring by reason of the sale, issuance, lapse, surrender, or redemption of an insurance policy in connection with the conversion of any trust funded prepaid funeral contract to insurance funded benefits.

(5) Post-conversion permit holder-The permit holder who will hold, administer, and assume responsibility for the delivery of the funeral service or merchandise and payment of the funeral provider, as the case may be, under the prepaid funeral contracts after conversion to insurance funding.

(6) Required reserves-The reserve liabilities for all outstanding annuity contracts valued or calculated pursuant to actuarial standards and statutory accounting standards not inconsistent with the Texas Insurance Code.

(7) TDI-The Texas Department of Insurance.

(c) Applications.

(1) When applying for permission to convert trust funded benefits under existing prepaid funeral contracts to insurance funded benefits, an applicant must, at a minimum:

(A) hold a valid permit issued by the department under the Act;

(B) be in good standing with the department;

(C) submit a completed conversion application to the Special Audits Division of the department; and

(D) as of its most recent examination by the department, not have been found to be in violation of any applicable laws or regulations relating to the Act or the Texas Insurance Code or to have any other deficiencies of any significance, which have not been remedied or corrected to the satisfaction of the department.

(2) The department may, if it deems it necessary to safeguard the interests of the prepaid funeral contract purchasers, conduct an examination of the applicant within 45 days of the date the application is accepted by the department for filing.

(3) Each application for conversion must include:

(A) a copy of a letter from an insurance company authorized to do business in Texas to the applicant that sets forth the insurance company's agreement to issue insurance policies to convert the prepaid funeral contracts from trust funded benefits to insurance funded benefits;

(B) a copy of the written commitment to the commissioner containing the agreement between or among the insurance company, the applicant, and the post-conversion permit holder regarding the transfer, receipt, and application of the trust funds upon conversion, which commitment must:

(i) include the full name of the agent or agents who will be receiving any load and their respective TDI license numbers; and

(ii) require that a copy of each insurance policy issued be furnished to the owner of the insurance policy and that a copy be made available to the respective prepaid funeral contract purchasers upon request, in the event they are not the owners of the policies;

(C) a pre-conversion summary of the individual prepaid funeral contracts, which must include, at a minimum, the following information (as of a date within 30 days of the date of the application), as well as aggregated totals for each category of information, if appropriate:

(i) purchaser's name and, if available, date of birth;

(ii) date of execution of the prepaid funeral contract;

(iii) face amount;

(iv) amount paid in and amount left owing;

(v) accumulated earnings;

(vi) amount due the prepaid funeral contract purchaser upon cancellation and the amount due the applicant upon death of the prepaid funeral contract beneficiary, assuming death or cancellation were to occur on or about the date of the application; and

(vii) amount retained by the applicant under the Act, §5(a)(1);

(D) a post-conversion summary of the individual prepaid funeral contracts, which must include, at a minimum, the following information (as of the same date as the pre-conversion summary), as well as aggregated totals for each category of information, if appropriate:

(i) insured or annuitant's name;

(ii) original prepaid funeral contract amount;

(iii) amount paid in;

(iv) amount applied to the purchase of the insurance policy;

(v) initial cash surrender value and initial death benefit under the insurance policy; and

(vi) amount retained by the applicant under the Act, §5(a)(1);

(E) a copy of the insurance policy approved by TDI showing the approval stamp of TDI, or evidence that the policy is deemed to have been approved or exempt from approval;

(F) a copy of the proposed negative response notification letter to the prepaid funeral contract purchasers from the applicant containing a statement explaining the purchaser has 60 days to file a written request with the department to have the contract converted back to trust funded benefits;

(G) unless otherwise waived by the commissioner upon a showing of good cause, current year-to-date financial statements for the post-conversion permit holder and insurance company (dated no more than 6 months prior to the date of the application) and an actuarial certification certifying that the reserves to be held by the insurance company with respect to the conversion will be adequate to pay claims as they become due;

(H) a copy of the insurance company's most recent actuarial certification, dated no more than one year prior the date of application;

(I) a copy of the proposed notification letter from the insurance company to the prepaid funeral contract purchasers regarding the conversion;

(J) a statement defining the insurance policy load, including the percentage and dollar amount of the load, the time at which it is to be imposed, and how the load will be distributed;

(K) a copy of the form of assignment, if any, to be used in assigning insurance policy rights or proceeds to the post-conversion permit holder;

(L) the conversion application fee prescribed in §25.23 of this title (relating to application fees); and

(d) Standards for approval of application.

(1) An application for conversion will be approved by the commissioner if, in the commissioner's opinion, the rights and interests of the prepaid funeral contract purchasers under the insurance funded benefits arrangement will be safeguarded to at least the same degree as provided under the trust funded benefits arrangement. An application may be approved without the necessity of a hearing.

(2) In order for insurance funded benefits under an application for conversion to be considered to safeguard the rights and interests of the prepaid funeral contract purchasers to at least the same degree as the trust funded benefits, the insurance benefits must comply with this subsection.

(A) Unless otherwise permitted by the commissioner upon a showing of good cause, the insurance funded benefits arrangement must apply to all of the applicant's trust funded prepaid funeral contract purchasers, as of the date of the application.

(B) The transfer of the trust funds to the insurance company must include the full sum required to be deposited as trust principal by the applicant pursuant to the Act under the trust funded prepaid funeral contracts proposed for conversion, plus all net earnings accumulated with respect thereto, as of the transfer date. No load may be deducted from the trust funds transferred pursuant to the conversion application.

(C) No provision in the insurance policy may provide or allow for contesting coverage, limited death benefits in the case of suicide, or make reference to a physical examination, or any other provision that would operate as an exclusion, limitation, or condition, other than submittal of proof of death or surrender of the policy, upon the funding, at maturity, or cancellation, as the case may be, of the original trust funded prepaid funeral contract or the benefits thereof.

(D) The death benefit under the insurance policy, net of any loads, at all times must be no less than the death benefit prior to conversion and must increase in the full amount of each payment received. The death benefit under the insurance policy must be paid to the funeral home that honors the prepaid funeral contract.

(E) The insurance company must demonstrate that, in the previous seven years, the average death benefit growth under the same or substantially similar insurance policies issued by the insurance company to fund prepaid funeral contracts has been at least 3.0% per annum. If the insurance company cannot so demonstrate, then the insurance policy must provide for guaranteed growth of the death benefit of no less than 2.0% per annum compounded annually beginning in the first year of the policy.

(F) The post-conversion permit holder is responsible for payment of all death and cancellation claims in accordance with the provisions of the Act.

(G) The post-conversion permit holder must have a current valid permit issued by the department under the Act, and must be in good standing with the department.

(H) The post-conversion permit holder must have been examined by the department within the 24-month period immediately preceding the date of the application and not have been found to be in violation of any applicable laws or regulations relating to the Act or the Texas Insurance Code, or to have any other deficiencies of any significance, which have not been remedied or corrected to the satisfaction of the department. If the post-conversion permit holder has not been examined by the department within such time period, the department may, if it deems necessary, conduct an examination of the post-conversion permit holder within 45 days of the date the application is accepted for filing.

(I) The insurance company must be a member of the Texas Life, Accident, Health, and Hospital Service Insurance Guaranty Association.

(J) Any insurance policy issued on any individual must be for an amount not less than the amount of principal and interest transferred for that individual to the insurance company, and any supplemental insurance policy issued to cover the unfunded portion of the contract must have a face amount that is at least the same as the unfunded principal balance. No credit or reduction may be made for interest earned or accrued on the paid in principal balance.

(K) The insurance policy must provide each prepaid funeral contract purchaser with a cash surrender value or cancellation benefit that is at least the same as the cancellation benefit provided for under the trust funded benefits arrangement for the duration of the prepaid funeral contract. If a prepaid funeral contract is cancelled at the initiative of the purchaser after the 60-day initial conversion cancellation period, the post conversion permit holder must remit the entire cash surrender value of the purchaser's annuity contract directly to the purchaser. In addition, the insurance company is responsible for maintaining adequate reserves for cancellations.

(3) The applicant must demonstrate compliance with the Act, §5B, for the previous year, and may not convert prepaid funeral contracts that are presumed abandoned under the Act, §5B. Any prepaid

funeral contracts presumed to have been abandoned and the funds attributable to such contracts must be reported and delivered to the Texas State Treasurer in accordance with Texas Property Code, Chapter 74.

(e) Post-conversion summary. The post-conversion permit holder must submit to the department, within 90 days of the date of transfer of the trust funds as authorized by the commissioner's order, a post-conversion summary of the individual prepaid funeral contracts as of the conversion date, which must include, at a minimum, the following information, as well as aggregated totals for each category of information, if appropriate:

(1) insured or annuitant's name;

(2) insured or annuitant's policy number;

(3) the original prepaid funeral contract amount;

(4) amount paid in;

(5) unpaid balance of the prepaid funeral contract;

(6) amount retained by the applicant under the Act, §5(a)(1);

(7) amount applied to the purchase of the insurance policy; and

(8) initial cash surrender value and initial death benefit under the insurance policy.

(f) Records. The applicant shall relinquish to the post-conversion permit holder the individual prepaid funeral contract ledgers reflecting the amount paid and the amount left owing on the prepaid funeral contract, if any. The post conversion permit holder shall be responsible for maintaining such ledgers to reflect the principal balance of the converted contracts as well as any outstanding balances.

(g) Time requirements. Within 90 days of the execution of the conversion order, the post-conversion permit holder must submit a notarized statement to the department attesting that the insurance policies have been issued and funded on behalf of the contract purchasers listed in the original post-conversion summary included in the conversion application and that all notices required under subsection (c)(3)(I) of this section have been given. Within 120 days of the execution of the conversion order, all requirements under this section for completion of a conversion must be met; if they are not, the conversion order is void without further action of the department

(h) Hearings. The commissioner may order a hearing on an application. A hearing, if ordered, shall be conducted pursuant to the department's rules governing hearings. The applicant shall have the burden to demonstrate the existence of all factors necessary to entitle the applicant to convert to insurance funded benefits from trust funded benefits by a preponderance of the evidence.

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

Issued in Austin, Texas, on November 7, 1995.

TRD-9514398 Everette D. Jobe
General Counsel
Texas Department of Banking

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 475-1300

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Chapter 31. Miscellaneous

Subchapter A. Procedures

• 7 TAC §§31.1-31.4

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

The Finance Commission of Texas (the commission) proposes the repeal of the entirety of Title 7, Chapter 31, specifically §§31.1-31.4 (Subchapter A), §§31.20-31.22 (Subchapter B), and §31.40 and §31.41 (Subchapter C), concerning rules and procedures governing the affairs of the State Banking Board. Notice of the proposed repeal of each subchapter is published separately as required by the *Texas Register*, preceded by this common preamble.

Pursuant to the Texas Banking Act (as enacted by Act of May 18, 1995, 74th Legislature, Chapter 914, §1, 1995 Texas Session Law Service 4451), the State Banking Board is eliminated effective September 1, 1995, and its powers and duties transferred to the Banking Commissioner and the commission. The substantive provisions of these sections that have continuing vitality are proposed to be adopted as new sections in Title 7, Chapter 15, in this issue of the *Texas Register*.

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

Mr. Jobe also has determined that for each year of the first five years the repeals are in effect the public benefit anticipated as a result of enforcing the repeals will be that regulations regarding practice and procedure will be updated to eliminate superseded references to statutes that have been amended, repealed, or recodified, and will be better organized and easier to follow and apply.

Comments on the proposal may be submitted in writing to Everette D. Jobe, General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705-4294.

Repeal of these sections is proposed pursuant to rulemaking authority under the Texas Banking Act (the Act), §1.012(a)(1), which authorizes the commission to adopt rules necessary or reasonable to implement and clarify the Act. As required by the Act, §1.012(b), the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state bank system, and allow for economic development within this state.

No statutes or rules are affected by the proposed repeals in that the statutes underlying these sections have been repealed.

§31.1. Rules Governing Administrative Hearings Before The Banking Board.

§31.2. Rulemaking.

§31.3. Substitute Members of the Banking Board.

§31.4. Applications to Engage in Certain Businesses: Notices to Applicants and Semi; Application Processing Times and Semi; Appeals.

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

Issued in Austin, Texas, on November 7, 1995.

TRD-9514399 Everette D. Jobe
General Counsel
State Banking Board

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 475-1300

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Subchapter B. Bank Applications

• 7 TAC §§31.20-31.22

(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 State Banking Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal of these sections are proposed pursuant to rulemaking authority under the Texas Banking Act (the Act), §1.012(a)(1), which authorizes the commission to adopt rules necessary or reasonable to implement

and clarify the Act. As required by the Act, §1.012(b), the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state bank system, and allow for economic development within this state.

No statutes or rules are affected by the proposed repeal in that the statutes underlying these sections have been repealed.

§31.20 Interim Bank Charters

§31.21. Option to Withhold Identity of Officers

§31.22 Applications for Change of Domicile

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

Issued in Austin, Texas, on November 7, 1995.

TRD-9514400 Everette D. Jobe
General Counsel
State Banking Board

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 475-1300

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Subchapter C. Trust Company Applications

• 7 TAC §31.40, §31.41

(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 State Banking Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal of these sections are proposed pursuant to rulemaking authority under the Texas Banking Act (the Act), §1.012(a)(1), which authorizes the commission to adopt rules necessary or reasonable to implement and clarify the Act. As required by the Act, §1.012(b), the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state bank system, and allow for economic development within this state.

No statutes or rules are affected by the proposed repeal in that the statutes underlying these sections have been repealed.

§31.40. Applicability of Banking Code

§31.41. Exempt Trust Companies.

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

Issued in Austin, Texas, on November 7, 1995.

TRD-9514401 Everette D. Jobe
General Counsel
State Banking Board

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 475-1300

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TITLE 16. ECONOMIC REGULATION

Part I. Railroad Commission of Texas

Chapter 9. Liquefied Petroleum Gas Division

Subchapter B. Basic Rules

• 16 TAC §9.183

The Railroad Commission of Texas proposes an amendment to §9.183, concerning uniform protection standards. The commission proposes this action to allow an additional construction method for storage racks.

Section 9.183 describes the protection required for LP-gas transfer systems and storage containers, including fencing, guardrails, signs and lettering, and storage specifications. The proposed amendment in subsection (e) relating to storage racks allows carriage bolts to be used instead of welding provided that they are at least 3/8 inch in size, the heads of the bolts are to the outside of the rack, and the nuts are tack-welded on the inside of the rack.

Thomas D. Petru, assistant director, LP-Gas Section, Gas Services Division, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Petru also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section as proposed will be the use of an additional method to construct storage racks that will not compromise current safety requirements. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. The proposal adds an alternative method for constructing storage racks, but does not add any additional requirements.

Comments on the proposal may be submitted to Kellie Martinec, Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967. Comments will be accepted for 30 days after publication in the *Texas Register*.

The amendment is proposed under the Texas Natural Resources Code, §113. 051, which authorizes the commission to adopt rules relating to any and all aspects or phases of the LP-gas industry that will protect or tend to protect the health, welfare, and safety of the general public.

Texas Natural Resources Code, §113.051 is affected by this amendment.

§9.183 Uniform Protection Standards

(a)-(d) (No change.)

(e) A storage rack may be used to store 20-pound DOT portable or forklift containers. Welding or carriage bolts at least 3/8 inch in size shall be used to construct the storage rack provided that the heads of the carriage bolts are to the outside of the rack and that the nuts are tack-welded on the inside of the rack. The rack[, and it] shall be constructed of at least [a minimum]:

(1)-(3) (No change.)

(f)-(j) (No change.)

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

Issued in Austin, Texas, on November 8, 1995.

TRD-9514439 Mary Ross McDonald
Acting General Counsel
Railroad Commission of Texas

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 463-7008

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• 16 TAC §9.184, §9.190

The Railroad Commission of Texas proposes amendments to §9.184. relating to uniform safety requirements; and §9.190, relating to maintenance. Section 9.184 describes safety requirements for installations, including fire prevention, transfer procedures, container maintenance, and specifications for valves and pumps. Section 9.190 specifies that all containers, valves, dispensers, accessories, piping, and transfer equipment shall be maintained in good operating condition.

The proposed amendment in §9.184 clarifies some existing requirements and add new requirements to prevent a major loss of LP-gas. Proposed changes to §9.184(b)(10) clarify requirements for containers with internal valves. The specific proposed requirements in §9.184(b)(11) and (12) requiring main liquid and vapor shutoff valves to remain closed, and either ball-type shutoff valves with locking handles or gate-type or globe-type shutoff valves, ensure further safety at LP-gas instal-

lations because these valves will not be opened until the transfer hose is properly and completely connected. These valves would also decrease the chance of accidental opening. If a loss of LP-gas did occur when the internal valves were still closed, the loss would be limited to only the LP-gas in the piping and transfer system. Loss of LP-gas in the storage container itself should not occur. The addition of these requirements will help prevent a major accident or fire.

The proposed amendment in §9.190 adds the requirement that the installation shall be removed from service if any part of it is not properly maintained.

Thomas D. Petru, assistant director, LP-Gas Section, Gas Services Division, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Petru also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be a significant increase in safety during transfer operations and a decrease in potential damage or injury due to an accident, fire, or lack of proper maintenance at an LP-gas installation.

There is no anticipated economic cost to small businesses or to persons required to comply with the proposed requirements regarding the valves remaining closed and locked. There is an anticipated economic cost regarding the locking handles for the ball-type shutoff valves, which are proposed to be required in §9.184(b)(12). A ball valve equipped with a locking handle costs about $20 more than a ball valve without a locking handle; the exact cost of compliance cannot be determined since it will depend on how many such valves are required to be purchased for a particular installation. There is no anticipated cost for either gate-type or globe-type shutoff valves since these types of valves are already commonly used.

Comments on the proposal may be submitted to Kellie Martinec, Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967. Comments will be accepted for 30 days after publication in the *Texas Register* and should refer to LP-Gas Docket Number 1475.

The amendments are proposed under the Texas Natural Resources Code, §113. 051, which authorizes the commission to adopt rules relating to any and all aspects or phases of the LP-gas industry that will protect or tend to protect the health, welfare, and safety of the general public.

Texas Natural Resources Code, §113.051 is affected by these amendments.

§9.184. Uniform Safety Requirements

(a) (No change.)

(b) Valves.

(1)-(9) (No change.)

(10) Internal valves. Containers which are equipped with internal valves are not required to have shutoff valves as specified in paragraph (9) of this subsection.

(11) Ball-type, gate-type, and globe-type shutoff valves. Either ball-type, gate-type, or globe-type shutoff valves shall be used on the connecting end of transfer hoses attached to stationary containers.

(12) Locking handles on ball-type shutoff valves. Any ball-type shutoff valve less than two inches in size shall have a locking handle. If a ball-type shutoff valve of any size has a locking handle, the main liquid and/or vapor valves or main shutoff valves on the stationary container at an attended installation may remain open during transfer operations between the stationary container and the transport as long as the locking handle remains locked until the transfer hose is properly connected. If a ball-type shutoff valve does not have a locking handle, the main liquid and/or vapor valves or main shutoff valves on the stationary container shall remain closed at all times and shall not be opened until the transfer hose is properly connected.

(c) (No change.)

§9.190. Maintenance All LP-gas storage containers, valves, dispensers, accessories, piping, and transfer equipment shall be maintained **in proper working order in accordance with the manufacturer's instructions and the LP-Gas Safety Rules. If LP- gas storage containers, valves, dispensers, accessories, piping, and transfer equipment are not in proper working order, the installation shall be immediately removed from LP-gas service and shall not be operated until the necessary repairs have been made** [in good operating condition].

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

Issued in Austin, Texas, on November 8, 1995.

TRD-9514440 Mary Ross McDonald
Acting General Counsel
Railroad Commission of Texas

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 463-7008

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Subchapter T. DOT MC-330 and MC-331 Transport Containers

• 16 TAC §9.1777

The Railroad Commission of Texas proposes an amendment to §9.1777, concerning container appurtenances and related equipment. The commission proposes this action to delete an unnecessarily restrictive requirement currently in the rule.

Section 9.1777 describes requirements for transport containers, including appurtenances, mounting equipment, and trailers. The proposed amendment deletes subsection (f)(3) because it is overly restrictive and burdensome for container manufacturers, subframers, and other licensees. The requirement means tanks have to be built especially for use in Texas. The requirement adds additional cost without resulting in a subsequent increase in safety. A major container manufacturer in Texas noted this discrepancy when its 3,000-gallon tank fell two inches short of the ratio requirement. The proposed amendment will allow units from other states to be sold and registered in Texas. Other proposed nonsubstantive amendments include some changes in wording or punctuation to provide clearer language.

Thomas D. Petru, assistant director, LP-Gas Section, Gas Services Division, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Petru also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be less expensive tanks and more access to other container manufacturers who previously were unable to sell tanks in Texas due to the requirements of subsection (f)(3). There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. In fact, the proposal should result in a reduction in cost for containers since manufacturers will not be required to build special containers for use in Texas.

Comments on the proposal may be submitted to Kellie Martinec, Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967. Comments will be accepted for 30 days after publication in the *Texas Register* and should refer to LP-Gas Docket Number 1480.

The amendment is proposed under the Texas Natural Resources Code, §113. 051, which authorizes the commission to adopt rules relating to any and all aspects or phases of the LP-gas industry that will protect or tend to protect the health, welfare, and safety of the general public.

Texas Natural Resources Code, §113.051 is affected by this amendment.

§9.1777. Container Appurtenances and Related Equipment.

(a) **Transport** [All transport] containers shall be equipped with full baffles[,] adequate to prevent surging of **the container's** [container] contents.

(b) Stops or other means **shall** [must] be provided to prevent relative motion between the container and the vehicle chassis when the vehicle is in operation.

(c) Transport **containers** [**container(s)] shall be mounted on the vehicle frame with at least grade eight and 5/8 inch size** [minimum grade of 8, 5/8-inch,] hold-down bolts. "U" or "J" bolts are prohibited.

(d) Acme-threaded adapters or hose couplings **shall** [must] be [of] brass [material]. Extended-type hose couplings **of steel-aluminum construction** [(steel-aluminum construction)] with a female acme connection of 1 3/4 [1-3/4] inch or less are acceptable.

(e) **Transport** [All transport] trailers shall be of the fifth-wheel type and shall be directly attached to the tractor.[; the] **Towing** [towing of] additional trailers is prohibited.

(f) **Transport containers** [Each transport container] constructed after June 1, 1989, shall meet the following requirements.

(1) The **transport container manufacturer shall stamp the** minimum gross vehicle weight (GVW) [must be stamped] in letters **at least** [not less than] 3/8 inch in height on the **DOT** [Department of Transportation] specification plate [by the transport container manufacturer].

(2) (No change.)

[(3) The completed delivery unit (with chassis mounted cargo container) must shall a container length to container diameter ratio of 2.25 or greater to one.]

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

Issued in Austin, Texas, on November 8, 1995.

TRD-9514441 Mary Ross McDonald
Acting General Counsel
Railroad Commission of Texas

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 463-7008

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Chapter 15. Alternative Fuels Research and Education Division

Alternative Fuel Highway Signage Rebate Program

- **16 TAC §§15.301, 15.305, 15.310, 15.315, 15.320, 15.325, 15. 330, 15.335, 15.340, 15.345, 15.350**

The Railroad Commission of Texas proposes new §§15.301, 15.305, 15.310, 15.315, 15.320, 15.325, 15.330, 15.335, 15.340, 15.345, and 15.350, concerning the establishment and administration of a highway signage rebate program for propane (liquefied petroleum gas; LPG) and natural gas motor fuel outlets open to the general motoring public. Participation in the program will be voluntary. No person has a legal entitlement or other right to an alternative fuel highway sign rebate under this program.

Proposed new §15.301 states the purpose of the program, and §15.305 defines terms used in the rule. Proposed new §15.310 establishes the alternative fuel highway signage rebate program for a period of two years unless the commission changes the termination date. Eligibility requirements, application procedures and conditions for installation of the alternative fuel highway signs are described in proposed new §§15.315, 15.320, and 15.325; rebate amounts are established in §15.330. Proposed new §15.335 authorizes the commission to prescribe verification, disallowance and refund procedures and requirements. Conditions under which a public propane or natural gas motor fuel outlet may be declared ineligible to participate in the alternative fuel highway signage rebate program are set out in proposed new §15.340. Procedures for the receipt and handling of complaints and penalties for violation of program rules are set out in proposed new §§15.345 and 15.350.

The commission views the alternative fuel highway signage rebate program as a means of better informing the motoring public about the availability of alternative fuels as these fuels are defined in the federal Energy Policy Act of 1992, Public Law Number 102-486, 106 Stat. 2776, and to further the mission of the commission's Alternative Fuels Research and Education Division to educate the public about and develop marketing programs for environmentally beneficial alternative fuels that can contribute to the improvement of air quality in this state. For that reason, the commission wants to implement this program as quickly as possible, while ensuring adequate opportunity to receive ideas, information, and suggestions about the alternative fuel highway signage rebate program from a wide array of interested persons.

The commission has set the initial rebate rate at 50% of the cost of eligible alternative motor fuel billboard advertising up to a maximum of $1, 000 per eligible installation. This rate and this maximum are subject to change or cancellation by the commission without notice at any time. A total of $31,000 is available for this purpose from a grant to the Commission from the United States Department of Energy. If required to ensure timely processing of applications, approved rebates may be paid from Alternative Fuels Research and Education Account 101 within General Revenue-Dedicated and the account shall be repaid in full from available grant funds immediately upon receipt of reimbursements from the grantor. Implementation of this pilot program is contingent upon the availability of grant funds.

Dan Kelly, director, Alternative Fuels Research and Education Division, has determined that the estimated cost to state government for the two years that the proposed sections are in effect will be $15,330 for commission employees' time spent in preparation, administration, and enforcement of the program. This amount makes up part of the matching funds required as a condition of the grant. An estimated additional $31,000 in matching funds will come from participating natural gas and propane retailers. Actual cost will depend on the degree of acceptance of the program by participating propane and natural gas retailers. There will be no fiscal implications for state government thereafter, since the program will expire after two years unless reauthorized by the commission through an amendment to this rule. There will be no fiscal implications for local governments as a result of enforcing or administering the sections as proposed.

Mr. Kelly also has determined that for the first two years the sections as proposed are in effect the public benefit anticipated as a result will be increased public awareness and understanding of the availability of propane and natural gas as environmentally beneficial alternative fuels.

There will be fiscal implications for certain small businesses that choose to participate in the voluntary program. Participating propane and natural gas retailers will be required to process applications and meet other administrative requirements. The extent to which the cost of performing these services will be offset by increased propane and natural gas motor fuel sales and cost-recovery practices will vary from business to business and cannot be determined in advance.

There will be no anticipated economic cost to persons who would be required to comply with the sections as proposed, since participation is voluntary.

Comments on the proposed new rules may be submitted to Dan Kelly, Director, Alternative Fuels Research and Education Division, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967. Comments will be accepted for 30 days after publication in the *Texas Register*.

The new sections are proposed under Texas Natural Resources Code, §113. 241, which authorizes the commission to adopt rules relating to educating the public regarding the use of LPG and other environmentally beneficial alternative fuels that are or have the potential to be effective in improving the quality of air in this state; Texas Natural Resources Code, §113.243(c) (2), which authorizes the commission to implement marketing and advertising programs relating to

alternative fuels to make alternative fuels more understandable and readily available to consumers; and Texas Natural Resources Code, §113.243(c)(6), which authorizes the commission to use money in the Alternative Fuels Research and Education Fund 101 and its successor Alternative Fuels Research and Education Account 101 in General Revenue-Dedicated to implement programs necessary to promote the use of LPG or other environmentally beneficial alternative fuels. Texas Natural Resources Code §§113.248, 113.249, and 113.250 prescribe civil and criminal penalties and establish an enforcement mechanism for violations of the Texas Natural Resources Code or commission rules.

Texas Natural Resources Code, §§113.241, 113.243(c)(2), 113.243(c)(6), 113.248, 113.249, and 113.250 is affected by these new sections.

§15.301. Purpose. The purpose of §§15.301, 15.305, 15.310, 15.315, 15.320, 15.325, 15.330, 15.335, 15.340, 15.345, and 15.350 of this title (relating to the Alternative Fuels Research and Education Division) is to establish for Texas retail propane and natural gas motor fuel outlets an alternative fuel highway signage rebate program that achieves increased public awareness and convenience in the use of propane and natural gas as motor fuels. These sections outline the commission's mechanisms for determining the eligibility of applicants, application requirements, administrative procedures, rebate amounts and adjustments, terms of compliance, penalties for violations, and program termination.

§15.305. Definitions. The following words and terms, when used in §§15.301, 15.305, 15.310, 15.315, 15.320, 15.325, 15.330, 15.335, 15. 340, 15.345, and 15.350 of this title (relating to the Alternative Fuels Research and Education Division), shall have the following meanings, unless the context clearly indicates otherwise.

Account-The Alternative Fuels Research and Education Account 101, General Revenue-Dedicated, in the state treasury, consisting of fees charged under Texas Natural Resources Code, Chapter 113, Subchapter I, and deposited into the Account; penalties collected under Texas Natural Resources Code, Chapter 113, Subchapter I, and deposited into the Account; interest earned on amounts in the Account; and grants and contributions designated for the highway signage rebate program and deposited into the Account.

Applicant-An owner or operator of a retail propane and/or natural gas motor fuel outlet open to the general motoring public who has submitted a complete and timely application.

Application-That set of forms, including all required supporting documentation, prescribed by the commission for the purposes of applying for a highway signage rebate and of participating in the highway signage rebate program.

CNG-Compressed natural gas, as that term is defined in Texas Natural Resources Code, Chapter 116.

Commission-The Railroad Commission of Texas.

Delivery date-The date of postmark on a mailed application or the date that a hand-delivered application is stamped in at the Austin offices of the division.

Division-The Alternative Fuels Research and Education Division of the Railroad Commission of Texas.

Division motor fuel billboard design-A design for billboard advertising produced by the division and approved by the commission for use in the highway signage rebate program.

Eligible installation-An installation of eligible signage that complies with all local, state and federal laws and regulations and:

(A) whose owner regularly accepts rental fees from the public for advertising placed upon the signage; or

(B) is a billboard on which construction began after the effective date of this program on land owned by the applicant; and

(C) that is permanently affixed to a building, structure or to the ground and designed or constructed in such a manner that it cannot be moved or relocated without major structural or support changes.

Eligible propane and/or natural gas outlet-A retail motor fuel outlet that is:

(A) located in the State of Texas;

(B) licensed by the commission's Gas Services Division; and

(C) in compliance with all applicable federal, state and local legal requirements for the sale of propane and/or natural gas motor fuel to the general motoring public.

Eligible purchase-Any payment for a rental of 30 days or more of an eligible installation, or for construction of an eligible installation.

Eligible signage-A billboard whose final design has been approved in advance in writing by the division and that:

(A) contains not less than 72 square feet of advertising space, upon which is displayed the division's official motor fuel billboard design;

(B) is visible and legible to passing motorists from a distance of at least 100 yards; and

(C) devotes not more than 25% of its advertising space to content that is specific to the eligible propane and/or natural gas outlet.

LPG-Liquefied petroleum gas; see "Propane" in this section.

Person-An individual, sole proprietorship, partnership, corporation or other legal entity.

Program period-A two-year period beginning on January 1, 1996, and ending on January 1, 1998.

Propane-Liquefied petroleum gas (LPG), as that term is defined in Texas Natural Resources Code, Chapter 113.

Natural gas-Compressed natural gas or liquified natural gas, as those terms are defined in Texas Natural Resources Code, Chapter 116.

Owner or operator of a propane and/or natural gas motor fuel outlet open to the motoring public-A person who:

(A) has been issued a current Category E, G, I or J LPG license or a current Category 3 or 5 CNG license from the Gas Services Division of the commission, or is an active company representative or operations supervisor on file with the Gas Services Division; and

(B) operates or manages a retail business, including any branch outlet or outlets, that offers propane and/or natural gas refueling services to the general motoring public; and

(C) has completed and timely submitted the form prescribed by the commission for participation in the alternative fuel highway signage rebate program.

§15.310. Establishment; Duration; Operation.

(a) The alternative fuel highway signage rebate program is hereby established on the effective date of this undesignated head of this chapter (relating to the Alternative Fuels Research and Education Division).

(b) The commission may terminate this alternative fuel highway signage program at any time. The program shall terminate on January 1, 1998, unless the commission amends this subsection to continue it in effect past that date.

(c) At the time of application, an applicant shall submit proof of payment in full for each eligible installation for which

application is made for a rebate under this section. If required to ensure timely processing of applications, the commission may pay rebates from funds available in the account. Amounts so paid shall be repaid in full from available grant funds deposited into the Account immediately upon receipt from the grantor.

§15.315. Eligibility.

(a) To be eligible for an alternative fuel highway signage rebate under this program, a propane and/or natural gas outlet owner or operator must document, using forms prescribed by the commission for the purpose, that an eligible purchase has been made of an eligible installation.

(b) Sign structures that are not permanently affixed to the ground or to a building or other permanent structure, or that are designed or constructed in such a manner that the signs can be moved or relocated without major structural or support changes, such as mobile signs, are not eligible for rebates under this program. Examples of installations that are not eligible for rebates under this program include, but are not limited to, A-frame signs, sandwich signs, curb signs, and signs on trailers with or without wheels.

(c) No more than one highway signage rebate may be paid for each eligible installation.

(d) An applicant may apply for a rebate for any number of eligible installations.

(e) The commission may limit the total amount of rebates that may be paid to any applicant.

§15.320 Application.

(a) Forms. Application for an alternative fuel highway signage rebate shall be made by a propane and/or natural gas outlet manager or owner on forms prescribed for that purpose by the commission.

(b) Payment. The commission may approve payment of a rebate to an applicant subject to the availability of funds. Applicants have no legal right or other entitlement to receive rebates under this program, and receipt of a complete and correct application does not bind the commission to approve payment of a rebate to any applicant.

(c) Priority. Applications shall be considered on a first-come, first-served basis according to the dates of receipt of complete and correct applications.

(d) Acceptance. Applications will be accepted no earlier than the effective date of this rule and no later than the date of termination of the program. An application must be received at the commission no later than 60 days following the date of the eligible installation to be eligible for rebates. Applications may be mailed or hand-delivered to the Railroad Commission of Texas, Alternative Fuels Research and Education Division, 1701 North Congress Avenue, Room 10-115, P.O. Box 12967, Austin, Texas 78711-2967. Applications may not be submitted electronically or by facsimile transmission (FAX).

(e) Installation date. Applications must pertain to purchases of eligible installations made not earlier than the effective date of this rule and not later than the program termination date.

(f) Completeness. Applicants must furnish completely and correctly all information required on the official alternative fuel highway signage rebate application. No application may be considered complete until all required information is correct and all forms, fees and required supporting documentation are received by the division.

(g) Incomplete applications. Applicants have 30 days from the date the division sends notice to correct any errors or omissions on the application. If a complete, correct application is not received in the division within 30 days after notice has been sent, the application shall be void.

§15.325. Conditions of Receipt of Rebate. The application forms prescribed by the commission shall include conditions that the applicant agrees to allow commission inspection of the installation pursuant to §15. 335 of this chapter (relating to verification; disallowance; refund).

§15.330. Rebate Amount.

(a) The commission shall establish the rebate amount for an eligible installation. The commission may change this amount at any time. If the commission changes the rebate amount, an applicant whose application is approved will receive the amount that is in effect for the eligible installation at the time of the approval of the application.

(b) In setting the rebate amount, the commission may consider any or all of the following:

(1) availability of funds;

(2) the effectiveness of the program in increasing public awareness and use of alternative fuels;

(3) dealer participation; and

(4) administrative cost.

§15.335. Verification; Disallowance; Refund.

(a) Upon reasonable notice and at any reasonable time, an inspector, employee or agent of the commission may enter premises where an eligible installation has taken place to verify compliance with the requirements of the rebate program. The commission may perform such inspection prior to approving payment of a rebate.

(b) No rebate will be paid for any installation inspected and found to be out of compliance. If an installation found to be out of compliance is not brought into compliance within 30 days, the rebate will be disallowed.

(c) If an installation is inspected by the commission after payment of a rebate and found not to be in compliance, the applicant shall have 30 days to bring the installation into compliance. If the installation is not brought into compliance at the end of 30 days, the applicant shall refund the full amount of the rebate to the commission.

§15.340. Compliance.

(a) An owner or operator of a propane or natural gas refueling outlet may be suspended from participation or declared ineligible to participate in the alternative fuel highway signage rebate program if, in the judgment of the division director, the owner or operator has submitted false information or otherwise violated rebate program rules.

(b) Within 30 days after the division director mails a notice of suspension or ineligibility to an owner or operator, the owner or operator may appeal the suspension or declaration of ineligibility in writing to the commission. Actions taken by the commission with respect to such appeals are final.

§15.345 Complaints. Any person may file a complaint about an owner or operator of a propane and/or natural gas refueling outlet or another person regarding alleged violations of the alternative fuel highway signage rebate program rules. Complaints should be sent in writing to the division director at the address set forth in §15.320 of this chapter (relating to application).

§15.350. Penalties. Violations of alternative fuel highway signage program rules are subject to civil and criminal prosecution and penalties prescribed under Texas Natural Resources Code, §§113.248, 113.249, and 113.250.

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

Issued in Austin, Texas, on November 8, 1995.

TRD-9514442 Mary Ross McDonald
Acting General Counsel
Railroad Commission of Texas

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 463-7008

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Part VIII. Texas Racing Commission

Chapter 321. Pari-mutual Wagering

Subchapter B. Distribution of Pari-mutuel Pools

• 16 TAC §321.111

The Texas Racing Commission proposes an amendment to §321.111, concerning the distribution of the twin trifecta pool. The amendment clarifies the procedures relating to the dissemination of information about the pool and for paying the pool if a race animal is prevented from starting.

Paula Cochran Carter, General Counsel for the Texas Racing Commission, 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 the section.

Ms. Carter also has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the section will be that pari-mutuel wagering will be of the highest caliber and will be conducted with the utmost integrity. 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 on or before December 15, 1995, to Paula Cochran Carter, General Counsel for the Texas Racing Commission, P.O. Box 12080, Austin, Texas 78711.

The amendment is proposed under the Texas Civil Statutes, Article 179e, §3.02, which authorize the commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; §6.06 which authorizes the commission to adopt rules relating to all aspects of the operation of pari-mutuel racetracks; and §11.01, which authorizes the commission to adopt rules regulating pari-mutuel wagering.

The proposed amendment implements Texas Civil Statutes, Article 179e.

§321.111. Twin Trifecta.

(a)-(m) (No change.)

(n) If an animal entered in the second twin trifecta race is scratched, the holders of tickets on the affected animal may exchange the tickets for another selection. The association shall make public announcements, the windows shall be reopened if necessary, and reasonable time shall be given for exchange of tickets. [If an animal in the second twin trifecta race is prevented from starting, the holders of tickets on the affected animal shall receive a consolation in an amount equal to the payoff of the first twin trifecta race. The money for the consolation shall be deducted from the pool for the second twin trifecta race.]

(o)-(p) (No change.)

[(q) A person may not disclose the number of tickets sold in the twin trifecta or the number or amount of winning tickets eligible for exchange for the second race of the twin trifecta until after the results of the second race of the twin trifecta are official. The totalisator equipment shall be programmed or constructed to suppress the publication or printing or any such information, except the total number of dollars wagered in the twin trifecta, until after the results of the second race of the twin trifecta are official.]

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

Issued in Austin, Texas, on November 6, 1995.

TRD-9514404 Paula Cochran Carter
General Counsel
Texas Racing Commission

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 794-8461

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Part IX. Texas Lottery Commission

Chapter 401. Administration of the State Lottery Act

Subchapter D. Lottery Games Rules

• 16 TAC §401.309

The Texas Lottery Commission proposes new §401.309, relating to the assignability of prize winnings. The section clarifies that assignments of prizes are prohibited, including assignments supported by a judicial order.

The proposed rule will confirm the general rule set out in the Texas Government Code, §466.406, which is that assignments of prizes are prohibited. This statute does authorize a person other than a prize winner to be paid a prize pursuant to an appropriate judicial order. However, this rule will track the general rule of prohibition of assignability of prizes, including assignments supported by a judicial order. This rule does not define or identify the type or kind of order which would be an appropriate judicial order. It simply clarifies that an order issued to enforce or approve an agreement between a prize winner and any third party in exchange for consideration is not an appropriate judicial order, as contemplated by §466. 406.

Richard Sookiasian, budget analyst, has determined that for the first five-year period the section is in effect there will be fiscal implications for state government as a result of enforcing or administering the section. The estimated reduction in cost for 1996-$2,500; 1997-$2,500; 1998-$2, 500; 1999-$2,500; and 2000-$2,500. This reduction in cost is based on an estimated numbers of orders relating to voluntary assignments each year. There is no fiscal implications for local government.

Mr. Sookiasian also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be the avoidance of the possibility of the requirement that the Texas Lottery withhold tax on the entire jackpot amount. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Comments on the proposal may be submitted to Kimberly L. Kiplin, General Counsel, Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630.

The new section is proposed under the Texas Government Code, §466.015, which gives the Texas Lottery Commission authority to adopt rules governing the establishment and operation of the lottery and Texas Government Code, §467.102, which gives the Texas Lottery Commission the authority to adopt rules for the enforcement and administration of Texas Government Code, Chapter 467 and the laws under the Texas Lottery Commission's jurisdiction.

The proposed new section affects the Texas Government Code, §466.406 and §466.015.

§401.309. Assignability of Prizes Prizes in the lottery are not assignable except:

(1) if the prize winner dies before the prize is paid, the director shall pay the prize as required by law; or

(2) pursuant to an appropriate judicial order, which order shall not include an order issued to enforce or approve an agreement between a prize winner and any third party where the prize winner has agreed to transfer future prize payments to a third party in exchange for consideration.

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

Issued in Austin, Texas, on November 6, 1995.

TRD-9514279 Kimberly L. Kiplin
General Counsel
Texas Lottery Commission

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 323-3791

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TITLE 19. EDUCATION

Part II. Texas Education Agency

Chapter 75. Curriculum

Subchapter AA. Driver Education

- **19 TAC §75.1010**

The Texas Education Agency (TEA) proposes new §75.1010, concerning the certificate of completion of an approved driver education course. The rule establishes the fee for a driver education certificate and requirements relating to issuing, completing, and maintaining the certificate

J R. Cummings, associate commissioner for special populations, has determined that for the first five-year period the rule is in effect there will be fiscal implications as a result of enforcing or administering the rule. The TEA is required by Senate Bill 964, 74th Texas Legislature, 1995, to provide driver education certificates to public schools and colleges or universities. The fee for each certificate will be $1.00, which will be sufficient to cover TEA administrative costs associated with each certificate. The schools may recover the cost of the certificate by increasing the fees they charge for driver training programs. The effect on state government will be both an estimated additional cost and an estimated increase in revenue of $68,450 in fiscal year (FY) 1996 and $85,000 in each of FYs 1997-2000.

Mr. Cummings and Criss Cloudt, associate commissioner for policy planning and research, have 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 an increase in accountability for driver education certificates and a decrease in unauthorized use of the certificates. The anticipated economic cost to persons who are required to comply with the rule as proposed cannot be precisely determined. As discussed previously, the increase in costs for schools may be passed on to individuals through an increase in fees for driver training programs.

Comments on the proposal may be submitted to Criss Cloudt, Policy Planning and Research, 1701 North Congress Avenue, Austin, Texas 78701, (512) 463-9701. All requests for a public hearing on the proposed rule submitted under the Administrative Procedure Act and the Texas Register Act must be received by the commissioner of education not more than 15 calendar days after notice of a proposed change in the rule has been published in the *Texas Register*.

The new rule is proposed under Senate Bill 964, §9A, which authorizes TEA to provide by rule for the design and distribution of the driver education certificate and to charge a fee for each certificate.

The new rule implements Senate Bill 964, §9A.

§75.1010. Procedures for Student Certification.

(a) The Texas Education Agency (TEA) shall be responsible for providing the driver education certificate (Form DE-964E) to public schools, education service centers (ESCs), and colleges or universities exempt from the Texas Driver and Traffic Safety Education Act. The TEA shall also provide the DE-964E certificate to the Texas Department of Public Safety (DPS) for driver education programs approved by DPS. On this form, the driver education instructor and the chief school official, ESC or DPS director, or individuals designated by the chief school official or ESC or DPS directors must certify that the driver education course was conducted according to TEA and Texas Department of Public Safety (DPS) education standards for an approved course in driver education for Texas schools.

(1) For schools exempt from the Texas Driver and Traffic Safety Education Act and programs approved by DPS, the DE-964E certificate shall consist of five parts to be designated as follows: Texas Department of Public Safety Copies (Instruction Permit and Driver's License), Insurance Copy, Texas Education Agency Copy, and School Copy. The DE-964E certificate is used to certify completion of an approved driver education course and is a government record.

(2) The TEA shall charge a fee of $1.00 for each DE-964E certificate provided.

(3) The DE-964E certificates shall be issued to the chief school official, ESC or DPS director, or individuals designated by the chief school official or ESC or DPS director to be responsible for managing the certificates. The DPS shall be responsible for the DE-964E certificates provided to DPS approved driver education programs.

(4) Responsibilities of the chief school official, ESC or DPS director, or a designee.

(A) The chief school official, ESC or DPS director, or a designee may request to receive serially numbered DE-964E certificates for exempt schools and programs approved by DPS by submitting a completed order on the form provided by the commissioner of education stating the number of certificates to be purchased and including payment of all appropriate fees.

(B) The chief school official, ESC or DPS director, or a designee shall be responsible for accounting for each DE-964E certificate he or she has been issued. All DE-964E certificates and records of certificates shall be maintained in an orderly fashion.

(C) All DE-964E certificates and records of certificates must be provided to TEA or DPS upon request. The chief school official, ESC or DPS director, or a designee shall maintain the school copies of the certificates and submit the TEA copies of all issued certificates to TEA no later than February 15, June 15, and September 15 of each year. The chief school official, ESC or DPS director, or a designee shall return unissued DE-964E certificates to TEA within 30 days from the date the school discontinues the driver education program, unless otherwise notified.

(D) Each chief school official, ESC or DPS director, or a designee shall ensure that the policies concerning DE-964E certificates are followed by all individuals who have responsibility for the certificates.

(E) The chief school official, ESC or DPS director, or a designee shall maintain effective protective measures to ensure that unissued DE-964E certificates and records of certificates are secure. The chief school official, ESC or DPS director, or a designee shall report any incident of unaccounted DE-964E certificates to TEA immediately upon discovering the incident. If such an incident occurs, the chief school official, ESC or DPS director, or a designee shall conduct an investigation to determine the circumstances of the unaccounted certificates. A report of the findings of the investigation, including measures taken to prevent the incident from recurring, shall be submitted to TEA within 30 days of the discovery.

(F) The right to receive DE-964E certificates may be immediately suspended for a period determined by TEA if:

(i) a TEA investigation is in progress and TEA has reasonable cause to believe the certificates have been misused or abused or that adequate security was not provided; or

(ii) the chief school official, ESC or DPS director, or a designee fails to provide information on records requested by TEA or DPS within the allotted time.

(5) The DPS copy of a DE-964E certificate must contain the original signature of the certified instructor. The name of the chief school official, ESC or DPS director, or a designee may be written, stamped, or typed.

(6) The chief school official, ESC or DPS director, or a designee may issue a duplicate DE-964E certificate to a student who completed a course under the responsibility of the chief school official, ESC or DPS director, or a designee. The duplicate shall indicate the control number of the original DE-964E certificate.

(b) A student may take the examination for an instruction permit when the DE-964E certificate showing completion of class instruction or of specified lessons in concurrent programs is presented to any driver's license office.

(c) The instruction permit restricts a student to driving "accompanied by a licensed driver, age 18 or over, in the front seat." An examination to remove this restriction cannot be given until the licensee is 18 or presents the DE-964E certificate showing that he or she completed an approved driver education program, including the laboratory phase, after reaching the age of 16.

(d) An authorized DPS employee shall accept a DE-964E certificate when a certified driver education instructor certifies that the driver education program was completed according to the standards for an approved course and that the student has achieved the competencies specified in the curriculum guide. The school official shall make a copy of the teacher's certificate for driver education available to authorized DPS representatives when requested.

(e) When a student completes a driver education course under more than one certified driver education instructor, each instructor shall complete a separate DE-964E certificate for the part of the course he or she taught, attach to it a statement of the hours taught, and number the certificate in the order in which the student received instruction. However, the chief school official or ESC director may designate one certified driver education teacher to sign the DE-964E certificate. In a concurrent program, only one teacher shall be required to sign a DE-964E certificate, but each teacher giving instruction in the concurrent program must be a fully certified driver education teacher or state-approved teaching assistant. In each case, the teacher signing the DE-964E certificate must compile all records and verify the student's successful completion.

(f) When a student changes schools before completing the classroom or laboratory instruction, he or she shall receive credit for the hours completed, provided the student enrolls within 90 days and completes courses at least comparable to those in which the student was first enrolled. The teacher of the course in which the student was originally enrolled shall prepare a DE-964E certificate, attaching to it a statement showing the number of hours completed and the titles of the lessons in the state-approved curriculum guide completed for each phase of the program, and mail the form to the chief official of the school to which the student is transferring. When the student completes the course, the second teacher shall issue a second DE-964E certifying the student's instruction in the manner explained in subsection (e) of this section.

(g) When more than one certificate is necessary to show completion of a course, each certificate must be presented to the driver's license office when the student applies for a Texas instruction permit or for removal of restrictions. However, the chief school official or ESC director may designate one teacher to compile all records, verify the student's successful completion, and issue only one DE-964E.

(h) When it is impossible or inconvenient for the certified driver education instructor to sign a driver education certificate (because of transfer, illness, or death, etc.), the superintendent, ESC director, or chief school official or individuals designated by the chief school official or ESC director may, by completing the driver education affidavit form on the reverse side of the DE-964E certificate, certify that official records show a particular student completed an approved driver education course.

(i) Each record must be included as part of the student's record when it is necessary to compile records to verify that a student successfully completed a driver education course.

(j) A student may receive credit for course hours completed before a teacher's endorsement was suspended provided the suspension was not for an infraction that would conclusively establish the course as inadequate.

(k) The DPS shall accept DE-964E certificates marked "innovative program" only when the program has been approved in advance by TEA and DPS. When an innovative program has been approved, DPS shall be notified.

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

Issued in Austin, Texas, on November 6, 1995.

TRD-9514345

Criss Cloudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 463-9701

Chapter 176. Driver Training Schools

The Texas Education Agency (TEA) proposes new §§176.1001-176.1003, 176. 1101, and 176.1102, concerning Texas driver education and driving safety schools. The rules establish minimum requirements for teenage and adult driver education courses; the circumstances under which course approval may be revoked or denied; and responsibilities concerning issuance of the certificate of completion of an approved driver education course and the uniform certificate of completion for driving safety.

J. R. Cummings, associate commissioner for special populations, has determined that for the first five-year period the rules are in effect there will be fiscal implications as a result of enforcing or administering the rules. The effect on state government will include estimated additional costs and increases in revenue. The estimated additional cost will be $154,670 in each of fiscal years (FYs) 1996-2000. The estimated increase in revenue will be $493,576 in FY 1996 and $581,669 in each of FYs 1997-2000.

The additional costs include operating expenses and professional services. The increase in revenue will result primarily from an increase in the cost of driving safety certificates from $1.10 to $1.70. In addition, revenue will increase based on sales of a new driver education certificate. The TEA projects that the increases in revenue will be offset by costs associated with the increased regulation required by Senate Bill 964, 74th Texas Legislature, 1995.

The effect on small businesses (that is, school owners and course providers) cannot be precisely determined. Driving safety school owners will be required to pay an increase of $.60 per certificate of completion. Driver education school owners will be required to pay an increase of $1.96 per certificate of completion. The TEA anticipates that the increases in costs will be passed on to individuals through an increase in driving safety and driver education course fees.

Small driving safety course providers may incur a one-time expense of approximately $3,000 for new automation requirements. The cost of compliance for small businesses compared with the largest businesses affected by the proposed rules may differ slightly based on sales volume. However, the difference, resulting from the one-time automation costs, should be minimal.

Mr. Cummings and Criss Cloudt, associate commissioner for policy planning and research, have determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing the rules will be an increased awareness of traffic safety and a move toward reducing the toll in human suffering and property loss inflicted by vehicle crashes. The anticipated economic cost to persons who are required to comply with the rules as proposed cannot be precisely determined. As discussed previously, the increases in costs for school owners and course providers may be passed on to individuals through an increase

in driving safety and driver education course fees.

Comments on the proposal may be submitted to Criss Cloudt, Policy Planning and Research, 1701 North Congress Avenue, Austin, Texas 78701, (512) 463-9701. All requests for a public hearing on the proposed rules submitted under the Administrative Procedure Act and the Texas Register Act must be received by the commissioner of education not more than 15 calendar days after notice of a proposed change in the rules has been published in the *Texas Register*.

Subchapter AA. Commissioner's Rules on Minimum Standards for Operation of Licensed Texas Driver Education Schools

- **19 TAC §§176.1001-176.1003**

The new rules are proposed under Texas Civil Statutes, Article 4413(29c), §6(b), which authorizes the commissioner of education to establish by rule the curriculum and designate the textbooks that must be used in a driver education course; Texas Civil Statutes, Article 4413(29c), §9A, which authorizes TEA to provide by rule for the design and distribution of the certificate of completion of an approved driver education course; and Texas Civil Statutes, Article 6701d, §143A(f), which authorizes TEA to provide by rule for the design and distribution of the uniform certificate of course completion.

The new rules implement Texas Civil Statutes, Article 4413(29c), §6(b); Article 4413(29c), §9A; and Article 6701d, §143A(f).

§176.1001. Definitions. The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

Break–An interruption in a course of instruction occurring after the course introduction and before the course summation.

Chief school official–A person as defined in §176.2 of this title (relating to Definitions).

Clock hour–55 minutes of instruction in a 60-minute period for a driver education classroom session; and 60 minutes of instruction in a 60-minute period for in-car instruction.

DE-964–The driver education certificate of completion used for certifying completion of an approved driver education course. This term encompasses all parts of a certificate of completion with the same control number issued for an approved driver education course. It is a government record.

Division director–A person as defined in §176.2 of this title (relating to Definitions).

Public or private school–A school as defined in §176.2 of this title (relating to Definitions).

§176.1002. Courses of Instruction.

(a) The educational objectives of adult driver education courses shall include, but not be limited to, promoting respect for and encouraging observance of traffic laws and traffic safety responsibilities of driver education and citizens; reducing traffic violations; reducing traffic-related injuries, deaths, and economic losses; and motivating development of traffic-related competencies through education, including, but not limited to, Texas traffic laws, risk management, driver attitudes, courtesy skills, and evasive driving techniques.

(b) This section contains requirements for driver education courses. For each course, curriculum documents and materials may be requested as part of the application for approval.

(1) Teenage driver education.

(A) Driver education schools instructing students ages 14-18 shall meet the requirements promulgated in the state-approved curriculum guide for driver education, the "Standards for an Approved Course in Driver Education for Texas Schools," and this chapter.

(B) Driver education schools that desire to instruct students ages 14-18 shall provide classes with uniform beginning and ending dates. Students shall be enrolled and in attendance in the class before the seventh hour of classroom instruction.

(i) Students shall proceed in a sequence approved by the division director. The units of instruction shall meet the requirements of the approved curriculum guide.

(ii) Students shall receive classroom instruction directly from an instructor who is certified and licensed by the Texas Education Agency (TEA). The instructor shall be in the classroom and available to students during the entire 32 hours of instruction, including self-study assignments. Instructors shall not have other teaching assignments or administrative duties during the 32 hours of classroom instruction.

(iii) Self-study assignments that present units outlined in the curriculum guide shall not exceed 25% of the course and shall be presented to the entire class simultaneously.

(C) Each classroom student shall be provided a driver education textbook currently adopted by the State Board of Education (SBOE).

(D) A copy of the current edition of the "Texas Driver Handbook" or TEA-approved study material shall be furnished to each student enrolled in the classroom phase of the driver education course.

(E) The school director shall ensure that each driver education instructor provides instruction as outlined in the most recent edition of the "Standards for an Approved Course in Driver Education for Texas Schools" and the current state-approved curriculum guide. In addition, the school director shall obtain a current copy of the "Standards for an Approved Course in Driver Education for Texas Schools" and a current state-approved curriculum guide appropriate for the phase of instruction.

(F) A school may not permit more than 36 students per driver education class, including make-up students

(G) When a student changes schools, interrupting the classroom phase of the driver education course, the school may grant credit for the hours completed, provided the student enters and completes within 90 days a course comparable to that in which the student first enrolled. Any credit received shall be documented in the student file.

(H) The classroom phase of driver education shall be completed in no fewer than 20, and no more than 90, calendar days from the first day of class, with no more than two hours of regularly scheduled classroom activities in one day. This shall not circumvent the attendance and progress policies.

(I) All in-car instruction shall consist of actual driving practice while the motor vehicle is in motion or as provided for in the curriculum guide for driver education. No school shall permit a ratio of less than two, or more than four, students per instructor, except as allowed by subparagraph (K)(i) of this paragraph. The in-car phase shall be completed in no fewer than 14 calendar days from the first actual driving lesson. The in-car phase shall be completed within 180 calendar days of the completion of the classroom phase or the first contracted in-car lesson, whichever comes first.

(J) A student must have a valid driver's license or instruction permit in his or her possession during behind-the-wheel instruction.

(K) Driver education schools are authorized the following exceptions to the Standards for an Approved Course in Driver Education for Texas Schools and the state-approved curriculum guide (driver ed-

ucation classroom and in-car instruction). These exceptions do not except a school from full compliance with any other provisions of Chapter 176 of this title (relating to Driver Training Schools).

(i) In-car instruction may be provided for only one student when it is not practical to instruct more than one student or a hardship would result if scheduled instruction is not provided. The school shall obtain a waiver signed and dated by the parent or legal guardian of the student and the school director stating that the parent or legal guardian understands that the student may be provided in-car instruction on a one-on-one basis with only the instructor and student present in the vehicle during instruction. The waiver may be provided for any number of lessons; however, the waiver shall specify the exact number of lessons for which the parent is providing the waiver. The waiver shall be signed before the first lesson in which the parent is granting permission for the student to receive one-on-one instruction.

(ii) Schools are not required to employ supervising teachers to supervise and evaluate teaching assistants in driver education courses.

(iii) Motion picture films, slides, videos, tape recordings, and other media approved by the division director that present concepts outlined in the curriculum guide may be used as part of the required clock hours of the 32 hours of classroom instruction. Units scheduled to be instructed may also be conducted by guest speakers as part of the required clock hours of instruction. Together, these shall not exceed 640 minutes of the total 32 clock hours.

(iv) If a student is not 15 years of age by the end of the classroom phase, the school may still enroll the student as long as the student is 15 years of age within 30 days from the first day of scheduled classroom instruction.

(L) Each school owner that teaches driver education courses shall collect adequate student data to enable TEA to evaluate the overall effectiveness of the driver education course in reducing the number of violations and accidents of persons who successfully complete the course. The commissioner of education shall determine a level of effectiveness that serves the purposes of Texas Civil Statutes, Article 4413(29c). For each student, each school owner shall collect and, upon request, make available to TEA the following data:

(i) complete legal name;

(ii) driver's license number;

(iii) date of birth; and

(iv) date of course completion.

(2) Adult driver education. An adult driver education course may be approved as required under Texas Civil Statutes, Article 6687b, Chapter 173, §12, if the course meets the minimum standards outlined in this paragraph.

(A) Minimum course content. For students desiring to obtain an instruction permit under a concurrent program, the adult driver education course shall consist of six clock hours of classroom instruction that meets or exceeds the minimum requirements outlined in the state-approved curriculum guide for driver education. Under the concurrent program, a student may apply to the Department of Public Safety (DPS) for an instruction permit after completion of six hours of classroom instruction devoted to the lessons in the approved curriculum guide that cover driving laws and procedures.

(B) Course management. Approved adult driver education courses shall be presented in compliance with the following guidelines.

(i) Driver education schools instructing students ages 18 and over shall submit evidence of approval to issue the non-photograph driver's permit for adults from DPS with the application for approval of an adult driver education six-hour course. The course shall meet the minimum course content outlined in this subsection.

(ii) Students shall receive classroom instruction directly from a TEA-approved driver education teacher or supervising teacher, who shall be in the classroom and available to students during the entire six hours of instruction. The teacher shall not have other teaching assignments or administrative duties during the six hours of classroom instruction.

(iii) A copy of the current edition of the "Texas Driver Handbook" shall be furnished to each student enrolled in the course.

(iv) A driver education school shall not permit more than 36 students per class in the six-hour adult driver education course.

(v) Twenty-five minutes of time, exclusive of the 335 minutes of instruction, shall be dedicated to break periods. All break periods shall be provided after the course has begun and before the conclusion of the course.

(vi) em>Films, slides, videos, tape recordings, and other media approved by the division director that present concepts outlined in the curriculum guidelines may be used as part of the classroom instruction. Together, these shall not exceed 100 minutes of the total 360 minutes.

(vii) Administrative procedures, such as enrollment and attendance, shall not be included in the 360 minutes of instruction.

(viii) Students shall receive classroom instruction directly from an instructor licensed and certified by TEA who shall be in the classroom and available to students during the entire 360 minutes of instruction, including self-study assignments. Instructors shall not have other teaching assignments or administrative duties during the 360 minutes of instruction.

(C) Innovative adult driver education courses. Upon the written request of an applicant, the division director may approve the course structure of an innovative adult driver education course which would not otherwise be in compliance with this chapter. The application for an innovative delivery method for an adult driver education course shall include the following:

(i) the actual presentation that would be used;

(ii) justification demonstrating how the offered course would more completely satisfy the educational objectives of an adult driver education course than an adult driver education course that could be otherwise approved pursuant to this subchapter;

(iii) a specific plan of implementation and statement of goals;

(iv) the DE-964 signed by a properly licensed instructor;

(v) sufficient evidence that, with the exception of circumstances beyond the control of the school owner, the student has adequate access to a licensed driver education teacher or supervising teacher throughout the course such that the flow of instructional information is not delayed to the extent that learning is impaired;

(vi) sufficient evidence to demonstrate the security of the course and that it cannot be circumvented by the general public; and

(vii) any other information requested by the division director to adequately review the presentation.

(c) If, upon review and consideration of an original, renewal, or amended application for course approval, the commissioner of education determines that the applicant does not meet the legal requirements, the commissioner shall notify the applicant, setting forth the reasons for denial in writing.

(d) The commissioner of education may revoke approval of a school's courses under certain circumstances, including, but not limited to, the following.

(1) A statement contained in the application for the course approval is found to be untrue.

(2) The school has failed to maintain the faculty, facilities, equipment, or courses of study on the basis of which approval was issued.

(3) The school has been found to be in violation of Texas Civil Statutes, Article 4413(29c), and/or this chapter.

(4) The course has been found to be ineffective in carrying out the purpose of the Texas Driver and Traffic Safety Education Act.

§176.1003. Driver Education Certificates (DE-964).

(a) The DE-964 shall be issued only to primary driver education schools. The primary driver education school shall maintain a record reconciling all DE-964's that are distributed to branch driver education schools and courses offered by the primary school at public or private schools.

(b) School owners shall be responsible for the DE-964 in accordance with this subsection.

(1) A licensed or exempt driver education school may request to receive the serially numbered DE-964's by submitting an order form provided by the Texas Education Agency (TEA) stating the number of DE-964's to be purchased and including payment of all appropriate fees. The form shall have the original signature of the driver education school owner or school director when submitted.

(2) Each driver education school owner shall maintain the TEA copies of the DE-964's in ascending numerical order. The driver education school owner shall make available to TEA upon request copies of the issued DE-964's.

(3) Each driver education school owner shall ensure that the policies concerning the DE-964 are followed and communicated to all instructors and employees of the school.

(4) The driver education school owner or school director shall maintain effective protective measures to ensure that unissued DE-964's are secure. The driver education school owner or school director shall report all unaccounted DE-964's to the division director within two days of the discovery of the incident. In addition, the driver education school shall be responsible for conducting an investigation to determine the circumstances surrounding the unaccounted DE-964's. A report of the findings of the investigation, including preventative measures for recurrence, shall be submitted to the division director within 30 days of the discovery. Failure to provide adequate security may result in action against the instructor and/or school approvals and licenses. Each unaccounted or missing DE-964 may be considered a separate violation within the meaning of Texas Civil Statutes, Article 4413(29c), §24(a). This may include lost, stolen, or otherwise unaccounted DE-964's.

(5) No driver education school owner-operator or employee shall complete, issue, or validate a DE-964 to a person who has not successfully completed the entire portion of the course for which the DE-964 is being issued.

(c) Supervising teachers and driver education teachers shall be responsible for the DE-964 in accordance with this subsection.

(1) Each supervising teacher and/or driver education teacher shall ensure that the DE-964's are kept in such a manner as to ensure security of the DE-964's.

(2) Each supervising teacher and/or driver education teacher who signs the Instruction Permit portion of the DE-964 shall certify that the student has completed at least six hours of driver education driving laws and procedures and is enrolled in a driver education course approved by TEA.

(3) Each supervising teacher and/or driver education teacher who signs the driver's license portion of the DE-964 shall certify that the student has completed and passed both the classroom phase and laboratory phase of a driver education course approved by the Department of Public Safety (DPS) or TEA.

(d) If a driver education school issues a duplicate DE-964, the duplicate shall indicate the control number of the original DE-964.

(e) A student who changes schools, or re-enters the same school, before completing the classroom or laboratory instruction for teenage driver education shall receive credit for the hours completed, provided the student enters and completes within 90 days a course that is at least comparable to that in which the student was first enrolled. The teacher of the course in which the student was originally enrolled shall execute the DE-964 and attach to it a statement showing the specific lessons covered by the student as outlined in the state-approved curriculum guide and the number of hours completed. The teacher shall mail the DE-964 to the chief school official in the school to which the student is transferring.

(f) The fee for a DE-964 is $2.00.

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

Issued in Austin, Texas, on November 6, 1995.

TRD-9514346 **Criss Cloudt**
Associate Commissioner, Policy Planning and Research
Texas Education Agency

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 463-9701

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Subchapter BB. Commissioner's Rules on Minimum Standards for Operation of Texas Driving Safety Schools and Course Providers

• 19 TAC §176.1101, §176.1102

The new rules are proposed under Texas Civil Statutes, Article 4413(29c), §6(b), which authorize the commissioner of education to establish by rule the curriculum and designate the textbooks that must be used in a driver education course; Texas Civil Statutes, Article 4413(29c), §9A, which authorizes TEA to provide by rule for the design and distribution of the certificate of completion of an approved driver education course; and Texas Civil Statutes, Article 6701d, §143A(f), which authorizes TEA to provide by rule for the design and distribution of the uniform certificate of course completion.

The new rules implement Texas Civil Statutes, Article 4413(29c), §6(b); Article 4413(29c), §9A; and Article 6701d, §143A(f).

§176.1101. Definitions. The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

Division director-A person as defined in §176.102 of this title (relating to Definitions).

Uniform certificate of course completion-A document that is printed, administered, and supplied by the Texas Education Agency (TEA) to owners or primary consignees for issuance to students who successfully complete an approved driving safety course and that meets the requirements of the Uniform Act Regulating Traffic on Highways, Texas Civil Statutes, Article 6701d, §143A. This term encompasses all parts of a uniform certificate of course completion with the same serial number. It is a government record.

§176.1102. Uniform Certificate of Course Completion for Driving Safety Course.

(a) Course provider responsibilities. Course providers shall be responsible for uniform certificates of course completion in accordance with this subsection.

(1) The course provider of a driving safety course shall ensure that each instructor completes the verification of course completion document provided by the Texas Education Agency (TEA) or an approved equivalent. This verification of course completion document shall be returned to the course provider upon completion of each driving safety class and maintained at the course provider facility for no less than three years.

(2) The course provider shall maintain an ascending numerical accounting record approved by the division director of the students receiving the uniform certificates of course completion. The course provider shall make available upon request data pertaining to all uniform certificates of course completion purchased from TEA. The course provider shall also maintain a policy which effectively ensures protective measures are implemented by the course provider to ensure that unissued uniform certificates of course completion are secure at all times. The records and unissued uniform certificates of course completion shall be readily available for review by representatives of TEA.

(3) Course providers shall issue and mail uniform certificates of course completion only to students who have successfully completed the course provider's approved driving safety course taught by TEA- licensed instructors in TEA-approved locations.

(4) The course provider must keep all parts of all voided uniform certificates of course completion.

(5) Course providers shall ensure that adequate training is provided regarding course provider policies and updates on course provider policies to all driving safety schools offering their approved driving safety course.

(6) Course providers shall report all unaccounted uniform certificates of course completion to the division director within two business days of the discovery of the incident. In addition, the course provider shall be responsible for conducting an investigation to determine the circumstances surrounding the unaccounted uniform certificates of course completion. A report of the findings of the investigation, including preventative measures for recurrence, shall be submitted for approval to the division director within 30 days of the discovery on a form provided by TEA.

(7) Each unaccounted or missing uniform certificate of completion may be considered a separate violation within the meaning of Texas Civil Statutes, Article 4413(29c), §24(a). This may include lost, stolen, or otherwise unaccounted uniform certificates of course completion.

(8) Course providers shall mail all uniform certificates of course completion using first-class postage.

(9) Course providers shall not transfer uniform certificates of course completion to a course other than the course for which the certificates were ordered from TEA.

(10) No course provider or employee shall complete, issue, or validate a uniform certificate of course completion to a person who has not successfully completed the entire course.

(b) School owner responsibilities. In order to prevent misuse of uniform certificates of course completion, driving safety school owners shall ensure that:

(1) the course provider policies are followed and communicated to all instructors and employees of the school; and

(2) all records are returned to the course provider in a timely manner as set forth by the course provider.

(c) Instructor responsibilities. In order to prevent misuse of uniform certificates of course completion, driving safety instructors shall ensure that:

(1) all records are returned to the driving safety school to be forwarded to the course provider within the time allowed by course provider policy;

(2) the verification of course completion document provided by TEA is signed by the instructor who conducted the class upon completion of the class;

(3) the entire course is completed prior to signing the verification of course completion document;

(4) the court information is obtained from each student taking the driving safety class for the purposes of the Uniform Act Regulating Traffic on Highways, Texas Civil Statutes, Article 6701d, §143A. Students who want an insurance reduction only shall have insurance only indicated in the court information area on the verification of course completion document provided to the course provider; and

(5) the instructor adheres to the school and course provider policies.

(d) Fee. The fee for a uniform certificate of course completion is $1.70.

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

Issued in Austin, Texas, on November 6, 1995.

TRD-9514347

Criss Cloudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 463-9701

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TITLE 22. EXAMINING BOARDS

Part X. Texas Funeral Service Commission

Chapter 203. Licensing and Enforcement-Specific Substantive Rules

The Texas Funeral Service Commission proposes the repeal of §§203.1 and 203.7-203.11; and new §§203.1, and 203.7-203.11, concerning definitions, price disclosures, misrepresentations, disclosures, declaration of intent, and display of funeral merchandise. The repealed and new rules are being proposed to bring state regulations into alignment with Federal Trade Commission rules.

Marc Allen Connelly, general counsel, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Connelly also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be to prevent confusion by conforming state to federal regulations. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Comments on the proposal may be submitted to Marc Allen Connelly, General Counsel, Texas Funeral Service Commission, 8100 Cameron Road, Suite 550, Austin, Texas 78753.

• 22 TAC §§203.1, 203.7-203.11

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

The repeals are proposed pursuant to Texas Civil Statutes, Article 4582b, §5, which authorize the Texas Funeral Service Commission to adopt rules to administer the statute.

The proposed repeals affect Texas Civil Statutes, Article 4582b.

§203.1. Definitions.

§203.7. Comprehension of Disclosures.

§203.8. Telephone Price Disclosures.

§203.9. Price Disclosure.

§203.10. Display of Funeral Merchandise.

§203.11 Clarification of Fraudulent or Deceptive Conduct in Providing Funeral Services or Merchandise.

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

Issued in Austin, Texas, on November 1, 1995.

TRD-9514119 Marc Allen Connelly
General Counsel
Texas Funeral Service Commission

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 834-9992

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The new sections are proposed pursuant to Texas Civil Statutes, Article 4582b, §5, which authorize the Texas Funeral Service Commission to adopt rules to administer the statute.

The proposed new sections affect Texas Civil Statutes, Article 4582b.

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

Alternative container-An unfinished wood box or other non-metal receptacle or enclosure, without ornamentation or a fixed interior lining, which is designed for the encasement of human remains and which is made of fiberboard, pressed-wood, composition materials (with or without an outside covering) or like materials.

Cash advance item-Any item of service or merchandise described to a purchaser as a "cash advance," "accommodation," "cash disbursement," or similar term. A cash advance item is also any item obtained from a third party and paid for by the funeral provider on the purchaser's behalf. Cash advance items may include, but are not limited to: cemetery or crematory services; pallbearers; public transportation; clergy honoraria; flowers; musicians or singers; nurses; obituary notices; gratuities and death certificates.

Casket-A rigid container which is designed for the encasement of human remains and which is usually constructed of wood, metal, fiberglass, plastic, or like material, and ornamented and lined with fabric.

Commission-The Texas Funeral Service Commission, employees, agents and representatives.

Cremation-A heating process which incinerates human remains.

Crematory-Any person, partnership or corporation that performs cremation and sells funeral goods.

Direct cremation-Disposition of human remains by cremation, without formal viewing, visitation, or ceremony with the body present.

Funeral ceremony-A service commemorating the deceased with the body present.

Funeral goods-Goods which are sold or offered for sale directly to the public for use in connection with funeral services.

Funeral provider-Any person, partnership or corporation that sells or offers to sell funeral goods and funeral services to the public.

Funeral services-Any services which may be used to:

(A) care for and prepare deceased human bodies for burial, cremation or other final disposition; and

(B) arrange, supervise or conduct the funeral ceremony or the final disposition of deceased human bodies.

Immediate burial-Disposition of human remains by burial, without formal viewing, visitation, or ceremony with the body present, except for a graveside service.

Memorial service-A ceremony commemorating the deceased without the body present.

Outer burial container-Any container which is designed for placement in the grave around the casket including, but not limited to, containers commonly known as burial vaults, grave boxes, and grave liners.

Person-Any individual, partnership, corporation, association, government or governmental subdivision or agency, or other entity.

Services of funeral director and staff-The basic services, not to be included in prices of other categories, that must be stated separately on the general price list or written memorandum, that are furnished by a funeral provider in arranging any funeral, such as conducting the arrangements conference, planning the funeral, obtaining necessary permits, and placing obituary notices.

§203.7. Price Disclosures.

(a) Unfair or deceptive acts or practices. In selling or offering to sell funeral goods or funeral services to the public, it is an unfair or deceptive act or practice for a funeral provider to fail to furnish accurate price information disclosing the cost to the purchaser for each of the specific funeral goods and funeral services used in connection with the disposition of deceased human bodies, including at least the price of embalming, transportation of remains, use of facilities, caskets, outer burial containers, immediate burials, or direct cremations, to persons inquiring about the purchase of funerals. Any funeral provider who complies with the preventive requirements in subsection (b) of this section is not engaged in the unfair or deceptive acts or practices defined here.

(b) Preventive requirements. To prevent these unfair or deceptive acts or practices, as well as any other unfair or deceptive acts or practices, funeral providers must:

(1) Telephone price disclosure. Tell persons who ask by telephone about the funeral provider's offerings or prices any accurate information from the price lists described in paragraphs (2)-(4) of this subsection and any other readily available information that reasonably answers the question.

(2) Casket price list.

(A) Give a printed or typewritten price list to people who inquire in person about the offerings or prices of caskets or alternative containers. The funeral provider must offer the list upon beginning discussion of, but in any event before showing caskets. The list must contain at least the retail prices of all caskets and alternative containers offered which do not require special ordering, enough information to identify each, and the effective date for the price list. In lieu of a written list, other formats, such as notebooks, brochures, or charts may be used if they contain the same information as would the printed or typewritten list, and display it in a clear and conspicuous manner. Provided, however, that funeral providers do not have to make a casket price list available if the funeral providers place on the general price list, specified in paragraph (4) of this subsection, the information required by this paragraph.

(B) Place on the list, however produced, the name of the funeral provider's place of business and a caption describing the list as a "casket price list."

(3) Outer burial container price list.

(A) Give a printed or typewritten price list to persons who inquire in person about outer burial container offerings or prices. The funeral provider must offer the list upon beginning discussion of, but in any event before showing the containers. The list must contain at least the retail prices of all outer burial containers offered which do not require special ordering, enough information to identify each container, and the effective date for the prices listed. In lieu of a written list, the

funeral provider may use other formats, such as notebooks, brochures, or charts, if they contain the same information as the printed or typewritten list, and display it in a clear and conspicuous manner. Provided, however, that funeral providers do not have to make an outer burial container price list available if the funeral providers place on the general price list, specified in paragraph (4) of this subsection, the information required by this paragraph.

(B) Place on the list, however produced, the name of the funeral provider's place of business and a caption describing the list as an "outer burial container price list."

(4) General price list.

(A) Written list required.

(i) Give a printed or typewritten price list for retention to persons who inquire in person about the funeral goods, funeral services or prices of funeral goods or services offered by the funeral provider. The funeral provider must give the list upon beginning discussion of any of the following:

(I) The prices of funeral goods or funeral services;

(II) The overall type of funeral service or disposition; or

(III) Specific funeral goods or funeral services offered by the funeral provider.

(ii) The requirement in subparagraph (A)(i) of this paragraph applies whether the discussion takes place in the funeral home or elsewhere. Provided, however, that when the deceased is removed for transportation to the funeral home, an in-person request at that time for authorization to embalm, required by §203.8(a)(2)(c)(ii), does not, by itself, trigger the requirement to offer the general price list if the provider in seeking prior embalming approval discloses that embalming is not required by law except in certain special cases, if any. Any other discussion during that time about prices or the selection of funeral goods or services triggers the requirement under subparagraph (A)(i) of this paragraph to give consumers a general price list.

(iii) The list required in subparagraph (A)(i) of this paragraph must contain at least the following information:

(I) the name, address, and telephone number of the funeral provider's place of business;

(II) a caption describing the list as a "general price list"; and

(III) the effective date for the price list.

(B) Include on the price list, in any order, the retail prices (expressed either as the flat fee, or as the price per hour, mile or other unit of computation) and the other information specified as follows for at least each of the following items, if offered for sale:

(i) forwarding of remains to another funeral home, together with a list of the services provided for any quoted price;

(ii) receiving remains from another funeral home, together with a list of the services provided for any quoted price;

(iii) the price range for the direct cremations offered by the funeral provider, together with:

(I) a separate price for a direct cremation where the purchaser provides the container;

(II) separate prices for each direct cremation offered including an alternative container; and

(III) a description of the services and container (where applicable), included in each price;

(iv) the price range for the immediate burials offered by the funeral provider, together with:

(I) a separate price for an immediate burial where the purchaser provides the casket;

(II) separate prices for each immediate burial offered including a casket or alternative container; and

(III) a description of the services and container (where applicable) included in that price;

(v) transfer of remains to funeral home;

(vi) embalming;

(vii) other preparation of the body;

(viii) use of facilities and staff for viewing;

(ix) use of facilities and staff for funeral ceremony;

(x) use of facilities and staff for memorial service;

(xi) use of equipment and staff for graveside service;

(xii) hearse; and

(xiii) limousine.

(C) Include on the general price list, in any order, the following information:

(i) either of the following:

(I) the price range for the caskets offered by the funeral provider, together with the statement: "A complete price list will be provided at the funeral home."; or

(II) the prices of individual caskets, disclosed in the manner specified by paragraph (2)(A) of this subsection; and

(ii) either of the following:

(I) the price range for the outer burial containers offered by the funeral provider, together with the statement: "A complete price list will be provided at the funeral home."; or

(II) the prices of individual outer burial containers, disclosed in the manner specified by paragraph (3)(A) of this subsection; and

(iii) either of the following:

(I) the price for the basic services of funeral director and staff, together with a list of the principal basic services provided for any quoted price and, if the charge cannot be declined by the purchaser, the statement: "This fee for our basic services will be added to the total cost of the funeral arrangements you select. (This fee is already included in our charges for direct cremations, immediate burials, and forwarding or receiving remains.)". If the charge cannot be declined by the purchaser, the quoted price shall include all charges for the recovery of unallocated funeral provider overhead, and funeral providers may include in the required disclosure the phrase "and overhead" after the word "services"; or

(II) the following statement: "Please note that a fee of (specify dollar amount) for the use of our basic services is included in the price of our caskets. This same fee shall be added to the

total cost of your funeral arrangements if you provide the casket. Our services include (specify)." The fee shall include all charges for the recovery of unallocated funeral provider overhead, and funeral providers may include in the required disclosure the phrase "and overhead" after the word "services." The statement must be placed on the general price list together with the casket price range, required by clause (i)(I) of this subparagraph, or together with the prices of individual caskets, required by clause (i)(II) of this subparagraph.

(D) The services fee permitted by subparagraph (C)(iii)(I) or (II) of this paragraph is the only funeral provider fee for services, facilities or unallocated overhead permitted by this part to be nondeclinable, unless otherwise required by law.

(E) Funeral providers must retain and make available for inspection by the commission, accurate copies of the price lists specified in this rule for at least one year after their last distribution to customers.

(5) Statement of funeral goods and services selected.

(A) Give an itemized written statement for retention to each person who arranges a funeral or other disposition of human remains, at the conclusion of the discussion of arrangements. The statement must list at least the following information:

(i) the funeral goods and funeral services selected by that person and the prices to be paid for each of them;

(ii) specifically itemized cash advance items (These prices must be given to the extent then known or reasonably ascertainable. If the prices are not known or reasonably ascertainable, a good faith estimate shall be given and a written statement of the actual charges shall be provided before the final bill is paid.); and

(iii) the total cost of the goods and services selected.

(B) The information required by this paragraph (5) of this subsection may be included on any contract, statement, or other document which the funeral provider would otherwise provide at the conclusion of discussion of arrangements.

(C) An accurate copy of each statement of funeral goods and services selected shall be kept by the funeral provider for at least one year from the date of the arrangements conference.

(6) Other pricing methods. Funeral providers may give persons any other price information, in any other format, in addition to that required by paragraph (2), (3), and (4) of this subsection so long as the statement required by paragraph (5) of this subsection is given when required by the rule.

§203.8. Misrepresentations.

(a) Purchases of funeral goods and services.

(1) Unfair or deceptive acts or practices. In selling or offering to sell funeral goods or funeral services, it is an unfair or deceptive act or practice for a funeral provider to:

(A) condition the furnishing of any funeral good or funeral service to a person arranging a funeral upon the purchase of any other funeral good or funeral service, except as required by law or as otherwise permitted by this part;

(B) charge any fee as a condition to furnishing any funeral goods or funeral services to a person arranging a funeral, other than the fees for:

(i) services of funeral director and staff, permitted by §203.7(b)(4)(C)(iii);

(ii) other funeral services and funeral goods selected by the purchaser; and

(iii) other funeral goods or services required to be purchased, as explained on the itemized statement in accordance with subsection (e)(2) of this section.

(2) Preventive requirements.

(A) To prevent these unfair or deceptive acts or practices, funeral providers must:

(i) place the following disclosure in the general price list, immediately above the prices required by §203.7(b)(4)(B) and (C): "The goods and services shown as follows are those we can provide to our customers. You may choose only the items you desire. If legal or other requirements mean you must buy any items you did not specifically ask for, we will explain the reason in writing on the statement we provide describing the funeral goods and services you selected." Provided, however, that if the charge for "services of funeral director and staff" cannot be declined by the purchaser, the statement shall include the sentence: "However, any funeral arrangements you select will include a charge for our basic services" between the second and third sentences of the statement specified previously herein. The statement may include the phrase "and overhead" after the word "services" if the fee includes a charge for the recovery of unallocated funeral provider overhead;

(ii) place the following disclosure in the statement of funeral goods and services selected, required by §203.7(b)(5)(A): "Charges are only for those items that you selected or that are required. If we are required by law or by a cemetery or crematory to use any items, we will explain the reasons in writing as follows. "

(B) A funeral provider shall not violate this section by failing to comply with a request for a combination of goods or services which would be impossible, impractical, or excessively burdensome to provide.

(b) Embalming provisions.

(1) Deceptive acts or practices. In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(A) represent that state or local law requires that a deceased person be embalmed when such is not the case;

(B) fail to disclose that embalming is not required by law except in certain special cases, if any.

(2) Preventive requirements. To prevent these deceptive acts or practices, as well as other unfair or deceptive acts or practices, funeral providers must:

(A) not represent that a deceased person is required to be embalmed for:

(i) direct cremation;

(ii) immediate burial; or

(iii) a closed casket funeral without viewing or visitation when refrigeration is available and when state or local law does not require embalming; and

(B) place the following disclosure on the general price list, required by §203.7(b)(4), in immediate conjunction with the price shown for embalming: "Except in certain special cases, embalming is not required by law. Embalming may be necessary, however, if you select certain funeral arrangements, such as a funeral with viewing. If you do not want embalming, you usually have the right to choose an arrangement that does not require you to pay for it, such as direct cremation or im-

mediate burial." The phrase "except in certain special cases" need not be included in this disclosure if state or local law in the area(s) where the provider does business does not require embalming under any circumstances.

(C) It is an unfair or deceptive act or practice for any provider to embalm a deceased human body for a fee unless:

(i) state or local law or regulation requires embalming in the particular circumstances regardless of any funeral choice which the family might make; or

(ii) prior approval for embalming (expressly so described) has been obtained from a family member or other authorized person; or

(iii) the funeral provider is unable to contact a family member or other authorized person after exercising due diligence, has no reason to believe the family does not want embalming performed, and obtains subsequent approval for embalming already performed (expressly so described). In seeking approval, the funeral provider must disclose that a fee will be charged if the family selects a funeral which requires embalming, such as a funeral with viewing, and that no fee will be charged if the family selects a service which does not require embalming, such as direct cremation or immediate burial.

(D) Preventive requirement. To prevent these unfair or deceptive acts or practices, funeral providers must include on the itemized statement of funeral goods and services selected, required by §203.7(b)(5), the statement: "If you selected a funeral that may require embalming, such as a funeral with viewing, you may have to pay for embalming. You do not have to pay for embalming you did not approve if you selected arrangements such as a direct cremation or immediate burial. If we charged for embalming, we will explain why as follows."

(c) Casket for cremation provisions.

(1) Deceptive acts or practices. In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(A) represent that state or local law requires a casket for direct cremations;

(B) represent that a casket is required for direct cremations; or

(C) require that a casket be purchased for direct cremations.

(2) Preventive requirements.

(A) To prevent these deceptive acts or practices, funeral providers must place the following disclosure in immediate conjunction with the price range shown for direct cremations: "If you want to arrange a direct cremation, you can use an alternative container. Alternative containers encase the body and can be made of materials like fiberboard or composition materials (with or without an outside covering). The containers we provide are (specify containers)." This disclosure only has to be placed on the general price list if the funeral provider arranges direct cremations.

(B) If the funeral provider arranges for direct cremations, an alternative container must be made available.

(d) Outer burial container provisions.

(1) Deceptive acts or practices. In selling or offering to sell funeral goods and funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(A) represent that state or local laws or regulations, or particular cemeteries, require outer burial containers when such is not the case;

(B) fail to disclose to persons arranging funerals that state law does not require the purchase of an outer burial container.

(2) Preventive requirement. To prevent these deceptive acts or practices, funeral providers must place the following disclosure on the outer burial container price list, required by §203.7(b)(3)(A), or, if the prices of outer burial containers are listed on the general price list, required by §203.7(b)(4), in immediate conjunction with those prices: "In most areas of the country, state or local law does not require that you buy a container to surround the casket in the grave. However, many cemeteries require that you have such a container so that the grave will not sink in. Either a grave liner or a burial vault will satisfy these requirements." The phrase "in most areas of the country" need not be included in this disclosure if state or local law in the area(s) where the provider does business does not require a container to surround the casket in the grave.

(e) General provisions on legal and cemetery requirements.

(1) Deceptive acts or practices. In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for funeral providers to represent that federal, state, or local laws, or particular cemeteries or crematories, require the purchase of any funeral goods or funeral services when such is not the case.

(2) Preventive requirements. To prevent these deceptive acts or practices, as well as the deceptive acts or practices identified in subsections (a)(1), (b)(1), and (c)(1) of this section, funeral providers must identify and briefly describe in writing on the statement of funeral goods and services selected (required by §203.7(b)(5)) any legal, cemetery, or crematory requirement which the funeral provider represents to persons as compelling the purchase of funeral goods or funeral services for the funeral which that person is arranging.

(f) Provisions on preservative and protective value claims. In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(1) represent that funeral goods or funeral services will delay the natural decomposition of human remains for a long-term or indefinite time;

(2) represent that funeral goods have protective features or will protect the body from gravesite substances, when such is not the case.

(g) Cash advance provisions.

(1) Deceptive acts or practices. In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(A) represent that the price charged for a cash advance item is the same as the cost to the funeral provider for the item when such is not the case;

(B) fail to disclose to persons arranging funerals that the price being charged for a cash advance item is not the same as the cost to the funeral provider for the item when such is the case.

(2) Preventive requirements. To prevent these deceptive acts or practices, funeral providers must place the following sentence in the itemized statement of funeral goods and services selected, in immediate conjunction with the list of itemized cash advance items required by §203.7(b)(5)(A)(ii): "We charge you for our services in obtaining: (specify cash advance items)," if the funeral provider makes a charge upon, or receives and retains a rebate, commission or trade or volume discount upon a cash advance item.

§203.9. Disclosures. To prevent the unfair or deceptive acts or practices specified in

§203.7 and §203.8, funeral providers must make all disclosures required by those sections in a clear and conspicuous manner. Providers shall not include in the casket, outer burial container, and general price lists, required by §203.7(b)(2)-(4), any statement or information that alters or contradicts the information required by this rule to be included in those lists.

§203.10. Declaration of Intent.

(a) Except as otherwise provided in §203.7(a), it is a violation of this rule to engage in any unfair or deceptive acts or practices specified in this rule, or to fail to comply with any of the preventive requirements specified in this rule;

(b) The provisions of this rule are separate and severable from one another. If any provision is determined to be invalid, it is the Commission's intention that the remaining provisions shall continue in effect.

(c) This rule shall not apply to the business of insurance or to acts in the conduct thereof.

§203.11. Display of Funeral Merchandise. The commission will approve only those display rooms in funeral establishments which meet the requirements of Texas Civil Statutes, Article 4582b, §4(C)(5), that are designed and utilized to allow the public to make a private inspection and selection, if they so desire.

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

Issued in Austin, Texas, on November 1, 1995.

TRD-9514118 Marc Allen Connelly
General Counsel
Texas Funeral Service Commission

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 834-9992

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Part XIX. Polygraph Examiners Board

Chapter 391. Polygraph Examiner Internship

• 22 TAC §391.3

The Polygraph Examiners Board proposes an amendment to §391.3, concerning the internship training schedule. The amendment is proposed for the ultimate benefit of the public by insuring that only qualified polygraph schools will be approved by the Board. The amendment is proposed pursuant to Article 4413(29cc) Texas Civil Statutes, Article §6(a) and §8(a)(3) which allow the Board the authority to issue regulations consistent with the provisions of the Polygraph Examiners Act.

Article 4413(29cc) Texas Civil Statutes, Article, §6(a) and §8(a)(3) are affected by this proposal.

Bryan M. Perot, Executive Officer has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Perot also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be that the polygraph industry will be more closely regulated in areas that the Board determines to be critical.

Comments on the proposal may be submitted to Bryan M. Perot, Executive Officer, Polygraph Examiners Board, P.O. Box 4087, Austin, Texas, 78773, (512) 465-2058.

The amendment is proposed under Texas Civil Statutes, Article 4413(29cc), which provide the Polygraph Examiners Board with the authority to regulate persons who purport to be able to detect deception or to verify truth of statements through the use of instrumentation.

No statutes, article, or codes are affected by the amendment.

§391.3. Internship Training Schedule. The following internship schedule has been approved and adopted by the board as a minimum type and number of hours of any internship training program to be utilized in course of supervised instruction of not less than 32 hours per week:

(1) -(12) (No change.)

(13) Approved polygraph schools include the following:

(A)-(J) (No change.)

(K) Western Oregon State College School of Polygraphy.

(L)[(K)] Any other polygraph school or institution the board may approve from time to time.

(14)-(17) (No change.)

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

Issued in Austin, Texas, on November 1, 1995.

TRD-9514189 Bryan M. Perot
Executive Officer
Polygraph Examiners Board

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 465-2058

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Part XX. Texas Board of Private Investigators and Private Security Agencies

Chapter 423. Rules of Procedure and Seal Code of Professional Responsibility and Conduct

• 22 TAC §423.4

The Texas Board of Private Investigators and Private Security Agencies proposes new §423.4, concerning Continuing Education Course for Private Investigators. The Board has determined that this amendment is necessary in order to comply with the provisions of House Bill 713 of the 74th Texas Legislature. This section defines the number of hours and types of continuing education programs to be completed by all private investigators in the State of Texas.

Clema D. Sanders has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state and local government as a result of enforcing or administering the rule.

Ms. Sanders also has determined that for each year of the first five years the rule as proposed is in effect the public benefits anticipated as a result of enforcing the rule as proposed will be the availability of licensed private investigators who have undergone training in various aspects of their professional. There will be no effect on small businesses. The anticipated economic cost to persons who are required comply with the rule as proposed will be minimal.

Comments on the proposal may be submitted to Clema D. Sanders, Texas Board of Private Investigators and Private Security Agencies, P.O. Box 13509, Austin, Texas 78711.

The new section is proposed under Texas Civil Statutes, Article 4413(29bb), §11(a)(3), which provide the Texas Board of Private Investigators and Private Security Agencies with the authority "to promulgate all rules and regulations necessary in carrying out the provisions of this Act."

Texas Civil Statutes, Article 4413(29bb) is affected by this new section.

§423.4. Continuing Education Course for Private Investigators.

(a) Beginning February 1, 1996, a person who is registered as a private investigator and/or a manager of an investigations company shall successfully complete a minimum total of 12 hours of Board approved continuing education credits within the two year period for which his private investigator's registration pocket card is issued. Proof of the required continuing edu-

cation must be received by the Board at the time of renewal of the private investigator's registration.

(1) The instructor of a continuing education course shall provide a certificate of completion to each person completing the course within seven days after the date the course was taught.

(2) The certificate of completion shall contain:

(A) the name and social security number of the person attending the course;

(B) the title and topic of the course;

(C) the number of hours of instruction provided;

(D) the signature of the instructor; and

(E) the words" has successfully completed a continuing education course for private investigators ".

(3) Copies of certificates of completion for the continuing education course for private investigators shall be submitted to the Board by a private investigator and/or a manager at the time of their renewal.

(b) To receive Board approval, a continuing education course shall contain instruction relating to one or more of the following:

(1) Investigative procedures and practices.

(2) Business practices.

(3) Legal aspects of private investigation.

(4) Ethical aspects of private investigation.

(c) To receive Board approval, a continuing education course shall contain no less than 4 hours of instruction.

(d) The Executive Director shall approve classes for continuing education that she determines meets the qualifications of these rules and the Act. Such classes may be provided for and taught by any organization or person that, in the Executive Director's discretion, has the education, knowledge and experience to provide such information, including informal classes by manufacturers of products normally used in the course of investigations company business; informal classes by investigation affiliated associations; or other qualified entity. A person wishing to conduct a continuing education class must provide the Executive Director a description of the contents of the curriculum and the qualifications of any instructor. The Executive Director shall inform the person wishing to conduct the class of her approval or disapproval within 15 days of receiving the request. The Executive Director may delegate this responsibility to other employees of the Board.

(e) A private investigator or manager who is approved by the Board to instruct a continuing education course may count the hours instructed toward his own continuing education credits.

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

Issued in Austin, Texas, on November 8, 1995.

TRD-9514463 Clema D. Sanders
Executive Director
Texas Board of Private Investigators and Private Security Agencies

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 463-5545

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Chapter 428. Guard Dog Company

• 22 TAC §§428.3-428.10

The Texas Board of Private Investigators and Private Security Agencies proposes new §§428.3-428.10, concerning Personal Protection Authorization. This section clearly defines the Level Four training course which is required for obtaining a Personal Protection Authorization. The Board has determined that this new section is necessary in order to comply with the provisions of House Bill 713 of the 74th Texas Legislature.

Clema D. Sanders has determined that for the first five-year period the rules are in effect the fiscal implications for state government as a result of enforcing or administering the rules will be an estimated additional cost of $50,000 per year. There will be no fiscal implications for state or local government.

Clema D. Sanders has determined that for each year of the first five years the rules as proposed is in effect the public benefits anticipated as a result of enforcing the rules as proposed will be to ensure that all personal protection officers are qualified and receive adequate training. The effect on small businesses will be minimal. There are no anticipated economic costs to persons who are required comply with the rules as proposed.

Comments on the proposal may be submitted to Clema D. Sanders, Texas Board of Private Investigators and Private Security Agencies, P.O. Box 13509, Austin, Texas 78711.

The new sections are proposed under Texas Civil Statutes, Article 4413(29bb) , §11(a)(3), which provide the Texas Board of Private Investigators and Private Security Agencies with the authority "to promulgate all rules and regulations necessary in carrying out the provisions of this Act."

Texas Civil Statutes, Article 4413 (29bb) is affected by these new sections.

§428.3 Board Approved Personal Protection Officer Instructor/Level Four Training/Approved Commissioned Security Officer Training Schools.

(a) The personal protection officer course must be offered by Board approved commissioned security officer training schools and taught by Board approved Personal Protection Officer Instructors who are employed by the approved school. Personal Protection Officer Training Instructors must be approved to instruct the Level Four training. To receive Board approval, a school or instructor must submit an application to the Board on a form provided by the Board. Any person applying for approval as an instructor shall submit proof of qualification as required by the Board. Proof of qualification as an instructor shall include, but not be limited to, the following:

(1) An instructor's certificate issued by the Texas Commission on Law Enforcement Officer Standards and Education (TCLEOSE) along with proof that the individual has instructed nonlethal self-defense or nonlethal defense of a third party for three or more years. Evidence may include:

(A) Affidavit from employer.

(B) A copy of curriculum taught.

(2) An instructors certificate issued by federal, state or political subdivision law enforcement academy along with proof that the individual has instructed nonlethal self-defense or nonlethal defense of a third party for three or more years. Evidence may include:

(A) Affidavit from employer.

(B) A copy of curriculum taught.

(3) An instructor's certificate issued by the Texas Education Agency (TEA) along with proof that the individual has instructed nonlethal self-defense or nonlethal defense of a third party for three or more years. Evidence may include:

(A) Affidavit from employer.

(B) A copy of curriculum taught.

(4) An instructor's certificate relating to law enforcement, private security or industrial security issued by a junior college, college or university along with proof that the individual has instructed nonlethal self-defense or nonlethal defense of a third party, for three or more years. Evidence may include:

(A) Affidavit from employer.

(B) A copy of curriculum taught.

(5) Evidence of attending and successfully completing a Board approved training course for Personal Protection Officer Instructors.

(b) A letter of approval from the Board shall be issued to each approved instructor and shall be valid for a period of one year. The instructor's approval may be renewed for a period of one year upon application to the Board and payment of the renewal fee.

(c) A letter of approval for a personal protection officer instructor shall be considered a license with respect to suspension, revocation or denial.

(d) Notice shall be given in writing to the Board within 14 days after a change in the address of the approved instructor.

§428.4. Level Four Training (Personal Protection Officer Training Course).

(a) The Personal Protection Officer Training Course shall consist of a minimum of 15 classroom hours and shall be offered by Board approved training schools and taught by Board approved personal protection training instructors. All training shall be conducted with Board approved instructor present during all instruction. All students of a Personal Protection Officer Training Course shall be tested with an examination prepared by and obtained from the Board. Board official Personal Protection Officer Training Video Tapes shall be obtained from the Board and used as the curriculum. LEVEL FOUR TRAINING COURSE

(1) Introduction .5 hr.

(A) Credentials-Establishing credibility for purpose of student confidence

(B) Options in personal protection.

(C) Increased security consciousness

(2) Rules to employ in personal protection circumstances. 1. hr.

(A) Distance is insurance-maintain the defensive cocoon

(B) Reversing the flow of fear and intimidation

(C) Maximizing the use of the element of surprise

(D) Do not assume help will arrive

(E) Never turn your back on danger

(3) The Force Continuum: An academic study 1. hr.

(A) Command presence

(B) Verbal tactics

(C) Empty hand control (soft)

(D) Empty hand control (hard)

(E) Intermediate

(F) Deadly force

(G) Totality of circumstances affecting the use of force

(H) Evaluation and Testing

(4) UnArmed Defensive Tactics 10.hrs.

(A) Empty hand control (hard)/linear attack response techniques

(B) Empty hand control (soft)/Control measures, detainment technique, and takedowns.

(C) Practical simulations

(D) Evaluation and Testing

(5) Oleoresin Capsicum/Aerosol Projector Training 2.5 hrs. THIS SECTION MUST HAVE A CERTIFIED OLEORESIN CAPSICUM (O.C.) INSTRUCTOR TO OBTAIN CERTIFICATION IN O.C. USE.

(A) Historical overview

(B) Position on force continuum

(C) Familiarization with chemical agent, content, and dispensing unit

(D) Effects of O.C.

(E) Subject/Officer decontamination

(F) Deployment

(G) Practical exercises

(H) Evaluation and Testing 15 hours total

(b) Personal Protection Officer training video tapes will be prepared by Board staff and selected experts in the field of nonlethal self-defense and nonlethal self-defense of a third party.

§428.5. Personal Protection Officer Training Video Tapes, Examination, and Grade.

(a) The Boards official Personal Protection Officer Training Video Tapes shall be used by all Board approved schools and instructors as their curriculum and shall be obtained from the Board.

(b) All students of a Personal Protection Officer Training Course shall be tested with an examination prepared by and obtained from the Board.

(c) The passing grade of the Personal Protection Officer Training Course shall be a minimum of 70% correct answers on academic studies and must meet the minimum standards as set forth by the approved instructor on practical simulations.

§428.6. Certificate of Completion.

(a) The certificate of completion shall contain the:

(1) the name and approval number of the school;

(2) the name and signature of the school director;

(3) name, signature and approval number of the personal protection training instructor;

(4) date of completion;

(5) full name and social security number of the student; and

(6) the complete address of the location where the training was conducted.

(b) The certificate of completion shall contain the words "has successfully completed the 15-hour Personal Protection Officer Level Four Training Course approved by the Texas Board of Private Investigators and Private Security Agencies".

(c) Certificates of completion shall be issued by Board approved training school.

§428.7. Attendance, Progress and Completion Records Required. A Board approved school shall;

(1) Issue an original Certificate of Completion to each qualifying student, within seven days after the student qualifies.

(2) Maintain adequate records to show attendance and progress of grades of students and maintain on file a copy of each certificate issued to students at the Board approved training school.

(3) Make records available to Board Investigators for inspection during reasonable business hours.

§428.8 Requirements for Issuance of a Personal Protection Authorization.

(a) Shall submit a written application for a personal protection authorization on a form prescribed by the Board;

(b) Shall be at lease 21 years of age.

(c) Shall provide proof that the applicant is currently employed by a Investigations Company or a Guard Company. Proof may be in the form of an original sworn affidavit or letter from the employer, reflecting the company name, license number, phone number and address, signed by the licensed manager.

(d) Shall have a valid Security Officer Commission Card issued prior to applying for a personal protection authorization.

(e) Shall submit proof that the applicant has requalified with his handgun within 90 days of receipt of the application for a personal protection authorization.

(f) Shall submit proof that the applicant has successfully completed the Personal Protection Officer Course taught by a Board approved Personal Protection Officer Instructor.

(g) Shall submit proof of completion of the Minnesota Multiphasic Personality Inventory test. Proof of completion of the Minnesota Multiphasic Personality Inventory test shall be in the form of the Board approved Declaration of Psychological and Emotional Health and shall be signed by a licensed psychologist.

(1) The Declaration of Psychological and Emotional Health form submitted shall be the original signed by a licensed psychologist.

(2) A Declaration of Psychological and Emotional Health form shall be submitted upon renewing a Personal Protection Authorization, or after any break in employment.

(h) Personal Protection Officer Pocket Cards are not transferable and shall be issued to the licensed company by whom the personal protection officer is employed.

(i) Shall meet all qualifications established by the Act and by the rules of the board.

§428.9. Requirements of Personal Protection Officer Employer.

(a) Personal Protection Officer Employers shall:

(1) obtain Personal Protection Officer Lapel Pins from the Board and shall issue the same to their Personal Protection Officer,

(2) purchase from the Board approved Personal Protection Officer lapel pins annually as the lapel pins will expire on August 31 of each year.

(3) issued the Personal Protection Officer authorization pocket card issued by the Board to the Personal Protection Officer when received from the Board and affix a color photograph to the pocket card.

(4) shall maintain on file for Board inspection, contracts for Personal Protection Officer's;

(5) shall maintain on file for Board inspection current records on all persons issued a personal protection authorization. The records shall contain:

(A) current residence of personal protection officer:

(B) current duty assignment, location of assignment and the person(s) the officer is protecting from bodily harm along with the hours, date(s) and duties;

§428.10. Violations of the Act by Personal Protection Officers. The following shall be considered a violation of the Act if a personal protection officer;

(1) does not perform personal protection officer duties for the employer as indicated in the Board records;

(2) performs personal protection officer duties for any person(s) other than the employer as indicated in the Board records;

(3) does not affix his signature, right index fingerprint and color photograph to the personal protection officer pocket card issued by the Board;

(4) does not timely surrender his personal protection officer pocket card upon written notice served by the Board or his employer;

(5) fails to timely surrender his personal protection officer pocket card upon any arrest, charge, indictment or conviction of any felony or crime involving moral turpitude.

(6) while in the course and scope of his employment fails to wear a Board approved lapel pin on his outermost garment, or wears a Board approved lapel pin that is not valid.

(7) provides any other service other than providing personal protection from bodily harm to one or more individuals.

(8) fails to conceal his firearm on his person or carries his firearm in a manner that alarms another.

(9) fails to surrender his personal protection officer pocket card to his employer upon termination of employment.

(10) fails to carry on his person, the security officer commission and personal protection authorization issued to him while performing the officer's duties as a personal protection officer.

(11 fails to present the commission and authorization card on request.

(12) violates any portion of the Act or Board Rules.

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

Issued in Austin, Texas, on November 8, 1995.

TRD-9514462 Clema D. Sanders
Executive Director
Texas Board of Private Investigators and Private Security Agencies

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 463-5545

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Chapter 435. Training Programs

• 22 TAC §§435.1, 435.3, 435.15

The Texas Board of Private Investigators and Private Security Agencies proposes amendments to §§435.1, 435.9, and 435.15 concerning Training. This section clearly defines

the Level One, Two and Three training courses which are required for various members of the private security and private investigation industry. The Board has determined that this new section is necessary in order to ensure that all private security and private investigation registrants are properly trained.

Clema D. Sanders has determined that for the first five-year period the rules are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Ms. Sanders also has determined that for each year of the first five years the rules as proposed are in effect: the public benefits anticipated as a result of enforcing the rules as proposed will be to ensure that all registrants in the private security and private investigation industry receive adequate training. There will be minimal effect on small businesses. The anticipated economic cost to persons who are required comply with the rules as proposed will be none.

Comments on the proposal may be submitted to Clema D. Sanders, Texas Board of Private Investigators and Private Security Agencies, P.O. Box 13509, Austin, Texas 78711.

The new sections are proposed under Texas Civil Statutes, Article 4413(29bb) , §11(a)(3), which provide the Texas Board of Private Investigators and Private Security Agencies with the authority "to promulgate all rules and regulations necessary in carrying out the provisions of this Act."

Texas Civil Statutes, Article 4413(29bb) is affected by these new sections.

§435.1. Application for a Training Course Approval

(a) An application for [private security officer] training school approval shall be on a form prescribed by the Board to show proof that the applicant:

(1) has developed an adequate training course or is using the Board's [Private Security Officer] Training Manual as its curriculum:

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

(b) (No change.)

§435.9. [Basic] Training Course.

(a) In accordance with the Act, §20 and §32, the following training shall be required of employees: (The required number of training hours shall be actual training and shall not include examination or question and answer sessions which time shall be over and above the required training time.)

(1) Level One-All registrants, and commissioned guards including non-commissioned security officers, private investigators, branch office managers, licensed managers, alarm systems monitors, dog trainers and security consultants and excluding alarm installers, alarm salespersons, owner, officers, partners, and shareholders. A Certificate of Completion of Level 1 training shall be submitted to the Board along with the application to register the individual within 14 days after they commence employment.

(A) Introduction to Act and Board Rules-2 hours

(B) Field Note Taking-1/2 hour

(C) Report Writing (Phase I)-1/2 hour

(D) Introduction to Leadership and Professional Demeanor-1 hour

(E) Individual Company Policy (Not on Video, Provided by Company-1 hour

(F) Question and Answers and Examination to Follow

(2) Level Two-Unarmed and Armed Guards Only. A Certificate of Completion issued by a Board approved school and signed by a Board approved instructor shall be submitted to the Board within 90 days after they commence employment.

(A) Powers and Authority of Security Officers (Phase I)-2 hours

(B) Patrol Tactics, Observation Techniques-1-1/2 hours

(C) Recognizing Emergency Situations (Including Emergency Reporting)-1 hour

(D) Report Writing (Phase II)-1-1/2 hours

(E) Question and Answers and Examination to Follow

(3) Level Three-Armed Guards Only.

(A) Powers and Authority of Security Officer (Phase II) Including Legal Limitations on the Use of Firearms-8 hours

(B) Handling Emergency Situations-8 hours

(C) Firearms Training (Includes Range Firing and Procedures and Firearm Safety and Maintenance)-9 hours

(D) Using Handcuffs and Other Weapons-2 hours

(E) Uniform Regulations-1 hour

(F) Public Relations-1 hour

(G) Questions and Answers and Examination to Follow

[(a) The basic training course shall consist of a minimum of 30 hours and shall include:

[(1) legal limitations on the use of firearms;

[(2) powers and authority of a private security officer;

[(3) familiarity with the Act;

[(4) field note taking and report writing;

[(5) range firing and procedure, firearm safety and maintenance;

[(6) range qualification as required by the Act; and

[(7) first aid (successful completion of the American Red Cross eight-hour standard multimedia first aid course) or an equivalent course taught by the holder of a current emergency medical services instructor certificate issued by the Texas Department of Health or any other first aid course approved by the executive director;

[(8) the basic training course shall contain the following minimum hours:

[(A) introduction to the Act-two hours;

[(B) introduction to the board rules-two hours;

[(C) powers and authority of the security officer (includes range firing and procedures and firearm safety and maintenance)-five hours;

[(D) field notes-one hour;

[(E) report writing-two hours;

[(F) firearms training and qualification (includes range firing and procedures and firearm safety and maintenance)-five hours;

[(G) first aid training-eight hours;

[(H) review and examination-1.5 hours;]

(b) The Board's official Level One Training Videotape and test packet shall be obtained from the Board and used by all licensed companies as their curriculum for Level One Training. Videos may be used to enhance course presentation for Level Two and Level Three training but cannot be the only teaching methods used.

(c)[(b)] **The Training manual will be prepared by Board staff and other qualified individuals selected by the Director.** [selected private security representatives.]

§435.15. Security Officer Training Manual, Examination, and Grade.

(a) The Board's official [commissioned security officer] training manual shall be used by all Board-approved [security officer] training schools [, beginning September 1, 1984].

(b) All students of a [commissioned security officer] training school basic program shall be tested with an examination prepared by and obtained from the Board [, beginning September 1, 1984].

(c) The passing grade of the commissioned security officer examination shall be a minimum of 70% correct answers.

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

Issued in Austin, Texas, on November 8, 1995.

TRD-9514461 Clema D. Sanders
Executive Director
Texas Board of Private Investigators and Private Security Agencies

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 463-5545

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Chapter 452. Criminal History Background Checks

• 22 TAC §452.1

The Texas Board of Private Investigators and Private Security Agencies proposes new §452.1, concerning Criminal History Background Checks. This section is proposed to require all applicants to submit fingerprints and the required fees so that the Board may conduct a criminal history background check through both the Department of Public Safety and the Federal Bureau of Investigation. The Board has determined that this amendment is necessary to comply with the provisions of House Bill 713 of the 74th Texas Legislature.

Clema D. Sanders has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Sanders also has determined that for each year of the first five years the rule as proposed is in effect the public benefits anticipated as a result of enforcing the rule as proposed will be to ensure that all individuals in the private security and private investigation industry have had their backgrounds checked by the most thorough means available. There will be no effect on small businesses. The anticipated economic cost to persons who are required comply with the rule as proposed will be $25.

Comments on the proposal may be submitted to Clema D. Sanders, Texas Board of Private Investigators and Private Security Agencies, P.O. Box 13509, Austin, Texas 78711.

The new section is proposed under Texas Civil Statutes, Article 4413(29bb), §11(a)(3), which provide the Texas Board of Private Investigators and Private Security Agencies with the authority "to promulgate all rules and regulations necessary in carrying out the provisions of this Act."

Texas Civil Statutes, Article 4413(29bb) is affected by this new section.

§452.1. Criminal History Background Checks. All applicants for any license, permit or approval issued by the Board shall submit two sets of classifiable fingerprints on fingerprint cards obtained from the Board along with any required fees to the Board for the purpose of a criminal history check.

(1) One set of classifiable fingerprints shall be submitted by the Board to the Texas Department of Public Safety.

(2) One set of classifiable fingerprints shall be submitted to the Federal Bureau of Investigations.

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

Issued in Austin, Texas, on November 8, 1995.

TRD-9514460 Clema D. Sanders
Executive Director
Texas Board of Private Investigators and Private Security Agencies

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 463-5545

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Chapter 455. Fees

• 22 TAC §455.1

The Texas Board of Private Investigators and Private Security Agencies proposes an amendment to §455.1, concerning Fees. The Board has determined that this amendment is necessary in order to comply with House Bill 713 of the 74th Texas Legislature. This amendment details the fee for Personal Protection Authorization and details the different fees for resubmission of fingerprints to the Texas Department of Public Safety and to the Federal Bureau of Investigation.

Clema D. Sanders has determined that for the first five-year period the rule is in effect the fiscal implications for state government as a result of enforcing or administering the rule will be an estimated additional cost of $19,369 per year and estimated increase in revenue of $30,631 per year.

Ms. Sanders also has determined that for each year of the first five years the rule as proposed is in effect the public benefits anticipated as a result of enforcing the rule as proposed will be cost recovery for administration and enforcement of the Personal Protection Authorization program and for the resubmission of fingerprints. There will be no effect on small businesses. The anticipated economic cost to persons who are required comply with the rule as proposed will be $50 for those wishing to obtain their Personal Protection Authorization.

Comments on the proposal may be submitted to Clema D. Sanders, Texas Board of Private Investigators and Private Security Agencies, P.O. Box 13509, Austin, Texas 78711.

The amendment is proposed under Texas Civil Statutes, Article 4413(29bb), §11(a)(3), which provide the Texas Board of Private Investigators and Private Security Agencies with the authority "to promulgate all rules and regulations necessary in carrying out the provisions of this Act."

Texas Civil Statutes, Article 4413(29bb) is affected by this amendment.

§455.1. Fees. The Board has established the following fees for the administration of the Act:

(1)-(22) (No change.)

(23) Resubmission of fingerprints (rejected by DPS) $15.

(24) (No change.)

(25) Resubmission of fingerprints (rejected by FBI) $25.

(26) Personal Protection Authorization $50.

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

Issued in Austin, Texas, on November 8, 1995.

TRD-9514464 Clema D. Sanders
Executive Director
Texas Board of Private Investigators and Private Security Agencies

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 463-5545

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Part XXIX. Texas Board of Professional Land Surveying

Chapter 661. General Rules of Procedures and Practices

Applications, Examinations, and Licensing

• 22 TAC §661.41

The Texas Board of Professional Land Surveying proposes an amendment to §661.41 concerning filing an application for certification as a surveyor-in-training or registration as a registered professional land surveyor. The section clearly defines what a person must do to file an application.

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

Ms. Smith also has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section. There will be no effect or economic cost to small or large businesses or persons who are required to comply with this amendment.

Comments may be submitted to Sandy Smith, Texas Board of Professional Land Surveying, 7701 North Lamar Boulevard, Suite 400, Austin, Texas 78752.

The amendment is proposed under the Texas Civil Statutes, Article, §9, 5282c, which provide the Texas Board of Professional Land Surveying with the authority to make and enforce all reasonable and necessary rules, regulations and bylaws not inconsistent with the Texas Constitution, the laws of this state and this Act.

The Texas Civil Statutes, Article 5282c, is affected by this proposed amendment.

§661.41. Applications.

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

(d) No credit will be considered for experience obtained in violation of the Professional Land Surveying Practices Act or any applicable prior Act governing the surveying profession. Only that experience obtained in regular full-time employment, or as otherwise specifically allowed in the act and rules, will be considered in evaluating an applicant's record.

(e) (No change.)

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

Issued in Austin, Texas, on November 2, 1995.

TRD-9514166 Sandy Smith
Executive Director
Texas Board of Professional Land Surveying

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 452-9427

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TITLE 30. ENVIRONMENTAL QUALITY

Part I. Texas Natural Resource Conservation Commission

Chapter 115. Control of Air Pollution From Volatile Organic Compounds

Subchapter G. Consumer Related Sources

Utility Engines

• 30 TAC §115.621, §115.625

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

The Texas Natural Resource Conservation Commission (TNRCC or commission) proposes the repeal of §115.621 and §115.625, concerning Utility Engines. This action is proposed to remove regulations that have been made redundant by recent federal rulemaking and policy decisions.

The Utility Engine rule was adopted in November 1993, as part of a large rule revision package intended to reduce the emissions of volatile organic compounds (VOC) 15% below 1990 levels in the four areas of Texas that do not meet the national ambient air quality standard for ozone. These reductions were to be accomplished by the end of 1996. The rule established emission standards for small engines under 25 horsepower commonly used in lawn mowers, garden, and light industrial equipment. Emissions from these engines account for about 9.0% of VOC emissions inventories and were not previously regulated.

In December 1993, the Outdoor Power Equipment Institute (OPEI) filed suit against the TNRCC stating that the implementation schedule of the Utility Engine rule was in conflict with the Federal Clean Air Act. In an attempt to settle the suit, the TNRCC revised the rule in November 1994, to match the anticipated federal implementation schedule. The TNRCC retained the rule as a contingency in case the federal rule was delayed or modified. The TNRCC also agreed to evaluate emissions from 1994 and 1995 model year engines with the aid of the United States Environmental Protection Agency (EPA) Office of Mobile Sources. The OPEI contended that these engines, while not meeting the anticipated federal standards, produced less emissions than engines the TNRCC used to calculate emissions reductions required by 1996. Emissions data was submitted by the OPEI.

In May 1995, the federal small engine rule was adopted with an implementation schedule that called for the introduction of complying engines over a two-year period from January 1996 through December 1997. The TNRCC rule applies to engines manufactured after August 1, 1996, and conflicts with the adopted federal schedule. In September 1995, the EPA indicated that it would approve early reduction credit for 1994 and 1995 engines. This credit can be applied to the reductions in VOC that the TNRCC is required to achieve in the four ozone nonattainment areas.

Using conservative calculations, the emissions credits that accumulate as a result of these federal actions are comparable to those that the staff calculated from implementation of the TNRCC rule and make the rule unnecessary. Based on these developments, the staff recommends that the TNRCC repeal the Utility Engine rule.

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the proposed repeals are in effect there will be no fiscal implications for local or state governments.

Mr. Minick also has determined that for each year of the first five years the proposed repeals are in effect, the manufacturers of small engines will benefit through the removal of a requirement to supply a separate type of engine for the Texas market. This benefit should be passed on to the general public by keeping the manufacturer's marketing and subsequent retail prices lower. There are no anticipated economic costs to persons who are required to comply with the proposed repeals.

A public hearing on this proposal will be held in Austin on December 7, 1995 at 2:00 p.m. in Building E, Room 254S at the TNRCC offices located at 12100 Park 35 Circle, Austin. Individuals may present oral statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however a TNRCC staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Written comments not presented at the hearing may be submitted to the TNRCC central office in Austin. The deadline for submission of written comments will be Monday, Decem-

ber 11, 1995. Material received by the TNRCC Office of Policy and Regulatory Development by 4:00 p.m. on that date will be considered by the commission prior to any final action on the proposal. Please mail written comments to Heather Evans, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, and reference Rule Log Number 95170-115-AI. Comments can also be faxed to (512) 239-5687. Copies of the proposal are available at the central office of the TNRCC, Air Policy and Regulations Division, located at 12118 North IH-35, Park 35 Technology Center, Building E, Austin, and at all TNRCC regional offices. For further information, contact Beecher Cameron at (512) 239-1495.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

The repeals are proposed under the Texas Health and Safety Code (Vernon 1992), the Texas Clean Air Act (TCAA), §382.017, which provides the TNRCC with the authority to adopt rules consistent with the policy and purposes of the TCAA.

The proposed repeals affect the Health and Safety Code, §382.017.

§115.621. Control Requirements.

§115.625. Exemptions.

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

Issued in Austin, Texas, on November 6, 1995.

TRD-9514276 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: January 31, 1996

For further information, please call: (512) 239-1970

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TITLE 34. PUBLIC FINANCE

Part I. Comptroller of Public Accounts

Chapter 3. Tax Administration

Subchapter O. State Sales and Use Tax

- **34 TAC §3.295**

The Comptroller of Public Accounts proposes an amendment to §3.295, concerning natural gas and electricity. The amendment implements legislative changes to the Tax Code, §151.317 and §151.331. Subsection (a)(5)(E) and (F) are added to reflect legislated changes effective October 1, 1995, defining as noncommercial use the off-wing processing, overhaul, or repair of a jet turbine engine or its parts for a certificated or licensed carrier of persons or property, and the repair, maintenance, or restoration of rolling stock. Subsection (a)(7) is also amended to set out the comptroller's policy that repairing tangible personal property belonging to another person is a taxable service rather than processing. Subsection (a)(8) is amended to include in the definition of residential use the use by the owner of the dwelling, apartment, complex, or building or part of the building occupied and the use by a tenant under a contract for an initial term of more than 29 days. Subsection (e)(5) implements a policy change which waives the requirement for a predominant use study for companies that are in an industry on which an industry-wide study reflects that the natural gas or electricity used by companies in that industry will always qualify as exempt use. The waiver of the predominant use requirement for qualifying industries is retroactive to four years from the effective date of this rule. Subsection (g)(1) is clarified, regarding the exemption of natural gas or electricity used to transport materials extracted from the earth, by adding, as examples of eligible materials, crushed stone, sand and gravel, and water.

Mike Reissig, chief revenue estimator, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Reissig also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be in providing new information regarding tax responsibilities. The rule is adopted under the Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to persons who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Karey W. Barton, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

The amendment is proposed under the Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of the Tax Code, Title 2.

This amendment implements the Tax Code, §151.317.

§3.295. Natural Gas and Electricity.

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

(1)-(4) (No change.)

(5) Other noncommercial uses-include:

(A) exploration for [or] production or transportation of material extracted from the earth;

(B) (No change.)

(C) electrical processes such as electroplating, electrolysis, and cathode protection; [or]

(D) direct or indirect use, consumption, or loss of electricity by an electric utility engaged in the purchase of electricity for resale;[.]

(E) the off-wing processing, overhaul, or repair of a jet turbine engine or its parts for a certificated or licensed carrier of persons or property; or

(F) the repair, maintenance, or restoration of rolling stock.

(6) (No change.)

(7) Processing-The physical application of the materials and labor necessary to modify or to change the characteristics of tangible personal property. [The repair of tangible personal property by restoring it to its original condition is not considered processing of that property.] The property being processed may belong either to the processor or the customer, the only tests being whether the property is processed and whether it will ultimately be sold. [The mere packing, unpacking, or shelving of a product to be sold will not be considered to be processing of that product.] Direct use of natural gas or electricity in processing will be referred to as noncommercial use. Processing does not include remodeling or any action taken to prolong the life of tangible personal property or to prevent a deterioration of the tangible personal property being held for sale. **The repair of tangible personal property belonging to another by restoring it to its original condition is not considered processing of that property. The mere packing, unpacking, or shelving of a product to be sold will not be considered to be processing of that product.**

(8) Residential use-Use in a family dwelling or in a multifamily apartment complex or housing complex or nursing home or in a building or portion of a building occupied as a home or residence **when the use is by the owner of the dwelling, apartment, complex, home, or building or part of the building occupied. Residential use also includes use in a dwelling, apartment, complex, house, or building or part of a building occupied as**

a home or residence when the use is by a tenant who occupies the dwelling, apartment, complex, house, or building or part of a building under a contract for an express initial term of more than 29 consecutive days. Absent a contract, only the period exceeding 29 consecutive days will be considered residential use, when supported by valid documentation (i.e., receipts, cancelled checks, etc.). For purposes of the exemption for residential use of natural gas and electricity, nursing homes qualify for exemption only for periods beginning after December 31, 1987.

(b)-(d) (No change.)

(e) Determining predominant use: Utility studies.

(1)-(4) (No change.)

(5) This subsection does not apply to persons whose use of natural gas or electricity is for processing, manufacturing, or other noncommercial function if an industry-wide study for that particular industry reflects that the natural gas or electricity used would always qualify as exempt use. The industry-wide study must be submitted to the comptroller's office for review and approval. A subsequent study may be required, in the future, if factors relative to the original study change.

(f) (No change.)

(g) Transportation of a material extracted from the earth.

(1) Sales or use tax is not due on natural gas or electricity used to transport a material or its components extracted from the earth. Examples of materials or components extracted from the earth would be oil, natural gas, coal or coal slurry, **crushed stone, sand and gravel, and water.**

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

(h) (No change.)

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

Issued in Austin, Texas, on November 1, 1995.

TRD-9514193 Martin Cherry
Chief, General Law
Comptroller of Public Accounts

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 463-4028

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Part V. Texas County and District Retirement System

Chapter 101. Practice and Procedure Regarding Claims

• 34 TAC §101.6

The Texas County and District Retirement System proposes an amendment to §101.6, concerning the minimum time requirement for filing retirement applications prior to a selected effective retirement date for either service or disability retirement. This amendment is proposed to implement recently enacted amendments to Texas Government Code, Chapter 844, §844.101 and §844.301(b). House Bill 2283, 74th Legislature, 1995, eliminated the maximum period and reduced the minimum period preceding a selected effective retirement date during which an application for service or disability retirement could be submitted. Prior to the amendment, applications could not be submitted more than 90 days nor less than 30 days before a selected effective retirement date. The maximum limitation of 90 days was eliminated and the minimum period for submitting a retirement application prior to a selected effective retirement date was reduced to 15 days.

Terry Horton, Director of the Texas County and District Retirement System, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section as proposed.

Mr. Horton also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be that a member of the System will have greater flexibility in selecting an effective retirement date nearer in time to the decision to retire. There will be no effect on small businesses. There is no anticipated economic cost to persons required to comply with the section as proposed.

Comments on the proposal may be submitted to Terry Horton, Director, Texas County and District Retirement System, 400 West 14th Street, Austin, Texas 78701-1688.

The amendment is proposed under Government Code, §845.102, which provides the board of trustees of the Texas County and District Retirement System with the authority to adopt rules necessary or desirable for the effective administration of the System.

The Government Code, Chapter 844, §844.104 and §844.301(b) is affected by this amendment.

§101.6. Time Filing of Retirement Applications All applications for retirement, whether for service or for disability, must be filed not less than 15 [30 nor more than 90] days prior to the date specified by the member as the effective date of his or her retirement; the date specified as the effective date for retirement must be the last day of a calendar month, may not be earlier than one year after the effective date of membership, and may not be a date preceding the termination of the member's employment with **all** [the] participating **subdivisions** [subdivision].

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

Issued in Austin, Texas, on November 7, 1995.

TRD-9514425 Terry Horton
Director
Texas County and District Retirement System

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 476-6651

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• 34 TAC §101.7

The Texas County and District Retirement System proposes an amendment to §101.7, concerning the amount of time allowed to a member in which to submit all required documentation following the effective retirement date selected in a duly filed retirement application. This amendment requires that an applicant for benefits provide all documents reasonably related to his or her claim within four months following the effective retirement date chosen in the application. Failure to timely provide the documents without good cause being shown will invalidate the application and require a new application with a new effective retirement date. This proposed amendment is intended to encourage cooperation and diligence in completing the application process.

Terry Horton, Director of the Texas County and District Retirement System, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Horton also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be that the System will be able to more effectively and efficiently process benefit claims thereby improving service to its participants. There will be no effect on small businesses. There is no anticipated economic cost to persons required to comply with the section as proposed.

Comments on the proposal may be submitted to Terry Horton, Director, Texas County and District Retirement System, 400 West 14th Street, Austin, Texas 78701-1688.

The amendment is proposed under Government Code, §845.102, which provides the board of trustees of the Texas County and District Retirement System with the authority to adopt rules necessary or desirable for the effective administration of the System.

The Government Code, Chapter 845, §845.114 is affected by this amendment.

§101.7. Supporting Documents to be Submitted. The director is authorized to require submission of documents reasonably related to establishment of a claimed right to benefits. These documents include but are not limited to birth certificates; marriage licenses; divorce decrees; letters of guardianship; letters testamentary or letters of administration; death certificates; relevant court orders; sworn statements of witnesses and attending physicians; autopsy reports; sworn statements of the claimant or of others having personal knowledge of relevant facts. **Except upon good cause being shown, failure to submit all required documents within four months of the date specified by the member as his or her effective retirement date will invalidate the application for retirement (service or disability) for all purposes. Thereafter, a new application must be submitted and a new retirement date chosen in accordance with §101.6 of this title (relating to Time Filing of Retirement Applications).** [An applicant shall have a reasonable time from date of written request to furnish supporting documents required by the director.]

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

Issued in Austin, Texas, on November 7, 1995.

TRD-9514426 Terry Horton
Director
Texas County and District Retirement System

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 476-6651

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Chapter 103. Calculation or Types of Benefits

• 34 TAC §103.3

The Texas County and District Retirement System proposes an amendment to §103.3, concerning the requirement that the consent of the member's spouse be obtained before a retirement benefit can be paid in a form other than a joint-and-survivor annuity. The proposed amendment adds an exception to the consent requirement when a duly licensed physician has determined that the spouse is not mentally capable of managing his or her own affairs and the director is satisfied that a guardianship of the estate is not necessary. The competent spouse customarily assumes the responsibility for the control and management of the affairs of both the community estate and the incompetent spouse without formalizing his or her authority through the judicial system. The proposed amendment requiring only a physician's determination of incapacity supports this typical and usual practice without placing the additional financial burden upon the community of requiring a judicial determination.

Terry Horton, Director of the Texas County and District Retirement System, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section as proposed.

Mr. Horton also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be that the competent member of the marital community will be able to exercise judgment and discretion in the management and disposition of the member's retirement benefit without burdening the community estate with the additional expense of a judicial proceeding. There will be no effect on small businesses. There is no anticipated economic cost to persons required to comply with the section as proposed.

Comments on the proposal may be submitted to Terry Horton, Director, Texas County and District Retirement System, 400 West 14th Street, Austin, Texas 78701-1688.

The amendment is proposed under Government Code, §845.102, which provides the board of trustees of the Texas County and District Retirement System with the authority to adopt rules necessary or desirable for the effective administration of the System.

The Government Code, Chapter 804, §804.051 is affected by this amendment.

§103.3. Requirement of Spousal Consent.

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

(c) The consent required by subsection (a) of this section is not required if it is established to the satisfaction of the system that:

(1)-(3) (No change.)

(4) a duly licensed physician has determined that the spouse is not mentally capable of managing his or her own affairs and the director is satisfied that a guardianship of the estate is not necessary;

(5)[(4)] the spouse and the member will have been married for less than one year as of the date the annuity first becomes payable; or

(6)[(5)] a former spouse is entitled to receive a portion of the member's retirement benefit under a qualified domestic relations order.

(d) (No change.)

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

Issued in Austin, Texas, on November 7, 1995.

TRD-9514427 Terry Horton
Director
Texas County and District Retirement System

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 476-6651

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Chapter 105. Creditable Service

• 34 TAC §105.2

The Texas County and District Retirement System proposes an amendment to §105.2, concerning the exclusion of temporary employees from participation in the System. This amendment is proposed to implement recently enacted amendments to Texas Government Code, Chapter 841, §841.001. House Bill 2283, 74th Legislature, 1995, defined and clarified an exception to the eligibility and mandatory participation of temporary employees. The purpose of the system is to administer a retirement benefit earned for long-term, regular service. Excluding temporary employees from mandatory participation recognizes the current practice of many subdivisions in hiring temporary employees to fill short-term positions for special projects. This narrow exception to the mandatory participation and withholding requirements allows the participating subdivision, the System and the temporary employee to avoid the creation of temporary, non-retirement type accounts.

Terry Horton, Director of the Texas County And District Retirement System, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section as proposed.

Mr. Horton also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be that participating subdivisions, the System and the temporary employees will be able to eliminate the administrative burden associated with the withholding of employee contributions from wages, the establishment and maintenance of small temporary accounts, and the delay of the use of such wage contributions by temporary employees until a refund application is submitted. There will be no effect on small businesses. There is no anticipated economic cost to persons required to comply with the section as proposed.

Comments on the proposal may be submitted to Terry Horton, Director, Texas County and District Retirement System, 400 West 14th Street, Austin, Texas 78701-1688.

The amendment is proposed under Government Code, §845.102, which provides the board of trustees of the Texas County and District Retirement System with the authority to adopt rules necessary or desirable for the effective administration of the System.

The Government Code, Chapter 841, §841.001(6) and §841.001(15) is affected by this amendment.

§105.2. Probationary Employment.

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

(c) A subdivision may not exclude from membership in the system employees who are temporary employees except as provided in Texas Government Code, § 841.001(15).

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

Issued in Austin, Texas, on November 7, 1995.

TRD-9514428 Terry Horton
Director
Texas County and District Retirement System

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 476-6651

Chapter 109. Domestic Relations Orders

• 34 TAC §§109.3, 109.6-109.10, 109.13, 109.14

The Texas County And District Retirement System proposes amendments to §§109.3, 109.6-109.10, concerning the procedures for the determination, resolution and disposition of domestic relations orders; and new §109.13 and §109.14, concerning the use and submission of a simplified, pre-approved model qualified domestic relations order. Specifically, the amendments relate to notices mailed to the parties to the order; changes in statutory section numbers to conform with recodification; adoption of a fixed time for contesting a conditionally approved order; circumstances when a conditionally approved order is deemed to be an approved order; adoption of fixed time limits to commence and conclude action for contesting orders and bringing orders into compliance; and provisions permitting distributions to members prior to final determinations. The new sections provide a simplified model domestic relations order which has been preapproved as a qualified order if completed and submitted in accordance with those provisions.

Terry Horton, Director of the Texas County and District Retirement System, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Horton also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be the improvement in the efficient and effective administration of the system by streamlining the procedures for determining the qualification of domestic relations orders. Requiring diligent and timely action by the parties and authorizing the use of pre-approved simplified model orders will hasten the determination process and thereby allow the system to improve service to its members and participating subdivisions. There will be no effect on small businesses. There is no anticipated economic cost to persons required to comply with the sections as proposed.

Comments on the proposal may be submitted to Terry Horton, Director, Texas County and District Retirement System, 400 West 14th Street, Austin, Texas 78701-1688.

The amendments and new sections are proposed under Government Code, §845. 102, which provides the board of trustees of the Texas County and District Retirement System with the authority to adopt rules necessary or desirable for the effective administration of the System.

The Government Code, Chapter 804, §804.003 is affected by these amendments and new sections.

§109.3. Notice Regarding Receipt of Order. Upon receiving a domestic relations order, the domestic relations liaison shall promptly send a notice to those persons listed in paragraphs (1) and (2) of this section, stating that the system has received the domestic relations order and that it will be acted upon by the system in accordance with the procedures set forth in this chapter [a copy of which procedures will be enclosed with the notice]. The persons who are to receive the notice are:

(1)-(2) (No change.)

§109.6. Order Should Divide all Benefits.

(a) Under the Act, a participant's accumulated contributions (with interest as allowed thereon under the Act) may become payable to a participant upon terminating subdivision employment and membership in the system prior to retirement, as set forth in the Act, **§842.108** [§52.108], or may become payable to the participant's designee or estate under the Act, **§844.401** [§54.401], in the event of the participant's death prior to retirement. A domestic relations order regarding a participant who has not yet retired should clearly state the basis upon which any portion of such sums should be payable to an alternate payee. In the event that a domestic relations order does not clearly state how interest allowed on the contributions is to be divided, it will be divided (upon any payment of accumulated contributions under either the Act, **§842.108** [§52.108] or **§844.401** [§54.401]) pro rata on the basis that the amount awarded to the alternate payee bears to the total accumulated contributions.

(b) Under the Act, a service retirement benefit or a disability retirement benefit may become payable to the participant (and, upon the participant's death, to a designee) as set forth in the Act, **§§844.101-844.106** [§§54.101-54.106] and **§§844.301-844.305** [§§54. 301-54.3041]. A domestic relations order regarding a participant should clearly state the basis upon which any portion of such retirement benefit should be payable to an alternate payee.

(c) A supplemental death benefit may become payable under the Act, **§844.503** [§54.503] or **§844.504** [§54.504], upon the death of a participant who was or had been employed by certain of the subdivisions participating in the system. That benefit is not the property of a participant, but rather is a benefit that is paid by the system as a result of the death of a participant. If any portion of such benefit becomes payable to an alternate payee under the express wording of a qualified domestic relations order, it will be so paid upon the death of the participant; however, if the domestic relations order does not specifically provide that some portion of that benefit is to be paid to an alternate payee, then no portion of the supplemental death benefit shall be paid otherwise than as set forth in the Act, **§844.505** [§54.505].

§109.7. Conditional Approval of Order. If, upon receipt of a domestic relations order, the domestic relations liaison is of the opinion that it complies in all ways with the requirements for a qualified domestic relations order hereunder, the domestic relations liaison shall so state in the notice to be sent under §109.3 of this title (relating to Notice Regarding Receipt of Order). In that event, the notice shall also state that the system will thereafter pay the sums payable under the order in the manner set forth in the order, unless any of the parties notifies the system in writing, within **two weeks (and such additional time as may be allowed by the System upon good cause being shown)** [a fixed number of days] from the date of mailing of the notice, that they are contesting the order.

§109.8. Payments Under Conditionally Approved Order.

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

(d) If conditional approval of an order is given by the domestic relations liaison under this section, and the system has received written notice of a contest of that determination within the period specified, but neither a subsequent qualified order is received nor is the contest resolved within the period (including any extensions for good cause) set forth in §109.10(c)(2) of this title (relating to Procedures for Determination-Contested Order), the order shall be deemed to be a qualified domestic relations order hereunder, and the system will make payments in accordance therewith.

(e)[(d)] In accordance with the Act, §841.009 [§51.009], neither the system nor any officials of the system shall be liable to any person for making payment pursuant to an order under this section.

§109.9. Order Appearing Not to Qualify.

(a) If, upon receipt of a domestic relations order, the domestic relations liaison is of the opinion that the order does not comply in all ways with the requirements for a qualified domestic relations order hereunder, the domestic relations liaison shall so state (in the notice to be sent under §109.3 of this title (relating to Notice Regarding Receipt of Order)) and notify the parties that unless they commence action within 90 days to bring [request the assistance of the parties in bringing] the order into compliance with the provisions of this chapter relating to qualified domestic relations orders the order will be determined not to be a qualified domestic relations order. If 60 days have elapsed and neither party has submitted documentation to the system reflecting that action has been commenced to bring the order into compliance, the domestic relations liaison will remind each party by first class mail that unless documentation has been submitted to the system showing that action has been commenced before the expiration of the 90 day period the order will be determined not to be a qualified domestic relations order and the system will pay to the participant any sums that have been withheld up to that date, and shall thereafter make payment of benefits as if no order had been received by the system.

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

(d) In the event that either party has timely commenced action in accordance with subsection (a) of this section and the domestic relations liaison determines after the expiration of 90 days from the date of mailing of the notice under §109.3 of this title (relating to Notice Regarding Receipt of Order) that the order [does not appear to comply and] has not been brought into compliance with the requirements of this chapter for qualified domestic relations orders, the order is not a qualified domestic relations order. The [the] domestic relations liaison shall so notify the parties in writing, and the system will pay to the participant any sums that have been withheld hereunder after [none of the benefits that have been withheld shall be paid until the first to occur of:]

[(1) the system's receipt of a certified copy of a subsequent order that the domestic relations liaison determines qualifies under this chapter; or]

[(2)] the expiration of 6 [18] months from the date the notice under §109.3 of this title (relating to Notice Regarding Receipt of Order) was mailed (provided that upon good cause being shown prior to the expiration of such 6-month period, the time for bringing the order into compliance may be extended for up to two additional 6-month periods), and shall thereafter make payment of benefits as if no order had been received [domestic relations order is received].

(e)-(f) (No change.)

(g) In accordance with the Act, §841.009 [§51.009], neither the system nor any officials to the system shall be liable for making any payment under this section.

§109.10. Procedures for Determination-Contested Order.

(a) (No change.)

(b) For a period of 90 days following the date of mailing of the conditional approval under §109.7 of this title (relating to Conditional Approval of Order) if a notice of contest has been timely received [system's receipt of notice of a contest], the system will not make any payment to [either the participant or] the alternate payee under the contested order unless the contest is sooner withdrawn in writing by the party who gave written notice of contest. The system may (but is not required to) pay to the participant all or any portion of any benefits to which the participant appears entitled under the order. Any benefits not paid under this subsection shall be retained by the system until they are paid under one of the subsections of this section.

(c) Any party desiring to contest the order may, within that 90-day period, apply to the courts for a clarification order, and, in the event that the system receives (within such 90-day period) notice of such a motion being filed, the system will continue to withhold payment of benefits until the first to occur of:

(1) (No change.)

(2) the expiration of 6 [18] months from the date of mailing of the notice of conditional approval under §109.7 of this title (relating to Conditional Approval of Order) provided that for good cause shown prior to the expiration of the 6-month period, the time for withholding payment of benefits may be extended for up to two additional 6-month periods. [the domestic relations order was received by the system.]

(d) If, within the 6-month period (including any extensions for good cause) set forth in subsection (c)(2) of this section [18 months after the date the system received the original domestic relations order], the system receives a subsequent order under §109.11 of this title (relating to Procedure for Obtaining Formal Hearing), the system will pay all benefits (including any that have been withheld under this chapter) pursuant to that subsequent order, unless the domestic relations liaison notifies the parties in writing that the order does not qualify under this chapter. In making a determination hereunder, the domestic relations liaison may (but shall not be required to) rely on the determination of the court in a clarification order meeting the requirements of §109.4 of this title (relating to Requirements for Qualified Domestic Relations Orders). If the domestic relations liaison notifies the parties in writing that the subsequent order does not qualify, action on the order thereafter will be in accordance with the provisions of §109.9 of this title (relating to Order Appearing Not to Qualify).

(e)-(f) (No change.)

(g) In accordance with the Act, §841.009 [§51.009], neither the system nor any officials to the system shall be liable for making any payment under this section.

§109.13. Form of Qualified Domestic Relations Order.

(a) The following form has been pre-approved by the retirement system as meeting the requirements of this title for a qualified order. A qualified domestic relations order in substantially the following form incorporates by reference the definitions set forth in this section and the provisions set forth in §109.14 of this title (relating to Provisions Incorporated by Reference).

Figure 1: 34 TAC §109.13(a)

(b) It is the responsibility of the parties to insert the correct information in the pre-approved form at those places marked by parentheses enclosing capital letters, and to provide the system with a certified copy of the order after it has been entered.

(c) The term "community property ratio" as used in the pre-approved form shall mean the ratio that contributions and interest deposited to Participant's individual account with the retirement system between the dates shown bears to Participant's total contributions and interest at time of retirement or withdrawal of accumulated contributions if "accumulated contributions" is shown in the order to be the basis for division.

(d) The term "community property ratio" as used in the pre-approved form shall mean the ratio that Participant's credited service between the dates shown bears to Participant's total credited service at time of retirement or withdrawal of accumulated contributions if "total credited service" is

shown in the order to be the basis for division.

(e) The order shall not be considered qualified unless it clearly reflects which of the ratios described above is intended to be used in computing the division of benefits.

(f) The fraction inserted in paragraph 4 of the pre-approved form customarily would be one-half; however, nothing in this section shall preclude the parties inserting any fraction that is intended to control the division of the benefit.

(g) The dates inserted in paragraph (4) of the pre-approved form customarily would be the dates the marriage began and ended; however, nothing in this section shall preclude the parties inserting any dates that are intended to control the division of the benefit.

§109.14. Provisions Incorporated by Reference. An order on the form set forth in §109.13 of this title (relating to Form of Qualified Domestic Relations Order) expressly incorporates all of the following by reference:

(1) The order shall not be interpreted in any way to require the Plan to provide any type or form of benefit or any option not otherwise provided under the Plan.

(2) The order shall not be interpreted in any way to require the Plan to provide increased benefits determined on the basis of actuarial value.

(3) The order shall not be interpreted in any way to require the Plan to pay any benefits to an/any Alternate Payee named in the order which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

(4) The order shall not be interpreted in any way to require the payment of benefits to Alternate Payee before the retirement of Participant, the distribution of a withdrawal of contributions to Participant as authorized by the statutes governing the Plan, or other distribution to Participant required by law.

(5) If the Plan provides for a reduced benefit upon "early retirement", the order shall be interpreted to require that, in the event of Participant's retirement before normal retirement age, the benefits payable to Alternate Payee shall be reduced in a proportionate amount.

(6) The order shall not be interpreted to require the designation of a particular person as the recipient of benefits in the event of Participant's death, or to require the selection of a particular benefit payment plan or option.

(7) In the event that, after the date of the order, the amount of any benefit otherwise payable to Participant is increased as a result of amendments to the law governing the Plan, Alternate Payee shall receive a proportionate part of such increase unless such an order would disqualify the order under the rules the Plan has adopted with regard to qualified domestic relations orders.

(8) In the event that, after the date of the order, the amount of any benefit otherwise payable to Participant is reduced by law, the portion of benefits payable to Alternate Payee shall be reduced in a proportionate amount.

(9) If, as a result of Participant's death after the date of the order, a payment is made by the Plan to Participant's estate, surviving spouse, or designated beneficiaries, which payment does not relate in any way to Participant's length of employment or accumulated contributions with the Plan, but rather is purely a death benefit payable as a result of employment or retired status at the time of death, no portion of such payment is community property, and Alternate Payee shall have no interest in such death benefit.

(10) If the board of trustees of the Plan has by rule provided that, in lieu of paying an alternate payee the interest awarded by a qualified domestic relations order, the Plan may pay the alternate payee an amount that is the actuarial equivalent of an annuity payable in equal monthly installments for the life of the alternate payee, or a lump sum, then and in that event the Plan is authorized to make such a payment under the order.

(11) All payments to Alternate Payee under the order shall terminate upon Alternate Payee's death or at such earlier date as may be required as a result of the retirement option selected by Participant.

(12) All benefits payable under the Plan, other than those payable under paragraph 4 of the order to Alternate Payee, shall be payable to Participant in such manner and form as Participant may elect in his/her sole and undivided discretion, subject only to Plan requirements.

(13) Alternate Payee is ORDERED to report any retirement payments received on any applicable income tax return, and to promptly notify the Plan of any changes in Alternate Payee's mailing address. The Plan is authorized to issue a Form 1099R on any direct payment made to Alternate Payee.

(14) Participant is designated a constructive trustee for receiving any retirement benefits under the Plan that are due to Alternate Payee but paid to Participant. Participant is ORDERED to pay the benefit defined in this paragraph directly to Alternate Payee within three days after receipt by Participant. All payments made directly to Alternate Payee by the Plan shall be a credit against this order.

(15) The Court retains jurisdiction to amend the order so that it will constitute a qualified domestic relations order under the Plan even though all other matters incident to this action or proceeding have been fully and finally adjudicated.

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

Issued in Austin, Texas, on November 7, 1995.

TRD-9514429 Terry Horton
Director
Texas County and District Retirement System

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 476-6651

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

Part III. Texas Youth Commission

Chapter 85. Admission and Placement

Placement Planning

- **37 TAC §§85.21, 85.23, 85.25, 85.27, 85.29, 85.30, 85.33, 85.35, 85.37, 85.47**

The Texas Youth Commission (TYC) proposes amendments to §§85.21, 85.23, 85.25, 85.27, 85.29, 85.30, 85.33, 85.35, and 85.37, concerning the program assignment system, classification, minimum length of stay, program restriction levels, program completion and movement, involvement of victims, parole of undocumented nationals, sentenced offender disposition, discharge, and new §85.47, concerning sex offender registration. The amendments in all sections are necessary to implement changes in laws passed by the 74 legislature which are effective on January 1, 1996 and related sections necessary for that implementation.

Amendments in §§85.23, 85.29, 85.35, and 85.37 implement sentencing laws including listing sentences for which a youth may be sentenced to the Texas Youth Commission and the rules and conditions under which the youth may be transferred to the Texas Department of Criminal Justice (TDCJ). Prior to the period of minimum period of confinement, the youth may be moved from a high restriction facility to an appropriate transition program other than home or home substitute and shall not be released to parole without ap-

proval of the juvenile court. Following completion of the minimum period of confinement, a youth's eligibility for release on parole or to a transition program shall be governed by the release criteria for the classification the youth would have received if not a sentenced offender. Disciplinary movements following a disciplinary hearing within TYC may result in placement in high restriction, or following the youth's 16th birthday, and after he/she has served at least six months of the sentence in high restriction, he may be transferred to TDCJ, Institutional Division with approval of the juvenile court. If the youth was on parole at the time of the behavior for which he is being returned, TYC will hold a parole revocation hearing before requesting the court to schedule the hearing. A sentenced offender is discharged from TYC when the court sentence expires, when youth is transferred to TDCJ, Institution Division or Pardons and Paroles Division.

Amendments in §§85.21, 85.25, and 85.27 implement changes in required minimum lengths of stay for youth committed to TYC but not sentenced. Youth classified as type A and type B violent offender length of stay remains at current levels while the minimum length of stay for chronic serious offender, controlled substance dealers, and firearms offenders is being increased from nine to 12 months. General offender minimum length of stay is increased from six to nine months. These lengths of stay are minimum and a youth may remain in program longer as bed space is available.

The amendment to §85.30 establishes expanded procedures for victim participation in the TYC youth's release process to be consistent with changes made by the 74th legislature. Amendment to §85.33 requires that all undocumented nationals in TYC institutions be released to the U S Immigration and Naturalization Service (INS), not just youth whose family lives in Mexico. The new §85.47 requires compliance with sex offender registration laws passed by the 74th legislature.

John Franks, Director of Finance, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Franks also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be compliance with legislative intent to better protect the public from destructive delinquent behavior. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Comments on the proposal may be submitted to Gail Graham, Policy and Manuals Coordinator, Texas Youth Commission, 4900 North Lamar Boulevard, P.O. Box 4260, Austin, Texas 78765.

The amendments and new section are proposed under the Human Resources Code, §61.075, which provides the Texas Youth Commission with the authority to determine placement and treatment; §61.079, which provides the Texas Youth Commission with the authority to refer youth for transfer to TDCJ; §61.081, which provides the Texas Youth Commission with the authority to release youth under supervision, and §61.084 which provides the Texas Youth Commission with the authority to terminate custody of youth.

The proposed rules implement the Human Resource Code, §61.034.

§85.21. Program Assignment System.

(a) Policy. Texas Youth Commission (TYC) utilizes an objective, equitable system of program assignment for each youth in TYC care. Based on each youth's [age,] offense(s), and risk level, TYC has predetermined the most appropriate level of restriction and minimum length of stay requirements **for public protection and to promote rehabilitation.** Services provided by each program are **evaluated along** [matched] with youth service needs to determine the most appropriate program placement. The assessment and placement process provides current information on individual youth needs. [Male and female] Youth in **coeducational facilities** have equal access to agency programs and activities.

(b) Rules.

[(1) Guiding Principles. TYC's development of the system of program assignments is based on the following:

[(A) Program placements are in the least restrictive, most appropriate and available placement.

[(B) Among program placement alternatives of which each provides the required services and level of restriction, the placement selected is the one closest to the youth's home.]

(1)[(2)] Placement System Factors. The program placement system incorporates the following factors.

(A) Classification is determined by the classifying offense and a finding regarding extenuating circumstances.

(B) The minimum length of stay is designated by the classification. See GOP.47.05, §85.25 of this title relating to Minimum Length of Stay.

[(C) Special consideration is given to the placement of youth under the age of thirteen.]

(C)[(D)] Risk is assessed and used as a guideline in designating **restriction level** [placement.]

(D)[(E)] Placements are made according to restriction and needs.

[(i) The level of restriction required of the placement selected is determined by classification , age and risk level. See GOP.47.07, §85.27 of this title, relating to Program Restriction Levels.]

(i)[(ii)] Initial placements are always to residential programs [or day treatment programs providing services at least eight hours per day, five days per week,] except for some youth classified as violators of CINS probation.

(ii)[(iii)] The youth's assessed service needs are used to select a placement within the required level of restriction.

[(F) See paragraph (5) of this subsection for waivers and exceptions to the placement system factors.]

(2)[(3)] System Description. The determining factors [and guiding principles] result in the following placement and length of stay determinations for all TYC youth on initial commitment, for youth recommitted for the commission of a felony or high-risk offense, and for youth found at an administrative level I hearing to have committed a felony or high-risk offense.

(A) A sentenced offender is assigned a minimum length of stay equal to the court sentence or time until transfer, or recommitment, or discharge and, regardless of [age, or] risk level, is assigned to a **program of high restriction with a fenced perimeter.** [TYC perimeter secure facility.]

(B) A type A violent offender is assigned a minimum length of stay of 24-48 months [as set by executive director,] and [if 13 years or older,] with any risk level, is assigned to a program of [maximum] **high restriction with a fenced perimeter.**

[(C) A type A violent offender is assigned a minimum length of stay of 24-48 months as set by executive director and if younger than 13 years, with any risk level, is assigned to a program of high restriction.]

[(D) A type B violent offender classified for conspiracy to commit murder, conspiracy to commit capital murder, solicitation of murder, or solicitation of capital murder, is assigned a minimum length of stay of 12 months and if 13 years or older, with any risk level, is assigned to a program of maximum or high restriction.

[(E) A type B violent offender classified for conspiracy to commit murder, conspiracy to commit capital murder, solicitation of murder, or solicitation of capital murder, is assigned a minimum length of stay of 12 months and if younger than 13 years, with any risk level, is assigned to a program of high restriction.]

(C)[(F)] A type B violent offender [classified on or after March 25, 1994] is assigned a minimum length of stay of 12 months, and [if 13 years or older,] with any risk level, is assigned to a program of [maximum or] high restriction. [The minimum length of stay for these youth classified before March 25, 1994 is nine months.]

[(G) A type B violent offender classified on or after March 25, 1994 is assigned a minimum length of stay of 12 months and if younger than 13 years, with any risk level, is assigned to a program of medium restriction. The minimum length of stay for these youth classified before March 25, 1994 is nine months.]

(D)[(H)] A chronic serious offender, **controlled substances dealer, or firearms offender** classified **for offenses committed** on or after **January 1, 1996** [March 25, 1994] is assigned a minimum length of stay of **12** [nine] months and [if 13 years or older,] with any risk level, is assigned to a program of high restriction. The minimum length of stay for these youth classified **for offenses committed** before **January 1, 1996** [March 25, 1994] is **nine** [six] months.

[(I) A chronic serious offender classified on or after March 25, 1994 is assigned a minimum length of stay of nine months and if younger than 13 years, with any risk level, is assigned to a program of medium restriction. The minimum length of stay for these youth classified before March 25, 1994 is six months.

[(J) A controlled substances dealer classified on or after March 25, 1994 is assigned a minimum length of stay of nine months and if 13 years or older, with any risk level, is assigned to a program of high restriction. The minimum length of stay for these youth classified before March 25, 1994 is six months.

[(K) A controlled substances dealer classified on or after March 25, 1994 is assigned a minimum length of stay of nine months and if younger than 13 years, with any risk level, is assigned to a program of medium restriction. The minimum length of stay for these youth classified before March 25, 1994 is six months.

[(L) A firearms offender classified on or after March 25, 1994 is assigned a minimum length of stay of nine months, and if 13 years or older, with any risk level, is assigned to a program of high restriction. The minimum length of stay for these youth classified before March 25, 1994 is six months.

[(M) A firearms offender classified on or after March 25, 1994 is assigned a minimum length of stay of nine months, and if younger than 13 years, with any risk level, is assigned to a program of medium restriction. The minimum length of stay for these youth classified before March 25, 1994 is six months.]

(E)[(N)] A general offender **classified for offenses committed on or after January 1, 1996** is assigned a minimum length of stay of **nine** [six] months, and [if 13 years or older,] with a: [high risk level, is assigned to a program of high restriction.]

(i) **high risk level, is assigned to a program of high restriction;**

(ii) **low or medium risk level, is assigned to a program of medium restriction.**

(F)[(O)] A general offender **classified for offenses committed before January 1, 1996** is assigned a minimum length of stay of six months, and [if 13 years or older,] with a: [low or medium risk level, is assigned to a program of medium restriction.]

(i) **high risk level, is assigned to a program of high restriction;**

(ii) **low or medium risk level, is assigned to a program of medium restriction.**

[(P) A general offender is assigned a minimum length of stay of six months, and if younger than 13 years, with any risk level, is assigned to a program of medium restriction.]

(G)[(Q)] A violator of CINS probation is not assigned a minimum length of stay, and [regardless of age,] with a: [high or medium risk level, is assigned to a program of medium restriction;]

(i) **high or medium risk level, is assigned to a program of medium restriction;**

(ii) **low risk level, is assigned to a program of minimum restriction.**

[(R) A violator of CINS probation is not assigned a minimum length of stay and regardless of age, with low risk level, is assigned to a program of minimum restriction.]

(3)[(4)] Responsibility. The specific program placement selection for each youth is the responsibility of the [Statewide Reception Center for TYC training school placements and the] centralized placement unit for all [other] placements including Evins Regional Juvenile Center. [Specific selection is based on:

(A) programs available which can meet determined service needs and do so within the restrictions of placement assignment matrix;

(B) a program's proximity to the youth's home; and

(C) a recommendation by the previous program staff, if applicable.]

(4)[(5)] Waivers and Exceptions. Waivers and exceptions may be granted under special circumstances.

(A) A **restriction level** [placement] designation, except that of sentenced offender or type A violent offender, [which is a disposition to a more restrictive placement following a disciplinary hearing or a placement designation following initial reception center evaluation,] may be waived by the **assessment unit** [reception center] superintendent when a youth is qualified. A designated placement may be waived in order to provide specialized treatment not available in the designated placement when it is determined a youth is physically handicapped, has a special medical condition, or is emotionally disturbed, if such condition would prevent the youth from functioning in the designated placement. The waiver is effective for the period of time necessary to stabilize the youth or to treat the condition as long as the condition inhibits the youth's ability to function in the designated placement.

(B) Any placement designation except those of sentenced offenders and type A violent offenders may be waived by the **assessment unit** [reception center] superintendent when population is at or above established capacity.

(C) Any designated placement may be waived or the youth moved to any other placement of equal or less restriction if requested by the institutional superintendent or regional director where the youth

is located and granted by the deputy executive director or designee.

(D) For waiver of classification, see GOP.47.03, §85.23 of this title (relating to Classification).

(E) For movement for population control see GOP.47.09, §85.29 of this title, relating to Program Completion and Movement.

(5)[(6)] Parent Notification. Parents/guardians are notified of all placements.

§85.23. Classification.

(a) (No change.)

(b) Explanation of Terms Used.

(1)-(2) (No change.)

(3) Most Serious Offense. The most serious offense is determined according to the following hierarchy, with each subsequent factor being considered only if two or more relevant offenses yield the same result under the preceding factor. If two or more offenses yield the same results through all steps of the hierarchy, determination of the most serious offense is left to the discretion of the staff assigning classification. **The most serious offense is:**

(A)-(E) (No change.)

(4) (No change.)

(c) Rules.

(1) Classifications.

(A) Sentenced Offender. **A sentenced offender is a youth committed to TYC pursuant to §54.04(d)(3) or §54.05(f) Family Code for offenses committed:**

***(i)* prior to January 1, 1996, for:** [A sentenced offender is a youth committed to TYC pursuant to §54.04(d)(3) or §54.05(f), Family Code:]

(I)[(i)] murder, 19.02, all

(II)[(ii)] capital murder, 19.03, all

(III)[(iii)] aggravated kidnapping, 20.04, all

(IV)[(iv)] aggravated sexual assault, 22.021, all

(V)[(v)] deadly assault on a law enforcement officer, corrections officer, or court participant, 22.03

(VI)[(vi)] criminal attempt, 15.01, only if the offense attempted was Capital Murder (§19.03)

***(ii)* on or after January 1, 1996, for an offense listed in clause (i) of this subparagraph or:**

(I) sexual assault, 22.011

(II) aggravated assault, 22.02

(III) aggravated robbery, 29.03

(IV) felony injury to a child, elderly individual, or disabled individual, 22.04, first, second or third degree felony only

(V) felony deadly conduct involving discharging a firearm, 22.05(b) , felony discharging a firearm only

(VI) aggravated or first degree controlled substance felony, subchapter D, Chapter 481 Health and Safety Code, aggravated or first degree felony only

(VII) criminal solicitation, 15.03

(VIII) indecency with a child, 21.11(a)(I) sexual contact only

(IX) criminal solicitation of a minor, 15.031

(X) attempted 3G offense, only if offenses attempted was a murder (§19.02), indecency with a child (§21.11), aggravated kidnapping (sec. 20. 04), aggravated sexual assault (§22.021) or aggravated robbery (§29.03).

(XI) habitual felony conduct, as defined in Juvenile Justice Code, 51.031

(B) (No change.)

(C) Type B-Violent Offender A type B violent offender is a youth whose classifying offense is the commission, attempted commission, aiding the commission, conspiracy to commit, or solicitation of one of the offenses listed in this paragraph and who has not been sentenced to commitment in TYC. TYC adopts the Texas Penal Code definition [(Titles 5 and 7)] for each offense in clauses (i)-(xvi) [(xvii)] of this subparagraph in its entirety except where TYC policy limits the applicability to specific subsections or under the conditions named.

(i)-(xviii) (No change.)

(D)-(H) (No change.)

(2) (No change.)

(3) Waivers.

(A) A designated classification, except sentenced offender, may be waived and a less restrictive classification assigned when a waiver is requested by the youth assessment team [panel] and granted by the executive director or his designee.

(i) The assessment team [panel] may request a waiver when, in the professional judgment of its members, a youth's needs can best be met by such a waiver.

(ii) The assessment team [panel] will always consider requesting a waiver when a youth's classifying offense is a violent offense and there are extenuating circumstances incident to the offense.

(B)-(C) (No change.)

§85.25. Minimum Length of Stay.

(a) Policy. The Texas Youth Commission (TYC) has established two types of minimum lengths of stay (MLOS) requirements for TYC youth classification MLOS and assigned disciplinary MLOS. The classification MLOS is established on initial commitment, for youth recommitted for the commission of a felony or high-risk offense, and for youth found at an administrative level I hearing to have committed a felony or high-risk offense. Classification minimum lengths of stay of youth classified before January 1, 1996 may include creditable time prior to commitment. An assigned [a] disciplinary MLOS may be levied [assigned] in accordance with GOP.63. 11, §91.11 of this title (relating to Disciplinary Transfer/Assigned Minimum Length of Stay Consequences) and is subject to provisions herein. Youth may be eligible for transition to medium restriction to complete the minimum length of stay requirement in accordance with GOP.47.09, §85.29 of this title (relating to Program Completion and Movement).

(b) Rules.

(1) Classification Minimum Length of Stay.

(A) Sentenced offenders serve the time assessed by the juvenile court **and are not affected by requirements in this section.** See GOP.47.15, §85.35 of this title (relating to Sentenced Offender Disposition).

(B) Type A violent offenders must complete a minimum of 24-48 months in a [TYC's] **high** [maximum] restriction program. [following the date of original disposition for the classifying offense.] The minimum length of stay for each youth classified as a type A violent offender is **24 months unless the superintendent or regional director sets a longer minimum length of stay up to 48 months. Length of stay should be equal to that set by the court for equivalent offenses for a sentenced offender. The superintendent and regional director shall document considerations and circumstances for establishing a minimum length of stay longer than 24 months and shall consider:** [established by the executive director following a recommendation from the superintendent of the maximum or high restriction placement. The superintendent shall submit the recommendation to the executive director within 90 days of the youth's admission to the placement. A minimum of longer than 24 months is based on the totality of the circumstances, including, but not limited to:]

(i)-(viii) (No change.)

(C) [If classified on or after March 25, 1994, all] Type B violent offenders must complete a minimum length of stay of 12 months. [in a medium, high or maximum restriction program. following the date of original disposition for the classifying offense.]

[(D) If classified before March 25, 1994, Type B violent offenders must complete a minimum length of stay of 12 months if classified for conspiracy to commit murder or conspiracy to commit capital murder, solicitation of murder, or solicitation of capital murder, and complete nine months for any other designated offense. Youth are assigned to medium, high or maximum restriction program. following the date of original disposition for the classifying offense.]

(D)[(E)] Chronic serious offenders, **controlled substances dealers, and firearms offenders** must complete a minimum length of stay of **12** [nine] months [in a medium or high restriction program] if classified **for offenses committed on or after January 1, 1996** [March 25, 1994] or **nine** [six] months if classified **for offenses committed** before that date.

[(F) Controlled substances dealers must complete a minimum length of stay of nine months in a medium or high restriction program if classified on or after March 25, 1994 or six months if classified before that date.

[(G) Firearms offenders must complete a minimum length of stay of nine months in a medium or high restriction program if classified on or after March 25, 1994 or six months if classified before that date.]

(E)[(H)] General offenders must complete a minimum length of stay of nine [six] months [in a medium or high restriction program] **if classified on or after January 1, 1996, or six months if classified before that date.**

(F)[(I)] Violators of CINS probation are not assigned a minimum length of stay.

(2) (No change.)

(3) **Creditable Time.** [Restrictions.]

(A) All minimum lengths of stay will run consecutively **except when a youth is recommitted, in which case, any incomplete MLOS at the time of recommitment is eliminated.**

(B) For youth reclassification:

(i) **when previous MLOS have been completed, the new classification minimum length of stay is counted from the date of the most recent due process hearing.**

(ii) **when previous MLOS have not yet been completed, the new classification minimum length of stay is counted from the completion of the previous MLOS.**

(C)[(B)] Classification MLOSs must be completed before any assigned disciplinary MLOS begins.

(D) After the count begins, all time spent in program, on furlough or in detention or jail counts (except as a disposition in a criminal case) toward meeting a minimum length of stay requirement.

(E) Time spent as an escapee from a TYC or probation placement or time spent in jail as a court ordered placement in an adult correctional residential program as disposition in a criminal case do not count toward meeting the minimum length of stay requirement.

(F)[(C)] For a sentenced offender youth, see GOP.47.15, §85. 35 of this title (relating to Sentenced Offender Disposition).

(4) Creditable Time After January 1, 1996.

(A) The counting of time toward completion of minimum lengths of stay is specific and documented electronically.

(B) For youth classified for offenses committed on or after January 1, 1996 on initial commitment, classification minimum length of stay is counted from:

(i) **the first day a youth reaches any TYC operated or assigned facility; or.**

(ii) **the first day a youth reaches the subsequent placement as determined by the Marlin Assessment and Orientation facility staff (for youth at this facility).**

(5)[(4)] Creditable Time Before January 1, 1996. [for Classification Minimum Length of Stay.] **The following is effective for youth classified for offenses committed before January 1, 1996.**

[(A) All classification MLOS

[(i) After the count begins, all time spent in program, on furlough or in detention or jail counts toward meeting a minimum length of stay requirement.

[(ii) Time spent as an escapee from a TYC or probation placement does not count toward meeting the minimum length of stay requirement.]

(A) Initial commitment classification minimum length of stay for youth whose classifying offense was found at:

(i) **the most recent due process hearing, is counted from the first day the youth reaches any TYC operated or assigned facility following commitment.**

(ii) **an earlier due process hearing, is counted from the date of original disposition for the classifying offense.**

(B)[(iii)] In no case will creditable time reduce the minimum length

of stay while in TYC to less than six months.

[(B) Initial MLOS only.

[(i) Except for a sentenced offender, Classification minimum length of stay for a youth whose classifying offense was found at the most recent due process hearing, is counted from the first day the youth reaches any TYC operated or assigned facility following commitment.

[(ii) Except for a sentenced offender, Classification minimum length of stay for a youth whose classifying offense was found at an earlier due process hearing, is counted from the date of original disposition for the classifying offense.

[(C) Reclassification/recommitment when no MLOS is remaining. Classification minimum length of stay is counted from the first day the youth reaches any TYC operated or assigned facility following reclassification or recommitment.

[(D) Reclassification/recommitment when a MLOS is remaining. Classification minimum length of stay is counted from the completion of the previous MLOS.]

(6)[(5)] Waivers and Reductions.

(A) [For youth, except sentenced offenders and type A violent offenders,] The classification minimum length of stay requirement may be reduced by the deputy executive director in extenuating circumstances when it is documented that the minimum length of stay is not justified because of the minor nature of the youth's classifying offense and offense history.

(B) The disciplinary assigned MLOS may be reduced in accordance with GOP.63.11, §91.11 of this title (relating to Disciplinary Transfer/Assigned Minimum Length of Stay Consequences.)

§85.27. Program Restriction Levels.

(a) (No change.)

(b) Rules.

(1) (No change.)

(2) Levels

[(A) Maximum Restriction-a self-contained program with perimeter security which provides services solely to youth who are violent or sentenced offenders. For example: Giddings State School]

(A)[(B)] High Restriction-a self-contained program which provides services [primarily] for youth who are violent and high risk to self or others. For example:

(i) TYC training schools in **Giddings,** Brownwood, Crockett, Gainesville, **Pyote, Beaumont, Marlin, San Saba and Sheffield Boot Camp.** [West Texas.]

(ii) Corsicana Residential Treatment Center

(iii) self-contained residential contract placement designated by TYC as appropriate

[(iv) Vernon Drug Treatment Center]

(iv)[(v)] state hospitals

(B)[(C)] Medium Restriction-any self-contained **residential** program which provides routine unsupervised access to the community, or any **residential** program [facility] not self-contained which provides services primarily for youth who are a medium level risk to self or others. For example:

(i) TYC halfway houses

(ii) any residential contract program which is not self-contained, e.g., certain substance abuse programs, residential treatment centers, group homes, or organizational foster care

(iii) independent living preparation program

[(iv) any nonresidential program which provides treatment or training at least eight hours per day, five times per week]

(C)[(D)] Minimum Restriction-any non residential program which provides treatment or training **at least eight hours per day five days a week,** or less than eight hours per day, five times a week but with at least one contact per day or monitoring daily. For example:

***(i)* day treatment**

(ii)[(i)] specialized aftercare [intensive supervision]

(iii)[(ii)] electronic monitoring

(D)[(E)] Home-the home of the parent, other relative or individual acting in the role of parent, managing conservator, or guardian, or an independent living arrangement, in which there is treatment or training less than eight hours per day, five times a week, and there is not daily staff contact or monitoring. For example:

(i) home or home substitute

(ii) independent living in any approved location.

§85.29. Program Completion and Movement.

(a) Policy. The Texas Youth Commission (TYC) uses specific objective criteria to determine when a youth has completed a program and is eligible to be released home or to another program. Progress toward successful completion of criteria is evaluated at specific regular intervals. [When criteria are substantially completed, the youth attains parole status and is moved to his or her home.] When [certain] criteria **for transition** are met, [but completion of required criteria is not possible or is not desirable in the current placement program, the] a youth **is likely to be transitioned to an equal or less restrictive** [is moved to a follow-up] placement. [where completion is possible.] **When criteria for release are substantially completed, the youth attains parole status and is moved to his or her home.** TYC does not accept the presence of a detainer as an automatic bar to earned release. The agency releases a youth to authorities pursuant to a warrant. Additional procedures and restrictions are applied prior to the release on parole from TYC facilities for all sentenced offender youth. See GOP.47.15, §85.35 of this title (relating to Sentenced Offender Disposition). Youth may be moved to a placement of equal or more restriction as a disciplinary consequence. Each of these and other types of placement changes are subject to policies in this chapter and in the Disciplinary Practices chapter, GOP.63.

(b) Rules.

(1) Program Completion Criteria.

(A) Youth becomes eligible for transition to medium restriction when the following criteria are met:

***(i)* completion of minimum length of stay except three months;**

***(ii)* 70% completion of phase three in goals for resocialization;**

***(iii)* completion of required Individual Case Plan (ICP) objectives;**

***(iv)* no major violation of rules of conduct within 30 days prior to the review.**

(B)[(A)] Youth becomes eligible for **residential** program release and parole status when the following criteria are met:

(i) completion of the minimum length of stay;

(ii) completion of required Individual Case Plan (ICP) objectives; [and]

(iii) **completion of phase four of goals for resocialization; and**

(iv)[(iii)] no major violations of rules of conduct within 30 days:

(I) prior to the case review to determine eligibility for parole release; and

(II) prior to the actual release.

(C)[(B)] TYC program staff where the youth is assigned determine when criteria have been met.

(D)[(C)] Program completion criteria are explained to every youth [through the youth handbook and] during orientation to each placement.

(2) Sentenced Offender Treatment. Due to the nature of determinate sentences, some rules governing the classification, placement, release, **transition** [follow-up,] parole status, and disciplinary movement of TYC youth must be applied differently to sentenced offenders.

(A) (No change.)

(B) Initial Placement. All sentenced offenders are assigned to **high restriction** [TYC operated] perimeter-secure facilities unless the executive director waives such placement for a particular youth in compliance with GOP.47.01, §85.21 of this title (relating to Program Assignment System).

(C) For youth sentenced for offenses committed on or after January 1, 1996:

(i)[(C)] Movement and Parole. Sentenced offenders who meet program completion criteria for **transition** [release on follow-up] or parole may not be released without proper authorization:

(I)[(i)] Prior to a sentenced offender's 18th birthday, a youth may be **transitioned to** [placed in] an appropriate **placement** [follow-up program] if approved by the deputy executive director. **The** [A follow-up] placement may be to any location other than home or home substitute.

(II)[(ii)] When a juvenile court orders that a sentenced offender be released under supervision, the youth shall be **transitioned** [released on follow-up] or **paroled** [parole], as appropriate to the youth's progress at the time of the court's order.

(III)[(iii)] When the juvenile court orders that a sentenced offender be recommitted to TYC without a determinate sentence, the youth's eligibility for release on parole or **transition** [follow-up] shall be governed by the release criteria and procedures for the classification the youth would have received if not a sentenced offender.

(ii)[(D)] Disciplinary Movement. A sentenced offender may be assigned to any appropriate placement, including a **high** [maximum] restriction facility, following a disciplinary hearing. The appropriate placement is selected according to the totality of the circumstances, including the youth's age, sentencing offense, length of time and progress in TYC custody, and the nature of the misconduct for which the youth is being disciplined.

(iii)[(E)] Release Exceptions. Sentenced offenders will be considered for release under a hardship or for population control only if:

(I)[(i)] the youth is less than 18 years of age and the release is approved by the committing court; or

(II)[(ii)] the youth is 18 years of age or older and meets the exception criteria for the classification the youth would have received if not a sentenced offender.

(D) For youth sentenced for offenses committed before January 1, 1996:

(i) **Movement and Parole. Sentenced offenders who meet program completion criteria for release on transition or parole may not be released without proper authorization:**

(I) Prior to a sentenced offender's completion of the minimum period of confinement applicable to the youth's committing offense, a youth may be transitioned to an appropriate placement if approved by the deputy executive director. The placement may be to any location other than home or home substitute

(II) Prior to a sentenced offender's completion of the minimum period of confinement applicable to the youth's committing offense, a youth may not be released on parole without the approval of the juvenile court. The approval of the deputy executive director is required before the juvenile court is requested to schedule a hearing on the parole release.

(III) Following a sentenced offender's completion of the minimum period of confinement applicable to the youth's committing offense, the youth's eligibility for release on parole or to a transition program shall be governed by the release criteria and procedures for the classification the youth would have received if not a sentenced offender.

(IV) The minimum period of confinement is ten years for youth sentenced for capital murder; three years for youth sentenced for an aggravated controlled substance felony or a felony of the first degree; two years for a felony of the second degree; and one year for a felony of the third degree.

(ii) **Disciplinary Movement.**

(I) A sentenced offender may be assigned to any appropriate placement, including a high restriction facility, following a disciplinary hearing. The appropriate placement is selected according to the totality of the circumstances, including the youth's age, sentencing offense, length and time of progress in TYC custody, and the nature of the misconduct for which the youth is being disciplined.

(II) Following a sentenced offender's 16th birthday, and after the youth has served at least six months of the youth's sentence in a high restriction facility, the sentenced offender may be transferred to the Texas Department of Criminal Justice, Institutional Division, with the approval of the juvenile court. The deputy executive director must determine that the youth's conduct indicates the welfare of the community requires the transfer before the juvenile court is requested to schedule a hearing on the transfer. If the youth was on parole at the time of the conduct, a Level I hearing and revocation of parole is required before the juvenile court is requested to schedule a hearing on the transfer.

(3) Release Review and Movement [Requirements.]

(A) **Periodic reviews are** [A release review is] held specifically to evaluate a youth's status in meeting all program

completion criteria and thus his or her release and parole status eligibility. [Release reviews are held on the following schedule.]

[(i) For youth in TYC operated residential programs as an initial placement, i.e., on commitment, recommitment or following a disciplinary movement:

[(I) every 90 days; and

[(II) within 30 days prior to completion of minimum length of stay; and/or

[(III) within 30 days prior to release.

[(ii) For youth in TYC operated residential programs as a follow-up placement or in a TYC contract program, every 30 days.]

(B) If, at the release review, it is determined the youth has not completed [all] criteria **required for a transition movement or release on parole,** [and that substantial completion is possible in the current program,] the youth continues in the current program.

(C) If, at the release review, it is determined the youth has **completed criteria required for transition, movement is considered. A transition placement is always to a placement of equal or less restriction than the youth's current placement but no less restriction than medium unless the minimum length of stay has been completed.** [not completed all criteria and that completion may be more appropriate in a different placement, follow-up placement is considered and the objective(s) not met is documented.]

(D) If, at the release review, it is determined the youth has completed [all required program completion] criteria **required for release on parole,** a date of release [and parole] is set for within 30 days.

(E) A youth may request and in doing so will be granted a level II (transfer) hearing prior to the release movement.

[(4) Criteria Incomplete-Follow-up Movement Procedures.

[(A) A follow-up placement is always to a placement of equal or less restriction than the youth's current placement but no less restriction than medium level unless the minimum length of stay has been completed.

[(B) A youth may be released to a follow-up placement when at a release review, program staff finds and documents that:

[(i) the youth has met all program completion criteria except required ICP objective(s) and that the program is one in which the youth can meet remaining objective(s); or

[(ii) the youth is not a type A violent offender and has met program completion criteria except required minimum length of stay and required ICP objective(s) and that the follow-up program is one in which the youth can meet remaining objective(s). The youth is required to complete the minimum length of stay in the follow-up placement. A youth who may be considered is one who:

[(I) has been in placement at least four months if the minimum length of stay is nine months or more, or three months if the minimum length of stay is six months;

[(II) has made substantial progress on ICP objectives; and

[(III) has no major rule violations within the 30 days prior to movement.

[(C) A youth may request and in doing so will be granted a level II (transfer) hearing prior to the release movement.]

(4)[(5) Criteria Complete-] Parole Release. [Procedures.]

(A) Parole status means that a youth, having attained parole status, shall not be moved into a placement of high restriction without a level I hearing.

(B)[(A)] If, at a release review, it is determined the youth has completed all required program completion criteria, the youth is released to his home or home substitute within 30 days unless such movement is not possible according to GOP.47.11, §85.31 of this title (relating to Home Placement.) If a youth's release to his home or home substitute is not immediately possible, he is released as soon as possible. [If a youth in a maximum or high restriction program has not been placed within 30 days of determining that criteria have been met, he is moved to a temporary placement.]

(i) **If a youth in a high restriction program has not been placed within 30 days, he is moved to a temporary placement. Parole status cannot be attained in high restriction.**

(ii) **If a youth in medium restriction has not been placed within 30 days, he may remain temporarily in the placement until an appropriate placement is found. The halfway house superintendent or community corrections officer responsible for the program must review and justify the continued placement to the regional director every 30 days.**

(C)[(B)] Release of Type A violent offenders must be approved by the **deputy** executive director. A release packet includes the ICP, record of progress through the **phase** [level] system, record of major **rule** [rules] violations, the home **assessment** [evaluation, parole plan], initial commitment psychological, a current psychiatric and/or psychological report, and **recommendations and justifications by either** the institutional superintendent and director of institutions **or the regional director and director of community services.** [recommendations and justifications.] The **deputy** executive director notifies the youth, superintendent and director of institutions **or the regional director and director of community services** in writing of the decision. If release is denied, the **deputy** executive director indicates a date for resubmitting the release packet.

(D)[(C)] A youth may request and in doing so will be granted a level II (transfer) hearing prior to the release movement.

(E)[(D)] When it is determined that a youth will be paroled out of state upon completion of the program, see GOP.47.23, §85.43 of this title (relating to Interstate Compact for TYC Youth). Arrangements for out-of-state supervision requires a minimum of six to eight weeks to complete.

[(6) Parole-Earned and Granted.

[(A) Parole status means that a youth, having attained parole status, shall not be moved into a placement of maximum, or high restriction without a level I hearing. A youth either earns parole status or is granted parole status under specific conditions.

[(B) A youth earns parole status when he is deemed to have substantially completed all program completion criteria. When a youth has earned parole status and release is pending, he attains parole status in the current program prior to the release unless he is in a high or maximum

restriction program, in which case he attains parole status on leaving the facility.

[(C) If a youth does not earn parole status, he is granted parole status in the following circumstances:

[(i) A youth in a follow-up program which is not a high restriction program attains parole status automatically when he has been in follow-up for six consecutive months after release to the first follow-up placement which is not a high restriction program. For youth who are not in a high restriction follow-up program, parole status is automatically attained in six months:

[(I) regardless of progress toward completion of ICP objectives in the follow-up plan;

[(II) regardless of the number of consecutive follow-up placements the youth has been in since the first follow-up placement; and

[(III) if the youth has not been moved to any placement as a disciplinary move since his placement in the first follow-up program.

[(ii) A youth whose initial placement is a medium restriction level facility, shall attain parole status after completion of six months if the youth has not been moved to any other placement as a disciplinary move.

[(D) A youth in a high restriction follow-up program must earn parole by meeting program completion criteria unless the youth is transferred to another, less restrictive follow-up placement prior to completing the high restriction program and subsequently meets the criteria in subparagraph (C) of this paragraph, for granted parole.]

(5)[(7)] Disciplinary Movements.

(A) A disciplinary movement is the movement of a youth, following appropriate due process, as a consequence of violation of rule(s). Disciplinary movements are always to placements of equal or more restriction than the current placement, as defined by GOP.47.07, §85.27 of this title (relating to Program Restriction Levels.)

(B) Disciplinary movements and/or assigned minimum lengths of stay must be justified through an appropriate due process hearing. See chapter on Disciplinary Practices.

(C) Any disciplinary movement requires that [a new set of] program completion **objectives** [criteria] be developed in the new placement which must be met prior to **a transition or** release **on parole.** from the new program.

[(D) When a youth in a follow-up program is assessed a disciplinary movement, he loses credit for the time spent in follow-up program(s). The six month time count begins again if, upon completion of the necessary program completion criteria, the youth is assigned to a different follow-up program.

[(E) In accordance with disciplinary policies, a disciplinary movement justified through a due process hearing may not always physically occur. When a youth in a follow-up program is held in the same program and assigned a minimum length of stay in lieu of a transfer, the program is no longer considered a follow-up program. When this occurs, a new set of program completion criteria is assigned and any accumulated follow-up time is lost just as it would be if the youth had physically moved.]

(6)[(8)] Six Month Justification. Retention of a youth in any community residential placement beyond six months must be justified to and approved by the regional director. Retention of a youth in order to complete a minimum length of stay is adequate justification.

(7)[(9)] Release Exceptions in Hardship Cases. Youth may be released and paroled home without meeting completion criteria in hardship cases upon the recommendation by parole staff. Release in hardship cases requires approval of the [executive director if the youth is a type A violent offender, or of the] deputy executive director. [for any other classification.]

(8)[(10)] Release Exceptions to Control Population . When necessary to control population and/or manage available funds concerning youth in residential placement, the deputy executive director may approve one or more of following options. Youth[, except type A violent offenders,] may be:

(A) moved into similar residential placements of equal restriction without meeting completion criteria when early release or movement to a less restrictive placement is not indicated, but movement is necessary to manage available funds; or

(B) released early without meeting completion criteria when population is at or above established capacity. Youth who have completed the minimum length of stay and are low risk are released first. In general, youth who are closest to completing criteria may be released next; however, type B violent, chronic serious, controlled substance dealer, firearms and general offenders with a minimum length of stay must meet the following criteria:

(i) completion of a portion of the minimum length of stay:

(I) if 12 months, complete nine months;

(II) if nine months, complete seven months;

[(III) if six months, complete five months.]

(ii) substantial completion of ICP objectives;

***(iii)* 50% completion of phase 3 resocialization**

***(iv)*[(iii)] no major violations of Rules of Conduct within 30 days prior to consideration for waiver and prior to the actual release; and**

***(v)*[(iv)] recommendation by superintendent or regional director.**

(9)[(11)] Notification.

(A) Parents or guardians are notified **of** [prior to] all movements.

(B) Send original Notification to the Juvenile Court, CCF-181, to the committing juvenile judge and copies to the prosecuting attorney and **community corrections officer** [parole officer] no later than 15 days prior to the youth's:

(i) release under supervision (release to youth's home or home substitute); [whether paroled or as follow-up);]

(ii) authorization for an absence from custody (out-of-state placement); or

(iii) discharge.

(C) Send original Notification to Chief Juvenile Probation Officer, CCF-185 to the county chief juvenile probation officer in the county to which the youth is being moved (any placement other than into an institution) within ten days of the placement.

§85.30. Involvement of Victims.

(a) (No change.)

(b) Rules.

(1) Applicability. [The requirements herein apply only:]

(A) **Victim means a person who:** [to victims:]

(i) **is the victim of the delinquent conduct of a child that includes the elements under the penal law of this state,** of sexual assault, kidnapping, aggravated robbery as adjudged by the juvenile court; [or]

(ii) [who] **has** [have] suffered physical pain, illness, or any impairment of physical condition or death as a result of the conduct **of a child** that violates a penal law of this state; **or**

(iii) **is the owner or lessor of property damaged or lost as a result of the conduct of a child that violates a penal law of this state.**

(B) **The requirements herein apply** to a youth in any placement when he is being considered for return to his home, regardless of parole status. Home refers to any placement in the home level of restriction, i.e., home of a parent, relative, managing conservator, or guardian, or in an independent living arrangement.

(2) Requirements for Information. To victims and their legal guardians (or close relatives if the victim is deceased), TYC staff of the youth's placement program will:

(A) on request, provide information **of the procedures for** [on TYC's] release **under supervision or transfer of the youth to the custody of the pardons and paroles division of the Texas Department of Criminal Justice for parole;** [date and release procedures, i.e., completion criteria and release review process.]

(B) on [written] request, provide notification of the: [date of release proceedings, if a current address has also been made available to TYC.]

(i) **release or transfer for parole proceedings concerning the youth;**

(ii) **the youth's release or transfer for parole.**

(3) Victim Participation.

(A) A victim may provide to TYC for inclusion in the youth's file, information to be considered by the commission before the release under supervision or transfer for parole of the person.

(B)[(A)] A victim who wishes to have input into the release **or transfer for parole** process may:

(i) submit a written statement which is provided to staff members responsible for the release **or transfer** review. [staffing when the youth's return home is considered.]

(ii) make a statement in person during **the release or transfer review.** [a scheduled staffing.] The victim or legal guardian need not be allowed to attend the entire **review** [staffing] regarding the youth.

(iii) meet at any convenient time with the youth's primary service worker.

(C)[(B)] Victims who appear in person should be provided a waiting area separate from any location where they could encounter the youth.

(D)[(C)] The victim's input will be considered as it affects the youth's successful reintegration into the home community, youth's and others' safety, and determination of special conditions to the youth's parole program.

(E)[(D)] The victim has no right of appeal in any TYC decision.

(4) (No change.)

*§85.33. Parole of **Undocumented Nationals** [Youth Whose Parents Live in Mexico].*

(a) Policy. The Texas Youth Commission (TYC) works with [the Mexican Consulate and] the United States Immigration and Naturalization Service (INS) for parole release of youth whose **parents/guardian** [parents] or closest adult relative live **outside the United States.** [in Mexico.] Such youth are released and returned to their homes on parole status and without TYC staff parole supervision **except where authorized services are provided.** Procedures herein apply to all programs releasing TYC youth whose parents live **outside the United States.** [in Mexico.]

(b) Rules.

(1) When completion of program criteria have been met, the releasing **authority informs INS** [primary service worker informs institutional Placement Coordinator (IPG)] primary service worker informs Institutional Placement Coordinator (IPC)of the pending release. [Statewide reception center (SRC) transportation is responsible for notification of appropriate persons within specified time limits Statewide reception center (SRC) transportation is responsible for notification of appropriate persons within specified time limits.]

(2) The releasing authority, INS and Primary Service Worker (PSW) should provide information pertinent to potential placement options.

(3)[(A)] Thirty days before parole release the TYC staff of the releasing program:

(A) completes the parole release packet and a date scheduled for release;

(B) sends written notice to the INS in the region;

(C) notifies the assigned community corrections officer and appropriate consulate of release arrangements; and sends the family notification of parole release, and makes reasonable attempts to provide translation where necessary;

(D) sends notification of parole release to the appropriate authorities, CCF-181, Notification to Juvenile Court;

(E) INS meets with youth and confirms date of transportation of youth with the appropriate staff.

[(i) notifies the appropriate Mexican Consulate of the expected release date so that arrangements can be made for returning the youth home;

[(ii) sends notification of parole release to the appropriate authorities, CCF-181, Notification to Juvenile Court;

[(iii) completes the parole release packet;

[(iv) notifies the assigned parole officer of release arrangements;

[(v) sends the family notification of parole release (in both English and Spanish); and

[(vi) sends written notice to the Immigration and Naturalization Service in the region.

[(B) At least two days before the release, SRC transportation confirms the release date, time and place with the consulate and the parole office.]

(4)[(2)] On the day of parole release, INS [SRC transportation] transports the youth to **the point of deportation closest to youth's home or directly to the youth's home if his parents live in the United States.** [a place designated by the

Mexican Consulate office. The assigned parole officer is present at the designated location.]

[(3) The youth is left in the care of the consulate and a written receipt for the youth signed by the Mexican Consul General or designee is obtained.]

(5)[(4)] If the release of a youth is canceled for any reason, the releasing program immediately notifies INS [IPC who notifies the Mexican Consulate, Immigration and Naturalization Service,] community corrections [parole] officer and other affected parties.

(6) The youth's case is transferred to the community corrections officer nearest to the point of deportation.

§85.35. Sentenced Offender Disposition.

(a) Youth who are sentenced to commitment in the Texas Youth Commission (TYC) on or after January 1, 1996 are subject to requirements in this subsection.

(1) Movement and Parole. Sentenced offenders who meet program completion criteria for transition or parole may not be released without proper authorization:

(A) Prior to a sentenced offender's completion of the minimum period of confinement applicable to the youth's committing offense, a youth may be transitioned to an appropriate placement if approved by the deputy executive director. The placement may be to any location other than home or home substitute.

(B) Prior to a sentenced offender's completion of the minimum period of confinement applicable to the youth's committing offense, a youth may not be released on parole without the approval of the juvenile court. The approval of the deputy executive director is required before the juvenile court is requested to schedule a hearing on the parole release.

(C) Following a sentenced offender's completion of the minimum period of confinement applicable to the youth's committing offense, the youth's eligibility for release on parole or to a transition program shall be governed by the release criteria and procedures for the classification the youth would have received if not a sentenced offender.

(D) The minimum period of confinement is ten years for youth sentenced for capital murder; three years for youth sentenced for an aggravated controlled substance felony or a felony of the first degree; two years for a felony of the second degree; and one year for a felony of the third degree.

(2) Disciplinary Movement.

(A) A sentenced offender may be assigned to any appropriate placement, including a high restriction facility, following a disciplinary hearing. The appropriate placement is selected according to the totality of the circumstances, including the youth's age, sentencing offense, length and time of progress in TYC custody, and the nature of the misconduct for which the youth is being disciplined.

(B) Following a sentenced offender's 16th birthday, and after the youth has served at least six months of the youth's sentence in a high restriction facility, the sentenced offender may be transferred to the Texas Department of Criminal Justice, Institutional Division (TDCJ), with the approval of the juvenile court. The deputy executive director must determine that the youth's conduct indicates the welfare of the community requires the transfer before the juvenile court is requested to schedule a hearing on the transfer. If the youth was on parole at the time of the conduct, a Level I hearing and revocation of parole is required before the juvenile court is requested to schedule a hearing on the transfer.

(3) Discharge. Sentenced youth are discharged when one of the following occurs:

(A) expiration of the sentence imposed by the juvenile court;

(B) the youth is transferred to the Texas Department of Criminal Justice, Institutional Division, pursuant to an order issued by the juvenile court at a transfer hearing;

(C) the youth has been sentenced for the offense of capital murder, has not completed the ten-year minimum period of confinement and is transferred to the Texas Department of Criminal Justice, Institutional Division, at age 21 to serve the remainder of the sentence; or

(D) the youth has been released on parole, has reached the age of 21 (or younger, if the youth is released on parole after age 19) and is transferred to the Texas Department of Criminal Justice, Pardons and Paroles Division, to serve the remainder of the sentence.

(b)[(a) Policy.] Youth who are sentenced to commitment in the Texas Youth Commission (TYC) **before January 1, 1996 are subject to requirements in this subsection** [with a transfer to the Texas Department of Criminal Justice (TDCJ) for a term of years (sentenced offenders) are subject to a release hearing by the court just prior to their eighteenth birthdays to consider the youth's disposition when a youth's sentence will not be completed prior to the youth's 18th birthday].

[(b) Rules.]

(1) Court Hearing Preparation.

(A) During the sixth month before the month in which the youth will turn 18 years old prior to completing sentence, the TYC program administrator of the youth's placement sends the committing court "notice of transfer to TDCJ."

(B) The committing court sets a date for a hearing on the notice of transfer and notifies all parties.

(C) Prior to the hearing on the notice of transfer, the staff of the youth's placement shall review all relevant records and reports concerning the youth, and at least 14 days prior to the hearing, recommend to the executive director the most appropriate disposition. The executive director shall determine the disposition to be recommended to the court.

(D) The deputy executive director appoints appropriate TYC staff to represent TYC at the hearing.

(2) Youth Under 1987 Sentencing Law.

(A) This section applies to youth committed to TYC under determinate sentences for conduct that occurred on or after September 1, 1987, and before September 1, 1991.

(B) On conclusion of the transfer hearing, the court will order:

(i) release under supervision, or

(ii) transfer to TDCJ.

(C) A youth residing in an any program other than the **high** [maximum] restriction facility at the time of a court order directing the youth's transfer to TDCJ will be moved to the **high** [maximum] restriction facility for the time remaining before the youth's transfer at age 18.

(3) Youth Under 1991 Sentencing Law.

(A) This section applies to youth committed to TYC under determinate sentences for conduct that occurred on or after September 1, 1991.

(B) On conclusion of the hearing, the court will order:

(i) recommitment to TYC without a determinate sentence;

(ii) transfer to TDCJ; or

(iii) final discharge.

(C) On entry of an order that the youth be transferred to TDCJ, the youth is immediately transported and transferred to TDCJ.

(4) Discharge. Sentenced youth are discharged:

(A) if ordered by the court;

(B) on the 21st birthday;

(C) prior to age 18 with approval of the committing court; or

(D) on the day the sentence is completed, including the time spent in detention in connection with the offense plus time spent at TYC under the order of commitment.

§85.37. Discharge.

(a) (No change.)

(b) Rules.

(1) Controlling Classification. Discharge criteria are [is] applied according to classification or to special circumstance. Eligibility for discharge according to classification is controlled by the most serious offense for which the youth has ever been classified.

(2) Discharge Criteria.

(A) Classification.

(i) Youth who are [ever classified as] sentenced **for an offense committed before January 1, 1996** [offenders] are discharged when one of the following occurs:

(I) (No change.)

(II) the youth is transferred to the Texas Department of Criminal Justice (TDJC) pursuant to an order issued by the juvenile court at a transfer hearing; or

(III) (No change.)

***(ii)* Youth who are sentenced for an offense committed after January 1, 1996 are discharged when one of the following occurs:**

(I) expiration of the sentence imposed by the juvenile court;

(II) the youth is transferred to the Texas Department of Criminal Justice, Institutional Division, pursuant to an order issued by the juvenile court at a transfer hearing;

(III) the youth has been sentenced for the offense of capital murder, has not completed the ten-year minimum period of confinement and is transferred to the Texas Department of Criminal Justice, Institutional Division, at age 21 to serve the remainder of the sentence; or

(IV) the youth has been released on parole, has reached the age of 21 (or younger, if the youth is released on parole after age 19) and is transferred to the Texas Department of Criminal Justice, Pardons and Paroles Division, to serve the remainder of the sentence.

(iii)[(ii)] Youth ever classified as type A violent offenders are discharged when age 21 is reached.

(iv)[(iii)] Youth ever classified as type B violent offenders are discharged when one of the following occurs:

(I) age 21 is reached; or

(II) completion of 12 consecutive months on parole status in the home or home substitute and the youth:

(-a-) has had no delinquency adjudications or criminal convictions during the period;

(-b-) has no pending delinquency petitions or criminal charges;

(-c-) is on minimum [or medium] supervision level; and

(-d-) has had a positive parole adjustment, as defined in this policy.

(v)[(iv)] Youth ever classified as a chronic serious offender, controlled substance dealer, or firearms offender are discharged when one of the following occurs:

(I) age 21 is reached; or

(II) completion of six consecutive months on parole status in the home or home substitute and the youth:

(-a-) has had no delinquency adjudications or criminal convictions during the period;

(-b-) has no pending delinquency petitions or criminal charges;

(-c-) is on minimum [or medium] supervision level; and

(-d-) has had a positive parole adjustment as defined in this policy.

(vi)[(v)] General offenders and violators of CINS probation are discharged when one of the following occurs:

(I) the youth is on parole status in the home or home substitute and:

(-a-) age 18 is reached; or

(-b-) before age 18 is reached if the youth has completed six consecutive months on parole status in the home or home substitute and the youth:

(-1-) has had no delinquency adjudications or criminal convictions during the period;

(-2-) has no pending delinquency petitions or criminal charges;

(-3-) is on minimum [or medium] supervision level; and

(-4-) has had a positive parole adjustment as defined in this policy; or

(II) the youth is in any program other than parole status in the home or home substitute reaches age 18 and thereafter meets his or her required program completion criteria. The youth is discharged and not placed on parole status in the home or home substitute.

(B) Special Circumstances.

(i) (No change.)

(ii) Youth of any classification except sentenced offenders **and type A violent offenders** are discharged under the following circumstances:

(I) (No change.)

(II) Court ordered placement for a minimum of 12 months in an adult correctional residential program as part of the disposition of a criminal case.

(III)[(II)] Immediately on release from any residential placement, if the youth was placed on adult probation while in residential placement.

(IV)[(III)] Placement on juvenile probation.

(3) Exception for Services.

(A) TYC custody of a youth who would otherwise be discharged at age 18 may be continued up to age 21 **if** [and] and extended supervision is requested in writing by the primary service worker, agreed to in writing by the youth, and would allow TYC to support special programs for the youth which would not be provided by other means.

(B)-(C) (No change.)

(4) Positive Parole Adjustment. For purposes of discharge, positive parole adjustment shall be shown by documentation that a youth:

(A) has completed ICP objectives **including 70% of phase five of resocialization and community service requirements**; and

(B) (No change.)

(5) (No change.)

(6) Notification.

(A) **Immediately on a youth's discharge,** [As soon as the discharge date is determined, but not more than 30 days prior to the discharge date. As soon as the discharge date is determined, but not more than 30 days prior to the discharge date,] the program to which the youth is assigned shall send a letter of discharge **,LS-300,** to the youth. The youth is informed of the procedure for sealing records, LS-301.

(B) (No change.)

§85.47. Sex Offender Registration.

(a) Policy. The Texas Youth Commission (TYC) complies with the requirements of the sex offender registration program (Texas Civil Statutes, Article 6252-13c.1).

(b) Rules.

(1) Any program releasing a youth who is subject to the sex offender registration program will confirm the requirements of the program which are applicable to the youth based on the youth's adjudication date, and complete any documentation for which the agency is responsible under those requirements.

(2) TYC intake facilities will ensure the availability of youth fingerprints for youth required to register under the sex offender registration program who are adjudicated on or after September 1, 1995.

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

Issued in Austin, Texas, on October 26, 1995.

TRD-9514163 Steve Robinson
Executive Director
Texas Youth Commission

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 483-5244

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Chapter 89. Youth Rights and Remedies

- **37 TAC §§89.7, 89.9, 89.10, 89.11, 89.13, 89.15, 89.17, 89.19, 89.21, 89.23**

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

The Texas Youth Commission (TYC) proposes the repeal of §§89.7, 89.9, 89.10, 89.11, 89.13, 89.15, 89.17, 89.19, 89.21, and 89.23, concerning youth complaint resolution system terms and rules, complaint resolution procedure for TYC operated facilities, probationary complaint program for TYC operated facilities, complaint resolution procedure for residential contract programs, complaint resolution procedure for youth at home, alleged mistreatment rules and definitions, alleged mistreatment procedure for TYC operated facilities, alleged mistreatment procedure for striking incidents, alleged mistreatment procedure for residential contract programs, and alleged mistreatment procedure for youth at home. These sections are being repealed to propose new sections which will replace the repealed rules. The new sections will streamline new procedures in the youth complaint system and the alleged mistreatment resolution system.

John Franks, Director of Finance, has determined that for the first five-year period the repeals as proposed are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeals.

Mr. Franks also has determined that for each year of the first five years the repeals as proposed are in effect the public benefit anticipated as a result of enforcing the repeals will be a more streamlined youth complaint system and alleged mistreatment resolution system. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the repeals as proposed.

Comments on the proposed repeals may be submitted to Gail Graham, Policy and Manuals Coordinator, Texas Youth Commission, 4900 North Lamar Boulevard, P. O. Box 4260, Austin, Texas 78765.

The repeals are proposed under the Human Resources Code, §61.034, which provides the Texas Youth Commission with the authority to make rules appropriate to the proper accomplishment of its functions.

The proposed repeals implement the Human Resource Code, §61.034.

§89.7. Youth Complaint Resolution System Terms and Rules.

§89.9. Complaint Resolution Procedure for TYC Operated Facilities.

§89.10. Probationary Complaint Program for TYC Operated Facilities.

§89.11. Compluint Resolution Procedure for Residential Contract Programs.

§89.13. Complaint Resolution Procedure for Youth at Home.

§89.15. Alleged Mistreatment Rules and Definitions.

§89.17. Alleged Mistreatment Procedure for TYC Operated Facilities.

§89.19. Alleged Mistreatment Procedure for Striking Incidents.

§89.21. Alleged Mistreatment Procedure for Residential Contract Programs.

§89.23. Alleged Mistreatment Procedure for Youth At Home.

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

Issued in Austin, Texas, on October 26, 1995.

TRD-9514164 Steve Robinson
Executive Director
Texas Youth Commission

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 483-5244

♦ ♦ ♦

• 37 TAC §89.7, §89.15

The Texas Youth Commission (TYC) proposes new §89.7 and §89.15, concerning youth complaint resolution system and alleged mistreatment system. The new sections allow more local control of procedures than did the repealed sections. New §89.7 defines qualifications of the staff member having authority to resolve a youth's complaint, the procedures required for the resolution, and provides for appeals to the executive director. New §89.15 defines behaviors subject to alleged mistreatment procedures, establishes investigation and reporting requirements, and provides for appeals to the executive director.

John Franks, Director of Finance, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Franks also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be the streamlining of centralized requirements to promote more efficient use of resources. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Comments on the proposal may be submitted to Gail Graham, Policy and Manuals Coordinator, Texas Youth Commission, 4900 North Lamar Boulevard, P.O. Box 4260, Austin, Texas 78765.

The new sections are proposed under the Human Resources Code, §61.034, which provides the Texas Youth Commission with the authority to make rules appropriate to the proper accomplishment of its functions.

The proposed rule implements the Human Resource Code, §61.034.

§89.7. Youth Complaint Resolution System.

(a) Purpose. This section should be implemented in a way that best achieves the following public purposes:

(1) to provide a simple trustworthy way for a youth, the youth's parents or other persons to voice complaints about a youth's care and treatment;

(2) to respond to all complaints promptly and thoroughly with corrective measures or information that aids understanding; and

(3) to achieve the foregoing purposes in a manner that contributes positively to the resocialization process and results in on-going improvement in agency programs and services.

(b) Explanation of terms used.

(1) "Complaint" means any dissatisfaction expressed by any person with regard to youth care, treatment or conditions that is within the agency's jurisdiction to correct.

(2) "Tracking number" means a number that is recorded for each complaint to confirm its filing and track its progress.

(c) Application. This section does not apply to complaints about:

(1) alleged abuse or neglect that are handled according to the provisions of §89.15 of this title (relating to Alleged Mistreatment System);

(2) disciplinary actions that are handled according to the provisions of §91.3 of this title (relating to Rules of Conduct, Contraband and Dress);

(3) phase system progress that are handled according to the provisions of §87.3 of this title (relating Levels/Phase System in TYC Operated Facilities); and

(4) security or detention referrals that are handled according to the provisions of §91.65 of this title (relating to Security Unit).

(d) Filing Complaints.

(1) Complaints shall be in writing and given to the person who has been designated at the youth's placement to receive them.

(2) Reasonable restrictions may be imposed on the time, place and manner of filing to preserve order and maintain attention during instructional or treatment activities.

(3) Youth or their parents shall be provided assistance when necessary in writing a complaint and in seeing to it that the complaint is filed correctly.

(4) A complaint has been filed correctly when the person who has been designated at the youth's placement to receive complaints has assigned it a tracking number.

(5) No one shall be retaliated against in any way for filing a complaint. No reference to the filing of a complaint shall be included in the youth's records.

(e) Resolving Complaints.

(1) The person or team leader who is assigned to resolve a complaint shall be a person or team leader at the youth's placement who:

(A) has the authority to implement an appropriate corrective measure;

(B) has the responsibility to recommend changes in agency policies or procedures that would be needed to implement an appropriate corrective measure; or

(C) has knowledge or access to information that can aid understanding.

(2) The person or team leader who is assigned to resolve a complaint may employ whatever methods the person determines necessary and appropriate to reach a successful resolution of the complaint, such as:

(A) conducting personal interviews of the youth, the youth's parents, or others who might provide helpful information;

(B) researching previous resolutions of the same or similar complaints;

(C) using mediation, dispute resolution or other problem-solving techniques; or

(D) consulting with other persons who might be affected by or contribute to a successful resolution.

(3) A complaint is successfully resolved when the response results in corrective measures or in the provision of information that aids understanding.

(4) The response to a complaint shall be in writing and shall indicate the tracking number and a brief summary of any factual determinations that are made, corrective measures that are taken, or information that is given to aid understanding.

(f) Appeal to the Executive Director.

(1) A youth or the youth's parents may appeal an unsatisfactory response or the lack of response to a complaint that has been assigned a tracking number.

(2) There is a lack of response to a complaint if no response to it is received within 15 working days of filing.

(3) Appeals shall be handled under the provisions of §89.25 of this title (relating to Appeal to the Executive Director).

§89.15. Alleged Mistreatment System.

(a) Purpose. This chapter should be implemented in a way that best achieves the following purposes:

(1) to provide definitions of abuse and neglect of any youth who receives care, treatment or services from a facility, contract program or agent of the Texas Youth Commission (TYC);

(2) to provide procedures for the protection of youth through the reporting and investigation of all alleged abuse and neglect by TYC and contract employees and volunteers; and

(3) to prescribe principles and methods for the prevention of abuse and neglect.

(b) Explanation of terms used. Alleged mistreatment is divided into two categories: abuse and neglect.

(1) Abuse is an act or omission by any TYC staff member, contract employee or volunteer that endangers or impairs a youth's physical, mental or emotional health and development. Abuse includes the following:

(A) mental or emotional injury to the youth that results in an observable and material impairment in the youth's growth, development, or psychological functioning;

(B) causing or permitting the youth to be in a situation in which the youth sustains a mental or emotional injury that results in an observable and material impairment in the youth's growth, development, or psychological functioning;

(C) physical injury that results in substantial harm to the youth, or the genuine threat of substantial harm from physical injury to the youth, including an injury that is at variance with the history or explanation given and excluding an accident, reasonable discipline, or justified use of force that does not expose the youth to a substantial risk of harm;

(D) failure to make a reasonable effort to prevent an action by the youth or another person that results in physical injury that results in substantial harm to the youth;

(E) sexual conduct harmful to a youth's mental, emotional or physical welfare;

(F) failure to make a reasonable effort to prevent sexual contact harmful to a youth;

(G) compelling or encouraging the youth to engage in sexual conduct harmful to the youth or others;

(H) causing, permitting, encouraging, engaging in, or allowing the photographing, filming, or depicting of the youth if the person know or should have known that the resulting photograph, film or depiction of the youth is obscene or pornographic.

(2) Neglect is an act or omission by any TYC staff member, contract employee or volunteer who is either directly responsible for providing adequate food, clothing, shelter, protection, medical care and supervision, or arranging to have someone else to provide such needs and whose failure to do so, results in harm or the substantial risk of harm. Neglect includes the following:

(A) the leaving of a youth in a situation where the youth would be exposed to a substantial risk of harm, without arranging for necessary care for the child, and a demonstration of an intent not to return by a parent, guardian, TYC employee, contract provider or volunteer;

(B) the following acts or omissions by any person:

(i) placing the youth in or failing to remove the youth from a situation that a reasonable person would realize requires judgment or actions beyond the youth's level of maturity, physical condition, or mental abilities and that results in bodily injury or a substantial risk of immediate harm to the youth;

(ii) the failure to seek, obtain, or follow through with medical care for the youth, with the failure resulting in or presenting a substantial risk of death, disfigurement, or bodily injury or with the failure resulting in an observable and material impairment to the growth, development, or functioning of the youth;

(iii) the failure to provide the youth with food, clothing or shelter necessary to sustain the life or health of the youth, excluding failure caused primarily by financial inability unless relief services had been offered and refused; or

(iv) placing a youth in or failing to remove the youth from a situation in which the youth would be exposed to a substantial risk of sexual conduct harmful to the youth; or

(v) the failure by the person responsible for the youth's care, custody or welfare to permit the youth to return to the youth's home without arranging for the necessary care for the child after the youth has been absent from the home for any reason, including having been in residential placement, or having run away.

(c) Application. Alleged mistreatment does not include:

(1) proper use of restraints or restraint techniques;

(2) complaints related to the daily administrative operations of a facility (e.g. staff falling asleep where youth is not affected, theft of youth's personal property or youth escapes where no harm results). Such complaints shall be referred to the administrator of the facility or program;

(3) verbal remarks made by TYC or contract staff or volunteers where there is no evidence of observable or material impairment or where substantial harm or risk of substantial harm does not occur as a result of the remarks;

(4) reasonable discipline;

(5) accidental injuries, unless the harm results from inadequate supervision, and

(6) the clinical practice of a physician, dentist, registered nurse, or licensed vocational nurse.

(d) Investigation Requirements.

(1) All allegations of mistreatment are thoroughly investigated, including new allegations that arise during the course of the initial investigation.

(2) When necessary, additional staff will be assigned to conduct investigations. Priority will be given to situations threatening the immediate safety and well-being of the youth.

(3) The allegation of mistreatment is filed by the facility or program where the alleged incident occurred even though the alleged victim and other witnesses may have moved prior to the filing;

(4) The Youth Rights Administrator may aid or assume an investigation at any stage of the investigation process. This shall include enlisting the assistance of additional investigators when all parties are not located in the same place.

(e) Appeal to the Executive Director.

(1) A youth or someone on the behalf of the youth, may appeal an unsatisfactory decision or lack of response to an allegation of mistreatment that has been assigned a case file number.

(2) Appeals shall be handled under the provisions of §89.25 of this title (relating to Appeal to Executive Director).

(f) The TYC Board shall be responsible for:

(1) receiving and reviewing complaints about the manner in which investigations have been conducted by the agency; and

(2) if necessary, conducting an independent investigation.

(g) The internal audit department shall periodically review procedures for investigating abuse and neglect in all TYC facilities and contract programs.

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

Issued in Austin, Texas, on October 26, 1995.

TRD-9513817 Steve Robinson
Executive Director
Texas Youth Commission

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 483-5244

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Part XIII. Texas Commission on Fire Protection

Chapter 421. Standards for Certification

• 37 TAC §421.3

The Texas Commission on Fire Protection proposes an amendment to §421.3, concerning minimum standards set by the commission. The change to this section adds language concerning objectives of the commission, to recognize the participation of the commission in the accreditation program outlined by the International Fire Service Accreditation Congress (IFSAC), by allowing the commission to grant individuals from Texas IFSAC certification. The amendment has a proposed effective date of January 1, 1997.

Leonardo Perez, Fire Protection Personnel Advisory Committee Vice-Chairman, has determined that for the first five-year period the amended section is in effect there will be fiscal implications for state government. It is estimated that the state will expend approximately $3,000 each year on IFSAC certification seals for individuals from Texas seeking IFSAC certification. The commission may recover some or all of the cost through fees to individuals seeking IFSAC certification. There will be no fiscal implications for local governments.

Mr. Perez also has determined that for each of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be that participation in the IFSAC accreditation process insures that Texas certification requirements comply with national standards for testing and training of fire protection personnel and benefits Texas fire fighters by increasing their mobility to other accredited jurisdictions. There are no additional costs of compliance for small or large businesses. Individuals who seek to comply with the IFSAC requirements will incur a cost of approximately $5.00 to purchase the IFSAC seal to go on each certificate.

Comments on the proposal may be submitted to Gary L. Warren, Interim Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286.

The amendment is proposed under Texas Government Code, §419.008, which provides the Texas Commission on Fire Protection with authority to propose rules for the administration of its powers and duties; and Texas Government Code, §419.022(a)(5), which provides the commission with authority to establish minimum requirements for fire protection personnel.

Section 419.022(a)(5) is affected by the proposed amendment.

§421.3. Minimum Standards Set by the Commission.

(a) (No change.)

(b) Objectives. The objectives of the commission are to raise the level of competence of fire protection personnel by establishing specified minimum standards within the scope of the Code creating the commission and outlining its duties and responsibilities. The commission has the authority to:

(1)-(9) (No change.)

(10) grant equivalent International Fire Service Accreditation Congress (IFSAC) Certification to individuals holding current commission certificates recognized by IFSAC.

(c) (No change.)

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

Issued in Austin, Texas, on November 1, 1995.

TRD-9514170 Jack Woods
General Counsel
Texas Commission on Fire Protection

Proposed date of adoption: January 1, 1997

For further information, please call: (512) 918-7184

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Chapter 423. Fire Suppression

Subchapter A. Minimum Standards for Structure Fire Protection Personnel Certification

• 37 TAC §423.11

The Texas Commission on Fire Protection proposes new §423.11, concerning International Fire Service Accreditation Congress (IFSAC) certification. The new section allows individuals holding current Texas certification as structural fire protection personnel to apply for IFSAC certification. The new section has a proposed effective date of January 1, 1997.

Leonardo Perez, Fire Protection Personnel Advisory Committee Vice-Chairman, has determined that for the first five-year period the section is in effect there will be fiscal implications for state government. It is estimated that the state will expend approximately $3,000 each year on IFSAC certification seals for individuals from Texas seeking IFSAC certification. The commission may recover some or all of the cost through fees to individuals seeking IFSAC certification. There will be no fiscal implications for local governments.

Mr. Perez also has determined that for each of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be that participation in the IFSAC accreditation process insures that Texas certification requirements comply with national standards for testing and training of fire protection personnel and benefits Texas fire fighters by increasing their mobility to other accredited jurisdictions. There are no additional costs of compliance for small or large businesses. Individuals who seek to comply with the IFSAC requirements will incur a cost of approximately $5.00 to purchase the IFSAC seal to go on each certificate.

Comments on the proposal may be submitted to Gary L. Warren, Interim Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286.

The new section is proposed under Texas Government Code, §419.008, which provides the Texas Commission on Fire Protection with authority to propose rules for the administration of its powers and duties; and Texas Government Code, §419.022(a)(5), which provides the commission with authority to establish minimum requirements for fire protection personnel.

Section 419.022(a)(5) is affected by the proposed new section.

§423.11. International Fire Service Accreditation Congress (IFSAC) Certification. Individuals holding current commission Structural Fire Protection Certification may be granted International Fire Service Accreditation Congress (IFSAC) Certification by making application to the commission for the IFSAC seal and paying applicable fees.

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

Issued in Austin, Texas, on November 1, 1995.

TRD-9514171 Jack Woods
General Counsel
Texas Commission on Fire Protection

Proposed date of adoption: January 1, 1997

For further information, please call: (512) 918-7184

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Chapter 437. Fees

• 37 TAC §437.3

The Texas Commission on Fire Protection proposes an amendment to §437.3, concerning certification fees. The amendment conforms subsection (f) to other rule changes concerning fire instructor certification and changes the language in subsections (h), (i) and (j) relating to certificate expiration to allow re-certification without testing to the extent permitted by Government Code, §419.034. The amendment has a proposed effective date of March 1, 1996.

Leonardo Perez, Fire Protection Personnel Advisory Committee Vice-Chairman, has determined that for the first five-year period the amended section is in effect there will be fiscal implications for state government. The rule change will result in additional processing time for termination notices estimated at approximately 50 hours a year at an average cost of $15/hour, for a total annual cost of $750. Additional programming may reduce this processing time and cost. The commission may also experience a loss of revenue of approximately $3,000 each year in certification fees for certificates that will be transferred instead of reissued. Local governments may realize a reduction in certification fees of $20 each where they employ an individual who holds multiple certificates that have not expired. In addition, testing fees of $15 to $65 are eliminated in certain circumstances where unexpired certificates are transferred and renewed instead of reissued.

Mr. Perez also has determined that for each of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be that local governments that employ previously certified fire protection personnel will not incur costs associated with proficiency testing that the commission deems unnecessary. There are no additional costs of compliance for small or large businesses or individuals required to comply.

Comments on the proposal may be submitted to Gary L. Warren, Interim Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286.

The amendment is proposed under Texas Government Code, §419.008, which provides the Texas Commission on Fire Protection with authority to propose rules for the administration of its powers and duties; Texas Government Code, §419.026, which provides the commission with authority to establish fees for certification and examinations; and Texas Government Code, §419.034, which provides the commission with authority to establish standards for certificate renewal.

Texas Government Code, §419.026, and §419.034 is affected by the proposed amendment.

§437.3. Fees-Certification.

(a)-(e) (No change.)

(f) In addition to the certificates listed in subsection (e) of this section (concerning minimum level certificates), one of the following instructor certificates, as a minimum, is required for personnel who will provide fire service training approved by the Commission that is to be applied toward any level of certification:

(1) Basic Fire Service Instructor.

(2) Intermediate Fire Service Instructor.

(3) **Basic Fire Education Specialist.** [Instructional Specialist.]

(4) **Intermediate Fire Education Specialist.**

(5) **Associate Instructor.**

(g) (No change.)

(h) If a person who was placed on the Commission's inactive status list reenters the fire service, whose certificate(s) has not expired, the employing entity must, within 14 days of employment, notify the Commission that the individual has been employed. No fee will be charged until the certificate(s) is renewed.

(i)[(h)] If a person who was placed on the Commission's inactive status list reenters the fire service, **whose certificate(s) has been expired for** [with a break in service of] less than one year, the employing entity must:

(1) Within 14 days of employment, notify the Commission that the individual has been employed.

(2) Within one year from the date of **expiration of the previously held certificate** [employment], make application for certification of the individual and pay the certification fee as required by subsection (a) of this section (concerning certification fees). Upon payment of the required fees, the certificates previously held by the individual, for which he or she continues to qualify, will be re-issued. The employing entity has the option of making the application and paying the fee at any time within the one-year period, provided the certificate has not been expired for more than one year.

(j)[(i)] If a person who was placed on the Commission's inactive status list reenters the fire service, **whose certificate(s) has been expired for** [with a break in service of] one year or longer, the employing entity must:

(1) Within 14 days of employment, notify the Commission that the individual has been employed;

(2) Prior to assignment to any fire suppression duties, obtain documented proof that the individual has passed the [written] proficiency test as required by §439.15 [§439.17] of this title (relating to Testing for Proof of Proficiency) within one calendar year prior to the date of employment; and

(3) Within one year from the date of employment, make application for certification of the individual and pay the certification fee as required by subsections (a) and (b) of this section (concerning certification fees). Upon payment of the required fees, the certificates previously held by the individual for which he or she continues to qualify, will be re-issued. The employing entity has the option of making the application and paying the fee at any time within the one-year period.

(k)[(j)] Any person who holds a certificate, and is no longer employed by an entity that is regulated by the Commission may submit in writing a request together with the required fee to receive a one-time certificate stating the level of certification in each discipline held by the person on the date that person left employment, pursuant to the Texas Government Code, §419.033(b). Multiple certifications may be listed on the one-time certificate. The one-time fee for the one-time certificate shall be the same as the current certification fee provided in subsection (a) of this section.

(l)[(k)] A facility that provides training for any certification in subsection (e) of this section must be certified by the commission. A training facility that is certified by the commission to instruct in one or more disciplines shall be charged only one certification fee.

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

Issued in Austin, Texas, on November 1, 1995.

TRD-9514172 Jack Woods
General Counsel
Texas Commission on Fire Protection

Proposed date of adoption: March 1, 1996

For further information, please call: (512) 918-7184

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• 37 TAC §437.17

The Texas Commission on Fire Protection proposes new §437.17, concerning fees for International Fire Service Accreditation Congress seals. The new section allows the commission to charge a fee for individual IFSAC seals. The new section has a proposed effective date of January 1, 1997.

Leonardo Perez, Fire Protection Personnel Advisory Committee Vice-Chairman, has determined that for the first five-year period the section is in effect there will be fiscal implications for state government. It is estimated that the state will expend approximately $3,000

each year on IFSAC certification seals for individuals from Texas seeking IFSAC certification. The commission may recover some or all of the cost through fees to individuals seeking IFSAC certification. There will be no fiscal implications for local governments.

Mr. Perez also has determined that for each of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be that participation in the IFSAC accreditation process insures that Texas certification requirements comply with national standards for testing and training of fire protection personnel and benefits Texas fire fighters by increasing their mobility to other accredited jurisdictions. There are no additional costs of compliance for small or large businesses. Individuals who seek to comply with the IFSAC requirements will incur a cost of approximately $5.00 to purchase the IFSAC seal to go on each certificate.

Comments on the proposal may be submitted to Gary L. Warren, Interim Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286.

The new section is proposed under Texas Government Code, §419.008, which provides the Texas Commission on Fire Protection with authority to propose rules for the administration of its powers and duties; and Texas Government Code, §419.022(a)(5), which provides the commission with authority to establish minimum requirements for fire protection personnel.

Section 419.022(a)(5) is affected by the proposed new section.

§437.17. Fees-International Fire Service Accreditation Congress (IFSAC) Seal. A fee may be charged for individual IFSAC seals.

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

Issued in Austin, Texas, on November 1, 1995.

TRD-9514173 Jack Woods
General Counsel
Texas Commission on Fire Protection

Proposed date of adoption: January 1, 1997

For further information, please call: (512) 918-7184

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Chapter 439. Examinations for Certification

• 37 TAC §439.15

The Texas Commission on Fire Protection proposes an amendment to §439. 15, concerning testing for certification status. The amendment imposes a testing requirement on individuals whose certificate has been expired for one year or longer instead of referring to "inactive status." The amendment has a proposed effective date of March 1, 1996.

Leonardo Perez, Fire Protection Personnel Advisory Committee Vice-Chairman, has determined that for the first five-year period the amended section is in effect there will be fiscal implications for state government. The rule change will result in additional processing time for termination notices estimated at approximately 50 hours a year at an average cost of $15/hour, for a total annual cost of $750. Additional programming may reduce this processing time and cost. The commission may also experience a loss of revenue of approximately $3,000 each year in certification fees for certificates that will be transferred instead of reissued. Local governments may realize a reduction in certification fees of $20 each where they employ an individual who holds multiple certificates that have not expired. In addition, testing fees of $15 to $65 are eliminated in certain circumstances where unexpired certificates are transferred and renewed instead of reissued.

Mr. Perez also has determined that for each of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be that local governments that employ previously certified fire protection personnel will not incur costs associated with proficiency testing that the commission deems unnecessary. There are no additional costs of compliance for small or large businesses or individuals required to comply.

Comments on the proposal may be submitted to Gary L. Warren, Interim Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286.

The amendment is proposed under Texas Government Code, §419.008, which provides the Texas Commission on Fire Protection with authority to propose rules for the administration of its powers and duties; Texas Government Code, §419.026, which provides the commission with authority to establish fees for certification and examinations; and Texas Government Code, §419.034, which provides the commission with authority to establish standards for certificate renewal.

Texas Government Code, §419.026, and §419.034 is affected by the proposed amendment.

§439.15. Testing for Certification Status.

(a) An individual whose certificate(s) has been expired [on inactive status, as defined in §421.5 of this title (relating to definitions)] for one year or longer may not renew the certificate or certificates that were previously held.

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

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

Issued in Austin, Texas, on November 1, 1995.

TRD-9514174 Jack Woods
General Counsel
Texas Commission on Fire Protection

Proposed date of adoption: March 1, 1996

For further information, please call: (512) 918-7184

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Chapter 511. Standards for State Fire Marshal Inspections

• 37 TAC §§511.1, 511.3, 511.5, 511.7

The Texas Commission on Fire Protection proposes new Chapter 511, concerning Standards for State Fire Marshal Inspections, including new §§511. 1, 511.3, 511.5, and 511.7. The new chapter is proposed for the purpose of adopting standards for life safety inspections conducted by the State Fire Marshal's office pursuant to the Government Code, §417.008. The new chapter adopts by reference the 1994 edition of the Life Safety Code, NFPA 101, developed by the National Fire Protection Association, a nationally recognized standards-making association. The Life Safety Code will NOT apply in geographic areas under the jurisdiction of a local government that has adopted fire protection ordinances that apply in that geographic area.

G. Mike Davis, State Fire Marshal, has determined that for the first five-year period the rules are in effect there will be fiscal implications to state and local governments as a result of enforcing the new chapter. Buildings occupied by state agencies that are required to comply with the proposed rule will incur costs related to meeting the requirements of the Life Safety Code. The exact dollar amount will vary with the size of the building and the nature of the occupancy; however, costs of $2,500 to $15,000 per building are possible. Local governmental entities required to comply will also incur similar costs. It should be noted, however, that the standard will not apply in jurisdictions that have adopted their own fire protection ordinances.

Mr. Davis also has determined that for each year of the first five years the new sections are in effect the public benefit anticipated as a result of enforcing the new sections will be to provide a reasonable level of safety by reducing the probability of injury and loss of life from the effects of fire, smoke, fumes, or panic, and other emergencies having the potential for similar consequences with due regard to the nature and function of the occupancy. The degree or level of life safety afforded a particular occupancy is an interwoven combination of prevention of ignition, detection of fire, control of fire development, confinement of the effects of fire, extinguishment of fire, egress or evacuation, staff reaction, and provision of life safety information to occupants. The costs of compliance for small and large businesses are estimated to be the same on the basis of cost per $100 of sales volume, inasmuch as compliance costs will vary directly with the size of the facility which is generally related to sales volume. Initial compliance costs in the range of $500 to $5,000 per building are anticipated. The cost of compliance for individuals that operate facilities open to the public will be the same as the costs of compliance for businesses.

Comments on the proposal may be submitted to G. Mike Davis, State Fire Marshal, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas, 78768-2286.

The new sections are proposed under Texas Government Code, §417.008(e), which provides the Texas Commission on Fire Protection with authority to adopt by rule any appropriate standard developed by a nationally recognized standards-making association under which the state fire marshal may conduct inspections of buildings open to the public and order the correction of dangerous conditions.

Government Code, §417.008 is affected by the new sections.

§511.1. Purpose. The purpose of this chapter is to administer the law set forth in Government Code, §417.008 regarding right of entry and examination and correction of dangerous conditions.

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

NFPA-The National Fire Protection Association, a nationally recognized standards making organization.

§511.5. Adopted Standards. The Commission adopts by reference the following copyrighted standards and recommendations, except to the extent they are in conflict with sections of this chapter or any Texas statutes or federal law. The standards are published by and are available from the National Fire Protection Association, Batterymarch Park, Quincy, Massachusetts 02269: NFPA 101-1994, Life Safety Code and cited references.

§511.7. Severability. If any provision of this chapter or the application thereof to any person or circumstance is held invalid for any reason, the invalidity shall not affect the other provisions or any other application of these rules which can be given effect without the invalid provisions or application. To this end, all provisions of this chapter are declared to be severable.

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

Issued in Austin, Texas, on November 1, 1995

TRD-9514175 Jack Woods
General Counsel
Texas Commission on Fire Protection

Earliest possible date of adoption: December 15, 1995

For further information, please call: (512) 918-7184

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Texas Department of Insurance Exempt Filing

Notification Pursuant to the Insurance Code, Chapter 5, Subchapter L

(Editor's Note: As required by the Insurance Code, Article 5.96 and 5. 97, the Texas Register publishes notice of proposed actions by the Texas Board of Insurance. Notice of action proposed under Article 5.96 must be published in the Texas Register not later than the 30th day before the board adopts the proposal. Notice of action proposed under Article 5.97 must be published in the Texas Register not later than the tenth day before the Board of Insurance adopts the proposal. The Administrative Procedure Act, the Government Code, Chapters 2001 and 2002, does not apply to board action under Articles 5.96 and 5.97.

The complete text of the proposal summarized here may be examined in the offices of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78714-9104.)

The Commissioner of Insurance, at a public hearing under Docket Number 2188 scheduled for 1:30 p.m., December 14, 1995, in Room 100 of the Texas Department of Insurance Building, 333 Guadalupe Street in Austin, Texas, will consider a proposal made in a petition on automobile rental reimbursement coverage, filed by James H. Mallett. The petition seeks to amend actions taken by the State Board of Insurance on July 15, 1993, and ratified and adopted by Commissioner's Order Number 95-1164, issued November 7, 1995. The petition (Reference Number A-1095-37) was filed on October 9, 1995. In response to Mr. Mallett's petition, staff has filed its own exhibit under this same reference number.

On July 15, 1993, the Board adopted amendments to the Texas Automobile Rules and Rating Manual (the Manual), Rate Rule 30 and optional Endorsement 523A (to be redesignated 523B), Rental Reimbursement Coverage. Those amendments replaced the maximum benefit level of $20 per day, up to $600 total, with multi-tiered benefit levels as follows: $20/$600, $25/$750, $30/$900, or $35/$1,050. However, the amendments are not effective until the effective date of the relevant rates adopted pursuant to the private passenger and commercial automobile insurance benchmark rate hearing. New Endorsement 523B leaves blanks for the benefit levels chosen, and therefore would need no further revision if Mr. Mallett's proposal is adopted. However, Rate Rule 30 would need to be revised, as shown in staff's proposed exhibit mentioned herein.

Mr. Mallett's petition notes that the benefit level of $20 per day, $600 maximum was adopted more than 11 years ago. The petition alleges the "$20 level provides consumers with only the smallest sub-compact automobiles..." that result in greater injuries when wrecked. The petition makes other arguments against retaining the $20 level, and seeks its elimination. The petition supports the previously mentioned levels of $25, $30, and $35 per day, and the corresponding maximum amounts.

A copy of the petition containing the full text of the proposed amendments to the Manual is available for review in the office of the Chief Clerk of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas. For further information or to request copies of the petition, please contact Sylvia Gutierrez at (512) 463-6326; refer to (Reference Number A-1095-37).

The written comments should be directed to Office of the Chief Clerk, Texas Department of Insurance, P.O. Box 149104, MC 113-2A, Austin, Texas 78714-9104. An additional copy of comments is to be submitted to David Durden, Deputy Commissioner, Property and Casualty Insurance Lines, Texas Department of Insurance, P.O. Box 149104, MC 104-5A, Austin, Texas 78714-9104.

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Administrative Procedure Act.

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

Issued in Austin, Texas, on November 8, 1995.

TRD-9514459 Alicia M. Fechtel
General Counsel and Chief Clerk
Texas Department of Insurance

For further information, please call: (512) 463-6327

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WITHDRAWN RULES

An agency may withdraw a proposed action or the remaining effectiveness of an emergency action by filing a notice of withdrawal with the ***Texas Register***. The notice is effective immediately upon filling or 20 days after filing as specified by the agency withdrawing the action. If a proposal is not adopted or withdrawn within six months of the date of publication in the ***Texas Register***, it will automatically be withdrawn by the office of the Texas Register and a notice of the withdrawal will appear in the ***Texas Register***.

TITLE 7. BANKING AND SECURITIES

Part II. Texas Department of Banking

Chapter 10. Trust Companies

General

• 7 TAC §10.5

The Texas Department of Banking has withdrawn from consideration for permanent adoption a proposed new §10.5, which appeared in the August 8, 1995, issue of the *Texas Register* (20 TexReg 5975). The effective date of this withdrawal is November 7, 1995.

Issued in Austin, Texas, on November 7, 1995.

TRD-9514383 Everette D. Jobe
General Counsel
Texas Department of Banking

Effective date: November 7, 1995

For further information, please call: (512) 475-1300

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Chapter 25. Prepaid Funeral Contracts

Subchapter B. Regulation of Licenses

• 7 TAC §25.25

The Texas Department of Banking has withdrawn from consideration for permanent adoption a proposed new §25.25, which appeared in the August 1, 1995, issue of the *Texas Register* (20 TexReg 5863). The effective date of this withdrawal is November 7, 1995.

Issued in Austin, Texas, on November 7, 1995.

TRD-9514397 Everette D. Jobe
General Counsel
Texas Department of Banking

Effective date: November 7, 1995

For further information, please call: (512) 475-1300

♦ ♦ ♦

Name: Gavin Jasek
Grade: 4
School: Moulton Elementary School, Moulton ISD