

TEXAS REGISTER

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POSTMASTER: Please send form 3579 changes to the Texas Register, P.O. Box 13824, Austin, TX 78711-3824.

How to Use the Texas Register

Information Available: The 10 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Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.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.

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 19 (1994) is cited as follows: 19 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 "19 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 19 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, releases cumulative supplements to each printed volume of the TAC twice each year.

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.

**Administrative Guidelines for Registration of
Equipment Programs**

7 TAC §141.3 4067

**Administrative Guidelines for Registration of
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7 TAC §§143.1-143.8 4069

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25 TAC §§405.51-405.62 4083

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28 TAC §134.1000 4087

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31 TAC §§65.311, 65.312, 65.314, 65.316 4160

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37 TAC §91.73 4162

**Texas Department of Criminal
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General Allocation Rules

37 TAC §152.3 4162

37 TAC §152.22 4169

**Texas Department of Human
Services**

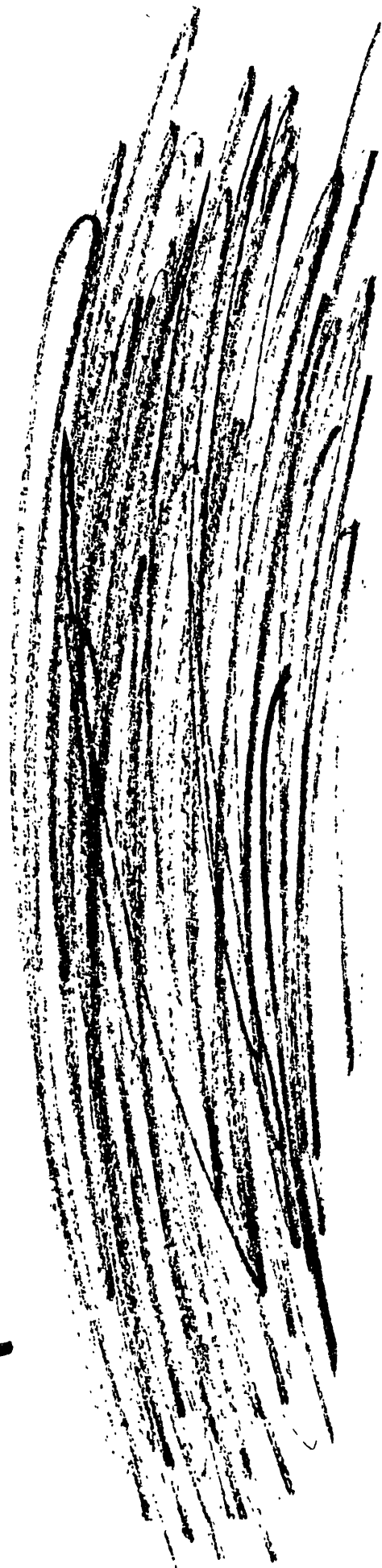
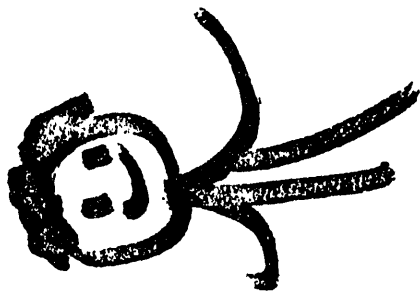
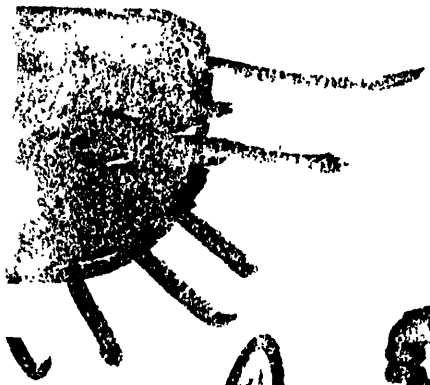
**Intermediate Care Facilities for the
Mentally Retarded (ICFs-MR)**

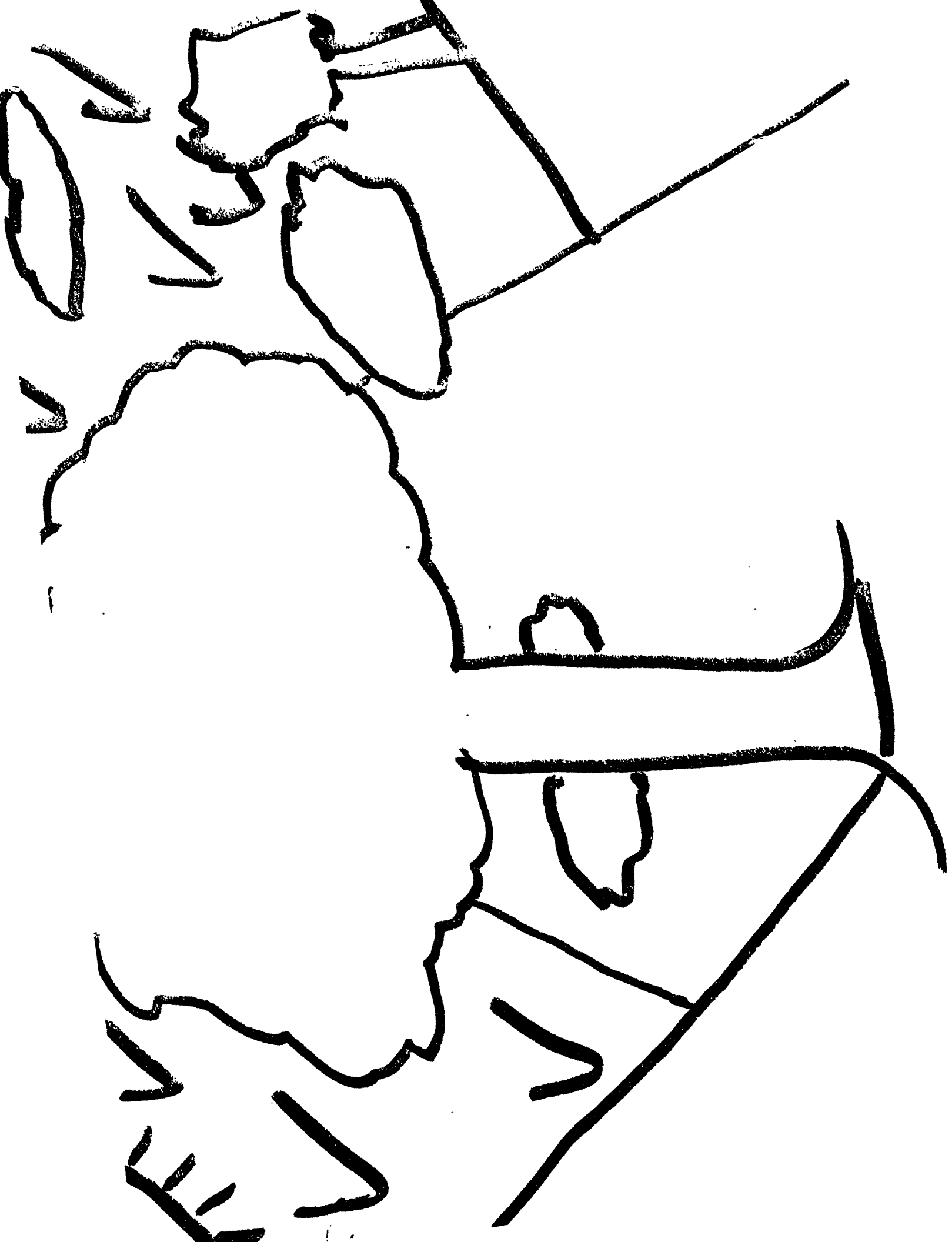
40 TAC §27.203 4170

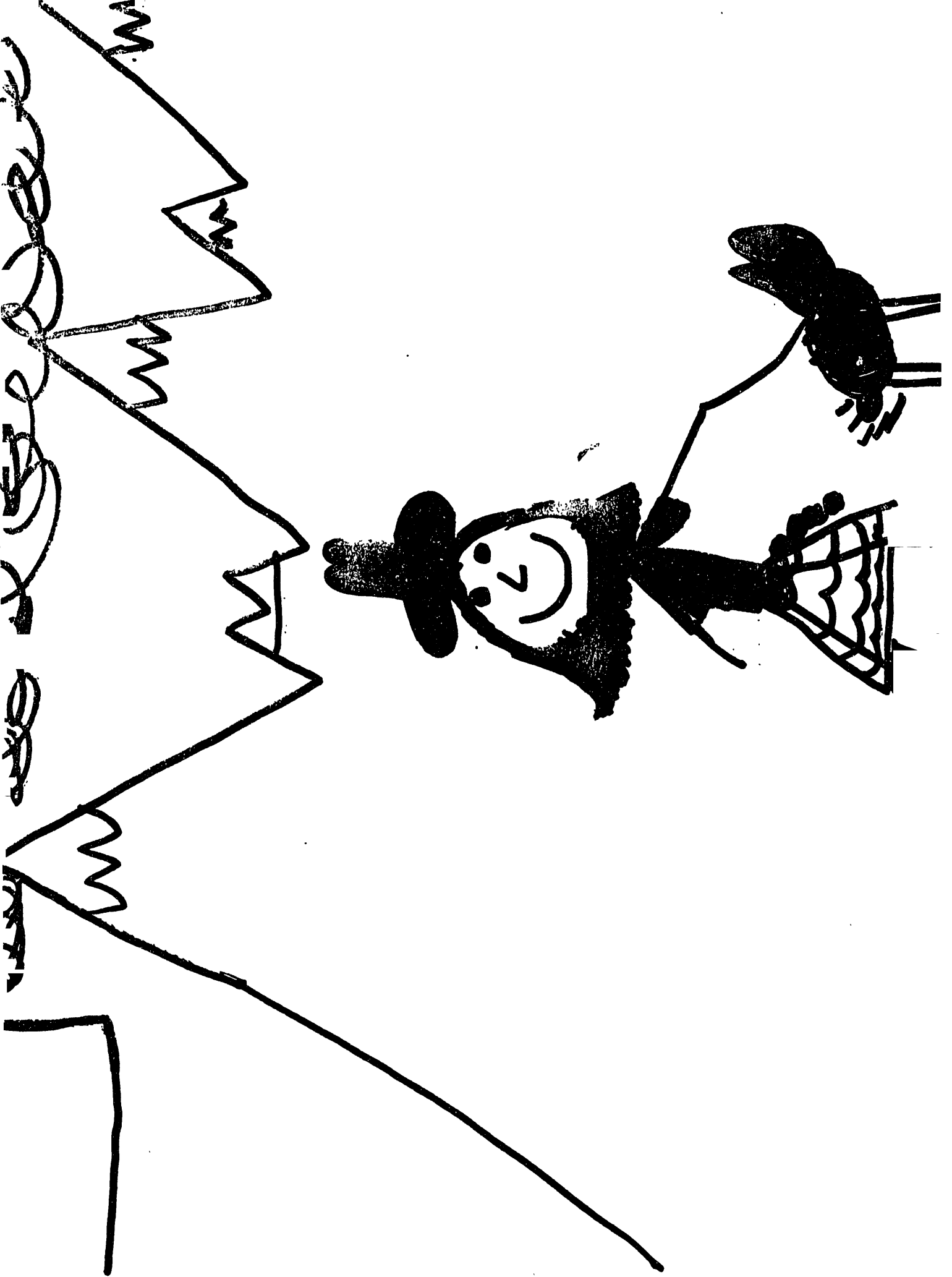


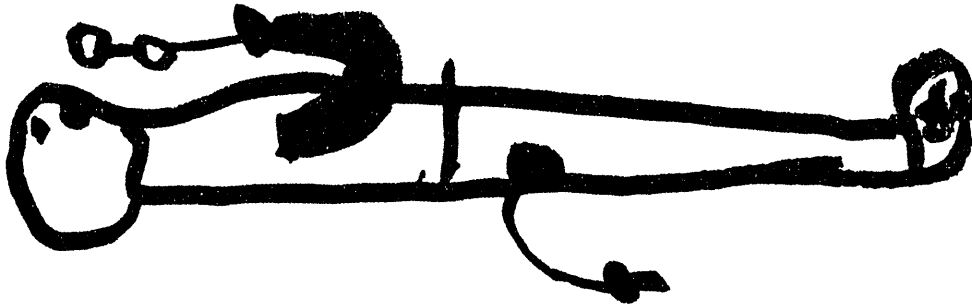
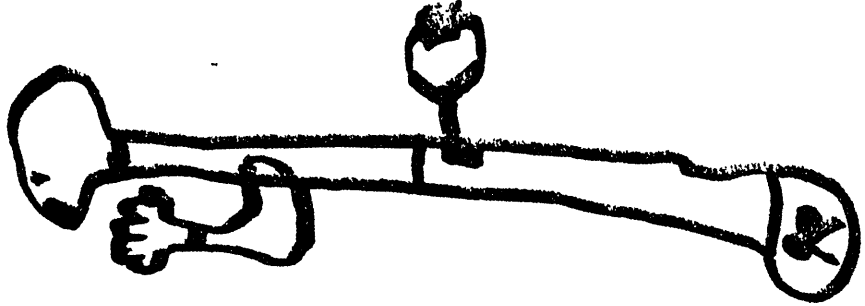
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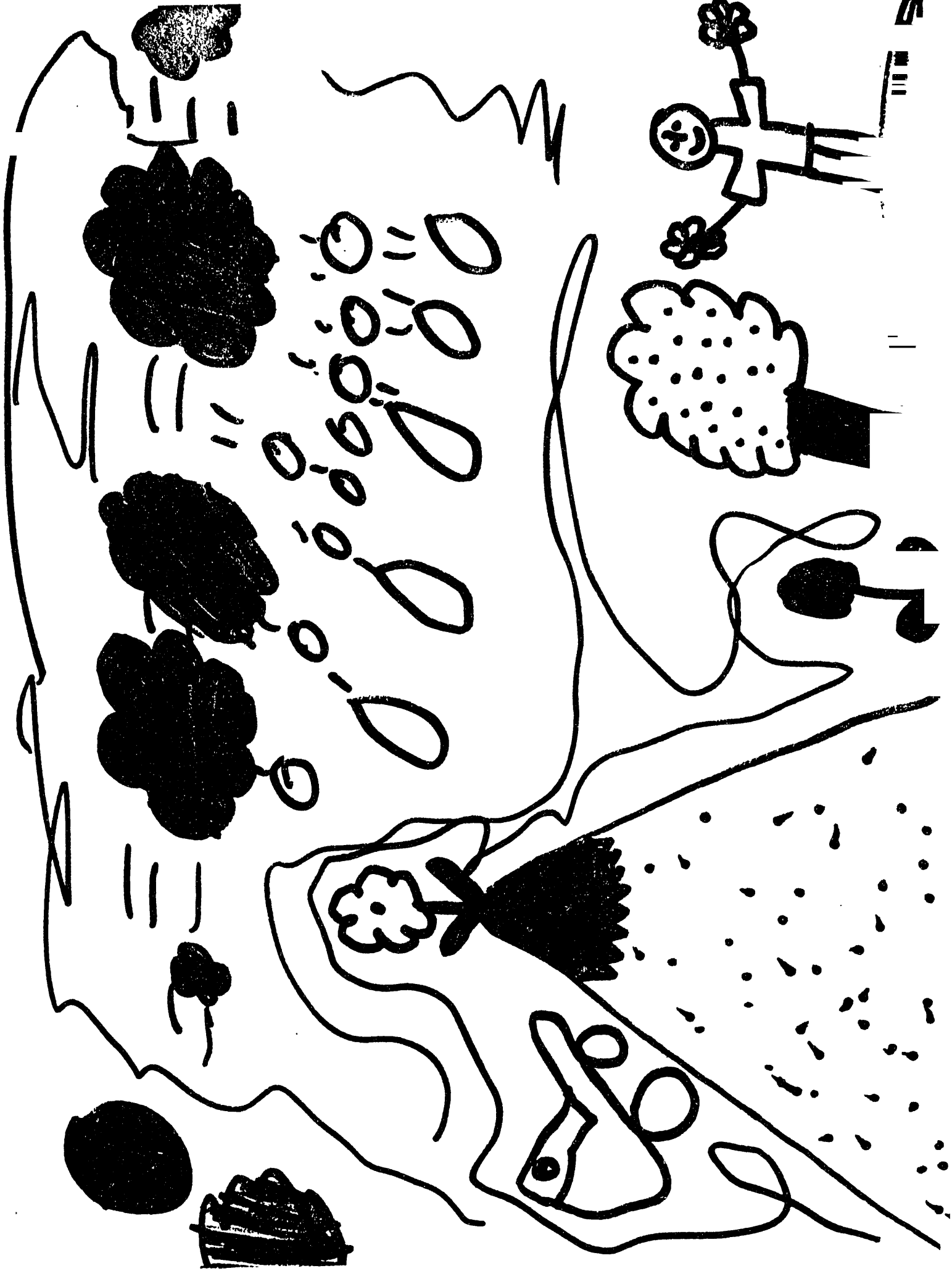
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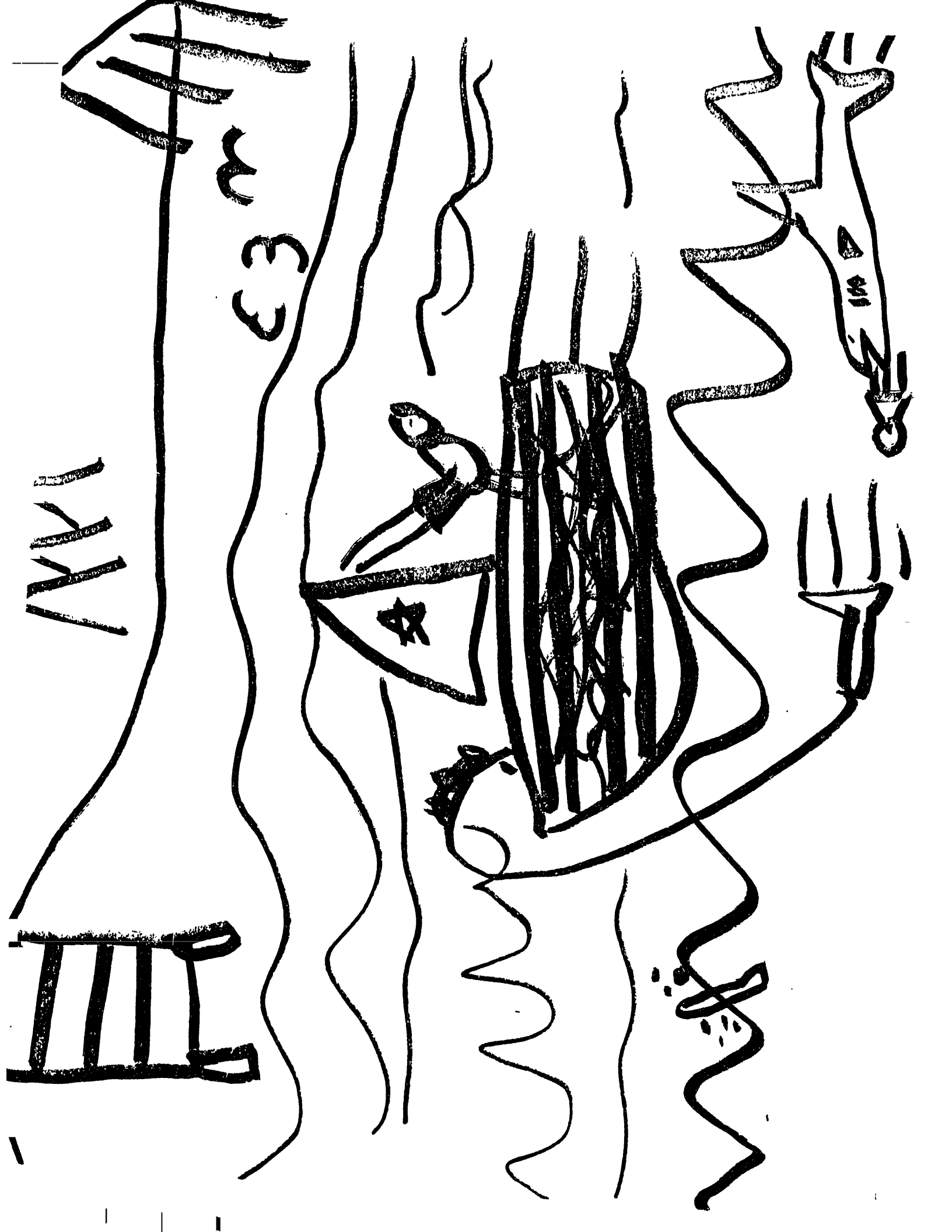












THE GOVERNOR

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

Appointments Made May 17, 1994

To be a member of the **Petroleum Storage Tank Advisory Committee** for a term to expire February 1, 1999: Carlos M. Marin, Ph.D., 2727 Clifford Drive, Harlingen, Texas 78550. Dr. Marin will be replacing Raymond C. Loehr of Austin, who resigned.

To be a member of the **Petroleum Storage Tank Advisory Committee** for a term to expire February 1, 1997: Marie V. Kleck, 730 Tuexedo, San Antonio, Texas 78209. Ms. Kleck will be replacing Gene Shull of Tyler, whose term expired.

To be a member of the **Texas State Board of Veterinary Medical Examiners** for a term to expire August 26, 1999: Sharon O. Matthews, P.O. Box 818, Albany, Texas 76430. Ms. Matthews will be replacing Olivia Ruth Eudaly of Crowley, whose term expired.

To be a member of the **Trinity River Authority of Texas Board of Directors** for a term to expire March 15, 1999: Michael P. Heiskell, 3504 Gardenia, Arlington, Texas 76016. Mr. Heiskell will be replacing Roger C. Hunsaker of Fort Worth, whose term expired.

To be a member of the **Central Colorado River Authority Board of Directors** for a term to expire February 1, 1999: Robert J. Cheaney, P.O. Box 667, Santa Anna, Texas 76878. Mr. Cheaney is being reappointed.

To be a member of the **Coastal Coordination Council** for a term to expire January 27, 1996: The Honorable Barbara K. Crews, Mayor of Galveston, 1412 Sealy, Galveston, Texas 77550. Mayor Crews is being reappointed.

To be a member of the **Texas State Commission on National and Community Service** for a term to expire April 15, 1995: Michael Anthony De La Garza, 25524 Autumn Glen, Boerne, Texas 78006. Mr. De

La Garza is being appointed to a new position pursuant to Executive Order AWR 94-15.

To be a member of the **Texas State Commission on National and Community Service** for a term to expire April 15, 1996: Raymond M. Hawkins, Ph.D., 400 West South Town #605, Tyler, Texas 75703. Dr. Hawkins is being appointed to a new position pursuant to Executive Order AWR 94-15.

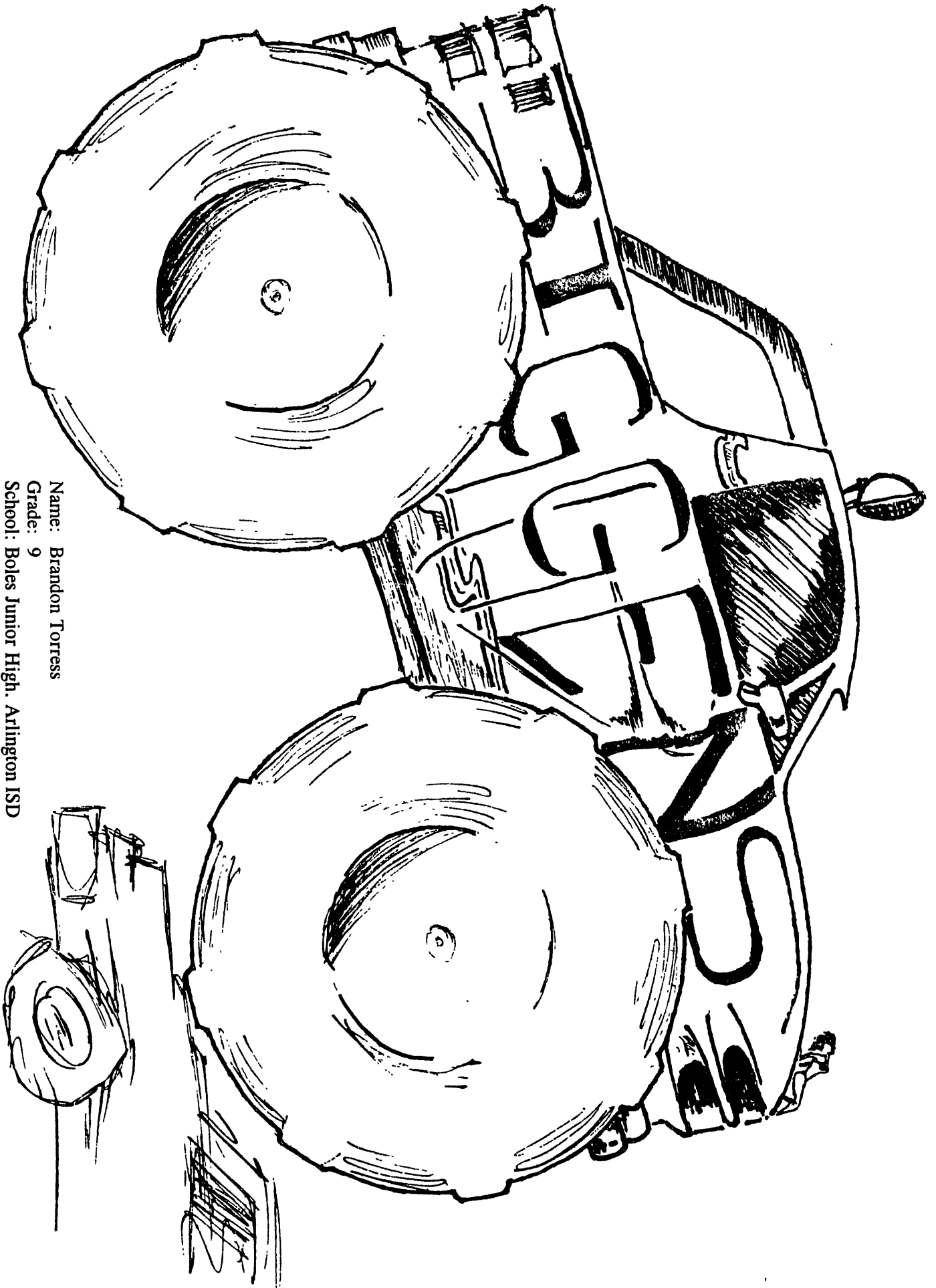
To be a member of the **Texas State Commission on National and Community Service** for a term to expire April 15, 1997: Philip Michael (Uri) Treisman, Ph.D., 3213 Hampton Road, Austin, Texas 78705. Dr. Treisman is being appointed to a new position pursuant to Executive Order AWR 94-15.

Issued in Austin, Texas, on May 18, 1994.

TRD-9441063

Ann W Richards
Governor of Texas





Name: Brandon Torress
Grade: 9
School: Boles Junior High, Arlington ISD

TEXAS ETHICS COMMISSION

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

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

Opinions

AOR-211. File closed. No opinion issued, answered by letter.

AOR-237. File closed. No opinion issued, answered by letter.

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

Issued in Austin, Texas, on May 19, 1994.

TRD-9441149

Sarah Woelk
Director, Advisory Opinions
Texas Ethics Commission

Filed: May 19, 1994

EAO-204. Disposition of state reimbursement for use of a car purchased with political contributions. (AOR-220).

Summary of Opinion. If an officeholder seeks and obtains state reimbursement for a use of a car purchased with political contributions, the money paid to the officeholder as reimbursement for use of the car must be paid by the officeholder into the officeholder's political fund.

EAO-205. Whether a member of the legislature may enter into "conservations or negotiations for future employment" with a state agency, a local governmental body, or a nongovernmental entity that does business with the state. (AOR-227).

Summary of Opinion. Nothing in the laws subject to interpretation by the Ethics Commission specifically addresses the issue of a legislator engaging in negotiations for future employment. The bribery law would prohibit a legislator from accepting or soliciting future employment in exchange for some official action on the part of the legislator during the remainder of his term of office.

EAO-206. Source of funds that may be used to pay a fine assessed by the Texas Ethics Commission under §254.042 of the Election Code (civil penalty for late report). (AOR-228).

Summary of Opinion. Payment of a fine for filing a late report with the Texas Ethics Commission is a political expenditure.

EAO-207. What a candidate, officeholder, or political committee may do with a contribution from an anonymous source. (AOR-230).

Summary of Opinion. There is no violation of Title 15 of the Election Code if a candidate, officeholder, or political committee transfers an anonymous contribution to a recognized tax-exempt charitable organization.

EAO-208. Reporting requirements applicable to a political committee that files reports of contributions and expenditures with the Federal Election Commission as well as with the Texas Ethics Commission. (AOR-231)

Summary of Opinion. General-purpose political committees are not required to report political expenditures made in connection with out-of-state campaigns, officeholders, or measures on reports filed under Chapter 254 of the Texas Election Code.

EAO-209. Whether it is permissible to use political contributions to purchase, prepare, and mail congratulatory letters to parents upon the birth of a child or certificates to students upon graduation from high school or college. (AOR-232).

Summary of Opinion. It is permissible for an officeholder to use political contributions to purchase, prepare, and mail congratulatory letters to parents upon the birth of a child and certificates to students upon graduation from high school or college. The attorney general is the appropriate source for determining whether the constitution permits the use of state resources for such purposes

EAO-210. Whether a particular bumper sticker is in violation of §255.006 of the Election Code. (AOR-233).

Summary of Opinion. The particular bumper sticker at issue in this opinion does not violate §255.006 of the Election Code. We caution that a candidate who is not an incumbent in the office sought should avoid uncertainty about the application of §255.006 by using words such as "for" before the name of the office sought, or "elect" before the candidate's name.

EAO-211. Whether a brochure that lists the duties of a justice of the peace and that bears the name, courthouse address, and courthouse phone number of a specific justice of the peace is political advertising that may not be paid for with public funds. (AOR-234).

Summary of Opinion. The attached brochure is not "political advertising" as defined in §251.001(16) of the Election Code.

EAO-212. Whether the "revolving door" provisions of Government Code, Chapter 572, apply where an individual previously employed by a regulatory agency to perform public relations services in connection with an issue subsequently seeks to perform similar services for a private foundation. (AOR-235).

Summary of Opinion. An individual formerly employed by a state regulatory agency to perform public relations work for the purpose of achieving public support for proposed legislation may perform public relations work for the same purpose for a private foundation without violating Government Code, §572.054(b).

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

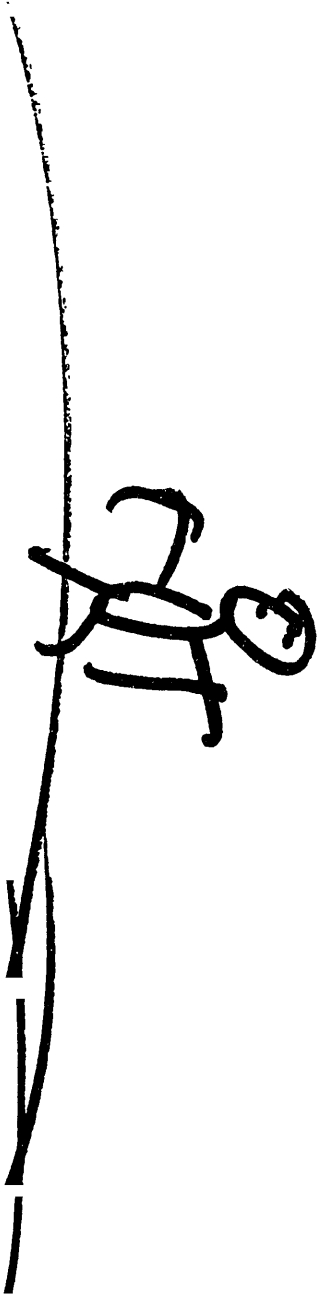
Issued in Austin, Texas, on May 19, 1994

TRD-9441148

Sarah Woelk
Director, Advisory Opinions
Texas Ethics Commission

Filed: May 19, 1994

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EMERGENCY RULES

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

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

TITLE 37. PUBLIC SAFETY AND CORRECTIONS

Part III. Texas Youth Commission

Chapter 91. Discipline and Control

Control

• 37 TAC §91.73

Texas Youth Commission (TYC) adopts on an emergency basis an amendment to §91.73, concerning resocialization program.

Youth in TYC operated high restriction facilities who engage in activities which incite and cause major disruption and endangerment of staff and youth are often better served by placement in a highly structured treatment program.

This section is adopted on an emergency basis to allow for qualified youth in high restriction facilities to be moved to the resocialization unit at Giddings State School to allow staff to gain control and youth to receive intensive treatment.

The amendment is adopted on an emergency basis under the Human Resources Code, §61.075, which provides the Texas Youth Commission authority to order confinement under conditions it believes best designed for the child's welfare and the interests of the public.

§91.73. Resocialization Program.

(a) Policy. The Texas Youth Commission [maximum security institution] operates a resocialization treatment program at the Giddings State School (GSS) [within the regular program. Youth classified as sentenced offenders or violent offenders who have intentionally exhibited aggressive, destructive, and assaultive behavior and have not responded to the treatment program may be eligible]. The program is highly restrictive and intensive and is operated [in an] on the Giddings State School campus in a unit separate from other units and campus activities.

(b) Rules.

(1) Admissions Criteria.

(A) Youth eligible for the resocialization program are:

(i)(A) Giddings State School youth classified as sentenced offenders or violent offenders who have intentionally exhibited aggressive, destructive, and assaultive behavior and have not responded to the treatment program; and whose [A youth's] immediate behavior [must] meets [meet] one of the following [eligibility criteria]:

(I)(i) assault of TYC staff;

(II)(ii) one or more serious assaults on a student, resulting in bodily injury;

(III)(iii) willful destruction of property; or

(IV)(iv) escape with exacerbating circumstances, e.g. [i.e.], aggravated assault, arson or possession of a weapon.

(ii) Youth in any other TYC institution who, while in that placement, assaulted TYC staff causing serious bodily injury.

(B) The admission decision is based on the following considerations:

(i)-(iii) (No change.)

(iv) sufficiency of other less restrictive interventions at this time; [and]

(v) probability of success of the Giddings Resocialization Program (GRP); and

(vi) amenability of treatment.

(2) Admission Procedure.

(A)[(C)] The fact-finding portion of the appropriate hearing, a level I hearing for non-GSS youth or a level II hearing for GSS youth, is held to determine the facts of the youth's behavior.

(B) The Special Services Committee recommends that the youth be referred to the GRP, and the referral is approved or denied by the sending superintendent.

(C) The GRP admission review staff submits a recommendation regarding admission to the superintendent or director of institutions as appropriate (see below).

(D) Except as provided in subparagraph (E), of this paragraph admission approval by the GSS superintendent or assistant superintendent is required.

(E) Youth in institutions other than GSS may be admitted with the approval of the director of institutions.

[(D) Admission approval by superintendent or assistant superintendent is required.]

(3)[(2)] Release.

(A) Each youth remains in program for a minimum of 30 days and must successfully complete specific objectives. Reintegration is individual and graduated if youth is a GSS youth.

(B) The resocialization program treatment team reviews progress weekly and determines when objectives have been met sufficiently to progress through levels and when release from the program has been earned. The team approves return to regular program or sending institution.

(C) Progress reviews and reintegration of a youth back to the sending institution are coordinated by GRP staff and sending Special Services Committee.

(4)[(3)] Program Requirements. Privileges afforded in the regular program may be restricted in the following areas:

(A) Types of clothing worn may be controlled. Wearing of outdoor shoes may be limited to outdoor activity.

(B) Visitation may be restricted to adult family members and attorneys.

(C) Incoming calls may be restricted to those of parents or guardians and attorneys.

Issued in Austin, Texas, on May 19, 1994.

TRD-8441208 Steve Robinson
 Executive Director
 Texas Youth Commission

Effective date: May 20, 1994

Expiration date: September 17, 1994

For further information, please call: (512)
483-5244

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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 7. BANKING AND SECURITIES

Part VII. State Securities Board

Chapter 101. General Administration

• 7 TAC §101.5

The State Securities Board proposes an amendment to §101.5, concerning charges for public information. The amendments satisfy the requirement in House Bill 1009, Chapter 428, Acts, 73rd Legislature, that agencies adopt rules consistent with the comprehensive rules covering publicly available information adopted by the General Services Commission. The proposal would also authorize the Commissioner to waive or reduce charges in certain circumstances. The relevant charges for public information are adopted by reference and reflected on a billing detail statement which is simultaneously proposed as Form 133.2.

Tom Spradlin, Director of Information Resources and Planning has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Spradlin also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that persons requesting copies of publicly available information will be apprised of the charges associated with obtaining such copies. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Rada Lynn Potts, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167

The amendment is proposed under Texas Civil Statutes, Article 581, §28-1. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction,

and prescribing different requirements for different classes

Statutes and codes affected none applicable.

§101.5. Charges for [Cost of] Copies of Public Records.

(a) The cost to any person requesting copies of any public record [photocopied reproductions of any readily available records] of the State Securities Board [, comprised of pages up to legal size, which are subject to public examination] pursuant to the open records provisions of the Texas Government Code, Title 5, Chapter 552, [shall be as follows:] will be the applicable charge established by the General Services Commission as reflected in Form 133.2.

[(1) For noncertified copies:

[(A) \$.12 per page for requests totaling 50 pages or less;

[(B) \$.98 for the first page and \$.17 for each additional page for requests totaling 51 pages or more.

[(2) For certified copies the charge shall be \$1.15 per page plus a \$5.00 certification fee.

[(3) When copies are required to be mailed, the cost of postage will be added to the computed fee.]

(b) At the discretion of the Commissioner, the Commissioner may reduce or waive these charges if furnishing the information at no cost or reduced cost primarily benefits the general public.

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 May 18, 1994.

TRD-9441086

Denise Voigt Crawford
Securities Commissioner
State Securities Board

Earliest possible date of adoption: June 27, 1994

For further information, please call: (512) 305-8300

Chapter 117. Administrative Guidelines for Registration of Real Estate Programs

• 7 TAC §§117.1-117.5, 117.7

The State Securities Board proposes amendments to §§117.1-117.5, and §117.7 concerning administrative guidelines for registration of real estate programs.

The proposed amendments to §117.3 reflect the recent amendments to the North American Securities Administrators' Association, Inc. (NASAA) real estate program guidelines, with one exception: §117.3(d)(5) has been rewritten to remove certain items from the list of representations prohibited in the subscription agreement. The items removed from the list are representations that: the participant understands or comprehends the risks associated with an investment in the program; the participant has read the prospectus; and in deciding to invest in the program, the participant has relied solely on the prospectus, and not on any other information or representations from other persons or sources.

The Board also proposes to change the arbitration provisions in §117.7(k) of the guidelines to promote the use of arbitration as an alternative dispute resolution mechanism. An amendment to this subsection is proposed to remove a prohibition of mandatory arbitration of disputes between the participant and the sponsor or the program, and thus to deviate from the provision in the NASAA guidelines. The proposed amendment to §117.7 would change existing subsection (k) to provide that, if a prospectus contains arbitration provisions, it must prominently disclose such fact on the cover page of the prospectus in bold type.

Changes are also proposed to §§117.1-117.2 and §§117.4-117.5 to correct typographical errors in the existing guidelines and to make nonsubstantive clarifications.

The Board originally published for comment the recent NASAA amendments to the administrative guidelines for real estate programs with no changes from the text adopted by NASAA. That proposal appeared in the

March 4, 1994, issue of the *Texas Register* (19 TexReg 1512) and has been withdrawn so that this proposal may be published. A comment letter from Thompson & Knight was received in response to the March 4th proposal. The comment letter indicated that it was inappropriate for the Board to adopt regulations limiting the representations that may be included in subscription agreements and thereby divest issuers of certain rights which may exist under current case law.

Michael Northcutt, Director, Securities Registration Division, 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.

Mr. Northcutt also has determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing the rules will be a substantial degree of consistency with uniform guidelines for the registration of real estate programs. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rules as proposed.

Comments on the proposal may be submitted to Rada Lynn Potts, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167.

The amendments are proposed under Texas Civil Statutes, Article 581, §28-1. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The proposed amendments affect Texas Civil Statutes, Article 581-7.

§117.1. Introduction.

(a) (No change.)

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

(1)-(13) (No change.)

(14) Construction fee—A fee or other remuneration for acting as general contractor and/or construction manager to construct improvements, supervise, and coordinate projects or to provide major repairs or rehabilitation on a program's property.

(15)-(19) (No change.)

(20) Investment in properties—The amount of capital contributions used to make or invest in mortgage loans or the amount actually paid or allocated to the purchase, development, construction, or improvement of properties acquired by the program, (including the purchase of properties, working capital reserves allocable thereto (except that working capital reserves

in excess of 5.0% shall not be included), and other cash payments such as interest and taxes but excluding front-end fees.)

(21)-(31) (No change.)

(32) Prospectus—Shall have the meaning given to that term by the Securities Act of 1933, §2(10), including a preliminary prospectus ; [.] provided, however, that such term as used herein shall also include an offering circular as described in the Securities Act of 1933, Rule 256, or, in the case of an intrastate offering, any document by whatever name known, utilized for the purpose of offering and selling securities to the public.

(33)-(37) (No change.)

§117.2. Requirements of Sponsors.

(a)-(e) (No change.)

(f) Terminated sponsor.

(1) (No change.)

(2) The method of payment to the terminated sponsor must be fair , [.] and must protect the solvency and liquidity of the partnership. Where the termination is voluntary, the method of payment will be deemed presumptively fair where it provides for a non-interest [noninterest] bearing unsecured promissory note with principal payable, if at all, from distributions which the terminated sponsor otherwise would have received under the partnership agreement had the sponsor not terminated. Where the termination is involuntary, the method of payment will be deemed presumptively fair where it provides for an interest bearing promissory note coming due in no less than five years with equal installments each year.

§117.3. Suitability of Participants [the Participant].

(a) General Policy. [Standards to be imposed. Given the limited transferability, the relative lack of liquidity, and the degree of risk associated with an investment in real estate programs, the sponsor and its selling representatives should be cautious concerning the persons to whom such securities are marketed. Suitability standards for investors will, therefore, be imposed which are reasonable in view of the foregoing and of the type of program to be offered. Sponsors will be required to set forth in the prospectus the investment objectives of the program, a description of the type of person who could benefit from the program, and the suitability standards to be applied in marketing it.]

(1) The sponsor shall establish minimum income and net worth standards for persons who purchase program interests.

(2) The sponsor shall propose minimum income and net worth [suitability] standards which are reasonable given the type of program and the risks associated with the purchase of program interests. Programs with greater investor risk shall have minimum standards with a substantial net worth requirement. The [proposed by the sponsor will be reviewed for fairness by the] Securities Commissioner shall evaluate [in processing the application. In determining how restrictive] the standards proposed by the sponsor when the program's application for registration is reviewed. In evaluating the proposed standards, the Securities Commissioner may consider the following: [must be, special attention will be given to the existence of such factors as]

(A) the program's use of [high] leverage ; [.]

(B) tax implications ; [.]

(C) mandatory deferred payments ; [.]

(D) assessments;

(E) balloon payment financing ; [.]

(F) [excessive] investments in unimproved land ; [and]

(G) potential variances in [uncertain or no] cash distributions; [flow from program property. Programs which involve more than ordinary investor risk should emphasize suitability standards involving substantial net worth of the investor.]

(H) potential participants;

(I) relationship between potential participants and the sponsor;

(J) liquidity of program interests;

(K) performance of sponsor's prior programs;

(L) financial condition of the sponsor;

(M) potential transactions between the program and the sponsor; and

(N) any other relevant factors.

(b) Income and Net Worth Standards.

(1) For programs other than programs with mandatory deferred payments, unless the Securities Commissioner determines that the risks associated with the program would require lower or higher standards, each participant shall have:

(A) a minimum annual gross income of \$45,000 and a minimum net worth of \$45,000; or

(B) a minimum net worth of \$150,000.

(2) For programs with mandatory deferred payments, unless the Securities Commissioner determines that the risks associated with the program would require lower or higher standards, each participant shall have:

(A) a minimum annual gross income of \$60,000 and a minimum net worth of \$60,000; or

(B) a minimum net worth of \$225,000.

(3) Net worth shall be determined exclusive of home, home furnishings, and automobiles.

(4) In the case of sales to fiduciary accounts, these minimum standards shall be met by the beneficiary, the fiduciary account, or by the donor or grantor who directly or indirectly supplies the funds to purchase the program interests if the donor or grantor is the fiduciary.

(5) The sponsor shall set forth in the final prospectus:

(A) the investment objectives of the program;

(B) a description of the type of person who might benefit from an investment in the program; and

(C) the minimum standards imposed on each participant in the program.

(c)[(b)] Determination that Sale [Sales] to Participant is Suitable and Appropriate [Persons].

(1) The sponsor and each person selling program interests on behalf of the sponsor or program shall make every reasonable effort to determine [assure] that

the purchase of [those persons being offered or sold the] program interests is a [are] suitable and [, considering the standards set forth as required in subsection (a) of this section, and the program interests are] appropriate [for the customers'] investment for each participant. [objectives and financial situation. The sponsor or his representatives shall ascertain that the investor can reasonably benefit from the program, and the following shall be evidence there-of:]

[(1) the investor has the capacity to understand the fundamental aspects of the program, which capacity may be evidenced by the following:

[(A) the nature of employment experience;

[(B) educational level achieved;

[(C) access to advice from qualified sources, such as attorney, accountant, and tax adviser;

[(D) prior experience with investments of a similar nature.]

(2) In making this determination, the sponsor or each person selling program interests on behalf of the sponsor or program [his representatives] shall ascertain that the prospective participant [investor has apparent understanding]:

(A) meets the minimum income and net worth standard established for the program;

(B) can reasonably benefit from the program based on the prospective participant's overall investment objectives and portfolio structure;

(C) is able to bear the economic risk of the investment based on the prospective participant's overall financial situation; and

(D) has apparent understanding of:

(i)[(A)] of the fundamental risks [and possible financial hazards] of the investment;

(ii) the risk that the participant may lose the entire investment;

(iii)[(B)] of the lack of liquidity of program interests [this investment];

(iv) the restrictions on transferability of program interests;

(v)[(C)] the background and qualifications of the sponsor or persons responsible for directing and managing the program [that the investment will be directed and managed by the sponsor]; and

(vi)[(D)] of the tax consequences of the investment.

(3) The sponsor or each person selling program interests on behalf of the sponsor or program will make this determination on the basis of information it has obtained from a prospective participant. Relevant information for this purpose will include at least the age, investment objectives, investment experience, income, net worth, financial situation, and other investments of the prospective participant, as well as any other pertinent factors. [the participant can reasonably benefit from the program in view of his overall investment objectives and portfolio structure.]

(4) The sponsor or each person selling program interests on behalf of the sponsor or program shall maintain records of the information used to determine that an investment in program interests is suitable and appropriate for each participant. The sponsor or each person selling program interests on behalf of the sponsor or program shall maintain these records for at least six years. [the participant is able to bear the economic risk of the investment. For purposes of determining the ability to bear the economic risk, unless the Securities Commissioner approves a lower suitability standard, participants shall have a minimum annual gross income of \$45,000 and a net worth of \$150,000. As provided in subsection (a) of this section higher suitability standards may be required. In the case of sales to fiduciary accounts, the suitability standards shall be met by the fiduciary, or by the fiduciary account, or by a donor who directly or indirectly supplies the funds to purchase the program interests. Net worth shall be determined exclusive of home, home furnishings, and automobiles.]

(5) The sponsor shall disclose in the final prospectus the responsibility of the sponsor and each person selling program interests on behalf of the sponsor or program to make every reasonable effort to determine that the purchase of program interests is a suitable and appropriate investment for each participant, based on information provided by the participant regarding the participant's financial situation and investment objectives.

[(c) Maintenance of Records The sponsor shall maintain a record of the information obtained to indicate that a partici-

tion, information indicating that the participants for whose account the purchase is made meet such suitability standards. Such information may be obtained from the participant through the use of a form which sets forth the prescribed suitability standards in full and which includes a statement to be signed by the participant in which he represents that he meets such suitability standards and is purchasing for his own account. However, where the offering is underwritten or sold by a broker-dealer, the sponsor shall obtain a commitment from the broker-dealer to maintain the same record of information required of the sponsor.]

(d) **Subscription Agreements.**

(1) The Securities Commissioner may require that each participant complete and sign a written subscription agreement.

(2) The sponsor may require that each participant make certain factual representations in the subscription agreement, including the following:

(A) the participant meets the minimum income and net worth standards established for the program;

(B) the participant is purchasing the program interests for his or her own account;

(C) the participant has received a copy of the prospectus;

(D) the participant acknowledges that the investment is not liquid.

(3) The participant must separately sign or initial each representation made in the subscription agreement. Except in the case of fiduciary accounts, the participant may not grant any person a power of attorney to make such representations on his or her behalf.

(4) The sponsor and each person selling program interests on behalf of the sponsor or program shall not require a participant to make representations in the subscription agreement which are subjective or unreasonable and which:

(A) might cause the participant to believe that he or she has surrendered rights to which he or she is entitled under federal or state law; or

(5) Prohibited representations include, but are not limited to, a representation that the investment is a suitable one for the participant.

(6) The sponsor may place the content of the prohibited representations in the subscription agreement in the form of disclosures to the participant. The sponsor may not place these disclosures in the participant representation section of the subscription agreement.

(e) **Completion of Sale.**

(1) The sponsor or any person selling program interests on behalf of the sponsor or program may not complete a sale of program interests to a participant until at least five business days after the date the participant receives a final prospectus.

(2) The sponsor or the person designated by the sponsor shall send each participant a confirmation of his or her purchase.

(f) **Minimum Investment.** The Securities Commissioner may require a minimum initial and subsequent cash investment amount.

§117.4. Fees-Compensation-Expenses

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

(c) Investment in properties.

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

(4) For programs whose total capital contributions do not exceed \$2 million, the Securities Commissioner may reduce the required amount of investment in properties to that permitted by paragraph (2)(B) of this subsection, notwithstanding the level of indebtedness encumbering the program's properties. To calculate the percent of financing of program properties in paragraph (2) of this subsection, divide the amount of financing by the purchase price of the property, excluding front-end fees. The quotient is multiplied by .1625% to determine the percentage to be deducted from 80%. The following are examples of application of the formula using capital contributions of \$1 million in each case:

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

(5) Notwithstanding the language in paragraph (4) this subsection, the \$2 million limitation is intended to be a benchmark figure and may be adjusted upward or downward by the Securities Commissioner based on the marketplace in his or her jurisdiction.

(a)-(m) (No change.)

(n) Program indebtedness.

(1) (No change.)

(2) For programs which own properties financed by [:]

[(A)] loans insured or guaranteed by the full faith and credit of the United States government, or by a state or local government, or by an agency or instrumentality of any of them, and/or

[(B)] loans received from any of the foregoing entities, the following requisites apply. Following [following] the termination of the offering the total amount of indebtedness incurred by the program shall at no time exceed the sum of 100% of the aggregate purchase price of all properties which have not been refinanced, and 100% of the aggregate fair market value of all refinanced properties as determined by the lender as of the date of refinancing.

(3)-(4) (No change.)

(o) (No change.)

§117.7. Rights and Obligations of Participants.

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

(k) Arbitration of disputes A prospectus may contain provisions relating to the use of arbitration as a means of dispute resolution. A prospectus which contains arbitration provisions shall prominently disclose such fact on the cover page of the prospectus in bold type. Allocation of the cost of arbitration may be made a matter for determination in the proceedings. [Except as permitted in §117.2(f) of this title (relating to Requirements of Sponsors), no provision requiring mandatory arbitration of disputes between the participant and the sponsor or the program is permitted. Nothing contained herein shall apply to preexisting contracts between broker-dealers and participants.]

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 May 18, 1994

TRD-9441087

Denise Voigt Crawford
Securities Commissioner
State Securities Board

Earliest possible date of adoption June 27, 1994

For further information, please call: (512) 305-8300

◆ ◆ ◆
Chapter 121. Administrative
Guidelines for Registration
of Oil and Gas Programs

• 7 TAC §§121.2-121.4, 121.10

The State Securities Board proposes amendments to §§121.2-121.4, and 121.10, concerning administrative guidelines for registration of oil and gas programs.

The proposed amendments to §121.4 reflect the recent amendments to the North American Securities Administrators' Association, Inc (NASAA) oil and gas program guidelines, with one exception: §121.4(d)(5) has been rewritten to remove certain items from the list of representations prohibited in the subscription agreement. The items removed from the list are representations that: the participant understands or comprehends the risks associated with an investment in the program, the participant has read the prospectus, and in deciding to invest in the program, the participant has relied solely on the prospectus, and not on any other information or representations from other persons or sources

The Board also proposes to change the arbitration provisions in §121.2(j) of the guidelines to promote the use of arbitration as an alternative dispute resolution mechanism. The proposed amendment to §121.2 would change existing subsection (j) relating to arbitration of disputes to provide that, if a prospectus contains arbitration provisions, it must prominently disclose such fact on the cover page of the prospectus in bold type. Additionally, an amendment to this subsection is proposed to remove, and thus deviate from the provision in the NASAA guidelines, a prohibition of mandatory arbitration of certain types of disputes.

Changes are also proposed to §121.3 and §121.10 to correct typographical errors in the existing guidelines and to make nonsubstantive clarifications

The Board originally published for comment the recent NASAA amendments to the administrative guidelines for oil and gas programs with no changes from the text adopted by NASAA. That proposal appeared in the March 4, 1994, issue of the *Texas Register* (19 TexReg 1515) and has been withdrawn so that this proposal may be published. A comment letter from Thompson & Knight was received in response to the March 4th proposal. The comment letter indicated that it was inappropriate for the Board to adopt regulations limiting the representations that may be included in subscription agreements and thereby divest issuers of certain rights which may exist under current case law.

Micheal Northcutt, Director, Securities Registration Division 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.

Mr Northcutt also has determined that for each year of the first five years the rules are in effect the public benefit anticipated as a

result of enforcing the rules will be a substantial degree of consistency with uniform guidelines for the registration of oil and gas programs. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rules as proposed.

Comments on the proposal may be submitted to Rada Lynn Potts, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167

The amendments are proposed under Texas Civil Statutes, Article 581, §28-1. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Securities Act, including rules and regulations governing registration statements and applications, defining terms, classifying securities, persons, and matters within its jurisdiction, and prescribing different requirements for different classes.

The proposed amendments affect Texas Civil Statutes, Article 581-7.

§121.2. Requirements of Sponsor.

(a)-(1) (No change.)

(j) Arbitration provisions. The program agreement may contain provisions relating to the use of arbitration as a means of dispute resolution. [; provided however, it may not require arbitration for allegations involving breach of contract, negligence, violations of state or federal securities laws, breach of fiduciary duty or other misconduct by the sponsor, nor shall it provide for mandatory venue.] Program agreements which contain arbitration provisions shall prominently disclose such fact on the cover page of the program agreement in bold type. Allocation of the cost of arbitration may be made a matter for determination in the proceedings. [This subsection should not be interpreted to prohibit separate arbitration agreements between sponsors and participants if the agreements are not a condition of making an investment in the program.]

§121.3. Selling of Units and Sales Material

(a) (No change.)

(b) Sales Material

(1) (No change.)

(2) Sales literature. Sales literature, including without limitation, books, pamphlets, movies, slides, article reprints, and television and radio commercials, sales presentations (including prepared presentations to prospective participants at group meetings) and all other advertising used in the offer or sale of units shall conform in all applicable aspects to filing, disclosure and adequacy requirements currently imposed on the sale of corporate securities under applicable regulations. When periodic or other reports, except those required by and filed with the Securities and Exchange Commission, furnished to participants in prior programs are furnished to prospective

participants in a program not yet sold, such reports will be treated as sales literature subject to the preceding requirements. Statements made in sales literature may not conflict with, or significantly modify, risk factors or other statements made in the prospectus. Sales literature shall not be so excessive in size or amount as to detract from the prospectus, nor shall any sales literature be used by securities broker-dealers or agents unless such literature has been approved by the sponsor in writing and incorporates, if the Securities Commissioner so requests, disclosure of the participant suitability standards imposed by §121.4 of this title (relating to Suitability of Participants [the Participant]).

(3)-(4) (No change.)

§121.4 Suitability of Participants [the Participant]

(a) General Policy [Standards].

(1) The sponsor shall establish minimum income and net worth standards for persons who purchase program interests. [In view of the limited transferability, the relative lack of liquidity, the high risk of loss, and the specific tax orientation of many oil and gas programs, suitability standards, which are reasonably related to the risks to be undertaken, will be required for the participants, and they must be set forth both in the prospectus and in a written instrument to be executed by each participant.]

(2) The sponsor shall propose minimum income and net worth standards which are reasonable given the type of program and the risks associated with the purchase of program interests. Programs with greater investor risk shall have minimum standards with a substantial net worth requirement. The Securities Commissioner shall evaluate the standards proposed by the sponsor when the program's application for registration is reviewed. In evaluating the proposed standards, the Securities Commissioner may consider the following: [The sponsor and each person selling program interests on behalf of the sponsor or program shall make every reasonable effort to assure that those persons being offered or sold the program interests are appropriate in light of the suitability standards set forth as follows and the investment is consistent with the customers' investment objectives and financial situations. In the case of sales to fiduciary accounts, the suitability standards may be met by the account or by each beneficiary of the account. Where the fiduciary is the donor of the funds for investment in the program, the suitability standards may be met by the fiduciary.]

- (A) the program's use of leverage;
 - (B) tax implications;
 - (C) mandatory deferred payments;
 - (D) assessments;
 - (E) potential variances in cash distributions;
 - (F) potential participants;
 - (G) relationship between potential participants and the sponsor;
 - (H) liquidity of program interests;
 - (I) performance of sponsor's prior programs;
 - (J) financial condition of the sponsor;
 - (K) potential transactions between the program and the sponsor; and
 - (L) any other relevant factors.
- (3) Persons selling program units shall make every reasonable effort to assure that the participants specifically understand the following (when applicable):
- [(A) the risks involved in the offering, including the speculative nature of the investment,
 - [(B) the financial hazards involved in the offering, including the risk of losing their entire investment;
 - [(C) the lack of liquidity of program units;
 - [(D) the restrictions on transferability of program units;
 - [(E) the background and qualifications of the sponsor and/or the manager or persons responsible for the offering;
 - [(F) the tax consequences of the investment; and

[(G) the unlimited liability associated with working interests or general partnership offerings]

(b) Income and Net Worth Standards [Suitability Standards for Drilling Programs].

(1) For income programs or programs that utilize at least 90% of capital contributions and funds borrowed (excluding organization and offering expenses) in providing completion financing, debt financing, or making other types of oil and gas investments, unless [purposes of determining the participant's ability to bear the various risks associated with a limited partnership investment, unless the circumstances warrant and] the Securities Commissioner determines that the risks associated with the program would require lower or higher standards, each [establishes another standard, the] participant shall have.

(A) a minimum annual gross income of \$45,000 and a minimum net worth of \$45,000 [\$225,000 or more (exclusive of home, furnishings, and automobiles)]; or

(B) a minimum net worth of \$150,000 [\$60,000 or more (exclusive of home, furnishings, and automobiles) and shall have had during the last tax year, or estimates that he or she shall have during the current tax year, "taxable income" as defined in the Internal Revenue Code of 1986, §63, as amended, of \$60,000 or more, without regard to the investment in the program].

(2) For drilling programs which provide the participant with statutory protection against unlimited liability, unless the Securities Commissioner determines that the risks associated with the program would require lower or higher standards, each participant shall have:

(A) a minimum annual gross income of \$60,000 and a minimum net worth of \$60,000; or

(B) a minimum net worth of \$225,000.

(3)[(2)] For drilling programs [purposes of determining the participant's ability to bear the various risks associated with an investment in a general partnership or other offering in] which do not provide the participant with [is not provided] statutory protection against unlimited liability, unless the Securities Commissioner determines that the risks associated with the program would [may] require [a] lower or higher standards, each participant shall

have [suitability standard. The following higher standard will be considered presumptively reasonable]:

(A) a minimum [an individual or joint] net worth [with his or her spouse] of \$225,000 [or more], without regard to the investment in the program, and a minimum annual gross income of \$100,000 for the current year and for the two previous years; or [(exclusive of home, home furnishings, and automobiles) and a combined "taxable income" as defined in the Internal Revenue Code of 1986, §63, as amended, of \$100,000 or more for the current year and for the two previous years;]

(B) a minimum [an individual or joint] net worth [with his or her spouse] in excess of \$1 million, inclusive of home, home furnishings, and automobiles; or

(C) a minimum [an individual or joint] net worth [with his or her spouse in excess] of \$500,000 [, exclusive of home, home furnishings, and automobiles]; or

(D) a minimum annual gross income [combined "gross income" as defined in the Internal Revenue Code of 1986, §61, as amended, in excess] of \$200,000 in the current year and the two previous years.

(4) Unless otherwise specified, net worth shall be determined exclusive of home, home furnishings, and automobiles.

(5) In the case of sales to fiduciary accounts, these minimum standards shall be met by the beneficiary, the fiduciary account, or by the donor or grantor who directly or indirectly supplies the funds to purchase the program interests if the donor or grantor is the fiduciary.

(6) The sponsor shall set forth in the final prospectus:

(A) the investment objectives of the program;

(B) a description of the type of person who might benefit from an investment in the program; and

(C) the minimum standards imposed on each participant in the program.

(c) Determination that Sale to Participant is Suitable and Appropriate. [Suitability Standards for Other Types of

Programs. In the case of income programs or programs that utilize at least 90% of capital contributions and funds borrowed (excluding organization and offering expenses) in providing completion financing, debt financing, or making other types of oil and gas investments, unless circumstances warrant and the Securities Commissioner establishes another standard, the participant shall have:]

(1) The sponsor and each person selling program interests on behalf of the sponsor or program shall make every reasonable effort to determine that the purchase of program interests is a suitable and appropriate investment for each participant. [a net worth of \$150,000 or more (exclusive of home, furnishings, and automobiles); or]

(2) In making this determination, the sponsor or each person selling program interests on behalf of the sponsor or program shall ascertain that the prospective participant: [a net worth of \$45,000 (exclusive of home, furnishings, and automobiles) and a taxable income in the current year of \$45,000 or more.]

(A) meets the minimum income and net worth standard established for the program;

(B) can reasonably benefit from the program based on the prospective participant's overall investment objectives and portfolio structure;

(C) is able to bear the economic risk of the investment based on the prospective participant's overall financial situation; and

(D) has apparent understanding of:

(i) the fundamental risks of the investment;

(ii) the risk that the participant may lose the entire investment;

(iii) the lack of liquidity of program interests;

(iv) the restrictions on transferability of program interests;

(v) the background and qualifications of the sponsor or the person responsible for directing and managing the program;

(vi) the tax consequences of the investment; and

(vii) the unlimited liability associated with working interest or general partnership offerings.

(3)[(d)] The sponsor or each

person selling program interests on behalf of the sponsor or program will make this determination on the basis of information it has obtained from a prospective participant. Relevant information for this purpose will include at least the age, investment objectives, investment experience, income, net worth, financial situation, and other investments of the prospective participant, as well as any other pertinent factors. [Mitigating factors with respect to suitability standards. In the presence of mitigating factors, the Securities Commissioner may approve any offering with participant suitability standards different from those contained in subsections (b) and (c) of this section. The Securities Commissioner may take into consideration the identity of the participants, an alternative type of suitability standard to be employed, the relationship of the participants to the sponsor, the knowledgeability of the participants, the legal, business, technical and accounting advice available to and utilized by the participants, the marketability of the program units, the prior performance of the sponsor, the additional obligations and financial condition of the sponsor, and any other factors deemed relevant.]

(4) The sponsor or each person selling program interests on behalf of the sponsor or program shall maintain records of the information used to determine that an investment in program interests is suitable and appropriate for each participant. The sponsor or each person selling program interests on behalf of the sponsor or program shall maintain these records for at least six years.

(5) The sponsor shall disclose in the final prospectus the responsibility of the sponsor and each person selling program interests on behalf of the sponsor or program to make every reasonable effort to determine that the purchase of program interests is a suitable and appropriate investment for each participant, based on information provided by the participant regarding the participant's financial situation and investment objectives.

(d) Subscription Agreements.

(1) The Securities Commissioner may require that each participant complete and sign a written subscription agreement.

(2) The sponsor may require that each participant make certain factual representations in the subscription agreement, including the following:

(A) The participant meets the minimum income and net worth standards established for the program.

(B) The participant is purchasing the program interests for his or her own account.

(C) The participant has received a copy of the prospectus.

(D) The participant acknowledges that the investment is not liquid.

(3) A participant must separately sign or initial each representation made in the subscription agreement. Except in the case of fiduciary accounts, the participant may not grant any person a power of attorney to make such representations on his or her behalf.

(4) The sponsor and each person selling program interests on behalf of the sponsor or program shall not require a participant to make representations in the subscription agreement which are subjective or unreasonable and which:

(A) might cause the participant to believe that he or she has surrendered rights to which he or she is entitled under federal or state law; or

(B) would have the effect of shifting the duties regarding suitability, imposed by law on broker-dealers, to the participant.

(5) Prohibited representations include, but are not limited to, a representation that the investment is a suitable one for the participant.

(6) The sponsor may place the content of the prohibited representations in the subscription agreement in the form of disclosures to the participant. The sponsor may not place these disclosures in the participant representation section of the subscription agreement.

(e) Completion of Sale.

(1) The sponsor or any person selling program interests on behalf of the sponsor or program may not complete a sale of program interests to a participant until at least five business days after the date the participant receives a final prospectus.

(2) The sponsor or the person designated by the sponsor shall send each participant a confirmation of his or her purchase.

(f) [(e)] Minimum Investment. The Securities Commissioner may require a minimum initial and subsequent cash investment amount. [For a drilling program, the minimum purchase shall not be less than

\$5,000, and in the event deferred payments are allowed, the initial payment by a participant shall not be less than \$5,000. For an income or production purchase program, the minimum purchase shall not be less than \$2,000 and in the event deferred payments are allowed, the initial payment by a participant shall not be less than \$2,000.]

[(f) Maintenance of suitability records. The sponsor shall maintain for a period of at least six years a record of the information obtained as evidence that a participant meets the suitability standards established in connection with the offer and sale of the program units. In addition, the sponsor must obtain a representation from each participant that he or she has purchased units for his, her or their own account or, in lieu of such representation, information indicating that the participants for whose account the purchase was made met such suitability standards. Such information may be obtained from the participant through inclusion of the statement in the written instrument described in subsection (a) of this section.]

§121.10. Prospectus Disclosure.

(a) (No change.)

(b) Offerings not registered with the Securities and Exchange Commission

(1) (No change.)

(2) At the minimum and in addition to the specific disclosures required by §§121.2-121.8 of this title (relating to Requirements of Sponsor, Selling of Units and Sales Material; Suitability of Participants [the Participant]; Fees, Compensation, and Expenses; Property Transactions with Affiliates and Other Restricted Activities, Farmouts, Special Disclosure Requirements, and Rights and Obligations of Participants), the following topics shall be thoroughly covered in the prospectus.

(A)-(O) (No change)

(3) (No change.)

(c) (No change)

(d) Demonstration of Guideline Compliance in Program Agreement. The requirements and/or provisions of appropriate portions of the following sections shall be included in the program agreement: §121.1(b) of this title (relating to Definitions), §121.2(d), (f), (h), (i), and (j) of this title (relating to Requirements of Sponsor), §121.4(f) of this title (relating to Suitability of Participants [the Participant]), §121.5(a)-(c) of this title (relating to Fees, Compensation, and Expenses), §121.6(a)-(c) of this title (relating to Property Transactions with Affiliates and Other Restricted Activities), §121.8(a)-(g) of this title (relating to Rights and Obligations of Participants), and

§121.9(b)-(g) of this title (relating to Miscellaneous Provisions)

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 May 18, 1994

TRD-9441088

Denise Voigt Crawford
Securities Commissioner
State Securities Board

Earliest possible date of adoption June 27, 1994

For further information, please call (512) 305-8300

Chapter 133. Forms

• 7 TAC §133.2

The State Securities Board proposes new §133.2, concerning Public Records Charges-Billing Detail, which will set out the charges for copies of public records. A related rule, §101.5, is being concurrently proposed

Tom Spradlin, Director of Information Resources and Planning has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule

Mr. Spradlin also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that the public will be apprised of the costs of obtaining copies of publicly available information in different formats from the Agency. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed

Comments on the proposal may be submitted to Rada Lynn Potts, State Securities Board, P O Box 13167, Austin, Texas 78711-3167.

The new rule is proposed under Texas Civil Statutes, Article 581, §28-1. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Securities Act, including rules and regulations governing registration statements and applications, defining terms, classifying securities, persons, and matters within its jurisdiction, and prescribing different requirements for different classes

Statutes and codes affected none applicable

§133.2 Public Records Charges-Billing Detail. The State Securities Board adopts by reference the public records charges billing detail. This form is available from the State Securities Board, P O Box 13167, Austin, Texas 78711

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 May 18, 1994.

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Securities Commissioner
State Securities Board

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Chapter 139. Exemptions by Rule or Order

• 7 TAC §139.15

The State Securities Board proposes new §139.15, concerning an exemption from registration for certain credit enhancements offered in conjunction with certain exempt or registered securities

Micheal Northcutt, Director, Securities Registration Division, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule

Mr. Northcutt also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to eliminate uncertainty about whether certain credit enhancements, which are offered in conjunction with, and not tradeable separately from, registered or exempt securities or are offered in connection with an exempt transaction, must be registered as separate securities. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Rada Lynn Potts, State Securities Board, P O. Box 13167, Austin, Texas 78711-3167.

The new rule is proposed under Texas Civil Statutes, Article 581, §28-1. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Securities Act, including rules and regulations governing registration statements and applications, defining terms; classifying securities, persons, and matters within its jurisdiction, and prescribing different requirements for different classes

The proposed new §139.15 affects Texas Civil Statutes, Articles 581-5, 581-6 and 581-7

§139.15. Credit Enhancements.

(a) Any "qualified credit enhancement" need not be registered as a separate security when no additional consideration is required to receive the enhancement and the enhancement is offered and sold in conjunction with, and is not tradeable separately from, securities that are:

(1) registered pursuant to the Securities Act, §7;

(2) exempt under the Securities Act, §6; or

(3) included within a transaction exempt under the Securities Act, §5

(b) For purposes of this section, the term "qualified credit enhancement" means.

(1) a letter of credit issued by a domestic branch or agency of a foreign bank if the nature and extent of the regulation and supervision of the particular branch or agency is substantially equivalent to that applicable to federal or state chartered domestic banks doing business in the same domestic jurisdiction, or

(2) a municipal bond insurance policy or guarantee issued by an insurance company licensed or supervised by the Texas Department of Insurance.

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 May 18, 1994.

THD-9441090

Denise Voigt Crawford
Securities Commissioner
State Securities Board

Earliest possible date of adoption June 27, 1994

For further information, please call (512) 305-8300

Chapter 141. Administrative Guidelines for Registration of Equipment Programs

• 7 TAC §141.3

The State Securities Board proposes amendments to §141.3, concerning administrative guidelines for registration of equipment programs

The proposed amendments to §141.3 reflect the recent amendments to the North American Securities Administrators' Association, Inc (NASAA) equipment program guidelines, with one exception §141.3(d)(5) has been rewritten to remove certain items from the list of representations prohibited in the subscription agreement. The items removed from the list are representations that the participant understands or comprehends the risks associated with an investment in the program, the participant has read the prospectus, and in deciding to invest in the program, the participant has relied solely on the prospectus, and not on any other information or representations from other persons or sources

The Board originally published for comment the recent NASAA amendments to the administrative guidelines for equipment programs with no changes from the text adopted by NASAA. That proposal appeared in the March 4, 1994, issue of the *Texas Register* (19 TexReg 1520) and has been withdrawn so that this proposal may be published. A comment letter was received from Thompson

& Knight in response to the March 4th proposal. The comment letter indicated that it was inappropriate for the Board to adopt regulations limiting the representations that may be included in subscription agreements and thereby divest issuers of certain rights which may exist under current case law

Michael Northcutt, Director, Securities Registration Division has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule

Mr Northcutt also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be a substantial degree of consistency with uniform guidelines for the registration of equipment programs. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed

Comments on the proposal may be submitted to Rada Lynn Polts, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167.

The amendments are proposed under Texas Civil Statutes, Article 581, §28-1. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Securities Act, including rules and regulations governing registration statements and applications, defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The proposed amendments affect Texas Civil Statutes, Article 581-7

§141.3 Suitability of Participants (the Participant).

(a) **General Policy.** [Standards to be imposed. Given the limited transferability, the relative lack of liquidity, and the degree of risk associated with an investment in programs, the sponsor and its selling representatives should be cautious concerning the persons to whom such securities are marketed. Suitability standards for participants will, therefore, be imposed which are reasonable in view of the foregoing and of the type of programs to be offered. Sponsors will be required to set forth in the prospectus the investment objectives of a program, a description of the type of person who could benefit from the program, and suitability standards to be applied in marketing it.]

(1) The sponsor shall establish minimum income and net worth standards for persons who purchase program interests.

(2) The sponsor shall propose minimum income and net worth [The suitability] standards which are reasonable given the type of program and the risks associated with the purchase of program

interests. Programs with greater investor risk shall have minimum standards with a substantial net worth requirement. The [proposed by the sponsor will be reviewed by the] Securities Commissioner shall evaluate [in processing the application. In determining how restrictive] the standards proposed by the sponsor when the program's application for registration is reviewed. In evaluating the proposed standards, the Securities Commissioner may consider the following: [must be, special attention will be given to the existence of such factors as]

(A) the program's use of [high] leverage ; [.]

(B) tax implications ; [.]

(C) mandatory deferred payments;

(D) assessments;

(E) balloon payment financing ; [, and]

(F) potential variances in [the uncertainty or lack of] cash distributions; [flow from program equipment. Programs which involve more than ordinary investor risk should emphasize suitability standards involving substantial net worth of the participants.]

(G) potential participants;

(H) relationship between potential participants and the sponsor;

(I) liquidity of program interests;

(J) performance of the sponsor's prior programs;

(K) financial condition of the sponsor;

(L) potential transactions between the program and the sponsor; and

(M) any other relevant factors.

(b) **Income and Net Worth Standards.**

(1) Unless the Securities Commissioner determines that the risks asso-

ciated with the program would require lower or higher standards, each participant shall have:

(A) a minimum annual gross income of \$45,000 and a minimum net worth of \$45,000; or

(B) a minimum net worth of \$150,000.

(2) Net worth shall be determined exclusive of home, home furnishings, and automobiles.

(3) In the case of sales to fiduciary accounts, these minimum standards shall be met by the beneficiary, the fiduciary account, or by the donor or grantor who directly or indirectly supplies the funds to purchase the program interests if the donor or grantor is the fiduciary.

(4) The sponsor shall set forth in the final prospectus:

(A) the investment objectives of the program;

(B) a description of the type of person who might benefit from an investment in the program; and

(C) the minimum standards imposed on each participant in the program.

(c)(b) Determination that Sale [Sales] to Participant is Suitable and Appropriate [Persons].

(1) The sponsor and each person selling program interests on behalf of the sponsor or program shall make every reasonable effort to determine [assure] that the purchase of [those persons being offered or sold the] program interests is a [are] suitable and [in light of the standards set forth in subsection (a) of this section, and that the program interests are] appropriate [for the investors'] investment for each participant. [objectives and financial situations Reasonable effort shall include receipt of the executed subscription agreement referred to in subsection (d) of this section prior to the sale of program interests to the investor. The sponsor or his representative shall have reasonable grounds to believe, prior to the sale of program interests, that the investor will benefit from the program in view of the investors' overall investment objectives and portfolio structure]

[(1) The investor shall have the capacity to understand the fundamental aspects of the program. That capacity may be evidenced by the following:

[(A) the nature of employment experience,

[(B) educational level achieved,

[(C) access to advice from qualified sources, such as attorney, accountant, and tax adviser; and

[(D) prior experience with investments of a similar nature.]

(2) In making this determination, the sponsor or each person selling program interests on behalf of the sponsor or program shall ascertain that the prospective participant: [The sponsor or his representatives shall ascertain that the investor]

(A) meets the minimum income and net worth standards established for the program;

(B) can reasonably benefit from the program based on the prospective participant's overall investment objectives and portfolio structure;

(C) is able to bear the economic risk of the investment based on the prospective participant's overall financial situation; and

(D) has apparent understanding of:

(i)[(A)] of the fundamental risks [and possible financial hazards] of the investment,

(ii) the risk that the participant may lose the entire investment;

(iii)[(B)] of the lack of liquidity of program interests [the investment];

(iv) the restrictions on transferability of program interests;

(v)[(C)] the background and qualifications of the sponsor or persons responsible for directing and managing the program [that the investment will be directed and managed by the sponsor]; and

(vi)[(D)] of the tax consequences of the investment.

(3) The sponsor or each person selling program interests on behalf of the sponsor or program will make this determination on the basis of information it has obtained from a prospective participant. Relevant information for this purpose will include at least the age, investment objectives, investment experience, income, net worth, financial situation,

and other investments of the prospective participant, as well as any other pertinent factors.

(4) The sponsor or each person selling program interests on behalf of the sponsor or program shall maintain records of the information used to determine that an investment in program interests is suitable and appropriate for each participant. The sponsor or each person selling program interests on behalf of the sponsor or program shall maintain these records for at least six years.

(5) The sponsor shall disclose in the final prospectus the responsibility of the sponsor and each person selling program interests on behalf of the sponsor or program to make every reasonable effort to determine that the purchase of program interests is a suitable and appropriate investment for each participant, based on information provided by the participant regarding the participant's financial situation and investment objectives.

[(c) The participant must be able to bear the economic risk of the investment For purposes of determining the ability to bear the economic risk, unless the Securities Commissioner approves a lower suitability standard, participants shall have a minimum annual gross income of \$45,000 and a net worth of \$45,000 or, in the alternative, a net worth of \$150,000. As provided in subsection (a) of this section, higher suitability standards may be required. In the case of sales to fiduciary accounts, the participant shall mean the fiduciary account and/or the donor who directly or indirectly supplies the funds to purchase the program interests Net worth shall be determined exclusive of home, home furnishings, and automobiles]

d) Subscription Agreements. [Maintenance of records The sponsor shall maintain a record of the information obtained to indicate that a participant meets the suitability standards employed in connection with the offer and sale of program interests and a representation by the participant that the participant is purchasing for its own account or, in lieu of such representation, information indicating that the participants for whose account the purchase is made meet such suitability standards. Such information shall be obtained from the participant through the use of the subscription agreement signed by the participant which sets forth the prescribed suitability standards in full and in which the participant represents that the participant meets such suitability standards and is purchasing for its own account. However, where the offering is underwritten or sold by a broker-dealer, the sponsor shall obtain a commitment from the broker-dealer to maintain the same record of information required of the sponsor.]

(1) The Securities Commissioner may require that each participant complete and sign a written subscription agreement.

(2) The sponsor may require that each participant make certain factual representations in the subscription agreement, including the following:

(A) The participant meets the minimum income and net worth standards established for the program.

(B) The participant is purchasing the program interests for his or her own account.

(C) The participant has received a copy of the prospectus.

(D) The participant acknowledges that the investment is not liquid.

(3) The participant must separately sign or initial each representation made in the subscription agreement. Except in the case of fiduciary accounts, the participant may not grant any person a power of attorney to make such representations on his or her behalf.

(4) The sponsor and each person selling program interests on behalf of the sponsor or program shall not require a participant to make representations in the subscription agreement which are subjective or unreasonable and which:

(A) might cause the participant to believe that he or she has surrendered rights to which he or she is entitled under federal or state law; or

(B) would have the effect of shifting the duties regarding suitability, imposed by law on broker-dealers, to the participant.

(5) Prohibited representations include, but are not limited to, a representation that the investment is a suitable one for the participant.

(6) The sponsor may place the content of the prohibited representations in the subscription agreement in the form of disclosures to the participant. The sponsor may not place these disclosures in the participant representation section of the subscription agreement.

(e) Completion of Sale. [Minimum Investment. The Securities Commissioner may require a minimum initial cash purchase. Subsequent transfers of program interests shall be limited to not less than such

initial minimum cash purchase, except for transfers by gifts, inheritance, intra-family transfers, family dissolutions, and transfers to affiliates.]

(1) The sponsor or any person selling program interests on behalf of the sponsor or program may not complete a sale of program interests to a participant until at least five business days after the date the participant receives a final prospectus.

(2) The sponsor or the person designated by the sponsor shall send each participant a confirmation of his or her purchase.

(f) Minimum Investment. The Securities Commissioner may require a minimum initial and subsequent cash investment amount.

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 May 18, 1994.

TRD-9441091 Denise Voigt Crawford
Securities Commissioner
State Securities Board

Earliest possible date of adoption: June 27, 1994

For further information, please call (512) 305-8300

◆ ◆ ◆
Chapter 143. Administrative
Guidelines for Registration
of Real Estate Investment
Trusts

• 7 TAC §§143.1-143.8

The State Securities Board proposes new §§143.1-143.8, concerning administrative guidelines for registration of real estate investment trusts

The new provisions would reflect the current real estate investment trust guidelines adopted by the North American Securities Administrators' Association, Inc (NASAA), with two exceptions. First, §143.3(d)(5) has been rewritten to remove certain items from the list of representations prohibited in the subscription agreement. The items removed from the list are representations that the participant understands or comprehends the risks associated with an investment in the program, the participant has read the prospectus, and in deciding to invest in the program, the participant has relied solely on the prospectus, and not on any other information or representations from other persons or sources

A change from the NASAA guidelines would also be made to the arbitration provisions contained in §143.2(h) to promote the use of arbitration as an alternative dispute resolution mechanism. As rewritten, §143.2(h) would provide that, if a prospectus contains arbitra-

tion provisions, it must prominently disclose such fact on the cover page of the prospectus in bold type. Additional changes have been made to remove, and thus deviate from the provision in the NASAA guidelines, a prohibition of mandatory arbitration of certain types of disputes imposed as a condition of making an investment in the REIT.

The Board originally published for comment the recent NASAA administrative guidelines for real estate investment trusts with no changes from the text adopted by NASAA. That proposal appeared in the March 4, 1994, issue of the *Texas Register* (19 TexReg 1523) and has been withdrawn so that this proposal may be published. A comment letter from Thompson & Knight was received in response to the March 4th proposal. The comment letter indicated that it was inappropriate for the Board to adopt regulations limiting the representations that may be included in subscription agreements and thereby divest issuers of certain rights which may exist under current case law.

Micheal Northcutt, Director, Securities Registration Division 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

Mr. Northcutt also has determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing the rules will be a substantial degree of consistency with uniform guidelines for the registration of real estate investment trusts. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rules as proposed

Comments on the proposal may be submitted to Rada Lynn Potts, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167

The new rules are proposed under Texas Civil Statutes, Article 581, §28-1. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction, and prescribing different requirements for different classes

The new rules affect Texas Civil Statutes, Article 581-7

§143.1. Introduction

(a) Application

(1) These guidelines apply to qualifications and registrations of Real Estate Investment Trusts (REITs)

(2) While applications not conforming to the standards contained herein shall be looked upon with disfavor, where good cause is shown, certain guidelines may be modified or waived by the Securities Commissioner

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

(1) Acquisition expenses—Expenses including, but not limited to, legal fees and expenses, travel and communications expenses, costs of appraisals, nonrefundable option payments on property not acquired, accounting fees and expenses, title insurance, and miscellaneous expenses related to selection and acquisition of properties, whether or not acquired.

(2) Acquisition fee—The total of all fees and commissions paid by any party to any party in connection with making or investing in mortgage loans or the purchase, development or construction of property by a REIT. Included in the computation of such fees or commissions shall be any real estate commission, selection fee, development fee, construction fee, nonrecurring management fee, loan fees or points or any fee of a similar nature, however designated. Excluded shall be development fees and construction fees paid to persons not affiliated with the sponsor in connection with the actual development and construction of a project.

(3) Administrator—Referred to as "Securities Commissioner" throughout these guidelines.

(4) Adviser—The person responsible for directing or performing the day-to-day business affairs of a REIT, including a person to which an adviser subcontracts substantially all such functions. To the extent the provisions of these guidelines are germane they shall apply to self-administered REITs.

(5) Affiliate—An affiliate of another person includes any of the following:

(A) any person directly or indirectly owning, controlling, or holding, with power to vote, 10% or more of the outstanding voting securities of such other person,

(B) any person 10% or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held, with power to vote, by such other person,

(C) any person directly or indirectly controlling, controlled by, or under common control with such other person,

(D) any executive officer, director, trustee, or general partner of such other person,

(E) any legal entity for which such person acts as an executive officer, director, trustee, or general partner

(6) Average invested assets—For any period, the average of the aggregate book value of the assets of the trust invested, directly or indirectly, in equity interests in, and loans secured by, real estate, before reserves for depreciation or bad debts or other similar non-cash reserves computed by taking the average of such values at the end of each month during such period.

(7) Competitive real estate commission—Real estate or brokerage commission paid for the purchase or sale of a property which is reasonable, customary, and competitive in light of the size, type, and location of such property.

(8) Construction fee—A fee or other remuneration for acting as general contractor and/or construction manager to construct improvements, supervise, and coordinate projects or to provide major repairs or rehabilitation on a REIT's property.

(9) Contract price for the property—The amount actually paid or allocated to the purchase, development, construction, or improvement of a property exclusive of acquisition fees and acquisition expenses.

(10) Cross reference sheet—A compilation of the guideline sections, referenced to the page of the prospectus and declaration of trust, or other exhibits, and justification for any deviation from the guidelines. Such compilation shall comply with the provisions set forth on the cross reference sheet.

(11) Declaration of trust—The declaration of trust, by-laws, certificate, articles of incorporation or other governing instrument pursuant to which a REIT is organized.

(12) Development fee—A fee for the packaging of a REIT's property, including negotiating and approving plans, and undertaking to assist in obtaining zoning and necessary variances and necessary financing for the specific property, either initially or at a later date.

(13) Independent expert—A person with no material current or prior business or personal relationship with the adviser or trustees who is engaged to a substantial extent in the business of rendering opinions regarding the value of assets of the type held by the REIT.

(14) Independent trustee(s)—The trustee(s) of a REIT who are not associated and have not been associated within the last two years, directly or indirectly, with the sponsor or adviser of the REIT

(A) A trustee shall be deemed to be associated with the sponsor or adviser if he or she.

(i) owns an interest in the sponsor, adviser, or any of their affiliates; or

(ii) is employed by the sponsor, adviser, or any of their affiliates; or

(iii) is an officer or director of the sponsor, adviser, or any of their affiliates; or

(iv) performs services, other than as a trustee, for the REIT; or

(v) is a trustee for more than three REITs organized by the sponsor or advised the adviser; or

(vi) has any material business or professional relationship with the sponsor, adviser, or any of their affiliates.

(B) For purposes of determining whether or not the business or professional relationship is material, the gross revenue derived by the prospective independent trustee from the sponsor and adviser and affiliates shall be deemed material per se if it exceeds 5 0% of the prospective independent trustee's:

(i) annual gross revenue, derived from all sources, during either of the last two years; or

(ii) net worth, on a fair market value basis.

(C) An indirect relationship shall include circumstances in which a trustee's spouse, parents, children, siblings, mothers- or fathers-in-law, sons- or daughters-in-law, or brothers- or sisters-in-law is or has been associated with the sponsor, adviser, any of their affiliates, or the REIT

(15) Initial investment—That portion of the initial capitalization of the REIT contributed by the sponsor or its affiliates pursuant to §143. 2(a) of this title (relating to Requirements of Sponsor, Adviser, Trustees, and any Affiliate).

(16) Leverage—The aggregate amount of indebtedness of a REIT for money borrowed (including purchase money mortgage loans) outstanding at any time, both secured and unsecured.

(17) Net assets—The total assets (other than intangibles) at cost before deducting depreciation or other non-cash reserves less total liabilities, calculated at least quarterly on a basis consistently applied

(18) Net income—For any period total revenues applicable to such period, less the expenses applicable to such period other than additions to reserves for depreciation or bad debts or other similar non-cash reserves. If the adviser receives an incentive fee, net income, for purposes of calculating total operating expenses in §143.4(d) of this title (relating to Fees, Compensation, and Expenses), shall exclude the gain from the sale of the REIT's assets.

(19) Organization and offering expenses—All expenses incurred by and to be paid from the assets of the REIT in connection with and in preparing a REIT for registration and subsequently offering and distributing it to the public, including, but not limited to, total underwriting and brokerage discounts and commissions (including fees of the underwriters' attorneys), expenses for printing, engraving, mailing, salaries of employees while engaged in sales activity, charges of transfer agents, registrars, trustees, escrow holders, depositaries, experts, expenses of qualification of the sale of the securities under federal and state laws, including taxes and fees, accountants' and attorneys' fees.

(20) Person—Any natural persons, partnership, corporation, association, trust, limited liability company, or other legal entity.

(21) Prospectus—Shall have the meaning given to that term by the Securities Act of 1933, §2(10), including a preliminary prospectus; provided, however, that such term as used herein shall also include an offering circular as described in Rule 256 of the General Rules and Regulations under the Securities Act of 1933 or, in the case of an intrastate offering, any document by whatever name known, utilized for the purpose of offering and selling securities to the public.

(22) Real estate investment trust ("REIT")—A corporation, trust, association, or other legal entity (other than a real estate syndication) which is engaged primarily in investing in equity interests in real estate (including fee ownership and leasehold interests) or in loans secured by real estate or both.

(23) Roll-up—A transaction involving the acquisition, merger, conversion, or consolidation either directly or indirectly of the REIT and the issuance of securities of a roll-up entity. Such term does not include:

(A) a transaction involving securities of the REIT that have been for at least 12 months listed on a national securities exchange or traded through the National Association of Securities Dealers Automated Quotation National Market System; or

(B) a transaction involving the conversion to corporate, trust, or association form of only the REIT if, as a consequence of the transaction there will be no significant adverse change in any of the following:

- (i) shareholders' voting rights;
- (ii) the term of existence of the REIT;
- (iii) sponsor or adviser compensation;
- (iv) the REIT's investment objectives.

(24) Roll-up entity—A partnership, real estate investment trust, corporation, trust, or other entity that would be created or would survive after the successful completion of a proposed roll-up transaction.

(25) Shareholders—The registered holders of a REIT's shares.

(26) Shares—Shares of beneficial interest or of common stock of a REIT of the class that has the right to elect the trustees of such REIT.

(27) Specified asset REIT—A program where, at the time a securities registration is ordered effective, at least 75% of the net proceeds from the sale of shares are allocable to the purchase, construction, renovation, or improvement of individually identified assets. Reserves shall not be included in the 75%.

(28) Sponsor—Any person directly or indirectly instrumental in organizing, wholly or in part, a REIT or any person who will control, manage or participate in the management of a REIT, and any affiliate of such person. Not included is any person whose only relationship with the REIT is as that of an independent property manager of REIT assets, and whose only compensation is as such. Sponsor does not include wholly independent third parties such as attorneys, accountants, and underwriters whose only compensation is for professional services. A person may also be deemed a sponsor of the REIT by:

(A) taking the initiative, directly or indirectly, in founding or organizing the business or enterprise of the REIT; either alone or in conjunction with one or more other persons;

(B) receiving a material participation in the REIT in connection with the founding or organizing of the business of the REIT, in consideration of services or property, or both services and property;

(C) having a substantial number of relationships and contacts with the REIT;

(D) possessing significant rights to control REIT properties;

(E) receiving fees for providing services to the REIT which are paid on a basis that is not customary in the industry; or

(F) providing goods or services to the REIT on a basis which was not negotiated at arms length with the REIT.

(29) Total operating expenses—Aggregate expenses of every character paid or incurred by the REIT as determined under generally accepted accounting principles, including advisers' fees, but excluding:

(A) the expenses of raising capital such as organization and offering expenses, legal, audit, accounting, underwriting, brokerage, listing, registration and other fees, printing and other such expenses, and tax incurred in connection with the issuance, distribution, transfer, registration, and stock exchange listing of the REIT's shares;

(B) interest payments;

(C) taxes;

(D) non-cash expenditures such as depreciation, amortization, and bad debt reserves;

(E) incentive fees paid in compliance with §143.4(f) of this title (relating to Fees, Compensation and Expenses);

(F) acquisition fees, acquisition expenses, real estate commissions on resale of property and other expenses connected with the acquisition, disposition, and ownership of real estate interests, mortgage loans, or other property, (such as the costs of foreclosure, insurance premiums, legal services, maintenance, repair, and improvement of property).

(30) Trustee(s)—The member(s) of the board of trustees or directors or other body which manages the REIT.

(31) Unimproved real property—The real property of a REIT which has the following three characteristics:

(A) an equity interest in real property which was not acquired for the purpose of producing rental or other operating income;

(B) has no development or construction in process on such land; and

(C) no development or construction on such land is planned in good faith to commence on such land within one year.

§143.2. Requirements of Sponsor, Adviser, Trustees and any Affiliate.

(a) Minimum Capital.

(1) Prior to the initial public offering, the sponsor, or any affiliate, shall contribute to the Real Estate Investment Trust (REIT) an amount not less than the lesser of:

(A) 10% of the total net assets upon completion of the offering, or

(B) \$200,000 as an initial investment.

(2) The sponsor or any affiliate may not sell this initial investment while the sponsor remains a sponsor but may transfer the shares to other affiliates.

(b) Number and Election of Trustees

(1) The REIT shall have a minimum of three trustees, each of whom (other than a trustee elected to fill the unexpired term of another trustee) is elected by the shareholders of the REIT and who shall serve for a term of one year.

(2) Nothing in this section shall prohibit a trustee from being reelected by the shareholders

(3) A majority of the trustees shall be independent trustees

(4) Independent trustees shall nominate replacements for vacancies amongst the independent trustees' positions.

(5) The trustees may establish such committees they deem appropriate (provided the majority of the members of each committee are independent trustees).

(c) Duties of Trustees

(1) At or before the first meeting of the trustees, the declaration of trust shall be reviewed and ratified by a majority vote of the trustees and of the independent trustees. The prospectus shall disclose that such ratification is required

(2) The trustees shall establish written policies on investments and borrow-

ing and shall monitor the administrative procedures, investment operations and performance of the REIT and the adviser to assure that such policies are carried out.

(3) A majority of the independent trustees must approve matters to which this section and subsections (a), (f), and (g) of this section; §143.4(a)-(g) of this title (relating to Fees, Compensation, and Expenses); §143.5(e), (h), and (j) of this title (relating to Conflicts of Interest and Investment Restrictions); and §143.6(a), (b)(4), and (g) of this title (relating to Rights and Obligations of Shareholders), of these guidelines apply.

(d) Experience of Trustees. A trustee shall have had a least three years of relevant experience demonstrating the knowledge and experience required to successfully acquire and manage the type of assets being acquired by the REIT. At least one of the independent trustees shall have three years of relevant real estate experience.

(e) Fiduciary Duty. The trustees and adviser of the REIT shall be deemed to be in a fiduciary relationship to the REIT and the shareholders. The trustees of the REIT shall also have a fiduciary duty to the shareholders to supervise the relationship of the REIT with the adviser.

(f) Advisory Contract.

(1) It shall be the duty of the trustees to evaluate the performance of the adviser before entering into or renewing an advisory contract. The criteria used in such evaluation shall be reflected in the minutes of such meeting.

(2) Each contract for the services of an adviser entered into by the trustees shall have a term of no more than one year

(3) Each advisory contract shall be terminable by a majority of the independent trustees, or the adviser on 60 days written notice without cause or penalty. In the event of the termination of such contract, the adviser will cooperate with the REIT and take all reasonable steps requested to assist the trustees in making an orderly transition of the advisory function.

(4) The qualifications of the adviser shall be set forth in the prospectus relating to the initial public offering of the shares of the REIT and the trustees shall determine that any successor adviser possesses sufficient qualifications to:

(A) perform the advisory function for the REIT; and

(B) justify the compensation provided for in its contract with the REIT.

(g) Liability and Indemnification.

(1) The REIT shall not provide for indemnification of the trustees, advisers, or affiliates for any liability or loss suffered by the trustees, advisers, or affiliates, nor shall it provide that the trustees, advisers, or affiliates be held harmless for any loss or liability suffered by the REIT, unless all of the following conditions are met:

(A) the trustees, advisers, or affiliates have determined, in good faith, that the course of conduct which caused the loss or liability was in the best interests of the REIT;

(B) the trustees, advisers, or affiliates were acting on behalf of or performing services for the REIT;

(C) such liability or loss was not the result of:

(i) negligence or misconduct by the trustees, excluding the independent trustees, advisers, or affiliates; or

(ii) gross negligence or willful misconduct by the independent trustees;

(D) such indemnification or agreement to hold harmless is recoverable only out of REIT net assets and not from shareholders

(2) Notwithstanding anything to the contrary contained in paragraph (1) of this subsection, the trustees, advisers, or affiliates and any persons acting as a broker-dealer shall not be indemnified by the REIT for any losses, liabilities, or expenses arising from or out of an alleged violation of federal or state securities laws by such party unless one or more of the following conditions are met

(A) there has been a successful adjudication on the merits of each count involving alleged securities law violations as to the particular indemnitee;

(B) such claims have been dismissed with prejudice on the merits by a court of competent jurisdiction as to the particular indemnitee;

(C) a court of competent jurisdiction approves a settlement of the claims against a particular indemnitee and finds that indemnification of the settlement and the related costs should be made, and the court considering the request for indemnification has been advised of the position of the Securities and Exchange Commission and of the published position of any state

securities regulatory authority in which securities of the REIT were offered or sold as to indemnification for violations of securities laws.

(3) The advancement of REIT funds to the trustees, advisers, or affiliates for legal expenses and other costs incurred as a result of any legal action for which indemnification is being sought is permissible only if all of the following conditions are satisfied:

(A) the legal action relates to acts or omissions with respect to the performance of duties or services on behalf of the REIT;

(B) the legal action is initiated by a third party who is not a shareholder or the legal action is initiated by a shareholder acting in his or her capacity as such and a court of competent jurisdiction specifically approves such advancement;

(C) the trustees, advisers, or affiliates undertake to repay the advanced funds to the REIT, together with the applicable legal rate of interest thereon, in cases in which such trustees, advisers, or affiliates are found not to be entitled to indemnification.

(h) Arbitration Provisions. The declaration of trust may contain provisions relating to the use of arbitration as a means of dispute resolution. A declaration of trust which contains arbitration provisions shall prominently disclose such fact on the cover page of the declaration of trust in bold type. Allocation of the cost of arbitration may be made a matter for determination in the proceedings.

§143.3. Suitability of Shareholders.

(a) General Policy.

(1) The sponsor shall establish minimum income and net worth standards for persons who purchase shares in a REIT for which there is not likely to be a substantial and active secondary market.

(2) The sponsor shall propose minimum income and net worth standards which are reasonable given the type of REIT and the risks associated with the purchase of shares. REITs with greater investor risk shall have minimum standards with a substantial net worth requirement. The Securities Commissioner shall evaluate the standards proposed by the sponsor when the REIT's application for registration is reviewed. In evaluating the proposed standards, the Securities Commissioner may consider the following:

(A) the REIT's use of leverage;

(B) tax implications;

(C) balloon payment financing;

(D) potential variances in cash distributions;

(E) potential shareholders;

(F) relationship among potential shareholders, the sponsor and adviser;

(G) liquidity of REIT shares;

(H) prior performance of sponsor and adviser;

(I) financial condition of the sponsor;

(J) potential transactions between the REIT and the sponsor and adviser; and

(K) any other relevant factors.

(b) Income and Net Worth Standards.

(1) Unless the Securities Commissioner determines that the risks associated with the REIT would require lower or higher standards, shareholders shall have:

(A) a minimum annual gross income of \$45,000 and a minimum net worth of \$45,000; or

(B) a minimum net worth of \$150,000.

(2) Net worth shall be determined exclusive of home, home furnishings, and automobiles.

(3) In the case of sales to fiduciary accounts, these minimum standards shall be met by the beneficiary, the fiduciary account, or by the donor or grantor who directly or indirectly supplies the funds to purchase the shares if the donor or grantor is the fiduciary.

(4) The sponsor shall set forth in the final prospectus:

(A) the investment objectives of the REIT;

(B) a description of the type of person who might benefit from an investment in the REIT; and

(C) the minimum standards imposed on each shareholder in the REIT.

(c) Determination that Sale to Shareholder is Suitable and Appropriate.

(1) The sponsor and each person selling shares on behalf of the sponsor or REIT shall make every reasonable effort to determine that the purchase of shares is a suitable and appropriate investment for each shareholder.

(2) In making this determination, the sponsor or each person selling shares on behalf of the sponsor or REIT shall ascertain that the prospective shareholder:

(A) meets the minimum income and net worth standards established for the REIT;

(B) can reasonably benefit from the REIT based on the prospective shareholder's overall investment objectives and portfolio structure;

(C) is able to bear the economic risk of the investment based on the prospective shareholder's overall financial situation; and

(D) has apparent understanding of:

(i) the fundamental risks of the investment;

(ii) the risk that the shareholder may lose the entire investment,

(iii) the lack of liquidity of REIT shares;

(iv) the restrictions on transferability of REIT shares;

(v) the background and qualifications of the sponsor or the adviser, and

(vi) the tax consequences of the investment.

(3) The sponsor or each person selling shares on behalf of the sponsor or REIT will make this determination on the basis of information it has obtained from a prospective shareholder. Relevant information for this purpose will include at least the age, investment objectives, investment experience, income, net worth, financial situation, and other investments of the prospective shareholder, as well as any other pertinent factors.

(4) The sponsor or each person selling shares on behalf of the sponsor or REIT shall maintain records of the information used to determine that an investment in shares is suitable and appropriate for a shareholder. The sponsor or each person selling shares on behalf of the sponsor or REIT shall maintain these records for at least six years.

(5) The sponsor shall disclose in the final prospectus the responsibility of the sponsor and each person selling shares on behalf of the sponsor or REIT to make every reasonable effort to determine that the purchase of shares is a suitable and appropriate investment for each shareholder, based on information provided by the shareholder regarding the shareholder's financial situation and investment objectives.

(d) Subscription Agreements.

(1) The Securities Commissioner may require that each shareholder complete and sign a written subscription agreement

(2) The sponsor may require that each shareholder make certain factual representations in the subscription agreement, including the following:

(A) the shareholder meets the minimum income and net worth standards established for the REIT,

(B) the shareholder is purchasing the shares for his or her own account,

(C) the shareholder has received a copy of the prospectus,

(D) the shareholder acknowledges that the shares are not liquid

(3) The shareholder must separately sign or initial each representation made in the subscription agreement. Except in the case of fiduciary accounts, the shareholder may not grant any person a power of attorney to make such representations on his or her behalf

(4) The sponsor and each person selling shares on behalf of the sponsor or REIT shall not require shareholders to make representations in the subscription agreement which are subjective or unreasonable and which:

(A) might cause the shareholder to believe that he or she has surrendered rights to which he or she is entitled under federal or state law, or

(B) would have the effect of shifting the duties regarding suitability, im-

posed by law on broker-dealers, to the shareholders.

(5) Prohibited representations include, but are not limited to, a representation that the investment is a suitable one for the shareholder.

(6) The sponsor may place the content of the prohibited representations in the subscription agreement in the form of disclosures to shareholders. The sponsor may not place these disclosures in the shareholder representation section of the subscription agreement.

(e) Completion of Sale.

(1) The sponsor or any person selling shares on behalf of the sponsor or REIT may not complete a sale of shares to a shareholder until at least five business days after the date the shareholder receives a final prospectus.

(2) The sponsor or the person designated by the sponsor shall send each shareholder a confirmation of his or her purchase.

(f) Minimum Investment. The Securities Commissioner may require minimum initial and subsequent cash investment amounts

§143.4. Fees, Compensation, and Expenses.

(a) Introduction.

(1) The prospectus must fully disclose and itemize all consideration which may be received in connection with REIT activities, directly or indirectly, by the sponsor, trustees, adviser, and underwriters, what the consideration is for and how and when it will be paid. This shall be set forth in one location in tabular form.

(2) The independent trustees will determine, from time to time but at least annually, that the total fees and expenses of the REIT are reasonable in light of the investment performance of the REIT, its net assets, its net income, and the fees and expenses of other comparable unaffiliated REITs. Each such determination shall be reflected in the minutes of the meeting of the trustees

(b) Organization and Offering Expenses. The organization and offering expenses paid in connection with the REIT's formation or the syndication of its shares shall be reasonable and shall in no event exceed an amount equal to 15% of the proceeds raised in an offering

(c) Acquisition Fees and Acquisition Expenses

(1) The total of all acquisition fees and acquisition expenses shall be reasonable, and shall not exceed an amount equal to 60% of the contract price of a

property, or in the case of a mortgage loan, 6.0% of the funds advanced.

(2) Notwithstanding the above-mentioned, a majority of the trustees (including a majority of the independent trustees) not otherwise interested in the transaction may approve fees in excess of these limits if they determine the transaction to be commercially competitive, fair and reasonable to the REIT.

(d) Total Operating Expenses.

(1) The total operating expenses of the REIT shall (in the absence of a satisfactory showing to the contrary) be deemed to be excessive if they exceed in any fiscal year the greater of 2.0% of its average invested assets or 25% of its net income for such year. The independent trustees shall have the fiduciary responsibility of limiting such expenses to amounts that do not exceed such limitations unless such independent trustees shall have made a finding that, based on such unusual and non-recurring factors which they deem sufficient, a higher level of expenses is justified for such year. Any such finding and the reasons in support thereof shall be reflected in the minutes of the meeting of the trustees.

(2) Within 60 days after the end of any fiscal quarter of the REIT for which total operating expenses (for the 12 months then ended) exceeded 2.0% of average invested assets or 25% of net income, whichever is greater, there shall be sent to the shareholders of the REIT a written disclosure of such fact, together with an explanation of the factors the independent trustees considered in arriving at the conclusion that such higher operating expenses were justified.

(3) In the event the independent trustees do not determine such excess expenses are justified, the adviser shall reimburse the REIT at the end of the 12 month period the amount by which the aggregate annual expenses paid or incurred by the REIT exceed the limitations herein provided.

(e) Real Estate Commissions on Resale of Property. If an adviser, trustee, sponsor, or any affiliate provides a substantial amount of the services in the effort to sell the property of the REIT, then that person may receive up to one-half of the brokerage commission paid but in no event to exceed an amount equal to 3.0% of the contracted for sales price. In addition, the amount paid when added to the sums paid to unaffiliated parties in such a capacity shall not exceed the lesser of the competitive real estate commission or an amount equal to 6.0% of the contracted-for sales price.

(f) Incentive Fees.

(1) An interest in the gain from the sale of assets of the REIT, for which full consideration is not paid in cash or property of equivalent value, shall be allowed provided the amount or percentage of such interest is reasonable. Such an interest in gain from the sale of REIT assets shall be considered presumptively reasonable if it does not exceed 15% of the balance of such net proceeds remaining after payment to shareholders, in the aggregate, of an amount equal to 100% of the original issue price of REIT shares, plus an amount equal to 6.0% of the original issue price of the REIT shares per annum cumulative. For purposes of this subsection, the original issue price of the REIT shares may be reduced by prior cash distributions to shareholders of net proceeds from the sale of REIT assets.

(2) In the case of multiple advisers, advisers, and any affiliate shall be allowed incentive fees provided such fees are distributed by a proportional method reasonably designed to reflect the value added to REIT assets by each respective adviser or any affiliate.

(g) Adviser Compensation. The independent trustees shall determine from time to time and at least annually that the compensation which the REIT contracts to pay to the adviser is reasonable in relation to the nature and quality of services performed and that such compensation is within the limits prescribed by these guidelines. The independent trustees shall also supervise the performance of the adviser and the compensation paid to it by the REIT to determine that the provisions of such contract are being carried out. Each such determination shall be based on the factors set forth below and all other factors such independent trustees may deem relevant and the findings of such trustees on each of such factors shall be recorded in the minutes of the trustees:

(1) the size of the advisory fee in relation to the size, composition, and profitability of the portfolio of the REIT;

(2) the success of the adviser in generating opportunities that meet the investment objectives of the REIT;

(3) the rates charged to other REITs and to investors other than REITs by advisers performing similar services;

(4) additional revenues realized by the adviser and any affiliate through their relationship with the REIT, including loan administration, underwriting or broker commissions, servicing, engineering, inspection and other fees, whether paid by the REIT or by others with whom the REIT does business;

(5) the quality and extent of service and advice furnished by the adviser;

(6) the performance of the investment portfolio of the REIT, including income, conservation or appreciation of capital, frequency of problem investments and competence in dealing with distress situations;

(7) the quality of the portfolio of the REIT in relationship to the investments generated by the adviser for its own account.

§143.5. Conflicts of Interest and Investment Restrictions.

(a) Sales and Leases to REIT. The Real Estate Investment Trust (REIT) shall not purchase property from the sponsor, adviser, trustee, or any affiliate thereof, unless a majority of trustees (including a majority of independent trustees) not otherwise interested in such transaction approve the transaction as being fair and reasonable to the REIT and at a price to the REIT no greater than the cost of the asset to such sponsor, adviser, trustee, or any affiliate thereof, or if the price to the REIT is in excess of such cost, that substantial justification for such excess exists and such excess is reasonable. In no event shall the cost of such asset to the REIT exceed its current appraised value.

(b) Sales and Leases to Sponsor, Adviser, Trustees, or any Affiliate.

(1) A sponsor, adviser, trustee, or any affiliate thereof shall not acquire assets from the REIT unless approved by a majority of trustees (including a majority of independent trustees), not otherwise interested in such transaction, as being fair and reasonable to the REIT.

(2) A REIT may lease assets to a sponsor, adviser, trustee, or any affiliate thereof only if approved by a majority of trustees (including a majority of independent trustees), not otherwise interested in such transaction, as being fair and reasonable to the REIT.

(c) Loans.

(1) No loans may be made by the REIT to the sponsor, adviser, trustee, or any affiliate thereof except as provided under paragraph (k)(3) of this section or to wholly owned subsidiaries of the REIT.

(2) The REIT may not borrow money from the sponsor, adviser, trustee, or any affiliate thereof, unless a majority of trustees (including a majority of independent trustees) not otherwise interested in such transaction approve the transaction as being fair, competitive, and commercially reasonable and no less favorable to the REIT than loans between unaffiliated parties under the same circumstances.

(d) Investments.

(1) The REIT shall not invest in joint ventures with the sponsor, adviser, trustee, or any affiliate thereof, unless a majority of trustees (including a majority of independent trustees) not otherwise interested in such transactions, approve the transaction as being fair and reasonable to the REIT and on substantially the same terms and conditions as those received by the other joint venturers.

(2) The REIT shall not invest in equity securities unless a majority of trustees (including a majority of independent trustees) not otherwise interested in such transaction approve the transaction as being fair, competitive, and commercially reasonable.

(e) Statement of Objectives.

(1) The prospectus must state specific investment objectives of the REIT. It should indicate whether the primary objective is to obtain current income, tax benefits, or capital appreciation for its shareholders.

(2) The independent trustees shall review the investment policies of the REIT with sufficient frequency and at least annually to determine that the policies being followed by the REIT at any time are in the best interests of its shareholders. Each such determination and the basis therefor shall be set forth in the minutes of the trustees.

(f) Multiple Programs. The method for the allocation of the acquisition of properties by two or more programs of the same sponsor or adviser seeking to acquire similar types of assets shall be reasonable. The method shall be described in the prospectus. It shall be the duty of the trustees (including the independent trustees) to insure such method is applied fairly to the REIT.

(g) Other Transactions. All other transactions between the REIT and the sponsor, adviser, trustee, or any affiliate thereof, shall require approval by a majority of the trustees (including a majority of independent trustees) not otherwise interested in such transactions as being fair and reasonable to the REIT and on terms and conditions not less favorable to the REIT than those available from unaffiliated third parties.

(h) Appraisal of Real Property. The consideration paid for real property acquired by the REIT shall ordinarily be based on the fair market value of the property as determined by a majority of the trustees. In cases in which a majority of the independent trustees so determine, and in all cases in which assets are acquired from the advisers, trustees, sponsors or affiliates thereof, such fair market value shall be as determined by an independent expert selected by the independent trustees.

(i) Roll-Up Transaction.

sets shall be obtained from a competent, independent expert. If the appraisal will be included in a prospectus used to offer the securities of a roll-up entity, the appraisal shall be filed with the Securities and Exchange Commission and the Securities Commissioner as an exhibit to the registration statement for the offering. Accordingly, an issuer using the appraisal shall be subject to liability for violation of the Securities Act of 1933, §11, and comparable provisions under Texas law for any material misrepresentations or material omissions in the appraisal. REIT assets shall be appraised on a consistent basis. The appraisal shall be based on an evaluation of all relevant information, and shall indicate the value of the REIT's assets as of a date immediately prior to the announcement of the proposed roll-up transaction. The appraisal shall assume an orderly liquidation of REIT assets over a 12-month period. The terms of the engagement of the independent expert shall clearly state that the engagement is for the benefit of the REIT and its investors. A summary of the independent appraisal, indicating all material assumptions underlying the appraisal, shall be included in a report to the investors in connection with a proposed roll-up.

(2) In connection with a proposed roll-up, the person sponsoring the roll-up shall offer to shareholders who vote "no" on the proposal the choice of

(A) accepting the securities of the roll-up entity offered in the proposed roll-up, or

(B) one of the following:

(i) remaining as shareholders of the REIT and preserving their interests therein on the same terms and conditions as existed previously; or

(ii) receiving cash in an amount equal to the shareholders' pro-rata share of the appraised value of the net assets of the REIT.

(3) The REIT shall not participate in any proposed roll-up which would result in shareholders having democracy rights in the roll-up entity that are less than those provided for under §143.6(a)-(e) of this title (relating to Rights and Obligations of Shareholders).

(4) The REIT shall not participate in any proposed roll-up which includes provisions which would operate to materially impede or frustrate the accumulation of shares by any purchaser of the securities of the roll-up entity (except to the minimum extent necessary to preserve the tax status of the roll-up entity). The REIT shall not

exercise the voting rights of its securities of the roll-up entity on the basis of the number of REIT shares held by that investor.

(5) The REIT shall not participate in any proposed roll-up in which investors' rights of access to the records of the roll-up entity will be less than those provided for under §143.6(e) of this title (relating to Rights and Obligations of Shareholders).

(6) The REIT shall not participate in any proposed roll-up in which any of the costs of the transaction would be borne by the REIT if the roll-up is not approved by the shareholders.

(j) Leverage. The prospectus shall include an explanation of the borrowing policies of the REIT. The aggregate borrowings of the REIT, secured and unsecured, shall be reasonable in relation to the net assets of the REIT and shall be reviewed by the trustees at least quarterly. The maximum amount of such borrowings in relation to the net assets shall, in the absence of a satisfactory showing that higher level of borrowing is appropriate, not exceed 300%. Any excess in borrowing over such 300% level shall be approved by a majority of the independent trustees and disclosed to shareholders in the next quarterly report of the REIT, along with justification for such excess.

(k) Other Limitations.

(1) The REIT may not invest more than 10% of its total assets in unimproved real property or mortgage loans on unimproved real property.

(2) The REIT may not invest in commodities or commodity future contracts. Such limitation is not intended to apply to future contracts, when used solely for hedging purposes in connection with the REIT's ordinary business of investing in real estate assets and mortgages.

(3) The REIT may not invest in or make mortgage loans unless an appraisal is obtained concerning the underlying property except for those loans insured or guaranteed by a government or government agency. In cases in which a majority of the independent trustees so determine, and in all cases in which the transaction is with the adviser, trustees, sponsor, or affiliates thereof, such an appraisal must be obtained from an independent expert concerning the underlying property. This appraisal shall be maintained in the REIT's records for at least five years, and shall be available for inspection and duplication by any shareholder. In addition to the appraisal, a mortgagee's or owner's title insurance policy or commitment as to the priority of the mortgage or the condition of the title must be

connection with investing in or making mortgage loans.

(A) The REIT shall not invest in real estate contracts of sale, otherwise known as land sale contracts, unless such contracts of sale are in recordable form and appropriately recorded in the chain of title.

(B) The REIT shall not make or invest in mortgage loans, including construction loans, on any one property if the aggregate amount of all mortgage loans outstanding on the property, including the loans of the REIT, would exceed an amount equal to 85% of the appraised value of the property as determined by appraisal unless substantial justification exists because of the presence of other underwriting criteria. For purposes of this paragraph, the "aggregate amount of all mortgage loans outstanding on the property, including the loans of the REIT," shall include all interest (excluding contingent participation in income and/or appreciation in value of the mortgaged property), the current payment of which may be deferred pursuant to the terms of such loans, to the extent that deferred interest on each loan exceeds 5.0% per annum of the principal balance of the loan.

(C) The REIT shall not make or invest in any mortgage loans that are subordinate to any mortgage or equity interest of the adviser, trustees, sponsors or any affiliate of the REIT.

(4) The REIT may not issue redeemable equity securities.

(5) The REIT may not issue debt securities unless the historical debt service coverage (in the most recently completed fiscal year) as adjusted for known changes is sufficient to properly service that higher level of debt.

(6) The REIT may not issue options or warrants to purchase its shares to the adviser, trustees, sponsors, or any affiliate thereof except on the same terms as such options or warrants are sold to the general public. The REIT may issue options or warrants to persons not so connected with the REIT but not at exercise prices less than the fair market value of such securities on the date of grant and for consideration (which may include services) that in the judgement of the independent trustees, has a market value less than the value of such option on the date of grant. Options or warrants issuable to the adviser, trustees, sponsors, or any affiliate thereof shall not exceed an amount equal to 10% of the outstanding shares of the REIT on the date of grant of any options or warrants.

(7) The REIT may not issue its shares on a deferred payment basis or other similar arrangement.

§143.6. Rights and Obligations of Shareholders.

(a) Meetings.

(1) There shall be an annual meeting of the shareholders of the REIT upon reasonable notice and within a reasonable period (not less than 30 days) following delivery of the annual report. The trustees, including the independent trustees, shall be required to take reasonable steps to insure that this requirement is met.

(2) Special meetings of the shareholders may be called by the chief executive officer, by a majority of the trustees, or by a majority of the independent trustees, and shall be called by an officer of the REIT upon written request of shareholders holding in the aggregate not less than 10% of the outstanding shares of the REIT entitled to vote at such meeting. Upon receipt of a written request, either in person or by mail, stating the purpose(s) of the meeting, the sponsor shall provide all shareholders within 10 days after receipt of said request, written notice, either in person or by mail, of a meeting and the purpose of such meeting to be held on a date not less than 15 nor more than 60 days after the distribution of such notice, at a time and place specified in the request, or if none is specified, at a time and place convenient to shareholders.

(b) Voting Rights of Shareholders.

(1) A public offering of equity securities of a REIT other than voting shares will be looked upon with disfavor.

(2) The voting rights per share of equity securities of the REIT (other than the publicly held equity securities of the REIT) sold in a private offering shall not exceed voting rights which bear the same relationship to the voting rights of the publicly held shares of the REIT as the consideration paid to the REIT for each privately offered REIT share bears to the book value of each outstanding publicly held share.

(3) The declaration of trust must provide that a majority of the then-outstanding shares may, without the necessity for concurrence by the trustees, vote to:

(A) amend the declaration of trust;

(B) terminate the REIT; and

(C) remove the trustees.

(4) The declaration of trust must provide that a majority of shareholders pre-

sent in person or by proxy at an annual meeting at which a quorum is present, may, without the necessity for concurrence by the trustees, vote to elect the trustees. A quorum shall be 50% of the then-outstanding shares.

(5) Without concurrence of a majority of the outstanding shares, the trustees may not:

(A) amend the declaration of trust, except for amendments which do not adversely affect the rights, preferences and privileges of shareholders including amendments to provisions relating to trustee qualifications, fiduciary duty, liability and indemnification, conflicts of interest, investment policies or investment restrictions;

(B) sell all or substantially all of the REIT's assets other than in the ordinary course of the REIT's business or in connection with liquidation and dissolution;

(C) cause the merger or other reorganization of the REIT; or

(D) dissolve or liquidate the REIT, other than before the initial investment in property.

(6) With respect to shares owned by the adviser, the trustees, or any affiliate, neither the adviser, nor the trustees, nor any affiliate may vote or consent on matters submitted to the shareholders regarding the removal of the adviser, trustees, or any affiliate or any transaction between the REIT and any of them. In determining the requisite percentage in interest of shares necessary to approve a matter on which the adviser, trustees, and any affiliate may not vote or consent, any shares owned by any of them shall not be included.

(c) Liability of Shareholders. The declaration of trust shall provide that:

(1) The shares of the REIT shall be non-assessable by the REIT whether a trust, corporation, or other entity.

(2) The shareholders of the REIT which is not a corporation shall not be personally liable on account of any of the contractual obligations undertaken by the REIT.

(3) All written contracts to which the REIT, which is not a corporation, is a party shall include a provision that the shareholder shall not be personally liable thereon.

(d) Reports.

(1) The declaration of trust shall provide that the REIT shall cause to be prepared and mailed or delivered to each

shareholder as of a record date after the end of the fiscal year and each holder of other publicly held securities of the REIT within 120 days after the end of the fiscal year to which it relates an annual report for each fiscal year ending after the initial public offering of its securities which shall include:

(A) financial statements prepared in accordance with generally accepted accounting principles which are audited and reported on by independent certified public accountants;

(B) the ratio of the costs of raising capital during the period to the capital raised;

(C) the aggregate amount of advisory fees and the aggregate amount of other fees paid to the adviser and any affiliate of the adviser by the REIT and including fees or charges paid to the adviser and any affiliate of the adviser by third parties doing business with the REIT;

(D) the total operating expenses of the REIT, stated as a percentage of average invested assets and as a percentage of its net income;

(E) a report from the independent trustees that the policies being followed by the REIT are in the best interests of its shareholders and the basis for such determination; and

(F) separately stated, full disclosure of all material terms, factors, and circumstances surrounding any and all transactions involving the REIT, trustees, advisers, sponsors, and any affiliate thereof occurring in the year for which the annual report is made. Independent trustees shall be specifically charged with a duty to examine and comment in the report on the fairness of such transactions.

(2) The trustees, including the independent trustees, shall be required to take reasonable steps to insure that the above requirements are met.

(e) Access to Records. Any shareholder and any designated representative thereof shall be permitted access to all records of the REIT at all reasonable times, and may inspect and copy any of them. Inspection of the REIT books and records by the Securities Commissioner shall be provided upon reasonable notice and during normal business hours. The declaration of trust shall include the following provisions regarding access to the list of shareholders:

(1) An alphabetical list of the names, addresses, and telephone numbers of the shareholders of the REIT along with the number of shares held by each of them (the "shareholder list") shall be maintained as part of the books and records of the REIT and shall be available for inspection by any shareholder or the shareholder's designated agent at the home office of the REIT upon the request of the shareholder.

(2) The shareholder list shall be updated at least quarterly to reflect changes in the information contained therein.

(3) A copy of the shareholder list shall be mailed to any shareholder requesting the shareholder list within 10 days of the request. The copy of the shareholder list shall be printed in alphabetical order, on white paper, and in a readily readable type size (in no event smaller than 10-point type). A reasonable charge for copy work may be charged by the REIT.

(4) The purposes for which a shareholder may request a copy of the shareholder list include, without limitation, matters relating to shareholders' voting rights under the REIT agreement, and the exercise of shareholders' rights under federal proxy laws.

(5) If the adviser or trustees of the REIT neglects or refuses to exhibit, produce, or mail a copy of the shareholder list as requested, the adviser, and the trustees shall be liable to any shareholder requesting the list for the costs, including attorneys' fees, incurred by that shareholder for compelling the production of the shareholder list, and for actual damages suffered by any shareholder by reason of such refusal or neglect. It shall be a defense that the actual purpose and reason for the requests for inspection or for a copy of the shareholder list is to secure such list of shareholders or other information for the purpose of selling such list or copies thereof, or of using the same for a commercial purpose other than in the interest of the applicant as a shareholder relative to the affairs of the REIT. The REIT may require the shareholder requesting the shareholder list to represent that the list is not requested for a commercial purpose unrelated to the shareholder's interest in the REIT. The remedies provided hereunder to shareholders requesting copies of the shareholder list are in addition to, and shall not in any way limit, other remedies available to shareholders under federal law, or the laws of any state.

(f) Repurchase of Shares. Ordinarily, the REIT is not obligated to repurchase any of the shares. However, the REIT is not precluded from voluntarily repurchasing the shares if such repurchase does not impair the capital or operations of the REIT. The REIT may have excess share

provisions that provide for mandatory redemption. The sponsor, adviser, trustees, or affiliates are prohibited from receiving a fee on the repurchase of the shares by the REIT.

(g) Distribution Reinvestment Plans. All distribution reinvestment plans shall, at the minimum, provide for the following:

(1) All material information regarding the distribution to the shareholder and the effect of reinvesting such distribution, including the tax consequences thereof, shall be provided to the shareholder at least annually.

(2) Each shareholder participating in the plan shall have a reasonable opportunity to withdraw from the plan at least annually after receipt of the information required in paragraph (1) of this subsection.

(h) Distributions. The declaration of trust shall state the manner in which distributions to shareholders are to be determined.

(i) Distributions in Kind. Distributions in kind shall not be permitted, except for:

(1) distributions of readily marketable securities;

(2) distributions of beneficial interests in a liquidating trust established for the dissolution of the REIT and the liquidation of its assets in accordance with the terms of the declaration of trust; or

(3) distributions of in-kind property which meet all of the following conditions:

(A) the trustees advise each shareholder of the risks associated with direct ownership of the property;

(B) the trustees offer each shareholder the election of receiving in-kind property distributions;

(C) the trustees distribute in-kind property only to those shareholders who accept the trustee's offer.

§143.7. Disclosure and Marketing.

(a) Sales Material. Sales material, including without limitation, books, pamphlets, movies, slides, article reprints, television and radio commercials, materials prepared for broker/dealer use only, sales presentations (including prepared presentations to prospective shareholders at group meetings) and all other advertising used in the offer or sale of units shall conform to filing, disclosure, and adequacy require-

ments under any applicable state regulations. Statements made in sales material communicated directly or indirectly to the public may not conflict with, or modify risk factors or other statements made in the prospectus.

(b) Prospectus and its Contents.

(1) Prospectus. A prospectus which is not part of a registration statement declared effective by the Securities and Exchange Commission pursuant to the Securities Act of 1933 shall generally conform to the disclosure requirements which would apply if the offering were so registered. The format and information requirements of applicable Guide(s) promulgated by the Securities and Exchange Commission shall be followed, with appropriate adjustments made for the different business of the REIT.

(2) Prohibited Representations.

(A) In connection with the offering and sale of shares in a REIT, neither the sponsor(s) nor the underwriter(s) may, in writing or otherwise, directly or indirectly, represent or imply that the Securities Commissioner has approved the merits of the investment or any aspects thereof.

(B) Any reference to the REIT's compliance with these guidelines or any provisions herein which connotes or implies compliance shall not be allowed.

(3) Forecasts and Projections.

(A) Neither the prospectus nor any sales material communicated directly or indirectly to the public shall contain a quantitative estimate of a REIT's anticipated economic performance or anticipated return to participants, in the form of investment objectives, cash distributions, tax benefits or otherwise, except as permitted by this paragraph of these guidelines.

(B) The presentation of predicted future results of operations of programs shall be permitted but not required for specified asset REITs and shall be prohibited for all other REITs. The cover of the prospectus must contain in bold face language one of the following statements:

(i) for specified asset REITs with forecasts: "Forecasts are contained in this prospectus. Any representation to the contrary and any predictions, written or oral, which do not conform to that contained in the prospectus shall not be permitted;" or

(ii) for all other REITs: "The use of forecasts in this offering is prohibited. Any representations to the contrary and any predictions, written or oral, as to the amount or certainty of any

present or future cash benefit or tax consequence which may flow from an investment in this program is not permitted."

(C) Content of Forecasts. Forecasts for specified asset REITs may be included in the prospectus and sales material of the REIT only if they comply with all of the following requirements.

(i) Generally, forecasts shall be realistic in their predictions and shall clearly identify the assumptions made with respect to all material features of presentation. Forecasts should be examined by an independent certified public accountant in accordance with the Guide for Prospective Financial Statements and the Statement on Standards for Accountant's Services on Prospective Financial Information as promulgated by the American Institute of Certified Public Accountants. The report of the independent certified public accountant must be included in the prospectus.

(ii) If any part of the forecast appears in the sales material, the entire forecast must be presented.

(iii) Forecasts shall generally be for a period equivalent to the anticipated holding period for REIT assets. Forecasts which do not extend through the expected term of the REIT's life must show the effects of a hypothetical liquidation of program assets under good and bad conditions. Yield information may not be presented for forecasts which do not extend through the expected term of the REIT's life.

(iv) Forecasts shall disclose possible undesirable tax consequences of an early sale of program assets, such as depreciation recapture, the loss of prior year tax credits, or the possible failure to generate sufficient cash from the disposition to pay the associated tax liabilities.

(v) In computing any rate of return or yield to investors, no unrealized gains or value shall be included.

(c) The Securities Commissioner may require that the declaration of trust be given to prospective shareholders.

§143.8. Miscellaneous.

(a) Provisions of the Declaration of Trust. The requirements and/or provisions of appropriate portions of the following sections shall be included in the declaration of trust: §143.1(b) of this title (relating to Definitions); §143.2(a)-(h) of this title (relating to Requirements of Sponsor, Adviser, Trustees, and any Affiliate); §143.3(b), (c) and (f) of this title (relating to Suitability of Shareholders); §143.4(a)(2) and (c)-(g) of this title (relating to Fees, Compensation, and Expenses); §143.5(a)-(d), (e)(2), and

(g)-(k) of this title (relating to Conflicts of Interest and Investment Restrictions); and §143.6(a)-(i) of this title (relating to Rights and Obligations of Shareholders).

(b) Amendments and Supplements. A marked copy of all amendments and supplements to an application shall be filed with the Securities Commissioner as soon as the amendment or supplement is available.

(c) Cross-Reference Sheet Requirement. The cross-reference sheet shall be included with the application for registration.

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 May 18, 1994.

TRD-9441092 Denise Voigt Crawford
Securities Commissioner
State Securities Board

Earliest possible date of adoption. June 27, 1994

For further information, please call (512) 305-8300

TITLE 22. EXAMINING BOARDS

Part XVII. Texas State Board of Plumbing Examiners

Chapter 361. Administration

General Provisions

• 22 TAC §361.1

The Texas State Board of Plumbing Examiners proposes an amendment to §361.1, concerning the definition of "Water Treatment Certificate." The proposed amendment to §361.1 updates the rule to cite correctly the state agency responsible for issuing the Water Treatment Certificate.

Douglas A. Beran, Ph.D, Chief Fiscal Officer/Office Manager, 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.

Dr. Beran 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 enhanced public health, safety, and welfare by ensuring each person who has access to a potable water system will not be endangered by lead in the water nor by a cross-connection of clean and unclean water. There will be no effect on small businesses. The anticipated economic cost to persons who are required to comply with the section as proposed will be contingent upon fees applicable to obtaining their respective water treatment certificates.

Comments on the proposal may be submitted to Dr. Beran at the Texas State Board of Plumbing Examiners, P.O. Box 4200, Austin, Texas 78765.

The amendment is proposed under Texas Civil Statutes, Article 6243-101, which provide the Texas State Board of Plumbing Examiners with the authority to prescribe, amend, and enforce all rules necessary to carry out the Plumbing License Law.

The amendment also is proposed under Chapter 341, Health and Safety Code, Subchapter C.

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

Water Treatment Certificate—A document issued by the Texas Natural Resource Conservation Commission [Texas Department of Health] certifying that the named person complies with the department rules for engaging in water treatment

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 May 9, 1994

TRD-9441213 Gilbert Klesling
Administrator
Texas State Board of
Plumbing Examiners

Proposed date of adoption. July 11, 1994

For further information, please call (512) 458-2145

Chapter 363. Examinations

• 22 TAC §363.1

The Texas State Board of Plumbing Examiners proposes an amendment to §363.1(f), concerning qualifications for the water supply protection specialist examination. The proposed amendment to §363.1(f) sets forth additional items to be included in the water supply protection specialist training program an individual must undertake in order to qualify for the water supply protection specialist examination.

Douglas A. Beran, Ph.D chief fiscal officer/office manager, has determined there will fiscal implications as a result of enforcing or administering the rule. There will be no effect on state government nor on local government. The fiscal implication on businesses will be contingent upon their costs to include the additional instructional elements in the curriculum of their water supply protection specialist training programs

Dr. Beran also has determined that for each year of the first five years the rule as proposed is in effect the public benefit anticipated as a result of enforcing the rule as proposed will be enhanced public health, safety, and welfare by ensuring compliance with health and safety and water protection law.

The anticipated economic cost to persons who are required to comply with the rule as proposed will be contingent upon fees charged them to undergo the required water supply protection specialist training program

Comments on the proposal may be submitted to Dr. Beran at the Texas State Board of Plumbing Examiners, P.O. Box 4200, Austin, Texas 78765

The amendment is proposed under Texas Civil Statutes, Article 6243-101, which provide the Texas State Board of Plumbing Examiners with the authority to prescribe, amend, and enforce all rules necessary to carry out the Plumbing License Law.

The proposed amendment does not affect other statutes, articles, nor codes

§363.1. Qualifications.

(a)-(e) (No change.)

(f) Water supply protection specialist. Each applicant must:

(1)-(2) (No change)

(3) have successfully completed a board-approved training program designed around the Federal Safe Drinking Water Act and the Federal Clean Water Act, on-site wastewater and site evaluations and greywater re-use, water quality training and water treatment, water utilities systems and regulations, water conservation, xeriscape irrigation, fire protection systems, and state laws regulating lead contamination in drinking water

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 May 9, 1994.

TRD-9441218 Gilbert Kissling
Administrator
Texas State Board of
Plumbing Examiners

Proposed date of adoption: July 11, 1994

For further information, please call (512) 458-2145

• 22 TAC §363.6

The Texas State Board of Plumbing Examiners proposes an amendment to §363.6, concerning examination conditions. The proposed amendment to §363.6 clarifies the responsibilities of the Board to provide reasonable accommodations for the special circumstances of an examinee.

Douglas A. Beran, Ph.D., chief fiscal officer/office manager, has determined there will be fiscal implications as a result of enforcing or administering the rule. The estimated additional cost for state government for the first five-year period the rule will be in effect is contingent upon the number of examinees who will need special assistance to participate in the Board's examinations and the Board's cost to provide reasonable accom-

modations for such needs. There will be no fiscal impact on local government.

Dr. Beran also determined that for each year of the first five years the rule as proposed is in effect the public benefit anticipated as a result of enforcing the rule as proposed will be enhanced public health, safety, and welfare by assuring all individuals licensed by the Board—regardless of their special needs—have been afforded reasonable accommodations to undergo the Board's rigorous written and applied/mechanical examinations. 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 Dr. Beran at the Texas State Board of Plumbing Examiners, P.O. Box 4200, Austin, Texas 78765.

The amendment is proposed under Texas Civil Statutes, Article 6243-101, which provide the Texas State Board of Plumbing Examiners with the authority to prescribe, amend, and enforce all rules necessary to carry out the Plumbing License Law

The proposed amendment does not affect other statutes, articles, nor codes.

§363.6. *Special Examination Conditions.* The board, on request, may [shall] conduct examinations orally, in a foreign language, for the hearing impaired, or for those with other disabilities, depending upon the special circumstances of the applicant

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 May 9, 1994.

TRD-9441216 Gilbert Kissling
Administrator
Texas State Board of
Plumbing Examiners

Proposed date of adoption: July 11, 1994

For further information, please call. (512) 458-2145

• 22 TAC §363.11

The Texas State Board of Plumbing Examiners proposes an amendment to §363.11 (a) and (b), concerning requirements for providers of medical gas piping installation training programs, and water supply protection specialist training programs. The proposed amendment to subsection (a) deletes anachronistic language. The proposed amendment to subsection (b) sets forth approval criteria for instructors, the required course outline and the minimum hours of training for prospective instructors, provider's notification to the Board of the time(s) and place(s) where water supply training will occur, and self-monitoring by the approved providers.

Douglas A. Beran, Ph.D., chief fiscal officer/office manager, 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.

Dr. Beran 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 enhanced public health, safety, and welfare by ensuring medical gas systems have been installed in such a manner as to prevent infection and/or an unintended cross-connection of breathable and lethal gases because the installers of medical gas piping have undergone quality medical gas training programs and compliance with health and safety and water protection law because water supply protection specialists have undergone quality water supply protection specialist training programs. There will be no effect on small businesses. The anticipated economic cost to persons who are required to comply with the section as proposed is contingent upon the costs to undertake the training set forth in the proposed rule.

Comments on the proposal may be submitted to Dr. Beran at the Texas State Board of Plumbing Examiners, P.O. Box 4200, Austin, Texas 78765.

The amendment is proposed under Texas Civil Statutes, Article 6243-101, which provide the Texas State Board of Plumbing Examiners with the authority to prescribe, amend, and enforce all rules necessary to carry out the Plumbing License Law.

§363.11. Endorsement Training Programs.

(a) Medical gas piping installation training programs.

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

[(4) Prior to the effective date of the law, September 1, 1993, the board shall accept as certification those training and testing programs in medical gas piping installation that meet board criteria.]

(4)[(5)] Instructors in medical gas piping installation will be required to successfully complete a board-approved program. Instructors will be required to pass the board examination as well as successfully complete a board-approved program of 160 clock hours which meets the following generic criteria. The Board will allow credit for approved courses:

(A) 40 hours to provide the instructor with the basic educational techniques and instructional strategies necessary to plan and conduct effective training programs;

(B) 40 hours to provide the instructor with the basic techniques and strategies necessary to analyze, select, develop, and organize instructional material for effective training programs;

(C) 40 hours to provide the instructor with the basic principles, techniques, theories, and strategies to establish and maintain effective relationships with students, co-workers, and other personnel in the classroom, industry, and community;

(D) 40 hours to provide the instructor with the basic principles, techniques, theories, and strategies to communicate effectively with the use of instructional media;

(E) to maintain his/her status as an approved instructor of medical gas piping installation training, the instructor shall undergo one of the aforementioned training programs every 12 months such that the entire training (160 hours) is complete within four years.

(5) [(6)] Each approved provider must notify the Board 30 days before conducting classes; the notice shall contain the time(s) and place(s) where the classes will occur.

(6)[(7)] Each approved provider will perform self-monitoring and reporting as required by the Board.

(b) Water supply protection training programs

(1) Any person wishing to offer a board approved training program in water supply protection to the public must meet criteria as prescribed by the board. Instructors shall be employed by a program that meets certification requirements of the Central Education Agency or is exempted from the Central Education Agency certification requirements under Texas Education Code, Chapter 32, §32.12(a) (5) (Proprietary Schools and Veterans Education). Such persons shall provide to the administrator [a course outline,] lesson plans[,] and instructor qualifications. The Board shall provide a course outline and the required minimum hours.

(2) (No change.)

(3) [As of March 1, 1994,] Instructors in water supply protection will be required to pass the board examination in water supply protection[,] and successfully complete a board-approved program of 160 clock hours which meets the following generic criteria. The Board will allow credit for approved courses:

(A) 40 hours to provide the instructor with the basic educational techniques and instructional strategies necessary to plan and conduct effective training programs;

(B) 40 hours to provide the instructor with the basic techniques and

strategies necessary to analyze, select, develop, and organize instructional material for effective training programs;

(C) 40 hours to provide the instructor with the basic principles, techniques, theories, and strategies to establish and maintain effective relationships with students, co-workers, and other personnel in the classroom, industry, and community.

(D) 40 hours to provide the instructor with the basic principles, techniques, theories, and strategies to communicate effectively with the use of instructional media;

(E) to maintain his/her status as an approved instructor of water supply protection training, the instructor shall undergo one of the aforementioned training programs every 12 months such that the entire training (160 hours) is complete within four years.

(4) Each approved provider must notify the Board 30 days before conducting classes; the notice shall contain the time(s) and place(s) where the classes will occur.

(5) Each approved provider will perform self-monitoring and reporting as required by the Board.

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 May 9, 1994.

TRD-9441223

Gilbert Kissling
Administrator
Texas State Board of
Plumbing Examiners

Proposed date of adoption: July 11, 1994

For further information, please call: (512) 458-2145

Chapter 365. Licensing

• 22 TAC §365.1

The Texas State Board of Plumbing Examiners proposes an amendment to §365.1, concerning tasks a master plumber is allowed to perform by virtue of being a master plumber. The proposed amendment to §365.1 updates the rule to cite correctly tasks a master plumber is entitled to perform.

Douglas A. Beran, Ph.D. chief fiscal officer/office manager, 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.

Dr. Beran 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 enhanced public assurance that permitted plumbing work is performed with the direct participation of a master plumber. 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 Dr. Beran at the Texas State Board of Plumbing Examiners, P.O. Box 4200, Austin, Texas 78765.

The amendment is proposed under Texas Civil Statutes, Article 6243-101, which provide the Texas State Board of Plumbing Examiners with the authority to prescribe, amend, and enforce all rules necessary to carry out the Plumbing License Law.

The proposed amendment does not affect other statutes, articles, nor codes.

§365.1. License Categories; Description; Scope of Work Permitted. The board shall establish three separate license categories and two endorsement categories, describer as follows:

(1) Master Plumber-A license that entitles the individual to enter into contracts or agreements and to secure permits to perform plumbing work and assigns the individual responsibility for plumbing that occurs under such contracts or agreements, or under his or her supervision. A master plumber who uses unlicensed individuals to do plumbing work that only a license is permitted to do abuses the master plumber license and becomes subject to disciplinary action by the board.

(2)-(5) (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 May 9, 1994.

TRD-9441223

Gilbert Kissling
Administrator
Texas State Board of
Plumbing Examiners

Proposed date of adoption: July 11, 1994

For further information, please call (512) 458-2145

• 22 TAC §365.2

The Texas State Board of Plumbing Examiners proposes an amendment to §365.2, concerning registration with the Board as a plumber's apprentice. To be eligible to take the journeyman plumber's examination, an applicant must be a registered apprentice, hold a high school diploma or GED, and meet certain minimum trade experience requirements described in the Texas State Board of Plumbing Examiners' rule §365.3(b)(3). The proposed amendment to §365.2 sets forth criteria to qualify as a registered plumber's apprentice.

Douglas A. Beran, Ph.D., chief fiscal officer/office manager, 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.

Dr. Beran 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 enhanced public health, safety, and welfare by ensuring each individual who applies to take the journeyman plumber's examination is a registered plumber's apprentice, has minimum educational qualifications, and has minimum trade experiences. There will be no effect on small businesses. The anticipated economic cost to persons who are required to comply with the section as proposed is zero.

Comments on the proposal may be submitted to Dr. Beran at the Texas State Board of Plumbing Examiners, P.O. Box 4200, Austin, Texas 78765

The amendment is proposed under Texas Civil Statutes, Article 6243-101, which provide the Texas State Board of Plumbing Examiners with the authority to prescribe, amend, and enforce all rules necessary to carry out the Plumbing License Law

§365.2 Apprentice Registration To qualify as a [A] registered plumber's apprentice, one must be at least 16 years of age and be registered with [and may record employment by applying to] the board [for registration]

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 May 9, 1994.

TRD-9441225
Gilbert Kissling
Administrator
Texas State Board of
Plumbing Examiners

Proposed date of adoption: July 11, 1994

For further information, please call: (512) 458-2145

◆ ◆ ◆
• 22 TAC §365.3

The Texas State Board of Plumbing Examiners proposes an amendment to §365.3, concerning criteria for licensure as a plumbing inspector. Presently, the rule provides a political subdivision shall furnish proof of a plumbing inspector applicant's employment prior to taking the plumbing inspector's examination. The amendment proposes that a political subdivision may furnish proof of intention to employ an individual as a plumbing inspector if the applicant meets the Board's requirements to qualify as a plumbing inspector.

Douglas A. Beran, Ph.D., chief fiscal officer/office manager, has determined there will not be a fiscal implication on state government for the first five-year period the rule will be in effect. However, there may be a reduction in cost for local governments because an

applicant for the plumbing inspector's examination will not need to be an employee of a political subdivision; instead, the political subdivision will need to show only the intention to employ the applicant if he/she successfully completes the requirements to be licensed by the Board as a plumbing inspector.

Dr. Beran also has determined that for each year of the first five years the rule as proposed is in effect the public benefit anticipated as a result of enforcing the rule as proposed will be enhanced public health, safety, and welfare by ensuring each person has access to clean water and clean air because of plumbing inspected by competent plumbing inspectors. There will be no effect on small businesses. The anticipated economic cost to persons who are required to comply with the rule as proposed will be zero.

Comments on the proposal may be submitted to Dr. Beran at the Texas State Board of Plumbing Examiners, P.O. Box 4200, Austin, Texas 78765

The amendment is proposed under Texas Civil Statutes, Article 6243-101, which provide the Texas State Board of Plumbing Examiners with the authority to prescribe, amend, and enforce all rules necessary to carry out the Plumbing License Law

The proposed amendment does not affect other statutes, articles, nor codes

§365.3. License Qualifications.

(a) An applicant may qualify for a license in one of the three categories or for an endorsement in one of the two categories by successfully completing the required examination and remitting the appropriate fee. Furthermore, in the case of plumbing inspectors, the political subdivision shall furnish proof of the applicant's employment or intention to employ if requirements are completed successfully.

(b) (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 May 9, 1994

TRD-9441228
Gilbert Kissling
Administrator
Texas State Board of
Plumbing Examiners

Proposed date of adoption: July 11, 1994

For further information, please call: (512) 458-2145

◆ ◆ ◆
• 22 TAC §365.11

The Texas State Board of Plumbing Examiners proposes an amendment to §365.11, concerning appliance work which must be performed by a licensed plumber, the Water Treatment Certificate, and grammatical changes. The proposed amendment to §365.11 clarifies appliance pre-connection work which must be performed by a licensed

plumber, updates the rule to cite correctly the state agency responsible for issuing the Water Treatment Certificate, and makes stylistic and grammatical changes.

Douglas A. Beran, Ph.D., Chief Fiscal Officer/Office Manager, 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.

Dr. Beran 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 enhanced public health, safety, and welfare by ensuring appliance pre-connections are performed by a licensed plumber to assure safe and proper appliance connections and each person who has access to a potable water system will not be endangered by lead in the water nor by a cross-connection of clean and unclean water. There will be no effect on small businesses. The anticipated economic cost to persons who are required to comply with the section as proposed will be contingent upon their costs to utilize a licensed plumber and upon fees applicable to obtaining their respective water treatment certificates.

Comments on the proposal may be submitted to Dr. Beran at the Texas State Board of Plumbing Examiners, P.O. Box 4200, Austin, Texas 78765

The amendment is proposed under the Texas Civil Statutes, Article 6243-101, which provide the Texas State Board of Plumbing Examiners with the authority to prescribe, amend, and enforce all rules necessary to carry out the Plumbing License Law.

The amendment also is proposed under Chapter 341, Health and Safety Code, Subchapter C

§365.11 Exemptions

(a) The board may not require appliance connections to be performed by a licensed plumber, unless the connection also requires cutting into existing piping, performing any work on the sewer side of a properly installed trap, or working [work] on the house side of or replacing [replacement of] valves provided for appliance installation, in which case [cases] a licensed plumber must perform the preconnection work.

(b) Persons holding a Water Treatment Certificate from the Texas Natural Resource Conservation Commission [Texas Department of Health] may engage in residential water treatment activities involving the cutting into and making connections with a potable water supply system. However, if the activities involve connections to the sewer, soil, or waste line, only a licensed plumber may perform the connection work.

(c)-(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 May 9, 1994

TRD-9441227 Gilbert Kissling
Administrator
Texas State Board of
Plumbing Examiners

Proposed date of adoption. July 11, 1994

For further information, please call: (512) 458-2145

◆ ◆ ◆
• 22 TAC §365.12

The Texas State Board of Plumbing Examiners proposes an amendment to §365.12, concerning the licensing of persons with criminal backgrounds. The proposed amendment to §365.12 clarifies the ineligibility of incarcerated felons to obtain or renew any license issued by the Texas State Board of Plumbing Examiners.

Douglas A. Beran, Ph.D., Chief Fiscal Officer/Office Manager, 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.

Dr. Beran 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 enhanced public health, safety, and welfare by ensuring individuals issued licenses by the Texas State Board of Plumbing Examiners are fit, competent, and qualified to engage in the trades regulated by the Board. There will be no effect on small businesses. The anticipated economic cost to persons who are required to comply with the section as proposed is zero.

Comments on the proposal may be submitted to Dr. Beran at the Texas State Board of Plumbing Examiners, P.O. Box 4200, Austin, Texas 78765.

The amendment is proposed under the Texas Civil Statutes, Article 6243-101, which provide the Texas State Board of Plumbing Examiners with the authority to prescribe, amend, and enforce all rules necessary to carry out the Plumbing License Law.

The proposed amendment does not affect other statutes, articles, or codes

§365.12. *Licensing of Persons with Criminal Backgrounds.*

(a) No currently incarcerated felon will be eligible to obtain or renew any [a plumber or plumbing inspector's] license

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 May 9, 1994

TRD-9441226 Gilbert Kissling
Administrator
Texas State Board of
Plumbing Examiners

Proposed date of adoption July 11, 1994

For further information, please call (512) 458-2145

◆ ◆ ◆
Chapter 367. Enforcement

• 22 TAC §367.1

The Texas State Board of Plumbing Examiners proposes an amendment to §367.1, concerning field representatives of the Board and plumbing inspectors. The proposed amendment to §367.1 clarifies employment criteria and job responsibilities of a field representative of the Board and clarifies job responsibilities of a plumbing inspector.

Douglas A. Beran, Ph.D., Chief Fiscal Officer/Office Manager, 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.

Dr. Beran 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 enhanced public assurance the Plumbing License Law is enforced by field representatives of the Texas State Board of Plumbing Examiners and by plumbing inspectors. There will be no effect on small businesses. The anticipated economic cost to persons who are required to comply with the section as proposed is zero.

Comments on the proposal may be submitted to Dr. Beran at the Texas State Board of Plumbing Examiners, P.O. Box 4200, Austin, Texas 78765.

The amendment is proposed under Texas Civil Statutes, Article 6243-101, which provide the Texas State Board of Plumbing Examiners with the authority to prescribe, amend, and enforce all rules necessary to carry out the Plumbing License Law.

§367.1 *General Provisions*

(a)-(b) (No change)

(c) Each locally designated plumbing inspector should [may] enforce the act and municipal ordinances and should [may] file complaints with the board and local prosecutors.

(d) The board shall [may] appoint a person knowledgeable of plumbing practice and law as field representative to assist in the enforcement of the act. The field representative may

(1)-(4) (No change)

(a)-(g) (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 May 9, 1994

TRD-9441215 Gilbert Kissling
Administrator
Texas State Board of
Plumbing Examiners

Proposed date of adoption July 11, 1994

For further information, please call: (512) 458-2145

◆ ◆ ◆
TITLE 25. HEALTH SERVICES

Part II. Texas Department of Mental Health and Mental Retardation

Chapter 405. Client (Patient) Care

Subchapter C. Life-Sustaining Treatment

• 25 TAC §§405.51-405.62

(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 Mental Health and Mental Retardation or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Mental Health and Mental Retardation (TXMHMR) proposes the repeal of §§405.51-405.62, concerning life-sustaining treatment. The repeal of the subchapter is proposed contemporaneously with the proposal of the subchapter that would replace it, also known as Chapter 405, Subchapter C. The proposed repeal affects Chapter 672 of the Texas Health and Safety Code.

The purpose of the proposed repeal is to allow for the adoption of a new subchapter which updates terminology and references and addresses procedures in the event an individual has executed an advance directive.

Leilani Rose, director, Office of Financial Services, 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.

Dr. William Reid, M.D., M.P.H., medical director, has determined that the public benefit is the adoption of rules which update the procedures for delineating the treatment and resuscitative status of persons served. 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 proposal may be submitted to Linda Logan, Director, Policy Development, Texas Department of Mental Health and Mental Retardation, P.O. Box 12668, Austin, Texas 78711-2668, within 30 days of publication.

The repeals are proposed under the Texas Health and Safety Code, §532.015 (Texas Civil Statutes, Article 5547-202, §2.11), which provides the Texas Department of Mental Health and Mental Retardation with broad rulemaking powers.

§405.51 *Purpose*

§405.52. Application.

§405.53. Definition.

§405.54. Resuscitative Status Policy.

§405.55. Determination and Implementation of Resuscitative Status Order.

§405.56. General Provisions Relating to Withholding or Withdrawal of Life-Sustaining Treatment Under the Texas Natural Death Act.

§405.57. Legal Expression Through Directive Under the Texas Natural Death Act.

§405.58. Decisionmaking Under the Texas Natural Death Act for Clients Who Have Issued Directives.

§405.59. Decisionmaking Under the Texas Natural Death Act for Clients Who Have Not Issued Directives.

§405.60. Ethics Committee.

§405.61. References.

§405.62. Distribution.

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 May 18, 1994.

TRD-9441045
Ann K. Utley
Chair
Texas Board of Mental
Health and Mental
Retardation

Earliest possible date of adoption: June 27, 1994

For further information, please call: (512) 206-4516



The Texas Department of Mental Health and Mental Retardation (TXMHMR) proposes new §§405.51-405.62, concerning life-sustaining treatment. The repeal of existing §§405.51-.62, also concerning life-sustaining treatment, is contemporaneously proposed in this edition of the Texas Register. The proposed subchapter affects Chapter 672 of the Texas Health and Safety Code.

The proposed subchapter primarily updates terminology and references. The term "reasonably" has been added to describe interventions which will be undertaken for persons who are classified Category I. In addition, a statement is added noting that an advance directive takes precedence over a resuscitative status category.

Leilani Rose, director, Office of Financial Services, 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.

Dr. William Reid, M.D., M.P.H., medical director, has determined that the public benefit is the adoption of rules which update the procedures for delineating the treatment and resuscitative status of persons served. 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 Linda Logan, Director, Policy Development, Texas Department of Mental Health and Mental Retardation, P.O. Box 12668, Austin, Texas 78711-2668, within 30 days of publication.

The new sections are proposed under the Texas Health and Safety Code, §532.015, which provides the Texas Board of Mental Health and Mental Retardation with rulemaking powers.

§405.51. Purpose. The purpose of this subchapter is to provide procedures for delineating the treatment and resuscitative status of persons served and for implementing the Natural Death Act, Texas Health and Safety Code, Chapter 672, which provides statutory authority for decisionmaking with regard to withholding or withdrawal of life-sustaining treatment.

§405.52. Application. This subchapter applies to all residential facilities of the Texas Department of Mental Health and Mental Retardation.

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

Competent-Possessing the ability, based on reasonable medical judgment, to understand and appreciate the nature and consequences of a treatment decision, including the significant benefits and harms of and reasonable alternatives to any proposed treatment decision.

Consulting-The descriptor for persons not employed by the Texas Department of Mental Health and Mental Retardation who serve on an ethics committee on a voluntary basis, i.e., without monetary or other tangible compensation.

Directive-Written or oral expression by a competent adult of his or her desires regarding life-sustaining treatment in the event of an occurrence of a terminal condition as certified by two physicians, one of whom is the attending physician, which meets the legal requirements of the Natural Death Act. Types of advance directives include the "Directive to Physicians/Living

Will" and the "Durable Power of Attorney for Health Care Decisions."

Ethics committee-An advisory committee of facility staff, consulting professionals, and advocates, whose purpose is to provide advice and consultation to physicians, parents, guardians, and family members regarding treatment decisions concerning qualified persons served.

Facility-Any state hospital, state school for persons with mental retardation, state center, or other institution of the Texas Department of Mental Health and Mental Retardation, and any organizational entity that hereafter may be made a part of the department.

Family-The spouse, reasonably available adult children, parent(s), siblings, or nearest relative of the person served

Incompetent-Lacking the ability, based on reasonable medical judgment, to understand and appreciate the nature and consequences of a treatment decision, including the significant benefit and harms of and reasonable alternatives to any proposed treatment decision.

Legal guardian-The person who, under court order, is the guardian of the person of the person served.

Life-sustaining treatment-A medical procedure or intervention which utilizes mechanical or other artificial means to sustain, restore, or supplant a vital function.

Person served-A person receiving residential services from a facility of the Texas Department of Mental Health and Mental Retardation.

Qualified person served-A person served diagnosed and certified in writing to have a terminal condition by two physicians, one of whom is the attending physician, and both of whom have personally examined the person served.

Resuscitation-Act of reviving from apparent death or unconsciousness.

Resuscitative status categories-Categories of intervention for persons served, as follows:

(A) **Category I: Maximum therapeutic effort**-Intervention in which everything reasonably necessary will be done to reduce mortality and morbidity, including transfer to a medical facility for additional services;

(B) **Category II: Therapeutic effort with no heroics**-Intervention in which conservative therapeutic and supportive measures will be performed to reduce mortality and morbidity, excluding initiation of endotracheal intubation and external cardiac massage. Defibrillation, surgical intervention, hyperalimentation, or implementation of other measures deemed extraordinary may be restricted or excluded. This category of intervention is only designated when a person served is qualified (see

§405.54 of this title (relating to Resuscitative Status Policy)); and

(C) Category III: Palliative measures only—Intervention in which measures directed toward reducing pain and enhancing the comfort and dignity of the person served will be maintained. However, no resuscitative measures will be performed. This category of intervention is only designated when a person served is qualified (see §405.54 of this title (relating to Resuscitative Status Policy)).

Terminal condition—An incurable or irreversible condition caused by injury, disease, or illness, which without the application of life-sustaining procedures, would, within reasonable medical judgment, produce death, and for which the application of life-sustaining procedures would serve only to postpone the moment of death of the person served, i.e., death would result within a relatively short time without application of such procedures.

§405.54. Resuscitative Status Policy.

(a) The resuscitative status of a person served is an integral part of the overall evaluation of the medical care of the person served. An order not to resuscitate (Category II or III) will be given only for a qualified person served and should be based on a judgment that resuscitation is an ethically extraordinary and non-obligatory procedure for prolonging his or her life. Such an order would be most appropriate when the person served is terminally ill and resuscitation would only prolong the dying process.

(b) Resuscitative status should be discussed with the person served (or legal guardian) and his or her family in advance of a medical emergency. When a determination of that status is being made by the person served (or legal guardian), family, and physician, the following considerations are recommended:

(1) The competent person served must be allowed the right to consensual partnership in the determination of resuscitative status. If the person served is factually incompetent, comatose, or incapable of communication, the decision should be made with the consultation and consent of his or her legal guardian and/or family. Because the wishes of the person served, if known, are to be honored, an expression of those wishes made when he or she was competent and capable of communication, e.g., in a directive issued in accordance with the Natural Death Act, should be respected and followed.

(2) Persons served who are comatose are living human beings whose lives are to be valued; however, this does not mean that all technologies for prolonging life are appropriate or obligatory.

(3) Age, handicaps, economic status, or incompetency should not be determinants of resuscitative status.

(4) Category II status normally reflects a decision to pursue a conservative therapeutic effort in the face of a chronic disabling illness. There may be persons served with such severe recurring complications that resuscitation would be contraindicated even though they are not in the final stages of a single, defined terminal illness. The physician, with the consultation and consent of the person served, or, if the person served is unable to participate in decisionmaking, his or her legal guardian and/or family, may order the further restriction of other measures. In such cases, although treating the intervening illness remains the primary goal, full resuscitation could be considered non-obligatory and a Category II order would be appropriate.

(5) A Category III order does not indicate withdrawal of palliative procedures. A person served for whom such an order has been written will receive all the usual care given to enhance comfort, dignity, safety, and a sense of well-being.

(6) In any problematic case involving a Category II or III designation or when a person served with a Category II or III designation has no legal guardian and/or family, consultation with the facility ethics committee should be sought.

(c) In the event a person served has executed a directive as outlined in §405.57 of this title (concerning Legal Expression Through Directive Under the Natural Death Act), the provisions regarding life-sustaining treatment outlined in the directive shall supersede any resuscitative status category.

§405.55. Determination and Implementation of Resuscitative Status Order.

(a) All persons served will be initially evaluated on an individual basis as to resuscitative status by the attending physician. Normally this evaluation will be made on admission to services but in all cases within one year of admission.

(1) If the attending physician does not categorize the person served, he or she will automatically be considered Category I.

(2) If the person served is competent and wishes to be classified Category II or III, the request will be honored.

(3) When the person served is factually incompetent, comatose, or incapable of communication, the wishes of the legal guardian and family will be honored, provided the attending physician concurs. If there is disagreement between the legal guardian and family, within the family, or

between the legal guardian or family and physician, the person served will be designated Category I status until there is consensus. Consultation with the facility ethics committee should be sought.

(4) If the person served is unable to give direction and has no legal guardian or family, the physician(s) should seek consultation with the facility ethics committee before designating a Category II or III resuscitative status for the person served.

(b) When the condition of the person served deteriorates subsequent to initial categorization, and this contingency has not been previously addressed by the ethics committee, the person served may be reclassified by following the procedure described in subsection (a) of this section.

(c) The attending physician will note in the medical record that the person served or his or her legal guardian and/or family have been consulted and concur with the designated status (or redesignation) and its corresponding treatment plan. Such consultations should be witnessed and documented.

(d) The resuscitative status categories of II and III must be evaluated and documented by the attending physician (or his/her physician designee) at least monthly. The resuscitative status category of every person served must be reviewed at least annually, preferably at the annual staffing and should be reevaluated when there is a significant change in the clinical condition of the person served. Documentation will be in the physician's orders section and the progress notes section of the chart. If an order to renew the resuscitative status category of a person served is not updated in writing, he or she will automatically be considered Category I until redesignated by the physician.

(e) When the physician has documented the need and written an order for a Category II or III designation, a form designated by the department will be placed in the chart of the person served. This form will have appropriate spaces for documentation of the periodic review.

§405.56. General Provisions Relating to Withholding or Withdrawal of Life-Sustaining Treatment under the Natural Death Act.

(a) The attending physician is charged with the responsibility of determining that all of the requirements of the Natural Death Act, herein adopted by reference as Exhibit A, have been fulfilled before life-sustaining treatment is withheld or withdrawn.

(b) If the attending physician refuses to comply with a directive or treat-

ment decision, the physician shall make a reasonable effort to transfer the person served to another physician.

(c) Life-sustaining treatment may not be withheld from a person served who is pregnant.

§405.57. Legal Expression through Directive under the Natural Death Act.

(a) When an adult person served is competent to make a decision regarding life-sustaining treatment and it is clinically appropriate to do so, the person served should be informed of the provisions of the Natural Death Act and provided with a copy of the form of the directive herein adopted as Exhibit B. The desires expressed by the competent person served should be observed.

(1) The directive may be made in writing at any time that the person served is competent to make such a decision.

(2) The directive may also be made by a nonwritten means of communication by a qualified person served.

(3) The directive may be revoked by the person served at any time, without regard to his mental state or competency.

(4) The present desire of the competent person served shall at all times supersede a directive.

(5) A competent adult person served can designate a person to make a treatment decision in the event that the person served becomes comatose, factually incompetent, or otherwise mentally or physically incapable of communication.

(b) A directive may be made on behalf of a qualified person served who is under 18 years of age by his or her spouse, if the spouse is an adult, or by the parents or legal guardian of the person served. However, such a directive can be overridden by the contrary desire of a competent person served, even if he or she is under 18 years of age.

(c) Although only a competent person may execute an advance directive, all persons served shall receive information about the right to execute advance directives upon admission

§405.58. Decisionmaking under the Natural Death Act for Persons Served Who Have Issued Directives

(a) The desires expressed by a competent person served through directive should be honored

(b) When a person served is factually incompetent to make a decision regarding life-sustaining treatment but was

previously competent and at that time designated a person through directive to make such a decision, the person so designated will be accorded decisionmaking power

(c) When a person served is unable to communicate and has previously issued a directive without designating a person to make treatment decisions, the attending physician shall comply with the directive unless the physician believes that the directive does not reflect the present desire of the person served.

§405.59. Decisionmaking under the Natural Death Act for Persons Served Who Have Not Issued Directives.

(a) When a person served is factually incompetent to make a decision regarding life-sustaining treatment, has not previously issued a directive while competent, and has a legal guardian, the legal guardian, along with the attending physician, can make a decision based on knowledge of what the person served would desire, if known.

(b) When a person served is factually incompetent to make a decision regarding life-sustaining treatment, has not previously issued a directive while competent, and does not have a legal guardian, at least two of the following persons, in order of priority, as available, along with the attending physician, can make the decision: the spouse, a majority of the reasonably available adult children, the parents, or the nearest living relative of the person served.

(c) When a person served is unable to give direction regarding life-sustaining treatment; has not, while competent, issued a directive or designated another person to make such a decision; does not have relatives as described in subsection (b) or such relatives are unavailable or unwilling to participate in decisionmaking; and has no legal guardian, the appointment of a legal guardian should be sought by the facility to the extent authorized by law or, in acute situations, the provisions of §405.60 of this title (relating to the Ethics Committee), should be followed.

(d) If the person served has executed an advance directive, the directive shall be attached to the person's chart and/or medical record. Such directives are evidence of the person's wishes if/when he or she becomes a qualified person served and shall be honored. Directives are not necessarily related to resuscitative status unless the person served is already a qualified person (i.e., terminal condition) Persons who are not terminal should remain in resuscitative category I, regardless of an advance directive. Should the person served develop a life-threatening condition, the directive will assist the facility in determining resuscitative status category based on the desires expressed in the directive

§405.60 Ethics Committee

(a) An ethics committee must be established by each facility. The committee may be established multi-institutionally in cooperation with other health care providers, e.g., local hospitals, serving the same geographical area.

(b) The ethics committee must minimally consist of one facility physician; one consulting physician; one facility registered nurse from the person served's unit who has knowledge of the person served and his or her condition, a member of the clergy; an attorney not affiliated with the facility or TDMHMR; a facility social worker (CSW-ACP certified); and a representative of a parents' group or a representative of an advocacy group. The committee may also include the following additional members as available: additional consulting physician; medical support staff, such as a physical therapist, clinical pharmacist, clinical psychologist, or occupational therapist; a consulting social worker (CSW-ACP certified); a rights representative; and additional representation by parents' and or advocacy organizations.

(c) Consultation with the ethics committee may be sought for any treatment decision, but should be sought as follows:

(1) when a person served is unable to give direction regarding the withholding or withdrawal of life-sustaining treatment, has no legal guardian, and has no person legally designated to make such a decision according to provisions of the Natural Death Act, and

(2) when a decision regarding the withholding or withdrawal of life-sustaining treatment is to be made and there is a conflict between or among the decisionmakers.

(d) Decisionmaking concerning recommendations to be made by the ethics committee shall be by consensus. Each consultation with the ethics committee shall be documented in the record of the person served.

§405.61. References. Reference is made in this subchapter to the Natural Death Act, Texas Health and Safety Code, Chapter 672.

§405.62. Distribution

(a) This subchapter shall be distributed to the medical director, deputy, associate, and assistant deputy commissioners, and directors of Central Office; and to superintendents/directors of all TDMHMR facilities.

(b) The superintendent/director will ensure distribution of this subchapter to all appropriate staff.

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 May 18, 1994.

TRD-9441046

Ann K Utley
Chair
Texas Board of Mental
Health and Mental
Retardation

Earliest possible date of adoption June 27, 1994

For further information, please call (512) 206-4516

◆ ◆ ◆
TITLE 28. INSURANCE
Part II. Texas Workers'
Compensation
Commission

Chapter 134. Guidelines for
Medical Services, Charges,
and Payments

Subchapter K. Treatment
Guidelines

• **28 TAC §134.1000**

The Texas Workers' Compensation Commission proposes new §134.1000, concerning mental health treatment guidelines. At the request of the *Texas Register* staff, this proposed guideline has been filed with the Register and will be published in its entirety in the *Texas Register* in rule format. The Mental Health Treatment Guideline is also available in standard guideline format from the Publications Department of the Texas Workers' Compensation Commission, 4000 South IH35, Southfield Building, Austin, Texas 78704-7491. The difference in format is one of designation only (e.g., "Section III" in the standard guideline format is referred to as "subsection (d)" in the rule format) and not of substance. This guideline is proposed in order to ensure the quality of health care to the injured workers of Texas and identify clinically acceptable courses of treatment for specific mental disorders. It will provide a mechanism to monitor the reasonableness of the treatments administered and establish treatment parameters. The guideline also clarifies those services that are reasonable and necessary for mental health care for the injured workers of Texas.

The Medical Review Division, in conjunction with the Medical Advisory Committee (MAC) and a broad representation from the medical community have worked together to develop the proposed Mental Health Treatment Guideline. The decision as to which treatments would go into the guideline was based on the input of the participants regarding treatments that are commonly used and medically accepted. This guideline is to be used by health care providers as a tool for clinical office practice to establish the required elements for all providers to initiate treatment. The insurance carrier should use this guide-

line to compare treatment prospectively, concurrently, and retrospectively with the predetermined elements contained in this guideline. The commission's primary mission in initiating and development of this task is to ensure appropriate guidelines relating to necessary treatments for compensable injuries, to provide a tool for monitoring of the necessity of treatments administered; and to provide a tool to review typical healthcare treatment.

The introductory text to the rule provides for a mental health evaluation of up to three hours that does not have to be pre-authorized by the insurance carrier. The introductory text to the rule also sets out the documentation required for treatment continued beyond the initial three-hour mental health evaluation.

The guideline is not to be viewed as being prescriptive in nature, or to be used as the sole basis for denial of services. It reflects typical courses of intervention. Treatment falling outside these parameters will be subject to more careful scrutiny and require additional documentation of the special circumstances to justify the need for treatment.

The guideline has been designed to achieve the following goals:

- (1) to ensure quality health care to the injured workers of Texas;
- (2) to assist all parties with regard to the appropriate treatment and management of mental disorders in workers' compensation healthcare;
- (3) to identify clinically acceptable courses of treatment for specific mental disorders;
- (4) to establish documentation standards which support the appropriateness of the level of service for assessment/evaluation and on-going treatment;
- (5) to establish treatment parameters based on a diagnostic grading system which allows for categorization of the manifestation of distress during the current phase of injury;
- (6) to establish parameters for eligibility and termination of treatment, and
- (7) to provide a mechanism for a progressive, concurrent, retrospective review of efficient and effective utilization of healthcare services.

Janet Chamness, Chief of Budget, has determined that for the first five-year period the rule is in effect there will be minimal fiscal implications as a result of enforcing or administering the rule.

For the first five years this rule is in effect state and local governments are expected to have no additional or reduced costs and no loss or increase in revenue.

Ms. Chamness also has determined that for each year of the first five years the rule as proposed is in effect the public benefit anticipated as a result of enforcing the rule will be greater efficiency in the provision of mental health care to the injured worker.

There is no anticipated economic cost to persons who are required to comply with the rule as proposed. But, it is possible that insurance carriers that now do not routinely approve

initial mental health evaluations may incur some extra cost resulting from compliance with the proposed rule. The costs for compliance will be the same for small and large businesses.

Comments on the proposal may be submitted, for at least 30 days following publication, to Elaine Crease, Office of the General Counsel, Mail Stop #4D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH-35, Austin, Texas 78704-7491. Commenters should specify whether they are referring to the proposed guideline published in rule format in the *Texas Register*, or the proposed guideline published in standard guideline format and available from the Texas Workers' Compensation Commission.

The new section is proposed under the Texas Labor Code, §402.061, which authorizes the commission to adopt rules necessary to administer the Act, the Texas Labor Code, §413.011, which authorizes the commission to establish by rule medical policies and guidelines relating to necessary treatments for injuries, and §413.013, which authorizes the commission to establish by rule a program for prospective, concurrent, and retrospective review and resolution of a dispute regarding health care treatments and services, and to establish by rule a program for the systematic monitoring of the necessity of treatments administered and fees charged and paid for medical treatments or services, including the authorization of prospective, concurrent, or retrospective review under the medical policies of the commission to ensure that the medical policies or guidelines are not exceeded.

This rule affects the Texas Labor Code, §§402.061, 413.011, and 413.013.

§134.1000 Mental Health Treatment Guideline.

(a) Table of Contents. The following headings and their corresponding subdivisions comprise a table of contents for this rule:

- (1) Introduction-subsection (b)
- (2) Texas Labor Code-subsection (c)
 - (A) Review of Texas Labor Code-subsection (c)(1)
 - (B) Review of Texas Workers' Compensation Commission Rules-subsection (c)(2)
 - (3) Confidentiality-subsection (d)
 - (A) Introduction-subsection (d)(1)
 - (B) Requests for, and Submission of, Confidential Information-subsection (d)(2)

(C) Informed Consent-subsection (d) (3).

(4) Concepts and Governing Principles for Involved Parties-subsection (e).

(5) Ground Rules-subsection (f).

(A) Requirement for Intervention in Mental Disorders-subsection (f)(1).

(B) General Ground Rules-subsection (f)(2).

(C) Mental Disorders with Limited Eligibility for Intervention subsection (f)(3).

(D) Claimants Clinical Condition/Direction of Treatment subsection (f)(4).

(E) CPT Code subsection (f)(5).

(F) Biofeedback subsection (f)(6).

(G) Termination of Treatment-subsection (f)(7).

(H) Consideration of Injury Related/Non-Injury Related Factors subsection (f)(8).

(6) Assessment/Evaluation subsection (g).

(A) Introduction subsection (g)(1).

(B) Indications for Assessment/Evaluation-subsection (g)(2).

(C) Parameters for Assessment/Evaluation-subsection (g)(3).

(D) Documentation Requirements for Assessment/Evaluation subsection (g)(4).

(7) On-Going Treatment subsection (h).

(A) Introduction subsection (h)(1).

(B) Indication for Ongoing Treatment subsection (h)(2).

(C) Parameters for Ongoing Treatment subsection (h)(3).

(D) Weekly Treatment Tables-subsection (h)(4).

(E) Treatment Durations subsection (h) (5).

(i) Organic Brain Impairment Resulting from Drug Toxicities subsection (h)(5)(A).

(ii) Psychotic Disorders subsection (h)(5)(B).

(iii) Affective Disorders subsection (h)(5)(C).

(iv) Anxiety Disorders subsection (h)(5)(D).

(v) Somatoform Disorders subsection (h)(5)(E).

(vi) Personality Disorders subsection (h)(5)(F).

(vii) Psychosexual Dysfunction subsection (h)(5)(G).

(viii) Substance Dependence Disorders and Substance Abuse Disorders subsection (h)(5)(H).

(ix) Acute Reaction subsection (h)(5)(I).

(x) Adjustment Reaction subsection (h)(5)(J).

(xi) Peri-Operative Algorithm subsection (h)(5)(K).

(F) Documentation for On-Going Treatment-subsection (h)(6).

(i) Guidelines for On-Going Treatment Documentation subsection (h)(6)(A).

(ii) Documentation Format and Content-subsection (h)(6)(B).

(8) Criteria for Referral to Other Programs subsection (i).

(A) Criteria for Inpatient Psychiatric Treatment Referral subsection (i)(1).

(B) Criteria for Referral to Chronic Pain Management Programs subsection (i)(2).

(9) Appendices.

(A) Appendix A: Psychosocial Stressor Scale-subsection (j).

(B) Appendix B: Global Assessment of Functioning Scale subsection (k).

(C) Appendix C: ICD-9/DSM-III R Code Overview-subsection (l).

(D) Appendix D: ICD-9/DSM-III R Code Table-subsection (m).

(E) Appendix E: Elements of a Mental Status Examination subsection (n).

(10) Bibliography subsection (o).

(b) Introduction.

(1) The purpose of this guideline is to clarify those services that are reasonable and necessary for mental health care for the injured workers of Texas. This guideline is not to be viewed as prescriptive or to be used as the sole basis for denial of services. The guideline reflects typical courses of intervention. Treatment falling outside these parameters will be subject to more careful scrutiny and require additional documentation of the special circumstances to justify the need for treatment.

(2) The primary goals of this document are to:

(A) ensure quality of health care to the injured workers of Texas;

(B) assist all parties with regard to the appropriate treatment and management of mental disorders in workers compensation healthcare;

(C) identify clinically acceptable courses of treatment for specific mental disorders;

(D) establish documentation standards which supports the appropriateness of the level of service for assessment/evaluation and on-going treatment;

(E) establish treatment parameters based on a diagnostic grading system which allows for categorization of the manifestation of distress during the current phase of injury;

(F) establish parameters for eligibility and termination of treatment; and

(G) provide a mechanism of progressive, concurrent, retrospective review of efficient and effective utilization of healthcare services.

(3) A major obstacle in devising such a set of guidelines is the relative ab-

sence of research regarding treatment of choice for various mental disorders, in particular the absence of clear indicators regarding frequency and duration of treatment. In the treatment of injured workers, the Qualified Mental Health Professional (QMHP) is confronted with a variety of mental and physical problems, including traumatic brain injury and permanent loss of functioning due to physical trauma, which can require many months of rehabilitation efforts. Even in common psychological reactions such as adjustment disorders and depression, the exact treatment plan will vary based on the needs of the individual. The nature of the physical injury, the amount and duration of lifestyle disruption, the person's general psychological well-being, ability to handle stress, and other constitutional factors such as biological predisposition to mental illness all affect the course of treatment.

(4) These guidelines are designed to apply primarily to outpatient evaluation and treatment. These guidelines do not apply to treatment involving cognitive rehabilitation of traumatic brain injury. General criteria for referral to more intensive full or partial psychiatric inpatient settings and rehabilitation/pain clinics are included in this guideline. Also, these guidelines apply to the delivery of services to inpatients on medical-surgical wards, but not to inpatient psychiatric hospitals, psychiatric/multidisciplinary outpatient programs and pain management programs.

(5) The diagnostic codes (ICD-9 codes) relating to mental disorders in this guideline were chosen based on the frequency with which they occur among injured workers and/or due to their importance in treatment planning for specific medical conditions.

(6) Other diagnoses not specifically included on the list are eligible for intervention and mental health services provided documentation substantiates the causal link of the treatment to the compensable injury.

(c) Texas Labor Code. The following sections of the Code and specific Commission rules address key areas pertaining to mental health services.

(1) Review of Texas Labor Code.

(A) Chapter 408, Subchapter B, §408.021 Entitlement to Medical Benefits.

(i) An employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed. The employee is specifically entitled to health care that:

(I) cures or relieves the effects naturally resulting from the compensable injury;

(II) promotes recovery; or

(III) enhances the ability of the employee to return to or retain employment.

(ii) Medical benefits are payable from the date of compensable injury.

(iii) Except in an emergency, all health care must be approved or recommended by the employee's treating doctor.

(iv) An insurance carrier's liability for medical benefits may not be limited or terminated by agreement or settlement.

(B) Chapter 401, Subchapter B, §401.011, General Definitions

(i) A "compensable injury" is defined as an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle.

(ii) "Health Care" is defined as all reasonable and necessary medical aid, medical examinations, medical treatments, medical diagnoses, medical evaluations, and medical services. The term does not include vocational rehabilitation. The term includes:

(I) medical, surgical, chiropractic, podiatric, optometric, dental, nursing, and physical therapy services provided by or at the direction of a doctor;

(II) physical rehabilitation services performed by a licensed occupational therapist provided by or at the direction of a doctor;

(III) psychological services if prescribed by a doctor;

(IV) the services of a hospital or other health care facility;

(V) prescription drugs, medicines, or other remedy; and

(VI) a medical or surgical supply, appliance, brace, artificial member or prosthesis, including training in the use of the appliance, brace, member or prosthesis.

(iii) "Doctor" is defined as a doctor of medicine, a doctor of osteopathic medicine, a doctor of optometry, a doctor of dentistry, or a doctor of podiatry, a doctor of chiropractic who is licensed and authorized to practice.

(iv) "Treating doctor" is defined as the doctor who is primarily responsible for the employee's health care for an injury.

(C) Chapter 408, Subchapter A, §408.006, Mental Trauma Injuries.

(i) It is the express intent of the legislature that nothing in this Act shall be construed to limit or expand recovery in cases of mental trauma injuries.

(ii) The mental or emotional injury that arises principally from a legitimate personnel action, including a transfer, promotion, demotion, or termination is not a compensable injury for the purposes of this subtitle.

(2) Review of Texas Workers' Compensation Commission Rules

(A) 28 TAC, Chapter 134, Subchapter G, §134.600, Procedure for Requesting Preauthorization of Specific Treatments and Services.

(i) All health care providers of mental health treatment must follow the preauthorization rule.

(ii) The health care treatments and services requiring preauthorization are:

(I) all non-emergency hospitalizations, ambulatory surgical center care, and transfers between facilities,

(II) psychiatric or psychological therapy or testing;

(III) biofeedback except as part of work hardening,

(IV) nursing home, convalescent, residential, and all home health care services and treatments, and

(V) pain clinics, chemical dependency clinics, or weight loss clinics.

(B) 28 TAC, Chapter 134, Subchapter E, §134.4 Definition of Consulting Doctor. The consulting doctor, for purposes of this title, is a licensed doctor who examines an injured employee, or the employee's medical record because of a request from the treating doctor as de-

scribed in the Act, §4.64(1). The purpose of the consulting doctor's examination is to evaluate the accuracy of the diagnosis and appropriateness of the treatment of the injured worker. When the consulting doctor delivers health care to the injured worker pertaining to the compensable injury or illness at the request of the treating doctor, the consulting doctor becomes a referred doctor. Except as provided in §133.3(b) of this title (relating to Responsibilities of Treating doctor) the consulting doctor shall not make referrals without the approval of the treating doctor.

(d) Confidentiality.

(1) Introduction.

(A) It is generally accepted that communication between a patient and health care professional, including any resulting records, are confidential. (These are enumerated in the Texas Health and Safety Code, Title 7, Chapter 611, Texas Civil Statutes, §§611.001-611.005). Two exceptions are:

(i) requests by insurance carriers and their designated representatives (§611.004(a)(6)(2)); and

(ii) requests from the Commission (§611.004(a)(1)).

(B) Throughout this document an effort has been made to balance the injured workers' right to confidential mental health care with the need of the commission and carrier to have access to information to determine various issues including the following:

(i) compensability of the injury;

(ii) reasonableness and necessity of treatment;

(iii) audit of the medical bills;

(iv) progression toward treatment goals; and

(v) compliance.

(C) The only mental disorders eligible for coverage under the Act are those which are causally linked to a work injury. This requirement places a higher demand for specific information on the patient and provider than is usually required in private health insurance coverage.

(D) In order to address the needs of all parties, required documentation components, timetables for submission, and guidelines on release of information have been included.

(2) Requests for, and Submission of, Confidential Information.

(A) The required documentation format, content, and timetables specified for assessment/evaluation and ongoing treatment, as found in subsections (g)(4) and (h)(6) of this rule, are deemed to be sufficient as documentation for utilization review purposes in the vast majority of cases.

(B) Insurance carriers and their designated representatives are not to routinely request copies of individual session notes. Only that information which is reasonable and necessary to answer a specific question and is pertinent to the issues in dispute should be requested (e.g. medical necessity).

(C) Individual session notes are only to be requested as part of:

(i) the informal dispute resolution process;

(ii) an administrative hearing by the commission;

(iii) a peer review initiated by the commission (the peer review must be conducted by a licensed qualified mental health professional whose scope of practice covers the services under review); or

(iv) a peer review by the carrier (the peer review must be conducted by a licensed qualified mental health professional whose scope of practice covers the services under review).

(D) Other than under subpoena or other appropriate legal action, such as a TWCC order to produce documentation, "raw" (not interpreted) psychological test data and/or test forms are to be requested and released only when the peer reviewer is a licensed psychologist, consistent with the rules of the Texas State Board of Examiners of Psychologists which incorporates the Ethical Principles of the American Psychological Association. Providers who are unable to obtain the name of the reviewer, but who have inquired and been told the reviewer is a licensed psychologist are considered to have satisfied their obligation regarding appropriate disclosure.

(E) Insurance carriers and their designated representatives, or employees may not disclose, disseminate, or publish any individual treatment records or any other confidential information obtained, except to the extent it is consistent with the authorized purposes for which it was first obtained (Texas Civil Statutes, §611.004(d)).

(F) In addition to the legal remedies specified in Texas Civil Statutes, §611.005, (relating to Legal Remedies for Improper Disclosure), an entity or individual who is guilty of improper disclosure under these guidelines has committed a Class A administrative violation, punishable by fines up to \$10,000 per occurrence.

(3) Informed Consent.

(A) Prior to initiating any mental health assessment/evaluation or treatment, it is strongly recommended that the health care provider obtain appropriate informed consent and authorization to release confidential information from the injured employee.

(B) In addition, providers should be aware that without the required documentation (as referenced in subsections (g)(4) and (h)(6) of this rule) submitted to the insurance carrier or the TWCC, payment for treatment and services may be denied.

(e) Concepts and Governing Principles for Involved Parties.

(1) Qualified Mental Health Professional (QMHP). The guideline is a tool for clinical office practice to establish the required elements for all providers to initiate and continue treatment. The guideline identifies typical mental health interventions. If, for example, a provider's treatment deviates from the guideline, this would require documentation of a clearly delineated rationale for medical necessity to substantiate the selected treatment.

(A) A Qualified Mental Health Professional (QMHP) is defined as someone who is independently licensed to provide mental health services, within the scope of practice defined by their applicable practice Act.

(B) This guideline should be used as a tool which identifies the recommended treatment parameters for treatment of injured workers within the workers' compensation system.

(C) It is expected that a subset of patients will be found to be outside the parameters of these guidelines.

(D) This guideline identifies the need to provide documentation which clearly explains the reason for treatment and relatedness to the workers' compensation injury.

(2) Insurance Carriers. The insurance carrier and their designated representatives should use this document to

compare treatment prospectively, retrospectively, and concurrently with the predetermined elements contained in the guideline.

(A) This document and threshold levels or parameters is only a guideline and are not to be used as the reason for denial of treatments and services.

(B) This guideline is not to be used to direct care toward a specific healthcare discipline or to a specific type of treatment.

(C) It is the responsibility of the insurance carrier and their designated representatives to provide their specific documentation and rationale for reasons of denial of treatment based on mental health treatment guideline.

(D) It is expected that a subset of patients will be found to be outside the parameters of these guidelines.

(3) Medical Review Division. The Medical Review Division will use the guideline as a tool for the basis of their administrative review of prospective, concurrent, and retrospective treatment.

(A) The guideline will provide the basis for adjudication of a disputed issue when minimal or no supporting documentation is available.

(B) The peer review advisor contracted with the Texas Workers' Compensation Commission Medical Review Division should use this guideline whenever the need arises for an unbiased medical opinion.

(C) Medical services consistent with this guideline are presumed reasonable.

(D) It will also be used as a tool in conducting on-site audits of both health care providers and insurance carriers.

(f) Ground Rules.

(1) Requirement for Intervention in Mental Disorders.

(A) An employee may receive a mental health evaluation for a compensable mental disorder that has allegedly resulted from or was exacerbated by a compensable injury or was traceable to a definite time, place, and cause on the job. The employee is entitled this evaluation without referral from a treating doctor if the evaluation constitutes emergency treatment, or if

the employee has not made an initial choice of treating doctor.

(B) If the reason for the referral does not clearly state the indications for assessment/evaluation as described in subsection (g)(2) of this rule or ongoing treatment as described in subsection (h)(2) of this rule, the healthcare provider must contact the referral source to clarify the reason for the mental health intervention.

(C) The assessment and/or reasonable treatment must be consistent with the Texas Labor Code as cited in subsection (c)(1) of this rule.

(2) General Ground Rules.

(A) The guidelines are not to be used as fixed treatment protocols by either the health care provider or insurance carrier. The guidelines reflect typical courses of intervention. It is acknowledged in atypical cases, treatment falling outside these guidelines will occasionally be necessary. However, those cases that exceed the guidelines level of treatment will be subject to more careful scrutiny and review and will require documentation of the special circumstances that justify the treatment.

(B) These guidelines should not be seen as prescribing the type and frequency or length of intervention. Treatment must be based on patient need and professional judgment.

(C) Treatment parameters described in this guideline represent typical courses of intervention for a given group of diagnoses. Actual treatment plans will vary with the level of severity of symptomatology, level of stressors, and diagnoses.

(D) The patient must have a diagnosable mental disorder which must be identified by ICD-9-CM codes and descriptions.

(E) When deciding level of service, two indicators, the Severity of Psychosocial Stressor Scale (PSS) and the Global Assessment of Functioning Scale (GAF) must be included in establishing rationale for level of service and treatment plan. The Severity of Psychosocial Stressor Scale (Appendix A) describes levels of acute and enduring stressors effecting current symptomatology. The Global Assessment of Functioning Scale (Appendix B) describes the patient's current ability to function in the presence of the illness. Both of these scales are derived from the Diagnostic and Statistical Manual III-R (DSM-III-R) of the American Psychiatric Association.

tion. DSM-III-R nomenclature may only be used for GAF and PSS. Diagnosis codes must follow ICD-9 format only.

(F) If the Global Assessment of Functioning score is 40 or less, this may be a strong indication for more intensive levels of treatment (i.e. partial or full hospitalization). (See subsections (i)(1) and (2) of this rule).

(G) The level of service should be the same as the health care provider's usual and customary level of service regardless of the payor system.

(H) Mental health interventions should include assessment/evaluation and may include on-going treatment.

(I) All services must have sufficient documentation to justify the level of service provided and the relationship of the services to a compensable injury. This includes, but is not limited to, initial evaluations, treatment plans, and subsequent reports (see subsections (g)(4) and (h)(6) of this rule for documentation requirements).

(J) Documentation must support the reason for concurrent conjoint and family psychotherapy.

(3) Mental Disorders with Limited Eligibility for Intervention.

(A) Personality disorders are eligible for intervention only if the personality disorder interferes with the ability to cooperate with medical treatment regimens. Treatment for the interfering personality disorder will be discontinued when this barrier is removed and cooperation with medical treatment for the injury is obtained, and/or no further progression in removing the interference of the personality disorder is anticipated. Subsequent treatment of the personality disorder may require referral outside of workers compensation system. Examples of maladaptive behaviors associated with personality disorders might include the following:

- (i) noncompliance with treatment;
- (ii) missed appointments;
- (iii) controlling, manipulative, deceitful, entitled, and/or unstable interpersonal relationships;
- (iv) seclusive, suspicious, hostile, passive-aggressive, and/or dependent behaviors; and
- (v) unstable swings of mood or affect.

(B) Assessment/evaluation is appropriate for uncovering and identifying the following conditions (however, following diagnosis and identification, these conditions are not eligible for on-going mental health treatment):

- (i) malingering;
- (ii) actitious disorder;
- (iii) anti-social personality disorder; and
- (iv) non-compensable diagnoses.

(C) Post traumatic stress disorders, not accompanying a physical injury, are eligible for intervention provided that the disorder is traceable to a definite time, place, and cause on the job, which is sudden or unexpected and arises related to an on-the-job occurrence.

(4) Claimant's Clinical Condition/Direction of Treatment. The following requirements apply to the claimant's clinical condition and direction of treatment:

(A) the patient's condition must have the potential for restoration of function and/or improvement; and

(B) the treatment must be specific to the mental disorder arising from, or exacerbated by the injury, and:

- (i) provide for potential improvement of the patient's condition; and
- (ii) the development of compensatory or adaptive skills; and/or
- (iii) prevention of relapse/regression.

(5) CPT Codes. The Texas Workers' Compensation Commission identifies the five digit numeric codes obtained from the *Physician's Current Procedural Terminology, Fourth Edition*, Copyright October 1992, for reporting medical services and procedures. For a complete listing of all appropriate Texas Workers' Compensation Commission/CPT codes for medical services, refer to the current Medical Fee Guideline. When a service or procedure is provided that is not specifically listed in the Medical Fee Guideline, the fee charge must be substantiated by documentation of procedure (DOP).

(A) The CPT codes for initial mental health services may include:

- (i) office visit series 99201-99205 (new patients) and 99211-99215 (established patients);
- (ii) consultation codes 99241-99245, or 99271-99275;

(iii) CPT code 90801 for initial office visit (psychiatric diagnostic interview examination including history), this code will be reimbursed at hourly increments up to three hours. Interviews exceeding this three hour timeframe will require documentation to substantiate the length of service; and

(iv) CPT code 90825 for review of records.

(B) The CPT codes for psychophysiological testing may include the following.

(i) All psychological testing will be billed as code 90830 (psychological testing by physician, with written report by the hour).

(ii) Neuropsychological assessment may be billed using codes 90830 (psychological testing) or 95880-95883 (assessment of higher cerebral function with medical interpretation, aphasia, developmental, cognitive testing, neuropsychological test battery).

(C) CPT codes for mental health treatment may include:

(i) Psychiatric Therapeutic Procedures 90835-90880, 90899; and

(ii) Biofeedback 90900-90915.

(D) CPT codes for management, ancillary, and administrative services may include:

(i) other psychiatric services 90882-90899;

(ii) team conferences 99361-99362;

(iii) telephone calls 99371-99373;

(iv) after hours and emergency office services 99050-99058; and

(v) miscellaneous services 99071-99082.

(6) Biofeedback.

(A) All Psychophysiological Profile Assessment (PPA) biofeedback procedures must be provided by a licensed provider or their supervisee whose scope of practice includes the provision of biofeedback services.

(B) A single routine session of biofeedback should be limited to:

(i) at least one biofeedback modality 90900-90915 minimum duration of 30 minutes for each of the above

range of modalities, maximum duration is one hour;

(ii) no more than two biofeedback modalities will be reimbursed per session (an exception to this reimbursement is the initial Psychophysiological Profile Assessment (PPA), which cannot exceed four modalities);

(iii) no more than one training session per day; and

(iv) treatment of more than one patient simultaneously; the group psychotherapy CPT codes 90853 and 90857 should be used to bill for treatment.

(C) The typical length of optimal biofeedback treatment is limited to three months of bi-weekly sessions with an additional three months of intermittent sessions not to exceed two per month. Two booster sessions at six month intervals for one year after termination of continuous or intermittent treatment may occur. If booster sessions show significant increase in readings and symptoms, only two to three sessions maximum to be approved to regain benefits. Supportive documentation will be required for more intensive treatment when patient has reached booster stages.

(D) There are certain nonmental health related medical conditions which are appropriate for biofeedback treatment. These and other compensable disorders will be considered based on a clear causal link established through clinical rationale.

ICD-9 DESCRIPTION

333	Abnormal Movement Disorders
342	Hemiplegic Syndrome
344	Paralytic Syndromes
344.61	Neurogenic bladder
345	Epilepsy (EEG only)
346.9	Migraine Headaches
353	Nerve Root and Plexus Disorders
354	Mononeuritis of Upper Limb and Multiplex
355	Mononeuritis of Lower Limb
367	Spasms
388.3	Tinnitus
524.6	TMJ
715	Osteoarthritis and Related Disorders
719.4	Joint Pain
722	Intervertebral Disc Disorders
728	Disorders of Muscle Ligament and Fascia
738.4	Acquired Spondylolisthesis
780.5	Sleep Disturbances
781.2	Gait and Posture Disorders
786.0	Dyspnea and Respiratory Abnormalities
847	Sprains and Strains

(7) Termination of Treatment. Since the reason for mental health treatment can vary widely, the criteria for terminating mental health treatment should be tied ratio-

nally to the reason for initiating treatment. Termination criteria should be specified at the outset of treatment in the treatment plan (See subsections (g)(4)(Q) and (h)(2) (B)(C) and (D) of this rule). The following criteria are general reasons to terminate treatment:

(A) treatment goals have been met;

(B) treatment has returned the patient to a pre-injury level of mental functioning;

(C) the mental disorder no longer interferes with the ability to:

- (i) return to work;
- (ii) obtain employment;
- (iii) participate in other physical treatment;

(D) no further improvement can be expected, unless it can be clearly documented that ongoing intervention is necessary to maintain current level of functioning or prevent relapse/regression;

(E) the patient no longer fulfills diagnostic criteria for any mental disorder; or

(F) patient non-compliance to all treatment. It is essential the patient understand his or her role in the recovery and return to work process.

(8) Consideration of Injury Related/Non Injury Related Factors. Liability for payment of mental health care treatments and services are limited to mental disorders where the factors contributing to the mental disorders are related to the compensable injury. Any factor which does not arise from the compensable injury will not be considered as rationale for the reasonableness or necessity of care under the Act.

(A) Factors are defined as:

(i) injury related (e.g. increase in pain level or increase in depression); or

(ii) non-injury related (e.g. death of significant others, other catastrophic event).

(B) Health care providers must identify these factors in their documentation.

(C) In situations where a combination of injury related and non injury related factors exist, only the injury related

factors are considered eligible within the workers compensation system, as outlined in this subsection.

(g) Assessment/Evaluation of Mental Disorders.

(1) Introduction. Assessment/evaluations are for the purpose of determining:

(A) diagnosis;

(B) appropriate treatment; and

(C) factors that are injury related and non-injury related.

(2) Indications for Assessment/Evaluation.

(A) In order for assessment/evaluation of a mental disorder to be considered reasonable and necessary, the patient must already meet the criteria listed in subsections (f)(1) (Requirement for Intervention and Mental Disorders) and (f)(3) (Mental Disorders with Limited Eligibility for Intervention) of this rule. A mental health evaluation is limited to a maximum of three hours total for interview, any necessary mental health testing, and preparation of report. This brief evaluation does not require preauthorization as described in 134.600 of this title (relating to Procedure for Requesting Pre-Authorization of Specific Treatments and Services).

(B) In addition, two or more of the following general indications for assessment/evaluation must be suspected or present prior to performing the assessment/evaluation:

(i) clinical signs of significant mental stress included, but not limited to:

(I) anxiety;

(II) agitation;

(III) depression (including reports of neurovegetative symptoms of depression);

(IV) suicidal ideation;

(V) delusions;

(VI) hallucinations;

(VII) disrupted thought processes,

(VIII) psychophysiological correlates of affect and stress; and

(IX) sleep disturbances.

(ii) concern that the patient's mental status is having an adverse impact on his or her ability to participate in, or respond to, appropriate medical treatment. (this includes issues of medication compliance, lack of motivation and effort, and difficulty participating in appropriate rehabilitation efforts);

(iii) overuse or inappropriate use of narcotics, tranquilizers, or sedative-hypnotic medications;

(iv) the use of alcohol or any illegal drugs, particularly for pain relief or relief of stress symptoms;

(v) functional disability considered to be out of proportion to severity of injury/diagnosed damage;

(vi) inconsistency between objective medical findings and patient's symptom presentation, including, but not limited to, "nonorganic" or "nonphysiological" responses to physical examination, pain/sensory changes in non-dermatome patterns, unusual reports of pain and loss of functioning, and "conversion reactions";

(vii) suspicion of symptom exaggeration and/or malingering due to primary or secondary gain issues;

(viii) hostile or belligerent behavior by the patient projected onto others secondary to pain complaints;

(ix) reports of increased family discord secondary to injury-related stress;

(x) persistent, excessive use of the health care system or excessive, inappropriate seeking of diagnostic testing/surgical intervention;

(xi) desire on the part of the treating doctor for input regarding treatment planning, in particular whether referral for mental health treatment or referral to comprehensive rehabilitation/pain management program is appropriate;

(xii) concern about the effects of a closed head injury, toxic poisoning, or other neurological or neuropsychological injury, especially the cognitive, functional, or psychological aspects of the actual or suspected brain disorder;

(xiii) a patient with pain extending beyond the primary intervention phase (0-3 months) with continued significant impairment in daily functioning and

failure to return to work and/or progress adequately in healthcare treatments.

(C) **Peri-Operative Mental Health Evaluation.** In addition to the indications noted in subparagraphs (A) and (B) of this paragraph, mental health assessment/evaluation is appropriate when a patient is a candidate for surgical intervention and there is a desire to determine the patient's psychological suitability for surgery and risk of outcome. The general rationale for such an assessment/evaluation is observation of a mental disorder and/or concerns about the patient's mental functioning, potential adverse effect on the patient's understanding of surgery, potential outcome, compliance, and post-surgical adjustment. Specific indications may include, but are not limited to the following:

(i) observed presence of a mental disorder and/or clinical signs of significant mental stress (subparagraph (B)(i) of this paragraph);

(ii) presence of, or evidence of, a somatoform disorder;

(iii) concern that impairment in cognitive functioning and/or intelligence will limit the patient's understanding of the surgery, post-surgical instructions, and compliance;

(iv) the presence of psychological, emotional, coping, or personality styles that may interfere with the patient's ability to comply with temporary or permanent restrictions on activity following surgery, which could lead to re-injury or the necessity of repeat surgery;

(v) concern about unrealistic expectations of surgical recovery, pain relief, recovery of functioning, or physical limitations resulting from the surgery;

(vi) presence of cigarette smoking or chemical dependency/abuse;

(vii) possible presence of familial, financial, or other secondary gain issues that may interfere with the patients appropriate activation or rehabilitation following surgery;

(viii) presence of asymptomatic and/or symptomatic pre-injury factors and occupational factors as outlined in the Peri-Operative Algorithm found in subsection (h)(5)(K) of this rule.

(D) **Post-Operative Mental Health Evaluation.** Mental health evaluation may be requested by the surgeon in cases where post-operatively, the patient shows signs of depression, anxiety, or confusion which may interfere with post-operative progress.

(i) Onset of symptoms, post-operatively, while hospitalized will be considered an emergency situation.

(ii) The surgeon will need to document that an emergency evaluation is necessary based on observation clinical signs, such as dramatic pain complaints, bouts of crying, lack of cooperation with hospital staff, etc.

(3) **Parameters for Assessment/Evaluation.**

(A) **Introduction.** Due to the great variation in the reasons for assessment/evaluation, the type and extent of the assessment/evaluation needs to be individualized. Some factors to be considered in determining the appropriateness, duration, frequency, or degree of service rendered includes, but is not limited to:

(i) the length and complexity of the medical and/or mental history;

(ii) reason for referral;

(iii) sign and symptom presentation;

(iv) ability of the patient to give a coherent and accurate history;

(v) availability and cooperation of collateral history sources (spouse, family, etc.); and

(vi) amount and type of psychological testing.

(B) **Components.** The following are typical components of a mental health assessment/evaluation, along with typical maximum frequencies and durations for adequate assessments. Services exceeding the parameters listed in items (i)-(v) of this subparagraph will not be reimbursed without documentation of need and are subject to further review.

(i) **Patient Interviews.** The assessment/evaluation interview with the patient may be up to, but not exceed, three hours. In the case of patients who are extremely mentally disorganized and/or have extremely long and complex medical histories, up to two additional hours may be allowed, providing the clinical rationale for additional interview time is documented.

(ii) **Collateral Interviews.** The assessment/evaluation interview with a spouse, significant other, and/or the family may be up to, but not exceed, two hours total.

(iii) **Review of Records.** The review of medical, psychological, educational, and/or vocational records may not exceed one hour. Review of records may exceed one hour in the case of complex

cases with lengthy records, provided that the length of time is documented and a brief summary of the review is provided.

(iv) **Psychological Testing.** Once criteria for evaluation has been met, the amount and type of psychological testing should be based on a clinical rationale including the reasons for referral; sign and symptom presentation; and assisting in treatment planning decisions.

(I) **Psychological Testing** may be up to, but not exceed three hours. This service includes the following types of tests:

(-a-) personality testing (MMPI, MBHI, SCL; 90, Rorschach, TAT, etc.); and

(-b-) pain, disability, and function inventories (Sickness Impact Profile, Oswestry, McGill, Dallas Pain Drawing Grid, Million, etc.).

(II) **Intelligence Testing** may be up to, but not exceed 1.5 hours. Such testing should be conducted only if the patient's intellectual capacity has some clear and direct bearing on the development of his or her treatment plan.

(III) **A full neuropsychological battery** consists of:

(-a-) up to a total of three hours initial clinical interview with patient and or caretakers;

(-b-) ten hours of face-to-face test administration to include interpretation of test data and preparation of report;

(-c-) two hours of feedback to patient and family using code 90887 up to two units; refer to Ground Rules in subsection (f)(5)(D) of this rule; and

(-d-) a full neuropsychological battery initial clinical interview, test administration and feedback to the patient and family, and interpretation of the report, not to exceed 15 hours.

(v) **Consultation.** Doctors coordinating verbal or telephone consultation with other providers involved in patient treatment up to, but not to exceed one 15 minute increment per provider every 30 days or when recommendations for changes in treatment can be documented, (for example, needed changes in medication or sudden withdrawal from medications).

(vi) **Psychophysiological Profile Assessment (PPA).**

(I) Assessment/evaluation is to determine if patient will likely benefit from biofeedback, or if barriers to biofeedback are present. Prior to a PPA, a comprehensive mental health assessment/evaluation must occur (see paragraphs (2) and (3) of this subsection). The components of PPA include one or more of the following:

- (-a-) resting baseline;
- (-b-) physiological levels of muscle activity;
- (-c-) skin temperature or peripheral blood flow;
- (-d-) skin conductance;
- (-e-) heart rate or blood pressure; and
- (-f-) other physiological parameters.

(II) Clinical response to one or more stressors or challenge tasks and latency of return to baseline levels following challenge must be documented to support a dysregulation or abnormality. The purpose of PPA is to:

- (-a-) establish baseline psychophysiological responses;
- (-b-) establish the existence of psychophysiological dysregulation or abnormality;
- (-c-) determine that the dysregulation or abnormality is consistent with the history of the individual's symptoms; and
- (-d-) utilize the knowledge gained from assessment for the development of a treatment plan.

(III) The psychophysiological assessment (PPA) using biofeedback equipment may last from one to 1.5 hours. This assessment consists of several modalities (see Ground Rules for Biofeedback, subsection (f)(6) of this rule) to assess chronic changes, such as muscular spasm function of sympathetic arousal and changes in blood flow. A report addressing PPA results and a treatment plan for biofeedback therapy must be submitted following the biofeedback assessment. In addition, a treatment plan specific for biofeedback therapy must be submitted consistent with documentation requirements see reference (paragraph (4)(p), (q), (r), and (s) of this subsection).

(C) Frequency of assessment/evaluation.

(i) Reasons for repeating an assessment/evaluation. Assessment/eval-

uation may be repeated based on the following reasons:

(I) referral to a new QMHP or facility;

(II) document response to treatment;

(III) elapsed time since last administration exceeds frequency guidelines listed in this subparagraph; and

(IV) documented need for change in type or level of service.

(ii) Interviews. Initial interviews and consultations at duration levels indicated in paragraph (B)(iv) of this subsection, with the patient, spouse, family, or significant others are appropriate whenever being evaluated by a new mental health provider or entering a new treatment setting.

(iii) Psychological testing.

(I) Major personality tests (MMPI, MBHI, SCL 90, Rorschach, TAT, etc.) should be administered no more than once every three months, unless there are significant intervening life events or changes in mental status requiring re-evaluation. Brief symptoms inventories (Beck, Zung, Hamilton, etc.) may be repeated up to weekly to monitor symptom progress, especially during initial phases of psychopharmacology treatment.

(II) Pain, disability, and function inventories should generally be administered no more than weekly.

(III) Intelligence testing should be administered no more frequently than once every six months.

(IV) Comprehensive neuropsychological testing may be repeated annually. Testing of selected cognitive function (e.g., memory only) may be repeated on a more frequent basis if justified and documented.

(iv) Psychophysiological Profile Assessments (PPA). PPAs are typically performed at the onset of biofeedback treatment and at termination of biofeedback treatment.

(4) Documentation Requirements for Assessment/Evaluation. As part of the assessment/evaluation of the patient by the Qualified Mental Health Professional, a report must be prepared containing enough information to document the level

of assessment provided. This report must include:

(A) reason for referral;

(B) history of present injury;

(C) past medical history and treatment;

(D) past assessment and treatment of pre-existing mental disorders;

(E) past and present substance abuse history, if any;

(F) current and past medication;

(G) history of head injury or other neuropsychological insult, past or present;

(H) social history including pertinent family, educational, vocational information, etc;

(I) current factors and/or significant lifestyle changes contributing to symptomatology which are injury related (see subsection (f)(8) of this rule);

(J) factors and/or significant lifestyle changes, contributing to symptomatology which are non-injury related (the period of time reviewed should include the six months preceding the injury and the two years prior to the date of the current evaluation);

(K) present mental/emotional symptoms, including clinically pertinent elements of a mental status exam (see Appendix E in subsection (n) of this rule);

(L) results of any psychological, cognitive, pain/disability, or neuropsychological testing administered;

(M) ICD-9-CM diagnosis;

(N) Global Assessment of Functioning/Psychosocial Stressor Scale Score;

(O) details of a causal link of present mental/emotional status to the compensable injury (a clear statement regarding whether or not the injury has caused or exacerbated a diagnosable mental disorder and how the mental diagnosis is injury related) (refer to subsection (f)(1) and (8) of this rule);

(P) a problem list comprised of a behavioral description of the diagnosis and/or the problem(s) identified during the assessment/evaluation;

(Q) the rationale or justification for initiating, continuing, changing, modifying or discontinuing treatment based on:

(i) a statement on how treatment is likely to have a detectable positive effect on the patient's overall condition, course of recovery (see subsections (c)(1)(A)(i) and (f)(1) and (4) of this rule and subparagraphs (O) and (P) of this paragraph);

(ii) ability to participate in and benefit from treatment; or

(iii) ability to return to/retain employment;

(R) goals/termination criteria of treatment (see Ground Rules, subsection (f) of this rule); and

(S) a plan of treatment, including.

(i) type of intervention/treatment modality;

(ii) frequency of treatment,

(iii) expected duration of treatment,

(iv) expected clinical response to treatment; and

(v) specification of a re-evaluation timeframe.

(h) Ongoing Treatment Requirements.

(1) Introduction. This section enumerates the number of sessions per week and duration of treatment for the majority of mental disorders arising in conjunction with compensable injuries. These guidelines also apply to the delivery of services to inpatients on medical-surgical wards, but not inpatient psychiatric hospital units, psychiatric/multidisciplinary day treatment programs, and multidisciplinary pain management programs.

(2) Indications for Ongoing Treatment.

(A) In order for on-going treatment of a mental disorder to be considered reasonable and necessary, the patient must already meet the criteria listed in subsection (f)(1)(Requirement for Intervention and Mental Disorder) and subsection (f)(3)

(Mental Disabilities with Limited Eligibility for Intervention) of this rule.

(B) Prior to initiation of on-going treatment, an assessment/evaluation which satisfies the documentation requirements of subsection (g)(4) of this rule, must already have been performed within the last six months.

(C) The patient must have a treatment plan either as part of a previous assessment/evaluation or if a new Qualified Mental Health Professional (QMHP) is employed. The new Qualified Mental Health Professional (QMHP) must develop a treatment plan and is subject to the criteria listed in subsection (g)(3)(C) of this rule for repeat assessment/evaluation.

(D) The treatment plan must include criteria in subsection (g)(4)(P)-(S) of this rule.

(3) Parameters for On-Going Treatment.

(A) The figures in this paragraph represent the estimated typical maximum number of sessions per week and duration of treatment. It is anticipated there will be injured workers who require less treatment, and other injured workers who will require more treatment. This document serves as a guideline and should not be used as a reason for denial of treatment services. It is acknowledged that in severe cases, treatment falling outside these guidelines will occasionally be necessary. However, these instances will be subject to more careful scrutiny, review, and require clear documentation of the special circumstances that justify the need for treatment which exceeds these guidelines.

(B) These guidelines should not be seen as prescribing the number of sessions per week or the duration of treatment. These must be based on patient need, professional judgement, and efforts toward cost containment.

(C) The general philosophy used in developing these guidelines is the number of sessions per week and duration of treatment should be based on the severity of the disorder. The severity is indicated by:

(i) the mental disorder diagnosis;

(ii) delineation of specific symptoms;

(iii) the Psychosocial Stressors Scale (See Appendix A in subsection (j) of this rule); or

(iv) the Global Assessment of Functioning Scale (See Appendix B in subsection (k) of this rule).

(D) As specified in subsection (f)(2)(3) of this rule, when deciding on level of service, severity of the Psychosocial Stressor Scale (PSS), and Global Assessment of Functioning Scale (GAF) must be included in establishing rationale for level of service and treatment plan. For the purposes of these guidelines, the following definitions apply (both acute events and enduring circumstance should be specified).

(i) Global Assessment of Functioning Scale:

(I) 90-61 = Mild;

(II) 60-41 = Moderate;

or

(III) 40-1 = Severe, Extreme, or Catastrophic.

(ii) Psychosocial Stressor Scale:

(I) 1-2 = Mild;

(II) 3 = Moderate; or

(III) 4-6 = Severe, Extreme, or Catastrophic.

(E) Another factor affecting the treatment plan is the existence of more than one mental disorder (co-morbidity). Having more than one mental diagnosis, particularly if psychosis, substance abuse, personality disorder, or major affective disorders will increase the complexity of the case, and therefore, the complexity of the treatment plan.

(F) The following interventions are considered common and appropriate for mental health services for injured workers. The number of sessions per week listed in this paragraph apply only to these direct clinical services, and do not include management or administrative services listed in subparagraph (G) of this subsection:

(i) 90835 Narcosynthesis;

(ii) 90841 Individual Psychotherapy, time unspecified;

(iii) 90843 Individual Psychotherapy 20-30 minutes;

(iv) 90844 Individual Psychotherapy 45-50 minutes;

(v) 90845 Medical Psychoanalysis;

(vi) 90846 Family Psychotherapy, without patient present;

(vii) 90847 Family Psychotherapy (conjoint psychotherapy);

(viii) 90849 Multiple Family Group Psychotherapy;

(ix) 90853 Group Medical Psychotherapy;

(x) 90855 Interactive Individual Psychotherapy;

(xi) 90857 Interactive Group Psychotherapy;

(xii) 90862 Pharmacologic Management;

(xiii) 90870 Electroconvulsive Therapy-Single Seizure;

(xiv) 90871 Electroconvulsive Therapy-Multiple Seizures per day;

(xv) 90880 Hypnotherapy;

(xvi) 90899 Unlisted Psychiatric Service;

(xvii) 90900 Biofeedback-EMG;

(xviii) 90902 Biofeedback-Conduction Disorder;

(xix) 90904 Biofeedback-Blood Pressure;

(xx) 90906 Biofeedback-Skin Temperature or Peripheral Blood Flow;

(xxi) 90908 Biofeedback-EEG;

(xxii) 90910 Biofeedback-Electrooculogram;

(xxiii) 90915 Biofeedback-Other;

(xxiv) 97540 Training in activities of daily living (self care skills and/or daily life management skills);

(xxv) 99050 Services requested after office hours services in addition to basic service;

(xxvi) 99052 Services requested between 10:00 p.m. and 8:00 a.m. in addition to basic service;

(xxvii) 99054 Services requested on Sundays and holidays in addition to basic service;

(xxviii) 99056 Services provided at request of patient in a location

other than physician's office which are normally provided in the office; and

(xxix) 99058 Office services provided on an emergency basis.

(G) The following services involve management of a patient's care, but not direct treatment of the patient. Provision of these services is subject to the Ground Rules in the Medical Fee Guideline §134.201 of this title (relating to Medical Fee Guideline). Units of these services are not included in the maximum number of sessions per week in this section:

(i) 90882 Environmental intervention with agencies, employers, or institutions;

(ii) 90887 Interpretation or explanation of results of examinations, procedure, or data to family or other responsible persons;

(iii) 90889 Preparation of report of patient's psychiatric status, history, or progress other than for legal or consultative purposes for other physicians, agencies, or insurance carriers;

(iv) 90899 Unlisted psychiatric service or procedure;

(v) 99071 Educational supplies such as books, tapes, and pamphlets, provided by the physician for the patient's education at cost to physician;

(vi) 99075 Medical testimony,

(vii) 99078 Physician educational services rendered to patient's in a group setting (eg prenatal, obesity, or diabetic instructions);

(viii) 99080 Special reports such as insurance forms or the review of medical data to clarify a patient's status more than the information conveyed in the usual medical communications or standard reporting form;

(ix) 99082 Unusual travel (eg, transportation and escort of patient);

(x) 99361 Medical conference with interdisciplinary team approximately 30 minutes;

(xi) 99362 Medical conference with interdisciplinary team approximately 60 minutes;

(xii) 99371 Telephone call, simple or brief;

(xiii) 99372 Telephone call, intermediate; and

(xiv) 99373 Telephone call, complex or lengthy.

(4) Weekly Treatment Tables.

(A) The number of sessions per week listed in this subsection apply only to clinical services rendered directly to patients (subsection (h)(3)(F) of this rule). The provision of specific services to a patient depend on the patient's diagnostic status, symptom cluster, response to treatment, overall treatment plan, and coordination with other healthcare providers. The relative emphasis of various clinical services will vary with the specifics of the case, and should be clearly specified in the treatment plan and ongoing documentation.

(i) The number of sessions per week of treatment suggested in these tables would be used primarily when the patient first comes to the attention of the mental health professional. It is expected that the number of sessions per week will decrease over time as the patient's symptoms abate. Change in symptoms and accompanying change in treatment plan should be clearly documented in monthly and quarterly progress reports as specified in subsection (h)(6)(A) and (B) of this rule.

(ii) If a patient is receiving intensive outpatient treatment consisting of several services, and there is a clinical need to exceed the maximum thresholds noted above, this situation is an indication to seriously consider referring the patient to a more intensive level of service than outpatient care. This could include psychiatric or multidisciplinary care programs in either a day treatment or inpatient setting. In deciding between intensive outpatient, day treatment, or inpatient care, consider criteria described in subsection (i) of this rule. Issues of convenience, compliance, coordination of care, efficiency of delivery of services, and cost should be considered.

(iii) Number of sessions per week beyond the parameters in this section may be indicated in an acute crisis and/or due to individual patient needs. This should be documented in the daily notes (problem oriented documentation-POD), as well as, monthly and quarterly treatment summaries, (see paragraph (6) of this subsection) When frequency of treatment is increased beyond the parameters noted in this subsection, such documentation should specify

(I) the nature of the crises (i.e. outpatient detoxification, significant change in emotional status, fear or unexpected change in medical treatment, etc.);

(II) reasons increased number of sessions per week will benefit the patient, and

(III) an estimate of expected treatment duration.

(B) The following steps are to be employed in determining maximum treatment thresholds.

(i) Determine the patient's ICD-9-CM mental disorder diagnosis from assessment/evaluation.

(ii) Find the diagnosis in paragraph (5) of this subsection (relating to treatment durations). Diagnoses are grouped by similarity of symptoms and duration of treatment.

(iii) Determine the number of sessions per week of treatment from Tables I and II in subparagraph (C) of this paragraph based on (all three indices must be taken into consideration):

(I) type of diagnosis;

(II) Global Assessment of Functioning Scale; and

(III) Psychosocial Stressors Scale.

(C) The following tables exclude biofeedback sessions, to determine maximum weekly session thresholds for biofeedback refer to subsection (f)(6) of this rule. (*Catastrophic level of severity is a strong indication for possible inpatient treatment.)

(i) Table I. Use with all mental disorder diagnoses except with diagnosis of personality disorder or psychosexual disorder.

	PSS and GAF = MILD	PSS or GAF = MODERATE -CATASTROPHIC*
MENTAL DIAGNOSES	3 SESSIONS/WEEK	4 SESSIONS/WEEK

(ii) Table II Use only if mental disorder is either personality disorder or psychosexual disorder.

	PSS and GAF = MILD	PSS or GAF = MODERATE -CATASTROPHIC*
PERSONALITY OR PSYCHOSEXUAL DISORDER	1 SESSIONS/WEEK	2 SESSIONS/WEEK

(5) Treatment Durations

(A) Organic Brain Impairment Resulting From Drug Toxicities. Organic mental symptoms which are due to consumption of drugs and/or solvents. The drug should be identified, and a diagnosis of drug dependence should be recorded, if present.

(i) Diagnosis 293.8

Transient Organic Mental Disorders.

(ii) Level of Severity. Global Assessment of Psychosocial Functioning Scale
 90-61 = Mild 1-2 = Mild
 60-41 = Moderate 3 = Moderate
 40 < = Severe, Extreme, or Catastrophic
 4-6 = Severe, Extreme, or Catastrophic

(iii) Treatment Duration. The duration of treatment may be up to six months.

(iv) Ground Rules.

(I) The treatment duration will vary in correlation with the level of severity of symptomatology and stressors.

(II) Both indicators (GAF & PSS) must be considered, and documentation must support the levels of service.

(III) A GAF score of 40 or less is a strong indication for possible inpatient treatment.

(B) Psychotic Disorders. Mental disorders in which impairment of mental function has developed to a degree that interferes grossly with insight, ability to meet some ordinary demands of life or to maintain adequate contact with reality. It is not an exact or well defined term. Mental retardation is excluded.

(i) Diagnosis:

(I) 296.9 Other and Unspecified Affective Psychosis;

(II) 298.0 Psychotic Reactive Depression;

(III) 298.8 Other and Unspecified Reactive Psychosis.

(ii) Level of Severity.

Global Assessment of Psychosocial Stressor
Functioning Scale Scale
90-61 = Mild 1-2 = Mild
60-41 = Moderate 3 = Moderate
40 < = Severe, Extreme, or Catastrophic
4-6 = Severe, Extreme, or Catastrophic

(iii) Treatment Durations.

(I) 296.9, 298. 0-6 months.

(II) 298.8-14 days (If psychotic symptoms extend beyond two weeks, a change in diagnosis is warranted).

(iv) Ground Rules.

(I) The treatment duration will vary in correlation with the level of severity of symptomatology, stressors and diagnosis.

(II) Both indicators (GAF & PSS) must be considered, and documentation must support the levels of service.

(III) A GAF score of 40 or less is a strong indication for possible inpatient treatment.

(C) Affective Disorders. Mental disorders, mild or moderate, in which there is a disturbance of mood (mostly compounded with depression and anxiety, but may be manifested as elation and excitement) which may be accompanied by one or more of the following: Distur-

bance in sleep patterns, decreased appetite, decreased energy, inability to derive pleasure, low self esteem, impaired concentration, and hopelessness. There may be a strong tendency to suicide. The affective mood disorders may be so severe as to present disturbances with contact with reality as evidenced by disorder of perception and behavior; hallucinations; and delusions. All affective disorders must have documentation which provides a clinical rationale to establish a direct link to the on-the-job injury. Manic and bipolar disorders are treatable only if a clinical rationale clearly establishes a direct link to the on-the-job injury.

(i) Diagnosis:

(I) 296.0 Manic Disorder, Single Episode;

(II) 296. 2 Major Depressive Disorder, Single Episode;

(III) 296.3 Major Expressive Disorder, Recurrent EPISODE;

(IV) 296.7 Bipolar Affective Disorder, Unspecified;

(V) 296.80 Manic Depressive Reaction, Unspecified;

(VI) 300.4 Depression, Reactive;

(VII) 311.0 Depressive Disorder, Not Elsewhere Classified.

(ii) Level of Severity.

Global Assessment of Psychosocial Functioning Scale Stressor Scale
90-61 = Mild 1-2 = Mild
60-41 = Moderate 3 = Moderate
40 < = Severe, Extreme, or Catastrophic
4-6 = Severe, Extreme, or Catastrophic

(iii) Treatment Duration.

The duration of treatment may be up to 15 months (treatment should be completed based on the fifth digit specificity).

(iv) Ground Rules.

(I) Treatment duration will vary in correlation with the level of severity of symptomatology, stressors, and diagnosis.

(II) Both indicators (GAF & PSS) must be considered, and documentation must support the levels of service

(III) A GAF score of 40 or less is a strong indication for possible inpatient treatment.

(D) Anxiety Disorders. Apprehension, tension, or uneasiness that stems from the anticipation of danger, the source of which may be largely unknown or unrecognized. The anxiety symptoms may be constant and persistent or may occur episodically as a reaction to a known object or situation, or they may occur without any apparent precipitant. The anxiety may occur in a sudden and overwhelming fashion with a number of physiological symptoms, e.g., shortness of breath, tightness in the chest, increased heart rate, profuse sweating, light-headedness, accompanying feeling of impending death, increased muscle tension, restlessness, gastrointestinal symptoms, and trembling. The episodic anxiety disorder may be so frightening that the person may significantly alter/limit their lifestyle to avoid these anxiety provoking episodes

(i) Diagnosis:

(I) 300.00 Anxiety State, Reaction,

(II) 300.01 Panic Disorder;

(III) 300.02 Generalized Anxiety Disorder,

(IV) 300.20 Phobia Unspecified;

(V) 300.21 Agoraphobia w/Panic Attacks,

(VI) 300.29 Isolated or Simple Phobias Specific to Work Related Situations Or Places

(ii) Level of Severity

Global Assessment of Psychosocial Functioning Scale Stressor Scale
90-61 = Mild 1-2 = Mild
60-41 = Moderate 3 = Moderate
40 < = Severe, Extreme, or Catastrophic
4-6 = Severe, Extreme, or Catastrophic

(iii) Treatment Duration

The duration of treatment may be up to 6 months

(iv) Ground Rules

(I) Treatment duration will vary in correlation with the level of severity of symptomatology, stressors and diagnosis

(II) Both indicators (GAF & PSS) must be considered, and documentation must support the levels of service.

(III) A GAF score of 40 or less is a strong indication for possible inpatient treatment.

(E) Somatoform Disorders
A variety of physical symptoms or types of physiological disorders of physical and/or mental origin which may or may not involve tissue damage. Due to the diagnostic complexity of these disorders, they continue to be recalcitrant to medical care involving a trend toward over-medication and overly frequent use of medical services, and the adoption of a disabled lifestyle. These may be non-organic disturbances of speech or limb. These conditions may give an unrealistic interpretation of physical signs, and the belief that one has a more serious injury than medical data warrants. The following diagnoses present a complex mixture of physical and mental challenges which can readily give rise to over utilization of medical services.

(i) Diagnosis:

(I) 300.11 Conversion Disorder;

(II) 307.80 Psychogenic Pain, Site Unspecified;

(III) 307.81 Tension Headache;

(IV) 307.89 Psychalgia, Other;

(V) 316.0 Psychic Factor Associate W/Diseases Classified Elsewhere;

(VI) 306.0 Physiological Malfunctions Arising From Mental Factors

(ii) Level of Severity.
Global Assessment of Psychosocial Functioning Scale Stressor Scale
90-61 = Mild 1-2 = Mild
60-41 = Moderate 3 = Moderate
40 < = Severe, Extreme, or Catastrophic 4-6 = Severe, Extreme, or Catastrophic

(iii) Treatment Duration.
The duration of treatment may be up to 45 days to complete initial evaluation and treatment. If symptoms continue, re-evaluation will be necessary for possible

continuation of treatment up to three months.

(iv) Ground Rules.

(I) Treatment duration will vary in correlation with the level of severity of symptomatology, stressors and diagnosis.

(II) Both indicators (GAF & PSS) must be considered, and documentation must support the levels of service

(III) A GAF score of 40 or less is a strong indication for possible inpatient therapy

(IV) Due to the complex nature of these disorders, re-evaluation may include a longer duration of treatment. Documentation must substantiate any increase in level of care and duration of treatment.

(F) Personality Disorders.
Deeply ingrained maladaptive patterns of behavior generally recognizable by the time of adolescence or earlier and continuing throughout most of adult life, although often becoming less obvious in middle or old age. The personality is abnormal either in the balance of its components, their quality and expression, or in its total aspect. Because of this deviation or psychopathology, the patient suffers or others have to suffer, and there is an adverse effect upon the individual or on society. It includes what is sometimes called psychopathic personality, but if this is determined primarily by malfunctioning of the brain, it should be classified as one of the non-psychotic organic brain syndromes. When the patient exhibits an anomaly of personality directly related to his neurosis or psychosis, e.g., schizoid personality and schizophrenia, the relevant neurosis or psychosis which is in evidence should be diagnosed in addition. Documentation must demonstrate this diagnosis interferes with the ability to cooperate with treatment, e.g noncompliance with medications, inability to keep appointments. Examples of pathological maladaptive behavior include noncompliance with treatment, missed appointments; controlling, manipulative, deceitful, entitled, unstable interpersonal relationships; seclusive, suspicious, hostile, passive-aggressive, and/or dependent behaviors; and unstable swings of mood or affect.

(i) Diagnosis:

(I) 301.0 Paranoid Personality Disorder

(II) 301.2 Schizoid Personality Disorder

(III) 301.4 Compulsive Personality Disorder

(IV) 301.5 Histrionic Disorder

(V) 301.6 Dependent Personality Disorders

(VI) 301.7 Antisocial Personality Disorder *;

(VII) 301.8 Other Personality Disorders

(VIII) 301.8 Borderline Personality.

(ii) Level of Severity.
Global Assessment of Psychosocial Functioning Scale Stressor Scale
90-61 = Mild 1-2 = Mild
60-41 = Moderate 3 = Moderate
40 < = Severe, Extreme, or Catastrophic 4-6 = Severe, Extreme, or Catastrophic

(iii) Treatment Duration.
The duration of treatment may be up to 12 months"

(iv) Ground Rules.

(I) Treatment duration will vary in correlation with the level of severity of symptomatology, stressors and diagnosis.

(II) Both indicators (GAF & PSS) must be considered, and documentation must support the levels of service.

(III) A GAF score of 40 or less is a strong indication for possible inpatient treatment.

(IV) To be used as a secondary diagnosis in conjunction with a primary ICD-9.

(V) *Flag these for prospective review or concurrent review. Flags alert review for potential abuse of situation. Psychotherapy not indicated, appropriate for evaluation only.

(VI) Emphasis is to remove barriers to treatment posed by the Personality Disorder rather than treat the Personality Disorder. Treatment should be

discontinued when Personality Disorder no longer interferes with medical treatment and/or no further progression is noted.

(G) **Psychosexual Dysfunction.** A group of disorders in which there is recurrent and persistent dysfunction encountered during sexual activity. The dysfunction must be acquired as a causal result of the compensable injury or arise secondary to a compensable physical or mental complication. This dysfunction will usually be a secondary diagnosis and documentation must demonstrate a causal relationship with the compensable injury. A routine medical screening must occur prior to psychological or psychiatric therapy to rule out a medical diagnosis.

(i) **Diagnosis.**
302.70 Psychosexual Dysfunction, Unspecified.

(ii) **Level of Severity.**
Global Assessment of Psychosocial Functioning Scale Stressor Scale
90-61 = Mild 1-2 = Mild
60-41 = Moderate 3 = Moderate
40 < = Severe, Extreme, or Catastrophic
4-6 = Severe, Extreme, or Catastrophic

(iii) **Treatment Duration.**
The duration of treatment may be up to 12 weeks.

(iv) **Ground Rules.**

(I) **Treatment duration** will vary in correlation with the level of severity of symptomatology and stressors, diagnosis

(II) **Both indicators (GAF & PSS)** must be considered, and documentation must support the levels of service.

(H) **Substance Dependence Disorders and Substance Abuse Disorders.**

(i) **Substance Dependence Disorders.** A substance dependence disorder is defined as a state, psychic and sometimes also physical, resulting from taking a drug, characterized by behavioral and other responses that always include a compulsion to take a drug on a continuous or periodic basis in order to experience its psychic effects, and sometimes to avoid the discomfort of its absence. Tolerance may or may not be present. A person may be dependent on more than one drug. Documentation must demonstrate that these conditions interfere with the treatment regimen, e.g., non-compliance in treatment, failure to keep appointments, over sedation, inability to participate in treatment due to intoxication.

(ii) **Substance Abuse Disorders.** A substance abuse disorder includes cases where an individual, for whom no other diagnosis is possible, has come under mental health care because of the maladaptive effect of a drug on which he/she is not dependent (see substance dependence) and that he/she has taken on his/her own initiative to the detriment of his/her health or social functioning. When drug abuse is secondary to mental disorder, record the disorder as an additional diagnosis. Documentation must demonstrate that these diagnosis interfere with the treatment regimen, e.g., non-compliance in treatment, failure to keep appointments, over sedation, inability to participate in treatment due to intoxication.

(iii) **Diagnosis:**

(I) 303. Alcohol Dependence Syndrome;

(II) 303.0 Alcohol Dependence Syndrome, Acute;

(III) 303.9 Alcohol Dependence Syndrome, Chronic;

(IV) 304.0 Opioid Type Dependence;

(V) 304.1 Barbiturate/Sedative/Hypnotic Dependence;

(VI) 304.7 Combinations of Opioid Drug With/Other;

(VII) 304.8 Combinations of Drug Dependence Excluding Opioid;

(VIII) 304.9 Unspecified Drug Dependence;

(IX) 305.0 Alcohol Abuse;

(X) 305.1 Tobacco Use Disorder (Pre-Spinal Fusion Surgery)*;

(XI) 305.9 Other Mixed or Unspecified Drug Abuse.

(iv) **Level of Severity.**
Global Assessment of Psychosocial Functioning Scale Stressor Scale
90-61 = Mild 1-2 = Mild
60-41 = Moderate 3 = Moderate
40 < = Severe, Extreme, or Catastrophic
4-6 = Severe, Extreme, or Catastrophic

(v) **Treatment Duration.**
The duration of treatment may be up to six months.

(vi) **Ground Rules.**

(I) **Treatment duration** would vary in correlation with the level of severity of symptomatology, stressors, and diagnosis.

(II) **Both indicators (GAF & PSS)** must be considered, and documentation must support the levels of service.

(III) **A GAF score of 40 or less** is a strong indication for possible inpatient treatment.

(IV) *** Treatment appropriate** for spinal fusion only.

(I) **Acute Reaction** Acute transient disorders of any severity and nature of emotions, consciousness, and psychomotor states (single or in combination) which occur in individuals, without any apparent pre-existing mental disorder, in response to exceptional physical or mental stress, such as natural catastrophe or battle, and which usually subside within hours or days.

(i) **Diagnosis.**

(I) 308.0 Predominant Disturbance of Emotions,

(II) 308.3 Other Acute Reactions to Stress,

(III) 308.4 Mixed Disorders as Reaction to Stress,

(IV) 308.9 Unspecified Acute Reaction to Stress.

(ii) **Level of Severity**
Global Assessment of Psychosocial Functioning Scale Stressor Scale
90-61 = Mild 1-2 = Mild
60-41 = Moderate 3 = Moderate
40 < = Severe, Extreme, or Catastrophic
4-6 = Severe, Extreme, or Catastrophic

(iii) **Treatment Duration**

(I) 308.0, 308.4, 308.9-14 days

(II) 308.3-6 months (Brief or acute post traumatic stress disorder).

(iv) Ground Rules.

(I) Treatment duration will vary in correlation with the level of severity of symptomatology, stressors and diagnosis.

(II) Both indicators (GAF & PSS) must be considered, and documentation must support the levels of service.

(III) A GAF score 40 or less is a strong indication for possible inpatient treatment.

(J) Adjustment Reaction. Mild or transient disorders lasting longer than acute stress reactions which occur in individuals of any age with any apparent pre-existing mental disorder. Such disorders are often relatively circumscribed or situation-specific, are generally reversible, and usually last only a few months. They are usually closely related in time and content to stresses such as bereavement, migration, or other experiences. Reactions to major stress that last longer than a few days are also included.

(i) Diagnosis:

(I) 309.0 Brief Depressive Reaction;

(II) 309.1 Prolonged Depressive Reaction;

(III) 309.24 Adjustment Reaction West/Anxious Mood;

(IV) 309.28 Adjustment Reaction West/Mixed Emotional Features;

(V) 309.81 Prolonged Post-Traumatic Stress Disorder;

(VI) 309.82 Adjustment Reaction West/Physical Symptoms;

(VII) 309.83 Adjustment Reaction West/Withdrawal;

(VIII) 309.89 Other Adjustment Reaction;

(IX) 309.9 Unspecified Adjustment Reaction.

(ii) Level of Severity.
Global Assessment of Psychosocial Functioning Scale Stressor Scale
90-61 = Mild 1-2 = Mild
60-41 = Moderate 3 = Moderate
40 < = Severe, Extreme, or Catastrophic 4-6 = Severe, Extreme, or Catastrophic

(iii) Treatment Duration. The duration of treatment may be up to six months. For prolonged post-traumatic stress disorder (code 309.81), the duration of treatment may be up to 12 months.

(iv) Ground Rules.

(I) Treatment duration will vary in correlation with the level of severity of symptomatology, stressors and diagnosis.

(II) Both indicators (GAF & PSS) must be considered, and documentation must support the levels of service.

(III) A GAF score of 40 or less is a strong indication for possible inpatient treatment.

(K) Peri-Operative Algorithm.

(i) A pre-surgical mental health evaluation may be obtained. An MMPI is strongly recommended.

(ii) If the patient is deemed a good surgical candidate based on results of an evaluation (he or she has no major mental disorders), a realistic understanding of the outcome, no concerns about his or her ability to comply with rehabilitation, and no concerns about smoking and/or chemical dependency/abuse), the health care provider may proceed with surgery as indicated by a surgical diagnostic work-up and appropriate surgical algorithms.

(ii) If the patient is deemed a poor surgical candidate and surgery is medically indicated, pre-surgical mental health interventions (smoking cessation program for spinal fusion only). The length of time for pre-surgical mental health interventions will vary with the severity and type of mental disorder, the patient's response to intervention, and the urgency of surgical intervention. Except in cases of severe mental disorders, generally six to eight weeks of one to two times per week of psychotherapy/behavioral intervention should be sufficient to prepare the patient for surgery. If surgery cannot be delayed due to the emergent nature of the patient's medical status, an appropriate mental health intervention should be initiated as quickly as possible following surgery. This may begin while the patient is still hospitalized with subsequent intensive follow-up post-surgery.

(iv) If surgery is deemed unnecessary, the health care provider may proceed to an appropriate rehabilitation such as specific physical reconditioning, work hardening, a pain management program, outpatient medical and/or mental health treatment and/or referral to vocational rehabilitation.

(v) A medical-surgical hospitalization follow-up may be indicated in cases where surgery is scheduled and psychosocial factors remain, such as anxiety, fear of catastrophic surgical outcome, difficulty focusing on instructions, etc. Peri-operative treatment may include, but is not limited to the following:

(I) one individual psychotherapy session per day;

(II) psychotherapy sessions, which may consist of one hour or 30 minute sessions based on professional judgement and patient need; and

(III) instructions or interventions with family members, as indicated.

(vi) Peri-Operative Algorithm.

Patient Identified As Potential Surgical Candidate

Patient demonstrates Psychosocial* or Occupational** factors which alert the treating doctor to refer to QMHP for evaluation/assessment.

Mental Health Evaluation.

Does evaluation indicate patient is a Good or Poor surgical candidate?

GOOD

GO TO CHART 5

POOR

Positive or Negative clinical indicators for surgery?

NEGATIVE

Proceed to chronic care programs, rehabilitation services, mental health services., etc.

POSITIVE

Peri-Op mental health intervention prior and/or immediately after surgery depending on emergency nature of surgery.

Monitor mental health status and pain issues carefully after surgery and during recovery/rehab.

PSYCHOSOCIAL FACTORS
(Risk factors for extending disability)

Pre-Injury Factors

- > Asymptomatic Pre-existing Conditions
 - . 1) Obesity, Substance Abuse
 - . 2) Affective Disorders
 - . 3) Personality Disorders
 - . 4) Other Psychiatric Disorders
 - . 5) Learning Disability/MR
 - . 6) History of Smoking (cigarette)
- > Symptomatic Pre-existing Conditions
 - . 1) Prior Unrehabilitated Musculoskeletal Injury
 - . 2) Affective Disorders
 - . 3) Substance Disorders
 - . 4) Personality Disorders
 - . 5) Somatization Disorders
 - . 6) Other Psychiatric Disorders

Post-Injury Factors

- > Injury-Related Factors
 - . 1) Inactivity
 - . 2) Medication Dependence
 - . 3) Employer-Employee Relationship
 - . 4) Affective Disorders
 - . 5) Substance Disorders
 - . 6) Personality Disorders
 - . 7) Somatization Disorders
 - . 8) Other Psychiatric Disorders
 - . 9) Adjustment Disorder-with Mixed Emotional Features

OCCUPATIONAL FACTORS
(Risk factors)

Cumulative Trauma Disorders

- . - Repetive Trauma Syndrome
- . - Overuse Syndrome
- . - Vibration Syndrome

No Return To Work Available

Heavy Work Only RTW Option

Vocational Rehabilitation Referral

- . - Education
- . - Age
- . - Past Work Skills

PERI-OPERATIVE TREATMENT DURATION

- 1) Length of mental health treatment will depend on the specific diagnosis. See Section 6.5 in Mental Health Treatment Guidelines.
- 2) If no diagnosed mental disorder but patient requires pre-op treatment for pain, somatization, unrealistic expectations etc., maximum length of mental health treatment is 3 months.

(6) Documentation Requirements for On-Going Treatment.

(A) Guidelines for On-Going Treatment Documentation.

(i) For patients receiving ongoing mental health services, a progress note meeting criteria in subparagraph (B) of this paragraph must be generated every session. The only report which must be submitted to the treating doctor is the 30-60 day clinical summary at least once every 60 days and no more than once every 30 days and upon termination of treatment (see subparagraph (B)(2) of this rule for 30-60 day clinical summary outline). However, progress notes per session must be maintained in the patient's clinical chart in the event that circumstances require the Qualified Mental Health Professional (QMHP) to produce documentation, see subsection (d)(2) of this rule.

(ii) For patients with on-going treatment extending past 90 days, a more thorough reevaluation must be submitted. In addition to the monthly documentation requirements, this quarterly review should contain information justifying the need for continued treatment, how continued treatment is likely to have a positive effect on the overall course of recovery, eventual return to work, and any change in diagnosis.

(iii) When the patient completes/terminates treatment prematurely or is discharged, the fact that treatment has ceased and reasons for the cessation of treatment should be reflected in the final progress note. Any follow-up needs, including occasional re-checks and/or medication follow-up should also be noted.

(B) Documentation Format and Content.

(i) Problem oriented documentation (POD). Problem oriented documentation (POD) is the prescribed format and content of the daily progress notes for all Qualified Mental Health Professionals (QMHP) to follow. This specified format provides for a standardized structure of daily progress notes satisfying documentation standards of all mental health treatment in workers' compensation. The structure of the documentation has three sections.

(I) Section I-Problem List (see subsection (g)(4)(P) of this rule). Section I is compromised of:

- (-a-) diagnoses;
and
(-b-) presenting symptomatology

(II) Section II-Treatment/Intervention. Section II is comprised of:

- (-a-) treatment techniques used;
(-b-) actual dates of services; and
(-c-) treatment rendered from other provider sources, if known.

(III) Section III-Clinical Status-Progress/changes/regression may include:

- (-a-) current status of problems;
(-b-) behavioral observations/brief mental status exam;
(-c-) symptom reports;
(-d-) activities of daily living; and
(-e-) self-report and behavior inventory (see subsection (g)(3)(B)(i)(I) (-b); and (g)(3)(C)(iii)(I) and (III) of this rule for type and frequency).

(ii) 30-60 Day Clinical Summary. This report must include all of the elements found in clause (i) of this subparagraph, as well as, response to treatment, progress, and overall improvement of symptoms since the last 30-60 day clinical summary along with a rationale for continued treatment. Any failure to respond to treatment within the 30-60 day timeframe should be documented and followed by a change in the plan of treatment.

(i) Criteria for Referral for Other Programs.

(1) Criteria for Inpatient Psychiatric Treatment Referral/Inpatient Chronic Pain Management Referral. It is assumed that the vast majority of mental disorders arising from/out of compensable injuries will be treatable on an outpatient basis, particularly if recognized early in the patient's course of recovery. However, certain serious situations will require inpatient treatment, either because it is necessary for the patient's safety and well-being, or because intensive intervention provides the most effective treatment. Inpatient hospitalization may take place in a medical/surgical hospital, free-standing psychiatric unit, or rehabilitation hospital, depending on the patient's individual needs and the services available at the specific facility. Criteria for inpatient treatment includes a GAF of 40-1 and a PSS of 4-6. Any inconsistencies between the GAF/PSS score when inpatient treatment is recommended, must be sup-

ported by documentation. The following situations are considered appropriate for referral to inpatient psychiatric treatment environments once a causal relationship to the compensable injury is established:

(A) severe depression that is unresponsive to outpatient treatment, particularly if there is suicidal risk;

(B) marked to severe deterioration in mental/emotional functioning including hallucinations, delusions, illusions, as well as behavioral, verbal, cognitive, or thought disorganization including, but not limited to psychosis and/or mania;

(C) dangerousness to self and/or others including assaultive behavior, significant risk of potential danger to others, suicide attempt, suicidal ideation requiring suicide precautions, and other self-injurious/self-mutilative behavior;

(D) detoxification for alcohol, prescription medications, or street drugs, when the chemical abuse/dependency has arisen secondary to, or has been exacerbated by, a compensable injury;

(E) inpatient treatment of chemical abuse/dependency (may also be necessary when the abuse/dependency is chronic, intense, and unremitting, and the patient has failed to improve with outpatient treatment or there is a presence of a concomitant illness rendering outpatient detoxification medically dangerous);

(F) to stabilize a patient on psychoactive medication, when it is considered unsafe to attempt this on an outpatient basis due to the patient's other medical or emotional conditions; and

(G) any patient who meets the referral criteria under paragraph (3) of this subsection, but requires inpatient care due to a GAF of 40-1.

(2) Because of the diversity of mental disorders and types of services found in inpatient psychiatric settings, there is no attempt made in this document to address treatment parameters for these settings. This guideline only focuses on appropriate criteria for referral to these facilities.

(3) Criteria for Referral to Chronic Pain Management Programs.

(A) A subset of patients with chronic or complex medical conditions, such as chronic pain, will not respond to outpatient psychotherapy conducted in con-

junction with primary and secondary phases of treatment. These patients will require referral to a treatment program with multidisciplinary, individualized and intensive treatment to deal with the complex mixture of medical and mental problems associated with chronic disability.

(B) The majority of patients requiring referral for chronic pain can be adequately treated as outpatients in some type of day or partial day treatment, with the patients returning to their homes or other lodging in the evening. The following criteria are considered appropriate for referral to outpatient treatment programs of this type:

(i) a Global Assessment of Functioning (GAF) rating of 40-90 with any psychosocial stressor (PSS) rating;

(ii) the patient has not responded to primary or secondary stages of outpatient physical therapy and/or mental health treatment in a reasonable period of time (e.g. within four to six months) and/or;

(iii) the patient exhibits pain behavior, functional limitations, and/or mental/emotional dysfunction, which are disruptive to their activities of daily living, and two or more of the following:

(I) the patient is facing significant, permanent loss of functioning

that requires major physical, vocational, and psychological readjustment;

(II) diagnostic findings are insufficient to explain the pain or further invasive medical treatment is not an option;

(III) pain has persisted beyond the expected tissue healing time;

(IV) the patient has chronic pain linked to adverse interpersonal relationships which interfere with rehabilitation;

(V) the patient has physical/mental impairment greater than expected on the basis of the diagnosed medical condition and treatment or differential diagnosis and treatment required in a more structured/supervised setting;

(VI) documented history of inappropriate and excessive use of healthcare services by the injured worker such as frequent emergency room visits;

(VII) documented history of inappropriate and excessive use of narcotic sedative/hypnotic medications, or alcohol;

(VIII) the patient continues to express unrealistic expectations regarding outcome of medical/psychiatric intervention in relief of their own symptomatology; and

(IX) referral to such programs is also appropriate earlier in treatment in order to prevent later development of an excessively disabled lifestyle role if the patient is judged to be at risk for developing such problems.

(C) A small percentage of chronic pain patients will require referral to inpatient chronic pain management care. Referral to such treatment requires that the patient meet criteria for both paragraph (1) of this subsection (criteria for inpatient psychiatric treatment) and this paragraph. Because such treatment centers are multidisciplinary by definition, there is no attempt made in this document to address treatment parameters for these comprehensive treatment programs.

(j) Appendix A.

(1) Severity of Psychosocial Stressors Scale: Adults (American Psychiatric Association (1987). *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (3rd edition, revised). Washington, D.C.: Author; pg 11, 19.)

CODE	TERM	EXAMPLES OF STRESSORS	
		Acute Events	Enduring Circumstances
1	None	No acute events that may be relevant to the disorder	No enduring circumstances that may be relevant to the disorder
2	Mild	Broke up with boyfriend or girlfriend; started or graduated from school; child left home	Family arguments; job dissatisfaction; residence in high-crime neighborhood
3	Moderate	Marriage; marital separation; loss of job; retirement; miscarriage	Marital discord; serious financial problems; trouble with boss; being a single parent
4	Severe	Divorce; birth of first child	Unemployment; poverty
5	Extreme	Death of spouse; serious physical illness diagnosed; victim of rape	Serious chronic illness in self or child; ongoing physical or sexual abuse
6	Catastrophic	Death of child; suicide of spouse; devastating natural disaster	Captivity as hostage; concentration camp experience
0	Inadequate information, or no change in condition		

(2) Rating the severity of the stressor. The rating of the severity of the stressor should be based on the clinician's assessment of the stress as an "average" person in similar circumstances and with similar socio-cultural values would experience from the particular psychosocial stressor(s). This judgement involves consideration of the following, the amount of change in the person's life caused by the stressor, the degree to which the event is desired and under the person's control, and the number of stressor. For example, a planned pregnancy is usually less stressful than an unwanted pregnancy. Even though a specific stressor may have greater impact on a person who is especially vulnerable or has certain internal conflicts, the rating should be based on the severity of the stress itself, not on the person's vulnerability to the particular stressor. The specific psychosocial stressor(s) should be noted and further specified as either

(A) predominantly acute events (duration less than six months); or

(B) predominantly enduring circumstance (duration greater than six months).

(k) Appendix B.

(1) Global Assessment of Functioning Scale (GAF Scale) (American Psychiatric Association (1987). *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (3rd ed., revised). Washington, D.C.: Author; pg 12.). Consider psychological, social, and occupational functioning on a hypothetical continuum of mental health-illness. Do not include impairment in functioning due to physical (or environmental) limitations (Use intermediate codes when appropriate, e.g., 45, 68, 72).

(2) Codes.

(A) 90-81 Absent or minimal symptoms (e.g., mild anxiety before an exam), good functioning in all areas, interested and involved in a wide range of activities, socially effective, generally satisfied with life, no more than everyday problems or concerns (e.g., an occasional argument with family members).

(B) 80-71 If symptoms are present, they are transient and expectable reactions to psychosocial stressors (e.g., difficulty concentrating after family argument); no more than slight impairment in social, occupational, or school functioning (e.g., temporarily falling behind in school work).

(C) 70-61 Some mild symptoms (e.g., depressed mood and mild insomnia) OR some difficulty in social, occupational, or school functioning (e.g., occasional truancy, or theft within the household), but generally functioning pretty well, has some meaningful interpersonal relationships.

(D) 60-51 Moderate symptoms (e.g., flat affect and circumstantial speech, occasional panic attacks) OR moderate difficulty in social, occupational or school functioning (e.g., few friends, conflicts with co-workers).

(E) 50-41 Serious symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) OR any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job).

(F) 40-31 Some impairment in reality testing or communication (e.g., speech is at times illogical, obscure, or irrelevant) OR major impairment in several areas, such as work or school, family relations, judgment, thinking, or mood (e.g., depressed man avoids friends, neglects family, and is unable to work, child frequently beats up younger children, is defiant at home, and is failing in school).

(G) 30-21 Behavior is considerably influenced by delusions or hallucinations OR serious impairment in communication or judgment (e.g., sometimes incoherent, acts grossly inappropriately, suicidal preoccupation) OR inability to function in almost all areas (e.g., stays in bed all day; no job, home, or friends).

(H) 20-11 Some danger of hurting self or others (e.g., suicide attempts without clear expectation of death, fre-

quently violent, manic excitement) OR occasionally fails to maintain minimal personal hygiene (e.g., smears feces) OR gross impairment in communication (e.g., largely incoherent or mute).

(I) 10-1 Persistent danger of severely hurting self or others (e.g., recurrent violence) OR persistent inability to maintain minimal personal hygiene OR serious suicidal act with clear expectation of death

(J) 0 Inadequate information.

(l) Appendix C.

(1) ICD-9/DSM III-R CODES OVERVIEW.

(A) ICD-9-CM Mental Disorders included in Mental Health Treatment Guideline. The most frequently occurring disabling and costly ICD-9's were identified by the panel of experts and the Commission staff in addition to the TWCC billing database. The vast majority of mental disorders treated under Workers' Compensation will most likely fall in the following general categories:

ICD-9 DESCRIPTION

293 Organic Brain Impairment due to Drug Toxicity
296/298 Psychotic Disorders
296/300/311 Affective Disorders
300 Anxiety Disorders
300/302/306/307/317 Somatoform Disorders
301 Personality Disorders
302 Psychosexual Dysfunction
303 Alcohol Dependence
303/304/305 Substance Dependence/Substance Abuse
308 Acute Reaction
309 Adjustment Reaction

(B) While these will be the most frequently diagnosed mental disorders, given the wide variety of individual reactions that may occur, all other ICD-9-CM mental disorders are included, with the exception of those specifically excluded. (See Ground Rules, subsection (f)(3) of this rule)

(m) Appendix D-ICD-9 CODES.

(m) Appendix D-ICD-9 Codes.

ORGANIC MENTAL DISORDERS-DRUG TOXICITIES

293.8 OTHER SPECIFIED TRANSIENT ORGANIC MENTAL DISORDERS

PSYCHOTIC DISORDERS

296.9 OTHER AND UNSPECIFIED AFFECTIVE PSYCHOSES
298.0 PSYCHOTIC REACTIVE DEPRESSION

AFFECTIVE DISORDERS

296.0 MANIC DISORDER, SINGLE EPISODE
296.2 MAJOR DEPRESSIVE DISORDER, SINGLE EPISODE
296.3 MAJOR DEPRESSIVE DISORDER, RECURRENT EPISODE
296.7 BIPOLAR AFFECTIVE DISORDER, UNSPECIFIED
296.80 MANIC DEPRESSIVE REACTION, UNSPECIFIED
300.4 DEPRESSION, FLUCTUATING
311.0 DEPRESSIVE DISORDER, NOT ELSEWHERE CLASSIFIED
296.00 MANIC AFFECTIVE DISORDER, SINGLE EPISODE, UNSPECIFIED DEGREE
296.01 MANIC AFFECTIVE DISORDER, SINGLE EPISODE, MILD DEGREE
296.02 MANIC AFFECTIVE DISORDER, SINGLE EPISODE, MODERATE DEGREE
296.03 MANIC AFFECTIVE DISORDER, SINGLE EPISODE, SEVERE DEGREE, WITHOUT MENTION OF PSYCHOTIC BEHAVIOR
296.04 MANIC AFFECTIVE DISORDER, SINGLE EPISODE, SEVERE DEGREE, SPECIFIED AS WITH PSYCHOTIC BEHAVIOR
296.05 MANIC AFFECTIVE DISORDER, SINGLE EPISODE, IN PARTIAL OR UNSPECIFIED REMISSION
296.06 MANIC AFFECTIVE DISORDER, SINGLE EPISODE, IN FULL REMISSION
296.20 MAJOR DEPRESSIVE AFFECTIVE DISORDER, SINGLE EPISODE, UNSPECIFIED DEGREE
296.21 MAJOR DEPRESSIVE AFFECTIVE DISORDER, SINGLE EPISODE, MILD DEGREE
296.22 MAJOR DEPRESSIVE AFFECTIVE DISORDER, SINGLE EPISODE, MODERATE DEGREE
296.23 MAJOR DEPRESSIVE AFFECTIVE DISORDER, SINGLE EPISODE, SEVERE DEGREE, WITHOUT MENTION OF PSYCHOTIC BEHAVIOR
296.24 MAJOR DEPRESSIVE AFFECTIVE DISORDER, SINGLE EPISODE, SEVERE DEGREE, SPECIFIED AS WITH PSYCHOTIC BEHAVIOR
296.25 MAJOR DEPRESSIVE AFFECTIVE DISORDER, SINGLE EPISODE, IN PARTIAL OR UNSPECIFIED REMISSION
296.26 MAJOR DEPRESSIVE AFFECTIVE DISORDER, SINGLE EPISODE, IN FULL REMISSION
296.30 MAJOR DEPRESSIVE AFFECTIVE DISORDER, RECURRENT EPISODE, UNSPECIFIED DEGREE
296.31 MAJOR DEPRESSIVE AFFECTIVE DISORDER, RECURRENT EPISODE, MILD DEGREE
296.32 MAJOR DEPRESSIVE AFFECTIVE DISORDER, RECURRENT EPISODE, MODERATE DEGREE
296.33 MAJOR DEPRESSIVE AFFECTIVE DISORDER, RECURRENT EPISODE, SEVERE DEGREE, WITHOUT MENTION OF PSYCHOTIC BEHAVIOR

296.34 MAJOR DEPRESSIVE AFFECTIVE DISORDER, RECURRENT EPISODE, SEVERE DEGREE, SPECIFIED AS WITH PSYCHOTIC BEHAVIOR
296.35 MAJOR DEPRESSIVE AFFECTIVE DISORDER, RECURRENT EPISODE, IN PARTIAL OR UNSPECIFIED REMISSION
296.36 MAJOR DEPRESSIVE AFFECTIVE DISORDER, RECURRENT EPISODE, IN FULL REMISSION
296.80 MANIC-DEPRESSIVE PSYCHOSIS, UNSPECIFIED
296.81 ATYPICAL MANIC DISORDER
296.82 ATYPICAL DEPRESSIVE DISORDER
296.83 MANIC-DEPRESSIVE PSYCHOSIS, OTHER AND UNSPECIFIED, SEVERE WITHOUT MENTION OF PSYCHOTIC BEHAVIOR
296.84 MANIC-DEPRESSIVE PSYCHOSIS, OTHER AND UNSPECIFIED, SEVERE, SPECIFIED AS WITH PSYCHOTIC BEHAVIOR
296.85 MANIC-DEPRESSIVE PSYCHOSIS, OTHER AND UNSPECIFIED, IN PARTIAL OR UNSPECIFIED REMISSION
296.86 MANIC-DEPRESSIVE PSYCHOSIS, OTHER AND UNSPECIFIED, IN FULL REMISSION

ANXIETY DISORDERS

300.00 ANXIETY STATE, REACTION
300.01 PANIC DISORDER
300.02 GENERALIZED ANXIETY DISORDER
300.20 PHOBIA UNSPECIFIED
300.21 AGORAPHOBIA W/PANIC ATTACKS
300.29 ISOLATED OR SIMPLE PHOBIAS OF SPECIFIC WORK RELATED SITUATIONS OR PLACES

SOMATOFORM DISORDERS

300.11 CONVERSION DISORDER
307.80 PSYCHOGENIC PAIN, SITE UNSPECIFIED
307.81 TENSION HEADACHE
307.89 PSYCHALGIA, OTHER
316.0 PSYCHIC FACTORS ASSOCIATED W/ DISEASES CLASSIFIED ELSEWHERE
306.0 PHYSIOLOGICAL MALFUNCTIONS ARISING FROM MENTAL FACTORS

PERSONALITY DISORDERS

301.0 PARANOID PERSONALITY DISORDER
301.2 SCHIZOID PERSONALITY DISORDER
301.4 COMPULSIVE PERSONALITY DISORDER
301.5 HISTRIONIC DISORDER
301.6 DEPENDENT PERSONALITY DISORDERS
301.7 ANTISOCIAL PERSONALITY DISORDER
301.8 OTHER PERSONALITY DISORDERS
301.83 BORDERLINE PERSONALITY

PSYCHOSEXUAL DYSFUNCTION

302.70 PSYCHOSEXUAL DYSFUNCTION, UNSPECIFIED

SUBSTANCE DEPENDENCE DISORDERS AND SUBSTANCE ABUSE DISORDERS

- 303. ALCOHOL DEPENDENCE SYNDROME
- 303.0 ALCOHOL DEPENDENCE SYNDROME, ACUTE
- 303.9 ALCOHOL DEPENDENCE SYNDROME, CHRONIC
- 304.0 OPIOID TYPE DEPENDENCE
- 304.1 BARBITURATE/SEDATIVE/HYPNOTIC DEPENDENCE
- 304.7 COMBINATIONS OF OPIOID DRUG W/OTHER
- 304.8 COMBINATIONS OF DRUG DEPENDENCE EXCLUDING OPIOID
- 304.9 UNSPECIFIED DRUG DEPENDENCE
- 305.0 ALCOHOL ABUSE
- 305.1 TOBACCO USE DISORDER PRE-SPINAL FUSION SURGERY
- 305.9 OTHER MIXED OR UNSPECIFIED DRUG ABUSE

ACUTE REACTION

- 308.0 PREDOMINANT DISTURBANCE OF EMOTIONS
- 308.3 OTHER ACUTE REACTIONS TO STRESS
- 308.4 MIXED DISORDERS AS REACTION TO STRESS
- 308.9 UNSPECIFIED ACUTE REACTION TO STRESS

ADJUSTMENT REACTION

- 309.0 BRIEF DEPRESSIVE REACTION
- 309.1 PROLONGED DEPRESSIVE REACTION
- 309.24 ADJUSTMENT REACTION W/ANXIOUS MOOD
- 309.28 ADJUSTMENT REACTION W/MIXED EMOTIONAL FEATURES
- 309.81 PROLONGED POST-TRAUMATIC STRESS DISORDER
- 309.82 ADJUSTMENT REACTION W/PHYSICAL SYMPTOMS
- 309.83 ADJUSTMENT REACTION W/WITHDRAWAL
- 309.89 OTHER ADJUSTMENT REACTION
- 309.9 UNSPECIFIED ADJUSTMENT REACTION

(n) Appendix E-Elements of a Mental Status Examination.

(1) Presentation.

(A) Grooming and Appearance

ance

(B) Personal Hygiene and Dress

Dress

(2) Behavior.

(A) Psychomotor Activity

(B) Appropriate to Situation

(3) Mood.

(4) Affect.

(5) Sensorium.

(A) Alert

(B) Orientation-Time, Place, and Person

(6) Memory

(A) Recent

(B) Remote

(7) Speech.

(8) Thought Process

(A) Thought Process

(B) Thought Content

(9) Hallucinations.

(10) Delusions.

(11) Thoughts of Harm to Self or Others

(A) Violence

(B) Incidence

(12) Judgement.

(13) Insight.

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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 May 16, 1994

TRD-9441003

Susan Cory
General Counsel
Texas Workers'
Compensation
Commission

Earliest possible date of adoption June 24, 1994

For further information, please call (512) 440-3700

◆ ◆ ◆
• 28 TAC §134.1001

The Texas Workers' Compensation Commission proposes new §134.1001, concerning spine treatment guidelines. At the request of the *Texas Register* staff, this proposed guideline has been filed with the Register and will be published in its entirety in the *Texas Register* in rule format.

The Spine Treatment Guideline is also available in standard guideline format from the Publications Department of the Texas Workers' Compensation Commission, 4000 South IH-35, Southfield Building, Austin, Texas 78704-7491. The difference in format is one of designation only (e.g., "Section III" in the standard guideline format is referred to as "subsection (d)" in the rule format) and not of substance.

The Spine Treatment Guideline is proposed in order to clarify those services that are reasonable and necessary for operative and nonoperative care to the spine for the injured workers of Texas. The guideline is not to be used as a fixed treatment protocol, but rather identifies a normal course of treatment, and reflects typical courses of intervention. It is anticipated that there will be injured workers who will require less or more treatment than the average. It is acknowledged that in atypical cases, treatment falling outside this guideline will occasionally be necessary. However, those cases that exceed the guideline level of treatment will be subject to more careful scrutiny and review and will require documentation of the special circumstances that justify the treatment. This guideline should not be seen as prescribing the type and frequency or length of intervention. Treatment must be based on patient need and professional judgement. The proposed rule is designed to function as a guideline and should not be used as the sole reason for denial of treatments and services.

The guideline has been designed to achieve the following goals:

- (1) to ensure quality health care to the injured workers of Texas,
- (2) to assist all parties with regard to the appropriate treatment and management of disorders of the spine,
- (3) to establish elements against which aspects of the quality of care can be compared,
- (4) to establish a guide to identify clinically acceptable courses of treatment for specific disorders;
- (5) to establish documentation standards which support the appropriateness of the level of service,
- (6) to establish a method for documenting treatment needs outside the guideline parameters, and
- (7) to provide a mechanism for prospective, concurrent, retrospective review for efficient and effective health care utilization.

The clinical and diagnostic treatment guidelines contained in this new rule have been developed in conjunction with health care providers and other parties in the workers' compensation system. The development process involved a national search of state agencies administering workers' compensation programs, which revealed that only a few states had developed treatment guidelines. Research revealed an algorithmic approach to be the most understandable format for the guideline. A survey of the successful guidelines developed in the private sector identified that involvement from provider work groups achieves the best outcome regarding clinical

policy development. The agency recognizes that the evaluation of the proposed guideline should be broad and include comments from employees, employers, health care providers and insurance carriers.

The guideline is proposed in order to promote quality health care, injury specific treatment and appropriateness of care, by facilitating communication between all parties in order to achieve rapid recovery from the effects of an injury. This communication will also promote a timely return to modified or full duty work that takes into account the job demands and the functional capabilities of the injured worker.

Janet Chamness, chief of budget, has determined that for the first five-year period the rule is in effect there will be no fiscal implications as a result of enforcing or administering the rule.

For the first five years this rule is in effect state and local governments are expected to have no additional or reduced costs and no loss or increase in revenue.

Ms Chamness has also determined that for each year of the first five years the rule as proposed is in effect the public benefit anticipated as a result of enforcing the rule will be the promotion of quality health care and injury specific treatment for injured workers by identifying clinically acceptable courses of care for specific spinal injuries. Another benefit will be that the rule will provide a mechanism to monitor the necessity of treatment administered and establish treatment parameters, thus providing greater efficiency in the provision of spinal treatment to the injured worker. There will be no costs for compliance for small businesses.

There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted, for at least 30 days following publication, to Elaine Crease, Office of the General Counsel, Mail Stop #4D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH-35, Austin, Texas 78704-7491. Commenters should specify whether they are referring to the proposed guideline published in rule format in the *Texas Register*, or the proposed guideline published in standard guideline format and available from the Texas Workers' Compensation Commission.

The new rule is proposed under the Texas Labor Code, §402.061, which authorizes the commission to adopt rules necessary to administer the Act, the Texas Labor Code, §413.011, which authorizes the commission to establish by rule medical policies and guidelines relating to necessary treatments for injuries, and §413.013, which authorizes the commission to establish by rule a program for prospective, concurrent, and retrospective review and resolution of a dispute regarding health care treatments and services, and to establish by rule a program for the systematic monitoring of the necessity of treatments administered and fees charged and paid for medical treatments or services, including the authorization of prospective, concurrent, or retrospective review under the

medical policies of the commission to ensure that the medical policies or guidelines are not exceeded.

This rule affects the Texas Labor Code, §402.061, §413.011, and §413.013.

§134.1001. Spine Treatment Guideline.

(a) Table of Contents. The following headings and their corresponding subdivisions comprise a table of contents for this rule.

- (1) Introduction-subsection (b).
 - (A) Purpose-subsection (b)(1).
 - (B) Goals-subsection (b)(2).
 - (C) Development Process-subsection (b)(3).
 - (D) Philosophy of Care-subsection (b)(4).
- (2) Role of Primary Gatekeeper-subsection (c).
 - (A) Statutory Requirements-subsection (c)(1).
 - (B) Primary Gatekeeper Responsibilities-subsection (c)(2).
 - (C) Referrals-subsection (c)(3).
 - (D) Diagnostics-subsection (c)(4).
 - (E) Expectation and Compliance-subsection (c)(5).
- (3) Application Instructions for Involved Parties-subsection (d).
 - (A) Concepts and Governing Principles-subsection (d)(1).
 - (B) Application Matrix Table-subsection (d)(2).
- (4) Ground Rules-subsection (e).
 - (A) Introduction-subsection (e)(1).
 - (B) Ground Rules-subsection (e)(2).
 - (C) General Documentation Requirements-subsection (e)(3).

- (D) Documentation Requirements for Unrelated or Intercurrent Illness-(e)(4).
- (5) Phases of Nonoperative Care-subsection (f).
 - (A) Introduction-subsection (f)(1).
 - (B) Referral Criteria in Primary Intervention Phase-subsection (f)(2).
 - (C) Referral Criteria in Secondary Intervention Phase-subsection (f)(3).
 - (D) Referral Criteria in Tertiary Intervention Phase-subsection (f)(4).
 - (E) Criteria to Distinguish between Secondary and Tertiary-subsection (f)(5).
 - (F) Phases of Intervention Tables-subsection (f)(6).
- (6) Assessments/Evaluations-subsection (g).
 - (A) Multidisciplinary Assessment-subsection (g)(1).
 - (B) Physical Capacity and Functional Capacity Assessment-subsection (g)(2).
 - (C) Appropriate and Inappropriate Testing-subsection (g)(3).
- (7) Treatment Algorithms-subsection (h).
 - (A) Introduction to Algorithms-subsection (h).
 - (B) Surgical Treatment Code Legend-subsection (h)(1).
 - (C) Initial Approach to Treatment of Spinal Injury Chart 1-subsection (h)(2).
 - (D) Fracture and/or Dislocation Chart 2-subsection (h)(3).
 - (E) Soft Tissue Injury Chart 3-subsection (h)(4).
 - (F) Peri-Operative Algorithm Chart 4-subsection (h)(5).

(G) Surgical Treatment Chart 5-subsection (h)(6).

(H) Surgical Treatment Subchart Chart 5A-subsection (h)(6) (A).

(I) Surgical Treatment Subchart Chart 5B-subsection (h)(6)(B).

(J) Surgical Treatment Subchart Chart 5C-subsection (h)(6)(C).

(K) Treatment Continuation Chart 6-subsection (h)(7).

(8) Bibliography-subsection (i).

(b) Introduction.

(1) Purpose. The purpose of this guideline is to clarify those services that are reasonable and necessary for operative and nonoperative care to the spine for the injured workers of Texas. This guideline identifies a normal course of treatment. It is anticipated that there will be injured workers who will require less treatment than the average and other injured workers who will require more treatment. This is a guideline and should not be used as the sole reason for denial of treatments and services.

(2) Goals. The primary goals of this guideline are to:

(A) ensure quality of health care to the injured workers of Texas;

(B) assist all parties with regard to the appropriate treatment and management of disorders of the spine;

(C) establish elements against which aspects of the quality of care can be compared;

(D) establish a guideline to identify clinically acceptable courses of treatment for specific disorders;

(E) establish documentation standards which support the appropriateness of the level of service;

(F) establish a method of how to document treatment needs outside the guideline parameters; and

(G) provide a mechanism of prospective, concurrent, retrospective review for efficient and effective health care utilization.

(3) Development Process. The Texas Workers' Compensation Commission (TWCC), in conjunction with health care

providers and other parties in the system, have developed clinical and diagnostic treatment guidelines. Following are three major components in the guideline development process.

(A) Design and Methodology. A search of all 50 workers' compensation state agencies revealed that only a few had developed treatment guidelines. The format and design of these guidelines were mainly in narrative presentation. Research revealed an algorithmic approach to be the most understandable. Therefore, the focus of this treatment guideline is toward an algorithmic approach versus straight text.

(B) Provider Work Group. Research into successful guidelines developed in the private sector identified that involvement from provider work groups achieves the best outcome regarding clinical policy development.

(C) Public Evaluation. The evaluation of the developed guideline should be broad and include comments from employees, employers, health care providers and insurance carriers.

(4) Philosophy of Care. The health care of the injured worker is a coordinated team effort. All parties including employees, employers, health care providers, insurance carriers and the Texas Workers' Compensation Commission should promote quality health care, injury specific treatment and appropriateness of care. Communication between all parties must remain open in order to achieve rapid recovery from the effects of the injury. This communication should promote a timely return to modified or full duty work that takes into account the job demands and the functional capabilities of the injured worker.

(c) Role of Primary Gatekeeper.

(1) Statutory Requirements. The following section of the Texas Labor Code and specific Commission rules address key areas pertaining to those services that are reasonable and necessary for treatment of the spine.

(A) Section 408.021(a). An employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed. The employee is specifically entitled to health care that:

(i) cures or relieves the effects naturally resulting from the compensable injury;

(ii) promotes recovery; or

(iii) enhances the ability of the employee to return to or retain employment.

(B) Section 408.021(b). Medical benefits are payable from the date of the compensable injury.

(C) Section 408.021(c). Except in an emergency, all health care must be approved or recommended by the employee's treating doctor.

(D) Section 408.025(b). The commission by rule shall adopt reasonable requirements for reports and records to be made available to other health care providers to prevent unnecessary duplication of tests and examinations.

(E) Section 408.025(c). The treating doctor shall be responsible for maintaining efficient utilization of health care.

(2) Primary Gatekeeper Responsibilities.

(A) The role of the treating doctor is an important role which requires the treating doctor to monitor all health care services being provided for the injured worker. These responsibilities of the treating doctor are vital aspects of the goal to ensure that the injured worker receives quality health care. This monitoring extends to ensure:

(i) the identification of the extent and severity of the injury initially;

(ii) the appropriateness of all services;

(iii) the relatedness of all services to the workers' compensation injury;

(iv) separation and referral of nonrelated health care services for management by other health plans;

(v) whether the treatment is duplicative, necessary and/or effective;

(vi) the appropriate cost of the services;

(vii) the quality of the treatment; and

(viii) enhancement and promotion of effective communication among all involved parties.

(B) Refer to §126.9 of this title (relating to Choice of Treating Doctor and Liability for Payment) and §133.3 of this title (relating to Responsibilities of Treating Doctor) for responsibilities of the treating doctor.

(3) Referrals.

(A) The treating doctor is responsible for recommending timely and appropriate referrals. The treating doctor must clearly delineate the clinical rationale for all referrals. The purpose of the referral should be clearly stated, i.e. to corroborate the diagnosis and/or the proposed course of treatment; or is the referral doctor to initiate ongoing treatment.

(B) It is appropriate for the treating doctor to document and explain the referral in the TWCC Form 61 or Form 64. Once a consultation or referral has occurred, the consulting or referral physician should submit a summary report or initiate a case management phone call back to the treating doctor coinciding with the treating doctor's responsibility to submit a TWCC Form 64 (every 60 days). A referral health care provider requesting preauthorization of proposed services under §134.600 of this title (relating to Procedure for Requesting Pre-Authorization of Specific Treatments and Services) is responsible for obtaining and submitting the medical information which substantiates the proposed service or to coordinate with the treating doctor the submission of this information.

(4) **Diagnostics.** Diagnostic work should be performed in accordance with the recommended testing and timeframes contained in this guideline. If the need arises to deviate from the guideline, then a clinical rationale must be available which adequately substantiates this deviation. The need to repeat previously completed diagnostic procedures may trigger a review if the reason to repeat the study is based on the study's quality. All health care providers involved in the treatment of an injured worker must share copies of all diagnostic reports of studies (reports or films) with those health care providers who are involved with that component of care. Section 133.2 of this title (relating to Sharing Medical Reports and Test Results) requires the sharing of all diagnostic studies to avoid duplication. Section 133.106 of this title (relating to Fair and Reasonable Fees for Required Reports and Records) addresses reimbursement for copies of records

(5) **Expectation and Compliance.**

(A) All health care providers must encourage injured workers to be active participants in their health care treatment regimens and communicate realistic expectations as to potential outcome of physical

functioning and/or ability to return to work. Therefore, an important component in documentation is to include information about the patient's compliance with treatment when reporting progress of recovery.

(B) Health care providers must explain to the injured worker in clear terms the extent and severity of the injury and the treatment needed. Health care providers must define the symptomatology that is directly and/or indirectly related to the injury and specify treatment not covered under workers' compensation.

(d) **Application Instructions for Involved Parties.**

(1) **Concepts and Governing Principles.**

(A) **Health Care Provider.** This guideline is to be used as a tool for clinical office practice to establish the required elements for all providers to initiate and continue treatment. If, for example, a provider's treatment deviates from the guideline, this would require documentation of a clearly delineated rationale for the medical necessity of the treatment to substantiate the selected treatment.

(i) This guideline identifies typical treatment based on normal tissue healing responses for the average injured worker.

(ii) It is expected that a subset of patients will be found to be outside the parameters of these guidelines.

(iii) This guideline should be used as a tool which identifies the recommended treatment parameters for treatment of injured workers within the workers' compensation system.

(iv) This guideline identifies the need to provide documentation which clearly explains the reason for the treatment, the relatedness to the workers' compensation injury and alternative treatment.

(v) The health care provider also becomes aware of the need to educate the injured worker of health care treatment appropriate in the workers' compensation injury.

(vi) This guideline recommends early return to work based upon the injured worker's functional capacity.

(B) **Insurance Carriers.** The insurance carrier should use this guideline to compare treatment prospectively, concur-

rently and retrospectively with the predetermined elements contained in the guides.

(i) This document and its parameters serve only as a guideline and are not to be used as the reason for denial of treatments and services.

(ii) This guideline provides a tool by which to monitor the injured worker's progress depending on the severity of the injury.

(iii) This guideline provides algorithms which outline the insurance carriers medical audit process.

(iv) This guideline is not to be used to direct care toward a specific health care discipline or to a specific type of treatment. It is the responsibility of the insurance carrier to provide their specific documentation and rationale for reasons of denial of treatment based on this guideline.

(v) It is expected that a subset of patients will be found to be outside the parameters of this guideline.

(C) **Medical Review Division.** The Medical Review Division will use the guideline as a tool for the basis of their administrative review of prospective, concurrent and retrospective treatment.

(i) The guideline will provide the basis for adjudication of a disputed issue; when there is minimal or no supporting documentation.

(ii) Medical services consistent with this guideline are presumed reasonable.

(iii) It will also be used as a tool in conducting on-site audits of both health care providers and insurance carriers.

(D) **Consulting or Peer Review Health Care Provider.** This guideline should be used as a reference in advising the Medical Review Division and when the need for an unbiased medical opinion is indicated. The peer reviewer should use his or her clinical expertise in conjunction with the clinical intent of the guideline to address issues.

(2) **Application Tables.**

(A) **Initiation of Treatment.**

	DOCTORS	ASSESSMENT/EVALUATION & TREATMENT	DIAGNOSTICS	DOCUMENTATION REQUIREMENT	INSURANCE CARRIER
(A) INITIATION OF TREATMENT	<ol style="list-style-type: none"> 1. Treating doctor selected by injured worker 2. First doctor seen by injured worker 3. Verification of workers' compensation coverage with insurance carrier 4. Go to algorithm(s) ground rules for initiation of treatment 5. Identify the extent and severity of injury 	<ol style="list-style-type: none"> 1. Assessment/evaluation initiated after verification unless emergency 2. Provision of emergency treatment 3. Formulate plan of treatment 4. Evaluate any prior treatment to body area of injury, prior injuries, etc. 5. Identify the extent and severity of the work related injury. What is related to the injury and what health care is not related. 	<ol style="list-style-type: none"> 1. Follow diagnostic module as far as timeframes 	<p>Treating doctor - TWCC-61 (see Rule 133.101 - Required Documentation Elements):</p> <ol style="list-style-type: none"> 1. Mechanism of injury, description at onset 2. Identification of all subjective/objective clinical presentations based on assessment/evaluation 3. Correlation of clinical symptoms to specific body area of injury 4. Defines extent and severity of injury 5. Define plan of treatment 6. Determine referral, if needed 7. Identify pre-existing condition, complicating factors or nonrelated factors. Clarify information to referral that identified treatment need is not workers' compensation related. 8. Summary of any prior treatment to injured body area. 	<ol style="list-style-type: none"> 1. Insurance carrier evaluates TWCC-61 and other attachments 2. Clarify all questions regarding medical necessity of treatment at onset of care 3. Increased focus on review for medical necessity after assessment/evaluation. This focus review is not preauthorization. For preauthorization refer to rule 134.600. 4. Performs a focus review of injury. This focus review will primarily consist of case management. Effective case management requires a reviewer with sufficient medical background. There must be adequate clinical and biographical case information assessable to the reviewer prior to initiating the review as onset of treatment. 5. Should have single point of contact to formulate this process. 6. The focus review must clarify and attempt to reach agreement that the proposed treatment is appropriate.

(B) Ongoing Treatment.

DOCTORS	ASSESSMENT/EVALUATION & TREATMENT	DIAGNOSTICS	DOCUMENTATION REQUIREMENT	INSURANCE CARRIER
<p>(E) ONGOING TREATMENT</p> <p>Treating doctor</p>	<ol style="list-style-type: none"> 1. Follow initial plan of treatment 2. Monitor clinical progress as: <ol style="list-style-type: none"> a. Static b. Decompensating c. Any change in clinical condition 3. Identify and enact changes in plan of treatment which correspond with changes in clinical and diagnostic profiles 4. Refer, if needed, for related conditions and clarify referrals for unrelated conditions 5. Possible MMI if plateau reached 	<p>Follow diagnostic module</p>	<p><i>Required Documentation Elements:</i></p> <ol style="list-style-type: none"> 1. Patient compliance with home or clinic based programs 2. Clinical progress or changes noted objectively or subjectively, with description of signs & symptoms 3. Diagnostic progress or changes noted objectively or subjectively, with description of signs & symptoms 4. Clearly document reason for changes in treatment plan 5. Patient teaching/education 6. Referral to other health care provider with specific medical rationale 7. Return to work potential and recommendation of level of work 8. MMI status if clinical plateau 9. Continued correlation of mechanism of injury with any clinical changes 	<ol style="list-style-type: none"> 1. Case management activities should address and focus on adherence to treatment, clinical progress, return to work issues instead of continually revisiting medical necessity. 2. Review bills with notes to verify the following: <ol style="list-style-type: none"> a. Patient compliance with treatment b. Services provided consistent with treatment plan c. Response to treatment d. Improvement in patient's progress e. Recommendations for changes in treatment in situations where there is no compliance, plateau, and/or there is minimal or no progress. 3. When there is no clinical progress, lack of changes in treatment plans and inconsistency between the level of severity and the level of service may require focus review for clarification. Additional documentation may be requested or inform health care provider of no reimbursement. Refer to Medical Dispute Resolution if unsuccessful at this level.

(C) Consulting Doctor.

	HEALTH CARE PROVIDER	ASSESSMENT/EVALUATION & TREATMENT	DIAGNOSTICS	DOCUMENTATION REQUIREMENT	INSURANCE CARRIER
(C) CONSULTING DOCTOR	<p>Function - To review and evaluate:</p> <ol style="list-style-type: none"> 1. Change in treatment 2. Suggested treatment 3. Recommended treatment 	<ol style="list-style-type: none"> 1. Assessment/ Evaluation activity only 2. No activity for ongoing treatment. 	<p>Diagnosics ordered by treating doctor</p>	<p>[See elements of Rule 133.104 (1)(a-d), (2),(3),(4)]</p> <ol style="list-style-type: none"> 1. Correlates findings with ICD.9 and/or recommends treatment 2. Generates report 3. Sends to treating doctor 	<p>Insurance carrier reviews consulting doctor report.</p>
(D) REFERRAL DOCTOR	<p>Function - To initiate approved treatment by the treating doctor:</p> <p>Responsibility - Keeps treating doctor apprised of all clinical findings and proposed/ongoing treatment</p>	<p>Follow assessment/evaluation and initiate ongoing treatment.</p>	<p>Follow diagnostic module</p>	<ol style="list-style-type: none"> 1. Documents plan of treatment 2. Keeps all other health care providers informed on: <ol style="list-style-type: none"> a. Findings of treatment b. Progress of treatment c. Recommended changes 3. Supplies a 60-day clinical summary report to the treating doctor 	<p>Insurance carrier verifies referral with treating doctor and verifies medical reason for referral. (Check for necessary referral only - not directing referral.)</p>
(E) PREAUTHORIZATION REQUIREMENTS 134.600	<p>All Health Care Providers</p>	<ol style="list-style-type: none"> 1. Treatment plan at onset should alert health care provider to possible need for preauthorization of treatment prior to the date additional treatment is to be performed. 2. For referral health care provider ensures adequate documentation to assist preauthorization reviewer. 	<p>N/A</p>	<ol style="list-style-type: none"> 1. Clear need for pre-authorization, documentation in evidence of record 2. Obtain written approval of services 3. Clinical rationale elements 	<p>Within 3 days, insurance carrier responds verbally and within 24 hours, insurance carrier responds with written report. Denials require clear explanation of reasons.</p>

• (D) Referral Doctor.

	HEALTH CARE PROVIDER	ASSESSMENT/EVALUATION & TREATMENT	DIAGNOSTICS	DOCUMENTATION REQUIREMENT	INSURANCE CARRIER
(C) CONSULTING DOCTOR	Function - To review and evaluate: 1. Change in treatment 2. Suggested treatment 3. Recommended treatment	1. Assessment/Evaluation activity only 2. No activity for ongoing treatment.	Diagnostics ordered by treating doctor	(See elements of Rule 133.104 (1)(a-d), (2),(3),(4)) 1. Correlates findings with ICD.9 and/or recommends treatment 2. Generates report 3. Sends to treating doctor	Insurance carrier reviews consulting doctor report.
(D) REFERRAL DOCTOR	Function - To initiate approved treatment by the treating doctor: Responsibility - Keeps treating doctor apprised of all clinical findings and proposed/ongoing treatment	Follow assessment/evaluation and initiate ongoing treatment.	Follow diagnostic module	1. Documents plan of treatment 2. Keeps all other health care providers informed on: a. Findings of treatment b. Progress of treatment c. Recommended changes 3. Supplies a 60-day clinical summary report to the treating doctor	Insurance carrier verifies referral with treating doctor and verifies medical reason for referral. (Check for necessary referral only - not directing referral.)
(E) PREAUTHORIZATION REQUIREMENTS 134.600	All Health Care Providers	1. Treatment plan at onset should alert health care provider to possible need for preauthorization of treatment prior to the date additional treatment is to be performed. 2. For referral health care provider ensures adequate documentation to assist preauthorization reviewer.	N/A	1. Clear need for pre-authorization documentation in evidence of record 2. Obtain written approval of services 3. Clinical rationale elements	Within 3 days, insurance carrier responds verbally and within 24 hours, insurance carrier responds with written report. Denials require clear explanation of reasons.

(E) Preauthorization Re-
quirements.

HEALTH CARE PROVIDER	ASSESSMENT/EVALUATION & TREATMENT	DIAGNOSTICS	DOCUMENTATION REQUIREMENT	INSURANCE CARRIER
(C) CONSULTING DOCTOR	Function - To review and evaluate: 1. Change in treatment 2. Suggested treatment 3. Recommended treatment	Diagnostics ordered by treating doctor	[See elements of Rule 133.104 (1)(a-d), (2)(C),(d)] 1. Correlates findings with ICD.9 and/or recommends treatment 2. Generates report 3. Sends to treating doctor	Insurance carrier reviews consulting doctor report.
(D) REFERRAL DOCTOR	Function - To initiate approved treatment by the treating doctor: Responsibility - Keeps treating doctor apprised of all clinical findings and proposed/ongoing treatment	Follow diagnostic module	1. Documents plan of treatment 2. Keeps all other health care providers informed on: a. Findings of treatment b. Progress of treatment c. Recommended changes 3. Supplies a 60-day clinical summary report to the treating doctor	Insurance carrier verifies referral with treating doctor and verifies medical reason for referral. (Check for necessary referral only - not directing referral.)
(E) PRAUTHORIZATION REQUIREMENTS 134.600	All Health Care Providers	N/A	1. Clear need for pre-authorization documentation in evidence of record 2. Obtain written approval of services 3. Clinical rationale elements	Within 3 days, insurance carrier responds verbally and within 24 hours, insurance carrier responds with written report. Denials require clear explanation of reasons.

(e) Ground Rules.

(1) Introduction. The guidelines are not to be used as fixed treatment protocols. The guidelines reflect typical courses of intervention. It is acknowledged in atypical cases, treatment falling outside these guidelines will occasionally be necessary. However, those cases that exceed the guidelines level of treatment will be subject to more careful scrutiny and review and will require documentation of the special circumstances that justify the treatment. These guidelines should not be seen as prescribing the type and frequency or length of intervention. Treatment must be based on patient need and professional judgment

(2) Ground Rules.

(A) Treatment of a work related injury must be:

- (i) adequately documented;
- (ii) evaluated for effectiveness and modified based on clinical changes;
- (iii) provided in the least intensive setting;
- (iv) cost effective;
- (v) consistent with this guideline or contain a documented clinical rationale for deviation from this guideline;
- (vi) objectively measured and demonstrate functional gains; and/or
- (vii) consistent in demonstrating ongoing progress in the recovery process by appropriate re-evaluation of the treatment.

(B) Communication between all health care providers involved in treating the patient must ensure that all previous treatment and diagnostic tests are considered when developing a plan of treatment. All reports and records should be made available to all health care providers to prevent unnecessary duplication of tests and examinations, as provided in subsection (c)(2) and (3) of this rule.

(C) Patient education is an essential component in ensuring patient compliance to all treatment. Education is essential for the cooperation of the patient in all aspects of health care and as a means to prevent re-injury. It is essential that the patient understand his or her role in the recovery and return to work process.

(D) All parties in the workers' compensation system should work together to ensure that the injured worker

returns to work at the earliest medically appropriate time. Return-to-work is an important therapeutic approach which benefits the injured worker. The provider should communicate with the injured worker, employer and the insurance carrier to coordinate a successful return to work.

(E) The level of service should be the same as the health care provider's usual and customary level of service regardless of the payor system.

(F) The patient may move between levels of care or utilize interventions in more than one level of care simultaneously, depending on clinical indicators.

(G) Treatment durations are cumulative; however, it should not always be necessary to use full durations for any given level of care.

(H) All tertiary, inter/multi-disciplinary programs are subject to preauthorization.

(I) Work Hardening Programs.

(i) Work Hardening programs may include a psychotherapy/behavioral medicine/pain management group. This group must be conducted by a qualified mental health provider see §134.1000 of this title (relating to Mental Health Treatment Guideline). Billing for this group is to be included in the global work hardening fee. Separate preauthorization for this group is not required.

(ii) As part of assessing the readiness for work hardening, a mental health evaluation may be conducted either prior to admission, or in the first week of work hardening. This evaluation is limited to a maximum of three hours total for an interview, any necessary mental health testing, and preparation of a report. This brief evaluation does not require preauthorization. However, if more extensive evaluations are undertaken, they must be preauthorized subject to §134.600 of the title (relating to Procedure for Pre-Authorization of Specific Treatments and Services). This mental health evaluation is to be billed at the individual CPT/TWCC rates reflected in the Medical Fee Guideline in effect at the time. The primary purpose of this evaluation is to assess the patient's suitability for work hardening. Patients referred to a work hardening program may have up to three hours of mental health evaluation (to include an interview, testing and a mental health report) without

preauthorization. Mental health services in excess of three hours will be included as part of work hardening.

(J) This guideline does not preclude the need for compliance with other rules, such as §134.600.

(K) The highest quality of patient care and clinical outcomes should be the standards by which referrals to secondary and tertiary care facilities are determined. Secondary and tertiary nonoperative care should not be provided sequentially within the same facility, or in facilities with linked ownership without the appropriate documentation which demonstrates clinical progress of the injured worker's condition and evidence of doctor supervision. This ground rule may be waived in case of a limited trial of secondary treatment or a limited trial of tertiary care prior to decision for surgery or if no self referral or conflict of interest elements exist.

(L) All health care providers providing services to an injured worker have the responsibility to substantiate in their documentation the level of service for which they request reimbursement. All payors have the responsibility to review all documentation submitted as the basis for the treatment and services provided.

(M) Any new treatment must meet acceptable standards of care and may be subject to review by the Texas Workers' Compensation Commission.

(N) Documentation of significant neurological deficit may support early intervention (0-6 weeks) of MRI's and CT scans, which would better direct the course of treatment.

(O) Implantable bone growth stimulators are recommended to be performed laterally as opposed to an anterior or posterior approach. Indications for implantable bone growth stimulators include:

- (i) revision spinal fusion;
- (ii) history of spinal fusion or delayed union at different level;
- (iii) multiple level spinal fusion;
- (iv) use of allograft;
- (v) spondylolisthesis greater than grade two; and
- (vi) nonassociated high risk problems: e.g. metabolic bone disease, smokers, diabetics, obesity.

(P) For the purpose of this rule the following terms will be defined as:

(i) **Inertial**-The mass of the load is controlled while the velocity is allowed to vary.

(ii) **Isokinetic**-Fixed speed with variable resistance which accommodates to the muscles ability to generate force. It is characterized by constant velocity at a pre-selected rate with variable resistance. Resistance varies to match torque applied throughout the entire range of motion.

(iii) **Isometric**-The muscle develops tension (contraction) but no motion takes place. Since velocity is held constant at zero, resistance automatically varies to match the force applied. Isometric is characterized by constant zero velocity with variable resistance.

(3) General Documentation Requirements.

(A) The health care provider's documentation is vital as an information source of the injured worker's injury and treatment, it also provides information which impacts income benefits. For this reason many of the commission's rules have set time requirements for submission of required reports. For example, the TWCC Form 61 could be the first report submitted which informs the insurance carrier of the injury. The determination of maximum medical improvement and an impairment rating on TWCC Form 69 may result in the change over from temporary income benefits to impairment income benefits.

(B) In addition, the submission of TWCC Form 64 every 60 days to the insurance carrier provides the medical information regarding the injured worker's clinical progress and the need for continuation of any income benefits.

(C) The health care provider will use his or her medical judgment to determine the need to deviate from this guideline. The documentation should contain elements to support the medical basis for all conclusions and opinions. Health care providers treating injured workers are responsible for providing documentation which can support the level of service which was provided.

(D) Permanent impairment for compensable injuries in workers' compensation should be limited to these injuries and illnesses for which physicians are able to demonstrate objective findings.

(E) The need for emergency treatment must be based on the doctor's medical judgment. In addition, documenta-

tion of the appropriateness of emergency services must provide a clear explanation of the emergency, the deteriorating medical condition, complications which could occur, as well as, any irreversible conditions which occurred or could occur.

(4) **Documentation Requirements for Unrelated or Intercurrent Illness.** There may arise situations where certain medical conditions need to be delineated and clarified prior to intervention. Documentation of treatment of these conditions provided to other body areas (not part of original injury) or pre-existing medical conditions must identify and document the relatedness of these conditions to the original mechanism of injury. There are times when treatment is pursued concurrently for some conditions which are work-related and other conditions which are not. In such cases, the clinician should explain to the patient that workers' compensation may not cover those conditions which are not work-related. It is important that the clinician explain relatedness of a condition and/or the development of complications. The connection between the injury and the condition may be clear to the doctor, however the insurance carrier must have a clear rationale by the provider to establish a causal link and thus continue medical benefits.

(f) Phases of Nonoperative Care.

(1) **Introduction.** This subsection defines the criteria for referral to primary, secondary and tertiary phases of intervention that are reasonable and necessary for care to the spine. Primary, secondary and tertiary levels of nonoperative care are illustrated in the three tables (I, II and III) presented in paragraph (6) of this subsection. The tables define duration and specific components of each level of care. The health care provider's documentation will be the determining factor for placing the injured worker in the most appropriate level of care. Depending on the clinical indicators, the patient may move between levels of care. Please note that treatment durations are considered cumulative and it should not always be necessary to use full durations for any given level of care (see subsection (e)(2)(G) of this rule).

(2) **Referral Criteria in Primary Intervention Phase.** Entry into this phase of intervention does not necessarily mean that the patient will require treatment by health care providers, since bedrest with partial or total work cessation are also considered primary modalities. However, referral to primary intervention with use of professional assistance also involves:

(A) pain or dysfunction of bony or soft tissue origin inconsistent with maintenance of full duty work;

(B) pain or dysfunction only partially responsive to rest and medication usage;

(C) the likelihood that application of primary intervention modalities will speed recovery and hasten return to full-duty or transitional modified duty work;

(D) a tool for symptom control to facilitate secondary or tertiary care within limits (see subsection (e) of this rule);

(E) a component of postoperative rehabilitation, although may be used solely in cases of surgery performed during acute injury phase (within 6-8 weeks); and/or

(F) mental health intervention in a limited number of cases (see §134.1000 of this title (relating to Mental Health Treatment Guideline) for referral criteria).

(3) Referral Criteria in Secondary Intervention Phase.

(A) Early reactivation treatment is appropriate for patients demonstrating early deconditioning or to prevent further development of physical deconditioning or psychosocial barriers to work return. Specific referral criteria include:

(i) inability to return to work in the post-acute phase of injury;

(ii) inability to increase functional capacity to meet full-duty job demands after trial of transitional period of modified duty;

(iii) need for reactivation treatment to overcome postoperative deconditioning in situations where the absence of psychosocial barriers to recovery makes secondary treatment adequate to achieve return to productivity without significant risk of recurrent disability;

(iv) situations in which consultative mental health or disability management support is adequate to achieve outcomes of return to productivity without significant risk of recurrent disability (see §134.1000 of this title (relating to Mental Health Treatment Guideline));

(v) situations in which a trial of preoperative reactivation to assess patient response in determining the appropriateness of surgical intervention is warranted; and/or

(vi) situations in which tertiary pain management improves patient pain coping ability, resulting in a motivated

patient with potential for functional recovery, leading to a recommendation for limited (but possibly repeated) secondary intervention.

(B) Global limitations to secondary care should fall within parameters of the guideline unless medical necessity for additional secondary intervention is documented by report.

(4) Referral Criteria in Tertiary Intervention Phase.

(A) These patients will usually fall into the chronic level of severity and represent a small percentage of patients unresponsive to earlier treatment, who are willing to cooperate with active interdisciplinary intervention designed to return them to productivity. Patients are considered candidates for tertiary nonoperative (or surgical) treatment only as long as they cooperate with and participate in, treatment recommendations. Specific referral criteria include:

(i) patients failing to respond to earlier interventions within 4-6 months of injury or reasonable postoperative healing period, necessitating timely tertiary intervention to effect MMI and return to productivity with low risk of recurrent disability;

(ii) development of significant physical deconditioning, as documented by objective, valid and reliable physical examination and quantitative physical/ functional capacity measurements, requiring interdisciplinary training expertise;

(iii) development of psychosocial barriers to recovery (with or without psychiatric DSM-III-R diagnosis) compromising return to productivity (e.g., substance abuse, depression, exacerbated personality disorder, etc.) (see Mental Health Treatment Guideline);

(iv) failure to respond to earlier surgical or nonoperative treatment efforts with inability to return to full-duty work or to obtain and retain employer-provided modified work (e.g., due to job demands such as heavy lifting, vibration or cumulative trauma); and/or

(v) lack of employer-provided work, with inadequate functional (physical or psychosocial) capacity to obtain and retain new employment, requiring achievement of the highest possible functional level to facilitate the greatest likelihood of return to productivity with low risk of recurrent disability (e.g., low education, low transferable skills, etc);

(B) Global limitations to tertiary care should fall within the parameters of this guideline unless medical necessity for additional tertiary intervention documented by report.

(5) Criteria to Distinguish Between Secondary and Tertiary Treatments. Health care providers and insurance carriers may have difficulty distinguishing the phase of services actually being provided. The following differences between secondary and tertiary programs should assist in distinguishing between them.

(A) Tertiary treatment must be directed by a doctor; secondary treatment may have limited physician involvement (as care is generally managed by physical and/or occupational therapists).

(B) While both are interdisciplinary and individualized, secondary treatment usually involves a physical training orientation based on the functional capacity evaluation, and standardized physical capacity quantification. Mental health services are provided sparingly, selectively and nonintensively, usually by outside consultants who are only nominally part of the team. Tertiary treatment must be individualized by specific physical and psychosocial assessment and all requisite services (medical, physical therapy, occupational therapy and mental health services must be present on site and available in a structured program on a daily basis during the intensive program phase.

(C) Because secondary treatment is a transition from acute care to return to work, its services are generally very limited in duration (usually 4-8 weeks). If good outcomes are to be achieved, they will be accomplished within this time frame, or extensive deconditioning, surgically-treatable pathology, or dense psychosocioeconomic barriers to recovery will be identified. Transfer to surgical or tertiary nonoperative treatment will result. By contrast, tertiary treatment is the last recourse, which should lead to maximum medical improvement (MMI) in most remaining cases.

(D) Staff-to-patient ratios will be higher in tertiary treatment. Requirements for equipment and testing/measurement devices also increase relative cost of providing tertiary treatment. For this reason, tertiary treatment is restricted to patients whose date of injury has exceeded a 4-6 month period, have either not responded to surgical treatment with ability to return to

work or demonstrated themselves to be equivocal surgical candidates, or have not responded successfully to prior conservative care. By contrast, secondary treatment is appropriate for patients having failed to respond with return to work after the acute phase of treatment, but who may still be in an active soft tissue healing period and whose surgical eligibility may not have been fully established. Postoperative rehabilitation may be either secondary or tertiary depending on chronicity and evaluation findings.

(E) Tertiary treatment must be individualized, based on patient chronicity, severity of psychosocial barriers, need for medication management (detoxification, antidepressants, etc.), degree of deconditioning, job availability and match between job demands and physical capacity.

(F) When choosing between secondary and tertiary treatment, many factors may go into this decision. In general, if lower cost secondary treatment can be effective, it is preferred over tertiary treatment. On the other hand, if deconditioning, severity, surgical equivocation or psychosocial barriers to recovery predominate, secondary treatment may be ineffective. The key factors for choosing between secondary and tertiary treatment are:

(i) time since injury (more than 4-6 months post date of injury is chronic) ;

(ii) psychosocial barriers to recovery (with or without psychiatric DSM-III-R diagnosis) including depression, substance abuse, personality disorder, etc.;

(iii) analyzing reasons for lack of response to prior treatment methods (including effort monitoring to identify fear of injury and inhibition of function);

(iv) degree of physical/functional deconditioning;

(v) failure to respond to surgical treatment, refusal to utilize surgical option, or persistent unresolved surgical option;

(vi) socioeconomic barriers to recovery (secondary gain); and

(vii) other factors outlined in §134.1000 of this title (relating to Mental Health Treatment Guideline).

(6) Phases of Intervention Tables.

(A) Primary Level of Care Duration < 8 weeks.

(6) Phases of Intervention Tables.

**(A) PRIMARY LEVEL OF CARE
DURATION < 8 weeks**

DESCRIPTION:	This intervention is generally performed in the acute phase. Little or no deconditioning has occurred due to the injury, immobilization, or decreased activity. There is usually a low level of severity of injury. Successful treatment (leading to maximum medical improvement (MMI)) is accomplished in 60-80% of musculoskeletal soft tissue injuries, requiring only limited medical intervention.
CLINICAL OR BEHAVIORAL INDICATORS:	<ol style="list-style-type: none"> 1) Brief history of acute injury with early positive response to treatment (i.e., early symptomatic relief). 2) No urgent surgical indicators on physical examination (i.e., progressive neurological deficit, myelopathy, or incapacitating pain). 3) No significant structural pathology, suggesting surgical solutions. 4) Post acute or chronic patient with acute exacerbation. 5) Early post-operative patient.
GOAL OF PRIMARY INTERVENTION:	Symptom control to facilitate rapid recovery and return to work before deconditioning or psychosocial barriers occur.
ASSESSMENTS:	History and physical examination including neurological evaluation. Physical and/or functional capacity evaluations may be necessary to assess work tolerance before intervention and return to work release.
TYPES OF INTERVENTION: ; include but not limited ,)	<p>Diagnostic Testing Pharmaceutical Treatment Pain/Symptom Control Education</p> <ul style="list-style-type: none"> ▶ Back School ▶ Neuromuscular Reeducation ▶ Anatomical Relationships ▶ Ergonomics Instruction ▶ Behavioral Pain Management/Relaxation Training ▶ Concurrent Home Program <p>Unattended Modalities (limited to a maximum of two (2) weeks) Attended Procedures Exercise Limited Activity</p> <ul style="list-style-type: none"> ▶ Bed Rest (2 - 3 days) ▶ Modified/Transitional Work ▶ Work Cessation Consideration <p>Orthotics TENS Injections (Epidural Steroid Injection, Trigger Point Injection, Facet Injection) Biofeedback Manipulations Mental Health Intervention Physical/Functional Capacity Evaluations Job Site Analysis</p>
EXPECTED OUTCOME:	Return to work and/or maximum medical improvement (MMI).

RETURN TO WORK ISSUES:	A mild level of severity allows return to work within 0-8 weeks, with or without modified/transitional work.
FAILURE TO RESPOND:	Documented failure to respond at any time to treatment may require additional diagnostic tests and/or treatment consistent with greater level of severity.

(B) Secondary Level of Care
Duration < 12 weeks.

**(B) SECONDARY LEVEL OF CARE
DURATION < 12 weeks**

DESCRIPTION:	This intervention is the first stage of rehabilitation for those individuals who have not returned to productivity through the normal healing process. It is designed to facilitate return to productivity before chronic disability. It is individualized, time-limited and of limited intensity. It is designed to prevent chronic disability, occurring because of progressive deconditioning and development of psychosocial barriers to work return.
CLINICAL OR BEHAVIORAL INDICATORS:	<ol style="list-style-type: none"> 1) History of an injury or illness with limited-to-good response to early primary treatment (persistent symptoms with limitation of activities of daily living). 2) Objective physical examination findings suggestive of early deconditioning (loss of motion and/or strength with limitation of activities of daily living). 3) No significant structural pathology suggesting surgical solutions. 4) Evidence of mental health/psychosocial barriers impeding progress.
GOAL OF PRIMARY INTERVENTION:	Arresting and preventing progressive physical deconditioning and appearance of psychosocial barriers to work return with a reactivation process, generally associated with the post-acute and early postoperative periods.
ASSESSMENTS:	The type of assessments utilized in this phase of treatment depend on the level of severity associated with the diagnosis. Physical and/or functional capacity evaluations may be necessary to assess work tolerance before intervention and return to work release. Mental health evaluation to identify psychosocial barriers, or the need for behavioral pain management may be appropriate. Documentation is required to substantiate the need for further testing.

<p>TYPES OF INTERVENTION: (May include but not limited to)</p>	<p>Diagnostic Testing Active Exercise Return-to-Work Programs Aerobic Conditioning Conditioning Education Programs <ul style="list-style-type: none"> ▶ Emphasis on > Acute ▶ Increased Mobilization vs Strength ▶ Behavioral Pain Management/Relaxation Training ▶ Concurrent Home Programs Limited Unattended Modalities only in conjunction with Attended Procedures Medication Modification Limited Program Activity with Access to Health Care Providers as Referrals and or Consultations Diagnostic Injections <ul style="list-style-type: none"> ▶ Selective Nerve Root ▶ Spinal Block ▶ Brevital Studies Rule In/Rule out Surgery Post-op Phase as Limited Rehabilitation Manipulations Manipulations Under Anesthesia Mental Health Intervention Biofeedback Physical/Functional Capacity Evaluations Job-Site Analysis</p>
<p>EXPECTED OUTCOME:</p>	<p>Return to work and/or maximum medical improvement (MMI).</p>
<p>RETURN TO WORK ISSUES:</p>	<p>The moderate level of severity allows return to work within 2 - 6 months with or without a transitional period of modified duty (not to exceed three months). Treatment response to primary and/or secondary interventions should result in a return to full duty (or minimally modified) work. There may possibly be limitations restricting some heavy jobs, even after the injured worker has completed the transitional modified duty period and reached maximum medical improvement.</p>
<p>FAILURE TO RESPOND:</p>	<p>Documented failure to respond may require additional diagnostic tests and/or treatment consistent with greater severity. Consider referral for mental health evaluation/assessment (see Mental Health Treatment Guideline - Section 5.2). Because secondary treatment requires the active cooperation of the injured worker, documented refusal to comply with the treatment recommendations may result in a determination that the patient has reached maximum medical improvement (MMI).</p>

(C) Tertiary Level of Care
Duration < 16 weeks.

**(C) TERTIARY LEVEL OF CARE
DURATION < 16 weeks**

DESCRIPTION:	This is interdisciplinary, individualized and intensive treatment designed for patients already demonstrating physical and psychological changes consistent with chronic disability. In general, differentiation from secondary treatment includes medical direction, intensity of services, severity of injury, individualized programmatic protocols with integration of physician, mental health and disability or pain management services and specificity of physical/psychosocial assessment.
CLINICAL OR BEHAVIORAL INDICATORS:	<ol style="list-style-type: none"> 1) Documented history of persistent failure to respond to nonoperative and/or operative treatment, which surpasses the usual healing period of > 4 - 6 months post-injury and/or post-surgery, or special cases with severe mental health issues which last >2 months without response to primary or secondary treatment. 2) History of significant psychosocial disturbance (i.e., substance abuse, affective disorders, psychiatric conditions). 3) Inhibition of physical functioning regarding relative work and Activities of Daily Living requirements as evidenced by pain sensitivity, nonorganic signs, fear producing physical inhibition or limited response to reactivation treatment and documented by quantitative physical examination or functional capacity testing. 4) Heavy job demands with inability to match physical capacity to work demands after adequate treatment causing inability to return to uninterrupted full duty. This situation would be evidenced by a claimant assigned to an excessive transitional period of light duty and/or significant episodes of lost time from work due to medical treatment. The inability to match patient skills to any job availability may necessitate medical rehabilitation with or without vocational rehabilitation. 5) Patients who cannot tolerate primary or secondary levels of care. 6) See also Mental Health Treatment Guideline Section 7 - Referral to Other Programs.
GOAL OF TERTIARY INTERVENTION:	To represent the final phase of nonoperative or postoperative treatment for severe cases, with the goal of giving patients an opportunity for cooperating actively in programs designed to achieve maximum medical improvement. Return to full duty work may not always be possible and may necessitate the introduction of post-medical vocational rehabilitation services by referral to Texas Rehabilitation Commission.
ASSESSMENTS:	Standard history and physical examination must be accompanied by mental health assessment, physical capacity evaluation of the injured region(s) or joint(s) and/or functional capacity evaluation of whole-body performance. The specific testing chosen and the need for serial assessments, may be individualized to the specific patient or programmatic protocols, based on documentation of effective outcomes of return to work, lower risk of recurrent disability and decreased future medical utilization.

<p>TYPES OF INTERVENTION: (Including but not limited to)</p>	<p>Diagnostic Testing Interdisciplinary Programs ▶ Chronic Pain Management ▶ Return-to-Work Programs Manipulations Manipulations Under Anesthesia Mental Health Intervention Behavioral Pain Management/Relaxation Training Physical/Functional Capacity Evaluations Job-Site Analysis</p>
<p>EXPECTED OUTCOME:</p>	<p>Should be the last remaining medical option before maximum medical improvement (MMI).</p>
<p>RETURN TO WORK ISSUES:</p>	<p>The severe level of severity allows return to work within 4 - 6 months with or without a transitional period of modified duty (not to exceed 4 months). Treatment response to tertiary interventions will ultimately allow a return to full duty (or permanently modified) work. There will likely be some limitations restricting medium-to-heavy jobs accompanied by some permanent impairment, but with the patient always able to reach MMI following surgical and/or primary, secondary and/or tertiary nonoperative interventions. Other outcomes include vocational rehabilitation, or voluntary decision to leave the work force.</p>
<p>FAILURE TO RESPOND:</p>	<p>Documented failure to respond at any time to treatment may require additional diagnostic tests and/or treatment consistent with greater level of severity. Consider mental health evaluation.</p>

(D) Surgical Intervention.

(D) SURGICAL INTERVENTION

CLINICAL OR BEHAVIORAL INDICATORS:	<ol style="list-style-type: none"> 1) Documented history of failure to respond to primary and/or secondary treatment with symptoms suggestive of surgically treatable lesion (i.e., persistent pain, limitation of activities of daily living, or perceived weakness) and, 2) Physical examination findings consistent with surgically treatable lesion (i.e., hyperesthesia, weakness, or loss of motion) or, 3) Structural diagnostic testing, i.e., MRI, CT, myelogram, discogram-computerized axial tomogram, consistent with a surgically treatable lesion noted on the above diagnostics. Surgery would not occur except on objective findings of structural defects.
EXPECTED OUTCOME:	<ol style="list-style-type: none"> 1) Participate in primary, secondary, or tertiary post-operative treatment. 2) Return to Work. 3) Maximum medical improvement (MMI) after appropriate care.
RETURN TO WORK ISSUES:	<p>The marked level of severity allows return to work within 2 - 6 months postoperatively with or without a transitional period of modified duty (not to exceed 4 months) after primary, secondary and/or tertiary intervention. There may possibly be limitations restricting medium or heavy work upon return to full duty (regular or permanently modified) and require job matching. In these cases, even after the injured worker has completed a period of transitional modified duty and reached maximum medical improvement.</p>
FAILURE TO RESPOND:	<p>Documented failure to respond at any time to treatment may require additional diagnostic tests and/or treatment consistent with greater level of severity. If surgery is refused and rehabilitation is also declined, the treating physician and/or health care provider may determine that the patient has reached maximum medical improvement (MMI). Failure to respond or refusal of surgery may indicate a need for mental health evaluation.</p>

(g) Assessments/Evaluations.

(1) **Multidisciplinary Assessment.** In certain cases of both surgical and nonoperative treatment, multidisciplinary evaluation may be necessary for assessment. These assessments may include the following.

(A) **Sequelae of Injury.** Injuries may produce a variety of unanticipated nonoperative or postoperative sequelae, including problems with other joints/regions due to deconditioning, chronic or progressive neurological conditions, urological problems, or a variety of mental health disturbances. Any or all of these may necessitate multidisciplinary medical assessment to determine treatment options necessary to bring the patient to the highest functional level.

(B) **Intercurrent Illness.** Patients suffering from a variety of intercurrent illnesses (e.g., hypertension, cardiac disease, diabetes, etc.) may require medical management beyond the scope of the gatekeeper treating physician in order to maximize effectiveness of nonoperative and surgical treatments necessary to bring the patient to the highest functional level. Appropriate medical evaluation with recommendations and possible follow-up may be required for this purpose. Treatment not related to the injury is not the responsibility of the workers' compensation insurance carrier. Other methods of payors reimbursement should be sought prior to initiating any workup.

(C) **Risk Factors for Complications.** Certain patients may have risk factors in their personal or family history for which complications of treatment may be anticipated. In particular, pre-surgical patients or pre-reactivation exercise patients may demonstrate a variety of cardiovascular risk factors necessitating special assessments (e.g., preoperative medical evaluation, cardiac stress tests, hypertension evaluation, cardiac catheterization, etc.) to permit safe surgery or rehabilitation.

(2) **Physical Capacity and Functional Capacity Assessments.** This section specifically discusses the issues of physical and functional capacity. Such measurements have been performed to monitor rehabilitation progress, and guide the doctors and/or therapists in providing exercise and providing objective data for permanent physical impairment evaluation. In most cases, the physical examination usually consists of a qualitative estimate of physical or functional ability. By contrast, human performance measurement involves the use of accurate devices and specific skills by the

test administrator to quantitatively measure specific performance parameters that lend themselves to objective measurement and are relevant to the injury. Such tests may help to define a diagnosis or to define degree of physical impairment, as in measurement of mobility or strength. Commonly used assessments include:

(A) **Physical Examination and Neurological Evaluation:**

(i) **Appearance:** Observation and palpation;

(ii) **Flexibility** (extremity joint or spinal region): Usually observational;

(iii) **Posture and Deformities;**

(iv) **Vascular Integrity;**

(v) **Dermatomal Sensation:** Observational, to detect neurological sensory deficit;

(vi) **Myotomal Strength:** Usually observational, by manual muscle testing, to detect gross neurological motor deficits; and

(vii) **Reflexes** to detect neurological reflex asymmetry.

(B) **Physical Capacity Evaluation (of the Injured Area):**

(i) **Range of Motion:** Quantitative measurements (using appropriate devices) of the injured joint or region (i.e., knee, shoulder, lumbar spine, cervical spine, etc.); and

(ii) **Strength/Endurance:** Quantitative measures of the injured area or region using accurate devices (isometric, isoinertial and/or isokinetic devices in one or more planes), with comparison to contralateral side and/or normative database;

(C) **Functional Capacity Evaluation (Whole-Person or Multi-Region Measurements):**

(i) **Isometric Lifting:** NIOSH standard leg lift, torso lift, arm lift or extremity isometric test using measurement device;

(ii) **Isokinetic Lifting:** Controlled speed floor-to-knuckle, knuckle-to-shoulder lifts using measurement devices and standardized protocols;

(iii) **Isoinertial Lifting:** Standardized free weight lifting tests;

(iv) **Activities of Daily Living Tests:** Standardized tests (but often

observational) of generic functional tasks (i.e. pushing, pulling, kneeling, squatting, carrying, climbing, etc.),

(v) **Hand Function Tests:** Measurement of fine/gross motor coordination, grip strength, pinch strength, manipulation tests, etc., using measurement devices;

(vi) **Submaximal Cardiovascular Endurance Tests:** Measurement of aerobic capacity using bicycle or treadmill; and

(vii) **Static Positional Tolerance:** Observational for tolerance of sitting or standing tolerance.

(3) **Appropriate and Inappropriate Testing**

(A) **Evaluations Appropriate to Phase of Treatment.** The clinical indicators identify phases of injury in the natural history of musculoskeletal disorders. Certain evaluations or assessments are appropriate during early phases of treatment, while others become necessary with greater chronicity, soft tissue healing, surgical treatment or progressive deconditioning. These phases of treatment include the following

(i) **Primary Level of Care.** Following soft tissue or cumulative trauma injury to any musculoskeletal area, the patient is in an early stage of healing. During this phase only limited assessments are necessary such as history, flexibility, neurological and manual muscle testing. Similar tests and assessments may have to be repeated for those patients who fail to respond, but no other type of testing should be required for patients resolving their problems during the acute phase. Exceptions may include pre-existing injuries contributing to deconditioning. A single functional capacity evaluation for work tolerance screening is optional to assist in determining any functional limitations or work restrictions in patients returning either to full duty or modified duty.

(ii) **Secondary Level of Care.** With or without early surgery, patients may produce another level of complexity. Even as soft tissue injuries are healing, the Deconditioning Syndrome is developing, producing localized immobility (loss of range of motion) and muscle inhibition or atrophy (loss of strength/endurance), specifically around the injured joint or region. These early changes may be accompanied by general inactivity, which leads to general deconditioning (loss of whole-body functional capacity) and aerobic capacity deficits. If such patients have problems which can be handled through secondary treatment, functional capacity or work tolerance testing performed at outset and conclu-

sion of treatment may prove sufficient. For example, lifting tests (isoinertial, isokinetic and isometric) are specific functional tests, rather than muscle tests (which refer to physical capacity human performance measurement of strength of isolated joints or regions like the lumbar spine, knee, etc.). Functional tests also include submaximal aerobic capacity testing and measures of ability to engage in Activities of Daily Living activities (pushing, climbing, twisting, running, sitting, etc.). In some cases, particularly when pre-existing general or local deconditioning is aggravated by the work-related injury, physical capacity evaluation may be necessary before and after treatment to identify specific joint or regional deficits requiring reconditioning.

(iii) Tertiary Level of Care. Physical deconditioning complicated by fear-induced inhibition, as well as psychosocioeconomic barriers to recovery (examples include, substance abuse, depression, personality disorders and secondary gain) may supervene. Nonoperative treatment includes shown to provide useful outcomes for workers' compensation systems in these cases (doctor-directed, interdisciplinary team approach programs, with integrated physician, mental health and disability management services) utilize objective physical capacity and functional capacity testing modes for feedback to patients and staff members. This is necessary to allow objective human performance measurement needed to guide the treatment program, in place of subjective patient self-report. This testing must recognize the in-

jured weak link with testing specific to the isolated injured area (whether a knee, low back or neck) that include mobility and strength measures of the isolated joint or region (physical capacity). The chronic phase testing must also utilize functional capacity testing of whole-body Motion/Time Measurement to compare to injured area performance. Medical necessity for testing must be clearly documented in terms of relevance for guiding treatment, determining impairment, identifying maximum improvement, or defining work restrictions or limitations.

(iv) Physical/Functional Capacity Test. Sophisticated mechanical physical/functional capacity testing for high-cost cases provides the opportunity to objectively match human performance capacities to job demands. However, the ability to perform a functional capacity test only will not permit successful return to work (without significant risk of reinjury) in the patient with chronic disability and established deconditioning, if the injured area's physical capacity is not also dealt with.

(B) Inappropriate Testing. Certain tests and procedures are inappropriate for the assessment of work-related injuries. Some examples include the following.

(i) At this time, tests performed only to assess patient effort are not considered scientifically valid and should not be performed. Scientific validation of any new technology to achieve this function is necessary (documentation of procedure).

(ii) Physical capacity assessments for localized joint or regional injury should be restricted to those joints or regions whose injuries have been caused or aggravated by the work-related event being compensated. Physical capacity evaluation of any other local joint or region requires documentation of medical necessity and relation to compensable injury.

(iii) Invalid or scientifically unjustifiable techniques shall not be reimbursed.

(h) Treatment Algorithms. The following pages present commonly pursued courses of treatment for spinal injuries depending on presenting conditions and associated factors. Algorithms are provided for progressive decisions relating to treatment approaches as well as commonly recognized treatment procedures. The treatment algorithms presented in this guideline offer greater potential for agreement between health care providers and payors on medical utilization for specific conditions than use of ICD-9 codes alone. Providers who pursue treatment at variance with the guideline are subject to greater documentation requirements as provided in subsection (e)(4) of this rule.

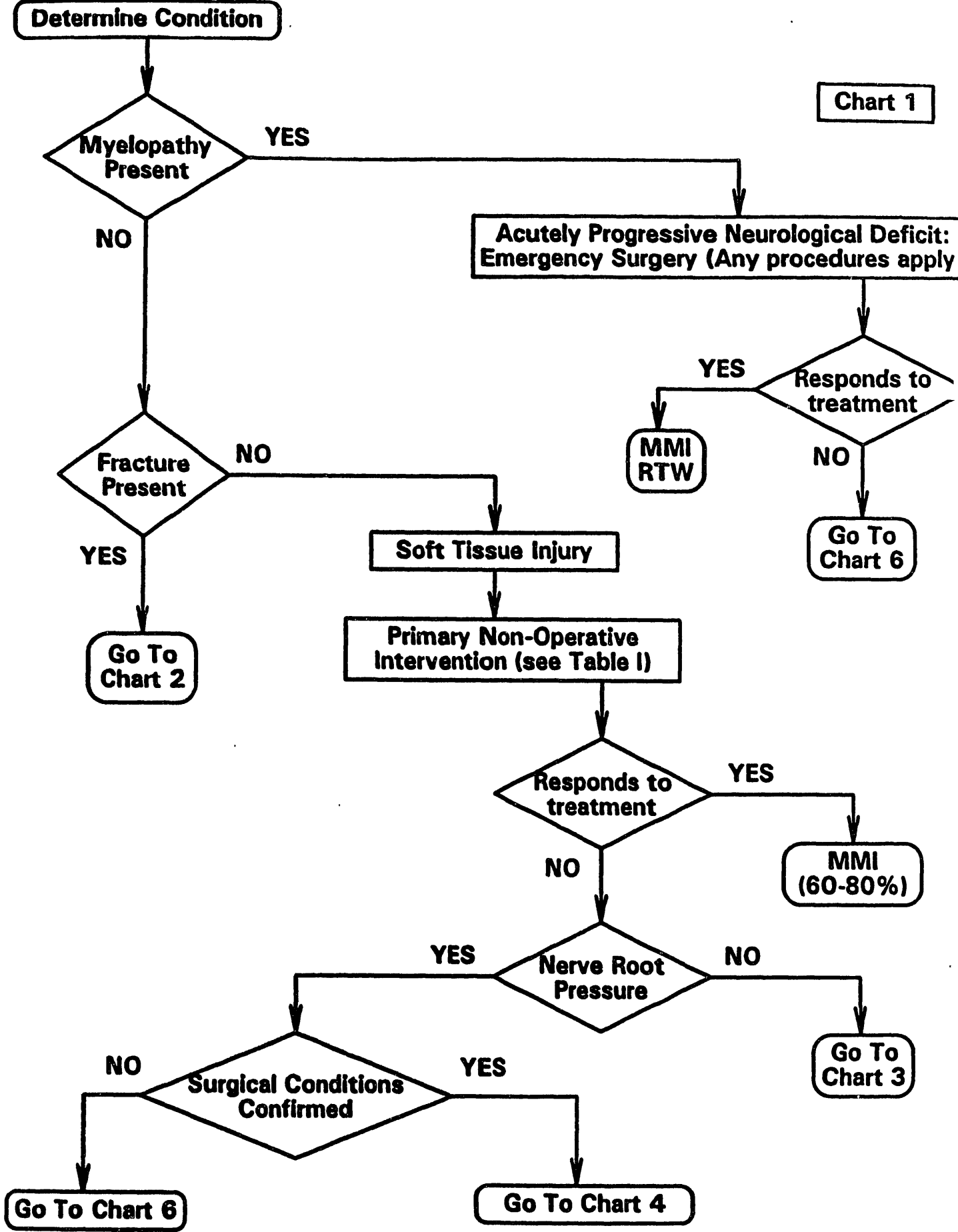
(1) Surgical Treatment Code Legend.

(1) SURGICAL TREATMENT CODE LEGEND

Key: Diagnostic Procedures (Some Require Preauthorization)	Key: CPT Code Definitions
<p>1) History and Physical</p> <p>a) Identify mechanism of injury</p> <p>b) correlate patient's association of complaint with mechanism of injury</p> <p>c) correlate mechanism of injury and resultant body area(s) of injury</p> <p>2) Plain X-ray</p> <p>a) 5 views</p> <p>b) 2 views</p> <p>c) Flexion/Extension views</p> <p>3) Laboratory Tests</p> <p>4) Myelogram</p> <p>5) CT Scan</p> <p>6) MRI</p> <p>7) CT Scan augmented with myelography</p> <p>8) IV enhanced CT Scan</p> <p>9) Gadolinium MRI - prior surgery, only failed back, rule out infection</p> <p>10) Discography +/- CT Scan</p> <p>11) Radionuclide Bone Scan</p> <p>a) Nucleotide</p> <p>b) Dualphoton</p> <p>c) P.E.T.</p> <p>12) EMG/Evoked Potential</p> <p>13) Diagnostic selective nerve root injection - must be done under flouro</p> <p>14) Diagnostic facet injection - done under flouro control both diagnostic & therapeutic</p> <p>15) Physical Capacity Evaluation</p> <p>16) Functional Capacity Evaluation</p> <p>17) Mental Health Evaluation</p>	<p>Cervical</p> <p>22140 Reconstruction of spine with bone graft</p> <p>22145 Reconstruction of spine following vertebral body resection</p> <p>22148 Harvesting of bone autograft</p> <p>22548 Arthrodesis, anterior transoral or extraoral technique</p> <p>22554 Arthrodesis, anterior interbody technique</p> <p>22585 Arthrodesis, anterior or anterolateral, each additional interspace</p> <p>22590 Arthrodesis, posterior technique, craniocervical</p> <p>22595 Arthrodesis, posterior technique, atlas-axis</p> <p>22600 Arthrodesis, posterior technique, cervical below C2 segment</p> <p>22650 Arthrodesis, posterior, posterolateral or lateral transverse, each additional interspace</p> <p>22820 Harvesting of bone autograft through separate incision</p> <p>22840 Posterior instrumentation</p> <p>22842 Posterior instrumentation; segmental fixation</p> <p>22845 Anterior instrumentation</p> <p>63001 Laminectomy with exploration and/or decompression, one or two vertebral segments</p> <p>63015 Laminectomy with exploration and/or decompression, without facetectomy, more than 2 segments</p> <p>63020 Laminotomy (hemilaminectomy), with decompression of nerve, one interspace</p> <p>63035 Laminotomy, each additional interspace</p> <p>63040 Laminotomy (hemilaminectomy), with decompression, including partial facetectomy</p> <p>63045 Laminectomy, facetectomy and foraminotomy, single vertebral segment</p> <p>63048 Laminectomy, each additional segment</p> <p>63075 Discectomy, anterior, with decompression</p> <p>63076 Discectomy, anterior, with decompression, each additional interspace</p> <p>63081 Vertebral corpectomy (vertebral body resection), single segment</p> <p>63082 Vertebral corpectomy (vertebral body resection), each additional segment</p>

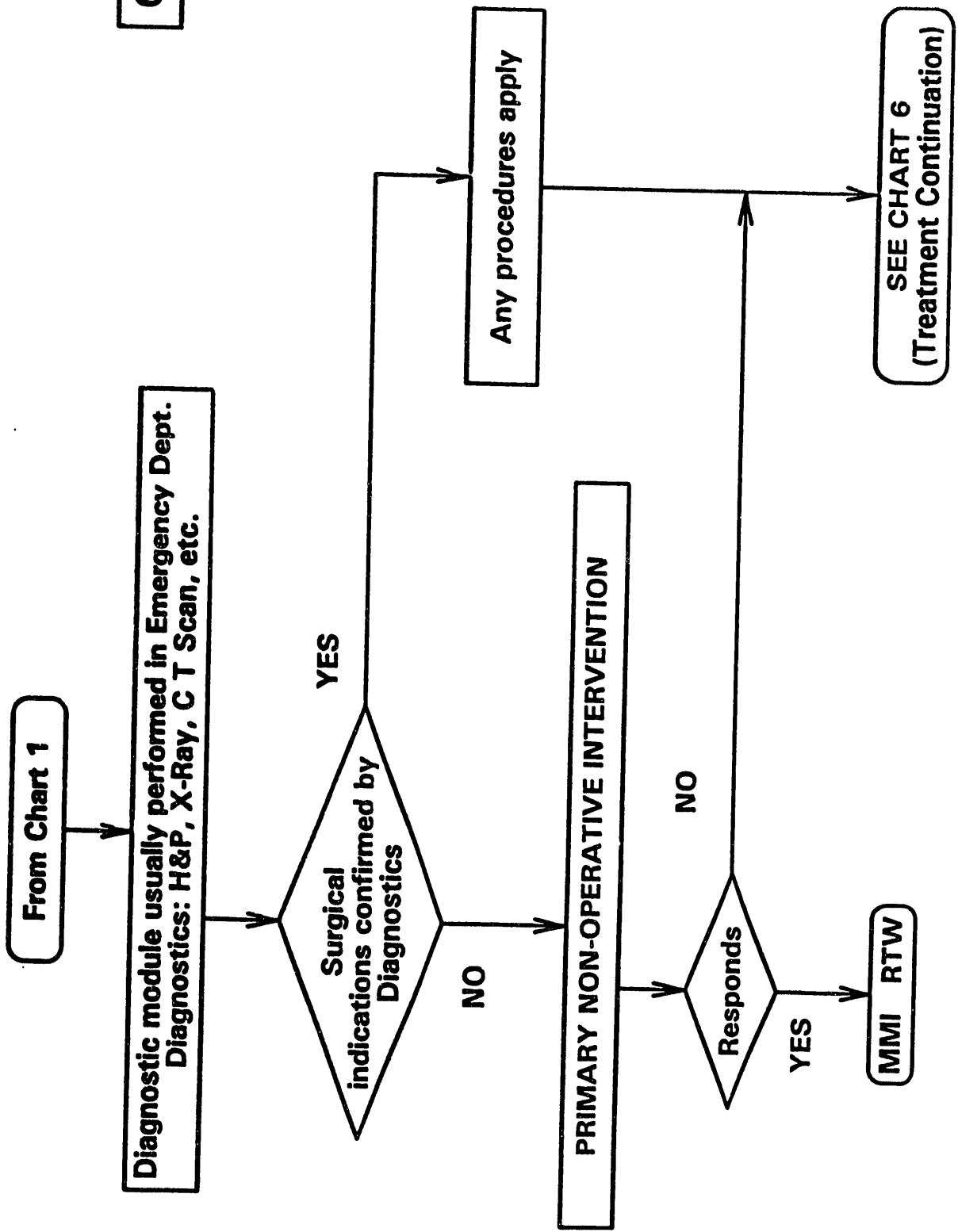
<p>1) History and Physical</p> <p>a) Identify mechanism of injury</p> <p>b) correlate patient's association of complaint with mechanism of injury</p> <p>c) correlate mechanism of injury and resultant body area(s) of injury</p> <p>2) Plain X-ray</p> <p>a) 5 views</p> <p>b) 2 views</p> <p>c) Flexion/Extension views</p> <p>3) Laboratory Tests</p> <p>4) Myelogram</p> <p>5) CT Scan</p> <p>6) MRI</p> <p>7) CT Scan augmented with myelography</p> <p>8) IV enhanced CT Scan</p> <p>9) Gadolinium MRI - prior surgery, only failed back, rule out infection</p> <p>10) Discography +/- CT Scan</p> <p>11) Radionuclide Bone Scan</p> <p>a) Nucleotide</p> <p>b) Dualphoton</p> <p>c) P E T.</p> <p>12) EMG/Evoked Potential</p> <p>13) Diagnostic selective nerve root injection - must be done under fluoro</p> <p>14) Diagnostic facet injection - done under fluoro control both diagnostic & therapeutic</p> <p>15) Physical Capacity Evaluation</p> <p>16) Functional Capacity Evaluation</p> <p>17) Mental Health Evaluation</p>	<p>Thoracic</p> <p>22141 Reconstruction of spine with bone graft; thoracic</p> <p>22556 Arthrodesis; thoracic, with local bone</p> <p>22585 Arthrodesis, anterior or anterolateral, each additional interspace</p> <p>22610 Arthrodesis, posterior or posterolateral technique</p> <p>22650 Arthrodesis, posterior, posterolateral or lateral transverse, each additional interspace</p> <p>22800 Arthrodesis, posterior for spinal deformity, 6 or less vertebrae</p> <p>22802 Arthrodesis, posterior for spinal deformity, 7 or more vertebrae</p> <p>22810 Arthrodesis, anterior, for spinal deformity, 4 to 7 vertebrae</p> <p>22812 Arthrodesis, anterior, for spinal deformity; 8 or more vertebrae</p> <p>22820 Harvesting of bone autograft through separate incision</p> <p>22840 Posterior instrumentation</p> <p>22842 Posterior instrumentation, segmental fixation</p> <p>22845 Anterior instrumentation</p> <p>63003 Laminectomy, thoracic</p> <p>63016 Laminectomy; more than 2 segments, thoracic</p> <p>63046 Laminectomy, facetectomy and foraminotomy, single vertebral segment; thoracic</p> <p>63048 Laminectomy; each additional segment</p> <p>63055 Transpedicular approach with decompression of spinal cord</p> <p>63057 Transpedicular approach with decompression of spinal cord; each additional segment</p> <p>63064 Costovertebral approach with decompression of spinal cord or nerve root(s)</p> <p>63066 Costovertebral approach with decompression of spinal cord or nerve root(s); each additional segment</p> <p>63077 Discectomy, anterior, with decompression, thoracic, single interspace</p> <p>63078 Discectomy, anterior, with decompression; thoracic, each additional interspace</p> <p>63085 Vertebral corpectomy (vertebral body resection), partial or complete</p> <p>63086 Vertebral corpectomy (vertebral body resection), partial or complete; thoracic, each additional segment</p> <p>63087 Vertebral corpectomy (vertebral body resection), partial or complete; decompression of spinal cord; single segment</p> <p>63088 each additional segment</p> <p>63090 Vertebral corpectomy (vertebral body resection), partial or complete, transperitoneal or retroperitoneal approach for decompression of spinal cord; single segment</p> <p>63091 Vertebral corpectomy (vertebral body resection), partial or complete, transperitoneal or retroperitoneal approach for decompression of spinal cord, each additional segment</p>
<p>1) History and Physical</p> <p>a) Identify mechanism of injury</p> <p>b) correlate patient's association of complaint with mechanism of injury</p> <p>c) correlate mechanism of injury and resultant body area(s) of injury</p> <p>2) Plain X-ray</p> <p>a) 5 views</p> <p>b) 2 views</p> <p>c) Flexion/Extension views</p> <p>3) Laboratory Tests</p> <p>4) Myelogram</p> <p>5) CT Scan</p> <p>6) MRI</p> <p>7) CT Scan augmented with myelography</p> <p>8) IV enhanced CT Scan</p> <p>9) Gadolinium MRI - prior surgery, only failed back, rule out infection</p> <p>10) Discography +/- CT Scan</p> <p>11) Radionuclide Bone Scan</p> <p>a) Nucleotide</p> <p>b) Dualphoton</p> <p>c) P E T.</p> <p>12) EMG/Evoked Potential</p> <p>13) Diagnostic selective nerve root injection - must be done under fluoro</p> <p>14) Diagnostic facet injection - done under fluoro control both diagnostic & therapeutic</p> <p>15) Physical Capacity Evaluation</p> <p>16) Functional Capacity Evaluation</p> <p>17) Mental Health Evaluation</p>	<p>Lumbar</p> <p>22142 Reconstruction of spine with bone graft, lumbar</p> <p>22145 Reconstruction of spine following vertebral body resection</p> <p>22148 Harvesting of bone autograft</p> <p>22558 Arthrodesis, lumbar, with bone graft</p> <p>22585 Arthrodesis, anterior or anterolateral, each additional interspace</p> <p>22612 Arthrodesis, posterior or posterolateral technique, lumbar</p> <p>22625 Arthrodesis, lateral transverse process technique</p> <p>22630 Arthrodesis, posterior interbody technique</p> <p>22650 Arthrodesis, posterior, posterolateral or lateral transverse, each additional interspace</p> <p>22820 Harvesting of bone autograft through separate incision</p> <p>22840 Posterior instrumentation</p> <p>22842 Posterior instrumentation, segmental fixation</p> <p>22845 Anterior instrumentation</p> <p>63005 Laminectomy, lumbar, except for spondylolisthesis</p> <p>63012 Laminectomy with removal of abnormal facets and/or pars, (Gill type procedure)</p> <p>63017 Laminectomy with exploration and/or decompression; without facetectomy; more than 2 segments</p> <p>63030 one interspace, lumbar</p> <p>63035 Laminotomy, each additional interspace</p> <p>63042 Laminotomy, with decompression; lumbar</p> <p>63047 Laminectomy; lumbar</p> <p>63048 Laminectomy, each additional segment</p> <p>63056 Transpedicular approach with decompression of spinal cord; lumbar</p> <p>63057 Transpedicular approach with decompression of spinal cord; each additional segment</p> <p>63087 Vertebral corpectomy (vertebral body resection), partial or complete, decompression of spinal cord, single segment</p> <p>63088 each additional segment</p> <p>63090 Vertebral corpectomy (vertebral body resection), partial or complete, transperitoneal or retroperitoneal approach for decompression of spinal cord; single segment</p> <p>63091 Vertebral corpectomy (vertebral body resection), partial or complete, transperitoneal or retroperitoneal approach for decompression of spinal cord; each additional segment</p>

(2) Chart 1-Initial Approach to
Treatment of Spinal Injury.

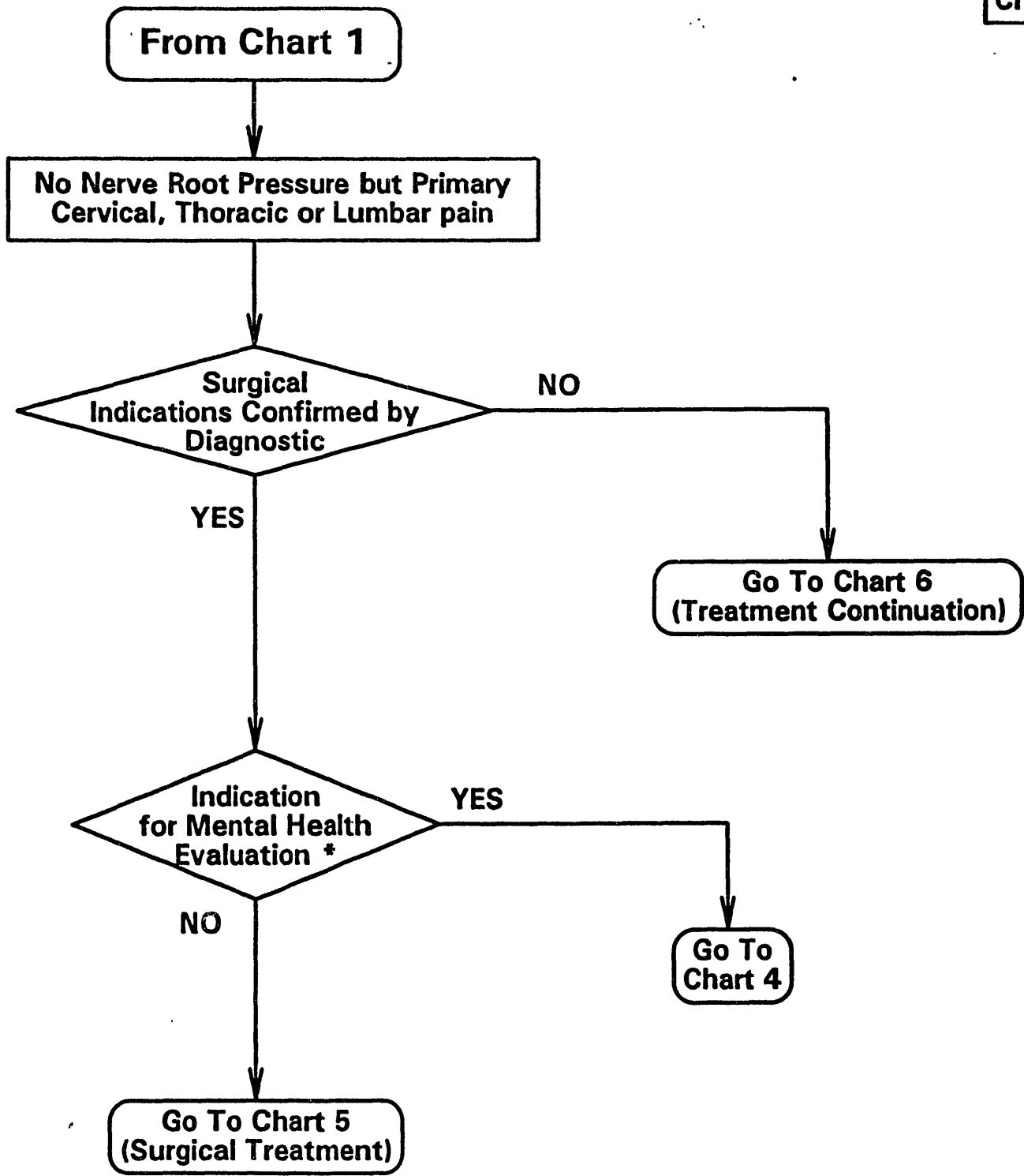


(3) Chart 2-Fracture and/or Dislocation.

CHART 2



(4) Chart 3-Soft Tissue Injury
(Muscle, Tendon, Ligament, Joint Capsule,
Nerve, Disc, Bursa).



*** If mental health evaluation and/or mental health treatment is indicated, consult Texas Workers' Compensation Commission Mental Health Treatment Guideline.**

(5) Chart 4-Peri-Operative Algorithm.

Patient Identified As Potential Surgical Candidate

Patient demonstrates Psychosocial* or Occupational** factors which alert the treating doctor to refer to QMHP for evaluation/assessment.

Mental Health Evaluation.

Does evaluation indicate patient is a Good or Poor surgical candidate?

GOOD

GO TO CHART 5

POOR

Positive or Negative clinical indicators for surgery?

NEGATIVE

Proceed to chronic care programs, rehabilitation services, mental health services., etc.

POSITIVE

Peri-Op mental health intervention prior and/or immediately after surgery depending on emergency nature of surgery.

Monitor mental health status and pain issues carefully after surgery and during recovery/rehab.

PSYCHOSOCIAL FACTORS
(Risk factors for extending disability)

Pre-Injury Factors

- > Asymptomatic Pre-existing Conditions
 - . 1) Obesity, Substance Abuse
 - . 2) Affective Disorders
 - . 3) Personality Disorders
 - . 4) Other Psychiatric Disorders
 - . 5) Learning Disability/MR
 - . 6) History of Smoking (cigarette)
- > Symptomatic Pre-existing Conditions
 - . 1) Prior Unrehabilitated Musculokeletal Injury
 - . 2) Affective Disorders
 - . 3) Substance Disorders
 - . 4) Personality Disorders
 - . 5) Somatization Disorders
 - . 6) Other Psychiatric Disorders

Post-Injury Factors

- > Injury-Related Factors
 - . 1) Inactivity
 - . 2) Medication Dependence
 - . 3) Employer-Employee Relationship
 - . 4) Affective Disorders
 - . 5) Substance Disorders
 - . 6) Personality Disorders
 - . 7) Somatization Disorders
 - . 8) Other Psychiatric Disorders
 - . 9) Adjustment Disorder-with Mixed Emotional Features

OCCUPATIONAL FACTORS
(Risk factors)

Cumulative Trauma Disorders

- . - Repetive Trauma Syndrome
- . - Overuse Syndrome
- . - Vibration Syndrome

No Return To Work Available

Heavy Work Only RTW Option

Vocational Rehabilitation Referral

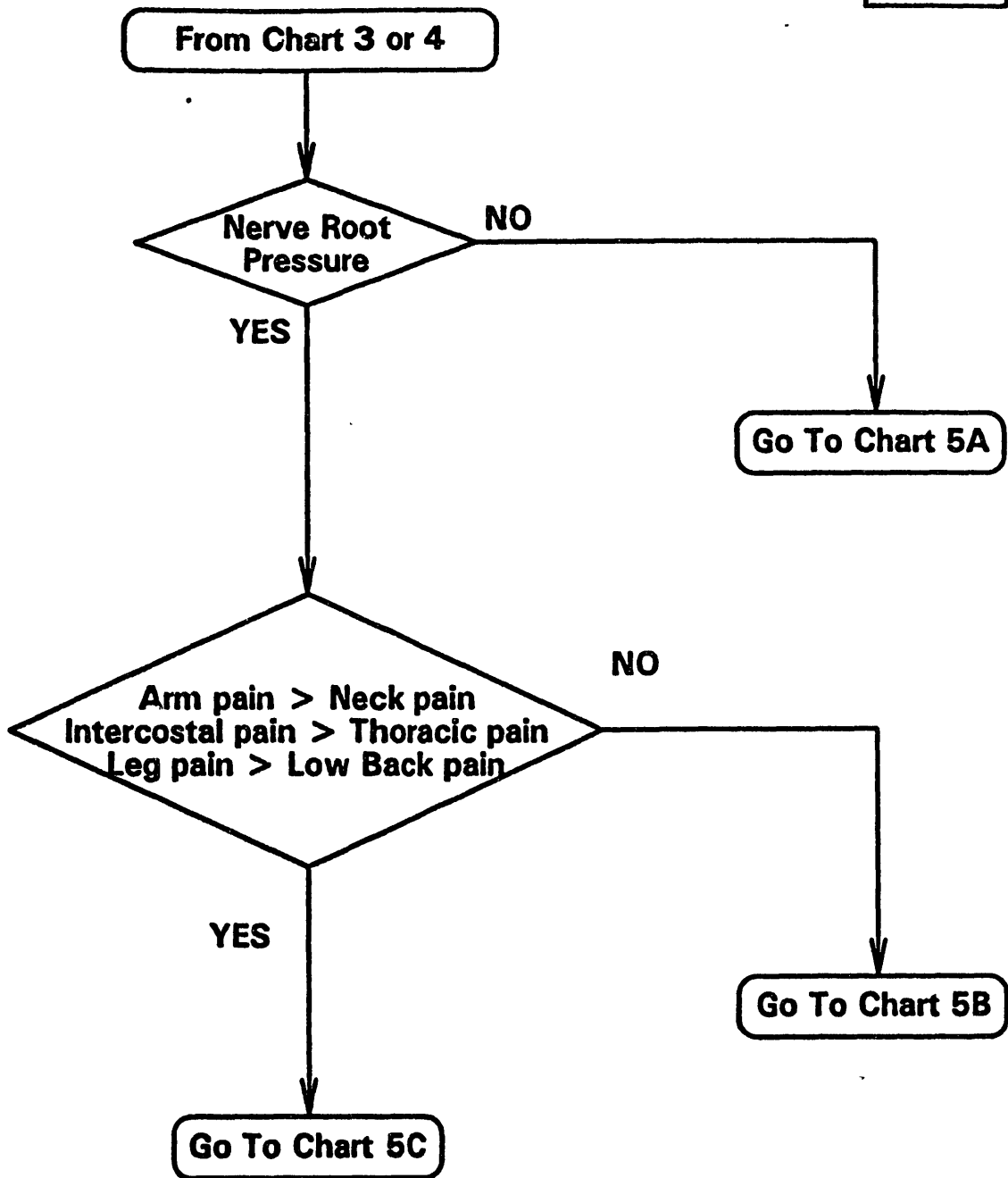
- . - Education
- . - Age
- . - Past Work Skills

PERI-OPERATIVE TREATMENT DURATION

- 1) Length of mental health treatment will depend on the specific diagnosis. See Section 6.5 in Mental Health Treatment Guidelines.
- 2) If no diagnosed mental disorder but patient requires pre-op treatment for pain, somatization, unrealistic expectations etc., maximum length of mental health treatment is 3 months.

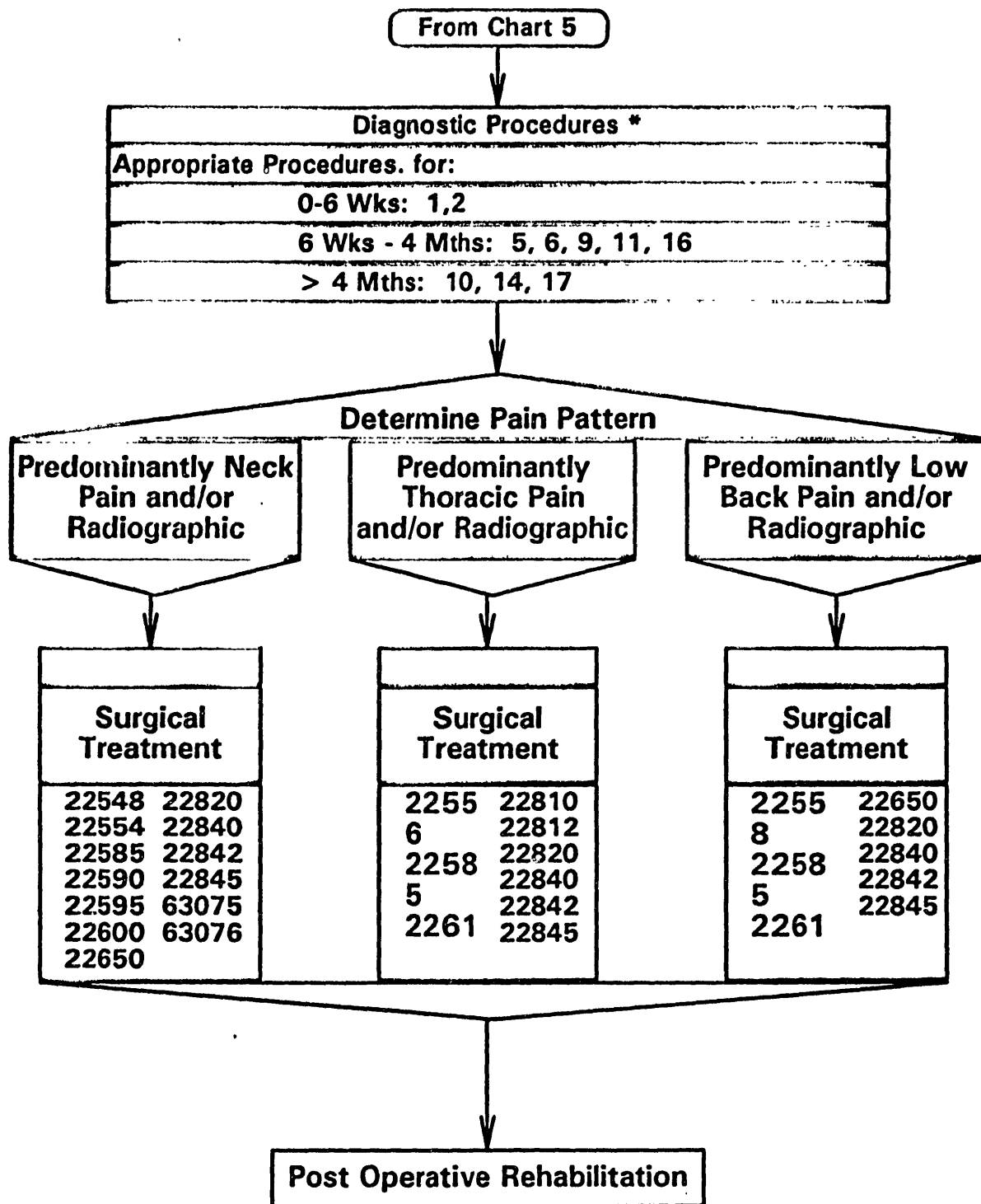
(6) Chart 5-Surgical Treatment.

Chart 5



(A) Chart
Treatment Subchart A.

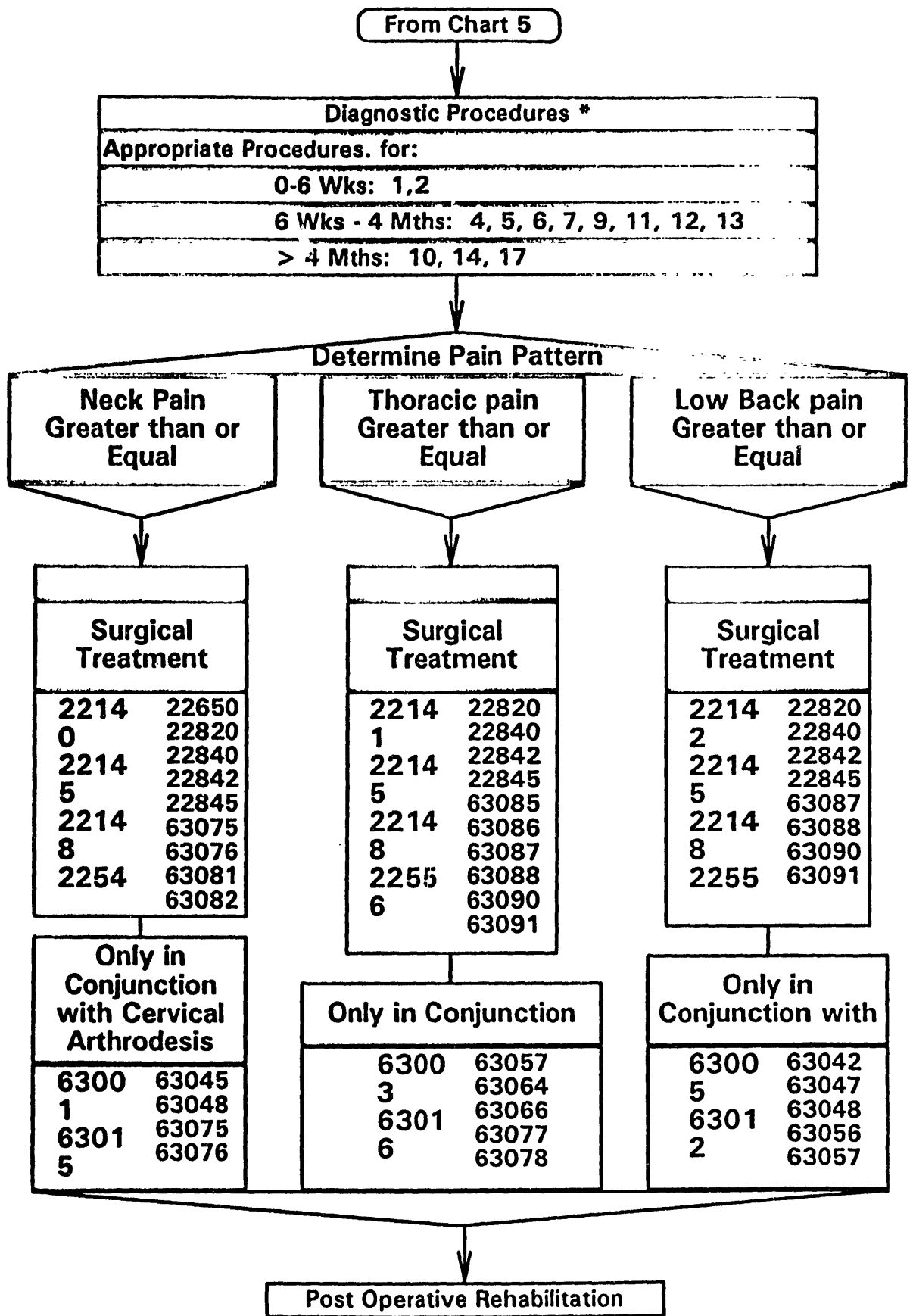
5A-Surgical



* In cases of significant neurological deficit, diagnostics 5 & 6 may also be appropriate for use in the first 6 weeks of treatment.

** See Surgical Treatment Code Legend for listing of diagnostic and treatment procedures.

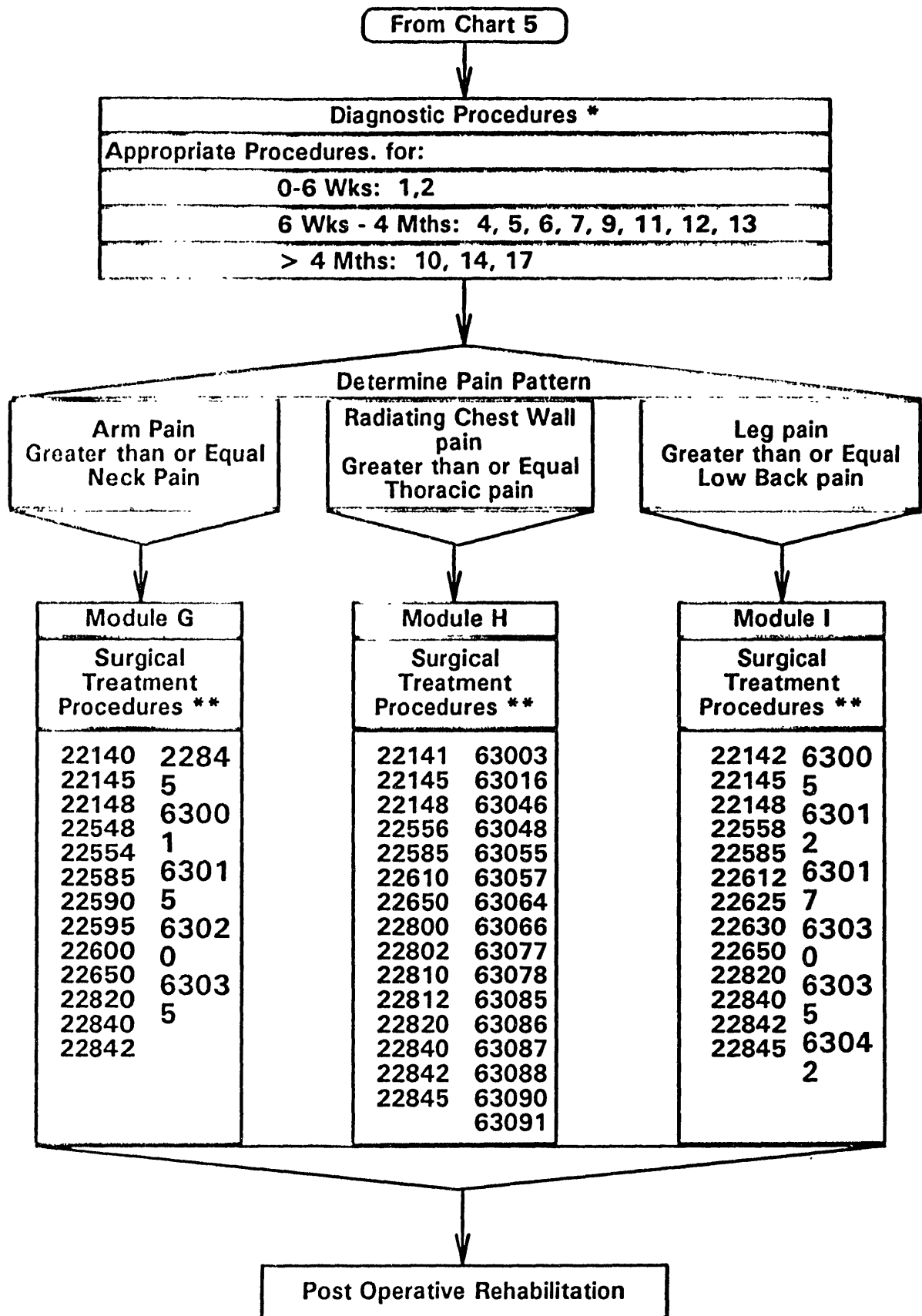
(B) Chart 5B- Surgical Treatment Subchart B.



* In cases of significant neurological deficit, diagnostics 5 & 6 may also be appropriate for use in the first 6 weeks of treatment.

** See Surgical Treatment Code Legend for listing of diagnostic and treatment procedures.

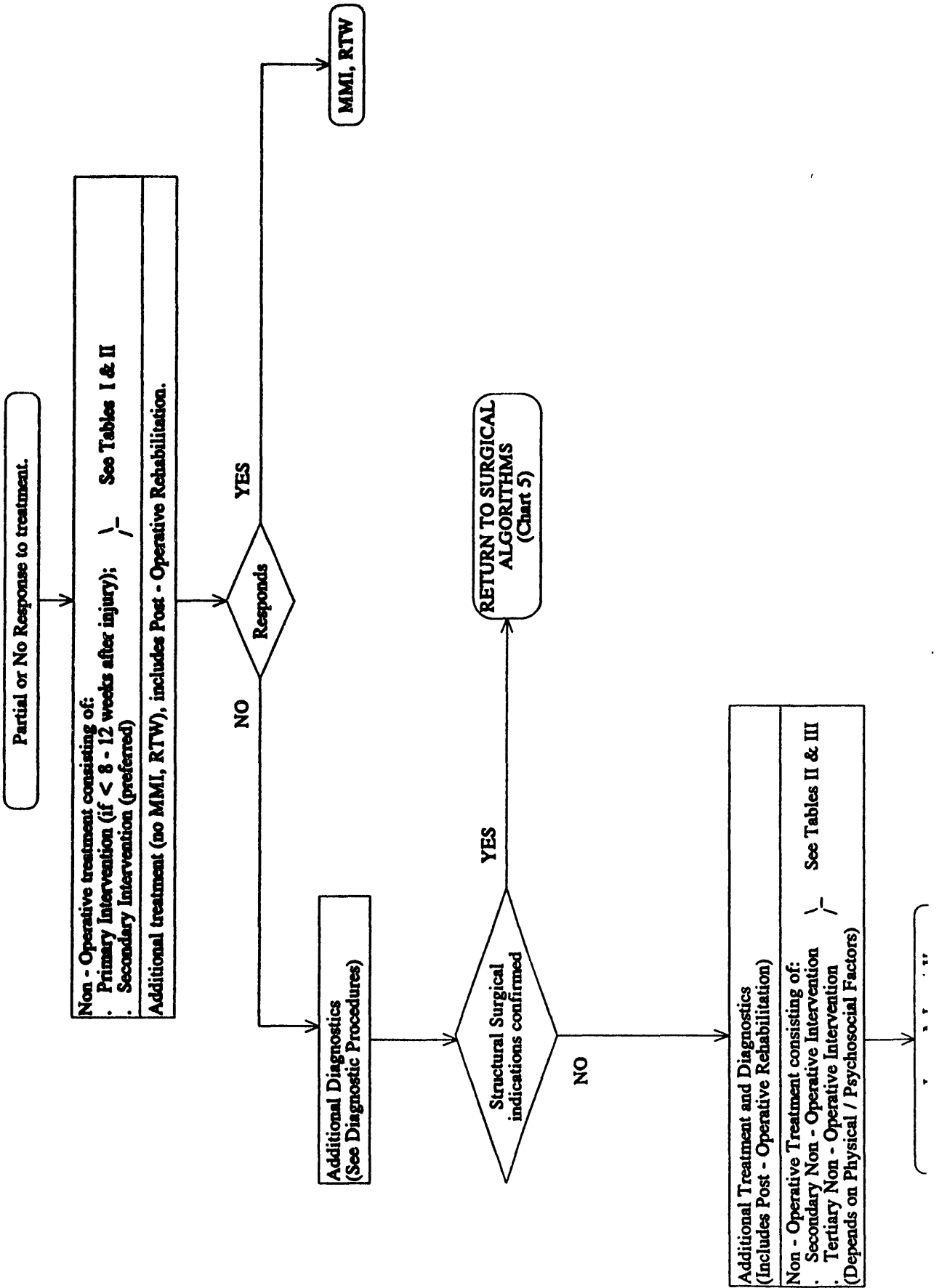
(C) Chart 5C-Surgical Treatment Subchart C.



* In cases of significant neurological deficit, diagnostics 5 & 6 may also be appropriate for use in the first 6 weeks of

** See Surgical Treatment Code Legend for listing of diagnostic and treatment

(7) Chart 6-Treatment Continu-
ation.



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coexisting pain and depression. PAIN, 7, 331-341.

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 May 16, 1994

TRD-9441004

Susan Cory
General Counsel
Texas Workers'
Compensation
Commission

Earliest possible date of adoption June 24, 1994

For further information, please call: (512) 440-3700

TITLE 31. NATURAL RESOURCES AND CONSERVATION

Part II. Texas Parks and Wildlife Department

Chapter 65. Wildlife

Subchapter N. Early Season Migratory Game Bird

• 31 TAC §§65.311, 65.312, 65.314, 65.316

The Texas Parks and Wildlife Commission proposes amendments to §§65.311, 65.312, 65.314, and 65.316, concerning the Early Season Migratory Game Bird Proclamation. Proposed changes in §65.311 revise the definition of 'nontoxic shot' to include zinc-coated steel shot now allowed under federal law and add a new definition of 'bow' to provide consistency with other statewide proclamations.

The proposed amendment to §65.312 changes the reference to archery equipment to provide consistency with other statewide hunting proclamations.

In 1991, the Fish and Wildlife Service allowed Texas to increase the number of white-winged doves permitted in the aggregate daily bag limit during the regular mourning dove season from two to six everywhere in the state except for a four-county area in the Lower Rio Grande Valley (LRGV). There, the whitewing bag limit has remained at two for the last three years. Breeding population counts of white-winged doves in the LRGV have been increasing since the 1989 freeze but populations are still 12% below the 30-year average. The U. S. Fish and Wildlife Service denied TPWD's request last year to increase the white-winged dove bag limit from 2 to 6 like the rest of the state but indicated that if breeding populations increased this spring the bag limit increase would be reconsidered. Staff believes the white-winged dove population has recovered sufficiently from the 1989 freeze to sustain the larger harvest expected to result from the higher bag limit. This change may slightly increase total hunters, days of hunting, and harvest during the 70-day regular dove season but should have

no negative effect on LRGV white-winged dove breeding populations. Therefore, §65.314(b)(3)(D) (relating to special exceptions for mourning doves in the south zone) is proposed for deletion from this title.

In the Central and South Dove Zones, the Commission proposes to split the January dove seasons into two segments (Option I). One segment would begin on November 24 and remain open for four days. The other segment would begin on December 26 and remain open for seven consecutive days in the Central Zone or 18 days in the South Zone. These seasons would allow young people an opportunity to hunt during the holidays when they are traditionally out of school. Therefore, §65.314(b) is revised to reflect these proposed changes.

If the U.S. Fish and Wildlife Service does not approve three segments for mourning doves in Central and South Dove Zones, staff proposes three alternatives. Option II is essentially the same season dates as last year except for normal calendar shift. The South Zone would open on Friday, September 23, 1994, and extend through November 13, 1994. The second season segment in the South Zone would open on December 26, 1994, and extend through January 12, 1995. The Central Zone season dates would be September 1, 1994-October 31, 1994 and reopen on December 26, 1994, extending through January 3, 1995.

Option III, should the Service not grant Texas three season segments, is the same season as last year except the season would be extended in January in the Central and South Zones. In the Central Zone, eight days could be taken from the end of the fall season (October) and moved to January. The season dates would be September 1-October 23, 1994, and December 26, 1994-January 11, 1995. In the South Zone, 10 days could be taken from the end of the fall season (November) and moved to January. The season dates would be September 23-November 3, 1994, and December 26, 1994-January 22, 1995.

Option IV being considered is a 60-day season with a daily bag limit of 15. This proposal would add three additional birds to the daily bag limit but cut 10 days off the season that has been in place for the last 10 years. Proposed season dates by zone are: North Zone: September 1-October 30, 1994; Central Zone: September 1-October 16, 1994, and December 26, 1994-January 8, 1995; South Zone: September 23-November 6, 1994, and December 26, 1994-January 9, 1995.

The Commission is also proposing two alternatives for the 1994 early teal season. The proposed amendment to §65.314(e) includes options for the early teal season for public consideration. These options are "mid-September", September 10-18, 1994 or "late-September", September 17-25, 1994.

If the U.S. Fish and Wildlife Service does not approve three segments for mourning doves in Central and South Dove Zones, then staff proposes that the falconry season begin November 14 for 37 consecutive days. The Option I changes in open season dates for migratory birds will require a later opening

date for the falconry season. In 1993, the falconry season began on November 15 and extended for 37 consecutive days. In 1994, these dates for falconry would conflict with a short shotgun season, November 24-27. Therefore, the proposed amendment to §65.316(a) and (b) would establish split falconry seasons of November 14-23, and November 28-December 24. Staff believes a better solution is to delay the falconry season opening date until January 9, so that there will be one consecutive season of 37 days (January 9-February 14, 1995) for doves, rails and gallinules. Language is added throughout §65.316 which would provide restrictions for possession of archery equipment consistent with other hunting and fishing proclamations.

These proposed amendments are consistent with biological studies and survey trends which indicate stable or increasing early season migratory game bird populations in Texas. These proposed rules regulate the taking of migratory game birds consistent with their populations to insure viable future populations. These proposed rule changes will require approval by the U.S. Fish and Wildlife Service.

Robin Riechers, staff economist, has determined that the first five years the rules are in effect there will be minimal fiscal implications to state or local governments as a result of enforcing or administering the rules.

Mr. Riechers also has determined that for each 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 permit recreational taking of migratory game species consistent with their populations. There will be minimal effects on small businesses. It is anticipated there will be no fiscal implications to persons who are required to comply with the rules as proposed.

Comments on the rules as proposed may be submitted to Jay Roberson, Program Leader for Migratory Shore and Upland Game Birds, Wildlife Branch, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-8011 or 1-800-792-1112, extension 8011.

The amendments are proposed under Texas Parks and Wildlife Code, Chapter 64, Subchapter C, which provides the Texas Parks and Wildlife Commission with authority to regulate seasons, means, methods, and devices for taking and possessing migratory game bird wildlife resources.

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

Bow—A bow includes the longbow, recurved bow, or compound bow that is hand-held and hand-drawn, and that has no mechanical device built into, or attached to, that will enable the archer to lock the bow at full or partial draw. Other than energy stored by the hand-held, hand drawn bow, no device to propel the arrow will be permitted.

Nontoxic shot—Any shot-type that does not cause sickness and death when ingested by migratory birds as determined by criteria established under Code of Federal Regulations, Title 50, Chapter 1, §20.134. The only nontoxic shot currently approved by the director, U.S. Fish and Wildlife Service, is steel shot, including copper, nickel, or zinc-coated [and/or nickel-plated] steel shot.

§65.312. Means, Methods, and Special Requirements.

(a) The following means and methods are lawful, subject to control of subsection (b) of this section, in the taking of migratory game birds:

(1) dogs, artificial decoys, manual or mouth-operated birdcalls, lawful archery equipment [longbow and arrows], legal shotguns as defined in §65.311 of this title (relating to Definitions), and by means of falconry;

(2)-(6) (No change.)

(b)-(g) (No change.)

§65.314. Open Seasons, Shooting Hours, Bag and Possession Limits.

(a) (No change.)

(b) Mourning doves.

(1) North Zone: That portion of the state north of a line beginning at the International Bridge south of Fort Hancock; thence north along FM 1088 to State Highway 20; thence west along State Highway 20 to State Highway 148; thence north along State Highway 148 to Interstate Highway 10 at Fort Hancock; thence east along Interstate Highway 10 to Interstate Highway 20; thence northeast along Interstate Highway 20 to Interstate Highway 30 at Fort Worth; thence northeast along Interstate Highway 30 to the Texas-Arkansas state line.

(A) Dates:

(i) Options I-III: September 1-November 9, 1994; or [1993.]

(ii) Option IV: September 1-October 30, 1994.

(B)-(C) (No change.)

(2) Central Zone: That portion of the state between the North Zone and the South Zone.

(A) Dates:

(i) Option I: September 1-October 29, 1994, November 24-27, 1994, [31, 1993.] and December 26, 1994-January 1, 1995 [3.];

(ii) Option II: September 1-October 31, and December 26, 1994-January 3, 1995;

(iii) Option III: September 1-October 23, 1994, and December 26, 1994-January 11, 1995; and

(iv) Option IV: September 1-October 16, 1994, and December 26, 1994-January 8, 1995.

(B)-(C) (No change.)

(3) South Zone: That portion of the state south of a line beginning at the International Toll Bridge in Del Rio; thence northeast along U.S. Highway 277 Spur to U.S. Highway 90 in Del Rio; thence east along U.S. Highway 90 to Interstate Highway 10 at San Antonio; thence east along Interstate Highway 10 to the Texas-Louisiana State Line.

(A) Dates:

(i) Option I: September 23 [24]-November 13, 1994 [14, 1993] (except in the special white-winged dove area the season is September 23 [24]-November 9, 1994 [10, 1993]), November 24-27, 1994, and December 26, 1994-January 12, 1995; and[.]

(ii) Option II: September 23-November 13, 1994, and December 26, 1994-January 12, 1995;

(iii) Option III: September 23-November 3, 1994, and December 26, 1994-January 22, 1995; and

(iv) Option IV: September 23-November 6, 1994, and December 26, 1994-January 9, 1995.

(B)-(C) (No change.)

[(D) Special exception: In Cameron, Hidalgo, Starr and Willacy counties, the bag and possession limits are: 12 mourning doves, white-winged doves, and white-tipped (white-fronted) doves in the aggregate including no more than two white-winged doves and two white-tipped doves per day; 24 mourning doves, white-winged doves, and white-tipped doves in the aggregate including no more than four white-winged doves and four white-tipped doves in possession.]

(c) White-winged doves. Special white-winged dove area: That portion of the state south and west of a line beginning at the International Toll Bridge in Del Rio; thence northeast along U.S. Highway 277 Spur to U.S. Highway 90 in Del Rio; thence east along U.S. Highway 90 to United States Highway 83 at Uvalde; thence south along U.S. Highway 83 to State Highway 44; thence east along State Highway 44 to

State Highway 16 at Freer; thence south along State Highway 16 to State Highway 285 at Hebronville; thence east along State Highway 285 to FM 1017; thence southeast along FM 1017 to State Highway 186 at Linn; thence east along State Highway 186 to the Mansfield Channel at Port Mansfield; thence east along the Mansfield Channel to the Gulf of Mexico.

(1) Dates: September 3, 4, 10 and 11, 1994 [4, 5, 11 and 12].

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

(d) Gallinules (Moorhen or common gallinule and purple gallinule). Statewide:

(1) Dates: September 1-November 9, 1994.

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

(e) Teal ducks (blue-winged, green-winged, and cinnamon). Statewide:

(1) Dates: September 10 [11]-September 18, 1994, [19] or September 17-25, 1994.

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

(f)-(g) (No change.)

§65.316. Extended Falconry Season.

(a) It is lawful to hunt and take rails, mourning doves, white-winged doves and gallinules [migratory game birds] by means of falconry, but the hunting or taking is limited to persons holding valid falconry permits issued by the department.

(b) It is lawful to take rails, mourning doves, white-winged doves and gallinules [migratory game birds] by means of falconry during:

(1) The [the] open seasons prescribed in §65.314 of this title (relating to Open Seasons, Bag and Possession Limits) [and during];

(2) The period January 9-February 14, 1995, and during those hours from one-half hour before sunrise to sunset. [the following Extended Falconry Seasons:]

[(1) Rails: November 15-December 21, from one-half hour before sunrise to sunset.

[(2) Mourning doves: November 15-December 21, from one-half hour before sunrise to sunset.

[(3) White-winged doves: November 15-December 21, from one-half hour before sunrise to sunset.

[(4) Gallinules: November 15-December 21, from one-half hour before sunrise to sunset.]

(c) (No change.)

(d) No person may possess a firearm or archery equipment [longbow and arrow] or be accompanied by a person possessing a firearm or archery equipment [longbow and arrow] while hunting by means of falconry.

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 May 19, 1994.

TRD-9441180 Paul M. Shinkawa
Acting General Counsel
Texas Parks and Wildlife
Department

Proposed date of adoption: September 1, 1994

For further information, please call: 1-800-792-1112, Ext 4443 or (512) 389-4443

◆ ◆ ◆
**TITLE 37. PUBLIC
SAFETY AND CORREC-
TIONS**

**Part III. Texas Youth
Commission**

**Chapter 91. Discipline and
Control**

Control

• 37 TAC §91.73

(Editor's Note. The Texas Youth Commission proposes for permanent adoption the amendment §91.73 it adopts on an emergency basis in this issue. The text of the amendment §91.73 is in the Emergency Rules section of this issue.)

The Texas Youth Commission (TYC) proposes an amendment to §91.73, concerning resocialization program. The amendment will allow for qualified youth in high restriction facilities to be moved to the resocialization unit at Giddings State School to allow staff to gain control and youth to receive intensive treatment.

John Franks, director of fiscal affairs, 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. Franks 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 section allows for youth in TYC operated high restriction facilities who engage in activities which incite and cause major disruption and endangerment of staff and youth to be better served by placement in a highly structured

treatment program. 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 Gail Graham, Policy and Manuals Coordinator, Texas Youth Commission, 4900 North Lamar Boulevard, P.O. Box 4260, Austin, Texas 78765

The amendment is proposed under the Human Resources Code, §61.075, which provides the Texas Youth Commission authority to order confinement under conditions it believes best designed for the child's welfare and the interests of the public.

The proposed rule implements the Human Resource Code, §61.034.

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 May 19, 1994.

TRD-9441209 Steve Robinson
Executive Director
Texas Youth Commission

Earliest possible date of adoption: June 27, 1994

For further information, please call: (512) 483-5244

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**Part VI. Texas Department
of Criminal Justice**

**Chapter 152. General
Allocation Rules**

The Texas Department of Criminal Justice (TDCJ) proposes an amendment to §152.3, the repeals of §152.22 and new §152.22, concerning respectively the allocation of admissions to TDCJ Institutional Division, and admissions to TDCJ Transfer Facilities. Under Government Code, §499.071, the Texas Board of Criminal Justice is required to promulgate a formula for allocation of admissions to the Institutional Division, and is further required to amend that formula annually. The board is required by law to include certain statutory factors in the formula, and has discretion to add other factors. The board is further required to use updated data each time it revises the formula. Under §499.071(b) and Code of Criminal Procedure, Article 42.13, §10(a)(3), formula funding for community corrections programs is to be distributed by an allocation formula with the same factors as for prison admissions, but different weights may be applied to those factors. Under Government Code, §499.153, the board is required to adopt an admissions policy for transfer facilities.

The prison admissions and transfer facility admissions formulae use identical weights

and have identical effect. Each of the formulae is proposed using the same weights as the respective previous version of the formula, but is calculated with updated data.

Total admissions through regular intake into transfer facilities, and subsequently into prison, are projected at 13,750, based on current parole rates. The total figure for community corrections funding in fiscal Year 1995 will be \$45,036,201.20.

David P. McNutt, assistant director for budget and management services, has determined that there will be no effect on state for the first five-year period of the rules as proposed are in effect.

The adoption of the proposed amendment and new section will impose additional costs on those counties that lose admissions under the new formula, while somewhat reducing costs to those counties that gain admissions. Since each county's costs for holding prisoners varies, it is not possible to ascertain the exact fiscal impact in each county. Units of local government (community supervision and corrections departments) will receive their allocated shares of state aid under the community corrections program.

Mr. McNutt also has determined that for the first five-year period the rules as proposed are in effect, the public benefit derived from enforcing these sections will be an equitable distribution of the capacity of the Institutional Division and of Transfer Facilities to receive new prisoners from county custody, in an orderly fashion that avoids shutting the system or triggering the Prison Management Act. A further benefit is the promotion of community corrections programs through state funding. 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 Carl Reynolds, General Counsel, Texas Board of Criminal Justice, P.O. Box 13084, Austin, Texas 78711. Written comments from the general public should be received within 30 days of the publication of this proposed amendment.

**Subchapter A. Institutional Di-
vision Admissions**

• 37 TAC §152.3

The amendment is proposed under Government Code, §492.013, which provides the Texas Department of Criminal Justice with the general authority to adopt rules

§152.3. Allocation Formula.

(a)-(e) (No change.)

(f) This formula gives each county a fixed percentage of institutional division admissions, as follows:

HIGH INTAKE COUNTIES

COUNTY	CURRENT PERCENTAGE	PROPOSED PERCENTAGE
HARRIS	[0.2032160132]	<u>0.2041193897</u>
DALLAS	[0.1663003963]	<u>0.1600503452</u>
TARRANT	[0.0796031314]	<u>0.0740646479</u>
BEXAR	[0.0685075666]	<u>0.0666090824</u>
TRAVIS	[0.0441298347]	<u>0.0420579471</u>
EL PASO	[0.0335080244]	<u>0.0353026797</u>
HIDALGO	[0.0192422943]	<u>0.0215145587</u>
JEFFERSON	[0.0191582528]	<u>0.0200685019</u>
NUECES	[0.0185239355]	<u>0.0194669940</u>
GALVESTON	[0.0137620425]	<u>0.0144679188</u>
CAMERON	[0.0134770765]	<u>0.0142549325</u>
LUBBOCK	[0.0111211632]	<u>0.0119345429</u>
MCLENNAN	[0.0099753095]	<u>0.0104669108</u>
BELL	[0.0093453529]	<u>0.0094475328</u>

OTHER TEXAS COUNTIES

COUNTY	CURRENT PERCENTAGE	PROPOSED PERCENTAGE
ANDERSON	[0.0019060292]	<u>0.0019664930</u>
ANDREWS	[0.0007637495]	<u>0.0007110001</u>
ANGELINA	[0.0035242485]	<u>0.0035176364</u>
ARANSAS	[0.0011132216]	<u>0.0010564461</u>
ARCHER	[0.0001628279]	<u>0.0001545937</u>
ARMSTRONG	[0.0000274797]	<u>0.0000632396</u>
ATASCOSA	[0.0010163291]	<u>0.0010153680</u>
AUSTIN	[0.0006443978]	<u>0.0006239623</u>
BAILEY	[0.0002179491]	<u>0.0002340946</u>
BANDERA	[0.0003377232]	<u>0.0003180960</u>
BASTROP	[0.0014780975]	<u>0.0015627463</u>
BAYLOR	[0.0001607725]	<u>0.0001900650</u>
BEE	[0.0010024531]	<u>0.0011263234</u>
BLANCO	[0.0001419114]	<u>0.0001476337</u>
BORDEN	[0.0000092355]	<u>0.0000106874</u>
BOSQUE	[0.0003390979]	<u>0.0004002612</u>
BOWIE	[0.0042552040]	<u>0.0041517249</u>
BRAZORIA	[0.0076237639]	<u>0.0082459732</u>
BRAZOS	[0.0062496785]	<u>0.0063151877</u>
BREWSTER	[0.0002524204]	<u>0.0003064060</u>
BRISCOE	[0.0000325515]	<u>0.0000340779</u>
BROOKS	[0.0014650590]	<u>0.0020047548</u>
BROWN	[0.0015374278]	<u>0.0015824332</u>
BURLESON	[0.0006873076]	<u>0.0008231573</u>
BURNET	[0.0007922851]	<u>0.0008141316</u>

COUNTY	CURRENT PERCENTAGE	PROPOSED PERCENTAGE
CALDWELL	[0.0011693211]	<u>0.0011276291</u>
CALHOUN	[0.0011222522]	<u>0.0012266801</u>
CALLAHAN	[0.0001997328]	<u>0.0002312139</u>
CAMP	[0.0005000344]	<u>0.0005019584</u>
CARSON	[0.0002422061]	<u>0.0002195687</u>
CASS	[0.0010489416]	<u>0.0010514561</u>
CASTRO	[0.0002437751]	<u>0.0003142258</u>
CHAMBERS	[0.0011979257]	<u>0.0013052890</u>
CHEROKEE	[0.0015107313]	<u>0.0013010831</u>
CHILDRESS	[0.0002675469]	<u>0.0002663760</u>
CLAY	[0.0002094074]	<u>0.0001748271</u>
COCHRAN	[0.0001452232]	<u>0.0001591456</u>
COKE	[0.0000894373]	<u>0.0000557092</u>
COLEMAN	[0.0002858920]	<u>0.0003519912</u>
COLLIN	[0.0088665184]	<u>0.0087849387</u>
COLLINGSWORTH	[0.0001451434]	<u>0.0001671700</u>
COLORADO	[0.0007613203]	<u>0.0007631315</u>
COMAL	[0.0022671065]	<u>0.0026192970</u>
COMANCHE	[0.0003692900]	<u>0.0003933990</u>
CONCHO	[0.0000906901]	<u>0.0000768515</u>
COOKE	[0.0008817377]	<u>0.0008940943</u>
CORYELL	[0.0012962183]	<u>0.0013811783</u>
COTTLE	[0.0000599367]	<u>0.0001021289</u>
CRANE	[0.0001638905]	<u>0.0001872665</u>
CROCKETT	[0.0000954501]	<u>0.0001764271</u>
CROSBY	[0.0001271095]	<u>0.0001558016</u>
CULBERSON	[0.0001172362]	<u>0.0001458817</u>
DALLAM	[0.0003385674]	<u>0.0003715827</u>
DAWSON	[0.0007328008]	<u>0.0006537405</u>
DEAF SMITH	[0.0008378740]	<u>0.0008558749</u>
DELTA	[0.0001491603]	<u>0.0001623958</u>
DENTON	[0.0087257387]	<u>0.0086925807</u>
DEWITT	[0.0004840093]	<u>0.0005280041</u>
DICKENS	[0.0000859197]	<u>0.0000993329</u>
DIMMIT	[0.0004110602]	<u>0.0005434710</u>
DONLEY	[0.0001490965]	<u>0.0001517371</u>
DUVAL	[0.0004989445]	<u>0.0005197969</u>
EASTLAND	[0.0007702446]	<u>0.0006753657</u>
ECTOR	[0.0070969935]	<u>0.0067848606</u>
EDWARDS	[0.0000501085]	<u>0.0001058177</u>
ELLIS	[0.0035231099]	<u>0.0035230213</u>
ERATH	[0.0009296333]	<u>0.0009055809</u>
FALLS	[0.0007458921]	<u>0.0007659378</u>
FANNIN	[0.0007683010]	<u>0.0008656169</u>
FAYETTE	[0.0006158489]	<u>0.0005748361</u>
FISHER	[0.0001136320]	<u>0.0001386186</u>
FLOYD	[0.0002179004]	<u>0.0002554856</u>
FOARD	[0.0000342806]	<u>0.0000268216</u>
FORT BEND	[0.0080704829]	<u>0.0085761207</u>
FRANKLIN	[0.0003123863]	<u>0.0003576007</u>
FREESTONE	[0.0007375241]	<u>0.0007348084</u>
FRIO	[0.0007243589]	<u>0.0007395550</u>
GAINES	[0.0004669059]	<u>0.0004447119</u>
GARZA	[0.0002152525]	<u>0.0002588772</u>

COUNTY	CURRENT PERCENTAGE	PROPOSED PERCENTAGE
GILLESPIE	[0.0004803775]	<u>0.0004730863</u>
GLASSCOCK	[0.0000216268]	<u>0.0000167610</u>
GOLIAD	[0.0001602611]	<u>0.0001769670</u>
GONZALES	[0.0005674229]	<u>0.0006311203</u>
GRAY	[0.0012360076]	<u>0.0009435662</u>
GRAYSON	[0.0045767963]	<u>0.0041592852</u>
GREGG	[0.0067439991]	<u>0.0065863041</u>
GRIMES	[0.0007166037]	<u>0.0008537850</u>
GUADALUPE	[0.0021954409]	<u>0.0025008966</u>
HALE	[0.0013375319]	<u>0.0013280005</u>
HALL	[0.0001437675]	<u>0.0001693327</u>
HAMILTON	[0.0002601065]	<u>0.0002806473</u>
HANSFORD	[0.0001106210]	<u>0.0001046720</u>
HARDEMAN	[0.0001597552]	<u>0.0002126872</u>
HARDIN	[0.0014810182]	<u>0.0014124929</u>
HARRISON	[0.0027820248]	<u>0.0026988526</u>
HARTLEY	[0.0000958408]	<u>0.0000998886</u>
HASKELL	[0.0001892966]	<u>0.0001770971</u>
HAYS	[0.0024954929]	<u>0.0023673523</u>
HEMPHILL	[0.0000630902]	<u>0.0000612396</u>
HENDERSON	[0.0025642244]	<u>0.0025153383</u>
HILL	[0.0010198746]	<u>0.0009778067</u>
HOCKLEY	[0.0007886326]	<u>0.0008830792</u>
HOOD	[0.0010699938]	<u>0.0011085188</u>
HOPKINS	[0.0013763053]	<u>0.0013834370</u>
HOUSTON	[0.0006859952]	<u>0.0008404044</u>
HOWARD	[0.0014020387]	<u>0.0014643229</u>
HUDSPETH	[0.0003780513]	<u>0.0004671290</u>
HUNT	[0.0034420762]	<u>0.0032454870</u>
HUTCHINSON	[0.0009302413]	<u>0.0008110518</u>
IRION	[0.0000649129]	<u>0.0000462367</u>
JACK	[0.0001787666]	<u>0.0002307013</u>
JACKSON	[0.0005367887]	<u>0.0004933473</u>
JASPER	[0.0011235174]	<u>0.0011990556</u>
JEFF DAVIS	[0.0000316516]	<u>0.0000289070</u>
JIM HOGG	[0.0004342786]	<u>0.0004255589</u>
JIM WELLS	[0.0016311348]	<u>0.0015768361</u>
JOHNSON	[0.0034135974]	<u>0.0035061190</u>
JONES	[0.0006956637]	<u>0.0005480881</u>
KARNES	[0.0004162215]	<u>0.0003188069</u>
KAUFMAN	[0.0026378973]	<u>0.0025720535</u>
KENDALL	[0.0005390597]	<u>0.0004605982</u>
KENEDY	[0.0000153993]	<u>0.0000229372</u>
KENT	[0.0000081309]	<u>0.0000124962</u>
KERR	[0.0015030948]	<u>0.0014830857</u>
KIMBLE	[0.0003258490]	<u>0.0003238032</u>
KING	[0.0000239949]	<u>0.0000161468</u>
KINNEY	[0.0000796512]	<u>0.0000985477</u>
KLEBERG	[0.0025726001]	<u>0.0030618288</u>
KNOX	[0.0001378335]	<u>0.0001621768</u>
LA SALLE	[0.0002338066]	<u>0.0002226232</u>
LAMAR	[0.0026997249]	<u>0.0026709094</u>
LAMB	[0.0004127210]	<u>0.0004314791</u>
LAMPASAS	[0.0005067013]	<u>0.0005977798</u>

COUNTY	CURRENT PERCENTAGE	PROPOSED PERCENTAGE
LAVACA	[0.0004153904]	<u>0.0004158608</u>
LEE	[0.0004249352]	<u>0.0005349400</u>
LEON	[0.0003779395]	<u>0.0004141358</u>
LIBERTY	[0.0021594568]	<u>0.0023358069</u>
LIMESTONE	[0.0009296898]	<u>0.0009454898</u>
LIPSCOMB	[0.0000401211]	<u>0.0000379617</u>
LIVE OAK	[0.0003041894]	<u>0.0004333978</u>
LLANO	[0.0003152598]	<u>0.0003116820</u>
LOVING	[0.0000089686]	<u>0.0000057942</u>
LYNN	[0.0001877973]	<u>0.0001940544</u>
MADISON	[0.0004079542]	<u>0.0005838055</u>
MARION	[0.0005114977]	<u>0.0006115128</u>
MARTIN	[0.0000802861]	<u>0.0001117060</u>
MASON	[0.0000591178]	<u>0.0000581108</u>
MATAGORDA	[0.0021728565]	<u>0.0021134647</u>
MAVERICK	[0.0014719634]	<u>0.0015856663</u>
MCCULLOCH	[0.0003483975]	<u>0.0004363559</u>
MCMULLEN	[0.0000157342]	<u>0.0000092990</u>
MEDINA	[0.0011842385]	<u>0.0011260491</u>
MENARD	[0.0000815168]	<u>0.0000859193</u>
MIDLAND	[0.0057841902]	<u>0.0054773810</u>
MILAM	[0.0009471493]	<u>0.0007952540</u>
MILLS	[0.0000641055]	<u>0.0000573795</u>
MITCHELL	[0.0003315231]	<u>0.0003313600</u>
MONTAGUE	[0.0004892893]	<u>0.0004556141</u>
MONTGOMERY	[0.0075447554]	<u>0.0076878388</u>
MOORE	[0.0006040322]	<u>0.0007140138</u>
MORRIS	[0.0005786276]	<u>0.0006146233</u>
MOTLEY	[0.0000216126]	<u>0.0000230425</u>
NACOGDOCHES	[0.0020909032]	<u>0.0019522022</u>
NAVARRO	[0.0023979589]	<u>0.0023131427</u>
NEWTON	[0.0003623925]	<u>0.0003769887</u>
NOLAN	[0.0008339982]	<u>0.0008818111</u>
OCHILTREE	[0.0002732763]	<u>0.0003297420</u>
OLDHAM	[0.0001469648]	<u>0.0001496977</u>
ORANGE	[0.0038917178]	<u>0.0040301971</u>
PALO PINTO	[0.0010563940]	<u>0.0011442113</u>
PANOLA	[0.0010194393]	<u>0.0009389361</u>
PARKER	[0.0017384619]	<u>0.0017329044</u>
PARMER	[0.0002580864]	<u>0.0002989920</u>
PECOS	[0.0007773038]	<u>0.0009174818</u>
POLK	[0.0017535382]	<u>0.0018234096</u>
POTTER	[0.0081666789]	<u>0.0084728500</u>
PRESIDIO	[0.0001977603]	<u>0.0001672985</u>
RAINS	[0.0002440577]	<u>0.0003290532</u>
RANDALL	[0.0020673700]	<u>0.0021489151</u>
REAGAN	[0.0001208807]	<u>0.0001057439</u>
REAL	[0.0000977417]	<u>0.0000893524</u>
RED RIVER	[0.0006187541]	<u>0.0006664937</u>
REEVES	[0.0008881048]	<u>0.0008525245</u>
REFUGIO	[0.0003392228]	<u>0.0005114793</u>
ROBERTS	[0.0000186391]	<u>0.0000110953</u>
ROBERTSON	[0.0009795073]	<u>0.0009702872</u>
ROCKWALL	[0.0009324273]	<u>0.0010023219</u>

COUNTY	CURRENT PERCENTAGE	PROPOSED PERCENTAGE
RUNNELS	[0.0004156462]	<u>0.0003870200</u>
RUSK	[0.0018221816]	<u>0.0020197795</u>
SABINE	[0.0002811198]	<u>0.0002214280</u>
SAN AUGUSTINE	[0.0003257987]	<u>0.0003216396</u>
SAN JACINTO	[0.0005466214]	<u>0.0006067572</u>
SAN PATRICIO	[0.0028882090]	<u>0.0025564414</u>
SAN SABA	[0.0001336228]	<u>0.0001801533</u>
SCHLEICHER	[0.0000790440]	<u>0.0000812852</u>
SCURRY	[0.0007129363]	<u>0.0006756156</u>
SHACKELFORD	[0.0000863665]	<u>0.0001141798</u>
SHELBY	[0.0008825652]	<u>0.0009800048</u>
SHERMAN	[0.0001149230]	<u>0.0000631728</u>
SMITH	[0.0078570818]	<u>0.0084073941</u>
SOMERVELL	[0.0001641391]	<u>0.0002730325</u>
STARR	[0.0013550044]	<u>0.0016175132</u>
STEPHENS	[0.0002844636]	<u>0.0002864036</u>
STERLING	[0.0000321242]	<u>0.0000247251</u>
STONEWALL	[0.0000642225]	<u>0.0000884315</u>
SUTTON	[0.0001072874]	<u>0.0001751854</u>
SWISHER	[0.0002837168]	<u>0.0002849949</u>
TAYLOR	[0.0064255749]	<u>0.0065815600</u>
TERRELL	[0.0000322030]	<u>0.0000362970</u>
TERRY	[0.0007364508]	<u>0.0007018138</u>
THROCKMORTON	[0.0000366471]	<u>0.0000256673</u>
TITUS	[0.0008922995]	<u>0.0009985496</u>
TOM GREEN	[0.0052074798]	<u>0.0052953298</u>
TRINITY	[0.0005265918]	<u>0.0005749374</u>
TYLER	[0.0007008978]	<u>0.0007826928</u>
UPSHUR	[0.0009901052]	<u>0.0011055838</u>
UPTON	[0.0001559714]	<u>0.0001111485</u>
UVALDE	[0.0009407426]	<u>0.0010109800</u>
VAL VERDE	[0.0016784380]	<u>0.0017712715</u>
VAN ZANDT	[0.0009827041]	<u>0.0010086678</u>
VICTORIA	[0.0037097762]	<u>0.0038865286</u>
WALKER	[0.0022530403]	<u>0.0019584107</u>
WALLER	[0.0015195832]	<u>0.0013444764</u>
WARD	[0.0005440423]	<u>0.0004869429</u>
WASHINGTON	[0.0010474764]	<u>0.0011355552</u>
WEBB	[0.0078283659]	<u>0.0081144019</u>
WHARTON	[0.0019104969]	<u>0.0019977170</u>
WHEELER	[0.0001412812]	<u>0.0001564793</u>
WICHITA	[0.0067468348]	<u>0.0068546526</u>
WILBARGER	[0.0008421088]	<u>0.0009604645</u>
WILLACY	[0.0007944214]	<u>0.0008262043</u>
WILLIAMSON	[0.0048387148]	<u>0.0045815037</u>
WILSON	[0.0006501279]	<u>0.0006651393</u>
WINKLER	[0.0003019327]	<u>0.0003923782</u>
WISE	[0.0009603254]	<u>0.0010227867</u>
WOOD	[0.0009719431]	<u>0.0009703317</u>
YOAKUM	[0.0002973838]	<u>0.0002757285</u>
YOUNG	[0.0005705815]	<u>0.0005304809</u>
ZAPATA	[0.0002270760]	<u>0.0002585359</u>
ZAVALA	[0.0003779018]	<u>0.0003768910</u>

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 May 20, 1994.

TRD-9441203

Carl Reynolds
Board of General Counsel
Texas Department of
Criminal Justice

Earliest possible date of adoption: June 27, 1994

For further information, please call: (512) 463-9693

Subchapter D. Transfer Facility Admissions

37 TAC §152.22

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

The repeal is proposed under Government Code, §492.013, which provides the Texas Board of Criminal Justice with general authority to adopt rules.

§152.22. Admissions Policy

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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Carl Reynolds
Board of General Counsel
Texas Department of
Criminal Justice

Earliest possible date of adoption: June 27, 1994

For further information, please call: (512) 463-9693

Subchapter D. Transfer Facility Policies.

37 TAC §152.22

The new rule is proposed under the Government Code, §492.13, which provides the Texas Board of Criminal Justice with general authority to adopt rules.

§152.22. Admissions Policy.

(a) The institutional division is authorized to operate, maintain, and manage transfer facilities to confine eligible inmates by Chapter 499 of the Texas Government Code. The Code, §499.153, requires the Texas Department of Criminal Justice to adopt and enforce an admissions policy to accept from county jails eligible inmates for

confinement in transfer facilities authorized by this subchapter.

(b) In creating the transfer facility admissions policy, the Board proposes the same factors and weights adopted for the allocation formula, 37 TAC §§152.1-152.3 of this chapter (relating to General Allocation Rules) and revised and published in the August 3, 1993, issue of the *Texas Register* (18 TexReg 5083). Specifically, the formula includes and weighs each of the following factors, of which the first seven are statutorily required:

(1) the percentage of prison admissions for the entire state that were admitted from the county in the preceding 12 months,

(2) the percentage of the state's violent index crime that occurred in the county in preceding 12 months;

(3) the percentage of the state's total index crime that occurred in the county in the preceding 12 months;

(4) the percentage of the state's total arrests under the Texas Controlled Substances Act, the Health and Safety Code, Chapter 481, that occurred in the county or counties in the preceding 12 months;

(5) the percentage of the state's population residing in the county or counties;

(6) the percentage of the state's total unemployment in the county or counties, and

(7) the percentage of all defendants serving sentences for felonies who were paroled from the institutional division, a jail in this state, or a jail or correctional institutional in another state in the preceding 12 months and who were released to reside in the county or counties. The board added other discretionary factors which are not mandated by the legislature specifically the following factors reflecting community effort:

(A) the county's percentage of the state's total number of persons placed on probation during the preceding calendar year, as determined by the Criminal Justice Division of Texas Department of Corrections. "Probation placements" are defined as including felons placed on regular probation, and felons placed in a special program, either through direct sentencing by the court or persons given shock probation;

(B) the county's percentage of the state's total number of persons completing probation during the preceding calendar year (as determined by the Community Justice Assistance Division)

whose probations were terminated either through early discharge or the expiration of the full term of probation;

(C) the county's percentage of the state's total funds expended by the counties for juvenile probation services in the most recently audited county fiscal year, as determined by the Texas Juvenile Probation Commission staff.

(c) the board assigned the following weight to each statutory and discretionary factor.

(1) Statutory Factors:

(A) §152.3(a)(1)-(historical admissions)-10;

(B) §152.3(a)(2)-(violent index crime)-15;

(C) §152.3(a)(3)-(total index crime)-20;

(D) §152.3(a)(4)-(drug crime arrests)-10;

(E) §152.3(a)(5)-(population)-5;

(F) §152.3(a)(6)-(unemployment)-5;

(G) §152.3(a)(7)-(parole releases)-10.

(2) Discretionary Factors:

(A) §152.3(b)(1)-(probation placements)-10;

(B) §152.3(b)(2)-(probation completions)-5;

(C) §152.3(b)(3)-(juvenile probation funding)-10.

(3) Total-100%.

(d) These weighted statutory factors and the community effort factors were applied to available transfer facility admissions to determine, employing normal rounding practices and allowing for holidays in the 12-month period, the number of admissions available to each county.

(e) The board may establish a minimum level of admissions, based on the timing of admissions transportation cycles, for counties that would otherwise fail to receive a meaningful number of admissions, as determined by the board.

(f) This formula gives each county a fixed percentage of transfer facility admissions identical to the percentage listed for that county in §152.3(f) of this title (relating to Allocation Formula).

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 May 20, 1994

TRD-9441263

Carl Reynolds
Board of General Counsel
Texas Department of
Criminal Justice

Earliest possible date of adoption June 27, 1994

For further information, please call (512) 463-9693

◆ ◆ ◆
TITLE 40. SOCIAL SERVICES AND ASSISTANCE

Part I. Texas Department of Human Services

Chapter 27. Intermediate Care Facilities for the Mentally Retarded (ICFs-MR)

Subchapter B. Contracting Requirements

• **40 TAC §27.203**

The Texas Department of Human Services (DHS) proposes an amendment to §27.203, concerning provider applications, in its Intermediate Care Facilities for the Mentally Retarded (ICFs-MR) rule chapter. The purpose for the amendment is to clarify the provider application rule regarding qualifications and requirements of a new applicant, refinanced facilities, half-mile rule, commensurate wages, and time frames.

Burton F. Raiford, commissioner, has determined that for the first five-year period the proposed amendment will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amendment.

Mr. Raiford 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 amendment will be improved quality of services provided by ICFs-MR resulting from changes to the application process. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

Questions about the content of the proposal may be directed to Maxine Tomlinson at (512) 450-3169 in DHS's Institutional Policy Section. Comments on the proposal may be submitted to Nancy Murphy, Agency Liaison, Policy and Document Support-142, Texas Department of Human Services W-402, P O

Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

The amendment is proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which provides the department with the authority to administer public and medical assistance programs and under Texas Civil Statutes, Article 4413 (502), §16, which provides the Health and Human Services Commission with the authority to administer federal medical assistance funds.

The proposal implements the Human Resources Code, §§32.001-32.042.

§27.203. Provider Applications.

(a) (No change.)

(b) All applicants for participation in the Intermediate Care Facility for the Mentally Retarded (ICF/MR) Program must submit an application to the Texas Department of Mental Health and Mental Retardation (TXMHMR) for review and approval. The application must include documentation to verify the applicant's ability to ensure the delivery of quality care and services. [The documentation submitted must indicate that]

(1) The documentation submitted must indicate that the following persons [the persons specified in subparagraphs (A) and (B) of this paragraph] will have completed the ICF/MR preapplication training course [within six months] prior to approval of the application: [In some situations, one person may serve in both capacities. If the person's employment status changes prior to approval of the application, approval of the application will be postponed until the appropriate persons complete the training]

(A) the applicant and/or a designated representative, other than a consultant; and/or [and]

(B) the individual who will be responsible for the direct management of the facility; or []

(C) those who, at the time of application, are not owners of an ICF/MR facility in the Texas ICF/MR Program.

(2) If the employment status of the persons specified in paragraph (1) of this subsection changes prior to approval of the application, approval of the application will be postponed until the appropriate persons complete the training [the applicant is financially creditable and of good moral character]

(c) All applications are limited to one level-of-care classification (I, V, VI, or

VIII) and must meet the requirements specified in paragraphs (1)-(5) of this subsection.

(1) Requested certification is limited to a maximum of six beds per facility, except for those facilities funded on through state general revenue and being refinanced by TXMHMR during fiscal year 1994-1995. This includes new facilities seeking initial certification and currently certified facilities seeking to increase the certified bed capacity. During the 1994-1995 biennium, facilities funded only through general revenue and refinancing under the ICF/MR Program that have more than six beds must become six-bed facilities within three years from the date of TXMHMR approval of the ICF/MR application packet.

(2) [The proposed facility is noncontiguous to an already existing residential facility which serves individuals with mental retardation or a related condition.] The proposed facility is in compliance with applicable special use permit requirements, local zoning, and/or occupancy code requirements, and [§27.103 of this title (relating to State Licensing Standards) and] §27.201 of this title (relating to Participation Requirements). The proposed facility must also meet the specifications described in subparagraphs (A) and (B) of this paragraph:

(A) The applicant must submit information about the proposed facility which addresses the services [, program, and plans] detailed in clauses (i) -(iv) of this subparagraph.

(i) Availability of 24-hour emergency medical services, utility services, fire protection, police and sheriff protection, [and] waste water, and garbage disposal.

[(ii) Plans for providing opportunities and support for the residents to develop and maintain positive relationships with a variety of persons in the community, including identification of the transportation resources available to the individuals who will reside in the proposed facility.]

[(iii) Plans for providing the programmatic and other support services, as required by 42 Code of Federal Regulations, Part 483, Subpart D, which are appropriate to the individuals who will be residing in the proposed facility.]

(ii) [(i)] If the proposed facility intends to serve individuals who are eligible for educational services, the application must include documentation to verify that the local school district has been notified of the development of the proposed facility.

(iii)(II) If the proposed facility intends to serve individuals who are 22 years of age and older, the application must include a description of how the program intends to provide and/or support the delivery of vocational, day habilitation, or supported employment services.

(iv)(III) If the services are to be provided by an entity other than the applicant or facility, the service provider must submit documentation of his intent to provide services to the individuals who will be residing in the proposed facility. If commensurate wages will be earned by individuals in a vocational services setting provided by the applicant, documentation of Department of Labor Certification is required.

(B) The applicant must submit documentation that the proposed facility is not within [located such that no other ICF/MR is within] a one-half mile radius of another ICF/MR [the proposed facility], except in those community care facilities that were refinanced by TXMHMR during fiscal year 1994-1995.

(3) A needs assessment has been conducted to include the following:

(A) (No change.)

(B) The applicant must submit documentation to verify that the Mental Retardation Authority in whose catchment area the proposed facility is located has been notified of the development of the proposed facility and the proposed facility's admission criteria. The applicant must obtain and submit two letters which address the need for the facility from [at least two of] the following sources: the superintendent of the state school and/or the executive director of the MHMR center in whose catchment area the proposed facility is located, advocacy groups, developmental disability service providers and organizations, school districts, and/or other appropriate developmental disability referral sources. Letters from individuals who have a financial interest in the proposed facility are not acceptable. The letters must:

(i) refer specifically to the proposed facility by name and/or address,

(ii) be current within six months prior to the submission of the application; and

(iii) be printed on the letterhead of the acknowledging entity.

(C) If the facility serves individuals qualifying for Level-of-Care VIII services, the applicant must additionally

submit documentation that verifies that the regional DHS office and at least two other appropriate developmental disability referral sources, such as Head Injury Foundation and Spina Bifida Foundation, have been notified about the development of the proposed facility.

(D) (No change.)

(4) (No change.)

(5) Facilities that are in the application process prior to initial certification, certified facilities, and licensed facilities requesting to reclassify must withdraw from the program and submit a new application for the new level of care [in accordance with DHS's Texas Community ICF/MR Provider Manual, Item 2560, and reapply in compliance with the requirements of this section. This includes new facilities seeking to reclassify during the application process prior to initial certification and currently certified facilities].

(d) The applicant has 270-calendar days [nine months] from the date an application for participation in the ICF/MR program has been approved by TXMHMR to obtain [a license and] certification by the Texas Department of Human Services (DHS) [Texas Department of Health (TDH)]. If, at the end of the 270-calendar-day [nine-month] period, the provider is unable to obtain [a license and] certification, the [applicant must withdraw the] request for program participation will be withdrawn by TXMHMR and the application will be returned to the applicant [and reapply in compliance with the requirements of this section].

(1) TXMHMR may grant applicants a 90-calendar-day [three-month] extension for new construction delayed by inclement weather, natural disaster, construction strike, litigation, requirements of other state agencies, or other causes beyond the provider's control. New construction does not include renovations or modifications to existing structures. The request for the extension must:

(A) be submitted in writing to TXMHMR [at least 60 days] prior to the end of the 270-calendar-day [nine-month] period, and

(B) include documentation to support the circumstance which caused the delay.

(2) If there is an agency delay which is not the fault of the applicant and results in failure to obtain [licensure and] certification within the 270-calendar-day [nine-month] period, an extension is granted to enable completion of the process. A copy of the written notification will be for-

warded to the provider and the other state agencies involved. The length of the extensions is as follows:

(A) new construction-90 days;

(B) survey scheduling-not to exceed the scheduled date of survey; or

(C) litigation-until:

(i) litigation is resolved, plus 270 days if construction was stopped because of an injunction; or

(ii) the scheduled date of survey; if

(I) there was no new construction; or

(II) construction was allowed to continue.

(3) If an applicant must change locations following application approval by TXMHMR, the change in location must:

(A) [be reported to TXMHMR at least ten days prior to the actual location change, and

[B)] be requested within the first 30 days from the date of the original application approval and include the relocation information required by TXMHMR;.]

(B)(C) meet all requirements set forth in this section and be approved by TXMHMR, ICF/MR Section; []

(C)(D) remain within the same geographic region as the previously approved location, as defined in [the] TXMHMR's Plan on Long-Term Care for People with Mental Retardation or Related Conditions; and [Plan for New Bed Development in the Texas ICF/MR Program.]

(D)(E) not alter the applicant's ability to obtain [a license and] certification within the 270-calendar-day [nine-month] time period set forth in this subsection.

(e) [All applications for participation in the ICF/MR Program will be reviewed within three weeks of receipt in the TXMHMR, ICF/MR Section.] To receive approval for participation, applications [Applications] must meet all requirements set forth in this section [to receive approval for participation] and be in compliance with

TXMHMR's Plan on Long-Term Care for People with Mental Retardation or Related Conditions [*Plan for New Bed Development in the Texas ICF-MR Program*]. Applications that have not received approval from TXMHMR within a 90-calendar-day [three-month] period from the date submitted will be withdrawn from the review process and returned to the applicant [for completion].

(1) TXMHMR reserves the right to deny the approval of any application if the applicant or an affiliate has been excluded from Medicaid program participation under Chapter 79, Subchapter V, of this title (relating to Fraud and Abuse Involving Medical Providers) or debarred from contracting with DHS under §§69.275-69.279 of this title (relating to Debarment and Suspension of Current and Potential Contractor's Rights, Causes for and Conditions of Debarment, Causes for and Conditions of Suspension, Proof Required for Debarment and Suspension, and Notice Requirements for Debarment and Suspension) . TXMHMR

also reserves the right to postpone the approval of any application if the applicant or an affiliate is currently under investigation or review for potential fraud, abuse, or misuse [misutilization] of Medicaid funds or for any violation for which a sanction could be taken under Chapter 79, Subchapters V, W, and X [§§79.2101-79.2304] of this title (relating to Fraud and Abuse Involving Medical Providers, Fraud or Abuse Involving Individual or Major Providers (Except Medical), and Recovery of Benefits Wrongfully Received).

(2) As necessary, TXMHMR, ICF/MR Program staff will contact the applicant to facilitate completion of the application process. Upon approval, TXMHMR will notify DHS [the TDH] that the facility can begin the [licensing and] certification survey process [processes]. If a change in ownership or control occurs after the application is approved, but before the facility is certified, the application will be withdrawn and returned to the original owner and/or applicant. Applications are

not transferable prior to certification of the facility. If a facility loses its license:

(A) its certification will be revoked; and

(B) the facility's provider contract will be canceled.

(3) The contract for services is dependent on compliance with the provisions of 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 May 20, 1994.

TRD-9441252

Nancy Murphy
Section Manager, Policy
and Document Support
Texas Department of
Human Services

Earliest possible date of adoption August 1, 1994

For further information, please call: (512) 450-3765

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