TEXAS REGISTER

IN THIS ISSUE

Volume 19, Number 84 November 15, 1994 *Page 8891-8965*

Proposed Sections

Texas Feed and Fertilizer Control Service

Feed

4 TAC §61.21, §61.22 8901

Pet Food

4 TAC §§63.1-63.9, 63.20 8902

Texas Motor Vehicle Commission

Advertising

16 TAC §105.12, §105.26 8905

Texas Higher Education Coordinating Board

Agency Administration

19 TAC §1.22 8906

State Postsecondary Review Program

19 TAC §§7.1-7.5 8907

19 TAC §§7.21-7.25 8912

19 TAC §§7.41-7.43 8914

19 TAC §§7.61-7.63 8918

19 TAC §§7.81-7.83 8919

19 TAC §§7.101-7.127 8921

Texas Board of Chiropractic Examiners

Application and Applicants

22 TAC §§71.1, 71.3, 71.12 8924

Rules of Practice

22 TAC §75.1 8925

Practice of Chiropractic

22 TAC §80.1, §80.2 8926

Texas Department of Health

Vital Statistics

25 TAC §181.28 8926

Volume 19, Number 84, Part I

Contents Continued Inside

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How to Use the Texas Register

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

Governor - Appointments, executive orders, and proclamations.

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

Secretary of State - opinions based on the election laws.

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

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

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

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

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

Open Meetings - notices of open meetings

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

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the *Texas Register* is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 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*, publishes on an annual basis.

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

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

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

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

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

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

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

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

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

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

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Texas Department of Mental Health and Mental Retardation

Medicaid Programs

25 TAC §§409.371-409.380 8928

Interagency Council on Early Childhood Intervention Services

Early Childhood Intervention

25 TAC §621.31 8930

Texas Department of Insurance

Property and Casualty Insurance

28 TAC §5.206 8934

Trade Practices

28 TAC §21.1002 8935

28 TAC §21.1004 8936

28 TAC §21.1005 8937

28 TAC §21.1006 8938

Texas Workers' Compensation Commission

Fees

28 TAC §108.1 8939

Texas Natural Resources Conservation Commission

Municipal Solid Waste

30 TAC §330.2 8942

30 TAC §330.203 8942

Comptroller of Public Accounts

Tax Administration

34 TAC §3.357 8943

Property and Tax Administration

34 TAC §9.411 8945

Employees Retirement System of Texas

Insurance

34 TAC §§81.1, 81.3, 81.5, 81.7 8946

Council on Sex Offender Treatment

Standards of Practice

40 TAC §§512.1-512.3 8952

Code of Professional Ethics

40 TAC §513.1, §513.2 8955

Texas Department of Transportation

Use of State Property

43 TAC §§22.10-22.15 8958

Withdrawn Sections

Texas Workers' Compensation Commission

Fees

28 TAC §108.1 8965

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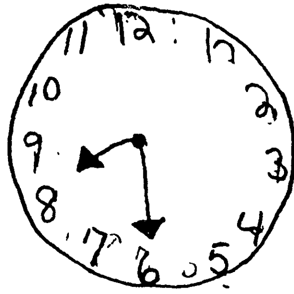

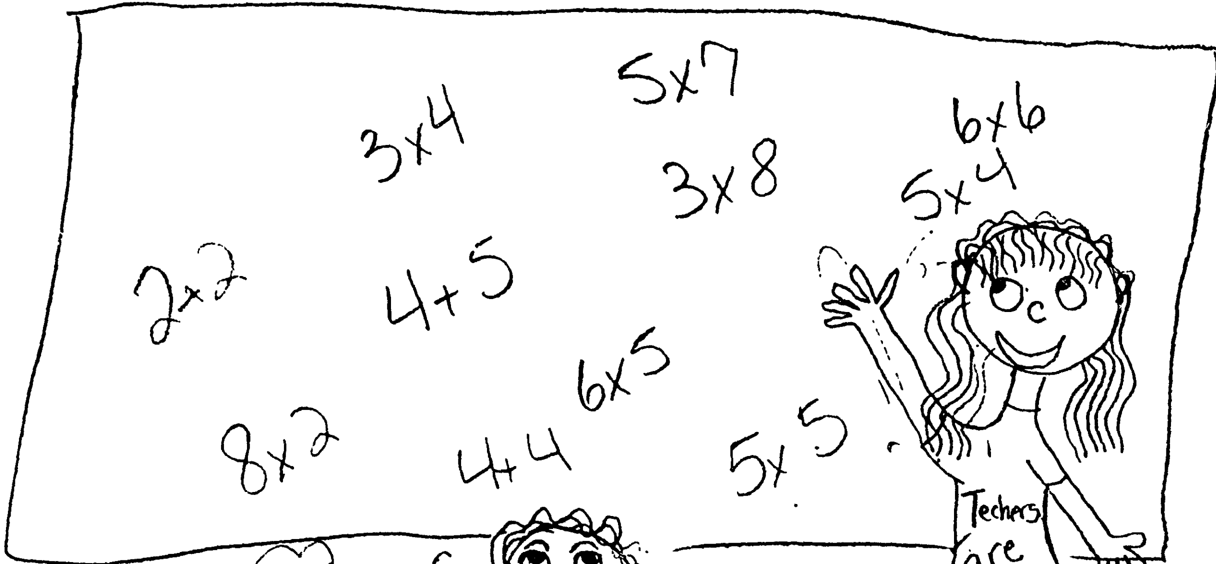

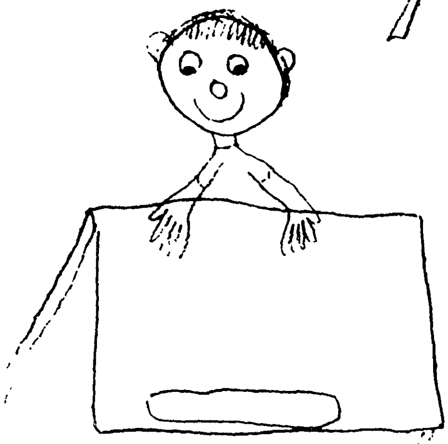

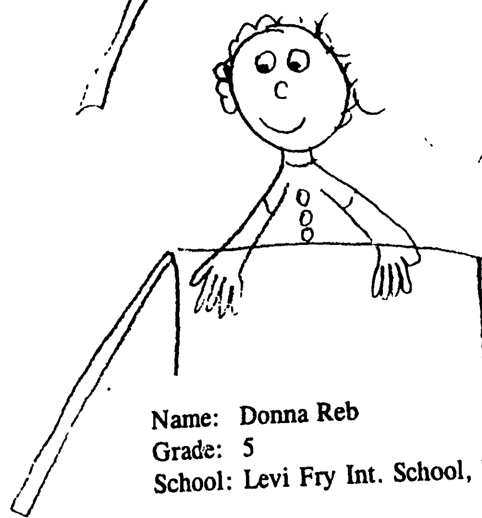

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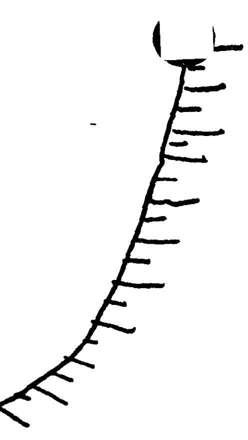

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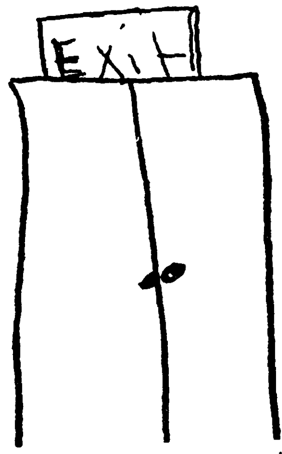

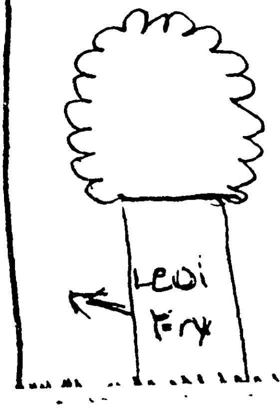

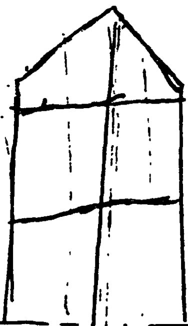
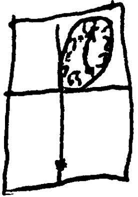
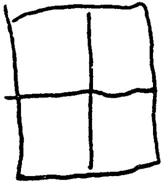

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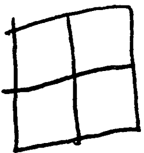
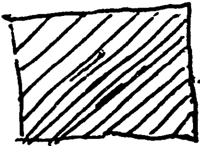
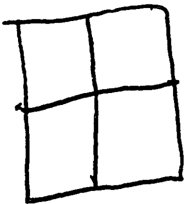
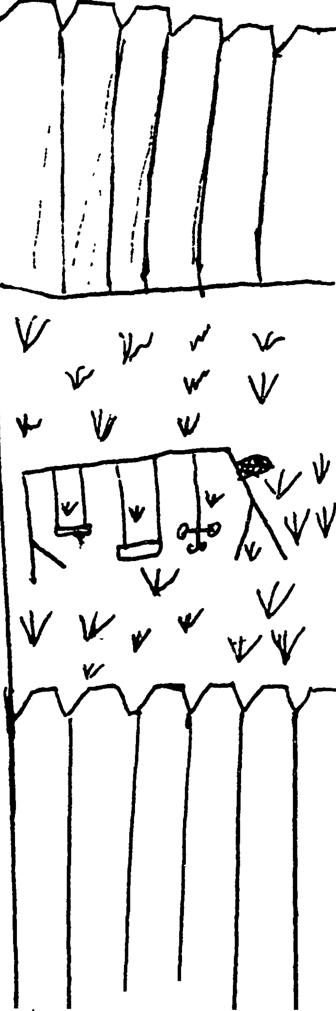
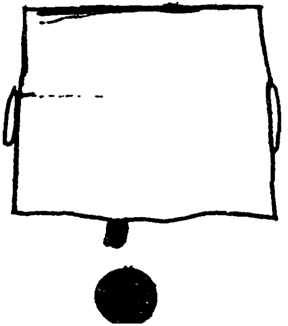
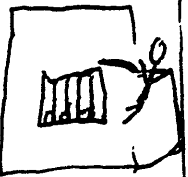

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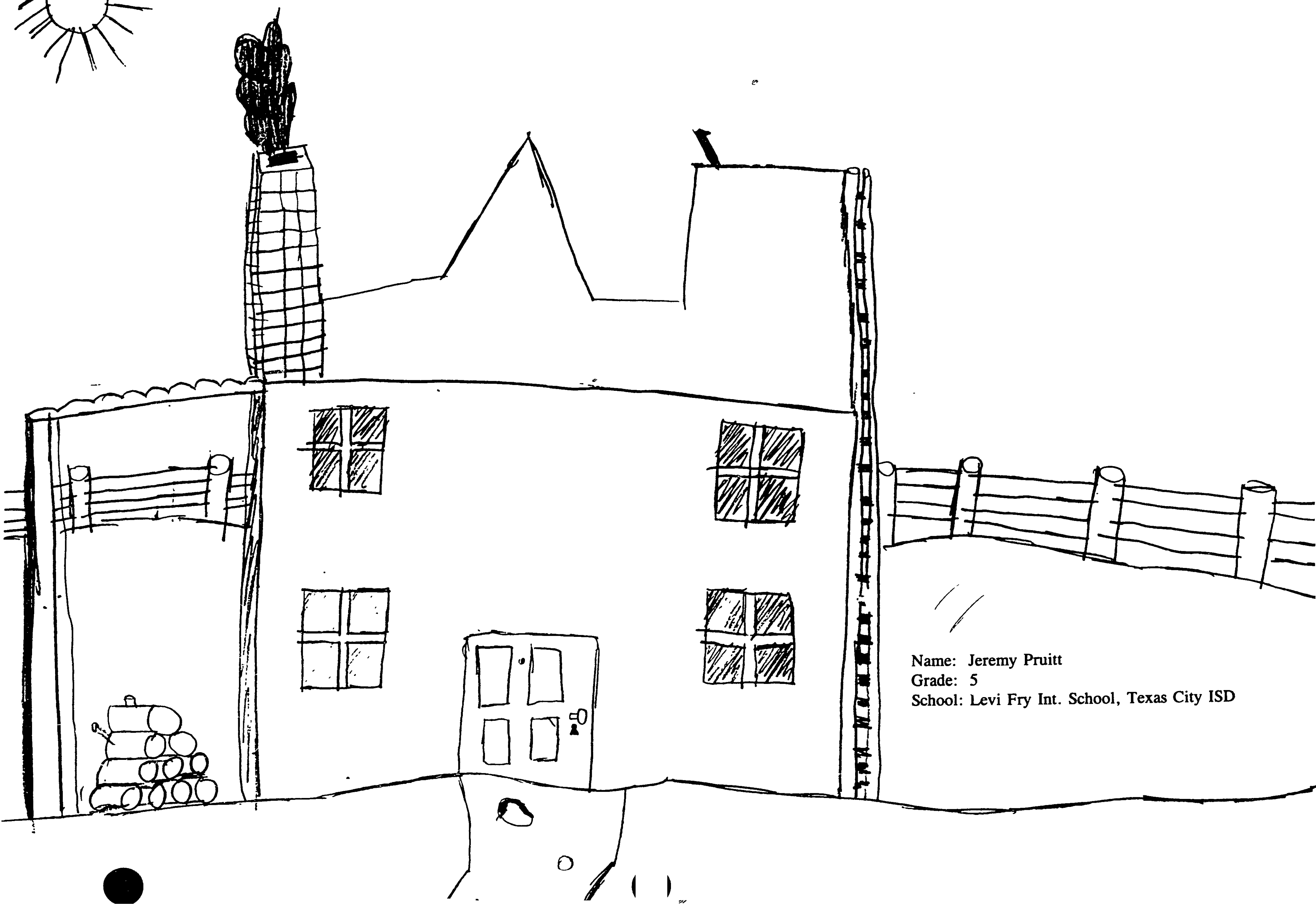

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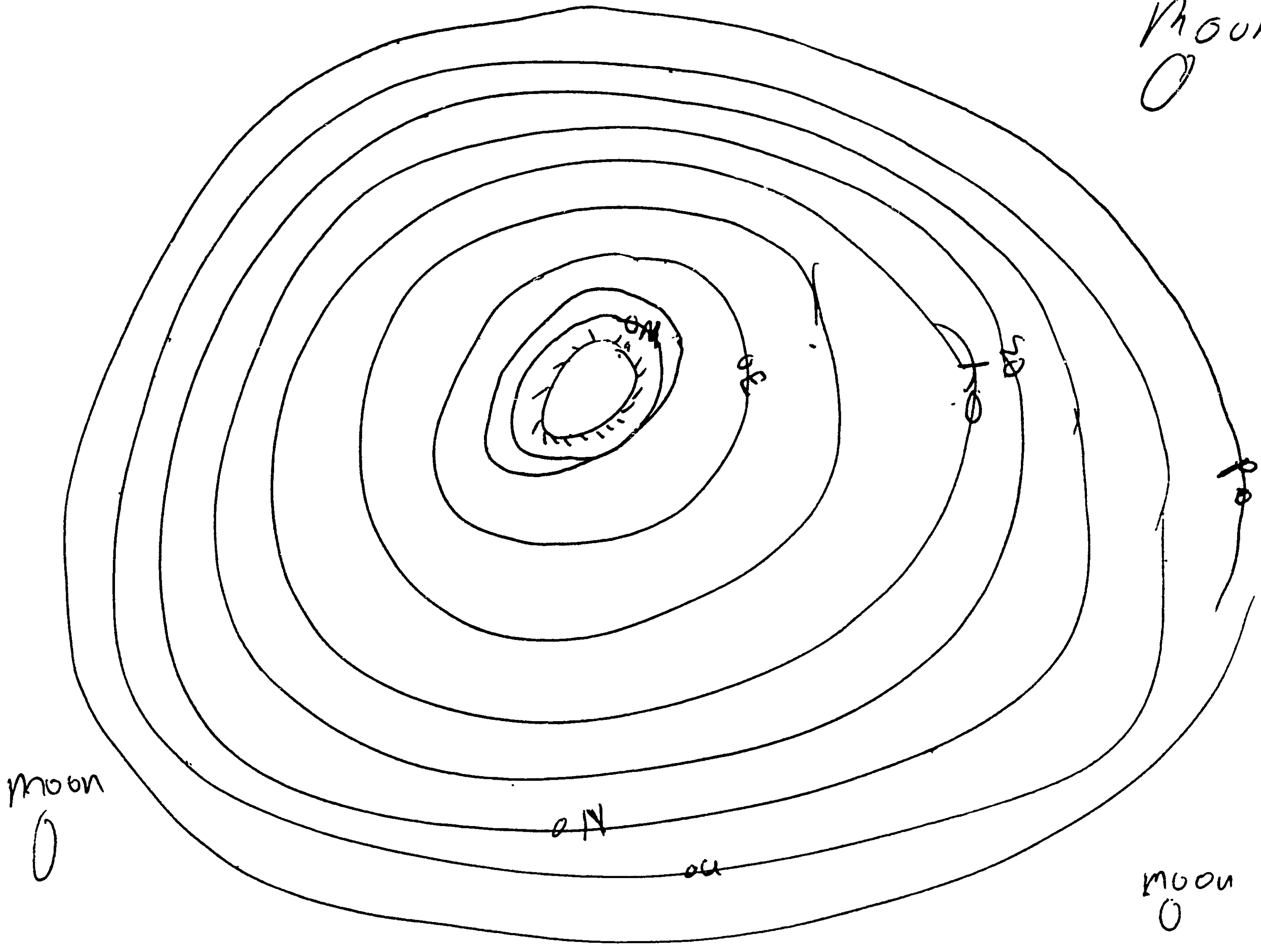

PROPOSED RULES

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

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

TITLE 4. AGRICULTURE

Part III. Texas Feed and Fertilizer Control Service

Chapter 61.

Labeling

• **4 TAC §61.21, §61.22**

The Feed and Fertilizer Control Service/Office of the Texas State Chemist proposes amendments to §61.21 and §61.22, concerning Labeling of Commercial Feed. The amendment is being proposed to update feed labels to be consistent with those approved by the Association of American Feed Control Officials.

Dr. George W. Latimer, Jr., state chemist, Office of the Texas State Chemist, has determined that there will be no fiscal implications on state and local governments for the first five year period.

There will be an effect on small businesses. The cost of compliance with the rule will be from preparing new label designs and plates.

There will be no difference in the cost of compliance for small businesses versus large business.

Dr Latimer has determined that for each year of the first five years the rule as proposed is in effect the public benefits anticipated as a result of enforcing the rule as proposed will be a clearer, more descriptive label which will allow the purchaser to make more informed decisions; to comply with standard label formats being adopted by other states so that Texas manufacturers can sell in non-Texas markets; a need to comply with new net weight requirements

The possible economic cost to persons who are required to comply with the rule as proposed will be preparation of new plates; removal of product with obsolete labels still in field. These costs differ for each registrant so that neither individual nor aggregate costs can be estimated; however, changes required to meet this new standard should be a one-time cost. To minimize transition costs, the Feed and Fertilizer Control Service has conducted numerous seminars and has and will supply advice to all firms marketing products in Texas. Additionally, the Service proposes a two-step phase by requiring labels for new products submitted for approval to conform to the new standard beginning on January 1, 1995; requiring all products with old style labels to be removed from the marketplace by December 31, 1995.

Comments on the proposal may be submitted to Dr. George W. Latimer, Jr., State Chemist, Office of the Texas State Chemist, P.O. Box 3160, College Station, Texas 77841-3160.

The amendment is proposed under Texas Agriculture Code, Chapter 141, §141. 004 which provides the Feed and Fertilizer Control Service with the authority to adopt rules relating to the distribution of commercial feeds.

The Texas Agriculture Code, Chapter 141, Subchapter C (Texas Commercial Feed Control Act) is affected by these amendments.

§61.21. General Label Restrictions.

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

(c) A trademark or trade name may form part of the labeling of a commercial feed provided that:

(1) (No change.)

(2) the display of the trademark or trade name is **no more** [not unduly] conspicuous **than** [in relation to] the display of the name of the registrant or guarantor of the product or other required information, **i.e., its style, size and color of print makes it no more likely to be read than the accompanying/surrounding word(s), statement(s) or other required information.**

(d)-(e) (No change.)

§61.22. Labeling of Commercial Feed. Commercial feed shall be labeled with the information prescribed in the Texas Commercial Feed Control Act (Act) and this **chapter** [part] on the principal display panel of the product with the following general format, unless otherwise specifically provided.

(1) Purpose Statement.

(A) A statement of purpose (unless exempted in accordance with paragraph (4)(E) of this section shall contain the specific species and animal class(es) for which the feed is intended.

(B) The manufacturer shall have flexibility in describing in more specific and common language the defined animal class, specie and purpose while being consistent with the category of animal class defined in the AAFCO Model Feed Bill, Regulation 3(a)(4), which may include, but is not limited to, including the weight range(s), sex or ages of the animal(s) for which the feed is manufactured.

[(1) Net Weight

[(A) Packages, dry, and liquid bulk shall be determined directly from scales or for bulk liquids only as calculated from volume and specific gravity/density.

[(B) Conformance to weight guarantee shall be judged solely by use of certified scale defined in accordance with Texas Department of Agriculture standards.

[(C) Dip-sticks, uncertified/uncalibrated meters, or sight gauges shall not be used to estimate volume. Scales not certified in accordance with the Texas Department to Agriculture standards shall not be used for net weights.]

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

(4) Guaranteed analysis of the feed:

(A) The guaranteed analysis of the feed shall include the following items in the following order **crude protein, non-protein nitrogen, amino acids, crude fat, crude fiber, acid detergent fiber, calcium, phosphorus, salt and sodium** [,] unless exempted in accordance with subparagraph (E) of this paragraph.

(i)-(iv) (No change.)

(v) The guarantees for minerals shall be expressed as follows.

(I) Commercial feeds containing [a total of 6.5% or more] calcium, phosphorus and/or salt shall include a guaranteed analysis of the following minerals in the following order:

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

(-c-) minimum and maximum percentages of salt (NaCl), when required [if added]; and

(-d-) (No change.)

(II)-(IV) (No change.)

(vi) The guarantees for vitamins shall be expressed as follows.

(I) If made, guarantees for minimum vitamin content of commercial feeds and feed supplements shall be stated on the label in milligrams per pound of feed, except that:

(-a-) vitamin A, other than precursors of vitamin A, shall be stated in international [or USP] units per pound;

(-b-) (No change.)

(-c-) vitamin D, for other uses, shall be stated in terms of international [or USP] units per pound;

(-d-) vitamin E shall be stated in international [or USP] units per pound;

(-e-)-(-f-) (No change.)

(II) (No change.)

(vii) The analysis shall include the **minimum percentage** total sugars as invert on products being sold for their molasses content or products containing more than 16% sugars.

(viii) (No change.)

(ix) Microorganisms need not be guaranteed when the commercial feed is intended for a purpose other than to furnish these substances and no other specific label claims are made. When guaranteed, the units shall be colony forming units (CFU) per gram if directions for use are in grams or in CFU per pound when directions for use are in pounds. **A parenthetical statement following guarantee shall list each species in order of predominance.**

***(x)* Other required and voluntary guarantees should follow in a general format such that the units of measure used to express guarantees (percentage, parts per million, international units, etc.) are listed in a sequence which provides a consistent grouping of the units of measure.**

(B)-(D) (No change.)

(E) Exemptions are as follows.

(i)-(iv) (No change.)

***(v)* The purpose statement may be excluded from the label if the product name includes a description of the species and animal class(es) for which the product is intended.**

***(vi)* A mineral guarantee is not required when the feed is intended or represented for zoo and/or laboratory animals and contains less than 6.5% minerals.**

(5) (No change.)

(6) Directions for use and cautionary statements.

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

(C) Feeds containing urea or other non-protein nitrogen products.

(i) All mixed feeds containing urea or other non-protein nitrogen products **except those which comply with clause (iv) of this subparagraph** shall have included on their label:

(I)-(III) (No change.)

(ii)-(iv) (No change.)

(D) (No change.)

(7) (No change.)

(8) Net Weight.

(A) Net weight must be expressed both in English and in SI units

***(i)* when the net weight is expressed in pounds, the corresponding SI units shall be in kilograms and vice-versa;**

***(ii)* when the net weight is expressed in ounces, the corresponding SI units shall be in grams;**

***(iii)* any fractional number which arises expressing the net weight in both systems shall be limited to two decimal places and the number rounded down.**

(B) Measurement

***(i)* Packages, dry and liquid bulk shall be determined directly from scales or for bulk liquids only as calculated from volume and specific gravity/density.**

***(ii)* Conformance to weight guarantee shall be judged solely by use of certified scale defined in accordance with Texas Department of Agriculture standards.**

***(iii)* Dip-sticks, uncertified/uncalibrated meters or sight gauges shall not be used to estimate volume. Scales not certified in accordance with the Texas Department of Agriculture standards shall not be used for net weights.**

***(iv)* Net weights shall meet both the English and SI statements on the label.**

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 College Station, Texas, on November 1, 1994.

TRD-9450329

George W. Latimer, Jr.
Texas State Chemist
Texas Feed and Fertilizer Control Service

Earliest possible date of adoption: December 16, 1994

For further information, please call: (409) 845-1121

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Chapter 63. Pet Food

• 4 TAC §§63.1-63.9, 63.20

The Office of the Texas State Chemist/Texas Feed and Fertilizer Control Service proposes amendments to §§63.1-63.5 and §63.7 and new §63.6, §63.8-63.9 and §63.20, concerning Pet Food Rules. Section 141.004 TAC requires that "to the extent practicable, rules that define and establish minimum standards for commercial feed must be in harmony with the Official Standards of the Association of American Feed Control Officials." After discussion with the pet food industry, the Association has substantially changed its standards as expressed in its model bill. These amendments reflect those changes differing only where Texas precedent and long-standing practice would not make change practical.

Dr. George W. Latimer, Jr., state chemist, has determined that for the first five year period the rules are in effect, there will not be fiscal implications for state or local government as a result of enforcing or administering the section.

Dr. Latimer also has determined that for the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the section as proposed will be to enable Texas manufacturers to compete with other manufacturers from other states in the marketplace. There is no anticipated economic cost to persons who are required to comply with the section as proposed because

most pet food manufacturers are already complying.

Comments on the proposal may be submitted to Dr. George W. Latimer, Jr., Office of the Texas State Chemist, P.O. Box 3160, College Station, Texas 77841-3160.

The amendments and new sections are proposed under Texas Agriculture Code 141, §141.004 which provides Texas Feed and Fertilizer Control Service with the authority to adopt rules relating to the distribution of commercial feeds.

The Texas Agriculture Code, Chapter 141, Subchapter C (Texas Commercial Feed Control Act) is affected by these amendments.

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

AAFCO Nutritional Task Force-The Nutritional Task Force appointed by the Association of American Feed Control Officials (AAFCO).

AAFCO Dog and Cat Food Nutritional Profiles-Practical standard nutrient profiles for dog and cat foods based on commonly used ingredients.

Immediate container-means the unit, can, box, tin, bag or other receptacle or covering in which a pet food is displayed for sale to retail purchasers, but does not include containers used as shipping containers.

Information panel-Information panel as defined by 21 Code of Federal Regulation **§501.2** [§501.1].

Ingredient Statements-means a collective and contiguous listing on the label of the ingredients of which the pet food is composed.

National Research Council-The National Research Council of the National Academy of Sciences.

Principal display panel-Principal display panel as defined by 21 Code of Federal Regulation **§501.1** [§501.2].

Quantity Statement-means the net weight (mass), net volume (liquid or dry) or count.

§63.2. Label Format and Labeling.

(a) The **quantity statement** [of net content] and product name must be shown on the principal display panel. All other required information may be placed elsewhere on the label but shall be sufficiently conspicuous as to render it easily read by the average purchaser under ordinary conditions of purchase and sale.

(b) The **quantity statement** [declaration of the net content] shall be made in conformity with the United States Fair Packaging and Labeling Act, 15 United States Code §1451, et seq, and the regulations promulgated thereunder **and if not in units of net weight, the manufacturer shall have:**

(1)-(2) (No change.)

(c) The information which is required to appear in the "Guaranteed Analysis" shall be listed in the following order:

(1) crude protein (minimum **percentage** [amount]);

(2) crude fat (minimum **percentage** [amount]);

(3) crude fiber (maximum **percentage** [amount]);

(4) moisture (maximum **percentage** [amount]);

(5) (No change.)

(d)-(k) (No change.)

(l) The label of a pet food shall not contain an unqualified representation or claim, directly or indirectly, that the pet food therein contained or a recommended feeding thereof, is or meets the requisites of a complete, perfect, scientific, or balanced ration for dogs or cats unless such product or feeding:

(1) contains ingredients in quantities sufficient to **meet** [provide] the [estimated] nutrient requirements for all life stages [of the life of a dog or cat] **established by the AAFCO Dog or Cat Food Nutrient Profiles**, as the case may be, **or some other FFCS-recognized authority on animal nutrition** [which have been established by a recognized authority on animal nutrition,] such as the Committee on Animal Nutrition of the National Research Council [provided however, that] to the extent that the product's ingredients provide nutrients in amounts which substantially deviate from those nutrient requirements estimated by such a recognized authority on animal nutrition, or in the event that no estimation has been made by a recognized authority on animal nutrition of the requirements of animals for one or more stages of said animals' lives, the product's represented capabilities in this regard must have been demonstrated by adequate testing; or

(2) contains a combination of ingredients which when fed to a normal animal as the only source of nourishment **in accordance with the testing procedures established by AAFCO, meets the criteria of such testing procedures for all life stages** [will provide satisfactorily for fertility of females, gestation and lactation, normal growth from weaning to maturity without supplementary feeding, and will maintain the normal weight of an adult animal whether working or at rest and has its capabilities in this regard demonstrated by adequate testing].

(m) Labels for products which are compounded for or which are suitable for only a limited purpose (i.e., a product designed for the feeding of puppies) may contain representations that said pet food product or recommended feeding thereof, is or meets the requisites of a complete, perfect, scientific, or balanced ration for dogs or cats only:

(1) (No change.)

(2) such qualified representations may appear on pet food labels only if:

(A) the pet food contains ingredients in quantities sufficient to **meet** [satisfy] the [estimated] nutrient requirements established by **the AAFCO Dog or Cat Food Nutrient Profiles, as the case may be, or some other FFCS-recognized authority on animal nutrition,** [a recognized authority on animal nutrition,] such as the Committee on Animal Nutrition of the National Research Council for such limited or qualified purpose; or

(B) (No change.)

(n) Except as specified by §63.3(c), of this title (relating to Brand and Product Names), the name of any ingredient which appears on the label other than in the product name shall not be given undue emphasis so as to create the impression that such an ingredient is present in the product in a larger amount than is the fact, **the aforementioned ingredient shall constitute at least 3.0% of the total ingredients (exclusive of water for processing) when preceded by the designation "with" or like term, the name shall be in the same size, style and color print**, and if the names of more than one such ingredient are shown, they shall appear in the order of their respective predominance by weight in the product.

(o) The label of a dog or cat food, other than one prominently identified as a snack or treat as part of the designation required upon the principal display panel under subsection (k) of this section, shall bear, on either the principal display panel or the information panel, in type of a size reasonably related to the largest type on the panel, a statement of the nutritional adequacy or purpose of the product. Such statement shall consist of one of the following:

(1) a claim that the pet food meets or exceeds the requirements of one or more of the recognized categories of nutritional adequacy: gestation, lactation, growth, maintenance, and complete for all life stages as those categories are set forth in subsections (l) and (m) of this section[;]. **The claim shall be stated as one of the following:**

(A) (Name of Product) is formulated to meet the nutritional levels established by the AAFCO Dog (or Cat) Food Nutrient Profiles for. (Blank is to

be completed by using the stage or stages of the pet's life, such as gestation, lactation, growth, maintenance, or the words "All Life Stages.")

(B) Animal Feeding tests using AAFCO procedures substantiates that (name of product) provides complete and balanced nutrition for. (Blank is to be completed by using the stage or stages of the pet's life tested, such as gestation, lactation, growth, maintenance or the words "All Life Stages.")

(2) (No change.)

(3) the statement: "Use only as directed by your veterinarian," if it is a pet [dietary animal] food product intended for use by, or under the supervision or direction of, a veterinarian **and shall make a statement in accordance with paragraph (1) or (4) of this subsection.**

(4) (No change.)

(p) The use of claims on pet food labels stating improvement or newness shall be sufficiently substantiated by the manufacturer and limited to six months production. The use of claims stating preference or comparative attribute claims shall be sufficiently substantiated by the manufacturer and limited to one year production after which the claim must be removed or resubstantiated.

(q) Dog and cat foods labeled as complete and balanced for any or all life's stages as provided in subsection (o)(1) of this section except those pet foods labeled in accordance with subsection (o)(3) of this section shall list feeding directions on the product label. These directions shall be expressed in common terms and shall appear prominently on the label. Feeding directions shall, at a minimum state "Feed (weight/unit of product) per (weight unit) of dog (or cat)."

§63.3. Brand and Product Names.

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

(f) When an ingredient or combination of ingredients [derived from animals, poultry, or fish] constitutes at least 25% but less than 95% of the total weight of all ingredients of a **dog or cat** [pet] food mixture, the name or names of such ingredient(s) may form a part of the product name of the pet food **if each of the ingredients constitute at least 3.0% of the product weight excluding water used for processing and** only if the product name also includes a primary descriptive term such as **"dinner," "platter, " or similar designation** ["meatballs" or "fishcakes"] so that the product name describes the contents of the product in accordance with an established law, custom, or usage or so that the product name is not misleading. **If the names of more than one such ingredient are shown, they shall appear in the order of their respective predominance by weight in the product.** All such ingredient names and primary descriptive terms shall be in the same size, style, and color print. For the purpose of this provision, water sufficient for processing shall be excluded when calculating the percentage of the named ingredient(s). However, such named ingredient(s) shall constitute at least 10% of the total product.

(g) (No change.)

§63.4. Expression of Guarantees.

(a) (No change.)

(b) **Pursuant to Texas Commercial Feed Control Act, §141.002(d), the** [The] label of a pet food which is formulated as and represented to be a mineral [additive] supplement shall include in the guaranteed analysis the minimum and maximum percentages of calcium, the minimum percentage of phosphorus, and the minimum and maximum percentages of salt. The minimum content of all other essential nutrient elements recognized by the **AAFCO Dog or Cat Food Nutrient Profile or FFCS-recognized nutrient profile** [National Research Council] from sources declared in the ingredients statement shall be expressed as the element in units specified in the **recognized nutrient profile** [of measurement established by a recognized authority on animal nutrition such as the National Research Council]. **Products labeled as per §63.2(b) of this title (relating to Label Format and Labeling) may express the mineral guarantees in milligrams (mg) per unit (e.g., tablets, capsules, granules or liquids) consistent with those employed in the quantity statement and directions for use. Liquids expressed as volume must also list a weight equivalent (e.g., 1 fluid ounce = 28 grams).**

(c) The label of pet food which is formulated as and represented to be a vitamin supplement, shall include a guarantee of the minimum content of each vitamin declared in the ingredients statement. **Vitamin guarantees shall be expressed as per subsection (d) of this section. Products labeled as per §63.2(b) of this title (relating to Label Format and Labeling) may express the vitamin guarantees in approved units per unit (e.g., tablets, capsules, granules or liquid) consistent with those employed in the quantity statement and directions for use. Liquids expressed as volume must also list a weight equivalent (e.g., 1 fluid ounce = 28 grams).** [Such guarantees shall be stated in units of measurements established by a recognized authority on animal nutrition such as the National Research Council.]

(d) Vitamins guaranteed on pet food labels shall be stated in international units per kilogram (IU/kg) for vitamins A, D, and E. All other vitamins shall be guaranteed in milligrams per kilogram (mg/kg) except vitamins which may be guaranteed in micrograms per kilogram (mcg/kg) [The vitamin potency of pet food products distributed in containers smaller than one pound may be guaranteed in approved units per ounce].

(e) If the label of a pet food does not represent the pet food to be either a vitamin or a mineral supplement, but does include a table of comparison of a typical analysis of the vitamin, mineral, or nutrient content of the pet food with levels recommended by **an AAFCO-recognized** [a recognized] animal nutrition authority, such comparison may be stated in the units of measurement used **in the AAFCO Dog or Cat Food Nutrient Profiles** [by the recognized authority on animal nutrition such as the National Research Council]. The statement in a table of comparison of the vitamin, mineral or nutrient content shall constitute a guarantee, but need not be repeated in the guaranteed analysis. Such table of comparison may appear on the label separate and apart from the guaranteed analysis.

(f) The use of percentages or words of similar import when referring to nutrient levels established by the AAFCO Dog or Cat Food Nutrient Profile or other recognized nutrient profile shall not be permitted on pet food labels except that such direct comparisons in whole or part of the individual nutrient contents of a pet food with those recommended by the recognized nutrient profile may be made where the comparisons are expressed in the same quantitative units as those used by the cited nutrient profile and

(1) the product in question meets the nutrient profile recommended by the authority; and

(2) the comparison is prescribed by a statement to that effect.

§63.6. Directions for Use. The label of a pet food product which is suitable only for intermittent or supplemental feeding or for some other limited purpose shall:

(1) (No change.)

(2) contain specific feeding directions which clearly state that the product should be used only in conjunction with other foods.

§63.7. Drugs and Pet Food Additives.

(a) (No change.)

(b) Prior to approval of a registration application and approval of a label for pet food which contains additives (including drugs, other special purpose additives, or nonnutritive additives), the distributor may be required to submit evidence to prove the safety and efficacy of the pet food, when used according to directions furnished on the label. Satisfactory evidence of the safety and efficacy of a pet food may be:

(1) when the pet food contains such additives, the use of which conforms to the requirements of the applicable regulation in the C.F.R., Title 21, or which are "prior sanctioned" or "generally recognized as safe" for such use; or

(2) when the pet food itself is a drug and is generally recognized as safe and effective for label use or is marketed subject to an application approved by the Food and Drug Administration under Title 21 United States Code **§360(b)** [§355 or §357].

(c) (No change.)

§63.8. Application for Registration.

(a) Each brand and product name of a pet food must be registered before it may be distributed.

(b) All labeling information shall be submitted with the application for registration.

(c) The Service may require the applicant to present evidence of authorization to use a registered trademark or other labeling reference as a condition for registration and that the ownership of such trademark, if referenced, appear inconspicuously both as to size or type and location on the label (or labeling) and that components of such trademark product be determinable by laboratory methods.

(d) The net weight shall be provided as a condition for registration of specialty products packaged and marketed in containers weighing one pound or less whose quantity statement is declared in conformance with §63.2(b) of this title (relating to Label Format and Labeling).

§63.9. Statement of Caloric Content. The label of a dog or cat food may bear a statement of caloric content, provided:

(1) The statement shall be separate and distinct from the "Guaranteed Analysis" and shall appear under the heading "Caloric Content"; and

(2) The statement shall be measured in terms of metabolizable energy (ME) on as fed basis and must be expressed as "kilocalories per kilogram" ("kcal/kg") of product, and may also be expressed as kilocalories per familiar household measure (e.g., cans, cups, pounds): and

(3) An affidavit shall accompany the request for label review or registration, substantiating that the caloric content was determined:

(A) by calculation using the following "Modified Atwater" formula: ME (kcal/kg) = 10 (3.5 x CP) + (8.5 x CF) + (3.5 x NFE) where CP = % crude protein as fed CF = % crude fat as fed NFE = % nitrogen-free extract (carbohydrate) as fed and the percentages of CP and CF are the arithmetic averages from proximate and the percentages of CP and CF are the arithmetic averages from proximate analyses of at least four production batches of the product, and the NFE is calculated as the difference between 100 and the sum of CP, CF, and the percentages of crude fiber, moisture and ash (determined in the same manner as CP and CF). The results of all the analyses used in the calculation must accompany the affidavit, and the claim on the label or other labeling must be followed parenthetically by the word "calculated";

(B) in accordance with a testing procedure established by the Association of American Feed Control Officials. The summary data used in the determination of calorie content must accompany the affidavit. The value stated on the label shall not exceed or understate the value determined in accordance with paragraph (3)(A) of this section by more than 15%; and

(4) Comparative claims shall not be false, misleading or given undue emphasis and must be based on the same methodology for both products.

§63.20. Compliance with Texas Commercial Feed Rules. The Pet Food Rules are a subset of the Feed Rules issued under the authority of Texas Commercial Feed Act, §141.004; they do not replace them. Registrants are expected to comply with the applicable sections of those rules where the Pet Food Rules are silent.

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 College Station, Texas, on November 1, 1994.

TRD-9450338 George W. Latimer, Jr.
Texas State Chemist
Texas Feed and Fertilizer Control Service

Earliest possible date of adoption: December 16, 1994

For further information, please call. (409) 845-1121

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TITLE 16. ECONOMIC REGULATION

Part VI. Texas Motor Vehicle Commission

Chapter 105. Advertising

• 16 TAC §105.12, §105.26

The Texas Motor Vehicle Board proposes amendments to §105.12, concerning Advertising at Cost or Invoice, and §105.26 to track the amendments to the Consumer Leasing Act.

The proposed amendment to §105.12(b), prohibits the use of the terms "invoice" and "invoice price" in new motor vehicle dealer advertisements.

Section 105.26 is amended by adding subsection (b) which authorizes dealers, who advertise payment amount, number of payments or refer to down payments in a consumer lease, to disclose required information by means of a toll-free telephone number or reference to a written advertisement that is in general circulation in the community served by the radio station. The required information includes a declaration that the transaction is a lease, the total initial payment, if any, payment amounts and schedule along with a total of all payments, a declaration of whether the lease includes an option to purchase, and whether the consumer has any liability at the end of the lease and the amount, or the formula for determining the amount, of such liability.

Brett Bray, director, Motor Vehicle Division, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for the state or local government as a result of enforcing or administering the sections

Mr. Bray also has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the sections.

The suggested public benefit anticipated as a result of amending these provisions will be uniformity of Texas Motor Vehicle Board rules with Federal Judicial decrees that invoice advertising is inherently deceptive, and conformity with the Federal Community Development and Regulatory Improvement Act of 1994, which already authorizes the alternate methods of lease term disclosure that is contemplated by the proposed amendment. There will be no effect on small businesses and no anticipated economic cost to persons who are required to comply with the sections as proposed.

Comments on the proposal may be submitted to Brett Bray, Division Director, Motor Vehicle Division, Texas Department of Transportation, P.O. Box 2293, Austin, Texas 78768, (512) 476-3587. The deadline for comments is January 6, 1995.

The amendments are proposed under the Texas Motor Vehicle Commission Code, §3.06, which provides the Board with authority to adopt rules necessary and convenient to effectuate the provisions of the Act and to

govern practice and procedure before the agency.

Motor Vehicle Commission Code, §5.01(2) and §5.01(5), is affected by the proposed amendments.

§105.12. Advertising at Cost or Invoice.

(a) (No change.)

(b) The use of the term "invoice" or "invoice price" in advertising **shall not be used.** [must be in reference to the manufacturer's or distributor's total invoice price on a vehicle without dealer added accessories and services and such advertisement shall clearly and conspicuously include one of the following disclosures:

[(1) "The invoice may not represent actual dealer cost;" or

[(2) "Actual dealer cost may vary from invoice."]

§105.26. Payment Disclosures-Lease.

(a) An advertisement that promotes a consumer lease and contains any one of the following messages, statements or terms:

(1) the amount of any payment,

(2) the number of required payments; or

(3) a statement that any down payments or no down payment, or other payment, is required at the beginning of the lease must include the following:

(A) a statement that the transaction advertised is a lease;

(B) the total amount of any payment (such as security deposit or capitalized cost reduction) required at the beginning of the lease, or a statement that no such payment is required,

(C) the number, amounts, due dates or periods of scheduled payments, and the total of these payments under the lease;

(D) a statement explaining whether the customer has the option to purchase the leased property and, if so, at what time and price. The method of determining the price may be substituted for disclosure of the price; and

(E) a statement of the amount (or method of determining the amount) of any liabilities the lease imposes upon the customer at the end of the term. If the customer has this liability, the ad also must include a statement that the customer is responsible for any difference between the estimated value of the leased property and its realized value at the end of the lease term.

(b) An advertisement that promotes a consumer lease by a radio broadcast and includes any of the information in subsection (a)(1)-(3) of this section may disclose the information required in subsection (a)(3)(A)-(E) of this section by means of a referral to:

(1) a toll-free telephone number. The toll-free telephone number may be used by a consumer to obtain the information required in subsection (a)(A)-(E) of this section and the lessor who offers the consumer lease shall establish the toll-free telephone number not later than the date of the radio broadcast and the lessor must maintain the toll-free telephone number for not less than ten days, beginning on the date of the radio broadcast. The information shall be provided orally or, if requested by the consumer, in written form; or

(2) a written advertisement. The written advertisement must appear in a publication in general circulation in the community served by the radio station in which the advertisement is broadcast during the period beginning three days before the broadcast and ending ten days after the broadcast. The name and dates of the publication must be disclosed within the radio broadcast.

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

Issued in Austin, Texas, on November 8, 1994.

TRD-9450671 Diane L. Northam
Legal Executive Assistant
Texas Motor Vehicle Commission

Earliest possible date of adoption: December 16, 1994

For further information, please call: (512) 463-8630

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TITLE 19. EDUCATION

Part I. Texas Higher Education Coordinating Board

Chapter 1. Agency Administration

Subchapter B. Hearings and Appeals

• **19 TAC §1.22**

The Texas Higher Education Coordinating Board proposes an amendment to §1.22, concerning Agency Administration (Hearings and Appeals). The amendments to the rules are necessary to implement the State Postsecondary Review Program (a federal program) and establish the guidelines under which the State Postsecondary Review Entity will review institutions of higher education in the state. The rules will guide the activities of the State Postsecondary Review Entity in its review of institutions of higher education. They will also establish the standards developed in consultation with affected schools.

Dr. Bill Sanford, Assistant Commissioner for Universities, has determined that for the first five-year period the rule is in effect that there will be fiscal implications as a result of enforcing the rule as proposed. At present the cost of operation of the SPRE is born by the federal government. The fiscal implications will be the cost on a public institution in preparing for a review. The following estimates are based on ten reviews of public institutions estimated at $600 each. Estimated additional cost for 1995 is $6, 000; for 1996-$6,000; for 1997-$6,000; for 1998-$6,000; and for 1999-$6,000. There will be no effect on local government for the first five-year period the rule will be in effect. The effect on small business is that this rule is promulgated under the authority of the Texas Tax Code, Title 2; therefore no analysis of the effect on small business is required. The cost compliance with the rule for small business will be contingent on the nature of non-compliance with the standards. For those institutions fully complying with federal regulations relating to Title IV, Higher Education Act (HEA) programs, additional cost of compliance with the new rules will be limited to the cost of assembling and copying documents requested for the reviews. Other institutions may be required to update their catalogs, improve building maintenance, increase financial strength or hire qualified administrative and instructional staff. The cost of compliance per hour of labor will vary by type of program the institution offers. Highly technical and mechanical programs may be more equipment intensive than other programs. Generally the cost of compliance for small business is expected to be approximately equal to the cost for large business, given the similar nature of programs.

Dr. Sanford 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 rules will eliminate fraud and abuse in Title IV, HEA programs, reduce loss resulting from high defaults in student loan program, and increase overall quality of education in the state. The possible economic cost to persons who are required to comply with the rule as proposed will be contingent on the degree of non-compliance with the standards. Refusal to bring an institution into compliance could result in the recommendation to terminate the institutions participation in Title IV, HEA programs.

Comments on the proposal may be submitted to Dr. Kenneth H. Ashworth, Commissioner of Higher Education, Texas Higher Education Coordinating Board, P. O. Box 12788, Austin, Texas 78711.

The amendment is proposed under 42 United States Code, §1099 a-1 and Texas Education Code, Chapter 61, §61.927, which provides the Texas Higher Education Coordinating Board with the authority to adopt rules concerning Agency Administration (Hearings and Appeals).

42 United States Code, §1099 a-1 and Education Code, Chapter 61, §61. 927 are also affected by these rules. There is also authority from federal regulations at 34 Code of Federal Regulations, Part 667.

§1.22. Scope and Purpose.

(a) This subchapter shall govern the proceedings in all contested cases before the board except contested cases arising under the SPRP program. Rules governing SPRP program are at Chapter 7 of this Title.

(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 November 8, 1994.

TRD-9450690 James McWhorter
Assistant Commissioner for Administration
Texas Higher Education Coordinating Board

Earliest possible date of adoption: December 16, 1994

For further information, please call: (512) 483-6160

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Chapter 7. State Postsecondary Review Program

Subchapter A. General Provisions

• 19 TAC §§7.1-7.5

The Texas Higher Education Coordinating Board proposes new §§7.1-7.5, concerning State Postsecondary Review Program (SPRE) (General Provisions). The new rules are necessary to implement the State Postsecondary Review Program (a federal program) and establish the guidelines under which the State Postsecondary Review Entity will review institutions of higher education in the state. The rules will guide the activities of the State Postsecondary Review Entity in its review of institutions of higher education. They will also establish the standards developed in consultation with affected schools.

Dr. Bill Sanford, Assistant Commissioner for Universities, has determined that for the first five-year period the rules are in effect that there will be fiscal implications as a result of enforcing the rules as proposed. At present the cost of operation of the SPRE is born by the federal government. The fiscal implications will be the cost on a public institution in preparing for a review. The following estimates are based on ten reviews of public institutions estimated at $600 each. Estimated additional cost for 1995 is $6, 000; for 1996-$6,000; for 1997-$6,000; for 1998-$6,000; and for 1999-$6,000. There will be no effect on local government for the first five-year period the rules will be in effect. The effect on small business is that these rules is promulgated under the authority of the Texas Tax Code, Title 2; therefore no analysis of the effect on small business is required. The cost compliance with the rules for small business will be contingent on the nature of non-compliance with the standards. For those institutions fully complying with federal regulations relating to Title IV, Higher Education Act (HEA) programs, additional cost of compliance with the new rules will be limited to the cost of assembling and copying documents requested for the reviews. Other institutions may be required to update their catalogs, improve building maintenance, increase financial strength or hire qualified administrative and instructional staff. The cost of compliance per hour of labor will vary by type of program the institution offers. Highly technical and mechanical programs may be more equipment intensive than other programs. Generally the cost of compliance for small business is expected to be approximately equal to the cost for large business, given the similar nature of programs.

Dr. Sanford 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 that the rules will eliminate fraud and abuse in Title IV, HEA programs, reduce loss resulting from high defaults in student loan program, and increase overall quality of education in the state. The possible economic cost to persons who are required to comply with the rules as proposed will be contingent on the degree of non-compliance with the standards. Refusal to bring an institution into compliance could result in the recommendation to terminate the institutions participation in Title IV, HEA programs.

Comments on the proposal may be submitted to Dr. Kenneth H. Ashworth, Commissioner of Higher Education, Texas Higher Education Coordinating Board, P. O. Box 12788, Austin, Texas 78711.

The new rules are proposed under 42 United States Code, §1099 a-1 and Texas Education Code, Chapter 61, §61.927, which provides the Texas Higher Education Coordinating Board with the authority to adopt rules concerning State Postsecondary Review Program (General Provisions).

42 United States Code, §1099 a-1 and Education Code, Chapter 61, §61. 927 are also affected by these rules. There is also authority from federal regulations at 34 Code of Federal Regulations, Part 667.

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

ALJ-Administrative Law Judge employed by the State Office of Administrative Hearings.

Academic year-

(A) A period that begins on the first day of classes and ends on the last day of classes or examinations and that is a minimum of 30 weeks (except as provided in 34 Code of Federal Regulations, §668.3) of instructional time during which for an undergraduate education program, a full-time student is expected to complete at least:

(i) twenty-four semester or trimester hours or 36 quarter hours in an educational program whose length is measured in credit hours; or

(ii) nine hundred clock hours in an educational program whose length is measured in clock hours.

(B) For purposes of this definition a week is a consecutive seven-day period. For an educational program using a semester, trimester, or quarter system or an educational program using clock hours, the Secretary considers a week of instructional time to be any work in which at least one day of regularly scheduled instruction, examination, or preparation for examinations occurs. For an educational program using credit hours but not using a semester, trimester, or quarter system, the Secretary considers a week of instructional time to be any week in which at least five days of regularly scheduled instruction, examinations, or preparation for examination occurs. Instructional time does not include periods of orientation, counseling, vacation, or other activity not related to class preparation or examinations.

Accredited-The status of public recognition which a nationally-recognized accrediting agency or association grants to an institution, school, or educational program which meets certain established qualifications and educational standards.

Act-The Higher Education Act of 1965, as amended.

Board-The Texas Higher Education Coordinating Board.

Board staff-Board-employed staff members or others who function as a part of the standards review team, peer review team, or other staff who have the responsibility of carrying out the functions of the State Postsecondary Review Program for the State of Texas.

Branch campus-A location of an institution that is geographically apart and independent of the main campus of the institution. The Secretary considers a location of an institution independent of the main campus if the location:

(A) is permanent in nature;

(B) offers courses in educational programs leading to a degree, certificate, or other recognized educational credential;

(C) has its own faculty and administrative or supervisory organization; and

(D) has its own budgetary and hiring authority.

Campus-based programs-Includes:

(A) the Federal Perkins Loan program (34 Code of Federal Regulations, Part 674);

(B) the Federal Work-Study (FWS) program (34 Code of Federal Regulations, Part 675); and

(C) the Federal Supplemental Educational Opportunity Grant (FSEOG) program (34 Code of Federal Regulations, Part 676).

Certify or certification-To attest to the truth in a signed document.

CIP-Classification of Instructional Programs-A manual published by the U.S. Department of Education, National Center for Education Statistics, that lists the codes, titles, and descriptions of educational programs used by institutions and States for reporting and analyzing education data at the national level. This manual can be obtained at the United States Department of Education, Outreach Division, OERI, 55 New Jersey Avenue, Northwest, Room 300, Washington, D.C. 20208.

Clock hour-A period of time consisting of:

(A) a 50-minute to 60-minute class, lecture, or recitation in a 60-minute period;

(B) a 50-minute to 60-minute faculty-supervised laboratory, shop training, or internship in a 60-minute period; or

(C) sixty minutes of preparation in a program of study by correspondence.

Cohort default rate-A percentage obtained by the formula defined in 34 Code of Federal Regulations, §668.17(e) and amended by the Student Right-to-Know Act of 1990, as amended.

Commissioner-The Commissioner of Higher Education, The Texas Higher Education Coordinating Board.

Completion rate-A percentage obtained by the formula defined in 34 Code of Federal Regulations, §668.8(f) and amended by the Student Right-to-Know Act of 1990, as amended.

Compliance guideline-The state-defined criteria for finding an institution to be conforming to the rules and regulations of the federal and state SPRE standards.

Conference-Proceeding to determine whether there was sufficient evidence to support a final report that finds an institution out of compliance with the Review Standards and which directs an institution to come into compliance with the Review Standards.

Conference officer-The individual appointed by the Board to preside over conferences.

Contested case-A proceeding in which the legal rights, duties, or privileges of a party are to be determined by the Board after an opportunity for adjudicative hearing. Control, controlling, controlled by, and under common control with-The possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract or otherwise.

Cost of attendance-An estimate of the student's educational expenses for a specific period of enrollment as prescribed in Part F, §472 of the HEA. It is generally the sum of tuition and fees, room and board, books and supplies, transportation, personal expenses, and if applicable, allowances for dependents and those expenses related to a specific disability.

Dependent student-Any student who does not qualify as an independent student (see Independent student).

Designated department official-An official of the U.S. Department of Education to whom the Secretary has delegated responsibilities indicated in this part.

Direct loan-A loan made under Title IV-E of the HEA after June 30, 1972, that does not satisfy the definition of Federal Perkins Loan.

Educational program-A legally authorized postsecondary program of organized instruction or study which leads to an academic or professional degree, vocational certificate, or other recognized educational credential.

Eligible institution-Includes:

(A) an institution of higher education, as defined in 34 Code of Federal Regulations, §600.4;

(B) a proprietary institution of higher education, as defined in 34 Code of Federal Regulations, §600.5; and

(C) a postsecondary vocational institution, as defined in 34 Code of Federal Regulations, §600.6.

Eligible program-An educational program provided by a participating institution in Title IV, HEA funds and satisfies other requirements contained in 34 Code of Federal Regulations, §668.8.

Enrolled-The status of a student who:

(A) has completed the registration requirements (except for the payment of tuition and fees) at the institution that he or she is attending; or

(B) has been admitted into an educational program offered predominantly by correspondence and has submitted one lesson, completed by him or her after acceptance for enrollment and without the help of a representative of the institution.

Factors of financial responsibility-Requirements prescribed in 34 Code of Federal Regulations, §668.15(b)(1)-(f)(3).

Fair and equitable refund policy-A refund policy of an institution or branch campus congruous with the requirements prescribed in 34 Code of Federal Regulations, §668.22(b).

Federal Consolidation Loan program-The loan program authorized by Title IV-B, §428C, of the HEA that encourages the making of loans to borrowers for the purpose of consolidating their repayment obligations, with respect to loans received by those borrowers while they were students, under the Federal Insured Student Loan (FISL) program as defined in 34 Code of Federal Regulations, Part 682, the Federal Stafford Loan, Federal PLUS (as in effect before October 17, 1986), Federal SLS, ALAS (as in effect before October 17, 1986), Federal Direct Student Loan, and Federal Perkins Loan programs, and under the Health Professions Student Loan (HPSL) program authorized by Subpart II of Part C of Title VII of the Public Health Service Act, for parent Federal PLUS borrowers whose loans were made after October 17, 1986, and for Higher Education Assistance Loans (HEAL) authorized by Subpart I of Part A of Title VII of the Public Health Services Act.

Federal Direct Student Loan (FDSL) program-The student loan program authorized on July 23, 1992, by Title IV-D of the HEA. Federal Direct PLUS loans and Federal Direct Stafford loans are made under this program.

Federal Family Educational Loan (FFEL) programs-The loan programs (formerly called the Guaranteed Student Loan Programs) authorized by Title IV-B of the HEA, including the Federal Stafford Loan, Federal PLUS, Federal SLS, and Federal Consolidation Loan programs, in which lenders use their own funds to make loans to enable students or their parents to pay the costs of the students' attendance at eligible institutions. Federal Stafford loans, Federal PLUS loans, Federal SLS loans, and Federal Consolidation loans are made under this program.

Federal Parent Loans for Undergraduate Students (PLUS) Loan program-The loan program authorized by Title IV-B, §428B of the HEA, that encourages the making of loans to parents of dependent undergraduate students. Before October 17, 1986, the Federal PLUS program also provided for making loans to graduate, professional, and independent undergraduate students. Before July 1, 1993, the Federal PLUS program also provided for making loans to parents of dependent graduate students. Federal PLUS loans are made under this program.

Federal Pell Grant program-The grant program authorized by Title IV-A-1 of the HEA.

Federal Perkins Loan program-The student loan program authorized by Title IV-E of the HEA after October 16, 1986. Loans made under this program are made to cover the cost of attendance for a period of enrollment beginning on or after July 1, 1987, to individuals who on July 1, 1987, had no outstanding balance of principal or interest owing on any loan previously made under Title IV-E of the HEA.

Federal Stafford Loan program-The loan program authorized by Title IV-B (exclusive of §§428A, 428B, and 428C) that encourages the making of subsidized Federal Stafford and unsubsidized Federal Stafford loans as defined in 34 Code of Federal Regulations, Part 682 to undergraduate, graduate, and professional students. Federal Stafford loans (subsidized and/or unsubsidized) are made under this program.

Federal Supplemental Educational Opportunity Grant (FSEOG) program-The grant program authorized by Title IV-A-2 of the HEA.

Federal Supplemental Loans for Students (SLS) program-The loan program (formerly called the ALAS program) authorized by Title IV-B, §428A, of the HEA that encourages the making of loans to graduate, professional, independent undergraduate, and certain dependent undergraduate students. Federal SLS loans are made under this program, but are no longer available as of July 1, 1993.

Federal Work-Study (FWS) program-The part-time employment program for students authorized by Title IV-C of the HEA.

Final determination-A written document sent to the institution and to the Secretary containing the Board's conclusion after affording notice and an opportunity for hearing relative to the institution's continued participation in Title IV, HEA programs.

Final report-The report of the Board's findings after reconsideration of the initial report based on evidence provided by an institution; or, if an institution fails to respond to the initial report within the time required by Board, the initial report becomes the final report the day after the expiration of the last day to file a response.

Full-time student-An enrolled student who is carrying a full-time academic workload (other than by correspondence) as determined by the institution under a standard applicable to all students enrolled in a particular educational program. The student's workload may include any combination of courses, work, research, or special studies that the institution considers sufficient to classify the student as a full-time student. However, for an undergraduate student, an institution's minimum standard must equal or exceed one of the following minimum requirements:

(A) 12 semester hours or 12 quarter hours per academic term in an educational program using a semester, trimester, or quarter system;

(B) 24 semester hours or 36 quarter hours per academic yearfor an educational program using credit hours but not using a semester, trimester, or quarter system, or the prorated equivalent for a program of less than one academic year;

(C) 24 clock hours per week for an educational program using clock hours;

(D) in an educational program using both credit and clock hours, any combination of credit and clock hours where the sum of the following functions is equal to or greater than one:

(i) for a program using a semester, trimester, or quarter system, number of credit hours per term/12 + number of clock hours per week/24;

(ii) for a program not using a semester, trimester, or quarter system, number of semester or trimester hours per academic year/24 + number of quarter hours per academic year/36 + number of clock hours per week/24;

(E) a series of courses or seminars that equal 12 semester hours or 12 quarter hours in a maximum of 18 weeks; or

(F) the work portion of a cooperative education program in which the amount of work performed is equivalent to the academic workload of a full-time student.

Graduation rate-For purposes of SPRP, graduation rate is the same as completion rate.

HEA-The Higher Education Act of 1965, as amended.

Hearing-A contested case proceeding at which all parties are given the opportunity to produce evidence, examine witnesses, and make argument.

Income Contingent Loan (ICL) program-The student loan program authorized by Title IV-D of the HEA prior to July 23, 1992.

Independent student-A student who qualifies as an independent student under §480(d) of the HEA.

Initial report-The first report of the findings of the Board staff after review of a referred institution.

Initiating official-The designated department official authorized to begin an emergency action under 34 Code of Federal Regulations, §668.83.

Institution-

(A) An institution of higher education as defined in 34 Code of Federal Regulations, §600.4;

(B) a proprietary institution of higher education as defined in 34 Code of Federal Regulations, §600.5; and

(C) a postsecondary vocational institution as defined in 34 Code of Federal Regulations, §600.6. The term also includes the governing board of any such entity.

Investigation-A close examination and systematic inquiry undertaken to discover facts and information regarding circumstances relevant to a student complaint.

Legally authorized-The legal status granted to an institution through a charter, license, or other written document issued by the appropriate agency or official of the State in which the institution is physically located.

Licensure examination pass rate-A percentage obtained by dividing the total number of students in a specific institution or branch campus who passed a licensing examination during the reporting year of January 1 through December 31 by the total number of students taking the licensing examination from that institution during that same period.

Limitation-A restriction of participation in the Title IV, HEA program for violations of provisions and regulations of the program. Limitation may include:

(A) a limit on the number or percentage of students enrolled in an institution who may receive Title IV, HEA program funds;

(B) a limit, for a stated period of time, on the percentage of an institution's total receipts from tuition and fees derived from Title IV, HEA program funds; or

(C) other conditions described in 34 Code of Federal Regulations,

§668.93 or by the Secretary of the U.S. Department of Education. Removal of a limitation cannot occur for at least 12 months from the effective date of the limitation.

NOICC-National Occupational Information Coordinating Committee. An agency jointly sponsored by the U.S. Departments of Education and Labor to facilitate comparisons between educational programs and related occupations and to provide information to State employment counseling services.

NOICC Master Crosswalk-A computerized database that shows the relationships among major occupational and educational systems used by the Federal government. This database can be obtained from the National Crosswalk Service Center, Iowa SOICC, 200 East Grand Avenue, Des Moines, Iowa 50309, (515) 242-4881.

National Defense Student Loan program-The student loan program authorized by Title II of the National Defense Education Act of 1958.

National Direct Student Loan (NDSL) program-The student loan program authorized by Title IV-E of the HEA between July 1, 1972, and October 16, 1986.

National Early Intervention Scholarship and Partnership (NEISP) program-The scholarship program authorized by Chapter 2 of Subpart 1 of Title IV-A of the HEA.

Nationally recognized accrediting agency or association-An agency or association that the Secretary has recognized to accredit or preaccredit a particular category or institution, school, or educational program in accordance with the provisions contained in 34 Code of Federal Regulations, Part 603. The Secretary periodically publishes a list of those nationally recognized accrediting agencies and associations in the *Federal Register*.

Nonprofit institution-An institution that:

(A) is owned and operated by one or more nonprofit corporations or associations, no part of the net earnings of which benefits any private shareholder or individual;

(B) is legally authorized to operate as a nonprofit organization by each State in which it is physically located; and

(C) is determined by the U.S. Internal Revenue Service to be an organization to which contributions are tax deductible in accordance with §501(c)(3) of the Internal Revenue Code.

One-third of an academic year-A period that is at least one-third of an academic year as determined by an institution. At a minimum, one-third of an academic year must be a period that begins on the first day of classes and ends on the last day of classes or examinations and is a minimum of ten weeks of instructional time during which, for an undergraduate educational program, a full-time student is expected to complete at least eight semester or trimester hours or 12 quarter hours in an educational program whose length is measured in credit hours or 300 clock hours in an educational program whose length is measured in clock hours. For an institution whose academic year has been reduced under 34 Code of Federal Regulations, §668.3, one-third of an academic year is the prorated equivalent, as measured in weeks and credit or clock hours, of at least one-third of the institution's academic year.

One-year training program-An education program that is at least:

(A) 24 semester or trimester hours or units, or 36 quarter hours or units, at an institution using credit hours or units to measure academic progress;

(B) nine hundred clock hours of supervised training at an institution using clock hours to measure academic progress; or

(C) nine hundred clock hours in a program of study by correspondence.

Ownership or ownership interest-A legal or beneficial interest in an entity, or a right to share in the profits derived from the operation of an entity. This does not include the interests of a mutual fund that is regularly and publicly traded, of an institutional investor, or of a profit-sharing plan in which all employees of an entity may participate.

Participating institution-An eligible institution that meets the standards for participation in Title IV, HEA programs in Subpart B, and has a current program participation agreement with the Secretary.

Party-Each person or agency named or admitted as a party to a hearing.

Peer review-Review conducted by the peer review team of the content and quality of the educational programs offered by a referred institution

Peer review team-The group of individuals with which the Board contracts to perform a peer review of a referred institution.

Placement rate-A percentage obtained by the formula defined in 34 Code of Federal Regulations, §668.8(g), as amended by the Student Right-to-Know Act of 1990, as amended. Generally, it is determined by dividing the total number of students who obtained gainful employment in the recognized occupation for which they were trained by the total number of students who completed the training.

Preaccredited-A status that:

(A) a nationally recognized accrediting agency or association, recognized by the Secretary to grant that status, has accorded an unaccredited public or private nonprofit institution that is progressing toward accreditation within a reasonable period of time; and

(B) the Secretary determines is the exclusive indication under §435(b)(5)(A) and 1201(a)(5)(A) of the HEA that an institution will meet the accreditation standards of a nationally recognized accrediting agency or association within a reasonable time.

Presidential Access Scholarship (PAS) program-The scholarship program authorized by Chapter 3 of Subpart 1 of Title IV-A of the HEA.

Professional program-An undergraduate or graduate educational program that:

(A) is listed in the CIP; and

(B) prepares individuals for an occupation, if that occupation:

(i) requires at least a bachelor's degree to qualify for entry;

(ii) involves the independent practice or application of a defined or organized body of competencies that is unique to the occupation; and

(iii) is formally recognized and regulated under a national or State licensure, accreditation, or permit system.

Program of study by correspondence-An educational program offered principally by mail by an institution. Under this type of program, the institution prepares lesson materials and mails them to the student in a sequential and logical order. The student completes the lessons and mails them back to the institution within a specified period of time. The program may include a required period of residential training.

Recognized equivalent of a high school diploma-

(A) A General Education Development (GED) Certificate, or

(B) a State certificate received by a student after the student has passed a State authorized examination which the State recognizes as the equivalent of a high school diploma.

Recognized occupation-An occupation that is:

(A) listed in an occupational division of the latest edition of the Dictionary of Occupational Titles, published by the U.S. Department of Labor; or

(B) determined by the Secretary in consultation with the Secretary of Labor to be a recognized occupation.

Records-A collection of items of information treated as a unit.

Referral-A recommendation by the Secretary or by the Board that an institution be reviewed to determine compliance with review standards.

Referred institution-An institution that:

(A) the Secretary has referred to the Board for review; or

(B) the Board has selected for review.

Regular student-A person who is enrolled or accepted for enrollment at an institution for the purpose of obtaining a degree, certificate, or other recognized educational credential offered by that institution.

Resolution-A recommended course of action or response made subsequent to an investigation of a student complaint.

Review-An evaluation of a referred institution conducted by the standards review or peer review team using the review standards contained in this Chapter

Review standards-The performance measures upon which referred institutions shall be evaluated by the standards review team.

SOAH-The Texas State Office of Administrative Hearings.

SPRE-The Texas Higher Education Coordinating Board in its capacity as the State Postsecondary Review Entity.

SPRP-The State Postsecondary Review Program, as regulated by the federal government in 34 Code of Federal Regulations, Part 667, which implements the program that is the subject of this Chapter.

SPRP coordinator-The individual designated by the institution to serve as the SPRP agent and contact for the institution.

Secretary-The U.S. Secretary of Education.

Six-hundred hour course or Six-month training program-See Two-thirds of an academic year

SOICC (also referred to as the state-verified NOICC) -Texas State Occupational Information Coordinating Committee.

Standards of administrative capability-Requirements prescribed in 34 Code of Federal Regulations, §668.16(a)-(n), as amended by the Student Right-to-Know Act of 1990, as amended.

Standards review team-Those individuals appointed to conduct reviews of referred institutions based on the standards set forth at Subchapter C.

State-A State of the Union, American Samoa, the Commonwealth of Puerto Rico, the District of Columbia, Guam, the Trust Territories of the Pacific Islands, the Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

State Student Incentive Grant (SSIG) program-The grant program authorized by Title IV-A-3 of the HEA.

Student Right-to-Know Act of 1990-Student Right-to-Know and Campus Security Act of 1990 (Public Law 101-542, amended by Public Law 102-26) and appropriate federal regulations.

Suspension-Suspension removes an institution's participation in Title IV, HEA programs for a period not to exceed 60 days, unless a limitation or termination proceeding has begun. Suspension actions are used when a school can be expected to correct a program violation in a short time.

Termination-A termination ends an institution's participation in the Title IV, HEA programs Additional prohibitions include making new commitments for funds, providing guarantee commitments, or disbursing funds Reinstatement cannot occur for at least 18 months, even if the school changes ownership.

Title IV, HEA program-Any student financial assistance program authorized by Title IV of the Higher Education Act of 1965, as amended Title IV, HEA programs include·

(A) the Federal Pell Grant program;

(B) the National Early Intervention Scholarship and Partnership program (NEISP),

(C) the Presidential Access Scholarship program (PAS);

(D) the Federal Supplemental Educational Opportunity Grant (FSEOG) program;

(E) the State Student Incentive Grant (SSIG) program,

(F) the Federal Stafford Loan program,

(G) the Federal Supplemental Loans for Students (SLS) program;

(H) the Federal Parent Loans to Undergraduate Students (PLUS) program;

(I) the Federal Consolidation Loan program;

(J) the Federal Work-Study (FWS) program;

(K) the Federal Direct Student Loan (FDSL) program; and

(L) the Federal Perkins Loan program

Two-thirds of an academic year-A period that is at least two-thirds of an academic year as determined by an institution. At a minimum, two-thirds of an academic year must be a period that begins on the first day of classes and ends on the last day of classes or examinations and is a minimum of 20 weeks of instructional time during which, for an undergraduate educational program, a full-time student is expected to complete at least 16 semester or trimester hours or 24 quarter hours in an educational program whose length is measured in credit hours or 600 clock hours in an educational program whose length is measured in clock hours. For an institution whose academic year has been reduced under §668 3, two-thirds of an academic year is the prorated equivalent, as measured in weeks and credit or clock hours, of at least two-thirds of the institution's academic year

Undergraduate-A regular student who is enrolled in an undergraduate course of study and who has not earned a baccalaureate or first professional degree (degrees offered by professional programs)

Vocational program-An educational program, below the bachelor's level, designed to prepare individuals with the skills and training required for employment in a specific trade, occupation, or profession related to the educational program.

Withdrawal rate-A percentage obtained by the formula found in 34 Code of Federal Regulations, §668 16(l), as amended by the Student Right-to-Know Act of 1990, as amended Generally, it is determined by dividing the number of undergraduate regular students who officially withdrew (excluding those who were entitled to a refund of 100% of tuition and fees, and other specific kinds of students) by the number of undergraduate regular students who were enrolled during an academic year or appropriate eight-month period.

§7.2. Scope and Purpose The rules in this Chapter implement the State Postsecondary Review Program (SPRP) authorized under Title IV of the Act, (Part H, Subpart 1 of the Higher Education Act of 1965, as amended). This Chapter applies to all institutions participating in Title IV, HEA programs. The rules in this Chapter implement standards and procedures required by the U. S. Department of Education by federal reg-

ulation. Fifty-nine *Federal Register* 22286-22311 (1994) to be codified at 34 Code of Federal Regulations, §667.1 et. seq. Where indicated in these rules, federally required criteria and provisions are incorporated by reference.

§7.3. Institutions Subject to SPRP. All institutions which participate in Title IV, HEA programs are subject to the provisions of this Chapter.

§7.4. Complaint Procedures.

(a) Complaints regarding institutions shall be made in writing. At its discretion, the Board may accept an oral complaint. If made orally, Board staff will reduce the complaint to writing, including the complainant's name, unless the Board staff member determines that the nature of the complaint warrants anonymity. The Board staff will track complaints by institution name.

(b) If the complaint relates to an institution's management of Title IV, HEA programs, or to advertising or promotion of educational programs, the Board staff shall:

(1) invite the institution to respond to the complaint;

(2) if appropriate, recommend options for resolution of the complaint; and

(3) notify the Secretary of complaints.

(c) The Board staff will refer all other complaints to an appropriate institution or authority.

§7.5. Institution Obligations.

(a) Each institution subject to this Chapter shall designate a SPRP coordinator and furnish in writing to the Board staff the name and telephone number of that person. The Board staff:

(1) may refer complaints to the coordinator if the referral might resolve the complaint without jeopardizing the complainant's relationship with the institution; and

(2) shall utilize the coordinator as the institutional contact for the review teams or Board staff.

(b) Each institution shall notify students of their rights to complain to the Board staff regarding the institution's management of Title IV, HEA programs or its advertising or promotion of its educational programs. The notification must be published in the institution's catalog or posted in a prominent campus location frequented by a significant student population.

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

Issued in Austin, Texas, on November 8, 1994.

TRD-9450684 James McWhorter
Assistant Commissioner for Administration
Texas Higher Education Coordinating Board

Earliest possible date of adoption: December 16, 1994

For further information, please call: (512) 483-6160

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Subchapter B. Institutional Reviews

• 19 TAC §§7.21-7.25

The Texas Higher Education Coordinating Board proposes new §§7.21-7.25, concerning State Postsecondary Review Program (Institutional Reviews). The new rules are necessary to implement the State Postsecondary Review Program (a federal program) and establish the guidelines under which the State Postsecondary Review Entity will review institutions of higher education in the state. The rules will guide the activities of the State Postsecondary Review Entity in its review of institutions of higher education. They will also establish the standards developed in consultation with affected schools.

Dr. Bill Sanford, Assistant Commissioner for Universities, has determined that for the first five-year period the rules are in effect that there will be fiscal implications as a result of enforcing the rules as proposed. At present the cost of operation of the SPRE is born by the federal government. The fiscal implications will be the cost on a public institution in preparing for a review. The following estimates are based on ten reviews of public institutions estimated at $600 each Estimated additional cost for 1995 is $6, 000; for 1996-$6,000; for 1997-$6,000; for 1998-$6,000; and for 1999-$6,000. There will be no effect on local government for the first five-year period the rules will be in effect. The effect on small business is that this rules is promulgated under the authority of the Texas Tax Code, Title 2; therefore no analysis of the effect on small business is required. The cost compliance with the rules for small business will be: contingent on the nature of non-compliance with the standards. For those institutions fully complying with federal regulations relating to Title IV, HEA programs, additional cost of compliance with the new rules will be limited to the cost of assembling and copying documents requested for the reviews. Other institutions may be required to update their catalogs, improve building maintenance, increase financial strength or hire qualified administrative and instructional staff The cost of compliance per hour of labor will vary by type of program the institution offers. Highly technical and mechanical programs may be more equipment intensive than other programs. Generally the cost of compliance for small business is expected to be approximately equal to the cost for large business, given the similar nature of programs.

Dr. Sanford 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 that the rules will eliminate fraud and abuse in Title IV, HEA programs, reduce loss resulting from high defaults in student loan program, and increase overall quality of education in the state. The possible economic cost to persons who are required to comply with the rules as proposed will be contingent on the degree of non-compliance with the standards. Refusal to bring an institution into compliance could result in the recommendation to terminate the institutions participation in Title IV, HEA programs.

Comments on the proposal may be submitted to Dr. Kenneth H. Ashworth, Commissioner of Higher Education, Texas Higher Education Coordinating Board, P. O. Box 12788, Austin, Texas 78711.

The new rules are proposed under 42 United States Code, §1099 a-1 and Texas Education Code, Chapter 61, §61 927, which provides the Texas Higher Education Coordinating Board with the authority to adopt rules concerning State Postsecondary Review Program (Institutional Reviews).

42 United States Code, §1099 a-1 and Education Code, Chapter 61, §61. 927 are also affected by these rules There is also authority from federal regulations at 34 Code of Federal Regulations, Part 667.

§7.21. Reviews Based on Secretary Referral.

(a) The criteria upon which the Secretary will refer an institution to the Board or upon which the Board staff will request approval from the Secretary for review have been mandated by the U.S. Department of Education, 59 *Federal Register* 22291 (1994) to be codified at 34 Code of Federal Regulations, §667.5. The criteria are listed in paragraphs (1)-(11) of this subsection .

(1) The institution has a cohort default rate equal to or greater than 25%.

(2) The institution.

(A) has a cohort default rate equal to or greater than 20%, and

(B) during the latest completed award year for which data are available:

(i) more than two-thirds of the institution's undergraduate students who were enrolled as at least half-time students received assistance under any Title IV, HEA program, excluding assistance received from the SSIG, NEISP, and Federal PLUS programs; or

(ii) the amount that the institution's students received under the Title IV, HEA programs, excluding funds from the SSIG, NEIDP and Federal PLUS

programs, is equal to or greater than two-thirds of the institution's education and general expenditures.

(3) The amount that the institution's students received under the Federal Pell Grant program is equal to or greater than two-thirds of the institution's education and general expenditures.

(4) The Secretary initiated a limitation, suspension, or termination action against the institution under 34 Code of Federal Regulations, Part 668, Subpart G, within the preceding five years.

(5) An audit finding in the institution's two most recent audits under 34 Code of Federal Regulations, §668.23 resulted in a required repayment by the institution of an amount greater than 5.0% of the funds the institution received under the Title IV, HEA programs for any one award year covered by those audits.

(6) The Secretary cited the institution for its failure to submit an acceptable audit report by the deadlines established under 34 Code of Federal Regulations, §668.23.

(7) The amount that the institution's students received:

(A) under the Federal Pell Grant program during any award year differed by more than 25% from the amount that the institution's students received under that program in the preceding award year, unless the differences can be accounted for by changes in that program;

(B) under the Federal Stafford Loan program during any award year differs by more than 25% from the amount that the institution's students received under that program in the preceding year, unless the differences can be accounted for by changes in that program; or

(C) under the Federal SLS program during any award year differs by more than 25% from the amount that the institution's students received under that program in the preceding award year, unless the differences can be accounted for by changes in that program.

(8) The institution failed to meet the factors of financial responsibility in 34 Code of Federal Regulations, Part 668, Subpart B.

(9) The institution underwent a change in ownership that resulted in a change of control as defined in 34 Code of Federal Regulations, §600.31.

(10) Except with regard to any public institution affiliated with a State system of higher education, the institution has participated for less than five years in:

(A) the Federal Pell Grant program;

(B) the FFEL program;

(C) the FSEOG program;

(D) the FWS program; or

(E) the Federal Perkins Loan program.

(11) The institution has been subject to:

(A) a pattern of complaints from students related to its management or conduct of the Title IV, HEA programs; or

(B) misleading or inappropriate advertising and promotion of the institution's educational programs that, in the Secretary's judgement, based on information available to the Secretary, including information provided to the Secretary by the SPRE, is sufficient to warrant review.

(b) If an institution in this State is a branch campus or additional location of a Secretary-referred institution that has its main campus located in another State, that branch or additional location, if referred by the Secretary, shall be subject to review by the Board, in accordance with the standards of review established under Subchapters C and D of this chapter (relating to State Review Standards and Peer Review Standards). The Board may:

(1) review that branch campus or additional location before a SPRE review is conducted of the main campus of that institution;

(2) delay its review of that branch campus or additional location until a SPRE review is conducted of the main campus of that institution; or

(3) choose not to review that branch campus or additional location if:

(A) the SPRE of the State in which the main campus is located reviews that institution and makes no significant findings; and

(B) the allotment of this State is insufficient to allow the Board to review all referred institutions.

(c) The Commissioner is entitled to enter into an agreement with the SPREs of other States which may alter the review responsibilities of the various SPREs with respect to the review of institutions with locations in more than one State.

§7.22. Reviews Initiated by the Board.

(a) The Board may review an institution under this part that was not referred by the Secretary if:

(1) the Board:

(A) either:

(i) determines that the institution meets a referral criterion in §7.21 of this title (relating to reviews based on Secretary referral), based on more recent data available to the Board; or

(ii) has reason to believe the institution is engaged in fraudulent practices; and

(B) requests the Secretary to approve its review of that institution; and

(2) the Secretary:

(A) approves that request; or

(B) does not respond to the Board's request within 21 calendar days after the date the Secretary receives that request.

(b) If, under subsection (a)(1)(A) of this section, the Board selects an institution for review, before the Secretary is requested to approve that review, the Board shall:

(1) notify the institution of the selection and provide the institution with the reasons for its selection; and

(2) delay its review request to the Secretary if the Board receives a notice from the institution, no later than seven calendar days after the institution receives the notice from the Board, challenging the accuracy of the information on which the selection was based.

§7.23. Challenge to Selection for Review by the Board.

(a) If an institution wishes to challenge the accuracy of the information on which its referral was based, it shall submit a notice of challenge no later than seven calendar days from the day the institution receives notice from the Board of the selection. The Board shall delay its review request to the Secretary upon receipt of a timely notice of challenge.

(b) The institution has the burden of proving that the information was inaccurate.

(c) If an institution challenges the accuracy of its cohort default rate for a particular year under 34 Code of Federal Regulations, §668.17(d) (1)(i)(A) and (B), it must file a timely appeal of that rate under those provisions.

(d) For purposes of subsection (b) of this section, the Board shall presume that records maintained in the normal course of business by the U.S. Department of Education, a guaranty agency under the FFEL programs, a SPRE, a State-licensing agency, or another State agency are accurate.

(e) To challenge the accuracy of the information on which its referral was based, the Board must receive no later than 30 calendar days after the institution receives the notice described in subsection (a) of this section the institution's submission, along with any supporting document or record.

(f) If the institution timely challenges its referral under subsection (e) of this section, the Board requests a review of the institution from the Secretary unless the institution convinces the Board that its selection was based upon inaccurate information.

(g) Documents referenced in this section may be hand-delivered or mailed.

(1) If documents are mailed, they must be mailed certified mail, return receipt requested, or by next-day mail or delivery service.

(2) If documents are mailed, proof of receipt shall be evidenced by the delivery date indicated on the U.S. Postal Service return receipt card, or the pick-up date indicated on the next-day mail or delivery service's bill.

(3) For purposes of paragraph (2) of this subsection, if any submission is sent by next-day mail service, the Board shall presume that the document was submitted on the date which appears on the U.S Postal Service postmark or, if delivered by private courier, the pick-up date which appears on the delivery receipt.

§7.24. Priorities for Reviews.

(a) The Board may determine that an institution shall be reviewed before or instead of another institution that has also met one or more of the criteria for review under §7.21 of this title (relating to reviews based on Secretary referral) or §7.22 of this title (relating to reviews initiated by the Board). The determination shall be based on the criteria prioritized according to the following list

(1) Referred institutions that the Secretary has scheduled for recertification under 34 Code of Federal Regulations, Part 668, Subpart B will be reviewed first.

(2) There is a pattern of student complaints related to management or conduct of Title IV funds or misleading or inappropriate advertising and promotion practices

(3) A limitation, suspension, or termination action has been initiated.

(4) There is a default rate equal to or greater than 25%.

(5) There is a failure to meet factors of financial responsibility.

(6) One or both of the two most recent audits results in a required repayment of an amount greater than 5.0% of the Title IV funds received for any award year.

(7) There is a default rate of 20% or more with two-thirds of the students on Title IV funds, or the amount of Title IV funds (excluding SSIG, NEISP and Federal Plus programs) is equal to or greater than two-thirds of the institution's education and general expenditures.

(8) There has been a change in ownership of the institution.

(9) The institution has participated in Title IV programs for less than five years.

(10) The amount of Pell Grant funds is equal to or greater than the institution's education and general expenditures.

(11) There has been a citation for failure to submit audits.

(12) There has been a fluctuation of more than 25% of Title IV funds in the preceding award year for Federal Pell Grants, Federal Stafford loans, or under the Federal SLS program.

(13) There has been a change of ownership or a citation for failure to submit audits, and the Board has previously reviewed the institution for the same reason and found no significant violations of standards.

(b) Review priorities also may be affected by the following factors:

(1) multiple triggers;

(2) volume of students and dollars affected; or

(3) geographic proximity of referred institutions.

§7.25. Notice to Accrediting Agency.

(a) If an institution is referred for review under §7.22(a)(1)(A)(i), of this title (relating to Reviews), the Board staff shall notify a nationally-recognized accrediting agency when it plans to conduct a review of an institution accredited or preaccredited by that agency; and

(b) after conducting a review of the institution, the Board staff shall notify the accrediting agency of its findings and the actions the Board takes, or plans to take, as a result of those findings.

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

Issued in Austin, Texas, on November 8, 1994.

TRD-9450685 James McWhorter
Assistant Commissioner for Administration
Texas Higher Education Coordinating Board

Earliest possible date of adoption: December 16, 1994

For further information, please call: (512) 483-6160

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Subchapter C. State Review Standards and Procedures

• 19 TAC §§7.41-7.43

The Texas Higher Education Coordinating Board proposes new §§7.41-7.43, concerning State Postsecondary Review Program (State Review Standards and Procedures) The new rules are necessary to implement the State Postsecondary Review Program (a federal program) and establish the guidelines under which the State Postsecondary Review Entity will review institutions of higher education in the state. The rules will guide the activities of the State Postsecondary Review Entity in its review of institutions of higher education. They will also establish the standards developed in consultation with affected schools.

Dr. Bill Sanford, Assistant Commissioner for Universities, has determined that for the first five-year period the rules are in effect that there will be fiscal implications as a result of enforcing the rules as proposed. At present the cost of operation of the SPRE is born by the federal government. The fiscal implications will be the cost on a public institution in preparing for a review. The following estimates are based on ten reviews of public institutions estimated at $600 each. Estimated additional cost for 1995 is $6, 000; for 1996-$6,000; for 1997-$6,000; for 1998-$6,000; and for 1999-$6,000. There will be no effect on local government for the first five-year period the rules will be in effect. The effect on small business is that these rules is promulgated under the authority of the Texas Tax Code, Title 2; therefore no analysis of the effect on small business is required. The cost compliance with the rules for small business will be: contingent on the nature of non-compliance with the standards. For those institutions fully complying with federal regulations relating to Title IV, HEA programs, additional cost of compliance with the new rules will be limited to the cost of assembling and copying documents requested for the reviews. Other institutions may be required to update their catalogs, improve building maintenance, increase financial strength or hire qualified administrative and instructional staff. The cost of compliance per hour of labor will vary by type of program the institution offers. Highly technical and mechanical programs may be more equipment intensive than other programs.

Generally the cost of compliance for small business is expected to be approximately equal to the cost for large business, given the similar nature of programs.

Dr. Sanford 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 that the rules will eliminate fraud and abuse in Title IV, HEA programs, reduce loss resulting from high defaults in student loan program, and increase overall quality of education in the state. The possible economic cost to persons who are required to comply with the rules as proposed will be contingent on the degree of non-compliance with the standards. Refusal to bring an institution into compliance could result in the recommendation to terminate the institutions participation in Title IV, HEA programs.

Comments on the proposal may be submitted to Dr. Kenneth H. Ashworth, Commissioner of Higher Education, Texas Higher Education Coordinating Board, P. O. Box 12788, Austin, Texas 78711.

The new rules are proposed under 42 United States Code, §1099 a-1 and Texas Education Code, Chapter 61, §61.927, which provides the Texas Higher Education Coordinating Board with the authority to adopt rules concerning State Postsecondary Review Program (State Review Standards and Procedures).

42 United States Code, §1099 a-1 and Education Code, Chapter 61, §61. 927 are also affected by these rules. There is also authority from federal regulations at 34 Code of Federal Regulations, Part 667.

§7.41. Review Personnel. Board staff shall:

(1) conduct institutional reviews to determine whether such institutions are in compliance with the standards set forth in §7.42 of this title (relating to state review standards); and

(2) prepare initial and final reports.

§7 42 State Review Standards.

(a) Availability of information.

(1) Review Standard Number 1. An institution shall publish and make available to prospective and enrolled students catalogs and other appropriate documents which provide accurate and current information regarding, but not necessarily limited to, clearly stated admissions requirements; academic calendar; program and course descriptions; schedules of tuition and fees; course cancellation policies; financial aid; refunds; withdrawals, policies for academic progress and dismissal; standards of student conduct including student rights and responsibilities; disciplinary procedures; rules and regulations of the institution that relate to students; enrollment agreements as applicable, and institutional and State complaint procedures.

(2) Compliance Guideline Number 1. An institution shall be considered in compliance if the information required by Review Standard Number 1 is documented in the catalog or other form, and it is available for distribution to prospective and enrolled students.

(3) References See subsection (b)(1) of this section (Review Standard Number 2).

(b) Accuracy of information

(1) Review Standard Number 2. An institution's course and program descriptions shall represent actual course and program content.

(2) Compliance Guideline Number 2. An institution's description of its courses and educational programs will be considered accurate unless there is evidence to the contrary.

(3) References. 59 *Federal Register* 22426 (1994) to be codified at 34 Code of Federal Regulations, §668.14(b)(9)(10)(i); 34 Code of Federal Regulations, Subpart D §§668.41-668.44 (1993); 34 Code of Federal Regulations, Subpart F, §§668.71-668.74 (1993), and HEA, Part G, §485(a) codified at 20 United States Code, §1092(a) (1994).

(c) Standards for admission

(1) Review Standard Number 3. An institution shall publish and consistently apply standards for admission to the institution and to specific programs where standards differ from general admissions requirements. The standards shall be based on a student's ability to complete successfully the course of study for which he or she has applied as demonstrated by possessing one or more of the following.

(A) a high school transcript, diploma, or high school equivalency diploma;

(B) an official academic transcript from an accredited institution of higher education;

(C) passing scores on independently administered tests approved by the Secretary of Education; or

(D) by satisfying other appropriate admissions requirements and/or placement standards

(2) Compliance Guideline Number 3. An institution shall be considered in compliance if the school's records show its admissions decisions are based on its published admissions policy which must include one or more of paragraph (1) (A)-(D) of this subsection

(3) References. 34 Code of Federal Regulations, §668.7(b) (1993); 59 *Federal Register* 22337 (1994) to be codified at 34 Code of Federal Regulations, §600.5; and 59 *Federal Register* 22339 (1994) to be codified at 34 Code of Federal Regulations, §600.7.

(d) Standards of academic progress.

(1) Review Standard Number 4. The institution shall have a written policy that defines acceptable academic progress and at least once in an academic year shall review the progress of all regular students to determine whether standards of academic progress are being achieved. The policy shall specify the range of actions the institution may take if satisfactory academic progress is not achieved

(2) Compliance Guideline Number 4 An institution shall be considered in compliance if it has a written policy defining acceptable academic progress and all regular students are reviewed in accordance with this policy at least once in an academic year

(3) References 59 *Federal Register* 22295 (1994) to be codified at 34 Code of Federal Regulations, §667 21(b)(3); 34 Code of Federal Regulations, §668 7(c) (1993); and 59 *Federal Register* 22431 (1994) to be codified at 34 Code of Federal Regulations, §668.16(e)

(e) Record maintenance

(1) Review Standard Number 5. The institution shall maintain records for each student that document admission status, course work completed, and formal educational attainments to include transcripts that contain a student's name, address, and social security number, dates of attendance and completion or termination, a copy of the enrollment agreement (if any), a record of all courses (including remedial courses) taken at the institution, a record of any credit granted; the total number of credit or clock hours of instruction received, grades and dates of enrollment for each course or unit of instruction; cumulative grade for completed work, an explanation of the grading system; financial aid records, and other such student records as prescribed by federal laws and regulations

(2) Compliance Guideline Number 5 An institution shall be considered in compliance if it has records for each student that contain the information required in Review Standard Number 5

(3) References 59 *Federal Register* 22295 (1994) to be codified at 34 Code of Federal Regulations, §667.21(b)(3), 59 *Federal Register* 22440-22441 (1994) to be codified at 34 Code of Federal Regulations, §668 23(h)(1)

to §668.24; and 34 Code of Federal Regulations, §668.36 (1993).

(f) Health and safety standards.

(1) Review Standard Number 6. An institution shall certify and maintain its compliance with applicable safety, health, fire, building, and sanitation regulations.

(2) Compliance Guideline Number 6. An institution shall be considered in compliance if it provides current certification that there are no citations, or if cited, there is a plan for coming into compliance that has been accepted by the citing authority.

(3) References. None are cited.

(g) Financial and administrative capacity.

(1) Review Standard Number 7. An institution shall maintain evidence of current financial, administrative, and other resources which are adequate to ensure satisfactory conduct of its programs and the achievement of its stated educational goals in accordance with the requirements of the U.S. Department of Education.

(2) Compliance Guideline Number 7. An institution's financial and administrative capacity and resources to conduct its programs shall be considered in compliance if they meet or exceed the requirements of the U.S. Department of Education

(3) References 59 *Federal Register* 22428-22431 (1994) to be codified at 34 Code of Federal Regulations, §668.15; 59 *Federal Register* 22431-22433 (1994) to be codified at 34 Code of Federal Regulations, §668.16; 59 *Federal Register* 22439 (1994) to be codified at 34 Code of Federal Regulations, §668.23; and 59 *Federal Register* 22444 (1994) to be codified at 34 Code of Federal Regulations, §668.82.

(h) Contingency for at risk institutions

(1) Review Standard Number 8. If, in accordance with Review Standard Number 7, the institution is determined to be financially at risk, it shall present a written plan which provides for the retention of and accessibility to its academic and financial aid records in the event of institutional closure Similarly, the institution shall make reasonable efforts to identify opportunities for students to transfer to alternative programs of instruction and present a written plan for informing students of their options.

(2) Compliance Guideline Number 8 An institution shall be considered in compliance if it has a written plan which provides for retention of and accessibility to its academic and financial aid records in event of institutional closure, and it has a written plan that identifies reasonable opportunities for students to transfer to alternative programs. For colleges and universities whose accreditation is recognized by the Board, credits will be assumed to be transferable. For all other institutions, the plan must contain evidence of assurance of financial and educational protection of the students.

(3) References. 59 *Federal Register* 22428 (1994) to be codified at 34 Code of Federal Regulations, §668.15(d)-(e).

(i) Vocational program cost and length.

(1) Review Standard Number 9. This standard applies to vocational programs below the bachelor's degree which have as their objective preparing students for gainful employment in specific recognized occupations. For each of these programs, the institution shall obtain and make available to students information regarding the total costs of tuition and fees for completing the program and the average remuneration an employee earns in the occupation for which the program is designed to prepare the student.

(A) The tuition and fees charged a student shall not be excessive.

(B) See Review Standard Number 11 for length of course; see Review Standard Number 17 for placement rates; and for quality of training see §7.62 of this title (relating to Peer Review Standards).

(2) Compliance Guideline Number 9. An institution shall be considered in compliance if the sum of tuition and fees charged to complete the program does not exceed by more than 10% the median charges of other like institutions for similar programs on a state or regional basis; and is not greater than a 1:1.5 ratio with the average earnings for the occupation based on state or regional data. For programs one year or less, the earnings period shall be one year. For programs longer than one year, the earnings period shall be the same length as the vocational program. An institution's tuition and fees shall not be considered excessive if the program completers may expect higher long-term earnings.

(3) References. 59 *Federal Register* 22336 (1994) to be codified as 34 Code of Federal Regulations, §600.2; 59 *Federal Register* 22337-22341 (1994) to be codified as 34 Code of Federal Regulations, §§600. 4-600 6, and 59 *Federal Register* 22427 (1994) to be codified as 34 Code of Federal Regulations, §668.14(b)(26).

(j) Availability of job market and licensing information.

(1) Review Standard Number 10. Each institution shall publish and make available to prospective and enrolled students in occupational, professional, and vocational programs information pertaining to the availability of employment opportunities in recognized occupations for which those programs were designed. Each institution shall publish and make available to prospective and enrolled students information that identifies courses designed to meet the requirements for state licensure in its specific occupational, professional, and vocational programs. This information shall also specify the relationship of the institution's programs and courses to specific Texas licensure requirements.

(2) Compliance Guideline Number 10. An institution shall be considered in compliance if:

(A) it publishes and makes available to prospective and enrolled students in occupational, professional, and vocational programs information pertaining to availability of employment opportunities in recognized occupations for which those programs were designed;

(B) it publishes and makes available to prospective and enrolled students information that identifies courses designed to meet the requirements for state licensure in its specific occupational, professional, and vocational programs; and

(C) the information specifies the relationship of the institution's programs and courses to specific Texas licensure requirements.

(3) References. 59 *Federal Register* 22426 (1994) to be codified at 34 Code of Federal Regulations, §668.14(b)(10)(i)-(ii).

(k) Appropriateness of required hours.

(1) Review Standard Number 11. An institution shall maintain and publish information specifying the length of its programs. The number of credit or clock hours required for the completion of any program shall be consistent with:

(A) common practice in similar postsecondary education programs;

(B) state licensing or certification standards; and/or

(C) accrediting agency requirements.

(2) Compliance Guideline Number 11. An institution shall be considered in compliance if:

(A) it maintains and publishes information specifying the length of its programs; and

(B) the number of credit or clock hours required for the completion of any program is consistent with:

(i) common practice in similar postsecondary education programs in that the length is not more than 10% above the median of similar programs in the state or region preparing students for the same occupation;

(ii) state licensing or certification standards; and/or

(iii) accrediting agency requirements.

(3) References. 59 *Federal Register* 22421 (1994) to be codified as 34 Code of Federal Regulations, §668.8(a)-(e)(iv) and §668.8(k)-(1).

(l) 600-clock hour program.

(1) Review Standard Number 12. The 600-clock hour courses shall be of appropriate length that is consistent with:

(A) applicable accrediting or credentialing requirements;

(B) available industry standards, or

(C) the length of similar programs in the state or region (by CIP code).

(2) Compliance Guideline Number 12. An institution shall be considered in compliance if the length of each 600-clock hour program is consistent with applicable accrediting or credentialing requirements and/or available industry standards. In the absence of such standards then the length shall be comparable to the length of similar programs in the state or region (by CIP code).

(3) References. 59 *Federal Register* 22421 (1994) to be codified at 34 Code of Federal Regulations, §668.8(d)-(e)(iv).

(m) Management integrity.

(1) Review Standard Number 13. An institution shall not have an owner, chief executive officer, member of a governing board, or shareholder (if applicable) who has been either:

(A) convicted of, or pled nolo contendere or guilty to, a crime involving the acquisition, use, or expenditure of funds; or

(B) judicially determined to have committed fraud involving funds.

(2) Compliance Guideline Number 13. An institution shall be considered in compliance if it provides current certification that no owner, chief executive officer, shareholder or board member has been either convicted of, or pled nolo contendere to, a crime involving the acquisition, use, or expenditure of funds or judicially determined to have committed fraud involving funds.

(3) References. 59 *Federal Register* 22339 (1994) to be codified at 34 Code of Federal Regulations, §600.7(a)(3); 59 *Federal Register* 22343 (1994) to be codified at 34 Code of Federal Regulations, §600.30(a)(7)) ; 59 *Federal Register* 22426 (1994) to be codified at 34 Code of Federal Regulations, §668.14(b)(18); 59 *Federal Register* 22428 (1994) to be codified at 34 Code of Federal Regulations, §668.15(c)-(d); and 59 *Federal Register* 22450 (1994) to be codified at 34 Code of Federal Regulations, §668.82(a)-(c)

(n) Complaint procedures.

(1) Review Standard Number 14. An institution shall publish and consistently administer internal procedures which receive, investigate, and formally respond to student complaints. At a minimum, the complaints procedure should process complaints concerning the management or conduct of its programs or concerning misleading advertisement or promotion of those programs.

(2) Compliance Guideline Number 14. An institution shall be considered in compliance if it has a procedure for receiving, investigating, and resolving student complaints which at a minimum, processes complaints concerning the management or conduct of its programs or concerning misleading advertisement or promotion of those programs.

(3) References. 59 *Federal Register* 22295 (1994) to be codified 34 Code of Federal Regulations, §667.21(b)(3).

(o) Advertising and recruiting practices

(1) Review Standard Number 15. Advertising, promotion, or student recruitment practices conducted by or on behalf of an institution shall not be false or misleading.

(2) Compliance Guideline Number 15. An institution shall be considered in compliance if information provided to prospective and enrolled students is accurate with respect to the costs of attendance, conditions, and benefits of the institution and its programs.

(3) References. 34 Code of Federal Regulations, §§668.71-668.74 (1993); 59 *Federal Register* 22426 (1994) to be codified at 34 Code of Federal Regulations, §668.14(b)(10); and 59 *Federal Register* 22427 (1994) to be codified at 34 Code of Federal Regulations, §668.14(b)(22).

(p) Refund policy.

(1) Review Standard Number 16. An institution shall publish and consistently administer fair and equitable refund policies that include procedures for official withdrawal.

(2) Compliance Guideline Number 16. An institution shall be considered in compliance if its refund policy complies with §484B of the HEA and the relevant implementing regulations with regard to students who receive Title IV financial aid. For non-Title IV students, an institution shall be in compliance if the refund policy complies with appropriate accrediting agency guidelines or other state and federal regulations.

(3) References. 59 *Federal Register* 22436 (1994) to be codified at 34 Code of Federal Regulations, §668.22; and 59 *Federal Register* 22453 (1994) to be codified at 34 Code of Federal Regulations, Appendix A to Part 668.

(q) Performance outcome measures.

(1) Review Standard Number 17. An institution's educational programs shall be successful as measured by its completion/graduation, withdrawal, placement, and licensure examination passage rates.

(2) Compliance Guideline Number 17. An institution shall be considered in compliance if its completion/graduation, withdrawal, placement, and licensure examination passage rates are comparable to the same rates at like institutions with similar missions, taking into account the selectivity of its admissions policies The Board shall establish and periodically review standards for institutions for which there are no comparable data available.

(3) References. 59 *Federal Register* 22421 (1994) to be codified at 34 Code of Federal Regulations, §668.8(e)-(h); 59 *Federal Register* 22431 (1994) to be codified at 34 Code of Federal Regulations, §668.16(l); and HEA, Part G, §485(a) to be codified at 20 United States Code, §1092(a) (1994). Student Right-to-Know Act of 1990, as amended.

§7.43. Procedures for State Reviews.

(a) Reviews may consist of inspection of documents and records, interviews with individuals, and announced and/or unannounced site visits.

(b) An institution under review shall·

(1) submit requested records immediately. For records not previously made, the institution shall submit records within the time allotted by the coordinator of the review; and

(2) when cited for non-compliance with a review standard and when a course of action has been prescribed, the institution shall comply with the performance and schedule requirements provided 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 November 8, 1994

TRD-9450686 James McWhorter
Assistant Commissioner for Administration
Texas Higher Education Coordinating Board

Earliest possible date of adoption: December 16, 1994

For further information, please call (512) 483-6160

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Subchapter D. Peer Review Standards and Procedures

• 19 TAC §§7.61-7.63

The Texas Higher Education Coordinating Board proposes new §§7 61-7 63, concerning State Postsecondary Review Program (Peer Review Standards and Procedures) The new rules are necessary to implement the State Postsecondary Review Program (a federal program) and establish the guidelines under which the State Postsecondary Review Entity will review institutions of higher education in the state The rules will guide the activities of the State Postsecondary Review Entity in its review of institutions of higher education. They will also establish the standards developed in consultation with affected schools

Dr Bill Sanford, Assistant Commissioner for Universities, has determined that for the first five-year period the rules are in effect that there will be fiscal implications as a result of enforcing the rules as proposed At present the cost of operation of the SPRE is born by the federal government The fiscal implications will be the cost on a public institution in preparing for a review The following estimates are based on ten reviews of public institutions estimated at $600 each Estimated additional cost for 1995 is $6, 000; for 1996-$6,000, for 1997-$6,000, for 1998-$6,000, and for 1999-$6,000 There will be no effect on local government for the first five-year period the rules will be in effect The effect on small business is that these rules is promulgated under the authority of the Texas Tax Code, Title 2, therefore no analysis of the effect on small business is required The cost compliance with the rule for small business will be. contingent on the nature of non-compliance with the standards For those institutions fully complying with federal regulations relating to Title IV, HEA programs, additional cost of compliance with the new rules will be limited to the cost of assembling and copying documents requested for the reviews. Other institutions may be required to update their catalogs, improve building maintenance, increase financial strength or hire qualified administrative and instructional staff. The cost of compliance per hour of labor will vary by type of program the institution offers Highly technical and mechanical programs may be more equipment intensive than other programs. Generally the cost of compliance for small business is expected to be approximately equal to the cost for large business, given the similar nature of programs.

Dr. Sanford 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 that the rules will eliminate fraud and abuse in Title IV, HEA programs, reduce loss resulting from high defaults in student loan program, and increase overall quality of education in the state. The possible economic cost to persons who are required to comply with the rules as proposed will be contingent on the degree of non-compliance with the standards. Refusal to bring an institution into compliance could result in the recommendation to terminate the institutions participation in Title IV, HEA programs

Comments on the proposal may be submitted to Dr Kenneth H Ashworth, Commissioner of Higher Education, Texas Higher Education Coordinating Board, P O. Box 12788, Austin, Texas 78711.

The new rules are proposed under 42 United States Code, §1099 a-1 and Texas Education Code, Chapter 61, §61 927, which provides the Texas Higher Education Coordinating Board with the authority to adopt rules concerning State Postsecondary Review Program (Peer Review Standards and Procedures)

42 United States Code, §1099 a-1 and Education Code, Chapter 61, §61. 927 are also affected by these rules. There is also authority from federal regulations at 34 Code of Federal Regulations, Part 667

§7 61 Review Personnel

(a) The Board shall contract with a group of peer reviewers (peer review team) consisting of individuals who have demonstrated to the Board their competence in assessing educational programs.

(b) Under the contract with the Board, the peer review team shall carry out a review or provide information from a previous review to the Board regarding the assessment of the quality and content of the institution's educational programs in relation to achieving the stated objectives for which the programs were offered.

(c) For each educational program, the assessment shall take into account the adequacy of the space, equipment, instructional materials, staff, and student support services, including student orientation and counseling provided for each program, and any other areas specified by the Board.

§7.62. Peer Review Standards.

(a) In the scope of the peer review, the peer review team shall consider the standards in this section.

(1) Faculty qualifications The character, education, and experience in higher education of the faculty shall be such as may reasonably ensure that the students will receive an education consistent with the objectives of the course or program of study.

(A) Each faculty member teaching in an associate or baccalaureate level degree program shall have at least a master's degree from an institution accredited by a recognized agency or a regional accrediting agency with at least 18 graduate semester credit hours in the discipline being taught. Furthermore, at least 25% of course work in a baccalaureate level major shall be taught by faculty members holding doctorates, or other terminal degrees, in the discipline being taught from institutions accredited by a recognized agency or a regional accrediting agency. Graduate level degree programs shall be taught by faculty holding doctorates, or other terminal degrees, in the discipline being taught from institutions accredited by a recognized agency or a regional accrediting agency.

(B) Each faculty member teaching in a proprietary institution of higher education in less than associate or baccalaureate level programs shall be approved under a variety of specific qualifications.

(i) For those institutions under the legislative oversight of the Texas Education Agency, faculty shall be approved under those qualifications contained in Title 19, Texas Administrative Code, Chapter 175, Subchapter A, §175 127(b)(1)(B)(ii) and §175.130(c)(1) and (d)(1) (West 1994)

(ii) For all other institutions, faculty shall comply with applicable minimum requirements as adopted by the appropriate regulatory entities

(2) Faculty size. There shall be a sufficient number of full-time teaching faculty resident and accessible to ensure continuity and stability of the education program, adequate educational association between students and faculty and among the faculty members, and adequate opportunity for proper preparation for instruction and professional growth by faculty members. At the associate and baccalaureate levels, there

shall be at least one full-time faculty member in each program. At the graduate level, there shall be at least four full-time faculty members in each program. In proprietary institutions, the school shall maintain sufficient and qualified faculty to complete the program during the length of time stipulated in the school catalog regardless of class size. As determined by the school director, an appropriate number of faculty shall have the relevant license or certificate required for the job objective

(3) Curriculum. The quality, content, and sequence of each course, curriculum, or program of instruction, training, or study shall be appropriate to the purpose of the institution and shall be such that the institution may reasonably and adequately achieve the stated objectives of the course or program Substantially all of the courses in the areas of specialization required for each degree program shall be offered in organized classes by the institution, provided such courses are appropriate to the level of the institutions.

(4) General education. Each associate or baccalaureate degree program shall contain a general education component consisting of at least 25% of the total hours offered for the program. This component shall be drawn from each of the following areas: Humanities and Fine Arts, Social and Behavioral Sciences, and Natural Sciences and Mathematics. It shall include courses to develop skills in written and oral communication and in basic computer instruction. Courses designed to correct deficiencies, remedial courses for associate and baccalaureate programs, and leveling courses for graduate programs may not count toward course requirements for the degree The applicant institution may arrange for all or part of the general education component to be taught by another institution with the following provisions the applicant institution's faculty shall design the general education requirement, there shall be a written agreement between the institutions to provide the general education component, at least one-half of the courses shall be offered in organized classes, and the providing institution shall be accredited by a recognized accrediting agency

(5) Facilities The institution shall have adequate space, equipment, and instructional materials to provide education of good quality

(6) Library The institution shall have in its possession or direct control and readily available to its students and faculty a sufficient quality and variety of library holdings to support adequately its own curriculum The holdings shall be catalogued and be readily accessible to students and faculty The institution shall have adequate library facilities for the library holdings, space for study, and work space for the librarian and library staff.

(A) For associate or baccalaureate level programs, the librarian shall hold a graduate degree in library science from an institution accredited by a recognized accrediting agency or a regional accrediting agency. Arrangements for the use of library materials made with other libraries shall be formalized in writing, the collection shall be validated by the institution to be appropriate for the programs being offered, records of usage by the students shall be kept, and the library shall be reasonably accessible to the students and faculty.

(B) For programs less than associate or baccalaureate degrees in proprietary institutions, these institutions shall maintain and have available and easily accessible to faculty and students recent editions of handbooks appropriate to the curriculum, current periodicals, and other references relative to the subject matter taught Business schools, in addition, shall have such standard reference works as current unabridged dictionaries, almanacs, and thesauruses. Major consideration shall be given to the variety of volumes, periodicals, and information technology available to students, recency of publications, appropriateness, and relevance to the program In occupational degree programs, the library must be accessible to students beyond classroom hours and holdings must be relevant to degree programs offered and comprised of texts, reference books, and audio-visual materials sufficient in breadth and scope to meet the needs of the student body

(7) Staff qualifications Staff shall be adequately qualified to assist faculty and administrators in meeting the stated objectives of the institution's educational and training programs

(8) Academic advising and counseling. The institution shall provide an effective program of academic advising for all students enrolled The program shall include orientation to the academic program, academic and personal counseling, career information and planning, placement assistance, and testing services

(9) Other standards The Board may ask the peer reviewers to review additional elements relating to quality and course or program content

(b) If the peer review team deems it appropriate, it may substitute a prior review report or the findings of an accreditation report for some or all of the findings it provides to the standards review team in its review report, provided that the report accurately reflects the current conditions of the referred institution and meets the requirements set forth in the agreement between the Board and the peer review team

(c) The Board staff shall consider the information provided by the peer review team to prepare an initial report of a referred institution that has been reviewed.

§7.63. Procedures for Peer Review.

(a) Reviews may consist of inspection of documents and records, interviews with individuals, some or all of the findings located in a recent accreditation or other review report, and announced and/or unannounced site visits

(b) An institution under review shall

(1) submit requested records immediately. (For records not available at that time, the institution shall submit records within the time allotted by the coordinator of the review), and

(2) comply with the performance and schedule requirements when cited for non-compliance with a review standard and when a course of action has been prescribed.

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

Issued in Austin, Texas, on November 8, 1994

TRD-9450687 **James McWhorter**
Assistant Commissioner for Administration
Texas Higher Education Coordinating Board

Earliest possible date of adoption: December 16, 1994

For further information, please call: (512) 483-6160

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Subchapter E. Initial and Final Reports

• 19 TAC §§7.81-7.83

The Texas Higher Education Coordinating Board proposes new §§7 81-7 83, concerning State Postsecondary Review Program (Initial and Final Reports) The new rules are necessary to implement the State Postsecondary Review Program (a federal program) and establish the guidelines under which the State Postsecondary Review Entity will review institutions of higher education in the state. The rules will guide the activities of the State Postsecondary Review Entity in its review of institutions of higher education. They will also establish the standards developed in consultation with affected schools

Dr Bill Sanford, Assistant Commissioner for Universities, has determined that for the first five-year period the rules are in effect that there will be fiscal implications as a result of enforcing the rules as proposed. At present the cost of operation of the SPRE is born by the federal government The fiscal implica-

tions will be the cost on a public institution in preparing for a review. The following estimates are based on ten reviews of public institutions estimated at $600 each. Estimated additional cost for 1995 is $6, 000; for 1996-$6,000; for 1997-$6,000; for 1998-$6,000; and for 1999-$6,000. There will be no effect on local government for the first five-year period the rules will be in effect. The effect on small business is that these rules is promulgated under the authority of the Texas Tax Code, Title 2; therefore no analysis of the effect on small business is required. The cost compliance with the rules for small business will be contingent on the nature of non-compliance with the standards. For those institutions fully complying with federal regulations relating to Title IV, HEA programs, additional cost of compliance with the new rules will be limited to the cost of assembling and copying documents requested for the reviews Other institutions may be required to update their catalogs, improve building maintenance, increase financial strength or hire qualified administrative and instructional staff The cost of compliance per hour of labor will vary by type of program the institution offers Highly technical and mechanical programs may be more equipment intensive than other programs Generally the cost of compliance for small business is expected to be approximately equal to the cost for large business, given the similar nature of programs

Dr. Sanford 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 that the rules will eliminate fraud and abuse in Title IV, HEA programs, reduce loss resulting from high defaults in student loan program, and increase overall quality of education in the state The possible economic cost to persons who are required to comply with the rules as proposed will be contingent on the degree of non-compliance with the standards Refusal to bring an institution into compliance could result in the recommendation to terminate the institutions participation in Title IV, HEA programs

Comments on the proposal may be submitted to Dr Kenneth H Ashworth, Commissioner of Higher Education, Texas Higher Education Coordinating Board, P O Box 12788, Austin, Texas 78711

The new rules are proposed under 42 United States Code,§1099 a-1 and Texas Education Code, Chapter 61, §61 927, which provides the Texas Higher Education Coordinating Board with the authority to adopt rules concerning State Postsecondary Review Program (Initial and Final Reports)

42 United States Code, §1099 a-1 and Education Code, Chapter 61, §61 927 are also affected by these rules There is also authority from federal regulations at 34 Code of Federal Regulations, Part 667

§7 81. Initial Report

(a) The Board staff shall issue an initial report to the reviewed institution within 45 calendar days after the review is complete.

(b) The initial report shall serve to summarize the findings of both review teams and to notify the institution of findings and/or recommendation to be made to the Secretary The report shall address the findings made at the time of the reviews

(c) The initial report may contain statements related to the conditions in paragraphs (1)-(3) of this subsection

(1) The institution was not in violation of one or more of the review standards

(2) The institution was in violation of one or more of the review standards. If so, the report shall

(A) cite the standard violated and the nature of the violation, and

(B) specify a course of action the institution must follow and a time period to correct the violation, or

(C) indicate that no further action by the institution is required as determined by the Board staff and the reasons for that determination, or

(D) notify the institution that the Commissioner shall initiate a proceeding to terminate the institution's participation in the Title IV, HEA programs

(3) A recommendation that the Commissioner initiate termination proceedings for the participation of the institution in Title IV, HEA programs

(d) The report shall inform the institution of its rights of appeal

(e) The Board may also determine that the institution should no longer participate in one or more Title IV, HEA programs and initiate termination proceedings if that institution does not

(1) respond to the findings or comply with the Board's required actions within the time permitted,

(2) allow a review team at the institution, or

(3) provide a review team with prompt access to its documents and records

(f) The initial report shall be sent to the Secretary within 30 calendar days after it is issued to the institution, unless the Board receives a timely and proper challenge from the institution If an institution fails to challenge the initial report within the number of days prescribed by the Board, the initial report becomes a final report on the day after the date provided to the institution for responding to the initial report. 59 Federal Register 22296 (1994) to be codified at 34 Code of Federal Regulations, §667 23(f)(1)(ii)

§7 82. Challenges to an Initial Report.

(a) An institution challenging the initial report shall notify the Board of its intent within seven working days after the institution's receipt of the initial report.

(b) Documents referenced in this section may be hand-delivered or mailed.

(1) If documents are mailed, they must be mailed certified mail, return receipt requested, or by next-day mail or delivery service

(2) If documents are mailed, proof of receipt shall be evidenced by the delivery date indicated on the U. S. Postal Service return receipt card, or the pick up date indicated on the next day mail or delivery service's bill

(3) For purposes of paragraph (2)(b) of this section, the board shall presume that the document was submitted on the date which appears on the U S Postal Service postmark or, if delivered by private courier, the pick-up date which appears on the delivery receipt

(c) Institutional responses must be in writing, but also may be accompanied by verbal discussions with the board staff. Written responses must be received within 30 calendar days after the institution receives the initial report and may

(1) provide basis for the differences of facts and initial findings of the Board staff,

(2) respond to each individual finding in the order each finding appears in the initial report, and

(3) respond to each individual prescribed course of action in the order each course of action is prescribed in the initial report

(d) An institution's written response must include attached documentation to support its position, with all documents referred to in the individual finding

(e) The reviewed institution has the burden to prove by compelling documentary evidence that the institution's failure to comply with a review standard does not warrant further action

§7 83 Final Report

(a) If an initial report is not challenged timely and properly, it will become the final report

(b) If the initial report is timely and properly challenged, under §7.82 the Board staff shall notify the institution in

writing of the result of the institution's challenge and the basis of that result The Board staff, through its response, may either cite institutional violations and how, when, and whether they must be corrected or may notify the institution that termination proceedings are initiated.

(c) The Board staff may determine, based on compelling evidence provided by the institution, that the institution's failure to satisfy a review standard does not warrant further action by the Board If no course of action will be required, the Board shall indicate in its final report why courses of action were not prescribed Fifty-nine *Federal Register* 22296 (1994) to be codified at 34 Code of Federal Regulations, §667 23(f)(2)

(d) The final report shall be reviewed by the Commissioner who will send it to the Secretary no later than 30 calendar days after it is issued and shall include any other information the Secretary requires This report shall NOT recommend termination to the Secretary, but may indicate that termination proceedings have been or shall be initiated However, the final report may be accompanied by a recommendation for termination if the institution failed to appeal the initial report properly and timely

(e) In the final report, the Board may initiate termination of participation by the institution in Title IV, HEA programs for the reasons set forth at §7 81(c) and (e)

(f) The final report shall inform the reviewed institution of its rights to appeal, if any

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

Issued in Austin, Texas, on November 8, 1994

TRD-9450688 James McWhorter
Assistant Commissioner for Administration
Texas Higher Education Coordinating Board

Earliest possible date of adoption December 16, 1994

For further information, please call (512) 483-6160

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Subchapter F. Administrative Review

• 19 TAC §§7.101-7.127

The Texas Higher Education Coordinating Board proposes new §§7 101-7 127, concerning State Postsecondary Review Program (Administrative Review) The new rules are necessary to implement the State Postsecondary Review Program (a federal program) and establish the guidelines under which the State Postsecondary Review Entity will review institutions of higher education in the state. The rules will guide the activities of the State Postsecondary Review Entity in its review of institutions of higher education They will also establish the standards develooed in consultation with affected schools.

Dr. Bill Sanford, Assistant Commissioner for Universities, has determined that for the first five-year period the rules are in effect that there will be fiscal implications as a result of enforcing the rules as proposed At present the cost of operation of the SPRE is born by the federal government The fiscal implications will be the cost on a public institution in preparing for a review The following estimates are based on ten reviews of public institutions estimated at $600 each Estimated additional cost for 1995 is $6, 000, for 1996-$6,000, for 1997-$6,000, for 1998-$6,000, and for 1999-$6,000 There will be no effect on local government for the first five-year period the rules will be in effect The effect on small business is that these rules is promulgated under the authority of the Texas Tax Code, Title 2, therefore no analysis of the effect on small business is required The cost compliance with the rules for small business will be contingent on the nature of non-compliance with the standards For those institutions fully complying with federal regulations relating to Title IV, HEA programs, additional cost of compliance with the new rules will be limited to the cost of assembling and copying documents requested for the reviews Other institutions may be required to update their catalogs, improve building maintenance, increase financial strength or hire qualified administrative and instructional staff The cost of compliance per hour of labor will vary by type of program the institution offers Highly technical and mechanical programs may be more equipment intensive than other programs Generally the cost of compliance for small business is expected to be approximately equal to the cost for large business, given the similar nature of programs

Dr Sanford 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 that the rules will eliminate fraud and abuse in Title IV, HEA programs, reduce loss resulting from high defaults in student loan program, and increase overall quality of education in the state The possible economic cost to persons who are required to comply with the rules as proposed will be contingent on the degree of non-compliance with the standards Refusal to bring an institution into compliance could result in the recommendation to terminate the institutions participation in Title IV, HEA programs

Comments on the proposal may be submitted to Dr Kenneth H Ashworth, Commissioner of Higher Education, Texas Higher Education Coordinating Board, P O Box 12788, Austin, Texas 78711

The new rules are proposed under 42 United States Code, §1099 a-1 and Texas Education Code, Chapter 61, §61 927, which provides the Texas Higher Education Coordinating Board with the authority to adopt rules concerning State Postsecondary Review Program (Administrative Review)

42 United States Code, §1099 a-1 and Education Code. Chapter 61, §61. 927 are also affected by these rules. There is also authority from federal regulations at 34 Code of Federal Regulations, Part 667.

§7.101 Conferences. An institution that wishes to contest a final report that cites institutional violations and prescribes to the institution a course of action, shall submit to the Commissioner a written request for a conference The request must

(1) indicate all legal bases for the challenge and state the relief the institution requests, and

(2) be sent to the Commissioner no more than ten working days after the final report is received by the institution.

§7 102 Challenges to Findings of Violations and Prescribed Course of Action Upon receipt of a challenge to the final report and a request for conference, as described in §7 101, the Board staff shall schedule a conference to take place not less than 30 days from receipt of the challenge The staff will notify the institution of the time, place and nature of the conference at least seven working days before the conference is to be held The notice shall include

(1) a statement of the time, place, and nature of the conference,

(2) a statement of the legal authority and jurisdiction under which the conference is to be held,

(3) a reference to the particular sections of the statutes and rules involved, and

(4) a short and plain statement of the matters asserted

§7 103 Conference Procedures

(a) A conference officer appointed by the Commissioner shall consider relevant documentation from the challenging institution as well as any other evidence the conference officer determines is relevant to the case The parties shall not be entitled to present live witnesses The Texas Rules of Civil Evidence and Civil Procedure shall not apply to the conference, but the conference officer shall allow the institution to present documentary evidence, and a brief oral statement which shall detail the institution's grievance with the final decision and present evidence to support the institution's position The conference officer shall allow the standards review team to present documentary evidence and a brief oral statement to support its position.

(b) The conference officer shall consider the documentary evidence and the oral statements before making a decision. The decision shall be released in the form

of findings of fact and conclusions of law within seven working days after the conference closes. The standard of review will be to determine the sufficiency of evidence to support the final report.

(c) Upon release of the decision, the institution shall be required to comply with the final report, if the decision determines the evidence supports the final report.

(d) Failure to comply with the final report within the time prescribed subjects the institution to the initiation by the Board of termination proceedings.

§7.104. Appeal of Conference Decision

(a) Upon receipt of the conference officer's decision, an institution may appeal to the Board.

(b) Appeals from a conference decision shall proceed and be subject to the provisions of §7.122 of this title (relating to committee to consider ALJ report or conference officer decision) and sections subsequent thereto.

(c) An appeal to the Board shall

(1) be considered by a committee designated by the Board;

(2) be held in a public hearing that takes place within 30 calendar days of notice of intent, and

(3) consists of a written appeal which must include new or compelling evidence why the Board should reconsider the decision of the conference officer

(d) The Board shall consider the recommendation of its committee at the next appropriate meeting of the Board

(e) The decision by the Board shall be mailed to the institution within seven working days following the Board's meeting.

§7.105. State Office of Administrative Hearings (SOAH) Hearings An institution that has been notified by the Board that termination proceedings are appropriate in a final report is entitled to request a hearing before the State Office of Administrative Hearings (SOAH). Provided it receives a timely request from the institution, the Board shall schedule a hearing for any reviewed institution.

§7.106. Challenge to Initiation of Termination Proceedings.

(a) An institution's request for a hearing must be sent to the Commissioner no later than seven working days after the institution receives the final report Failure of an institution to timely and properly request a hearing shall result in immediate recommendation to the Secretary that the institution be terminated.

(b) The rules regarding hearings are applicable to all challenges to a final report that finds termination of participation in Title IV, HEA programs of the reviewed institution is appropriate for any of the reasons provided by these rules.

§7.107. Notice. The Board staff shall inform the institution made the subject of termination proceedings of a hearing date which shall be determined by the SOAH. The notice shall include:

(1) a statement of the time, place, and nature of the hearing;

(2) a statement of the legal authority and jurisdiction under which the hearing is to be held;

(3) a reference to the particular sections of the statutes and rules involved;

(4) a short and plain statement of the matters asserted; and

(5) a statement of any and all standards of which the institution has been found to be in violation and/or other basis for initiation of termination proceedings

§7.108 Scope and Purpose of SOAH Hearings.

(a) The Sections of Subchapter F, dealing with SOAH hearings, shall govern the proceedings in all contested cases under this Chapter 7

(b) The purpose of this Section is to incorporate by reference, to the extent they are not in conflict with these rules, for all purposes the provisions of the Administrative Procedure Act, Texas Government Code, §2001 (Vernon 1994 pamphlet), and to set forth the procedure for the administration of all appeals before SOAH.

§7.109 Administrative Law Judge (ALJ)

(a) The SOAH may designate an Administrative Law Judge (ALJ) to act on behalf of the SOAH in conducting any hearing or proceeding held pursuant to this Subchapter and to prepare a written report on such hearing

(b) The ALJ has the authority to administer oaths, call and examine witnesses, issue subpoenas; make rulings on motions, admissibility of evidence, and amendments to pleadings; maintain decorum, schedule and recess the proceedings from day to day; and to make any other orders as justice requires

(c) If the ALJ is removed, dies, becomes disabled, or withdraws from an appeal prior to the completion of duties, the SOAH may designate a substitute ALJ to complete the performance of duties without the necessity of repeating any previous proceedings.

§7.110. Appearance. Any party allowed to appear may be represented by an attorney-at-law.

§7.111. Answers to Notice of Hearing and Initiation of Termination Proceedings.

(a) An institution shall file an answer to the notice of hearing within 30 calendar days of receipt of notification by the Board that a hearing has been docketed.

(b) The answer shall specifically admit or deny each allegation in the notice of hearing and shall set forth all affirmative defenses. Any allegation not specifically denied will be deemed admitted. The ALJ may deny the institution the opportunity to present evidence concerning any fact in the Board's notice which is not specifically denied or any affirmative defense which is not raised by the answer

§7.112 Classification of Pleadings Pleadings filed with the SOAH shall include, but not be limited to, petitions, answers, replies, exceptions, and motions Regardless of any error in its designation, the pleading shall be accorded its true status in the appeal in which it is filed

§7.113 Form and Content of Documents. All pleadings, briefs, and exhibits shall be legibly handwritten, typewritten, or printed on paper 8-1/2 inches wide by 11 inches long. Electronic transmission of pleadings in proper form containing a facsimile of the signature of the attorney or party filing the pleading is permissible

§7.114. Filing of Documents

(a) Any document shall be deemed filed only when actually received by the SOAH.

(b) Documents may be hand-delivered or filed by mail if sent by certified U S mail, return receipt requested A document will be deemed timely filed if it was mailed one day prior to the filing deadline

§7.115. Service of Pleadings. Copies of all pleadings must be sent to all parties of record in an appeal in compliance with the requirements of SOAH rules. 1 Texas Administrative Code, §155.22

§7.116. Prehearing Conference.

(a) In any appeal, the ALJ or a party may move for the setting of a prehearing conference. The ALJ may direct that the parties appear at a specific time for a conference prior to a hearing for the purposes of considering any of the following:

(1) the formulation or simplification of issues;

(2) admission of certain assertions of fact or stipulations;

(3) the procedure at the hearing;

(4) any limitation, where possible, of the number of witnesses; and/or

(5) such other matters as may aid in the simplification of the proceeding or the disposition of matters in controversy, including the settlement of matters in dispute.

(b) Action taken at the conference shall be reduced to writing and delivered to all parties.

§7.117. Dismissal or Withdrawal of an Appeal.

(a) The ALJ may, on the motion of a party, dismiss an appeal without a hearing for the following reasons: compromise; unnecessary duplication of proceedings; res judicata (a matter already decided by a court); withdrawal; mootness; untimely filing; lack of jurisdiction; or failure to prosecute.

(b) Institution may request that the hearing be terminated and that the institution's challenge be withdrawn at any time prior to the Board's decision.

§7.118. Rules of Evidence.

(a) The ALJ shall admit in evidence and shall consider all documentary evidence considered by the review team in making its final report. Otherwise, the rules of evidence as applied in a nonjury civil case in a district court of this state shall apply to a contested case except that evidence inadmissible under those rules may be admitted if the evidence is:

(1) necessary to ascertain facts not reasonably susceptible of proof under those rules;

(2) not precluded by statute; and

(3) of a type of which a reasonably prudent person commonly relies in the conduct of the person's affairs.

(b) Exclusion of Evidence. Evidence that is irrelevant, immaterial, or unduly repetitious shall be excluded.

(c) Privilege. The ALJ shall give effect to the rules of privilege recognized by law.

§7.119. Procedure at a Hearing.

(a) The Board shall state briefly the nature of the claim, what the Board expects to prove, and the action it seeks to effect. Immediately thereafter, the institution may make a similar statement, and intervenors and other parties will be afforded similar rights as determined by the ALJ.

(b) Evidence shall then be introduced by the Board.

(c) Unless such statement has already been made, institution shall briefly state the nature of the claim or defense, what institution expects to prove, and the relief sought.

(d) Evidence shall be introduced by institution.

(e) The intervenor and other parties shall make their statement, unless they have already done so, and shall introduce their evidence.

(f) The parties may be allowed closing arguments at the discretion of the ALJ.

(g) Unless the ALJ, for good cause stated in the record, otherwise directs, the order of procedure shall be the order designated in subsections (a)-(i) of this section.

(h) Parties shall provide four copies of each exhibit offered.

(i) In any appeal where a party is represented by more than one attorney, the ALJ shall require the designation of a lead attorney.

(j) A reasonable time limit may be set by the ALJ for any oral argument offered by a party.

(k) Testimony presented at a hearing shall be confined to the subject matter designated in the hearing notice. Any testimony not relevant or material to the subject matter may be excluded by the ALJ.

(l) The ALJ shall have the right to limit the number of witnesses whose testimony is merely cumulative.

§7.120. ALJ's Report. The ALJ shall recommend a decision and a statement of the reasons for the recommendation and of each finding of fact and conclusion of law supporting the recommended decision. A copy of the report shall be furnished to each party.

§7.121. Exceptions and Replies. Exceptions to the ALJ's report may be made by filing the exceptions, with the ALJ within 30 calendar days of the issuance of the report. Replies to the exceptions, if made, must be filed with the ALJ within 30 calendar days of the issuance of the report.

§7.122. Committee to Consider ALJ Report or Conference Officer Decision.

(a) If the institution wishes to appeal a conference officer's decision, it shall notify the Board within seven working days after receiving notice of the conference decision of its intention to appeal.

(b) An appeal to the Board from the ALJ hearing of the conference officer's decision shall be:

(1) considered by a committee designated by the Board;

(2) considered in an open meeting of the Board committee within 30 calendar days of notice of intent; and

(3) limited to a written appeal which shall include new or compelling evidence why the Board should reconsider the decision of the conference officer.

(c) A committee of the Board in an open meeting will consider the ALJ's recommendation or conference officer's decision, findings of fact, conclusions of law, and final report and render its own recommendation to the Board. This committee is not required to consist of a quorum of the Board. The committee shall:

(1) consider written material received from the ALJ or the conference officer or the institution, and

(2) at its discretion, listen to oral presentations, the length of which may be determined by the committee.

§7.123. Procedure before the Board.

(a) The Board shall consider the report of the ALJ, the conference officer's decision, and the committee's recommendation at the next appropriate Board meeting after the SOAH hearing or the conference is finally closed. The Board shall at that meeting issue a final decision or order.

(b) At least seven working days notice shall be given by the Commissioner to all parties to a hearing of the time and place of the Board meeting at which the report of the ALJ or appeal of the conference decision will be considered by the Board.

(c) No party shall be allowed to introduce evidence before the Board at the meeting at which the report of the ALJ or appeal of the conference decision is considered unless leave to present such newly discovered evidence has been heard by an ALJ or conference officer and the ALJ or conference officer has determined that such newly discovered evidence was unavailable at the time of the hearing and is material to the matter presented for Board determination

(d) The committee members shall not vote when the Board votes on the matter of the ALJ report or of a conference officer's report.

(e) The decision by the Board shall be mailed to the institution within seven

working days following the Board's meeting.

§7.124. Motion for Rehearing.

(a) A motion for rehearing in a contested case must be filed by a party not later than the 20th day after the date on which the party or the party's attorney of record is notified as required by the Government Code, §2001.142 of a decision or order that may become final under §2001.144.

(b) A reply to a motion for rehearing must be filed with the Board not later than the 30th day after the date on which the party or the party's attorney of record is notified as required by §2001.142 of the decision or order that may become final under §2001.144.

(c) A Board shall act on a motion for rehearing not later than the 45th day after the date on which the party or the party's attorney of record is notified as required by §2001.142 of the decision or order that may become final under §2001.144 or the motion for rehearing is overruled by operation of law.

(d) The Board may rule on a motion for rehearing at a meeting or by mail, telephone, telegraph, or another suitable means of communication if any Board member does not receive a salary for work as a Board member and resides outside of Travis County.

(e) The Board may by written order extend the motion or reply or take agency action under this section, except that an extension may not extend the period for Board action beyond the 90th day after the date on which the party or the party's attorney of record is notified as required by §2001.142 of the decision or order that may become final under §2001.144.

(f) In the event of an extension, a motion for rehearing is overruled by operation of law on the date fixed by the order or, in the absence of a fixed date, 90 days after the date on which the party or the party's attorney of record is notified as required by §2001. 142 of the decision or order that may become final under §2001.144.

(g) Rehearings may be conducted by the SOAH or the Board, as the Board may determine is appropriate, considering the nature of the motion for rehearing.

§7.125. Procedure after a Decision Becomes Final. If an institution does not file an appeal to district court within 30 calendar days after the Board's decision is final, the Board shall submit to the Secretary its final determination, which may include a recommendation for termination. If the institution has timely appealed the final decision, the Board shall notify the Secretary of the Board's final decision and the status of the appeal but shall not recommend termination until all appeals have been exhausted.

§7.126. Judicial Review. In the event that an institution timely files an appeal of the Board's final decision to district court, the provisions of the Administrative Procedure Act relevant to judicial review of contested cases shall apply.

§7.127. Final Determination Sent to U.S. Department of Education. The Board shall deliver the final determination to the institution and to the Secretary after the institution's right to appeal is exhausted. The final decision at the court of last appeal and any other information required by the Secretary shall be noted in the final determination.

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

Issued in Austin, Texas, on November 8, 1994.

TRD-9450689 James McWhorter
Assistant Commissioner for Administration
Texas Higher Education Coordinating Board

Earliest possible date of adoption: December 16, 1994

For further information, please call: (512) 483-6160

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TITLE 22. EXAMINING BOARDS

Part III. Texas Board of Chiropractic Examiners

Chapter 71. Application and Applicants

• 22 TAC §§71.1, 71.3, 71.12

The Texas Board of Chiropractic Examiners proposes new §§71.1, concerning Definitions, 71.3, concerning Qualifications of Applicants, and 71. 12, concerning National Board Examination.

New §71.1 defines terms used in the practice of chiropractic, used in The Chiropractic Act, Texas Civil Statutes, Article 4512b (the Act), or used elsewhere in these rules.

New §71.3 provides applicants with the information required to establish their qualifications to sit for the Texas licensure examination.

New §71.12 implements the requirement found in the Act, §10 that candidates for licensure must have successfully passed all required and optional parts of the National Board Examination.

Patte B. Kent, Executive Director, has determined that for the first five-year period the new sections are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the sections.

Ms. Kent also has determined that for each year of the first five years the new sections are in effect the public benefit anticipated as a result of enforcing the sections will be that application qualification requirements will be standardized. There will be no effect to small or large businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Comments on the proposal may be submitted to Patte B. Kent, 333 Guadalupe, Tower III, Suite 825, Austin, TX 78701 and must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*.

New §71.1 is proposed under the authority of the Texas Chiropractic Act, §§4a and 1, and under the Government Code, Chapter 2001, §2001.004. The Act, §4a authorizes the Board to make rules as may be necessary for the performance of its duties, the regulation of the practice of chiropractic, and the enforcement of the Act. The Act, §1 establishes the scope of practice of chiropractic. The Government Code, Chapter 2001, §2001.004 requires agencies to adopt rules of practice setting forth all available procedures, formal and informal.

New §71.3 is proposed under the authority of the Texas Chiropractic Act, §§4(a), 4a and 10. The Act, §4a authorizes the Board to make rules as may be necessary for the performance of its duties, the regulation of the practice of chiropractic, and the enforcement of the Act. The Act, §4(a) authorizes the Board to prescribe rules for the examination of applicants for licensure to practice chiropractic. The Act, §10 establishes the statutory requirement that applicants for licensure must have passed all required and optional parts of the National Board Examination.

New §71.12 is proposed under the authority of the Texas Chiropractic Act, §§4a and 10. The Act, §4a authorizes the Board to make rules as may be necessary for the performance of its duties, the regulation of the practice of chiropractic, and the enforcement of the Act. The Act, §10 establishes the statutory requirement that applicants for licensure must have passed all required and optional parts of the National Board Examination.

The Act, §§ 1, 4a, 4(a) and 10 and the Government Code, Chapter 2001, §2001.004 are affected by the proposed new rules.

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

Applicant-An individual who applies to take the examination for licensure given by the board.

Biomechanical condition of the musculoskeletal system-The structural and functional state of support and motor com-

ponents of the musculoskeletal system under biostatic and biodynamic conditions.

Board–The Texas Board of Chiropractic Examiners

Board member–One of the appointed members of the decision-making body defined in this section as the board.

Examinee–An individual who has been approved and admitted to take the examination given by the board.

Executive director–The executive director of the board.

Licensee–An individual who has been granted a license to practice chiropractic by the Texas Board of Chiropractic Examiners and whose license is active and not under suspension.

Practitioner–A doctor of chiropractic, a doctor of medicine, a doctor of osteopathy, a doctor of podiatry, or a doctor of dentistry who is licensed and authorized to practice under the laws of this state.

Subluxation–Subluxation is an aberrant relationship between two adjacent articular structures that may have functional or pathological sequelae, causing an alteration in the biomechanical and/or neurophysiological reflections of these articular structures, their proximal structures, and/or other body systems that may be directly or indirectly affected by them.

§71.3. Qualifications of Applicants

(a) All applicants shall have completed the number of college courses and credits required by Texas Civil Statutes, Article 4512b, §10.

(b) All applicants shall submit evidence to the executive director to determine that an applicant has met all the requirements specified in these sections and any other information reasonably required by the board.

(c) All applicants are required to have successfully passed all parts (Part I, Part II, Part III and Physiotherapy) of the National Board of Chiropractic Examiners Examination to be eligible to sit for the Texas Board Exam.

§71.12. National Board Examination

(a) The board determines that the written Examination by the National Board of Chiropractic Examiners complies in all material respects with the requirements of the Texas Chiropractic Act, Article 4512b. The passing score on each Part of the National Board Examination is determined by a criterion-referenced standard setting approach, in which the passing score is set at a scaled score of 375.

(b) All applicants must comply with the application process and qualification criteria of the Texas Chiropractic Act, Article 4512b, §10, as well as all applicable board rules.

(c) All applicants shall take and pass Parts I, II, III and Physiotherapy of the National Board Examination.

(d) Each applicant shall request that a true and correct copy of the applicant's score report be submitted to the executive director, and other evidence of having achieved a passing grade on each Section of the National Board Examination as the executive director may determine.

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

Issued in Austin, Texas, on November 3, 1994.

TRD-9450397 Patte B. Kent
Executive Director
Texas Board of
Chiropractic Examiners

Earliest possible date of adoption: December 16, 1994

For further information, please call: (512) 305-6700

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Chapter 75. Rules of Practice

• 22 TAC §75.1

The Texas Board of Chiropractic Examiners proposes new §75.1, concerning Grossly Unprofessional Conduct. The section defines those actions which will be considered to be unprofessional conduct or dishonorable conduct of a character likely to deceive or defraud the public, or other actions calculated to endanger the lives of patients.

Patte B. Kent, Executive Director, has determined that for the first five-year period the new sections is in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the section.

Ms. Kent also has determined that for each year of the first five years the new section is in effect the public benefit anticipated as a result of enforcing the section will be that the enforcement process will be standardized and the rule will more accurately mirror the statute. There will be no effect to small or large 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 Patte B. Kent, 333 Guadalupe, Tower III, Suite 825, Austin, TX 78701 and must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

New §75.1 is proposed under the authority of the Texas Chiropractic Act, §§4a, 4(c) and 14a. The Act, §4a authorizes the Board to make rules as may be necessary for the performance of its duties, the regulation of the practice of chiropractic, and the enforcement of the Act. The Act, §4(c) prohibits the Board, in part, from adopting a rule relating to the meaning of the practice of chiropractic except for a rule that defines an unacceptable practice of chiropractic and prescribes a penalty for committing the act. The Act, §14a authorizes disciplinary action against licensees who commit, among other things, acts of grossly unprofessional conduct or dishonorable conduct.

The Act, §§4a, 4(c) and 14a is affected by the proposed new rule.

§75.1. Grossly Unprofessional Conduct

(a) It shall be considered grossly unprofessional conduct for a licensee:

(1) to maintain unsanitary or unsafe equipment;

(2) to fail to use the word "chiropractor," "Doctor, D.C.," or "Doctor of Chiropractic, D.C." in all advertising, signs, letterheads, etc.;

(3) to engage in sexual misconduct with a patient within the chiropractic/patient relationship;

(4) to exploit patients through the fraudulent use of chiropractic services which result in financial gain for a licensee or a third party. The rendering of chiropractic services becomes fraudulent when the services rendered or goods or appliances sold by a chiropractor to a patient are clearly excessive to the justified needs of the patient as determined by accepted standards of the chiropractic profession;

(5) to submit a claim for chiropractic services, goods, or appliances to a patient or a third-party payor which contains charges for services not actually rendered or goods or appliances not actually sold;

(6) to fail to disclose, upon request by a patient or his or her duly authorized representative, the full amount charged for any service rendered or goods supplied;

(7) to use instruments, diagnostic techniques, or adjunctive therapy modalities and procedures, which do not come within the scope of chiropractic as defined by Texas Civil Statutes, Article 4512b, §1.

(b) Penalties for engaging in gross unprofessional conduct shall be determined in accordance with §75. 10 of this title (relating to Administrative Fines and Penalties).

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

Issued in Austin, Texas, on November 3, 1994.

TRD-9450396 Patte B. Kent
Executive Director
Texas Board of
Chiropractic Examiners

Earliest possible date of adoption: December 16, 1994

For further information, please call: (512) 305-6700

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Chapter 80. Practice of Chiropractic

• 22 TAC §80.1, §80.2

The Texas Board of Chiropractic Examiners proposes new §80.1, concerning Delegation of Authority and §80.2, concerning Titles.

New §80.1 sets out the circumstances under which a chiropractor may delegate authority to a student to perform manipulations or adjustments. This section also authorizes the delegation of tasks and procedures other than manipulations or adjustments to properly trained and qualified individuals acting under the licensee's supervision

New §80.2 sets forth the titles a chiropractor may use.

Patte B. Kent, Executive Director, has determined that for the first five-year period the new sections are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the sections.

Ms. Kent also has determined that for each year of the first five years the new sections are in effect the public benefit anticipated as a result of enforcing the sections will be that specific requirements for delegation to assistants and the specificity of allowable titles will be more clear and more accessible to the general public. There will be no effect to small or large businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Comments on the proposal may be submitted to Patte B. Kent, 333 Guadalupe, Tower III, Suite 825, Austin, TX 78701 and must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*

New §80.1 is proposed under the authority of the Texas Chiropractic Act, §§4a, 5a and 6. The Act, §4a authorizes the Board to make rules as may be necessary for the performance of its duties, the regulation of the practice of chiropractic, and the enforcement of the Act. The Act, §5a establishes the circumstances under which a student may engage in clinical practice. The Act, §6 authorizes the Board to establish guidelines relating to tasks and procedures that a chiropractor may delegate to an assistant.

New §80 2 is proposed under the authority of the Texas Chiropractic Act, §4a and Texas Civil Statutes, Article 4590e, The Healing Arts Identification Act. This section is also proposed under the authority of Attorney General Opinion Number JM-1279. The Texas Chiropractic Act, §4a authorizes the Board to make rules as may be necessary for the performance of its duties, the regulation of the practice of chiropractic, and enforcement of the Act. The Healing Arts Identification Act sets forth the titles that may appropriately be used by certain health care professionals. The Attorney General opinion concludes that use of the title "chiropractic physician" does not violate the Healing Arts Identification Act.

The Texas Chiropractic Act, §§1,4a and Texas Civil Statutes, Article 4590e are affected by the proposed new rules.

§80.1. Delegation of Authority.

(a) Except as provided in this section, a licensee shall not delegate to a nonlicensee authority to perform chiropractic adjustments or manipulations.

(b) A licensee may delegate authority to perform chiropractic adjustments or manipulations to a student enrolled in an accredited chiropractic college, provided that:

(1) the chiropractic adjustment or manipulation is performed as part of a regular curriculum; and

(2) the chiropractic adjustment or manipulation is performed under the supervision of a licensee who is physically present at the time of the adjustment.

(c) A licensee shall have the authority to delegate to any qualified and properly trained person or persons acting under the licensee's supervision any other task or procedure which is within the scope of practice, as defined in Texas Civil Statutes, Article 4512b, §1.

(d) A licensee shall not delegate any authority to a licensee whose license has been suspended or revoked during the effective period of thesuspension.

§80.2. Titles.

(a) A licensee may use any of the following titles:

(1) chiropractor;

(2) doctor of chiropractic;

(3) D.C.;

(4) doctor, D.C.;

(5) chiropractic physician; or

(6) any derivative of the previously listed terms with the exception of the term "chiropractic physician" which shall not be modified or altered in such a manner that would result in the use of the title "physician" by itself.

(b) Regardless of which of the previous titles a licensee chooses to use, licensee shall in professional use of his or her name use one of the following terms or titles to be in compliance with the Healing Arts Identification Act, Article 4590e:

(1) chiropractor;

(2) doctor, D.C.;

(3) doctor of chiropractic;

(4) D.C.

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

Issued in Austin, Texas, on November 3, 1994.

TRD-9450394 Patte B. Kent
Executive Director
Texas Board of Chiropractic Examiners

Earliest possible date of adoption: December 16, 1994

For further information, please call: (512) 305-6700

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TITLE 25. HEALTH SERVICES

Part I. Texas Department of Health

Chapter 181. Vital Statistics

Miscellaneous Provisions

• 25 TAC §181.28

Texas Department of Health, Bureau of Vital Statistics proposes new §181.28, relating to format, style, content and type of paper used for the issuance of certified copies of vital records issued by the department and local registrars. The section covers the criteria for minimum built in safety features of security paper to be used for the issuance of such records; the format, content and style of records to be issued, and the procedures for issuance.

Richard B. Bays, Chief, Bureau of Vital Statistics has determined that for the first five-year period and the years following, there will minimal fiscal implication or cost to local or state government in purchasing security paper. There will be no cost to small businesses or individuals and no impact on local employment.

Mr. Bays, also has determined the benefits to the public, state and local governments will be a decrease in the number of fraudulent entitlement claims and the use of altered documents, resulting in a corresponding reduction of expenses in these programs.

Comments on the proposed rule may be submitted to Richard B. Bays, State Registrar, Bureau of Vital Statistics, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3191, (512) 458-7692. Public comments will be accepted for 30 days after publication in the *Texas Register*.

The new section is proposed under authority of the Health and Safety Code, §192.003, which provides the Board of Health (board) with authority to adopt necessary rules for collecting, recording, transcribing, compiling and preserving vital statistics; §194.004 which requires the state registrar to prepare and issue detailed instructions necessary for

the uniform observance of Title 3, Vital Statistics and maintenance of a perfect system of registration; §191.051 which provides that certified copies shall be in a form approved by the department; and §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, or the Commissioner of the department.

The new section affects Health and Safety Code, Title 3, Vital Statistics.

§181.28. Instructions and Requirements for Issuance of Certified Copies of Vital Records by the State Registrar or Local Registrar.

(a) Birth certificates.

(1) The state registrar or local registrar shall issue only two types of records for births:

(A) a full reproduction of the legal portion of the original record as filed in their office with any addendum(s); or

(B) an abstract or certification of birth facts, taken from the original record except for probate records and delayed records which may not be abstracted. An abstract or certification of birth facts shall be issued in one of four styles:

(i) a standard abstract or certification;

(ii) a wallet-sized abstract or certification;

(iii) a typewritten abstract in accordance with Title 3, Health and Safety Code, §192.005 and §192.011, or when the condition of the original record does not permit full reproduction; or

(iv) an heirloom style abstract or certification.

(2) Each certified copy of a record, or abstract of a record, shall be issued over the signature or facsimile thereof of the officer to whom the record is entrusted, shall bear the seal of their office, and shall bear a statement of certification:

(A) either as a part of the custodian's local files; or

(B) as authorized to be issued from the state registrar's files.

(3) All certified copies or abstracts of birth records shall include at a minimum:

(A) state or local file number;

(B) given name(s);

(C) surname;

(D) date of birth;

(E) state, and city or county of birth;

(F) sex;

(G) father's name;

(H) mother's maiden name;

(I) date of filing;

(J) date issued;

(K) certification statement;

(L) signature or facsimile signature of registrar; and

(M) the seal of their office.

(b) Death certificates.

(1) The state registrar or local registrar shall issue only two types of death certificates:

(A) a full reproduction of the original record and any addenda as filed in their office; or

(B) a certification or abstract of death facts, taken from the original record.

(2) All certification or abstracts of death records shall include as a minimum:

(A) state or local file number;

(B) given name(s);

(C) surname;

(D) date of death;

(E) date of birth;

(F) state and city or county of death;

(G) sex;

(H) date of filing;

(I) date issued;

(J) certification statement;

(K) signature or facsimile signature of registrar; and

(L) the seal of their office.

(c) Security features. No certified copy or abstract shall be issued unless the issuing office provides security features in the paper used for issuance. Each sheet or document shall be made on paper which contains as a minimum, the following features:

(1) consecutive numbers;

(2) background security features;

(3) a copy void pantograph;

(4) an engraved border; and

(5) microline printing or security thread.

(d) Other permitted security features. Other security features such as, but not limited to the following, may also be incorporated in the paper used:

(1) sensitized security paper;

(2) prismatic printing;

(3) erasable fluorescent printing;

(4) non-optical brighteners;

(5) complex colors;

(6) intaglio printing;

(7) security laminate;

(8) watermark; or

(9) latent image.

(e) Record retention. A record of the date issued, document number, name and address and form of identification to whom issued shall be made and maintained for a period of three years from the date issued. The application form, with the document number inserted, used to apply for a record will fulfill this requirement.

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

Issued in Austin, Texas, on November 3, 1994.

TRD-9450622 Susan K. Steeg
General Counsel, Office of General Counsel
Texas Department of Health

Earliest possible date of adoption: December 16, 1994

For further information, please call: (512) 458-7692

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Part II. Texas Department of Mental Health and Mental Retardation

Chapter 409. Medicaid Programs

Subchapter J. Reimbursement for Services in Institutions for Mental Diseases (IMD)

• 25 TAC §§409.371-409.380

The Texas Department of Mental Health and Mental Retardation (TDMHMR) proposes new §§409.371-409.380, concerning Medicaid reimbursement for inpatient hospital services to individuals age 65 and older residing in institutions for mental diseases (IMD). The proposed new sections affect Texas Civil Statutes, Article 4413(502), §16.

The proposed new sections would provide the criteria and method for Medicaid reimbursement of inpatient hospital services delivered to persons age 65 and older in institutions for mental diseases, with rule adoption contingent on the approval of a State Plan amendment by the Health Care Financing Administration.

Operating agency responsibility for reimbursement of inpatient hospital services in IMDs was vested in TDMHMR by the single state Medicaid agency, the Health and Human Services Commission, following the approval of a similar rule proposal at the July 1994 meeting of the Medical Care Advisory Committee. The proposed new sections were additionally approved by the TDMHMR Medicaid Guidance Team and the State Medicaid Director.

Leilani Rose, director, Financial Services Department, has determined that the fiscal implications for state government include an increase in federal funds for services to elderly persons in institutions for mental diseases. The gross increase in federal revenues is estimated to be $2 million annually when the program is fully implemented. The net increase in revenues to the state cannot be projected until the costs of establishing and maintaining compliance with federal and state program standards can be determined. There are no fiscal implications for local government or small businesses as a result of administering the sections as proposed. There is no anticipated local economic impact.

Ernest McKenney, director, Office of Medicaid Administration, has determined that the public benefit is the promulgation of rules governing federal programs consistent with the Medicaid state plan and federal and state regulations. There is no cost to persons who are required to comply with the sections as proposed.

Written 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 Health and Safety Code, Title 7, §532.015(a), which provides the Texas Board of Mental Health and Mental Retardation with broad rulemaking powers.

Texas Civil Statutes, Article 4413(502), §16, which provide the Health and Human Services Commission with the authority to administer federal medical assistance funds, is affected by these proposed new sections.

§409.371. Purpose. The purpose of this subchapter is to describe the criteria used to determine whether a provider is eligible to receive Medicaid reimbursement for inpatient hospital services to people aged 65 and older in an institution for mental diseases (IMD) and to describe the methods by which patient and provider eligibility is established and reimbursement is accomplished.

§409.372. Application. This subchapter applies to institutions for mental disease.

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

Inpatient hospital services–Services provided under the direction of a physician in an IMD that meet certain requirements for psychiatric hospitals in CFR §482.60 (b), (c), and (e) and meets certain utilization review (UR) requirements in CFR §482.30 (a), (b), (d), and (e) unless the UR requirements have been waived pursuant to CFR §440.140.

Institution for mental disease (IMD)–A hospital of more than 16 beds that is primarily engaged in providing diagnosis, treatment, or care of persons with mental diseases, including medical care, nursing care, and related services.

Medical review team–A team designated by TDMHMR Office of Medicaid Administration, that includes at least one physician or other skilled medical professional who is familiar with the care of mentally ill individuals. No team member may be employed by or have a significant financial interest in the facility under review.

Mental diseases–Diseases listed as mental disorders in the International Classification of Diseases, 9th Edition, modified for clinical applications (ICD-9-CM), with the exception of mental retardation.

Qualified mental health professional–A person acting within the scope of his or her training and licensure or certification, who is a:

(A) certified or licensed social worker as defined by Section 50.001, Human Resources Code;

(B) licensed professional counselor as defined by Section 2, Licensed Professional Counselor Act (Texas Civil Statutes, Article 4512g);

(C) physician who is "practicing medicine" as defined by Section 1.03, Medical Practice Act (Article 4495b, Vernon's Texas Civil Statutes) or a person employed by any agency of the United States having a license to practice medicine in any state of the United States;

(D) registered nurse as defined in law; or

(E) psychologist offering "psychological services" as defined by Section 2, Psychologists' Certification and Licensing Act (Article 4512c, Vernon's Texas Civil Statutes).

§409.374. Eligible Population. Reimbursement for inpatient hospital services in an IMD is limited to individuals for whom the TDMHMR Office of Medicaid Administration determines services to be reasonable and medically necessary and who:

(1) are 65 years and older;

(2) have one or more mental diseases; and

(3) have no acceptable alternate placement.

§409.375. Definition of Services. Inpatient hospital services provided by eligible IMD providers for the care and treatment (including room and board) of individuals with mental diseases include but are not limited to:

(1) titration or change in medication;

(2) monitoring and assessing by qualified mental health professionals;

(3) suicide precautions;

(4) redirection of assaultive or other inappropriate and intrusive behaviors;

(5) group and individual therapies; and

(6) structured skills training activities.

§409.376. Provider Agreement. To be eligible to be reimbursed for inpatient hospital services as an institution for mental diseases, the provider must have in effect an agreement with the TDMHMR Office of

Medicaid Administration which describes respective responsibilities, including arrangements to ensure:

(1) joint planning efforts;

(2) development of alternative methods of care;

(3) access by the agency to the institution, the patient, and the patient's records when necessary to carry out the agency's responsibilities;

(4) recording, reporting, and exchanging medical and social information about the patients; and

(5) other procedures that may be required to achieve the purposes of the agreement.

§409.377. Provider Qualifications.

(a) Prior to receiving reimbursement for services, the provider must submit to the TDMHMR Office of Medicaid Administration written evidence that the provider:

(1) is currently accredited as a psychiatric facility by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO);

(2) is currently meeting the requirements specified in CFR §440.140(a) pertaining to providers of inpatient hospital services in institutions for mental disease; and

(3) is currently under the jurisdiction of the state mental health authority and is in substantial compliance with the provisions of the Texas Administrative Code, Title 25, Part II, Chapters 402, 403, 404, 405, and 408, relating to patient care and treatment in inpatient mental health facilities;

(4) is serving a patient population in which more than 50 percent currently require institutionalization because of a mental disease; and

(5) immediately admits or readmits and treats both eligible voluntary patients seeking services under the provisions of the Health and Safety Code, Chapter 572, and patients lawfully compelled to accept inpatient mental health treatment under the provisions of the Health and Safety Code, Chapters 573 and 574.

(b) Evidence required in subsection (a) of this section will be validated through onsite inspection by a medical review team designated by the TDMHMR Office of Medicaid Administration. For each Medicaid patient, the team will additionally review:

(1) the adequacy of services available to meet the patient's current health needs and promote the patient's maximum physical well-being;

(2) the necessity or desirability of the patient's continued placement in the facility; and

(3) the feasibility of meeting the patient's health care needs through alternative institutional or noninstitutional care.

(c) Reimbursement commences on the date of validation of evidence of eligibility, which is established by written notice from the TDMHMR Office of Medicaid Administration to the provider applicant.

(d) Eligibility must be renewed periodically at a time designated by the TDMHMR Office of Medicaid Administration, not to exceed two years.

(e) Provider reimbursement for inpatient hospital services as an institution for mental diseases is subject to termination with or without notice on the date that any of the following occurs:

(1) loss of JCAHO accreditation;

(2) failure to meet requirements specified in CFR §440.140(a) pertaining to providers of inpatient hospital services in institutions for mental disease;

(3) demonstrated substantial noncompliance with the provisions of Chapters 402, 403, 404, 405, and 408 of this title (relating to Patient Care and Treatment in Inpatient Mental Health Facilities), or with state laws governing admission and treatment described in subsection (a)(5) of this section;

(4) breach of the written agreement described in §409.376 of this title (relating to Provider Agreement) with the state Medicaid agency; or

(5) termination of the Medicaid program.

(f) Providers who receive Medicaid reimbursement for inpatient hospital services as institutions for mental diseases are governed by Chapter 409, Subchapter B of this title (relating to Contract Appeals), and Chapter 409, Subchapter C of this title (relating to Fraud and Abuse and Recovery of Funds).

§409.378. Reimbursement Methodology.

(a) Reimbursements under this subchapter are governed by Chapter 409, Subchapter A of this title, relating to General Reimbursement Methodology for all Medical Assistance Programs.

(b) Reimbursements for inpatient hospital services provided to individuals age 65 years and older in institutions for mental disease are based on the median of the per diem costs of those hospitals qualifying as providers under this subchapter which received Medicaid reimbursements on at least 50 percent of the total days of care provided by the hospital during the cost reporting period. If no qualified provider had 50% of its days of care during the cost reporting period reimbursed by Medicaid under this subchapter, then reimbursement will be based on the median per diem costs of all qualified providers that provided a minimum of 10% of all days of care provided during the cost reporting period and reimbursed under this subchapter.

§409.379. References. The following laws and rules are referred to in this subchapter:

(1) Code of Federal Regulations, §§482.60, 482.30, and 440.140;

(2) Human Resources Code, Section 50.001;

(3) Texas Civil Statutes, Articles 4495b, 4512c and g;

(4) Health and Safety Code, Chapters 572-574;

(5) Chapters 402-405 and 408 of this title; and

(6) This chapter including:

(A) Subchapter A of this chapter (relating to General Reimbursement Methodology for all Medical Assistance Programs);

(B) Subchapter B of this chapter (relating to Contract Appeals); and

(C) Subchapter C of this chapter (relating to Fraud and Abuse and Recovery of Funds).

§409.380. Distribution. The provisions of this subchapter shall be distributed to the medical director and deputy commissioners, Central Office; assistant and associate deputy commissioners and directors, Central Office; superintendents/directors of all TDMHMR facilities; advocacy organizations; and any person requesting a copy.

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

Issued in Austin, Texas, on November 9, 1994.

TRD-9450693

Ann Utley
Chair, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation

Earliest possible date of adoption: December 16, 1994

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

Part VIII. Interagency Council on Early Childhood Intervention Services

Chapter 621. Early Childhood Intervention

Early Childhood Intervention Service Delivery

• 25 TAC §621.31

The Interagency Council on Early Childhood Intervention Services proposes an amendment to §621.31, concerning formal hearing procedures, in its Early Childhood Intervention chapter. The purpose of the amendment is to update legal citations and reflect the State Office of Administrative Hearing's involvement in the formal hearings process.

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

Ms. Elder 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 current and clear rules concerning established procedures for processing contested cases. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Questions about the content of this proposal may be directed to Mary Elder at (512) 502-4900. Written comments on the proposal may be submitted to Nancy Murphy, Media and Policy Services-064, Texas Department of Human Services E-205, 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, §§73.003, which authorizes the Interagency Council on Early Childhood Intervention Services to establish rules regarding services provided for children with developmental delays.

The amendment implements the Human Resources Code, §§73.001-73.021.

§621.31. Formal Hearing Procedures.

(a) Purpose. This section covers the formal hearing procedures and practices that will be available to persons or parties who request formal hearings before the **Interagency Council on Early Childhood Intervention Services (council)** [council]. The intended effect of these procedures is to implement the contested case provisions of the Administrative Procedure [and Texas Register] Act **(APA), Title 10 of the Texas Government Code, §2001.001** [Texas Civil Statutes, Article 6252-13a]. These hearing procedures will be used for all **providers funded by the council** [hearings provided for in §§621. 21-621.30 of this title (relating to Early Childhood Intervention Service Delivery)], except instances when the rules provide that another fair hearing procedure will be used **or when the council elects to undertake a new or different program direction. Hearings will be conducted in accordance with the Act, rules of the State Office of Administrative Hearings, and the rules of the council. State Office of Administrative Hearing rules may be obtained from that office.**

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

(1)[(2)] **Administrative law judge (ALJ)** [Hearing examiner]-Any person designated or appointed [by the chairperson of the council] as the agent or representative of the **State Office of Administrative Hearings** [council] to conduct hearings provided for by rules of the council.

(2)[(1)] Contested case-A proceeding in which the legal rights, duties, or privileges of a party are to be determined by the council after an opportunity for an adjudicated hearing.

(3) Party-Each person or agency named or admitted as a party by the **administrative law judge** [hearing examiner] as having a justiciable interest in the matter being considered.

(4)-(5) (No change.)

[(6) TDH-The Texas Department of Health.

[(7) TDHS-The Texas Department of Human Services.

[(8) TXMHMR-The Texas Department of Mental Health and Mental Retardation.

[(9) TEA-The Texas Education Agency]

(c) Applicability and scope of rules.

(1) The provisions of **this section** [these sections] shall apply in all cases when the council [or TDH] proposes to cancel **a** [the] contract with **a** [the] provider, **withhold funds from a provider, or deny continuation funding to a provider.**

(2) **All matters not specifically included in the procedural rules adopted by the council shall be governed by the Act and the State Office of Administrative Hearings Rules of Procedure.** [The provisions of these sections shall apply when the council or TDH proposes to withhold funds of an ECI provider.]

(d) Filing of documents. All petitions, complaints, motions, protests, replies, answers, notices, and other pleadings relating to any proceeding governed by this section which is pending or to be instituted with the council shall be filed with the **State Office of Administrative Hearings** [ECI executive director through the ECI office, 1100 West 49th Street, Austin, Texas 78756-3179]. They shall be deemed filed only when actually received by **the State Office of Administrative Hearings** [such office].

(e) Computation of time; extension.

(1) (No change.)

(2) The time for the doing of any act under **this section** [these sections] may be extended by order of the **administrative law judge** [hearing examiner], upon written motion duly filed with him [through the ECI office] prior to the expiration of the applicable period of time for the doing of same, showing that there is good cause for such extension of time and that the need **therefor** [therefore] is not caused by neglect, indifference, or lack of diligence of movant. A copy of such motion shall be served upon all other parties to the proceeding contemporaneously with the filing thereof.

(f) Notice and service in proceedings.

(1) (No change.)

(2) Notice shall include:

(A)-(D) (No change.)

(E) a statement that any party can appear in person or by his **counsel** [council] and be heard.

(3) (No change.)

(4) The council shall mail the notice of the proposed contract cancellation, **withholding of funds, or denial of continuation funding** by certified or registered mail to the last known place of address of the person entitled to receive such notice. [The agency shall mail the notice of proposed withholding of funds by certified or registered mail to the last known place of address of the person entitled to receive such notice.]

(5) A copy of any protest, reply, answer, motion, or other pleadings filed by any party in any proceedings subsequent to the institution thereof shall be mailed or otherwise delivered by the party filing the same to every other party of record. If any party has appeared in the proceeding by attorney or other representative authorized under this section to make appearance, service shall be made upon such attorney or other representative. [The willful failure of

any party to make such service shall be sufficient grounds for an entry of an order by the hearing examiner, striking a protest or reply, answer, motion, or other pleadings for the records.]

(6) (No change.)

(g) Request for hearing. Any person who receives a written notice to propose to cancel the contract, [or a written notice to propose to] withhold **funding, or deny continuation funding** [the funds] must file a request for hearing with the **Early Childhood Intervention (ECI)** [ECI] **Program** executive director through the ECI office, 1100 West 49th Street, Austin, Texas 78756-3179 within ten days of receipt of the notice. The request for hearing shall be deemed filed only when actually received by such office. [Failure to file a request for hearing shall be considered a waiver by the person of his right to a fair hearing under Texas law.] Failure to file a request for hearing shall be considered a waiver by the person of his right to a fair hearing after the action is taken to [withhold the funds or to] cancel the contract, **withhold funding, or deny continuation funding, and ECI shall proceed to finalize its earlier decision**. The request for hearing **shall** [should] include:

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

[(h) Docketing and numbering of causes; hearing date

[(1) Upon receipt of the request for hearing, which complies with this section as to form and content, the ECI executive director shall docket the same as a pending proceeding, notify TDH, notify the chairperson of the council, and appoint an attorney to represent the council for the hearing.

[(2) Upon receipt of the notification that a request for hearing has been docketed by the ECI executive director, the chairperson of the council shall appoint the hearing examiner.

[(3) The hearing examiner shall set a date on which the hearing on the proceedings will be held. Said date will be no sooner than ten days nor later than 20 days from the date he or she receives written notification of his or her appointment as the hearing examiner. The hearing examiner may subsequently postpone or continue the hearing date until a later date if, in his sound judgment and discretion, good cause requires a later date. Good cause includes, but is not limited to, the consideration that a later date will result in a fairer and more just determination of the issues and that the welfare of any client will not be substantially endangered by reason of the postponement. The hearing examiner is not precluded by this section or any other section from ordering a postponement or continuance of the hearing upon the showing of good cause.]

(h)[(i)] Appointment of the hearing examiner.

(1) Hearings will be conducted by **an administrative law judge** [a hearing examiner] appointed by the **State Office of Administrative Hearings** [chairperson of the council] upon receipt of a request for hearing **from the ECI executive director.**

[(2) The commissioner, or his designee, of TDH, TXMHMR, TEA, and TDHS shall designate one attorney employed by each agency to make up a pool of hearing examiners from which the chairperson of the council shall appoint a hearing examiner and the ECI executive director shall appoint an attorney to represent the council for each hearing. The chairperson and the ECI executive director will consider the extent of involvement of each agency in the matters being contested, and insofar as is practicable, the hearing examiner will be selected from the agency with least involvement and the attorney representing the council will be selected from the agency with greatest involvement.]

(2)[(3)] The **administrative law judge** [hearing examiner] shall have authority to administer oaths, to examine witnesses, and to rule upon the admissibility of evidence and amendments to pleadings. The **administrative law judge** [hearing examiner] shall have the authority to recess any hearing from day to day.

[(4) If the hearing examiner dies, becomes disabled, or withdraws or is removed from employment or is removed from the case at any time before the final decision thereof, the chairperson of the council may appoint another hearing examiner who may perform any function remaining to be performed without the necessity of repeating the previous proceedings in the case.

[(5) The ECI executive director may request that the commissioner of TDH, TEA, TDHS, or TXMHMR designate one or more employees of any of these agencies with particular expertise and experience who are knowledgeable in the subject matter of the hearing in question in the evaluation of evidence presented at the hearing.]

(i)[(j)] Subpoenas.

(1) On **its** [the hearing examiner's] own motion or on the written request of any party to the hearing, **ECI** [the hearing examiner] shall issue a subpoena to the appropriate sheriff or constable to require the attendance of witnesses or the production of documents at the hearing.

(2) There has to be a show of good cause for the subpoena, i.e., the witnesses or documents must have information that is relevant and material to the hearing and the subpoena should not result in undue harassment, imposition, inconvenience, or expense to a party to the hearing.

(3) A party or witness may seek to quash the subpoena or move for a protective order as provided in Texas Rules of Civil Procedure.

(4) Witnesses may be subpoenaed from any place in the State of Texas.

(5) Documents include books, papers, accounts, and similar materials or objects.

(6) The payment of subpoena costs or fees and the failure to comply with a subpoena shall be governed by the Administrative Procedure [and Texas Register] Act, **§2001.094 and §2001.103** [(APTRA), §14].

(j) [(k)] Depositions. The taking and use of depositions in any contested case proceeding shall be governed by **the Administrative Procedure Act, §2001.094 and §2001.103** [APTRA, §14].

(k)[(l)] Prehearing conferences.

(1) In a contested case, the **administrative law judge** [hearing examiner], on his own motion or the motion of a party, may direct the parties, their attorneys or representatives to appear at a specified time and place for a conference prior to the hearing for the purpose of.

(A) the formulation and simplification of issues;

(B) the necessity or desirability of amending the pleadings;

(C) the possibility of making admissions or stipulations;

(D) the procedure at the hearing;

(E) specifying the number of witnesses;

(F) the mutual exchange of prepared testimony and exhibits;

(G) designation of parties; and

(H) other matters which may expedite the hearing.

(2) The **administrative law judge** [hearing examiner] will conduct the prehearing conference in such manner and with the necessary authority to expedite the conference while reaching a fair, just, and

equitable determination of any matters or issues being considered.

(3) The **administrative law judge** [hearing examiner] will have the minutes of the conference recorded in an appropriate manner and will issue whatever orders are necessary covering the said matters or issues.

(4) Any action taken at the prehearing conference shall be reduced to writing, signed by the parties, and made a part of the record.

(l)[(m)] Motions. Any motion relating to a pending proceeding governed by this section shall, unless made during a hearing and dictated into the record, be written and shall set forth the relief sought, the specific reasons and grounds therefore, and shall be supported by affidavit if based upon matters which do not appear of record. Motions not made during a hearing shall be filed with the **administrative law judge** [hearing examiner], who shall act upon it at the earliest practicable time.

(m)[(n)] Hearing procedure.

(1) The **administrative law judge's** [hearing examiner's] duties. The **administrative law judge** [hearing examiner] will preside over and conduct the hearing. On the day and time designated for the hearing, the **administrative law judge** [hearing examiner] shall:

(A) convene and call the hearing to order;

(B) state the purpose of and the legal authority for the hearing;

(C) announce that a record of the hearing will be made;

(D) outline the procedure and order of presentation that will be followed;

(E) administer oaths to those who intend to testify; and

(F) take any and all other actions as authorized by applicable law and these sections to provide for a fair, just, and proper hearing.

(2) Order of presentation.

(A) After making the necessary introductory and explanatory remarks on the purpose of the hearing, [etc.,] the **administrative law judge** [hearing examiner] will begin receiving testimony and evidence from the witnesses.

(B) Each party may present evidence and testimony and cross-examine or ask clarifying questions of any witness who presents evidence or testimony.

(C) The party who proposes to withhold funds or who proposes to cancel the contract has the burden of proving that the actions or proposed actions are justified; provided, however, that the order of proceeding may be altered or modified by the **administrative law judge** [hearing examiner] upon agreement of the parties or upon his own motion when such action will expedite the hearing without prejudice to any party.

(D) When the party first proceeding finishes his case, the remaining party or parties will be allowed to present evidence and testimony in the same manner. Each witness is subject to cross-examination and clarifying questions by other participants to the proceedings.

(E) The **administrative law judge** [hearing examiner] may limit the number of witnesses whose testimony will be repetitious, and **he** [the hearing examiner] may also establish time limits for testimony so long as all viewpoints are given a reasonable opportunity to be expressed.

(F) The **administrative law judge** [hearing examiner], at his discretion, may allow final arguments or take the case under advisement, note the time, and close the hearing. For sufficient cause, the **administrative law judge** [hearing examiner] may hold the record open for a stated number of days for the purpose of receiving additional evidence into the record.

(3) Consolidation. The **administrative law judge** [hearing examiner], upon his own motion or upon motion by any party, may consolidate for hearing two or more proceedings which involve substantially the same parties or issues. Proceedings before the **administrative law judge** [council] shall not be consolidated without consent of all parties to such proceedings, unless the **administrative law judge** [hearing examiner] finds that such consolidation will be conducive to a fair, just, and proper hearing and will not result in unwarranted expense or undue delay.

(4) Conduct and decorum during the hearing. Every party, witness, attorney, representative, or other person shall exhibit in all hearings proper dignity, courtesy, and respect for the **administrative law judge** [hearing examiner] and all other persons participating in or observing the hearing. The **administrative law judge** [hearing examiner] is authorized to take whatever action he deems [necessary and] appropriate to maintain the proper level of decorum and conduct, including, but not limited to, recessing the hearing to be reconvened at another time or place or excluding from the hearing any party, witness, attorney, representative, or other person for such period and upon such conditions as the **administrative law judge** [hearing examiner] deems fair and just.

(5) The hearing record. The hearing record will include:

(A) all pleadings, motions, and intermediate rulings;

(B) evidence received or considered;

(C) a statement of matters officially noticed;

(D) questions and offers of proof, objections, and rulings of them;

(E) proposed findings and exceptions;

(F) any decision, opinion, or report by the **administrative law judge** [hearing examiner]; and

(G) all staff memoranda or data submitted to or considered by the **administrative law judge** [hearing examiner] or members of the council who are involved in making the decision.

(6) Recording the hearing.

(A) The **administrative law judge** [hearing examiner] may keep either a stenographic or magnetic tape record of the hearing proceeding. A court reporter may be present to record the hearing. **The expenses of the court reporter shall be borne by the party requesting the service.**

(B) In those cases when a magnetic tape recording of the formal hearing is made, the **administrative law judge** [council] shall make such recording available to any party requesting permission to hear or, with appropriate protective measures, allow such recording to be duplicated.

(7) Assessing the cost of a transcript.

(A) In accordance with **the APA, §2001.059** [APTRA, §13(g)], proceedings, or any part of them, shall be transcribed on written request of any party. The council may pay the cost of the tran-

script or assess the cost to one or more parties.

(B) In the event a final decision of the council is appealed to the district court wherein the council is required to transmit to the reviewing court a written transcript of the hearing proceeding, or any part thereof, the council may:

(i) require the appealing party to file with the agency the original and one copy of such written transcript; or

(ii) acquire such written transcript directly from the court reporter or other person preparing the same and thereafter assess the cost of the original and one copy of such transcript against the appealing party as reimbursement for the cost of same.

(8) Rules of evidence. The **administrative law judge** [hearing examiner], at a hearing, a reopened hearing, or a rehearing will apply the rules of evidence under **the APA, §2001. 201-2001.88** [APTRA, §14(a)], and [also] the following rules.

(A) Consolidation. The **administrative law judge** [hearing examiner] may consolidate the testimony of parties or persons if the evidence can be effectively consolidated into one document or the testimony of one witness. The standard by which the **administrative law judge shall** [hearing examiner should] judge this consolidation is whether each party or person can offer unique or new evidence that has not been previously introduced. Any party under oath may make an offer of proof of the testimony or evidence excluded through consolidation by dictating into the record or submitting in writing the substance of the proposed testimony prior to the conclusion of the hearing.

(B) Documentary evidence. Documentary evidence should be presented in its original form but if the original is not readily available, documentary evidence may be received in the form of copies or excerpts. On request, parties shall be given an opportunity to compare the copy with the original. When numerous documents are offered, the **administrative law judge** [hearing examiner] may limit the documents in his discretion, or require the abstracting of the relevant data from the documents and presentation of the abstracts in the form of exhibits; provided, however, that before making such requirement, the **administrative law judge** [hearing examiner] shall require that all parties of record or their representatives be given the right to examine the documents from which such abstracts were made. Any party may make an offer of proof of the documents which are excluded by **the administrative law judge's** [a hearing examiner's] decision to remove only typical or representative documents.

(C) Exhibits.

(i) Form. Exhibits of documentary character shall be limited to facts material and relevant to the issues involved in a particular proceeding, and the parties shall make a reasonable effort to introduce exhibits which will not unduly encumber the files and records of the agency.

(ii) Tender and service. The original of each exhibit offered shall be tendered to the **administrative law judge** [hearing examiner] or a designee for identification and shall be offered to the parties for their inspection prior to offering or receiving the same into evidence.

(iii) Excluded exhibits. In the event an exhibit has been identified, objected to, and excluded, it shall be given an exhibit number for purposes of identification and shall be included in the record under seal.

(iv) After hearing. Unless specifically directed by the **administrative law judge** [hearing examiner], no exhibit will be permitted to be filed in any proceeding after the conclusions of the hearing except in a reopened hearing or a rehearing.

(D) Admissibility of prepared testimony and exhibits. When a proceeding will be expedited and the interests of the parties will not be prejudiced substantially, evidence may be received in written form. The prepared testimony of a witness upon direct examination, either in narrative or question and answer form, may be incorporated in the record as if read or received as an exhibit, upon the witness being sworn and identifying the same as a true and accurate record of what his testimony would be if he were to testify orally. The witness shall be subject to clarifying questions and to cross-examination and his prepared testimony shall be subject to a motion to strike either in whole or in part.

(E) Official notice. Official notice by the **administrative law judge** [hearing examiner or the agency] shall be governed by **APA, §2001.090** [APTRA, §14]. Further, official notice may be taken of any statute, ordinance, or duly promulgated and adopted rules or regulations of any governmental agency. The **administrative law judge** [hearing examiner] shall indicate during the course of a hearing that information of which he will take official notice. When **the administrative law judge's** [a hearing examiner's] findings are based upon official notice of a material fact not appearing in the evidence of record, the **administrative law judge** [hearing examiner] shall set forth in his proposal for decision those items with sufficient specificity so as to advise the parties of the matters which have been officially noticed. The parties shall have the opportunity to show to the contrary through the filing of exceptions to the **administrative law judge's** [hearing examiner's] proposal for decision.

(9) Informal disposition of case. Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.

(10) Agreements in writing. No stipulation or agreement between the parties, their attorneys or representatives, with regard to any matter involved in any proceeding shall be enforced unless it shall have been reduced to writing and signed by the parties or their authorized representatives, dictated into the record during the course of a hearing, or incorporated in an order bearing their written approval. This subsection does not limit a party's ability to waive, modify, or stipulate away any right or privilege afforded by this section.

(n)[(o)] Action after the hearing.

(1) Reopening of hearing for new evidence.

(A) The **administrative law judge** [hearing examiner] may reopen a hearing where new evidence is offered which was unobtainable or unavailable at the time of the hearing.

(B) The **administrative law judge** [hearing examiner] will reopen a hearing to include such new evidence as part of the record if the **administrative law judge** [hearing examiner] deems such evidence necessary for a proper and fair determination of the case. The reopened hearing will be limited to only such new evidence.

(C) Notice and procedural requirements will be the same as for the original hearing.

(2) Proposal for decision.

(A) The **administrative law judge** [hearing examiner] shall prepare a proposal for decision within ten days after the hearing is closed and provide copies of the same to all parties. **This time may be extended by the administrative law judge due to workload issues.**

(B) Each party having the right and desire to file exceptions and briefs shall file them with the **administrative law**

judge [hearing examiner] within the time designated by the **administrative law judge** [hearing examiner].

(C) Parties desiring to do so shall file written replies to these exceptions and briefs as soon as possible after receiving same, and within the time designated by the **administrative law judge** [hearing examiner].

(D) All exceptions and replies to them shall be succinctly stated.

(3) Filing At any time after the record has been closed in a contested case, and prior to the administrative decision becoming final in such case, all briefs, exceptions, written objections, motions (including motion for rehearing), replies to the foregoing, and all other written documents shall be filed with the **administrative law judge** [hearing examiner]; and further, the party filing such instrument shall provide copies of the same to all other parties of record by first class United States mail or personal service and certify, in writing thereon, the names and addresses of the parties to whom copies have been furnished, as well as the date and manner of service.

(4) Final decision.

(A) The final decision will be rendered by a majority of a quorum of the council, **unless the authority to render a final decision is delegated to the administrative law judge.**

(B) All final decisions shall be in writing and shall set forth the findings of fact and conclusions of law required by law, either in the body of the order or by reference to the **administrative law judge's** [hearing examiner's] proposal for decision.

(C) All final decisions shall be signed by each member of the council who made up the quorum which rendered the final decision.

(D) A copy of all final decisions shall be timely provided to all parties as required by law.

(E) When a contract has been canceled, either upon a final decision of the council or by mutual agreement prior thereto, **or a decision to deny continuation funding,** the provider shall notify parents of all children served by the provider that ECI approval has been canceled. If the provider fails to so notify the parents and furnish satisfactory documentation to the council within 30 days that such notification has been made, the ECI executive director may thereupon serve such notice upon said parents.

(o)[(p)] Decisions and orders.

(1) Motion for rehearing. A decision is final, in the absence of a timely motion for rehearing, on the expiration of the period for filing a motion for rehearing and is final and appealable on the date of rendition of the order overruling the motion for rehearing, or on the date the motion is overruled by operation of law. If the council finds that an imminent peril to the public health, safety, or welfare requires immediate effect of a final decision in a contested case, the finding in a decision shall be recited as well as the fact that the decision is final and effective on the date rendered, in which event the decision is final and appealable on the date rendered and no motion for rehearing is required as a prerequisite for appeal.

(2) Final decision. [Unless otherwise specifically stated by the statute, the] **The** final decision must be rendered within **30** [25] days after the date the hearing is finally closed. **The time period for the final decision shall be extended if the conclusions of law or findings of fact are not submitted timely to the council by the administrative law judge.**

(3) Appeals. Except as otherwise provided in paragraph (1) of this subsection, a motion for rehearing is a prerequisite to an appeal. A motion for rehearing must be filed within five days after the date of rendition of a final decision.

(p)[(q)] Hearing procedure for denial of the continuation of a grant to a provider. The hearing procedure described in subsections (a) -(o)[(p)] of this section shall govern all such proceedings except **that in subsection (n)(4)(C) of this section concerning the hearing procedure the party who has been denied the continuation of funding and is requesting that the decision of the council to deny funding be reversed has the burden of proving that such an action is justified** [with the following exceptions].

[(1) Subsection (h) of this section on the hearing procedure, will be changed so that the party who has been denied the continuation of a grant and is requesting that the decision of the council to deny funding be reversed has the burden of proving that such an action is justified.

[(2) Subsection (o) of this section on the action after the hearing will be changed to provide that the hearing examiner will render the final order or decision in the hearing, as the designee of the council.]

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

Issued in Austin, Texas, on November 8, 1994.

TRD-9450604

Nancy Murphy
Section Manager, Media and Policy Services
Interagency Council on Early Childhood Intervention Services

Earliest possible date of adoption: December 16, 1994

For further information, please call: (512) 450-3765

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TITLE 28. INSURANCE

Part I. Texas Department of Insurance

Chapter 5. Property and Casualty Insurance

Subchapter A. Automobile Insurance

Miscellaneous Interpretations

• 28 TAC §5.206

The Texas Department of Insurance proposes new §5.206, which designates geographic areas as underserved for automobile liability insurance for purposes of determining credits to offset an insurer's quota of assignments through the Texas Automobile Insurance Association. The new section is necessary to designate the ZIP Codes within Texas that are underserved and for which policies written in the ZIP Code will give rise to credits under the Plan of Operation for the Texas Automobile Insurance Plan Association.

The Department will consider the adoption of new §5.206 in a public hearing under Docket Number 2129, scheduled for 8:00 a.m. on December 16, 1994 in Room 100 of the Texas Department of Insurance Building, 333 Guadalupe Street in Austin, Texas.

Birny Birnbaum, Chief Economist–Associate Commissioner for Policy and Research, has determined that for the first five-year period the proposed new section is in effect there will be no fiscal implications as a result of enforcing or administering the rule for local government, small businesses, or local economies. There will be no additional cost to state government as a result of administering and enforcing the rule.

Mr. Birnbaum also has determined that for each year of the first five years the new section is in effect the public benefit anticipated as a result of enforcing the new section will be an increase in the availability of automobile insurance in underserved areas, as contemplated by Texas Insurance Code Article 21.81 §3(e). There is no anticipated cost to parties who are required to comply with the rule.

Comments on the proposal may be submitted to Chief Clerk, Texas Department of Insurance, 333 Guadalupe Street, P.O. Box 149104, Austin, Texas 78714-9104, Mail

Code 113-2A, within 30 days following the date of this publication.

The new rule is proposed under Insurance Code, Articles 1.03A and 21.81, §3(e). Article 1.03A authorizes the Commissioner to adopt rules and regulations for the conduct and execution of the duties and functions of the department as authorized by statute. Article 21.81 requires that the Commissioner designate underserved geographic areas by rule.

The following Articles of the Insurance Code are affected by this rule: §5.206 Article 21.81.

§5.206. Designation of Underserved ZIP Codes.

(a) FIGURE 1: 28 TAC §5.206(a)

(b) FIGURE 2: 28 TAC §5.206(b)

(c) FIGURE 3: 28 TAC §5.206(c)

(d) FIGURE 4: 28 TAC §5.206(d)

(e) Class 0. Any ZIP Code not listed in subsections (a)-(d) of this section are designated as a Class 0 ZIP Code.

(f) Changes to designations. After initial designation of a ZIP Code, the designation may not be decreased (to a lower numbered class) for three years. Any such decrease in designation shall not be effective until one year after the changed designation is adopted as an amendment to this rule. An increase in the designation of a ZIP Code (to a higher numbered class) may occur at any time by amending this rule.

(g) In designating ZIP Codes as Class 0, 1, 2, 3 or 4, the Commissioner shall principally use the share of average vehicles on policies in force in assigned risk and non-standard markets as a percentage of total average vehicles on polices in force by ZIP Code.

(h) The Department shall publish quarterly a listing of the number of average vehicles on policies in force by company by ZIP Code in this state. This information will enable the Texas Automobile Insurance Plan Association, insurers and the public to make the necessary credit calculations and allow all interested parties to monitor which ZIP Codes may be underserved in the future.

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

Issued in Austin, Texas, on November 9, 1994.

TRD-9450708 D J Powers
Chief Clerk and General Counsel
Texas Department of Insurance

Earliest possible date of adoption: December 16, 1994

For further information, please call: (512) 463-6327

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Chapter 21. Trade Practices

Subchapter J. Prohibited Trade Practices

• 28 TAC §21.1002

The Texas Department of Insurance proposes new §21.1002, which would prohibit the use of unfair underwriting guidelines by private passenger automobile and residential property insurers. Unfair underwriting guidelines are defined as those which are not related to the risk of loss for insuring a hazard (person, property or vehicle) or the expense in issuing or servicing the policy and those which are based, in whole or in part, on race, color, religion, national origin or familial status. The new section is necessary to prevent the unfair practice in the business of insurance by some insurers in using unfair underwriting guidelines. Use of unfair underwriting guidelines causes consumers to either be denied insurance or be placed in insurance companies with higher rates than those companies for which the consumer would otherwise qualify. The new section also provides safe harbors for companies to comply with or determine whether they are in compliance with the rule.

The Department will consider the adoption of new §21.1002 in a public hearing under Docket Number 2125, scheduled for 8:00 a.m. on December 16, 1994 in Room 100 of the Texas Department of Insurance Building, 333 Guadalupe Street in Austin, Texas.

Birny Birnbaum, Chief Economist-Associate Commissioner, has determined that for the first five-year period the proposed new section will be in effect there will be no fiscal implications as a result of enforcing or administering the rule for local government, small businesses, or local economies. There will be no additional cost to state government as a result of administering and enforcing the rule because the department's enforcement budget will not change as a result of this rule. To the extent necessary to enforce these new sections, the department will shift resources from other enforcement actions.

Mr. Birnbaum also has determined that for each year of the first five years the new section is in effect the public benefit anticipated as a result of enforcing the new section will be the elimination of unfair practices in the business of insurance; greater availability and affordability of insurance; greater ability of Texas consumers to obtain insurance at fair rates; and greater ability of Texas consumers to comply with the Texas Safety Responsibility Law, which effectively requires drivers to obtain automobile liability insurance. These benefits will arise from the more beneficially competitive insurance markets which will result from the elimination of the unfair practices.

There is no anticipated new direct economic cost to persons who are required to comply with the proposed new section for underwriting guidelines that are specifically listed in the safe harbor section of the rule.

There is an anticipated new direct economic cost to persons who are required to comply with the proposed new section for those guidelines which must be eliminated as being in violation of the rule. This cost is to notify the company's agents and underwriters of the elimination of the guideline. These costs may range from $100 to $100,000 per company, depending on the number of agents and underwriters and the method used in notifying them. There is no anticipated economic cost of higher losses or expenses as a result of the elimination of any underwriting guideline which is not related to risk of loss or size of expense, because, by definition, such underwriting guidelines do not identify an increase in loss or expense.

For companies that have underwriting guidelines which comply with subsection (a) but are not listed in the safe harbor provision of the rule, the company is not required to obtain approval of the use of the guideline and thus there are no new economic costs to comply with the rule. However, if the company seeks to have the department amend this section by adding the underwriting guideline to subsection (c), it will incur new economic costs of between $100 and $100,000 to participate in rule making proceedings.

For companies that have underwriting guidelines for which they have no data to determine whether use of the underwriting guideline complies with subsection (a) of the rule, the company is not required to obtain approval of the use of the guideline and thus is not required to incur any cost under the rule. However, if the company seeks to collect data on the underwriting guideline and/or have the department amend this section by adding the underwriting guideline to subsection (c), it will incur new economic costs of between $100 and $100,000 to collect the necessary data and/or to participate in rule making proceedings.

Comments on the proposal may be submitted to Chief Clerk, Texas Department of Insurance, 333 Guadalupe Street, P.O. Box 149104, Austin, Texas 78714-9104, Mail Code 113-2A, within 30 days following the date of this publication.

The new rule is proposed under Insurance Code, Articles 1.03A, 5.98, and 21. 21, §13. Article 1.03A authorizes the Commissioner to adopt rules and regulations for the conduct and execution of the duties and functions of the department as authorized by statute. Article 21.21, §13 authorizes the Department to promulgate rules and regulations to accomplish the purposes of Insurance Code, Articles 21.20 and 21.21. Article 5.98 authorizes the Department to adopt reasonable rules that are appropriate to accomplish the purposes of Insurance Code, Chapter 5, including Article 5.09 (prohibiting any distinction or discrimination in favor of an insured having a like hazard, which occurs when an underwriting guideline unrelated to risk or expense is used to place a consumer in a different company within a company group).

The following Articles of the Insurance Code are affected by this rule: §21.1002-Articles 5.09 and 21.21.

§21.1002. Unfair Underwriting Guidelines.

(a) Prohibition. Unless otherwise expressly authorized by law, a private passenger automobile or residential property insurer or agent shall not use an unfair underwriting guideline in making a decision to cancel, non-renew, limit the coverages made available to, or refuse to issue a policy to a consumer. The failure to comply with this subsection constitutes an unfair practice in the business of insurance in violation of the Insurance Code, Article 21.21, and shall be subject to the provisions thereof.

(b) Definition of "unfair underwriting guideline." An underwriting guideline is unfair if any one of the following applies.

(1) The underwriting guideline is not related to the risk of loss for insuring the consumer or the expense in issuing or servicing the policy.

(2) The underwriting guideline is based, in whole or in part, on race, color, religion, national origin or familial status.

(c) Definition of "related to risk or expense." An underwriting guideline is "not related to the risk of loss for insuring the consumer or the expense in issuing or servicing the policy" unless higher losses or higher expenses are shown to be associated with the characteristic through a standard statistical procedure that meets all of the requirements of paragraphs (1)-(3) of this subsection.

(1) The statistical procedure must control for all other underwriting guidelines and rating factors which have been approved by the department as being in compliance with subsection (a) of this section and all other underwriting guidelines of the insurer.

(2) The statistical procedure must show, to a 95% confidence level or higher, that consumers who satisfy the underwriting guideline have, on average, lower losses or cause the insurer to incur lower expenses than those consumers who do not satisfy the underwriting guideline.

(3) The analysis of the underwriting guideline must be based on sound actuarial principles.

(d) Safe Harbors. An underwriting guideline that meets the requirements of one of the safe harbors set out in paragraphs (1), (2), or (3) of this subsection is deemed to be in compliance with subsection (a) of this section. However, an insurer subject to subsection (a) of this section is not required to obtain the prior approval of the Department or rely on the safe harbor protections of this subsection to use an underwriting guideline.

(1) Underwriting guidelines for private passenger automobile insurance based on the following characteristics comply with subsection (a) of this rule:

(A) average miles driven in a year or other specified time period;

(B) accidents in which a person to be insured under the policy was substantially at fault and which resulted in bodily injury or property damage;

(C) a final conviction in any court in the United States, forfeiture of bond, or payment of a fine or an amount accepted by the court if the conviction, forfeiture or payment was a result of an allegation that a violation of a law regulating the operation of motor vehicles was committed;

(D) the making of a fraudulent insurance claim;

(E) number of years of driving experience or number of years licensed to drive.

(2) Underwriting guidelines for residential property insurance based on the following characteristics comply with subsection (a) of this rule:

(A) the physical condition of the property to be insured, provided the underwriting guideline has specific and objective measures to evaluate the hazard;

(B) claim experience on a residential property policy arising out of the consumer's negligence;

(C) if a structure to be insured is vacant or unoccupied for more than 60 days;

(D) the existence of a physical hazard, if the hazard presents a significant risk of loss directly related to the perils to be insured against. Residential property or traffic patterns shall not be considered to be physical hazards;

(E) the making of a fraudulent insurance claim;

(F) conviction for arson.

(3) Additional underwriting guidelines may be added to the lists in subsection (c)(1) and (2) of this section pursuant to the rule making procedures under the Government Code, Chapter 2001. The provisions set out in subparagraphs (A) and (B) of this paragraph shall also apply to a petition to amend this section.

(A) If an insurer makes the petition, that insurer's use of the underwriting guideline shall not be a violation of subsection (a) of this section for the period beginning on the date the petition for rule making is filed with the department. If the rule is not adopted, the safe harbor ends thirty days after either the entry of an order denying the petition or withdrawal of the proposed rule.

(B) If requested by the petitioner, the commissioner may postpone ruling on the petition to permit any interested person to collect data on the underwriting guideline for such period as the commissioner deems necessary. The commissioner may also add data elements to any applicable statistical plan as necessary.

(e) Definition Of "Underwriting Guideline." For the purposes of this rule, an "underwriting guideline" is a rule, standard, marketing decision, guideline, or practice, whether written, oral or electronic, used by an insurer or its agent to examine, bind, accept, reject, cancel or limit coverages made available to groupings of consumers.

(f) Definition Of "Consumer." For the purposes of this rule, a "consumer" is the person making the application to insure a person, property or vehicle. A "consumer" includes both existing insureds and applicants for insurance.

(g) Definition of "Rating factors." For the purposes of this rule, "rating factors" are all territories, rating classifications, discounts and surcharges promulgated or approved by the department.

(h) Other Laws Not Excepted. Compliance with subsection (a) of this section does not constitute an exemption from other rules or regulations of the department or statutory requirements.

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

Issued in Austin, Texas, on November 4, 1994.

TRD-9450492

D. J. Powers
Chief Clerk and General Counsel
Texas Department of Insurance

Earliest possible date of adoption: December 16, 1994

For further information, please call: (512) 463-6327

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• 28 TAC §21.1004

The Texas Department of Insurance proposes new §21.1004, which would prohibit

discrimination on the basis of race, color, religion, or national origin and, to the extent not justified by sound actuarial principles, on the basis of geographic location, disability, sex, or age, in making a decision whether to sell or cancel a policy or certificate of insurance. The new section is necessary to prevent the unfair practice in the business of insurance of using underwriting guidelines based on race, color, religion, or national origin and, to the extent not justified by sound actuarial principles, on the basis of geographic location, disability, sex, or age, in making a decision whether to sell or cancel a policy or certificate of insurance and thereby causing those consumers to either be denied insurance or be placed in insurance companies with higher rates than those companies for which the consumer would otherwise qualify.

The Department will consider the adoption of new §21.1004 in a public hearing under Docket Number 2126, scheduled for 8:00 a.m. on December 16, 1994 in Room 100 of the Texas Department of Insurance Building, 333 Guadalupe Street in Austin, Texas. The Department encourages any interested party with data or statistical analyses regarding the types of discrimination which are the subject of this rule to provide the Department with that data and statistical analyses at or before the hearing. This request includes, but is not limited to, data and statistical analyses related to whether the types of discrimination meet the three requirements for being "related to risk or expense" set out in proposed §21.1002(c) of this title.

Birny Birnbaum, Chief Economist-Associate Commissioner, has determined that for the first five-year period the proposed new section will be in effect there will be no fiscal implications as a result of enforcing or administering the rule for local government, small businesses, or local economies. There will be no additional cost to state government as a result of administering and enforcing the rule because the department's enforcement budget will not change as a result of this rule. To the extent necessary to enforce these new sections, the department will shift resources from other enforcement actions.

Mr. Birnbaum also has determined that for each year of the first five years the new section is in effect the public benefit anticipated as a result of enforcing the new section will be the elimination of unfair practices in the business of insurance; greater availability and affordability of insurance; greater ability of Texas consumers to obtain insurance at fair rates; and greater ability of Texas consumers to comply with the Texas Safety Responsibility Law, which effectively requires drivers to obtain automobile liability insurance. These benefits will arise from the more beneficially competitive insurance markets which will result from the elimination of the unfair practices.

There is an anticipated new direct economic cost to individuals who are required to comply with the proposed new section. This cost is to notify the company's agents and underwriters of the elimination of guidelines that do not comply with this section. These costs may range from $100 to $100,000 per company, depending on the number of agents and underwriters and the method used in notifying them. There are no additional economic costs.

Comments on the proposal may be submitted to Chief Clerk, Texas Department of Insurance, 333 Guadalupe Street, P.O. Box 149104, Austin, Texas 78714-9104, Mail Code 113-2A, within 30 days following the date of this publication.

The new rule is proposed under Insurance Code, Articles 1.03A and 21.21, §13. Article 1.03A authorizes the Commissioner to adopt rules and regulations for the conduct and execution of the duties and functions of the department as authorized by statute. Article 21.21, §13 authorizes the Department to promulgate rules and regulations to accomplish the purposes of Insurance Code, Articles 21.20 and 21.21.

The following Articles of the Insurance Code are affected by this rule: §21.1004-Article 21.21.

§21.1004. Discrimination in the Sale of Insurance.

(a) Prohibition. An insurer, agent, or other person licensed to engage in the business of insurance shall not discriminate, in whole or in part, on the basis of race, color, religion, or national origin and, to the extent not justified by sound actuarial principles, on the basis of geographic location, disability, sex, or age, in making a decision whether to bind, accept, reject, cancel or limit coverages made available to a consumer. The failure to comply with this subsection constitutes an unfair trade practice in the business of insurance in violation of the Insurance Code, Article 21.21, and shall be subject to the provisions thereof.

(b) Scope. This section applies to any person or entity licensed by the department to engage in the business of insurance in this state, including, but not limited to, agents, property and casualty insurers, life, health and accident insurers, title insurers, capital stock companies, mutual companies, county mutual companies, fraternal benefit societies, local mutual aid associations, statewide mutual assessment companies, Lloyd's plan companies, reciprocal or inter insurance exchanges, stipulated premium insurance companies, group hospital service companies, health maintenance organizations, farm mutual insurance companies, risk retention groups, and surplus lines carriers.

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

Issued in Austin, Texas, on November 4, 1994.

TRD-9450493

D. J. Powers
Chief Clerk and General Counsel
Texas Department of Insurance

Earliest possible date of adoption: December 16, 1994

For further information, please call: (512) 463-6327

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• 28 TAC §21.1005

The Texas Department of Insurance proposes new §21.1005, which would prohibit the use of underwriting guidelines by private passenger automobile insurers based on the purchase of types or amounts of coverage in excess of the minimum automobile liability coverage required by law. The new section is necessary to prevent the unfair practice in the business of insurance by some insurers in using underwriting guidelines based on the purchase of types or amounts of coverage in excess of the minimum automobile liability coverage required by law and thereby causing those consumers to either be denied insurance or be placed in insurance companies with higher rates than those companies for which the consumer would otherwise qualify. This rule was proposed in a petition for rule making by James Mallett of Dallas, Texas.

The Department will consider the adoption of new §21.1005 in a public hearing under Docket Number 2127, scheduled for 8:00 a.m. on December 16, 1994 in Room 100 of the Texas Department of Insurance Building, 333 Guadalupe Street in Austin, Texas. The Department encourages any interested party with data and statistical analyses regarding the underwriting guideline which is the subject of this rule to provide the Department with that data and statistical analyses at or before the hearing. This request includes, but is not limited to, data and statistical analyses related to whether the underwriting guideline meets the three requirements for being "related to risk or expense" set out in proposed §21.1002(c) of this title.

Birny Birnbaum, Chief Economist-Associate Commissioner, has determined that for the first five-year period the proposed new section will be in effect there will be no fiscal implications as a result of enforcing or administering the rule for local government, small businesses, or local economies. There will be no additional cost to state government as a result of administering and enforcing the rule because the department's enforcement budget will not change as a result of this rule. To the extent necessary to enforce these new sections, the department will shift resources from other enforcement actions.

Mr. Birnbaum also has determined that for each year of the first five years the new section is in effect the public benefit anticipated as a result of enforcing the new section will be the elimination of unfair practices in the business of insurance; greater availability and affordability of insurance; greater ability of Texas consumers to obtain insurance at fair rates; and greater ability of Texas consumers to comply with the Texas Safety Responsibility Law, which effectively requires drivers to obtain automobile liability insurance. These benefits will arise from the more beneficially competitive insurance markets which will result from the elimination of the unfair practices.

There is an anticipated new direct economic cost to persons who are required to comply with the proposed new section. This cost is to notify the company's agents and underwriters of the elimination of the guideline. These costs may range from $100 to $100,000 per company, depending on the number of agents and underwriters and the method used in notifying them. There is no anticipated economic cost of higher losses or expenses as a result of the elimination of this underwriting guideline because it is not related to risk of loss or size of expense.

Comments on the proposal may be submitted to Chief Clerk, Texas Department of Insurance, 333 Guadalupe Street, P.O. Box 149104, Austin, Texas 78714-9104, Mail Code 113-2A, within 30 days following the date of this publication.

The new rule is proposed under Insurance Code, Articles 1.03A, 5.98, and 21. 21, §13. Article 1.03A authorizes the Commissioner to adopt rules and regulations for the conduct and execution of the duties and functions of the department as authorized by statute. Article 21.21, §13 authorizes the Department to promulgate rules and regulations to accomplish the purposes of Insurance Code, Articles 21.20 and 21.21. Article 5.98 authorizes the Department to adopt reasonable rules that are appropriate to accomplish the purposes of Insurance Code, Chapter 5, including Article 5.09 (prohibiting any distinction or discrimination in favor of an insured having a like hazard, which occurs when this underwriting guideline unrelated to risk or expense is used to place a consumer in a different company within a company group).

The following Articles of the Insurance Code are affected by this rule: §21.1005-Articles 5.09 and 21.21.

§21.1005. Prohibition Of Underwriting Guidelines Based On The Purchase Of Types Or Amounts of Coverage In Excess Of Minimum Limits Liability Coverage.

(a) Prohibition. A private passenger automobile insurer or agent shall not use an underwriting guideline based, in whole or in part, on whether an insured or applicant for automobile insurance purchases types or amounts of coverage in excess of the minimum automobile liability coverage required to show proof of financial responsibility under the Texas Safety Responsibility Law, Texas Civil Statutes, Article 6701h. The failure to comply with this section constitutes an unfair trade practice in the business of insurance in violation of the Insurance Code, Article 21.21, and shall be subject to the provisions thereof.

(b) Definition Of "Underwriting Guideline." For the purposes of this rule, an "underwriting guideline" is a rule, standard, marketing decision, guideline, or practice, whether written, oral or electronic, used by an insurer or its agent to examine, bind, accept, reject, cancel or limit coverages made available to groupings of consumers.

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

Issued in Austin, Texas, on November 4, 1994.

TRD-9450490

D. J. Powers
Chief Clerk and General Counsel
Texas Department of Insurance

Earliest possible date of adoption: December 16, 1994

For further information, please call: (512) 463-6327

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• 28 TAC §21.1006

The Texas Department of Insurance proposes new §21.1006, which would prohibit the use by private passenger automobile and residential property insurers of underwriting guidelines involving the credit history of a person or persons applying for insurance. The new section is necessary to prevent the unfair practice in the business of insurance by some insurers in using underwriting guidelines involving the consumer's credit history and thereby causing those consumers to be denied insurance or be placed in insurance companies with higher rates than those companies for which the consumer would otherwise qualify.

The Department will consider the adoption of new §21.1006 in a public hearing under Docket Number 2128, scheduled for 8:00 a.m. on December 16, 1994 in Room 100 of the Texas Department of Insurance Building, 333 Guadalupe Street in Austin, Texas. The Department encourages any interested party with data and statistical analyses regarding the underwriting guideline which is the subject of this rule to provide the Department with that data and statistical analyses at or before the hearing. This request includes, but is not limited to, data and statistical analyses related to whether the underwriting guideline meets the three requirements for being "related to risk or expense" set out in proposed §21.1002(c) of this title.

Birny Birnbaum, Chief Economist-Associate Commissioner, has determined that for the first five-year period the proposed new section will be in effect there will be no fiscal implications as a result of enforcing or administering the rule for local government, small businesses, or local economies. There will be no additional cost to state government as a result of administering and enforcing the rule because the department's enforcement budget will not change as a result of this rule. To the extent necessary to enforce these new sections, the department will shift resources from other enforcement actions.

Mr. Birnbaum also has determined that for each year of the first five years the new section is in effect the public benefit anticipated as a result of enforcing the new section will be the elimination of unfair practices in the business of insurance; greater availability and affordability of insurance; greater ability of Texas consumers to obtain insurance at fair rates; and greater ability of Texas consumers to comply with the Texas Safety Responsibility Law, which effectively requires drivers to obtain automobile liability insurance. These benefits will arise from the more beneficially competitive insurance markets which will result from the elimination of the unfair practices.

There is an anticipated new direct economic cost to persons who are required to comply with the proposed new section. This cost is to notify the company's agents and underwriters of the elimination of the guideline. These costs may range from $100 to $100,000 per company, depending on the number of agents and underwriters and the method used in notifying them. There is no anticipated economic cost of higher losses or expenses as a result of the elimination of this underwriting guideline because it is not related to risk of loss or size of expense.

Comments on the proposal may be submitted to Chief Clerk, Texas Department of Insurance, 333 Guadalupe Street, P.O. Box 149104, Austin, Texas 78714-9104, Mail Code 113-2A, within 30 days following the date of this publication.

The new rule is proposed under Insurance Code, Articles 1.03A, 5.98, and 21. 21, §13. Article 1.03A authorizes the Commissioner to adopt rules and regulations for the conduct and execution of the duties and functions of the department as authorized by statute. Article 21.21, §13 authorizes the Department to promulgate rules and regulations to accomplish the purposes of Insurance Code, Articles 21.20 and 21.21. Article 5.98 authorizes the Department to adopt reasonable rules that are appropriate to accomplish the purposes of Insurance Code, Chapter 5, including Article 5.09 (prohibiting any distinction or discrimination in favor of an insured having a like hazard, which occurs when this underwriting guideline, which is unrelated to risk or expense, is used to place a consumer in a different company within a company group).

The following Articles of the Insurance Code are affected by this rule: §21.1006-Articles 5.09 and 21.21.

§21.1006. Prohibition Of Underwriting Guidelines Based On Credit History.

(a) Prohibition. A private passenger automobile or residential property insurer or agent shall not use an underwriting guideline based, in whole or in part, on the credit history of a person insured or to be insured under a policy. This section does not prohibit an insurer from refusing to offer an installment payment plan to a consumer who has, within the preceding two years, defaulted in the payment of premiums to an insurer and caused a lapse in the policy. The failure to comply with this subsection constitutes an unfair trade practice in the business of insurance in violation of the Insurance Code, Article 21.21, and shall be subject to the provisions thereof.

(b) Definition Of "Underwriting Guideline." For the purposes of this rule, an

"underwriting guideline" is a rule, standard, marketing decision, guideline, or practice, whether written, oral or electronic, used by an insurer or its agent to examine, bind, accept, reject, cancel or limit coverages made available to groupings of consumers.

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

Issued in Austin, Texas, on November 4, 1994.

TRD-9450491 D. J. Powers
Chief Clerk and General Counsel
Texas Department of Insurance

Earliest possible date of adoption: December 16, 1994

For further information, please call: (512) 463-6327

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Part II. Texas Workers' Compensation Commission

Chapter 108. Fees

• 28 TAC §108.1

The Texas Workers' Compensation Commission proposes new §108.1, concerning charges for copies of public records. The commission is simultaneously withdrawing the proposal of new §108.1 published in the September 20, 1994 issue of the *Texas Register* (19 TexReg 7323) and republishing this proposed new rule. The new rule is proposed to comply with House Bill 1009, 73rd Legislature, 1993 which mandates each state agency to promulgate rules specifying the charges the agency will establish for copies of public information. The charges listed in the proposed new rule are in accordance with the recently approved General Services Commission rules specifying the costs and methods that a state agency may use to recover the costs of providing copies of public records. The new rule proposes a framework within which the commission may recover the cost to provide copies of public records to persons requesting the copies. The rule also provides that the commission may waive these charges under certain circumstances, and authorizes the executive director of the commission to determine whether a public benefit exists on a case-by-case basis.

Janet Chamness, chief of budget for the commission, has determined that for each year of the first five years the rule as proposed will be in effect there will be no fiscal impact on state or local government as a result of enforcing or administering the rule. The commission will be able to recover costs for providing copies of public records in circumstances where such a practice would provide the most benefit to the commission and the state. Consistent with Texas General Services Commission approval, the Texas Workers' Compensation Commission has previously charged for copies of public records. The fees are calculated based on the agency's full cost of providing the service. There will be no effect on local employment or the local economy.

Ms. Chamness also has determined that for each year of the first five years the rule is in effect the public benefit anticipated is more efficient resource utilization, since the commission will be able to recover costs for providing copies of public records as a result of uniform procedures throughout state government for recovery of costs associated with providing public information. There is no anticipated economic cost to persons who are required to comply with the rule. Consistent with Texas General Services Commission approval, the Texas Workers' Compensation Commission has previously charged for copies of public records. Any costs, which would result from adoption of this rule, are the direct outgrowth of the legislative directive contained in House Bill 1009, not the result of the proposal and adoption of this rule.

The Texas Workers' Compensation Commission maintains a separate fee schedule for obtaining copies of workers' compensation claimant files, which are confidential under the Texas Labor Code, and for costs of audits and reviews required within the commission's regulatory authority.

Comments on the proposal may be submitted for 30 days after publication of the proposed rule in the *Texas Register*, to Elaine Crease, Texas Workers' Compensation Commission, Office of General Counsel, Mailstop #4-D, 4000 South IH-35, Austin, Texas 78704-7491 Requests for a public hearing on this proposal should be submitted separately.

The new rule is proposed under the provisions of §5 of Acts 1993, 73rd Legislature, Chapter 428, House Bill 1009; the Government Code §§552.230, 552.261, and 552.263; and the Texas Labor Code, §402.061 and §402.064. House Bill 1009 and the Government Code sections authorize the agency to promulgate reasonable rules of procedure under which public records may be inspected efficiently, safely, and without delay, and require the agency to prescribe rules specifying the charges the agency will make for copies of public records. The Texas Labor Code, §402.061 authorizes the commission to adopt rules as necessary for the implementation and enforcement of the Texas Workers' Compensation Act. The Texas Labor Code, §402.064 authorizes the commission to set reasonable fees for services provided to persons requesting services from the commission.

The proposed new rule affects agency operations under the following statutes: the Government Code, Chapter 552, and the Texas Labor Code, §402. 064.

§108.1. Public Records.

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

(1) Letter of Certification–A letter signed and sealed by the executive director of the commission, or stamped and sealed by his delegate, attesting to authenticity of attached document(s)

(2) Readily Available Records–Records that already exist in printed form, or information that is stored electronically and is ready to be printed or copied without requiring any programming, or information that already exists on a microfiche or microfilm, but not information that requires a substantial amount of time to locate or prepare for release, for example, as a result of required redaction for the purpose of deleting information that is confidential by law.

(3) Standard-size copy–A printed impression on one side of a piece of paper that measures up to 8 1/2 inches by 14 inches. A piece of paper that is printed on both sides shall be counted as two copies. A copy of a public record made available to a requestor in any other available format is not a standard-size copy.

(b) Public Record Requests. The Texas Labor Code, §402.021 provides that the Open Records Act applies to a record of the commission or the Texas Workers' Compensation Research Center. Except where limited by law, the following provisions will apply to all requests for review of the commission's public records pursuant to the Texas Government Code, Chapter 552.

(1) All public records requests shall be treated equally.

(2) All public records requests and appointments for inspection must be in writing and should be directed to the Office of Executive Communication, the commission's public records coordinator.

(3) A request for official records shall include the name, address and telephone number of the requestor, and a detailed description of the records in sufficient detail to permit efficient gathering of the requested information.

(4) The commission shall make every reasonable effort to provide the information in the manner requested and in a reasonable time without disruption of normal business activities.

(5) The following requirements apply to confidentiality of records.

(A) The commission will not provide records considered to be confidential by law or otherwise prohibited from release under the Texas Government Code, the Texas Labor Code or other provisions of law, unless the requestor is legally eligible for such information. The commission will comply with all copyright laws.

(B) If the commission considers that the requested records fall within an exception under the Government Code, and that the records should be withheld, by the tenth calendar date after the date of

receiving the written request, the commission will ask for an opinion from the attorney general about whether the records are within that exception, if there has not been a previous determination on that issue.

(C) Confidential claim files, arbitrator lists, and requests for information excepted from disclosure in the Texas Government Code, Chapter 552, will not be made available except under a court order, Attorney General directive, or other legal process.

(6) The following requirements apply to examination of information.

(A) Records access for purposes of inspection will be available by appointment only and will only be available during the regular business hours of the commission.

(B) A person requesting to examine commission records in the offices of the commission must complete the examination without disrupting the normal operations of the commission and not later than the tenth day after the date that the records are made available to the person. Upon written request by the requestor within the ten-day period, the commission will extend the examination period by increments of ten days, not to exceed a total of 30 days.

(C) A person may not remove any commission record from the offices of the commission. If the requestor desires a copy of information after examination of commission records, copies will be provided by commission staff and the requestor will be charged in accordance with this rule.

(D) If the safety of any public record or the protection of confidential information is at issue, or when compliance with a request for inspection would be unduly disruptive to the ongoing business of the commission, physical access may be denied and the option of receiving copies of the records at the fees stated in this rule shall be provided.

(E) In response to requests for inspection, the commission shall not charge for making available for inspection readily available information maintained in standard-size form. The commission may charge for preparing and making available information that is maintained in other than standard size and not readily available. Preparation may involve retrieval of information from a database or redaction of confidential information. In such cases, the commission may recover the cost of personnel time.

(7) The provision of copies of records or the inspection of records may be delayed or interrupted by the commission if the records are in active use by the commission, are needed for use by the commission, or are in storage. The period of interruption will not be charged against the requestor's ten day period to examine the records. If the information is unavailable because it is in active use or in storage, the requestor shall receive written notification of the delay and, if necessary, the office of executive communication will arrange a subsequent appointment for inspection of records when the information is available for inspection or duplication.

(8) Costs of duplication shall be the responsibility of the requesting party in accordance with the fees imposed by this rule. Fees are due and payable at the commission at the time of receipt of the copies of public records. However, if mail, expedited, or fax delivery is requested, fees are due in advance.

(9) When a particular request will involve considerable time and resources, the commission will advise the requesting party of what may be involved and will provide an estimate of the date of completion and the charges that may result.

(10) If the anticipated charges of this rule exceed $100, the commission may require a bond for payment of costs or cash prepayment equal to the total anticipated charges prior to the requested information.

(11) The commission may, in its discretion, waive fees if it serves a general public purpose. The executive director of the Texas Workers' Compensation Commission is authorized to determine whether a public interest benefit exists to the general public on a case-by-case basis.

(c) Charges and Fees for Copies of Public Records.

(1) Copies of 50 pages or less of standard-size copies of readily available records will be charged $.10 per page.

(2) Copies of 51 pages or more of standard-size copies of readily available records will be charged $.85 for the first page and $0.15 for each subsequent page.

(3) Copies of standard-size copies of not readily available records will be charged $1.00 for the first page and $.30 for each subsequent page.

(4) If certification of copies is requested, a letter of certification will be provided for an additional charge of $1.00, which will be added to the computed fee for each requested letter of certification. Several pages copied from a single file may require only one letter of certification.

(5) Charges for non-standard copies will be as follows:

(A) Audiotape $1.00 each;

(B) Videotape $2.50 each;

(C) Diskette $1.00 each;

(D) Magnetic Tape (2400 Reel-to-reel) $10.00 each;

(E) Magnetic Tape Cartridge (Type 3480) $10.00 each;

(F) Paper $.50 each; and

(G) Duplication of Photographic Images $5.00 per image plus commercial photo reproduction costs and postage

(d) Personnel Charge.

(1) The charge for personnel costs incurred in processing a request for public information is $15 an hour, which is the average hourly cost, including fringe benefits, to the state for classified state employees as of May 31, 1993. this charge will be prorated as appropriate.

(2) Personnel charges will be added to the computed fee for personnel time incurred in processing non-standard copy requests and for access to public records which are not readily available.

(3) Personnel charges will not be added to requests for information that is readily available in standard-size form.

(e) Overhead Charge.

(1) In response to a request for information that is not readily available or which is in excess of 50 pages of readily available information, the commission may include in the charges direct and indirect costs, in addition to the personnel charge, at a rate of 20% of the personnel charge. This overhead charge covers such costs as depreciation of capital assets, rent, maintenance and repair, utilities and administrative overhead.

(2) An overhead charge will not be billed in connection with requests for copies of 50 pages or less of information that is readily available in standard-size form.

(f) Remote Document Retrieval Charge. The actual cost of retrieving a document from an off-site storage location will be charged. If a remote retrieval charge is assessed, no personnel charge will be assessed.

(g) Computer Resource Charges.

(1) A computer resource charge is a computer utilization charge for computers based on the amortized cost of acquisition, lease, operation, and maintenance of computer resources, which might include, but is not limited to, some or all of the following: central processing units (CPUs), servers, disk drives, local area networks (LANs), printers, tape drives, other peripheral devices, communication devices, software, and system utilities.

(2) Computer Resource Charges are as follows:

(A) Mainframe Service Rate of $17.50 per minute;

(B) Midrange Service Rate of $3.00 per minute; and

(C) PC or LAN Service Rate of $.50 per minute.

(3) The charge made to recover the computer utilization is the actual time the computer takes to execute a particular program at the applicable rate.

(h) Programming Time. If a particular request requires the entry of data in order to execute an existing program or creation of a new program so that information may be accessed, an additional charge of $26 per hour will be added to the computed fee for the programmer's time. This charge will be prorated as appropriate.

(i) Miscellaneous Supplies. The actual cost of miscellaneous supplies, such as labels, boxes, and other supplies used to produce the requested information will be added to the total charge for public information.

(j) Expedited Handling. A $25 expedited handling charge will be added to requests which require completion on a priority basis.

(k) Delivery Charges.

(1) U.S. Mail. When requested copies of public records are to be mailed, the actual cost of postage and supplies will be added to the computed fee.

(2) Overnight Courier. When requested copies of public records are to be sent by overnight courier or other expedited delivery service, the cost of the service will be added to the computed fee unless the requestor furnishes a recipient delivery number for use by the commission in delivering the copies to the carrier.

(3) Faxing. The charge for faxing copies is $.10 per page for local telephone delivery, $.50 per page for telephone delivery within the same area code, and $1.00 per page for telephone delivery to a different area code. The commission may not be required to fax 20 or more pages of information and may require another form of delivery.

(l) Annual Re-evaluation of Charges. The charges set forth in this rule may be revised annually in accordance with the Texas General Services Commission's annual re- evaluation and update for charges for public records.

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

Issued in Austin, Texas, on November 8, 1994.

TRD-9450681 Susan Cory
General Counsel
Texas Workers' Compensation Commission

Earliest possible date of adoption: December 16, 1994

For further information, please call: (512) 440-3700

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TITLE 30. ENVIRONMENTAL QUALITY

Part I. Texas Natural Resource Conservation Commission

Chapter 330. Municipal Solid Waste

The Texas Natural Resource Conservation Commission (TNRCC) proposes amendments to §330.2 and §330.203, concerning requirements for municipal solid waste landfills (MSWLFs) designed below the seasonal high-water table.

The proposed amendments rules were developed to provide technically-based performance standards for those municipal solid waste landfills that, of necessity, must be designed below the seasonal high groundwater table. The proposed amendments also will allow for landfills to use waste, rather than soil, as ballast.

As part of the development process for the new municipal solid waste regulations that implement the federal Subtitle D requirements, the commission created a special advisory committee that assisted staff with the development of the State's rules. Although not addressed in the Subtitle D requirements, the need for the proposed rule was identified by the advisory group during the development of the Subtitle D regulations.

In response to the recommendation of the advisory group, a panel of technical professionals was organized to study this issue. The members included geotechnical engineers, civil and environmental engineers, groundwater hydrologists, and geologists. The technical panel researched and discussed the issue of requirements for landfills designed below the water table over a four-month period. The proposed rules resulted from these discussions.

The proposed rules have been reviewed by the Regulatory Oversight Committee of the Municipal Solid Waste Management and Resource Recovery Advisory Council. The Committee conducted a public meeting for input, following which the Committee recommended that the rules be published for public comment.

Proposed amendments to §330.2, "Definitions" would add definitions for "Seasonal high-water table" and "Water table." The addition of these definitions allows for clarification of certain groundwater terminology which would impact the changes found in §330.203. The definition for "water table" is a definition commonly used by geologists and groundwater hydrologists in the field. The definition of "Seasonal high-water table" was developed by the advisory group.

Proposed amendments to §330.203 "Special Conditions (Liner Design Constraints)" would replace existing §330.203(a) and (b) with new language and add §330.203(c)-(j) developed by the technical panel.

The amendment to §330.203(a) requires the owner/operator of a Type I landfill to demonstrate that the liner system will not undergo uplift from hydrostatic forces during construction.

The amendment to §330.203(b) requires the owner or operator to insure that the liner is stable during the filling and operation of the landfill through a suitable combination of dewatering and/or ballast from overlying soil and/or waste.

If a leachate collection system is necessary, §330.203(c) requires the leachate collection system to be designed to handle both the leachate generated and the groundwater inflow from materials beneath and lateral to the liner system.

Section 330.203(d) requires the owner or operator to perform a preliminary foundation evaluation satisfactory to the executive director prior to excavating any unit below the seasonal high water table.

Section 330.203(e) requires the owner/operator to address the demonstration required by §330.203(a)(1)-(3) in the Soil and Liner Quality Control Plan (SLQCP).

Section 330.203(f) requires the owner/operator to submit a ballast evaluation report (BER) to the agency for review and approval.

Section §330.203(g) requires any dewatering systems to be operated until the executive director determines that such systems are no longer required.

Section 330.203(h) provides that the executive director may require owners or operators of Type IV landfill excavations that extend below the seasonal high water table to meet one or more provisions in this subsection.

Section 330.203(i) allows for the use of waste as ballast if approved by the executive director. In order to use waste as ballast, the following are required. First, the first five feet or the total thickness of the ballast, whichever is less, shall be free of brush or bulky items.

Second, the weight of the liner system must be sufficient to offset any unbalanced upward or inward hydrostatic forces on the liner by a factor of 1.5 when waste is used for ballast. Waste used for ballast shall have a density of not less than 1, 000 pounds per cubic yard. If a trash compactor having a minimum weight of 40, 000 pounds is used, no compaction density verification will be required. Third, the SLQCP and the BER shall include methods to verify compaction density of 1, 000 pounds per cubic yard if a 40,000 pound compactor is not used.

Section 330.203(j) provides that the seasonal high water table shall be adjusted upward, if necessary, as additional data become available after a permit is issued.

All comments must be received within 30 days following the date of this publication.

Stephen Minick, Division of Budget and Planning, has determined that, for the first five years these sections as proposed are in effect, there will be fiscal implications as a result of enforcement and administration of the sections The effect on state government will be a marginal increase in workload and associated costs of the technical review and approval of the proposed performance requirements for landfill ballast. These cost increases are not anticipated to be significant and will not require additional staff or budget authority. The sections as proposed will have direct fiscal implications for local governments operating affected municipal landfill facilities. The fiscal implications will be equivalent to the effects on any private facility operator. Local governments served by private waste disposal facilities will be potentially affected indirectly as a result of the reflection of changes in operating costs of affected landfill in adjusted disposal service costs.

The effects of the proposed sections on affected landfill operators will be a general, net reduction in operating costs. Operators will realize increased costs of demonstration of compliance with proposed performance standards. These increases, however, are anticipated to be fully offset by potential savings in costs of compliance with landfill ballast requirements Both costs and cost savings can only be determined on a case-by-case basis and will vary with facility size, location and site-specific conditions. It is generally estimated that technical demonstration costs could vary from $50,000 up to $200,000, but could fall outside of this range in specific circumstances. Potential cost savings are anticipated to be even more variable. Savings have not been estimated on a unit cost basis, but potential direct cost savings of up to $5 million have been projected for larger representative facilities. Actual cost savings will not only vary considerably on a case-by-case basis, but will also depend on longer term effects of increased revenues and expanded landfill capacity as a function of utilization of wastes as ballast. The number of facilities directly affected by the proposed rules cannot be determined exactly, but it is estimated that up to half of the operating facilities outside of the arid western part of the state, or approximately 80 facilities, would be covered upon adoption of the proposal. The potential number of facilities that could become subject to the rule with modification or vertical expansion of facilities into existing water tables is unknown. It is not anticipated that the proposed sections will have direct effects on small businesses

Mr. Minick also has determined that for the first five years these sections as proposed are in effect, the public benefit anticipated as a result of enforcement of and compliance with the sections will be reductions in construction and operating costs of certain municipal solid waste disposal facilities, potential savings to consumers and recipients of solid waste disposal services, more cost-effective management and regulation of solid waste disposal and more effective utilization of landfill capacity in the state. There are no anticipated costs to other persons required to comply with these sections as proposed.

Written comments may be submitted to Clark Talkington, Municipal Solid Waste (MSW) Division at TNRCC Building F, First Floor, Room 1206, 12015 North Interstate 35, Austin, Texas 78753.

Please mail written comments to Clark Talkington, Technical Assistance/Special Projects Section, Municipal Solid Waste Division, Texas Natural Resource Conservation Commission, P.O Box 13087, Austin, Texas 78711-3087. For further information contact Clark Talkington at (512) 239-6731 or Hector Mendieta at (512) 239-6694.

Subchapter A. General Information

- **30 TAC §330.2**

The amendment is proposed under the Texas Water Code, §5.103, which provides the Texas Natural Resource Conservation Commission with the authority to adopt any rules necessary to carry out the powers and duties under the provisions of the Texas Water Code.

The rule affects Texas Health and Safety Code, Chapter 361, the Texas Solid Waste Disposal Act (the Act).

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

Seasonal high water table–The highest measured or calculated water level in an aquifer or other water-bearing zone during investigations for a permit application and/or any groundwater characterization studies at a site. The area to be considered is usually the MSWLF facility. If, however, activities have occurred or are occurring on or near the facility during investigation that would lower the water table at the facility, a sufficiently larger area than the facility shall be tested or adequate calculations shall be used to estimate the seasonal high water table including the effects of such activities.

Water table–The upper surface of the zone of saturation at which water pressure is approximately equal to atmospheric pressure, except where that surface is formed by a confining unit.

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

Issued in Austin, Texas, on November 4, 1994.

TRD-9450531 Mary Ruth Holder
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Earliest possible date of adoption: December 16, 1994

For further information, please call: (512) 239-6087

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Subchapter H. Groundwater Protection Design and Operation

- **30 TAC §330.203**

The amendment is proposed under the Texas Water Code, §5.103, which provides the Texas Natural Resource Conservation Commission with the authority to adopt any rules necessary to carry out the powers and duties under the provisions of the Texas Water Code.

The proposed amendment affects Texas Health and Safety Code, Chapter 361, the Texas Solid Waste Disposal Act (the Act).

§330.203. Special Conditions (Liner Design Constraints).

(a) **The owner or operator of a Type I landfill shall demonstrate that the liner system will not undergo uplift from hydrostatic forces during its construction by using one or more of the following methods:** [If ground water is encountered in the disposal excavations, or in cases where excavations extend below the seasonal high-water table, material with a weight equivalent to one foot of compacted clay liner for every two feet of static water head shall be used as a basis for the construction of a liner between the deposited solid waste and the ground water. The total thickness of the liner shall consist of no less than three feet of soil with a permeability coefficient of no more than $1x10^{-7}$ cm/sec, a liquid limit of no less than 30, a plasticity index of no less than 15, and a percent passing Number 200 sieve of no less than 30, plus an additional thickness of other material as required in this subsection. Pressure release systems may be used to reduce the amount of liner support construction.]

(1) **providing calculations satisfactory to the executive director that the weight of the liner systems, including**

any ballast, is sufficient to offset by a factor of 1.2 any otherwise unbalanced upward or inward hydrostatic forces on the liner; or

(2) incorporating an active or passive dewatering system in the design to reduce upward or inward hydrostatic forces on the liner by a factor of 1.2 and by providing calculations satisfactory to the executive director that the dewatering system will perform to adequately reduce those forces; or

(3) providing evidence satisfactory to the executive director that the soil surrounding the landfill is so poorly permeable that ground water can not move sufficiently to exert force that would damage the liner; or

(4) providing evidence that the seasonal high water table is below the deepest planned excavation.

(b) The owner or operator shall ensure that the liner is stable during the filling and operation of the landfill through a suitable combination of dewatering and/or ballast, if determined to be required in subsection (a)(1) -(3) of this section. These methods shall not be used without prior approval of the executive director. [Leachate-collection systems (LCS) used in conjunction with liner ballast shall be designed to allow leachate levels to be maintained at or below 30 cm during the operating life of the unit and through the closure and post-closure periods.]

(c) Any required leachate collection system shall be designed to handle both the leachate generated and the groundwater inflow from materials beneath and lateral to the liner system. The maximum volume of groundwater inflow shall be calculated based on determination of the permeability and potentiometric conditions of the liner system and of the materials surrounding the liner system.

(d) Prior to excavating any unit below the seasonal high water table, the owner or operator shall perform a preliminary foundation evaluation satisfactory to the executive director. The foundation evaluation shall consider stability, settlement, and constructability.

(e) The Soil and Liner Quality Control Plan (SLQCP) as required in §330.205(a)(3)(B) of this title (relating to Soils and Liner Quality Control Plan) shall include the following information for landfills to which subsection (a)(1)-(3) of this section are applicable:

(1) the methods and tests to be used to verify that the liner will not undergo uplift during construction and until ballast placement, if required, is complete; and

(2) the measures and tests that will be used to verify that any required ballast meets the criteria established, including but not limited to inspections, compaction, weight and density of material, thickness, and top elevations.

(f) If ballast is used, a Ballast Evaluation Report (BER) in a format specified by the executive director shall be submitted in triplicate to the Municipal Solid Waste Division for review and approval. Verbal approval may be obtained from the executive director, which will be followed by written confirmation. If no response is provided within 14 days of the date on which the BER document is date-stamped by the Municipal Solid Waste Division, the BER may be considered approved. If the executive director determines that the BER is incomplete or that the test data provided are insufficient to support the evaluation conclusions, additional test data or other information may be required. The BER shall include:

(1) verification that the liner did not undergo uplift during construction, using the method identified in the SLQCP;

(2) certification that ballast met the criteria established in this section and in the SLQCP; and

(3) signature and seal of the registered professional engineer performing the evaluation and signature of the site operator or his authorized representative.

(g) Any dewatering systems used to ensure liner stability during construction and filling shall be operated until the executive director determines that such systems are no longer required.

(h) At the discretion of the executive director, owners or operators of Type IV landfill excavations that extend below the seasonal high water table may be required to meet one or more provisions in this subsection.

(i) The executive director may determine on a site-specific basis that waste can be used as ballast. If so, the site operating plan for the landfill shall contain the following requirements.

(1) The first five feet or the total thickness of the ballast, whichever is less, placed on the liner system shall be free of brush and large bulky items, which would damage the underlying parts of the liner system or which cannot be compacted to the required density.

(2) If waste is used for ballast, a wheeled trash compactor having a minimum weight of 40,000 pounds, or equivalent equipment, shall be properly utilized to reach a compaction density of at least 1,000 pounds per cubic yard. For purposes of determining the required ballast thickness, a density of compacted waste of 1,000 pounds per cubic yard shall be used. The weight of the liner system must be sufficient to offset any unbalanced upward or inward hydrostatic forces on the liner by a factor of 1.5 when waste is used for ballast.

(3) The Soil and Liner Quality Control Plan (SLQCP) shall also include the method(s) to be used to verify that compaction of waste used for ballast is to a density of not less than 1,000 pounds per cubic yard. If a trash compactor having a minimum weight of 40,000 pounds is used, no compaction density verification will be required.

(4) If waste is used for ballast, the Ballast Evaluation Report (BER) shall also include verification that a trash compactor having a minimum weight of 40, 000 pounds was used or, if not, that compaction was at least 1,000 pounds per cubic yard.

(j) The seasonal high water table shall be adjusted upward, if necessary, as additional data become available after a permit is issued.

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

Issued in Austin, Texas, on November 4, 1994.

TRD-9450532

Mary Ruth Holder
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Earliest possible date of adoption: December 16, 1994

For further information, please call: (512) 239-6087

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TITLE 34. PUBLIC FINANCE

Part I. Comptroller of Public Accounts

Chapter 3. Tax Administration

Subchapter O. State Sales and Use Tax

• 34 TAC §3.357

The Comptroller of Public Accounts proposes an amendment to §3.357, concerning labor relating to nonresidential real property repair, remodeling restoration, maintenance, new construction, and residential property. The amendment allows for the labor separation of nontaxable charges for unrelated services

subsequent to the execution of a contract that includes taxable real property repair and remodeling services. The amendment is retroactive. Other amendments are made to comply with a change made by the 73rd Legislature, 1993. The exemption for repairs to property damaged by fire, floods, and other accidents is restricted to repairs only when the damage is caused by an event that causes the governor or president to declare a disaster area. These amendments are effective the same date as the statute effective date.

Mike Reissig, chief revenue estimator, has determined that for the first five-year period the rule will be in effect there will be no significant revenue impact on the state or local government.

Mr Reissig also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be in providing new information regarding tax responsibilities. This rule is adopted under the Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Joe A. Galvan, Jr., Manager, Tax Administration Division, P.O. Box 13528, Austin, Texas 78711.

Thie amendment is proposed under the Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of the Tax Code, Title 2.

The amendment implements §151.0101.

§3.357. Labor Relating to Nonresidential Real Property Repair, Remodeling, Restoration, Maintenance, New Construction, and Residential Property.

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

(1) (No change.)

(2) Disaster area-An area declared a disaster by the Governor of Texas under the Government Code, Chapter 418, or the President of the United States under 42 United States Code, §5141.

(3)[(2)] Labor-For the purposes of this section, labor means all components of a transaction or contract directly related to the remodeling, repair, or restoration other than those components attributable to materials incorporated into the realty. Unrelated components, such as charges by engineers and architects, are also part of the labor component unless separately stated to the customer.

(4)[(3)] Maintenance on real property-For operational and functioning improvements to realty, maintenance means scheduled, periodic work necessary to sustain or support safe, efficient, continuous operations, or to prevent the decline, failure, lapse, or deterioration of the improvement. Taxable real property services covered by §3.356 of this title (relating to Real Property Service) do not qualify as maintenance.

(A) As it relates to maintenance, the term "scheduled" means anticipated and designated to occur within a given time period or production level.

(B) As it relates to maintenance, the term "periodic" means ongoing or continual or at least occurring at intervals of time or production which are generally predictable.

(5)[(4)] New construction-All new improvements to real property including initial finish out work to the interior or exterior of the improvement. An example would be a multiple story building which has only had its first floor finished and occupied. The initial finishing out of each additional floor prior to initial occupancy will be considered new construction. New construction also includes the addition of new footage to an existing structure.

(6)[(5)] Nonprofit hospital-A public or private hospital licensed under the Health and Safety Code, Chapter 241 or Chapter 577 [555], that is operated as a charitable or nonprofit establishment.

(7)[(6)] Real property-Land including structures and other improvements embedded in or permanently affixed to the land.

(8)[(7)] Remodeling or modification-To make over, rebuild, replace, or upgrade existing real property. However, the replacement of an item within an operating and functioning unit in accordance with paragraph (4) [(3)] of this subsection is not taxable remodeling or modification. Finish out work performed after initial finish out has been done is remodeling even though the improvement has not been occupied. An example would be a shopping complex completely finished by the developer prior to renting to tenants. A prospective tenant wants a different color scheme before taking possession. The repainting by the developer is remodeling.

(9)[(8)] Repair-To mend or bring back as near as can be to its original working order real property which was broken, damaged, or defective. However, minor repair work performed on operational and functioning improvements to realty within the meaning of paragraph (4) [(3)] of this subsection is not taxable repair.

(10)[(9)] Residential property-Property intended for use as a family dwelling or a multifamily apartment or housing complex, nursing homes, condominiums, or retirement homes. The term includes homeowners association-owned and apartment-owned swimming pools, apartment-owned laundry rooms for tenants, and other common areas for tenants' use. Managers' offices will only be residential if the space occupied by the office is 5.0% or less of the total space of the residence. The term does not include hotels or any other facilities which are subject to the hotel occupancy tax or any other area open to nonresidents.

(11)[(10)] Restoration-An activity performed to bring back as near as can be to its original condition real property which is still operating and functional but that has faded, declined, or deteriorated, that is not work performed within the meaning of paragraph (4) [(3)] of this subsection.

(12)[(11)] Unrelated service. A service will be considered as unrelated if:

(A) it is not a service involving the repair, remodeling, or restoration of real property, nor a service taxed under other provisions of the Tax Code, Chapter 151;

(B) it is of a type which is commonly provided on a stand-alone basis; and

(C) the performance of the unrelated service is distinct and identifiable. Examples of an unrelated service which may be excluded from the tax base include engineering plans or architectural designs.

(b) Tax responsibilities of persons who repair, remodel, or restore nonresidential real property.

(1)-(6) (No change.)

(7) When both remodeling and new construction are being performed under the same contract, the parties to the contract should separately identify taxable from nontaxable labor in a construction contract and the charges applicable to each or the entire contract will be presumed to be for repair, restoration, and remodeling. Documentation which clearly defines the work being performed should be retained by both parties to show that had the new construction and remodeling been done independently of each other, the cost of each would be reasonably near the allocation of charges. Examples of acceptable documentation include written contracts which detail the scope of work, bid sheets, tally sheets, schedules of values and blueprints. If there is not a written contract signed by both parties clearly showing agreement as to the taxable and nontaxable work being performed, the customer and [owner should provide] **the service provider must prepare, at the time of the transaction,**[contractor with] **a writ-**

ten certification verifying the [contractor's] allocation of charges for remodeling and new construction [labor]. The comptroller may recalculate the charges if the allocation appears unreasonable and either party may be held responsible for the additional tax due.

(8) Repainting is presumed to be a restoration or remodeling activity unless it meets the definition of maintenance found in subsection (a)(4) [(a)(3)] of this section. Persons performing repainting or other restoration activities should collect sales tax on their total charge unless their customer provides a properly completed exemption certificate as outlined in subsection (c)(2) or (4) of this section.

(9) Where nontaxable unrelated services and taxable services are sold or purchased for a single charge and the portion relating to taxable services represents more than 5.0% of the total charge, the total charge is presumed to be taxable. The presumption may be overcome by the service provider at the time the transaction occurs by separately stating to the customer a reasonable charge for the taxable services. However, if the charge for the taxable portion of the services is not separately stated at the time of the transaction, the service provider may later establish for the comptroller or for the purchaser, through documentary evidence, the percentage of the total charge that relates to nontaxable unrelated services. Examples of acceptable documentation include written contracts detailing the scope of work, bid sheets, tally sheets, schedules of values and blueprints.

(c) Exemptions.

(1) (No change.)

(2) A charge for labor to maintain real property is not taxable. Persons providing maintenance on real property are liable for tax on all materials used. A service provider's customer must be able to substantiate by way of maintenance schedules or work orders or other evidence that the services meet the definition in subsection (a)(4) [(a)(3)] of this section. If the person performing the service does not have a written contract, but is only hired as needed, the service provider must presume that the labor is for repair or restoration and collect tax. If the service provider's customer has documentation to prove that the labor qualifies as maintenance, the customer may issue an exemption certificate in lieu of paying tax to the service provider. The certificate must state that the labor is maintenance as defined in subsection (a)(4) [(a)(3)] of this section, rather than repair or restoration, as defined in subsection (a)(9)(11) [(a)(8) and (10)] of this section, and that the customer will be liable for any additional tax due in the event that it is determined that repairs rather than maintenance were performed. Repairs or restoration performed under a claimed maintenance contract will not change a nontaxable maintenance contract into a taxable repair or restoration contract as long as the charges attributable to repairs and restoration are 5.0% or less of the overall charge. Note: The 5.0% test applies to each contract and subcontract. For example, if five different companies provide lump-sum contracts for services, each contract stands alone in determining if taxable services are 5.0% or less of that contract. In the absence of a written contract, the 5.0% test will apply to each billing or invoice to the customer. Maintenance contracts or services billed with repair and restoration as defined in subsection (a)(9) **and (11)** [(a)(8) and (10)] of this section, that exceed 5.0% will be taxable in total unless the charges for repairs and restoration are separately identified to the customer in the contract or billing. **However, see subsection (b)(9) of this section.**

(3) Modifying parts of existing structures for the sole purpose of supporting the addition of new space will not change a new construction contract into a remodeling contract as long as the charges attributable to remodeling are 5.0% or less of the overall charge. Examples include changing a one-story building to a two-story building and adding a stairway to the existing structure to provide access to the new space, or removing a wall to add additional structural support in the process of adding on a new room outside the original structural space. Contracts with remodeling charges exceeding 5.0% will be taxable in total unless the charges for remodeling are separately identified to the customer. **However, see subsection (b)(9) of this section.**

(4) (No change.)

(5) **The labor to repair real or tangible personal** [Repairing] property [lost or] damaged **within a disaster area by the condition or occurrence that caused the area to be declared a disaster area is exempt from tax if the charge** [by fire, flood, explosion, natural disasters, or other accident] **for labor is separately stated to the customer. The materials used to perform the repairs are taxable** [which a casualty claim could have been filed if the property was insured will be considered new construction. See §3.291 of this title (relating to Contractors)]. A person having property repaired under this paragraph should issue the service provider an exemption certificate in lieu of tax. The service provider **must presume** [provider's presumption is] that all work is taxable until **the customer issues an exemption certificate covering the separately stated labor portion of the bill. If the charge for the repair is lump-sum, the total charge is taxable** [is issued].

(6) (No change.)

(d)-(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 November 9, 1994.

TRD-9450679 Martin Cherry
Chief, General Law
Comptroller of Public Accounts

Earliest possible date of adoption: December 16, 1994

For further information, please call: (512) 463-4028

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Chapter 9. Property Tax Administration

Subchapter C. Appraisal District Administration

• 34 TAC §9.411

The Comptroller of Public Accounts proposes new §9.411, concerning application for pollution control property exemption. The new section prescribes the form and contents of an application for a pollution control property exemption and requires appraisal districts to make available to taxpayers a model application form developed by the Comptroller of Public Accounts. The new section is necessary because Tax Code, §11.31, provides an ad valorem tax exemption for property used to control land, water, and air pollution.

The new rule sets forth the contents of the application form and the sequence in which the contents must be displayed. The rule permits appraisal districts to duplicate the model form developed by the comptroller or use a different form than the comptroller's, provided the form uses the same language and sequence as the model form. In addition, in special circumstances and with the comptroller's written consent, an appraisal district may use a form that deletes information required by the model form or sets forth the information required by the form in a different sequence or different language than the comptroller's model form.

Mike Reissig, chief revenue estimator, has determined that for the first five-year period the rule will be in effect there will be no significant revenue impact on the state or local government.

Mr. Reissig also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be in providing new information regarding property tax responsibilities. No effect on small businesses is anticipated. There is no significant anticipated economic cost to persons who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Joe Vogel, Manager, Property Tax Division, P.O. Box 13528, Austin, Texas 78711-3528.

The new section is proposed under the Tax Code, §11.43, which requires the comptroller to prescribe the contents of an application form for each type of exemption.

The new section implements the Tax Code, §11.31.

§9.411. Exemption Application for Pollution Control Property.

(a) Each appraisal office shall prepare and make available exemption applications for pollution control property.

(b) Each application shall contain spaces for the property owner to provide the following information:

(1) the name and address of the property owner;

(2) the street address or other description of the property on which the pollution control facility, device or equipment is installed;

(3) whether the property qualifies for a pollution control property exemption, including the following information:

(A) whether the applicant is in the business of manufacturing, producing a product or service that prevents, monitors, or reduces or controls air, water, or land pollution;

(B) whether the property is used for residential purposes;

(C) whether the property is used for scenic, park, or recreational purposes;

(D) whether the property is a motor vehicle;

(E) the date the property was acquired;

(F) when construction began, was completed, or is expected to be completed;

(G) whether the property is subject to a tax abatement agreement and the date on which the agreement was executed; and

(H) whether the property is installed to wholly or partly meet or exceed laws, rules, or regulations designed to control, reduce, monitor, or prevent pollution;

(4) a statement of the penalties prescribed by Penal Code, §37.10, for making or filing an application containing a false statement; and

(5) instructions stating the following:

(A) that the property owner need not apply for the exemption annually;

(B) that the chief appraiser may require that the property owner reapply for the exemption; and

(C) that the applicant has a duty to notify the chief appraiser if eligibility for the exemption ends.

(c) Each application shall require the applicant to sign and date the application.

(d) Each application shall require that the applicant attach the pollution control use determination issued by the Texas Natural Resource Conservation Commission or its successor, provided the property owner has sought and received a use determination from the Texas Natural Resource Conservation Commission.

(e) The chief appraiser may duplicate the model form developed by the comptroller or use a different form that sets out the information listed in subsections (b)-(d) of this section in the same language and sequence as the model form.

(f) In special circumstances, the chief appraiser may use a form that provides additional information, deletes information required by this section, or sets out the required information in different language or sequence than that required by this section, if the form has been previously approved by the manager of the Property Tax Division, Comptroller of Public Accounts.

(g) The form developed by the comptroller may be obtained from the Comptroller of Public Accounts, Property Tax Division, P.O. 13528, Austin, Texas, 78711-3528.

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

Issued in Austin, Texas, on November 8, 1994.

TRD-9450613 Martin Cherry
Chief, General Law
Comptroller of Public Accounts

Earliest possible date of adoption: December 16, 1994

For furthijer information, please call: (512) 463-40218

Part IV. Employees Retirement System of Texas

Chapter 81. Insurance

• 34 TAC §§81.1, 81.3, 81.5, 81.7

The Employees Retirement System of Texas proposes amendments to §§81.1, 81.3, 81.5, and 81.7, concerning insurance. The amendments will clarify eligibility and coverage areas for participants, including retirees, coverage availability for surviving dependents of retirees and slain law officers, and former employees and dependents eligible under COBRA; clarify direct premium payment procedures and effects of nonpayment, and application of the state benefits contribution to coverages; clarify insurance coverage procedures for returning employees after Family and Medical Leave Act and military active duty leave.

William S. Nail, general counsel, has determined that there will be no fiscal implications as a result of enforcing or administering the amendments and there will no effect on small businesses.

Mr. Nail also has determined that the public benefit anticipated as a result of the proposed amendments will be streamlined procedures for enrollment and processing of insurance coverage, improved communication of benefits availability and cost savings. There is no economic cost to persons who are required to comply with the amendments as proposed.

Comments on the proposed amendments may be submitted to William S. Nail, General Counsel, Employees Retirement System of Texas, P.O. Box 13207, Austin, Texas 78711-3207.

The amendments are proposed under the Insurance Code, Article 3.50-2, §4, which provides the board of trustees with the authority to promulgate all rules, regulations, plans, procedures, and orders reasonably necessary to implement and carry out the purposes and provisions of the Texas Employees Group Insurance Benefits Act.

Other codes/statutes affected: Insurance Code, Articles 3.50-2 and 3.70-2(L) ; FMLA, 29 United States Code, §2601 et seq, Public Law 103-2; COBRA, 42 United States Code Annotated, §300bb-1 et seq; Uniformed Services Employment and Reemployment Rights Act of 1994, Public Law 103-353, October 13, 1994.

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

Age of employee-The age to be used for determining optional term life and voluntary AD&D insurance premiums will be the employee's attained age as of the employee's first day of active duty within a contract year.

Annuitant-A person as defined in the Act.

Dependent-The spouse of an em-

ployee or retiree and unmarried children under 25 years of age, including:

(A)-(F) (No change.)

(G) **an eligible child, as defined in this subsection,** [a child, excluding a child of the spouse who does not reside with the employee/retiree,] for whom the employee/retiree must provide medical support pursuant to a valid order from a court of competent jurisdiction; or

(H) any such child, regardless of age, who lives with or whose care is provided by an employee or retiree on a regular basis if such child is mentally retarded or physically incapacitated to such an extent as to be dependent upon the employee or retiree for care or support, as the trustee shall determine. Mentally retarded or physically incapacitated means any medically determinable physical or mental condition which prevents the child from engaging in self-sustaining employment, provided that the condition commences prior to such child's attainment of age 25, the child was eligible and covered under the plan immediately prior to reaching age 25, and that satisfactory proof of such condition and dependency is submitted by the employee/retiree within 31 days following such child's attainment of age 25. As a condition to the continued coverage of a child as a mentally retarded or physically incapacitated dependent beyond the age of 25, the [insurance] carrier or health maintenance organization shall have the right to require periodic certification of the child's physical or mental condition but not more frequently than annually [after the two-year period] following the child's attainment of age 25.

Leave [of absence] without pay-The status of an employee who is certified [monthly] by a **department** [an agency] administrator to be absent from duty [for a reason other than being disabled] who has not received **compensation** or a refund of retirement contributions based upon the most recent term of employment. [Such a leave is limited to a maximum period of duration in the current Appropriations Act.]

§81.3. Administration.

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

(c) Health maintenance organizations.

(1) (No change.)

(2) An HMO seeking board approval must satisfy the following conditions.

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

(C) The HMO must have been providing services in the area for which application is made for at least 12 months prior to the date the application is filed with the **system** [Employees Retirement System of Texas] **and must demonstrate the capacity to provide adequate services, as determined by the system, to the program participants. For a request for an expansion of a contiguous service area, the HMO must be providing services in the expanded area on the date the application is filed with the system and must demonstrate the capacity to provide adequate services, as determined by the system, to the program participants in the expanded area.** [This requirement shall also apply to a request for an expansion of service area if the expansion results in the establishment of a service area requiring a separate rating structure or an extension of the HMO's service area into another area in which one or more HMOs are currently providing services to state employees or retirees.]

(D)-(G) (No change.)

(3) -(5) (No change.)

(d) Funding.

(1) Contributions. Premiums for coverage provided under the **program** [Uniform Group Insurance Program] are funded from three sources: state contributions, **system** [Employees Retirement System of Texas] contributions, employee and retiree contributions. The [state] legislature appropriates monies to fund group insurance benefits for all [state] employees **as defined in the Act**. Monies for employees compensated from funds other than the General Appropriations Act are appropriated from the official operating budget of the respective [state] department. In addition, the **system** [Employees Retirement System of Texas] may contribute an additional amount, as determined by the trustee, for payment of premiums for employees and retirees. An employee or retiree who applies for coverage for which the monthly premium exceeds the state's or employing **department's** [agency's] and the **system's** [Employees Retirement System of Texas'] contribution must pay the excess amount.

(2) Payment of premiums. Deductions from monthly compensation or annuities and direct payment of premiums are two methods of payments used for the employee's, **retiree's, or other participant's** share of premiums.

(A) Employee deductions An employee or retiree who applies for coverage for which the monthly premium exceeds the state or employing **department** [agency] and the **system** [Employees Retirement System of Texas] contributions must authorize in writing on a form prescribed by the **system** [Employees Retirement System of Texas] a deduction from his **or her** monthly compensation or annuity to pay the difference. If an employee's monthly compensation or **retiree's annuity** is insufficient to provide for the appropriate deduction, the employee **or retiree** must pay premiums directly as explained in subparagraph (B)(i) of this paragraph. Failure to make the required payment of premiums **by the due date** will result in the cancellation of all coverages **not fully funded by the state contribution. A person entitled to the state contribution will retain member only health and basic life coverage provided the state contribution is sufficient to cover the premium for such coverage. If the state contribution is not sufficient for member only coverage in the health plan selected by the employee or retiree, the employee or retiree will be enrolled in the basic plan except as provided for in §81.7(i)(2)(B) of this title (relating to Enrollment and Participation).**

(B) Direct payment of premiums. Persons who are eligible participants in the program and who are not on a payroll or who are not receiving an annuity from a state retirement system from which the appropriate premiums may be deducted or whose salary or annuity are insufficient to allow for a full required deduction must pay premiums directly as indicated in the following.

(i) **A person who is eligible to receive but is not actually receiving an annuity, a person whose retirement annuity is temporarily suspended, a person whose annuity is insufficient, a person who is receiving or eligible to receive an annuity under the ORP, a former elected official, a former employee of the legislature, and a surviving spouse and/or dependent child/children of a deceased employee or retiree must pay monthly premiums in advance directly to the system. A person in a leave without pay status, a person whose salary is insufficient, and a non-salaried board member must pay monthly premiums in advance through the employee's employing department. Premium payments are due on the first day of the month covered and must be postmarked or received by the system or the employing department, whichever is appropriate, within 30 days of the due date to avoid cancellation of coverage. Failure to make the required premium payment by the due date will result in cancellation of all coverages not fully funded by the state contribution, if applicable. A person entitled to the state contribution will retain member only**

health and basic life coverage provided the state contribution is sufficient to cover the premium for such coverage. If the state contribution is not sufficient for member only coverage in the health plan selected by the employee or retiree, the employee or retiree will be enrolled in the basic plan except as provided for in §81.7(i) (2)(B) of this title. [A person whose retirement annuity is temporarily suspended, a person in a leave of absence without pay status, and a person in an extended sick leave without pay status must pay premiums monthly in advance. A person whose retirement annuity is temporarily suspended must submit premiums directly to the Employees Retirement System. A person in leave of absence without pay status and a person in extended sick leave without pay status shall submit premiums through the employee's employing agency. Premium payments are due on the first day of the month covered and must be postmarked or received by the Employees Retirement System or the employing agency, whichever is appropriate, within 30 days of the due date to avoid cancellation of coverage.]

(ii)-(iii) (No change.)

[(iv) A person, other than those described in clause (i) or (ii) of this subparagraph, must pay premiums in advance and may elect to pay either monthly, every three months, every six months, or annually. The full premium for the payment period option chosen must be paid directly to the Employees Retirement System and is due on the first day of the first month covered by the payment period. The premium payment must be postmarked or received by the Employees Retirement System within 30 days of the due date to avoid cancellation of coverage. A person who fails to complete a payment period option election prior to the first premium due date will be required to pay premiums in advance every month until an election is filed with the Employees Retirement System.]

§81.5. Eligibility.

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

(c) Retirees. A retiree is eligible **for health and dental** coverage on the day he or she becomes an annuitant. [A retiree must be insured in the health benefits plan before he or she is eligible to apply for any life insurance coverage. In addition,] A [a] retiree is eligible for optional life insurance coverage only if the retiree was enrolled in [for] optional life insurance coverage on the **day** [date] before becoming an annuitant. A **retiree is eligible for dependent life insurance coverage only if the retiree was enrolled in dependent life insurance coverage on the day before becoming an annuitant.** Retirees may not increase the amount of life insurance for which they have been enrolled, but may cancel life coverage at any time. Canceled life insurance coverages may never be reinstated. **A retiree is not eligible for disability or accidental death and dismemberment coverage.**

(1)-(2) (No change.)

(d) (No change.)

(e) Surviving dependents.

(1)-(2) (No change.)

(3) A surviving dependent child of a retiree may, after the death of the retiree and if the retiree leaves no surviving spouse, elect to continue coverage in the health and dental benefits plans in which the retiree was enrolled on the day of death of the retiree. A surviving dependent child may continue such coverage until the dependent child becomes ineligible as defined in §81.1 of this title (relating to Definitions).

(4) A surviving spouse or a dependent child of a paid law enforcement officer employed by the state or a custodial employee of the institutional division of the Texas Department of Criminal Justice who suffers a violent death in the course of performance of duty is eligible to continue or enroll in health and dental coverages. A surviving spouse or natural or adopted children of the deceased peace officer may enroll within 90 days from the date of death. Other eligible dependent children may continue health and dental coverages in effect on the date of death.

(f)-(i) (No change.)

(j) Continuation of health and dental coverages only for certain spouses and dependent children of employees/retirees, and for certain terminating employees, their spouses, and dependent children (as provided by the Consolidated Omnibus Budget Reconciliation Act, Public Law 99-272).

(1) The surviving spouse and/or dependent child/children of a deceased employee or retiree who are not eligible to continue coverage under the provisions of the Act or subsection (e) of this section, who are not entitled to benefits under the Social Security Act, Title XVIII, and who are not covered under any other group health plan unless that plan subjects them to a preexisting conditions limitation or exclusion, may continue for up to 36 months the health and dental coverages only that were in effect immediately prior to the date of death of the employee/retiree. A formal election must be made to continue coverage by the surviving spouse and/or the dependent child/children. The formal election must be postmarked or received by the **system** [Employees Retirement System] within 60 days of the date of notice contained in the notice of right to continue coverage form **or by the date coverage terminated, whichever is later.**

(2) An employee whose employment has been terminated voluntarily or involuntarily (other than for gross misconduct), **whose work hours have been reduced such that the employee is no longer eligible for the program as an employee, or whose coverage has ended following the maximum period of leave without pay as provided for in §81.7(i)(2)(A) of this title,** except for those persons not eligible pursuant to §81.11(c) of this title (relating to Termination of Coverage), and/or his or her spouse and/or dependent child/children who are not eligible to continue coverage under the provisions of the Act or subsection (g) or (h) of this section, who are not entitled to benefits under the Social Security Act, Title XVIII, and who are not covered under any other group health plan, **or who were covered by a plan** [unless] that [plan] subjects them to a preexisting conditions limitation or exclusion, may continue for up to 18 months the health and dental coverages only without the basic term life that were in effect immediately prior to the date of the **loss of coverage** [termination of employment]. A formal election must be made to continue coverage by the [former] employee and/or his or her spouse and/or dependent child/children. The formal election must be postmarked or received by the **system** [Employees Retirement System] within 60 days of the date of notice contained in the notice of right to continue coverage form **or by the date coverage terminated, whichever is later.**

(3) (No change.)

(4) A spouse who is divorced from an employee/retiree and/or the spouse's dependent child/children who are not otherwise eligible to continue coverage under the provisions of the Act or subsection (d) of this section, who are not entitled to benefits under the Social Security Act, Title XVIII, and who are not covered under any other group health plan, **or who are covered by a plan** [unless] that [plan] subjects them to a preexisting conditions limitation or exclusion, may continue for up to 36 months the health and dental coverages only that were in effect immediately prior to the date the divorce decree is signed. The employee/retiree or the divorced spouse or the divorced spouse's dependent child/children must notify the **system** [Employees Retirement System] through the employing **department** [agency] or retiree **benefits** [insurance] coordinator of the divorce within 60 days from the date the divorce decree is signed. A formal election must be made to continue coverage by the divorced spouse and/or the dependent child/children.

The formal election must be postmarked or received by the **system** [Employees Retirement System] within 60 days of the date of notice contained in the notice of right to continue coverage form **or by the date coverage is terminated, whichever is later.**

(5) A dependent child under 25 years of age who marries, who is not entitled to benefits under the Social Security Act, Title XVIII, and who is not covered under any other group health plan, **or who are covered by a plan** [unless] that [plan] subjects the child to a preexisting conditions limitation or exclusion, may continue for up to 36 months the health and dental coverages only that were in effect immediately prior to the date of the marriage. The married child or the employee/retiree must notify the **system** [Employees Retirement System] through the employing **department** [agency] or retiree **benefits** [insurance] coordinator of the marriage within 60 days from the date of the marriage. A formal election must be made by the married child to continue coverage. The formal election must be postmarked or received by the **system** [Employees Retirement System] within 60 days of the date of notice contained in the notice of right to continue coverage form **or by the date coverage is terminated, whichever is later.**

(6) A dependent child who has attained 25 years of age, who is not otherwise eligible to continue coverage indefinitely under the provisions of the Act or subsection (d) of this section, who is not entitled to benefits under the Social Security Act, Title XVIII, and who is not covered under any other group health plan, **or who is covered by a plan** [unless] that [plan] subjects the child to a preexisting conditions limitation or exclusion, may continue for up to 36 months the health and dental coverages only that were in effect immediately prior to the date of the child's 25th birthday. The child or employee/retiree must notify the **system** [Employees Retirement System] through the employing **department** [agency] or retiree **benefits** [insurance] coordinator within 60 days of the child's 25th birthday. A formal election must be made by the 25-year-old child to continue coverage. The formal election must be postmarked or received by the **system** [Employees Retirement System] within 60 days of the date of notice contained in the notice of right to continue coverage form **or by the date coverage is terminated, whichever is later.**

(7)-(9) (No change.)

§81.7. Enrollment and Participation.

(a) Full-time employees and their dependents.

(1) **A new employee, other than a part-time state agency employee, will automatically be enrolled in the basic plan of health and life insurance, effective on his or her first day of active duty with the State of Texas. To enroll eligible dependents, elect to enroll in an approved HMO and/or elect optional coverages, the employee must complete a form on the first day of active duty or within 30 days from that date. The employee may decline any and all coverages in the program by completing a form on or before the first day of active duty.** [A new full-time employee will automatically be enrolled in the basic plan of health and life insurance, effective on his or her first day of active duty with the State of Texas. An employee waives basic plan coverage by electing optional coverage and/or enrolling in an approved HMO. In order to elect additional optional coverages or enroll in an HMO in lieu of the basic plan of insurance, the employee must submit an application to the Employees Retirement System through his or her employing agency on the form provided by the Employees Retirement System. An employee may decline any and all coverage in the program by submitting a written statement indicating that he or she wishes to decline.]

(2) Applications for coverages to be effective on the day the employee begins active duty must be **completed** [submitted to the agency insurance coordinator] on or before that day. Coverages for which the application is submitted after the first day of active duty and within 30 days after that day will be effective on the first day of the month following the date of application. Applications submitted after the first 31 days will be governed by subsection (f) of this section.

(3) Coverages for dependents of an employee will be effective on the same day the employee's coverage becomes effective if an application is submitted on or before the effective date of the employee's coverage. If the application is submitted within 30 days after the employee's effective date, the dependent's coverage will be effective on the first day of the month following the date of application. **Coverage for a newly eligible dependent, other than a dependent referred to in paragraph (4) of this subsection,** [New dependents' coverage] will be effective on the date the person becomes a dependent if an application is submitted on or within 30 days after the date the dependent first becomes eligible. If the application is submitted more than 30 days after the employee's effective date or the date the dependent is first eligible, as the case may be, the application will be governed by the rules in subsection (f) of this section. **The requirement that an application must be submitted within 30 days after a dependent first becomes eligible is waived if the level of health, dental, and/or life coverages were in effect prior to the acquisition of the newly eligible dependent; however, an application must be completed before verification of coverage will be provided to the carrier(s).**

(4) Unless not in compliance with Chapter 85 of this title (relating to Flexible Benefits), a newborn natural child or eligible newborn grandchild will be covered immediately and automatically from the date of birth in the health plan in effect for the employee or retiree.

(A) (No change.)

(B) If health, **dental, and/or life coverages** [coverage] for dependent children **were** [was] already in effect, an application to add a subsequent newborn natural child or eligible newborn grandchild must be completed before verification of coverage for the newborn dependent will be provided to the [health] carrier.

(5)-(6) (No change.)

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

(d) Surviving dependents. A surviving spouse and dependents of a deceased employee who, at the time of death, met the age and service requirements to qualify for a retirement benefit or survivor's annuity and who met the program eligibility requirements in accordance with the Act may continue coverage as provided in §81.5(e) of this title (relating to Eligibility). A surviving spouse and dependents of a deceased retiree may continue coverage as provided in §81.5(e) of this title [(relating to Eligibility)]. A surviving spouse, who is receiving an annuity, shall make premium payments by deductions from the annuity as provided in §81.3(d)(2)(A) of this title (relating to Administration). A surviving spouse, who is not receiving an annuity, may make payments as provided in §81.3(d)(2)(B) of this title [(relating to Administration)]. The surviving spouse **or eligible dependents** must apply to continue coverage for himself or herself and dependents within 30 days after notification in writing of eligibility to make application.

(e) Special rules for additional or alternative coverages.

(1) An employee/retiree must be **enrolled** [insured] in [a] health **coverage** [insurance plan] provided by the program [or enrolled in an approved HMO before the employee/retiree is eligible] to apply for any [of the] optional coverages [provided by the program]. Only an employee or retiree or a former officer or employee specifically authorized to join the program may apply for optional coverages

(2) (No change.)

(3) A participant electing optional additional coverage and/or HMO coverage in lieu of the basic plan of insurance is obligated for the full payment of premiums. If the premiums are not paid, all coverages **not fully funded by the state contribution** will be canceled. **A person entitled to the state contribution will retain member only health coverage provided the state contribution is sufficient to cover the premium for such coverage. If the state contribution is not sufficient for member only coverage in the health plan selected by the employee or retiree, the employee or retiree will be enrolled in the basic plan except as provided for in §81.7(i) (2)(B) of this title.**

(4)-(5) (No change.)

(f) Changes in coverages beyond the first 31 days of eligibility.

(1) An employee or retiree who wishes to add or increase coverage, add eligible dependents to the self-insured health plan, or change coverage from an HMO to the self-insured health plan more than 30 days after the initial date of eligibility must make application for approval by providing evidence of insurability acceptable to the system. Unless not in compliance with Chapter 85 of this title [(relating to Flexible Benefits)], coverage will become effective on the first day of the month following the date approval is received by the employee's [agency] benefits coordinator or by the system, if the applicant is a retiree or an individual in a direct pay status. If the applicant is an employee in a leave without pay status, **the approved change in coverage** [it] will become effective on the date the employee returns to active duty if the employee returns to active duty within 30 days of the approval letter. If the date the employee returns to active duty is more than 30 days after the date on the approval letter, the approval is null and void; and a new application shall be required. An employee or retiree may withdraw the application at any time prior to the effective date of coverage by submitting a written notice of withdrawal

(2)-(4) (No change)

(5) An employee, retiree, or **other participant** [COBRA continuant, surviving spouse, TRS annuitant, ORP annuitant, elected state official, former member or employee of the legislature, or judge], who is enrolled in an approved HMO and permanently moves his or her place of residence out of that HMO's service area to a location where the participant is no longer eligible to be enrolled in any approved HMO, will be allowed to enroll in the self-insured health plan and other optional coverages held immediately prior to the date of change in residence. Coverage in the HMO will be canceled on the last day of the month in which the previously described **employee, retiree, or other** participant moved from the service area, and the coverages in the self-insured health plan will become effective on the day following the day HMO coverage is canceled. The evidence of insurability rule shall not apply in these cases. The preexisting conditions exclusion shall apply if the return to the self-insured health plan occurs within 12 months of the initial date of coverage under the current term of employment, as defined in subsection (g)(3) of this section.

(6) (No change.)

(7) Persons wishing to change from one HMO to another HMO in the same service area, [or] change from the self-insured health plan to an HMO, **enroll in a dental plan, or change dental plans** will be allowed an annual opportunity to do so. Such opportunity will be scheduled prior to September 1 of each year at times announced by the system. [The preexisting conditions exclusion and evidence of insurability provision will not apply in these cases. Coverages in the new HMO will be effective September 1.] Persons in a declined or canceled status may apply for coverages in an HMO for which they are eligible **and a dental plan** during the annual [limited] enrollment period. Coverage in the HMO will be effective September 1. An employee who re-enrolled after the close of the annual opportunity but prior to September 1 of the same calendar year shall have until August 31 of that calendar year to make changes as allowed above to be effective September 1.

(8)-(9) (No change.)

(10) An eligible dependent spouse or child who **has health coverage** [is insured] as an employee [for health coverage] under the **program** [Uniform Group Insurance Program] becomes eligible for coverage as a dependent on the day following termination of [state] employment. Eligible dependent children who **have health coverage in the program as dependents of** [are insured as dependents for health coverage under the Uniform Group Insurance Program by] an employee who terminates [state] employment also become eligible for coverage on the day following termination of employment. In order to be eligible for coverage, dependents must meet the definition of dependent contained in §81.1 of this title (relating to Definitions) and be enrolled for coverage by the [state] employee of whom they are the eligible dependent and who is enrolled for health coverage under the program The effective date of coverage will be the first day of the month following termination of employment if an application is submitted on or within 30 days following the date the dependent(s) become eligible under this rule

(11) Notwithstanding the effective dates of coverages, as defined in paragraphs (1)-(9) of this subsection, an employee, retiree or other eligible participant in the **program** [Uniform Group Insurance Program] may complete an application or applications during the annual [limited] enrollment period to make coverage changes, as determined by the trustee, to be effective September 1.

(g) (No change.)

(h) Reinstatement in the program.

(1) (No change.)

(2) An employee who is a member of the Texas National Guard or any of the reserve components of the United States Armed Forces and who is in a military leave without pay status or who must terminate employment as the result of an assignment to active military duty may, upon return to **active** [state] employment, reinstate all **program** [Uniform Group Insurance Program] coverages that were in effect immediately prior to the commencement of active military duty, as long as the return to **active** [state] employment occurs within 90 days of the release from active military duty. An employee may also reinstate the coverage of the employee's dependent, who is a member of the Texas National Guard or any of the reserve components of the United States Armed Forces and whose coverage is terminated as the result of an assignment to active military duty. To reinstate canceled coverages, submission of evidence of insurability acceptable to the [insurance] carrier [and the pre-existing condition exclusion] will not apply. **Provided all applicable preexisting conditions exclusions were satisfied at the time coverages were canceled, no additional preexisting conditions exclusions will apply upon reinstatement of coverages. If not, any remaining period of preexisting conditions exclusions must be satisfied upon reinstatement.** The application to reinstate such coverages must be submitted during the 30 days following the day the employee returns to active [state] employment. In the case of the dependents, the application to reinstate such coverages must be submitted within 30 days following the release from active duty. Applications for coverages to be effective on the day the employee returns to active [state] employment must be submitted to the **benefits** [state agency insurance] coordinator on or before the first day of the return to active [state] employment. Coverages for which the application is submitted after the first day of the return to active state employment and within 30 days after that day will be effective on the first day of the month following the date of application[, however, applications completed and signed by the employee on the first calendar day of the month will be effective on that day]

(3) Employees whose coverages were canceled during a period of leave without pay due to a certified work-related disability may, upon return to active duty status, reinstate all coverages that were in effect on the day immediately prior to entering the leave without pay status, except as provided in §81.11(c)(4) of this title (relating to Termination of Coverage), and provided application to reinstate such coverages is made within 30 days of the return to active duty. Evidence of insurability will [shall] not apply. **The preexisting conditions exclusions will apply upon return to active duty.** Coverages applied for on the first day of return to active duty will be effective on that day unless the employee completes the application indicating coverages are to be effective on the first day of the month following the date the employee returns to active duty. Coverages applied for after the first day of return to active duty and within 30 days after that day will be effective on the first day of the month following the date of application[; however, coverages applied for on the first day of the month will be effective on that day].

(4) Employees whose coverages were cancelled during a period of leave without pay as a result of the Family and Medical Leave Act of 1993 may, upon return to active duty, reinstate all coverages that were in effect on the day immediately prior to entering the leave without pay status, provided application to reinstate such coverages is made within 30 days of the return to active duty. To reinstate cancelled coverages, submission of evidence of insurability acceptable to the carrier will not apply. Provided all applicable preexisting conditions exclusions were satisfied at the time coverages were cancelled, no additional preexisting conditions exclusions will apply upon reinstatement of coverages. If not, any remaining period of preexisting conditions exclusions must be satisfied upon reinstatement.

(i) Continuing coverage in special circumstances.

(1) (No change.)

(2) **Continuation of health, dental, and life coverages for employees in a leave without pay status.** [An employee in a leave without pay status may continue the types and amounts of health, life, and dental coverages in effect on the date the employee entered that status for a maximum period of up to 12 months. The maximum period may be extended for up to 12 additional months for a total of 24 continuous months, provided the extension is certified by the department to be for educational purposes. During this period, the employee, other than an employee whose leave without pay status is a result of the Family and Medical Leave Act of 1993 (Public Law 103-3), may not change coverage except that, employees in a leave without pay status may: add new dependents, including newborns; reduce or cancel coverage; and make such coverage changes as are permitted during the annual enrollment period as described in subsection (f)(7) of this section. Disability income coverage for an employee in a leave without pay status will be suspended beginning on the first day of the month in which the employee enters the leave without pay status and continuing for those months in which the employee remains in that status. Suspended disability income coverage for an employee returning to active duty from a leave without pay status will be reactivated effective on the first day the employee returns to active duty if the entire period of unpaid leave was certified by the agency as approved leave without pay. The coverages of an employee whose leave without pay status is a result of the Family and Medical Leave Act of 1993 may continue at the same level of benefits and contributions that would have been in place if the employee had not taken the leave.]

(A) An employee in a leave without pay status may continue the types and amounts of health, life, and dental coverages in effect on the date the employee entered that status for a maximum period of up to 12 months. The maximum period may be extended for up to 12 additional months for a total of 24 continuous months, provided the extension is certified by the department to be for educational purposes. Disability income coverage for an employee in a leave without pay status will be suspended beginning on the first day of the month in which the employee enters the leave without pay status and continuing for those months in which the employee remains in that status. Suspended disability income coverage for an employee returning to active duty from a leave without pay status will be reactivated effective on the first day the employee returns to active duty if the entire period of unpaid leave was certified by the department as approved leave without pay.

(B) An employee whose leave without pay is a result of the Family and Medical Leave Act of 1993 will continue to receive the state contribution during such period of leave without pay. The employee must pay premiums directly as defined in §81.3(d)(2)(B)(i) of this title. Failure to make the required payment of premiums by the due date will result in the cancellation of all coverages except for member only health and basic life coverage. The employee will continue in the health plan in which he or she was enrolled immediately prior to the cancellation of all other coverages. If a premium beyond the state contribution for member only health and basic life coverage is owed, the employee must make the required payment of premiums directly to the employing department upon return to active duty.

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

(5) Continuation of health and dental coverage [benefits] for a surviving spouse and/or dependent child/children of a deceased employee or retiree. The surviving spouse and/or dependent child/children of a deceased employee/retiree, who, in accordance with §81. 5(j)(1) of this title [(relating to Eligibility)], elects to continue coverage may do so by submitting the required election notification and enrollment forms to the **system** [Employees Retirement System]. The enrollment form, including all premiums due for the election/enrollment period, must be postmarked or received by the **system** [Employees Retirement System] on or before the date indicated on the continuation of coverage enrollment form. Continuing coverage will begin on the first day of the month following the month in which the employee/retiree dies, provided all group insurance premiums due for the month in which the employee/retiree died and for the election/enrollment period have been paid in full.

(6) Continuation of health and dental coverage [benefits] for a covered employee whose employment has been terminated, voluntarily or involuntarily **(other than for gross misconduct), whose work hours have been reduced such that the employee is no longer eligible for the program as an employee, or whose coverage has ended following the maximum period of leave without pay as provided in §81.7(i)(2) (A) of this title. An** [A terminated] employee, his or her spouse and/or dependent child/children, who, in accordance with §81.5(j)(2) of this title [(relating to Eligibility)], elects to continue health and dental coverages may do so by submitting the required election notification and enrollment forms to the **system** [Employees Retirement System]. The enrollment form, including all premiums due for the election/enrollment period, must be postmarked or received by the **system** [Employees Retirement System] on or before the date indicated on the continuation of coverage enrollment form. Continuing coverage will begin on the first day of the month following the month in which the **employee's coverage ends** [covered employee terminates employment], provided all group insurance premiums due for the month in which the **coverage ends** [employee terminates] and for the election/enrollment period have been paid in full.

(7) Continuation of health and dental coverage [benefits] for a spouse who

is divorced from an employee/retiree and/or the spouse's dependent child/children. The divorced spouse and/or the spouse's dependent child/children (not provided for by §81.5(a) of this title [(relating to Eligibility)]) of an employee/retiree who, in accordance with §81.5(j)(4) of this title [(relating to Eligibility)], elects to continue coverage may do so by submitting the required election notification and enrollment forms to the system [Employees Retirement System]. The enrollment form, including all premiums due for the election/enrollment period, must be postmarked or received by the system [Employees Retirement System] on or before the date indicated on the continuation of coverage enrollment form. Continuing coverage will begin on the first day of the month following the month in which the divorce decree is signed, provided all group insurance premiums due for the month in which the divorce decree is signed and for the election/enrollment period have been paid in full.

(8) Continuation of health and dental coverage [benefits] for a dependent child under 25 years of age who marries. A dependent child under 25 years of age who marries and who, in accordance with §81.5(j)(5) of this title [(relating to Eligibility)], elects to continue coverage may do so by submitting the required election notification and enrollment forms to the system [Employees Retirement System]. The enrollment form, including all premiums due for the election/enrollment period, must be postmarked or received by the system [Employees Retirement System] on or before the date indicated on the continuation of coverage enrollment form. Continuing coverage will begin on the first day of the month following the month in which the dependent child's marriage occurred, provided all group insurance premiums due for the month in which the dependent child's marriage occurred and for the election/enrollment period have been paid in full.

(9) Continuation of health and dental coverage [benefits] for a dependent child who has attained 25 years of age. A 25-year-old dependent child (not provided for by §81.5(d) of this title [(relating to Eligibility)]) of an employee/retiree who, in accordance with §81.5(j)(6) of this title [(relating to Eligibility)], elects to continue coverage may do so by submitting the required election notification and enrollment forms to the system [Employees Retirement System]. The enrollment form, including all premiums due for the election/enrollment period, must be postmarked or received by the system [Employees Retirement System] on or before the date indicated on the continuation of coverage enrollment form. Continuing coverage will begin on the first day of the month following the month in which the dependent child of the employee/retiree attains 25 years of age, provided all group insurance premiums due for the month in which the dependent child attained age 25 and for the election/enrollment period have been paid in full.

(10) (No change.)

(11) Continuation coverage defined. Continuation coverage as provided for in paragraphs (5)-(10) of this subsection means the continuation of only health and dental coverage benefits which meet the following requirements.

(A) (No change.)

(B) Period of coverage. The coverage shall extend for at least the period beginning on the first day of the month following the date of the cessation of coverage event and ending not earlier than the earliest of the following:

(i) in the case of **loss of coverage due** to termination of an employee's employment, **reduction in work hours, or end of maximum period of leave without pay,** the last day of the 18th calendar month of the continuation period;

(ii) in the case of loss of **coverage due** to termination of an employee's employment, **reduction in work hours, or end of maximum period of leave without pay,** if the employee, spouse, or dependent child has been certified by the Social Security Administration as being disabled as provided in §81.5(j)(3) of this title [(relating to Eligibility)], the last day of the 29th calendar month of the continuation period;

(iii) in any case other than **loss of coverage due** to termination of an employee's employment, **reduction in work hours, or end of maximum period of leave without pay,** the last day of the 36th calendar month of the continuation period;

(iv)-(vi) (No change.)

***(vii)* the date on which the participant, covered under any other group health plan that subjects him or her to a preexisting conditions limitation or exclusion, is no longer subject to the preexisting conditions limitation or exclusion in the other plan;**

(viii)[(vii)] the date on which the participant, after the date of election, becomes entitled to benefits under the Social Security Act, Title XVIII.

(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 November 8, 1994.

TRD-9450632 Charles D. Travis
Executive Director
Employees Retirement System of Texas

Earliest possible date of adoption: December 16, 1994

For further information, please call: (512) 867-3336

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

Part XVI. Council on Sex Offender Treatment

Chapter 512. Standards of Practice

• 40 TAC §§512.1-512.3

The Council on Sex Offender Treatment proposes new §§512.1-512.3, concerning the standards for practice for sex offender treatment providers. The new rules are added to provide sex offender treatment providers standards to delineate appropriate evaluation and treatment procedures and policies.

Eliza May, executive director, Council on Sex Offender Treatment, has determined that for the first five years, there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Ms. May also has determined that the for each year the rules are in effect the public benefit anticipated as a result of enforcing the rules will provide assurances to the public that sex offender treatment providers have a set of standards in practice that delineate professional expectations for the treatment of sexual offenders. There will be no cost to small businesses. There is no anticipated economic costs to persons who are required to comply with the rules as proposed.

A public hearing is scheduled on December 9, 1994 from 10:00 a.m.-11:00 a.m. in the Central Services Building, 1711 San Jacinto, Room 402, Austin, Texas.

Comments on the proposal may be submitted to Eliza May, Council on Sex Offender Treatment, P.O. Box 12546, Austin, Texas 78701.

The new rules are proposed under Texas Civil Statutes, Article 4413(51), §13 and §15, which provide the Council on Sex Offender Treatment with the authority to establish and maintain a registry, develop standards for treatment of sex offenders that must be met by sex offender treatment providers.

Texas Civil Statutes, Article 4413(51) and the Code of Criminal Procedure, Article 42.12 are cross-reference to statute.

§512.1. Introduction.

(a) The Texas Council on Sex Offender Treatment (CSOT) is a state organization dedicated to the prevention of sexual assault through effective treatment and

management of sex offenders. It attempts to carry out its legislative mandate by identifying and certifying mental health treatment providers who have the appropriate training and experience in the treatment of sex offenders, by sponsoring training seminars and conferences, and by disseminating information about sex offender treatment to the Texas Legislature, Texas state and local governmental agencies, professional organizations, and the public. The Council publishes a Registry of Sex Offender Treatment Providers which lists the names, addresses and credentials of mental health treatment providers who strive to incorporate findings from empirical research into effective evaluation of and treatment strategies for sex offenders.

(b) Sexual deviance is a learned or acquired behavioral disorder but may also be influenced by biological factors. Treatment is focused on recognizing, changing and managing deviant behavior and the attitudes that promote it. Sexual deviance is not considered to be a disease that can be cured. The focus of contemporary treatment is on techniques designed to assist sex offenders in maintaining control throughout their lifetime. Therefore, treatment should include simple, practical techniques that can be used during and after formal therapy.

(c) Sex offender evaluation and treatment requires an approach unfamiliar to most mental health professionals. For example, therapists of sex offenders exercise substantial control over the lives of their clients because of the concern for community protection. For this and other reasons, standards of practice specific to the treatment of sex offenders are necessary.

(d) This document was developed by CSOT to delineate appropriate evaluation and treatment procedures and policies. The standards promulgated herein were largely adapted from the Practitioner's Handbook of the Association for the Treatment of Sexual Abusers (ATSA). They are not intended to supplant the standards of the clinician's licensing/certifying board, but are intended to supplement them. These standards delineate professional expectations for the treatment of sexual offenders.

§512.2. CSOT Assertions.

(a) Sex Offender treatment providers shall:

(1) be committed to community protection and safety;

(2) not discriminate against clients with regard to race, religion, gender preference or disability;

(3) treat clients with dignity and respect, regardless of the nature of their crimes or conduct;

(4) be knowledgeable of legal statutes and scientific data relevant to this area of specialized practice;

(5) perform professional duties with the highest level of integrity, maintaining confidentiality within the scope of statutory responsibilities;

(6) insure that the client fully understands the scope and limits of confidentiality in the context of his or her particular situation;

(7) refrain from using professional relationships to further their personal, religious, political, or economic interest other than accepting customary fees;

(8) not engage in sexual relationships with clients (sex between a therapist and a client is a third degree felony in Texas);

(9) fully inform clients in advance of fees for services;

(10) refrain from knowingly providing treatment services to a client who is in treatment with another professional without initial consultation with the current provider;

(11) make appropriate referrals when the therapist is not qualified or is otherwise unable to offer services to a client;

(12) insure that colleagues are qualified by training and experience before making a referral to them;

(13) when withdrawing services, minimize possible adverse effects on the client and the community by continuing treatment until the client has been admitted elsewhere;

(14) take into account the legal/civil rights of the clients, including the right to refuse therapy;

(15) make no claims regarding the efficacy of treatment that exceed what can be reasonably expected and supported by empirical literature;

(16) avoid drawing conclusions or rendering opinions that exceed the present level of knowledge in the field or the expertise of the evaluator; and

(17) attempt to resolve with the clinician and/or report to the appropriate licensing or regulatory authority unethical, incompetent, and dishonorable treatment or evaluation practices.

(b) Sex offender treatment providers assert the following.

(1) Community safety takes precedence over any conflicting consideration, and ultimately, is in the best interests of the offenders.

(2) Inappropriate or unethical treatment damages the credibility of all treatment and presents an unnecessary risk to the community.

(3) Sex offender treatment providers shall have no history of criminal or sexually deviant acts.

(4) Criminal investigation, prosecution, and court orders for treatment can be components of effective intervention.

(5) Where possible, therapists should actively involve community supervision officers, child protective services workers, and victim therapists in case management.

(6) A voluntary client accepted for treatment should be held to the same standards of compliance as are mandated offenders.

(7) It is imprudent to release an untreated sex offender without providing offense-specific evaluation and treatment or specialized supervision.

(8) Without external pressure many sex offenders will not follow through in treatment. Internal motivation improves the prognosis, but is not a guarantee of success.

(9) Many sex offenders require comprehensive, long-term, offense-specific treatment. Currently, cognitive-behavioral approaches that utilize sex offender peer groups and drug intervention appear to be the most effective and best evaluated methods. Self-help or time limited treatment should be used only as an adjunct to comprehensive treatment. For some offenders, incarceration without treatment may increase the risk of recidivism.

(10) Each offender will have an individual plan that identifies the issues, intervention strategies, and goals of treatment. This plan should outline expectations of the offender, his/her family (when possible), and support systems. Treatment contracts should include provisions to avert high risk situations. Contracts should be reassessed periodically.

(11) Progress, or lack thereof, should be clearly documented in treatment records. Specific achievements, failed assignments and rule violations should be recorded.

(12) Progress in treatment must be based on specific, measurable objectives, observable changes, and demonstrated ability to apply changes in relevant situations. For most offenders, progress requires changes in the offender's behavior, attitudes, social and sexual functioning, cognitive processes, and arousal patterns. These changes should demonstrate increased understanding of deviant behavior, victim sensitization, and ability to seek and apply help.

(13) When an offender has made the changes required in treatment, there should be a gradual and commensurate decline of intervention, support, and supervision following an offense-specific treatment program. Ongoing support, aftercare and monitoring are desirable.

(14) There will be instances when the clinician should refuse to treat an offender because essential ancillary resources do not exist to provide the necessary levels of intervention or safeguards.

(15) When a treatment provider determines that an offender is not making the changes necessary to reduce his/her risk to the community, the provider has an ethical obligation to refer the client to a more comprehensive treatment program and/or to the judicial system.

(16) Failure on the part of clients to abide by the treatment contract should result in referral back to the justice system.

(17) A therapist may decide to decline further involvement with a client who refuses to address any critical aspect of treatment.

(18) Treatment providers need to immediately notify the appropriate authority when a client drops out of Court-ordered treatment.

(19) Most sex offenders enter the criminal justice system with varying degrees of denial regarding their behavior. Overcoming denial is a gradual process achieved in treatment. The existence of some degree of denial should not preclude an offender entering treatment, although the degree of denial should be a factor in identifying the most appropriate form and location of treatment.

(20) Sex offender treatment is unlikely to be effective unless the offender admits his/her behavior. Community based treatment is not appropriate for offenders who continue to demonstrate complete denial after a trial period of treatment.

(21) Therapists should not rely exclusively on self report by the offender to assess progress or compliance with treatment requirements and/or probation or parole orders. Therapists should rely on multiple sources of information regarding the offender's behavior and when possible utilize methods such as polygraph and phallometric assessment.

(22) Polygraphs and phallometric measures should not replace other forms of monitoring but may improve accuracy when combined with active surveillance, collateral verifications, and self-report. Phallometric assessment in Texas must be conducted under the supervision of a physician.

(23) Polygraphy can be effective in encouraging disclosure of prior events and adherence to rules. This procedure should not be the only method used to determine factual information.

(24) Phallometric methods cannot be used to prove an individual did or did not, or will or will not commit a sexual offense. However, they can be useful in identifying sexual preferences and changes in preferences over time.

(25) Informed, voluntary consent should always be obtained prior to engaging clients in aversive conditioning.

(26) If phallometric assessment or aversive therapies are used with persons 15 years of age or younger, consent for such assessment and therapy should be obtained from the juvenile offender and the offender's parents, and the procedures should be reviewed by a multidisciplinary professional or institutional advisory group. This will insure that individuals not intimately involved in the treatment of the patient have input regarding the appropriateness of such methods for the developmental level of the child.

(27) Individuals under age 13 should not undergo phallometric assessment or aversive therapies except in rare cases.

(28) In cases of intellectually handicapped offenders who are unable to give consent, an interdisciplinary review and parental consent are the recommended ways to obtain permission to proceed with treatment.

(29) Removal of an intrafamilial offender from a residence in which children reside (instead of the children) is the preferred option.

(30) Treatment referrals should be offered to the non-offending spouse and children in cases where a parent has been removed and to the family where a juvenile offender has been removed.

(31) If the offender has a history of sexual arousal to or reported fantasies of sexual contact with children, he or she should be restricted from having access to children. If:

(A) it is determined that sufficient safeguards exist;

(B) the offender has demonstrated control over his or her deviant arousal; and

(C) it does not impede the offender's progress in treatment, supervised contact may be considered.

(32) There is evidence to support family participation in the treatment of sexual offenders. Where feasible and appropriate, spouses and other family members should be included. Victims or vulnerable children should be excluded until such time as joint therapy is determined to be appropriate for the children.

(33) The sex offender treatment provider should make every effort to collaborate with the victim's therapist in making decisions regarding communication, visits and reunificatic [illegible] ex offender treatment providers shoul [illegible] pportive of the victim's wishes regarding contact with the offender. Contact should be arranged in a manner that places child/victim safety first. When assessing child safety, both psychological and physical well-being should be considered. The sex offender treatment provider shall insure that custodial parents or guardians of the children have been consulted prior to authorizing contact and that contact is in accordance with Court directives.

(34) If reunification is deemed appropriate, the process should be closely supervised. There must be provisions for monitoring behavior and reporting rule violations. Victim comfort and safety should also be assessed on a continuing basis. The offender's therapist should recognize that supervision during visits with children is critical for those whose crimes are against children, or who have the potential to abuse children. Caution should be taken when selecting and preparing visitation supervisors.

(35) It is advisable to limit child molesters' decision-making or disciplinary authority over minors.

§512.3. Issues To Be Addressed in Treatment. During the past decade, the field of sex offender evaluation and treatment has undergone many changes. Research and clinical reports are beginning to demonstrate that a number of treatment methods may be effective in reducing some forms of sexual deviance. Although existing data are inadequate to determine which type of treatment is the most effective for which type of offender, the following treatment methods are [illegible]pted as those most critical to the treatment of sexual deviancy.

(1) Arousal Control. Control of deviant arousal, fantasies, and urges is a priority with most sex offenders. Fantasy and sexual arousal to fantasy are precursors to deviant sexual behavior. It should be assumed that most offenders have gained sexual pleasure from their specific form of deviance. Arousal control methods do not eliminate but only help control arousal. It is therefore necessary that clients learn to apply these techniques in everyday situations, without reliance on a special apparatus. Arousal control may require periodic booster sessions for the remainder of the

client's life. Effective arousal control must also include methods to control spontaneous deviant fantasies and to minimize contact with stimulating objects or persons. Arousal control should proceed from the most effective methods for reducing arousal to less effective methods. To document changes in arousal control, measurement is essential. Currently the most effective measures are obtained using a phallometric device. Multiple measures over time are required to determine change reliably.

(2) Cognitive Therapy. Cognitive distortions are thoughts and attitudes that allow offenders to minimize, justify and rationalize their deviant behavior. Cognitive distortions allow the offender to overcome prohibitions and progress from fantasy to behavior. These distorted thoughts provide the offender with an excuse to engage in deviant sexual behavior, and serve to reduce guilt and responsibility. Cognitive therapy strives to identify, assess, and modify cognition's that promote sexual deviance. Cognitive therapy is considered a vital component of treatment.

(3) Relapse Prevention. Current knowledge of deviant sexual behavior suggests that there is a series of behaviors, emotions, and cognition's that is identifiable and which precede deviant sexual behavior in a predictable manner. The ability to accurately identify these maladaptive behaviors is a primary goal for every offender in treatment. Autobiographies, offense reports, interviews and cognitive-behavioral chains are used to identify antecedents to offending. The ability to intervene can be enhanced by training primary partners and other support persons to recognize maladaptive behaviors and to encourage application of proper coping behaviors.

(4) Victim Empathy. Although there is no clear evidence to suggest that sex offenders can gain true empathy for victims of abuse, a universal goal of treatment is to learn to understand and value others. Highlighting the consequences of victimization helps sensitize the offender to the harm he or she has done.

(5) Increasing Social Competence. Sex offenders often have deficits in basic social and interpersonal skills. They may lack the ability to develop and sustain reciprocal friendships. Many offenders are poor problem-solvers, lack assertiveness, and do not adequately manage anger or stress. One goal of treatment is to improve the offender's ability to deal effectively with social situations and develop meaningful relationships with others.

(6) Improving Primary Relationships. Failure to develop and maintain a reciprocal, loving sexual relationship with an adult partner may lead one to seek out alternative sexual outlets. Identifying specific sexual dysfunctions, sex therapy, and training in dating skills and erotic techniques may be necessary to maintain a functional lifestyle. Failure to involve current partners in therapy often leads to the same stresses and failure in the relationship that precipitated the sexual deviancy.

(7) Couples/Family Therapy. To facilitate transition of the offender's partner into therapy a variety of treatment modalities are recommended. Individual therapy, non-offending spouses groups, and/or parents of victims groups prepare the partner for the issues and methods involved in sex offender treatment. Marital therapy or couples group therapy focused on sexual offending is essential in cases where an offender is to return home. If an offender is to eventually live in a home where victims or children reside, a predetermined integration sequence should be followed. This should include close supervision and a variety of safeguards for the protection of children.

(8) Support Systems. Involvement of close friends and family in therapy provides the offender with a milieu in which support is available. Part of the transition to follow-up treatment is less participation in group and individual therapy. To compensate for this loss of support and surveillance, the support system should assist the offender in avoiding and coping with antecedents to sexual deviance. The support system should include individuals from the offender's daily life (i.e., family, friends, co-workers, church members and extended family).

(9) Biomedical Approaches. Adjunctive therapy with psychopharmacological agents is useful in select cases. Antiandrogens such as depo-provera act by reducing testosterone and may be helpful in controlling arousal and libido when these factors are undermining progress in therapy or increasing the risk of reoffending before significant progress can be made in the cognitive aspects of therapy. Antidepressants and medications targeting obsessive compulsive symptoms are also useful in some individuals where those symptoms play a role in the overall psychodynamic picture.

(10) Follow-up Treatment. A therapeutic regime that includes follow-up significantly increases the likelihood that gains made during treatment will be maintained. In order for new habits and skills to be reinforced and to monitor compliance with treatment contracts, follow-up treatment should involve periodic booster sessions to reinforce and assess maintenance of positive gains made during treatment. This can be facilitated by involving the support group, and using polygraphy and phallometric assessment. Input from support group members, polygraph examinations, and phallometric assessments may serve to deter future offenses or alert therapists to problems.

(11) Comorbid Diagnosis. In some sex offenders there are sufficient signs and symptoms to merit an additional diagnosis by DSM IV criteria. These diagnoses can be anywhere in the entire spectrum of psychiatric disease. The most common are alcohol abuse, substance abuse and affective disorders. Treating an alcohol or substance abuse problem should not be assumed to make sex offender treatment unnecessary. Occasionally, the delusions and hallucinations of schizophrenia will be associated with the individual committing sexual offenses. The comorbid diagnoses should be treated with the appropriate therapies concomitantly with the treatment for sex offending behavior except in the case of schizophrenia where the antipsychotic therapy would obviously take precedence.

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

Issued in Austin, Texas, on October 27, 1994.

TRD-9450476 Eliza May
Executive Director
Council on Sex Offender Treatment

Earliest possible date of adoption: December 16, 1994

For further information, please call: (512) 463-2323

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Chapter 513. Code of Professional Ethics

• 40 TAC §513.1, §513.2

The Council on Sex Offender Treatment proposes new §513.1 and §513.2, concerning a code of professional ethics for sex offender treatment providers. The new rules are added to provide sex offender treatment providers standards for professional ethics appropriate to their work in evaluations and treatment procedures related to sexual abusers.

Eliza May, executive director, Council on Sex Offender Treatment, has determined that for the first five years, there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Ms. May also has determined that the for each year the rules are in effect the public benefit anticipated as a result of enforcing the rules will provide assurances to the public that sex offender treatment providers have a set of standards in practice and professional ethics that delineate professional expectations for the treatment of sexual offenders. There will be no cost to small businesses. There is no anticipated economic costs to persons who are required to comply with the rule as proposed.

A public hearing is scheduled on December 9, 1994 from 10:00 a.m.-11:00 a.m. in the Central Services Building, 1711 San Jacinto, Room 402, Austin, Texas.

Comments on the proposal may be submitted to Eliza May, Council on Sex Offender Treatment, P.O. Box 12546, Austin, Texas 78701.

The new rules are proposed under Texas Civil Statutes, Article 4413(51), §13 and §15, which provide the Council on Sex Offender Treatment with the authority to establish and maintain a registry, develop standards for treatment of sex offenders that must be met by sex offender treatment providers.

Texas Civil Statutes, Article 4413(51) and the Code of Criminal Procedure, Article 42.12 are the cross-reference to statute.

§513.1. Code of Professional Ethics. Sex offender treatment providers are trained in dealing with the assessment and treatment of sex offenders. These providers constitute a professional discipline which has a membership committed to establishing and maintaining the highest level of professional standards related to the assessment and treatment of sexual abusers. As such, they are conscious of their special skills and aware of their professional boundaries. They perform their professional duties with the highest level of integrity and appropriate confidentiality, within the scope of their statutory responsibilities. They will not hesitate to seek assistance from other professional disciplines when circumstances dictate. They are committed to protect the public against and will not hesitate to expose unethical, incompetent, or dishonorable practices. In order to maintain the highest standard of service and consumer protection, they commit themselves to the following principles designed to earn the greatest level of public confidence.

§513.2. Code of Ethics.

(a) Professional Conduct.

(1) Each clinician will provide professional service to anyone, regardless of race, religion, sex, political affiliation, social or economic status, or choice of life style. A provider will not allow personal feelings related to a client's alleged or actual crimes or behavior to interfere with professional judgment and objectivity. When a therapist cannot offer service to a client for any reason, he or she will make a proper referral. Providers are encouraged to devote a portion of their time to work for which there is little or no financial return.

(2) Each provider will refrain from using his or her professional relationship, related to the assessment or treatment of a client, to further personal, religious, political or economic interests, other than customary fees.

(3) The proper conduct of each therapist is a personal matter to the same degree as it is with any other individual, except when such conduct compromises the fulfillment of professional responsibilities or reduces the public trust in this specialty area. Consequently, providers are sensitive to predominant community standards and the potential impact that either conformity to, or deviation from, these standards can have on the quality of their own performance, as well as that of their colleagues.

(4) Each provider has an obligation to engage in continuing education and professional growth including active participation in meetings and affairs or relevant professional affiliations.

(5) Each provider will refrain from diagnosing, treating or advising on problems outside the recognized boundaries of his/her competence.

(b) Client Relationships.

(1) Each provider, while offering dignified and reasonable support to a client, is courteous in making a prognosis and will not exaggerate the efficacy of his or her service.

(2) When engaged in private practice, each provider recognizes the importance pertaining to financial matters with clientele. Arrangements for payments are to be settled at the beginning of an assessment or a therapeutic relationship.

(3) Each provider will attempt to avoid relationships with clientele which may impair professional judgment or pose a risk of exploiting them. Examples of such relationships include, but are not limited to, the following: treatment of family members, close friends, employees, or supervisors.

(4) Sexual intimacy with clients is unethical. Such behavior between a therapist and a client constitutes a felony offense in Texas.

(5) A provider shall not withdraw services to clients in a precipitous manner. Each member shall give careful consideration to all factors in the situation and take care to minimize possible adverse effects on the client.

(6) Each provider who anticipates termination or disruption of service to clients shall notify the clients promptly and provide for transfer, referral, or continuation of service in relationship to the client's needs and preferences.

(7) Each provider who serves the clients of a colleague during a temporary absence or emergency will serve those clients with the same consideration of that afforded any client.

(8) In their professional role, providers will avoid any action which will violate or diminish the legal and civil rights of clients or others who may be affected by their actions.

(c) Confidentiality.

(1) Providers will keep records on each client, storing them in such a way as to ensure their safety and confidentiality in accordance with the highest professional and legal standards.

(2) Each provider is responsible for informing clients of the limits of confidentiality. Clients should be informed of any circumstances which may trigger an exception to the agreed upon confidentiality. The client being evaluated or treated then has the option to decide what information to reveal and what risks to confidentiality he or she may wish to bear. A written and signed document (contract) is recommended.

(3) Providers in criminal justice settings, or elsewhere, should inform all parties with whom they are working of the level of confidentiality which applies. They should clarify any circumstances which would constitute exceptions to confidentiality, in advance of the service being rendered. Each provider should make clear to the client any "conflicts of interests" or dual-client relationships which affect his/her current relationship with a client.

(4) Written permission shall be granted by the client before any data may be divulged to other parties.

(5) When responding to an inquiry for information and when a written release by the client is obtained, written and oral reports should present data germane to the purpose of the inquiry. Every effort should be made to avoid undue invasion of privacy for the client.

(6) As noted in this section, information is not communicated to others without the consent of the client unless the following circumstances occur:

(A) there exists a clear and immediate danger to the person(s) from the client;

(B) there is an obligation, depending upon one's profession, to comply with specific statutes requiring reports of suspected abuse to authorities. Each provider is responsible for becoming fully aware of all statutes which pertain to the conduct of his or her professional practice.

(d) Assessments.

(1) Providers make every effort possible to promote the client's victim-free behavior while at the same time, acting in the best interest of the client, so long as others are not placed at identifiable risk.

They guard against the misuse of assessment data. They respect their clients' rights to know the results, the interpretations made, and the basis for the conclusions and recommendations drawn from such assessments. They endeavor to ensure that the assessments and reports they provide are used appropriately by others as well.

(2) Unless the client agrees to an exception in advance, each provider respects the right of the client to have a complete explanation of the nature and purpose of the methodologies, and any foreseeable side effects of the assessment, in language which the client is able to understand.

(3) Each provider will obtain voluntary informed consent, in written form, from a client prior to conducting a physiological assessment or engaging in treatment. In cases where a question exists regarding the appropriateness of administering a test to a particular client, the provider shall seek expert guidance from a competent medical or psychological authority prior to testing.

(4) In court-ordered evaluations, the client should have his or her rights read to him and signed, prior to the assessment being initiated.

(5) The responsible use of assessment measures is of paramount concern and a serious responsibility of each provider. Assessments regarding a person's degree of sexual dangerousness, suitability for treatment, or other forensic referral questions shall not be determined solely on the basis of a phallometric assessment. Rather, such data must be properly integrated within a comprehensive assessment, components of which are determined by a person who has specific training and expertise in making such assessments.

(6) An assessment should not be used to confirm or deny whether an event or crime has taken place.

(7) In reporting assessment results, providers indicate any reservations that might exist regarding validity or reliability because of the circumstances of the assessment or the absence of comparative norms for the person being tested. Each provider endeavors to ensure that assessment results and interpretations are not misunderstood or misused by others. Proper qualifications will be made with regard to prediction and "generalizability of data" issues, in order to not mislead the consumer of the report.

(8) Since it is not within the professional competence of providers to offer conclusions on matters of law, unless they are trained to do so, they should resist pressure to offer such conclusions (e.g., while it would be appropriate to address an issue regarding the probability of a client committing certain criminal acts within a certain period of time, it would be inappropriate to state that "an individual is too dangerous to be released.").

(9) Each provider should be very cautious in offering predictions of criminal behavior for use in imprisoning or releasing individuals. If a provider decided that it is appropriate, on the basis of a thorough evaluation in a given case, to offer a prediction of criminal behavior, he or she should specify clearly:

(A) the acts being predicted;

(B) the estimated probability that these acts will occur during a given period of time; and

(C) the facts on which these predictive judgments are based.

(10) Each provider should be thoroughly familiar with the assessment or treatment procedures and data used by another provider before providing any public comment or testimony pertaining to the validity, reliability, or accuracy of such information.

(11) Each provider will safeguard sexual arousal assessment testing and treatment materials. Each provider will recognize the sensitivity of this material and use it only for the purpose for which it is intended in a controlled phallometric laboratory assessment. Providers will not make such materials available to persons who lack proper training and credentials, or who would misinterpret or improperly use such stimulus materials.

(e) Professional Relationships.

(1) Each provider will refrain from knowingly offering services to a client who is in treatment with another professional without initially consulting with the parties involved.

(2) Each provider will act with proper regard for the needs, special competencies, and perspectives of not only colleagues who treat sexual abusers but other professionals as well.

(3) Each provider is encouraged to affiliate with professional groups, clinics, or agencies operating in the assessment and treatment of sexual offenders. Similarly, interdisciplinary contact and cooperation is encouraged.

(f) Research and Publications.

(1) Each provider is obligated to protect the welfare of his or her research subjects. Provisions of the "human subjects experimental policy" shall prevail as specified by the United States Department of Health, Education and Welfare guidelines.

(2) Each provider will carefully evaluate the ethical implications of possible research and has full responsibility to ensure that ethical practices are enforced in conducting such research.

(3) The practice of informed consent prevails. The research participant shall have full freedom to decline to participate in or withdraw from the research at any time without any prejudicial consequences.

(4) The research subject shall be protected from physical and mental discomfort, harm, and danger that may result from research procedures to the greatest degree possible.

(5) Publication credit is assigned to those who have contributed to a publication in proportion to their contribution, and in accordance with customary publication practices.

(g) Public Information and Advertising. All professional presentations to the public will be governed by the following standards on public information and advertising.

(1) General Principles. The practice of assessment and treatment of the sex offender exists for the public welfare. Therefore, it is appropriate for the well trained and qualified practitioner to inform the public of the availability of services. However, much needs to be done to educate the public as to the services available from qualified persons who engage in the assessment and treatment of sexual abusers. Therefore, providers have a responsibility to the public to engage in appropriate informational activities and avoid misrepresentation or misleading statements in keeping with the following general principles and specific regulations: Selection of the therapist by a prospective client should be made on an informed basis. Advice and recommendations of third parties, such as community corrections officers, attorneys, physicians, other professionals, relatives or friends, as well as responses to restrained publicity, may be helpful. Advertisements and public communications, whether in directories, announcement cards, newspapers or on radio or television, should be formulated to convey accurate information which is necessary to make an appropriate selection. Self-praising should be avoided. Information that may be helpful in some situations would include the following:

(A) office information such as name, including a group name and names of professional associates, address, telephone number, credit card acceptability, languages spoken and written, and office hours;

(B) earned degrees, state licensure and/or other certification, professional certification or affiliation;

(C) description of practice, including the statement that a practice is limited to the assessment or treatment of sexual offenders (if appropriate); and

(D) permitted fee information.

(2) The proper motivation for community publicity by members who are engaged in the assessment and treatment of sexual abusers lies in the need to inform the public of the availability of competent professionals. The public benefit derived from advertising depends upon the usefulness and accuracy of the information provided to the community to which it is directed.

(3) The regulation of public statements by providers is rooted in the public interest. Public statements through which a provider seeks business by use of extravagant or brash statements or appeals to fears could mislead or harm the lay person. Furthermore, public communications that would produce unrealistic expectations in particular cases and would bring about a lack of confidence in the profession, would be harmful to the community. The therapist-client relationship is personal and unique and should not be established as the result of pressures, deception or exploitation of the vulnerability of clients.

(4) The name under which a provider conducts his or her practice may be a factor in the selection process. Use of a name or credentials which could mislead referral sources or lay persons is improper. Likewise, one should not hold oneself out as being a partner or associate of any agency or firm if he is, in fact, not acting in that capacity (e.g., a person engaged in private practice who is also employed at a state hospital should make it clear to a prospective client in private practice that he is not acting on behalf of a state hospital).

(5) In order to avoid the possibility of misleading persons with whom he or she deals, a provider should be scrupulous in the representation of his or her professional background, training and status. Each provider must indicate, if it is accurate, any limitations in his or her practice (e.g., a therapist who is a member should specify if, while working in a private practice setting, he/she needs to operate under the supervision of a licensed professional).

(6) Providers do not represent their affiliation with any organization or agency in a manner which falsely implies sponsorship or certification by that organization.

(7) Regulation of public information and advertising.

(A) A provider shall not knowingly make a representation about his or her ability, background, or experience, or about that of a partner or associate, or about a fee or any other aspect of a proposed professional engagement that is false, fraudulent, misleading, or deceptive.

(B) A false, fraudulent, misleading, or deceptive statement or claim is defined as a statement or claim which:

(i) contains a material misrepresentation of fact;

(ii) omits any material or statement of fact which is necessary to make the statement, in light of all circumstances, not misleading;

(iii) is intended or likely to create an unjustified expectation concerning the clinician, or services.

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

Issued in Austin, Texas, on October 27, 1994.

TRD-9450475 Eliza May
Executive Director
Council on Sex Offender Treatment

Earliest possible date of adoption: December 16, 1994

For further information, please call: (512) 463-2323

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TITLE 43. TRANSPORTATION

Part I. Texas Department of Transportation

Chapter 22. Use of State Property

Subchapter B. Use of State Highway Right-of-Way

• 43 TAC §§22.10-22.15

The Texas Department of Transportation proposes new §§22.10-22.15, concerning use of state highway right-of-way.

Texas Civil Statutes, Article 6665, require the Texas Transportation Commission to formulate plans and policies for the location, construction, and maintenance of a comprehensive system of state highways and public roads. Texas Civil Statutes, Article 6674w-1, empower the commission to lay out, construct, maintain, and operate a modern state highway system. Government Code, Chapter 485, §485.004, requires state agencies to cooperate with the Office of the Governor's Music, Film, Television, and Multimedia Office to the greatest extent possible to promote the development of the music film, television, and multimedia industries in this state. Texas Civil Statutes, Article 6673h, require the commission to adopt rules concerning the use of highways for bicycle events. In accordance with these statutes, the commission proposes the following new sections governing certain temporary non-department uses of state highway right-of way which serve a public purpose and are consistent with the safety and convenience of the traveling public.

Section 22.10. Purpose. States the purpose of the subchapter, which is to facilitate the use of state highway right-of-way for certain public purposes benefitting the general public while being consistent with the safe operation of the state highway system.

Section 22.11. Definitions. Defines the words and terms used in the subchapter.

Section 22.12. Closures. Authorizes the department to close a segment of the state highway system for no more than seven days if such action serves a public purpose and is consistent with the safety of the traveling public; authorizes the submittal of a request for approval of a closure; requires a request for a closure in an incorporated area to come from the city, prescribes the content of the request; requires a request to be submitted within at least 30 days of the closure; provides that the district engineer will approve a closure based on criteria concerning public safety, the public purpose of the event, a traffic control plan that protects motorists, participants, and spectators, scheduled maintenance and construction activities, convenience of abutting property owners and residents, environmental impacts, and passage of emergency vehicles; provides for a written agreement between the requestor and the department; excepts emergency traffic control and maintenance activities pursuant to a municipal maintenance agreement from requiring prior department approval; refers film and video productions to §22.13; excepts certain bicycles races from requiring department approval; excepts routine traffic control from requiring department approval if the closure is in an incorporated area and does not take place on a controlled access highway, but does take place on an arterial highway (arterial highway is defined as a roadway containing predominately at-grade intersections, allowing continuous access to abutting property, and having posted speeds of 45 Mph or less); requires written notice if a request is disapproved; provides for an appeal to the assistant executive director, field operations.

Section 22.13. Film and Video Productions. Requires department approval of a production that requires a closure, will disrupt traffic, could damage the right-of-way or highway facilities, or affects the safety of the traveling public; requires a person or entity requesting approval of a production to first contact the Texas Film Commission; requires the requestor to then submit a request to the department district, and lists the required information; provides that the district engineer will approve a closure based on criteria concerning public safety, a traffic control plan that protects motorists, participants, and

spectators, scheduled maintenance and construction activities, convenience of abutting property owners and residents, environmental impacts, and passage of emergency vehicles; provides for a written agreement between the requestor and the department, and describes the minimum terms and conditions; requires written notice if a request is disapproved; provides for an appeal to the assistant executive director, field operations.

Section 22.14. Vendors. Prohibits the use of state highway right-of-way for the purpose of selling goods or services from a vehicle or structure unless authorized by law or for the sale of an edible agricultural commodity for a period not to exceed 60 days, if that commodity was grown or produced on the abutting property; requires person desiring to vend on the right-of-way, as authorized in this section, to file an application at the department's district office; lists the restrictions placed on the location of authorized vendors, which include protection of the traveling public and natural environment; restricts the placement of a sign on the right-of-way, vehicle, or structure; provides that the district engineer or his or her designee will approve an application, subject to necessary additional terms, if the use of right-of-way is in compliance with this section; provides for a written agreement between the requestor and the department, and describes the minimum terms and conditions; requires written notice if a request is disapproved; provides that any decision by a designee of the district engineer may be overruled by the district engineer.

Section 22.15. Signs. Authorizes the placement of special event signs and signs to identify a commercial entrance along a highway under construction; provides that a contractor for a highway improvement contract will erect a sign to indicate a commercial entrance as provided in the plans and specifications for the project; requires a person or entity requesting authorization to place a special event sign to file an application at the department's local area office not fewer than 14 days prior to the date of placement; lists minimum information required to accompany the application; provides that the area engineer will approve the placement and support for a special event sign found in compliance with this section, subject to any necessary additional terms; describes restrictions on the placement of signs relating to size, material, location, text, lighting, and banner supports; authorizes the executive director or designee to waive one or more requirements of this section; authorizes the department to remove a sign not maintained in compliance with this section; requires the applicant to remove the sign within 24 hours of the event, except banners must be removed within seven days; authorizes the department to remove a sign which becomes a hazard; provides that a sign not removed as required shall be removed by the department, and the applicant is liable for removal and disposal costs.

Gary K. Trietsch, Director of Traffic Operations, has determined that the overall annual cost to the state of enforcing or administering the sections cannot be determined due to the inability to estimate the type and quantity of requests. The department estimates the following approximate costs to the state per request: $50-$300 for closures and film/video productions; $24 for special event signs; and $280 for vending. There are no additional cost to local governments expected as a result of enforcing or administering the proposed sections.

Mr. Trietsch has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the proposed sections.

Mr. Trietsch also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of implementing the sections will be the protection of the safety and convenience of the traveling public and the protection of the integrity of the highway facility and adjacent right-of-way while authorizing certain events and activities on state highway right-of-way which serve a public purpose.

There will be no effect on small businesses. There will be an economic cost to persons who request to use state highway right-of way as provided in the proposed sections. For individuals or entities submitting requests for closures or film/video productions, the estimated costs range from $100 to $500 per day per request for small events, $500-$1,000 per day per request for medium size events, and $1,000-$10,000 per day per request for large events. Most requests will involve small events. The department estimates receiving one to two requests for large events per year. For individuals or entities requesting authority to vend and to place a sign costs will be negligible.

Pursuant to the Government Code, Chapter 2001, the Texas Department of Transportation will conduct a public hearing to receive comments concerning the proposed new sections. A public hearing will be held at 10:00 a.m. on November 28, 1994 in Room 102 of Riverside Annex, 200 East Riverside, Austin, Texas. The hearing will be conducted in accordance with the procedures specified in 43 TAC §1.5. Those desiring to make comments or presentations may register starting at 9:30 a.m. Any interested person may appear and offer comments, either orally or in writing, however, questioning of those making presentations will be reserved exclusively to the presiding officer as may be necessary to ensure a complete record. While any person with pertinent comments will be granted an opportunity to present them during the course of the hearing, the presiding officer reserves the right to restrict testimony in terms of time and repetitive content. Organizations, associations, or groups are encouraged to present their commonly held views and identical or similar comments through a representative member where possible. Comments on the proposed text should include appropriate citations to sections, subsections, paragraphs, etc., for proper reference. Any suggestions or requests for alternate language or other revisions in the proposed text should be submitted in written form. Presentations must remain pertinent to the issue being discussed. A person may not assign a portion of his or her time to another speaker. A person who disrupts a public hearing must leave the hearing room if ordered to do so by the presiding officer. Persons with disabilities who have special communication or accommodation needs and who plan to attend the hearing and who may need auxiliary aids or services such as interpreters for persons who are deaf or hearing impaired, readers, large print or braille, are requested to contact Eloise Lungren, Director of the Public Information office, at 125 East 11th Street, Austin, Texas 78701-2383, (512) 463-8588 at least two work days prior to the hearing so that appropriate arrangements can be made.

Written comments on the proposed new sections may be submitted to Gary K. Trietsch, Director of Traffic Operations, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of written comments will be 5:00 p.m. on December 9, 1994.

The new sections are proposed under Texas Civil Statutes, Articles 6666, which provide the Texas Transportation Commission with the authority to promulgate rules for the conduct of the work of the Texas Department of Transportation, Texas Civil Statutes, Article 6673h, which mandate that the Commission adopt rules for bicycle use on the state highway system; and Texas Civil Statutes, Article 6674w-1, which empower the commission to lay out, construct, maintain, and operate a modern state highway system.

The sections do not affect other statutes, articles, or codes.

§22.10. Purpose. It is the policy of the department and the commission to facilitate the use of state highway right-of-way for certain public purposes which benefit the general public while being consistent with the safe operation of the state highway system. The sections under this subchapter prescribe the policies and procedures governing use of state highway right-of-way for other than department business.

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

Area engineer–The chief administrative officer in charge of an area office of the department.

Area office–An office responsible for carrying out the department's primary functions at the local level for a designated geographical area within a district.

Arterial Roadway–A roadway which contains predominately at-grade intersections, allows continuous access to abutting property, and has posted speeds equal to or less than 45 miles per hour.

Banner–A sign painted or fabricated on fabric mesh or flexible plastic, placed between supports above or along a roadway or highway.

BC Sheets–The latest edition of Barricade and Construction Standards published by the department.

Closure–The temporary restriction, in whole or in part, of vehicular use of a segment of the state highway system.

Commission-The Texas Transportation Commission.

Controlled access highway-In accordance with applicable state law, a state highway on which owners or occupants of abutting lands and other persons are denied access to or from the highway except at such points only and in such manner as may be determined by the department.

Department-The Texas Department of Transportation.

District-A subdivision of the department responsible for the day-to-day operations of the department in a specific geographically defined area.

District engineer-The chief administrative officer of a district of the department.

Executive director-The chief administrative officer of the department.

Edible agricultural commodity-Any product produced and sold for human consumption.

Film and video production-The on-location creation of a film or video project including, but not limited to, feature films, television productions, television commercials, documentaries, music videos, and corporate or industrial communication productions.

MUTCD-Manual on Uniform Traffic Control Devices.

Person-An individual, corporation, organization, business trust, estate, trust, partnership, association, and any other legal entity.

Right-of-way-The entire width of land between the public boundaries or property lines of a highway.

Routine traffic control-The handling of events which last no more than four hours, such as parades, marches, and other such events, and use authorized law enforcement personnel who accept the responsibility for the traffic control as being well within their capabilities to protect and direct all parties involved.

Sign-Any outdoor sign, display, light, device, figure, painting, drawing, message, plaque, poster, or other thing that is designed, intended, or used to advertise or inform.

Special event-An event serving a public purpose and sponsored by a civic or non-profit organization, including, but not limited to, fairs, festivals, bicycle events, marathons, walkathons, rodeos, and charitable fund-raising ev nts, but not including political events or events that could be construed to advocate or oppose a candidate for election or influence the passage or defeat of a measure on an election ballot.

State highway system-The system of highways in the state included in a comprehensive plan prepared by the department's executive director under the direction and with the approval of the commission in accordance with Texas Civil Statutes, Article 6674b.

Texas Film Commission-The office responsible for promoting the development of the film industry in the state, currently located in the Office of the Governor's Music, Film, Television, and Multimedia Office.

§22.12. Closures.

(a) Policy. The department may authorize the closure of a segment of the state highway system for no more than seven days if such action serves a public purpose and is consistent with the safety of the traveling public. This section prescribes the policies and conditions by which an individual, private entity, or governmental entity may obtain such approval.

(b) Request.

(1) Who may submit.

(A) Unincorporated area. Any individual, private entity, or governmental entity may submit a request for approval of a closure in an unincorporated area.

(B) Incorporated area. Only a municipality may submit a request for approval of a closure in an incorporated area. Any individual, private entity, or other governmental entity desiring a closure must ask the municipality to submit a request to the district engineer.

(2) Content of request. A request for approval of a closure must be submitted in writing to the appropriate district engineer and must include the following information:

(A) a physical description of the limits of the event, including county names and highway numbers, the number of lanes the highway has, and the number of lanes to be used, and a map showing the location of the event;

(B) the proposed schedule of start and stop times at each location;

(C) a brief description of the proposed activities, including the approximate number of people and number and type of equipment involved;

(D) a traffic control plan which incorporates the requirements of the Texas MUTCD; and

(E) an explanation of the public purpose to be served by the event.

(3) When submitted. A request for a closure must be submitted at least 30 days prior to the date of the proposed event.

(c) Approval. The district engineer will approve a closure if he or she determines that:

(1) the event requiring the closure serves a public purpose;

(2) the requestor has designed a satisfactory traffic control plan to protect both motorists and all participants and spectators, and the plan will not substantially inconvenience the traveling public;

(3) the event itself will not impair the safety of the traveling public;

(4) the convenience of abutting property owners and residents is adequately protected, and adequate access for such persons to their property is assured;

(5) the closure does not conflict with scheduled maintenance or construction activities;

(6) the event will not cause substantial negative impacts to the environment, including landscape features; and

(7) there will be appropriate passage allowance for emergency vehicle travel.

(d) Written agreement. If the district engineer approves the proposed closure, the requestor, which will be considered the city if the closure is in an incorporated area, must enter into a written agreement with the department, in a form prescribed by the department, prior to the closure. The agreement will contain terms and conditions the department deems necessary to protect the public safety including, but not limited to:

(1) the physical description of the limits of the event, including county names and highway numbers;

(2) the proposed schedule of start and stop times at each location;

(3) a description of the proposed activities, including the approximate numbers of people and equipment involved;

(4) the traffic control plan;

(5) a statement that this event serves a public purpose;

(6) a statement that the requestor shall assume all costs associated with the event;

(7) a traffic enforcement plan, including a letter from the law enforcement agency that will be providing the traffic control for the event;

(8) assurance that there will be appropriate passage allowance for emergency vehicle travel;

(9) a statement that the requestor will avoid or minimize impacts, and will, at its own expense, restore or repair

damage occurring outside the right-of-way and restore or repair the right-of-way, including roadway and drainage structures, signs, pavement, etc., to a condition equal to that existing before the closure, and, to the extent practicable, restore the natural environment, including landscape features;

(10) a statement that:

(A) the requestor shall indemnify and save harmless the state, its officers, employees, agents, and contractors from claims and liabilities due to the activities of the requestor; or

(B) the city acknowledges its responsibilities for the acts and omissions of its officers, employees, agents, and contractors, to the extent permitted by applicable law, if the requestor is a city which is unable to provide indemnification;

(11) evidence that the requestor has obtained adequate insurance naming the department as a coinsured by the requestor or responsible party in an amount and form acceptable to the department for the payment of any damages which may occur during the time period of encroachment and to save the state harmless; and

(12) a statement that the requestor must abide by all applicable federal, state, and local environmental laws, regulations, ordinances, and any conditions or restrictions required by the department to protect the natural environment and cultural resources on the right-of-way.

(e) Exceptions.

(1) General. Closures necessary for emergency traffic control and maintenance activities pursuant to a municipal maintenance agreement do not require prior department approval.

(2) Film and video productions. Requests for approval of film and video productions must be submitted in accordance with §22.13 of this title (relating to Film and Video Productions).

(3) Bicycle races. A competitive bicycle race that does not involve the complete restriction of vehicular traffic in one or both directions such that a detour is required is not subject to approval by the department, if the sponsoring organization has obtained the approval of the appropriate local law enforcement agency or agencies in accordance with the Uniform Act Regulating Traffic, Texas Civil Statutes, Article 6701d, §179.

(4) Routine traffic control. A closure involving routine traffic control does not require department approval, provided that the closure is in an incorporated area and does not take place on a controlled access highway but does take place on an arterial roadway. The district engineer shall be notified by facsimile or by letter seven days before the routine traffic control event occurs.

(f) Disapproval. If a district engineer disapproves a request for approval of a closure, he or she will provide written notice describing the basis for the determination.

(g) Appeal. A requestor may appeal a district engineer's disapproval to the department's assistant executive director, field operations, by submitting to that official by mail or facsimile the information provided to the district engineer.

§22.13. Film and Video Productions.

(a) Policy. In accordance with Government Code, Chapter 485, it is the policy of the department to cooperate with the Office of the Governor's Music, Film, Television, and Multimedia Office to the greatest extent possible to fully implement the state's goal of promoting the development of the music, film, television, and multimedia industries in Texas. This section is intended to encourage and facilitate access to department highway facilities and their adjacent right-of-way for the promotion of that goal while protecting the safety of the traveling public and the integrity of state highway facilities and right-of-way.

(b) Activities included. A person or entity desiring to produce a film, video, or other production on a segment of the state highway system must first obtain the approval of the department for any activity within state highway right-of-way that:

(1) requires a closure of a segment of the state highway system;

(2) will otherwise disrupt the normal flow of traffic;

(3) could damage state highway right-of-way or other facilities of the department; or

(4) in anyway affects the safety of the traveling public.

(c) Request.

(1) A person or entity desiring approval for an activity subject to this section must first notify the Texas Film Commission. That office will provide general information, including instructions on how to submit a request for approval to the department.

(2) After contacting the Texas Film Commission, the person or entity must submit, as early as possible, preferably at least 30 days in advance of the proposed production, a written request to the department district or districts in which the production will occur. The request shall include the following information:

(A) the location of the production, including county name, highway number, and description of the physical location;

(B) the proposed schedule of start and stop times at each location (commonly known as preparation and wrap);

(C) a brief description of the proposed activities, including the proposed placement of production company personnel and equipment on state highway right-of-way; and

(D) a permit or appropriate documentation as may be required by applicable local ordinance of a municipality if the production is within the limits of an incorporated area.

(3) The district engineer may request additional information necessary to make his or her determination under subsection (d) of this section.

(d) Approval. The district engineer will approve the request if he or she determines that:

(1) the proposed production is consistent with the safety and convenience of the traveling public;

(2) the proposed production will not cause substantial negative impacts to the environment, including landscape features;

(3) the proposed production does not conflict with scheduled maintenance or construction activities;

(4) the convenience of abutting property owners and residents is adequately protected, and adequate access for such persons to their property is assured; and

(5) if a closure is proposed:

(A) the requestor has designed to the department's satisfaction a traffic control plan to protect both motorists and all participants and spectators, and that will not substantially inconvenience the traveling public; and

(B) there will be appropriate passage allowance for emergency vehicle travel.

(e) Agreement. If the district engineer approves the proposed production, the requestor must execute a written agreement with the department prior to the production. The agreement will contain terms and conditions the department deems necessary to protect the public safety and the integrity of the facility and adjacent right-of-way including, but not limited to:

(1) the location of the production, including county name, highway number, and description of the physical location;

(2) the schedule of start and stop times at each location;

(3) a description of the activities, including the placement of people and equipment that the requestor will place on state highway right-of-way;

(4) the traffic control plan, if applicable;

(5) a statement that the requestor assumes all costs associated with the production;

(6) a statement that the requestor will avoid or minimize impacts, and will, at its own expense, restore or repair damage occurring outside the right-of-way and restore or repair the right-of-way, including roadway and drainage structures, signs, pavement, etc., to a condition equal to that existing before the production, and, to the extent practicable, restore the natural environment, including landscape features;

(7) a statement that the requestor shall indemnify and save harmless the state, its officers, employees, agents, and contractors from claims and liabilities due to the activities of the requestor;

(8) suitable documentation that the requestor has obtained adequate insurance naming the department as a coinsured by the requestor or responsible party in an amount and form acceptable to the department for the payment of any damages which may occur during the time period of encroachment and to save the state harmless;

(9) a statement that the requestor will abide by all state and federal environmental laws and any conditions required by the department to protect the environment;

(10) if the production requires a closure:

(A) a traffic enforcement plan, including a letter, by mail or facsimile, from the law enforcement agency that will be providing the traffic control for the event, or a contact name and telephone number for the responsible law enforcement agency; and

(B) assurance that there will be appropriate passage allowance for emergency vehicle travel; and

(11) such other terms and conditions determined by the district engineer to be essential for the protection of the public safety.

(f) Disapproval. If a district engineer disapproves a request for approval of a production, he or she will provide written notice, by mail or facsimile, describing the basis for the determination. The district engineer will also provide notice of disapproval by telephone if requested by the requestor.

(g) Appeal. A requestor may appeal a district engineer's disapproval to the department's assistant executive director, field operations, by submitting to that official by mail or facsimile the information provided to the district engineer.

§22.14. Vendors.

(a) Purpose. Encroachment on highways and right-of-ways of the state highway system by unauthorized structures and vehicles and by road-side vendors causes damage to the system, increases litter, and frequently creates unsafe or hazardous conditions. This section prescribes the policies and procedures governing use of state highway right-of-way by vendors.

(b) Policy.

(1) A person may not park or place any vehicle or structure, wholly or partly within the right-of-way of a state highway, for the purpose of selling the same or of selling any article, service, or thing from such vehicle or structure, except as provided in paragraph (2) of this subsection.

(2) The prohibition described in paragraph (1) of this subsection does not apply to:

(A) placing, constructing, or maintaining a structure pursuant to other statutory authority;

(B) an activity undertaken pursuant to the terms of a right-of-way lease entered under the provisions of Texas Civil Statutes, Article 6673a-3;

(C) the sale of an edible agricultural commodity for a period not to exceed 60 days, within the right-of-way of a state highway other than a controlled access facility, if that commodity was grown or produced upon the property immediately abutting the affected right-of-way; or

(D) any other activity expressly authorized by law.

(c) Application. A person who desires to engage in an activity, as identified in subsection (b)(2)(C) of this section, must file an application to obtain authorization to sell goods on the right-of-way at the department's district office not fewer than seven calendar days prior to the requested date of placement. The application shall be in a form prescribed by the department and shall at a minimum require:

(1) the name, address, and telephone number of the person responsible for the request;

(2) a tax statement or other proof of ownership, leasehold, or written permission from the owner of the property;

(3) the proposed location of the vehicle or structure (distance from the roadway);

(4) the size of the encroachment (height, width, and length);

(5) the proposed time period of the encroachment;

(6) the commodities being sold; and

(7) a section reserved to the department which sets forth such other terms and conditions that the department may require.

(d) Use of rights-of-way restrictions.

(1) Location. The location approved under subsection (e) of this section shall be as far from the edge of the pavement as possible, and may not be in a place:

(A) where the encroachment may cause sight restriction or a safety problem;

(B) inside the clear zone as defined in the latest edition of the Department's Design Division Operations and Procedure Manual;

(C) which will conflict with scheduled maintenance or construction actions;

(D) which will cause substantial negative impacts to the environment, including landscape features; or

(E) where customers could park their vehicles in such a way as to create a safety hazard.

(2) Signs. A person authorized to utilize the right-of-way under this section may not place a sign on the right-of-way, vehicle, or the structure.

(e) Approval. The district engineer or his or her designee will review the application and approve the location, subject to any additional terms and conditions deemed necessary to protect the safety of the traveling public, if the use of right-of-way is in compliance with this section.

(f) Agreement. If the application is approved, the requestor must enter into a written agreement with the department. The agreement will contain terms and conditions the department deems necessary to protect the public safety including, but not limited to:

(1) the physical description of the encroachment;

(2) the approved location of the encroachment;

(3) the approved time period of the encroachment;

(4) the commodities being sold;

(5) a statement that the requestor will avoid or minimize impacts, and will, at its own expense, restore or repair damage occurring outside the right-of-way and restore or repair the right-of-way, including roadway and drainage structures, signs, pavement, etc., to a condition equal to that existing before the encroachment, and, to the extent practicable, restore the natural environment, including landscape features;

(6) a statement that the requestor is responsible for any damages or accidents which may occur during the time period of encroachment and to save the state harmless;

(7) a statement that the requestor will abide by all applicable federal, state, and local environmental laws, regulations, ordinances, and any conditions or restrictions required by the department to protect the natural and cultural resources of the right-of-way; and

(8) a statement that if hazardous traffic conditions develop due to the presence of the encroachment, the requestor shall correct the measure as the department requires.

(g) Disapproval. If the request is not approved, the department will provide written notice describing the basis for the determination.

(h) Review. Any decision made by a designee of the district engineer may be reviewed and overruled by the district engineer.

§22.15. Signs.

(a) Temporary signs. The department may authorize a person or entity to temporarily erect, place, and maintain a sign on state highway right-of-way, provided that the sign:

(1) informs the public of a special event which is open to the public; or

(2) serves to identify a commercial entrance or driveway along a state highway which is under construction if the department determines construction activities have temporarily restricted the access or visibility of the adjacent commercial area, thus impairing the safety and convenience of the travelling public.

(b) Application.

(1) Commercial signs. A contractor, working on a highway improvement contract pursuant to Texas Civil Statutes, Article 6674 et seq, is authorized to erect a sign to indicate a commercial entrance or driveway as provided in the plans and specifications developed in conjunction with the project.

(2) Special events. To obtain authorization for the placement of a special event sign on state highway right-of-way, a person or entity must file an application at the department's local area office not fewer than 14 calendar days prior to the requested date of placement. The application shall be in a form prescribed by the department and shall at a minimum include:

(A) the name, address, and telephone number of the person responsible for the request;

(B) the proposed location of the sign (distance from the pavement, mounting height);

(C) the proposed text, background color, and legend color for the sign;

(D) the size of the sign (height, width, thickness, and sign material);

(E) the proposed method of support of the sign (dimension and material),

(F) the nature, location, date of the event, and sponsor of the special event, if applicable; and

(G) any additional information requested by the area engineer as necessary to make his or her determination under subsection (c) of this section.

(c) Approval. The area engineer will approve the placement and support of a special event sign found to be in compliance with this section, subject to any additional terms and conditions deemed necessary to protect the safety of the traveling public by signing and dating the application, and stamping or otherwise inscribing the word "approved" on the requestor's application. If the area engineer does not approve the request, he or she will send written notice describing the basis for the determination.

(d) Sign restrictions.

(1) Sign size.

(A) A sign approved for placement by a contractor on a segment of the state highway system must conform with the Texas MUTCD and the BC sheets in effect at the time of installation.

(B) A sign approved for placement under subsection (c) of this section may not:

(i) exceed 16 square feet if placed on the roadside to inform the travelling public;

(ii) exceed four square feet if used to guide participants in a bicycle or pedestrian event;

(iii) exceed three feet from the width of the pavement if the sign is a banner; or

(iv) imitate or resemble any official traffic sign, signal, or device.

(2) Sign material. A sign approved for placement under subsection (c) of this section shall be constructed of heavy cardboard, plastic, fabric mesh, or plywood no thicker than 1/4 inches.

(3) Sign location. A sign approved for placement under subsection (c) of this section shall be placed as far from the edge of the pavement as possible (except for those signs used to guide participants in a bicycle or pedestrian event which shall be placed no less than one foot from the edge of the pavement), and may not be placed:

(A) in a location where it may prevent the driver of a vehicle from having a clear and unobstructed view of official signs and approaching or merging traffic;

(B) on any highway appurtenances, including, but not limited to, traffic control devices, official signs, sign supports, light standards, poles, and delineators;

(C) on any tree or other natural feature;

(D) less than 18-1/2 feet above the pavement if the sign is a banner placed over the pavement; or

(E) closer to the pavement edge than official highway signs, except for those signs used to guide participants in a bicycle or pedestrian event which shall be

placed no less than one foot from the edge of the pavement.

(4) Text of sign.

(A) A sign approved for placement for a special event under subsection (c) of this section shall not contain commercial advertising but may identify the event's sponsor by name and the sponsor's trademark. The name of the event's sponsor and sponsor's trademark shall be displayed less conspicuously than the activity.

(B) A sign approved for placement to aid visibility and access for a commercial business entrance or driveway may contain:

(i) directional text such as "DRIVEWAY" with an accompanying arrow;

(ii) the type of service such as "GAS," "LODGING," "FOOD," "MALL;"

(iii) the type of business such as "CLEANERS," "FOOD STORE," and "RESTAURANT."

(5) Lighting. A sign approved for placement under subsection (c) of this section may not display lighting.

(6) Banner supports. A banner approved for placement above a roadway under subsection (c) of this section shall be placed on supports which comply with the safety standards of the Texas MUTCD and the BC Sheets, and must be approved by department personnel prior to installation.

(7) Placement of sign. A special event sign location will be allocated on a first-come, first-serve basis. A sign approved for placement under subsection (c) of this section for a special event may not be placed more than 24 hours prior to the event; provided, however, a banner may be installed no more than 30 days prior to the event.

(e) Exception. The executive director or his or her designee may waive one or more of the requirements of this section not inconsistent with applicable statutory law provided that he or she, by written order, specifies the public benefits to result from the placement.

(f) Sign maintenance. A sign approved for placement under subsection (c) of this section shall be maintained by the owner in compliance with all requirements of this section. The authorization for any sign not maintained in accordance with all requirements is deemed void, and the sign may be removed by the department in accordance with subsection (g) of this section.

(g) Removal.

(1) A sign authorized for placement under this section shall be removed by the applicant within 24 hours of the completion of the event; except banners shall be removed within seven days of the completion of the event.

(2) If a sign becomes a hazard due to inclement weather, inadequate maintenance, accidental damage, or other cause, the department will remove the sign.

(3) A special event sign not removed in compliance with paragraph (1) of this subsection is subject to removal by the department and the applicant is liable for removal and disposal costs as provided by §25.10 of this title (relating to Signs on State Highway Right-of-Way).

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

Issued in Austin, Texas, on November 8, 1994.

TRD-9450669 Diane L. Northam
Legal Executive Assistant
Texas Department of Transportation

Earliest possible date of adoption: December 16, 1994

For further information, please call: (512) 463-8630

WITHDRAWN RULES

An agency may withdraw a proposed action or the remaining effectiveness of an emergency action by filing a notice of withdrawal with the ***Texas Register***. The notice is effective immediately upon filling or 20 days after filing as specified by the agency withdrawing the action. If a proposal is not adopted or withdrawn within six months of the date of publication in the ***Texas Register***, it will automatically be withdrawn by the office of the Texas Register and a notice of the withdrawal will appear in the ***Texas Register***.

TITLE 28. INSURANCE

Part II. Texas Workers' Compensation Commission

Chapter 108. Fees

• 28 TAC §108.1

The Texas Workers' Compensation Commission has withdrawn from consideration for permanent adoption a proposed new §108.1 which appeared in the September 20, 1994, issue of the *Texas Register* (19 TexReg 7323). The effective date of this withdrawal is November 9, 1994.

Issued in Austin, Texas, on November 8, 1994.

TRD-9450677 Susan Cory
General Counsel
Texas Workers' Compensation Commission

Effective date: November 9, 1994

For further information, please call: (512) 440-3700

1994 Publication Schedule for the *Texas Register*

Listed below are the deadline dates for the January-December 1994 issues of the *Texas Register*. Because of printing schedules, material received after the deadline for an issue cannot be published until the next issue. Generally, deadlines for a Tuesday edition of the *Texas Register* are Wednesday and Thursday of the week preceding publication, and deadlines for a Friday edition are Monday and Tuesday of the week of publication. No issues will be published on March 11, July 22, November 11, and November 29. A asterisk beside a publication date indicates that the deadlines have been moved because of state holidays.

FOR ISSUE PUBLISHED ON	ALL COPY EXCEPT NOTICES OF OPEN MEETINGS BY 10 A.M.	ALL NOTICES OF OPEN MEETINGS BY 10 A.M.
47 Friday, June 24	Monday, June 20	Tuesday, June 21
48 Tuesday, June 28	Wednesday, June 22	Thursday, June 23
49 Friday, July 1	Monday, June 27	Tuesday, June 28
50 Tuesday, July 5	Wednesday, June 29	Thursday, June 30
51 *Friday, July 8	Friday, July 1	Tuesday, July 5
Tuesday, July 12	SECOND QUARTERLY INDEX	
52 Friday, July 15	Monday, July 11	Tuesday, July 12
53 Tuesday, July 19	Wednesday, July 13	Thursday, July 14
Friday, July 22	NO ISSUE PUBLISHED	
54 Tuesday, July 26	Wednesday, July 20	Thursday, July 21
55 Friday, July 29	Monday, July 25	Tuesday, July 26
56 Tuesday, August 2	Wednesday, July 27	Thursday, July 28
57 Friday, August 5	Monday, August 1	Tuesday, August 2
58 Tuesday, August 9	Wednesday, August 3	Thursday, August 4
59 Friday, August 12	Monday, August 8	Tuesday, August 9
60 Tuesday, August 16	Wednesday, August 10	Thursday, August 11
61 Friday, August 19	Monday, August 15	Tuesday, August 16
62 Tuesday, August 23	Wednesday, August 17	Thursday, August 18
63 Friday, August 26	Monday, August 22	Tuesday, August 23
64 Tuesday, August 30	Wednesday, August 24	Thursday, August 25
65 Friday, September 2	Monday, August 29	Tuesday, August 30
66 Tuesday, September 6	Wednesday, August 31	Thursday, September 1
67 *Friday, September 9	Friday, September 2	Tuesday, September 6
68 Tuesday, September 13	Wednesday, September 7	Thursday, September 8
69 Friday, September 16	Monday, September 12	Tuesday, September 13
70 Tuesday, September 20	Wednesday, September 14	Thursday, September 15
71 Friday, September 23	Monday, September 19	Tuesday, September 20
72 Tuesday, September 27	Wednesday, September 21	Thursday, September 22
73 Friday, September 30	Monday, September 26	Tuesday, September 27
74 Tuesday, October 4	Wednesday, September 28	Thursday, September 29