Texas Register

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October table of *TAC* Titles Affected will appear in the November 12, 1993, issue of the *Texas Register*

Volume 18, Issue Number 84, Part I

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Texas Register

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Office of the
Secretary of State
P.O. Box 13824
Austin, TX 78711-3824
(512) 463-5561
FAX (512) 463-5569

Secretary of State
John Hannah, Jr.

Director
Dan Procter

Assistant Director
Dee Wright

Circulation/Marketing
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TAC Editor
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TAC Typographer
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Typographers
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How to Use the Texas Register

Information Available: The 10 sections of the *Texas Register* represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

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

Secretary of State - opinions based on the election laws.

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

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

Proposed Sections - sections proposed for adoption.

Withdrawn Sections - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

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

Open Meetings - notices of open meetings.

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

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

How to Cite: Material published in the *Texas Register* is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 18 (1993) is cited as follows: 18 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 "18 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 18 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the *Texas Register* office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using *Texas Register* indexes, the *Texas Administrative Code*, section numbers, or TRD number

Texas Administrative Code

The *Texas Administrative Code* (*TAC*) is the official compilation of all final state agency rules published in the *Texas Register*. Following its effective date, a rule is entered into the *Texas Administrative Code*. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the *TAC*. West Publishing Company, the official publisher of the *TAC*, releases cumulative supplements to each printed volume of the *TAC* twice each year.

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

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

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

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

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

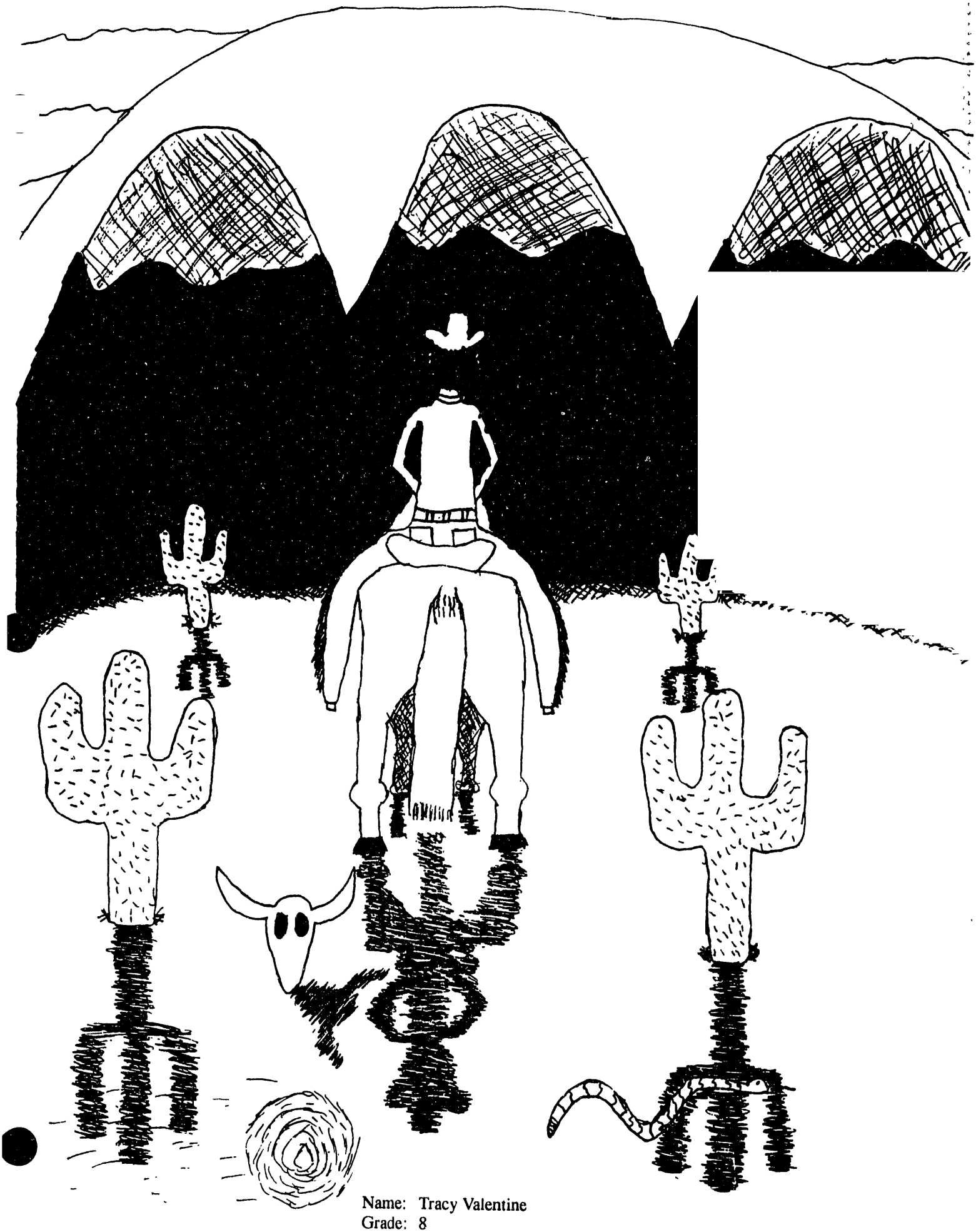
1 indicates the title under which the agency appears in the *Texas Administrative Code*; *TAC* stands for the *Texas Administrative Code*; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the *Texas Administrative Code*, please look at the *Table of TAC Titles Affected*. The table is published cumulatively in the blue-cover quarterly indexes to the *Texas Register* (January 22, April 16, July 13, and October 12, 1993). 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

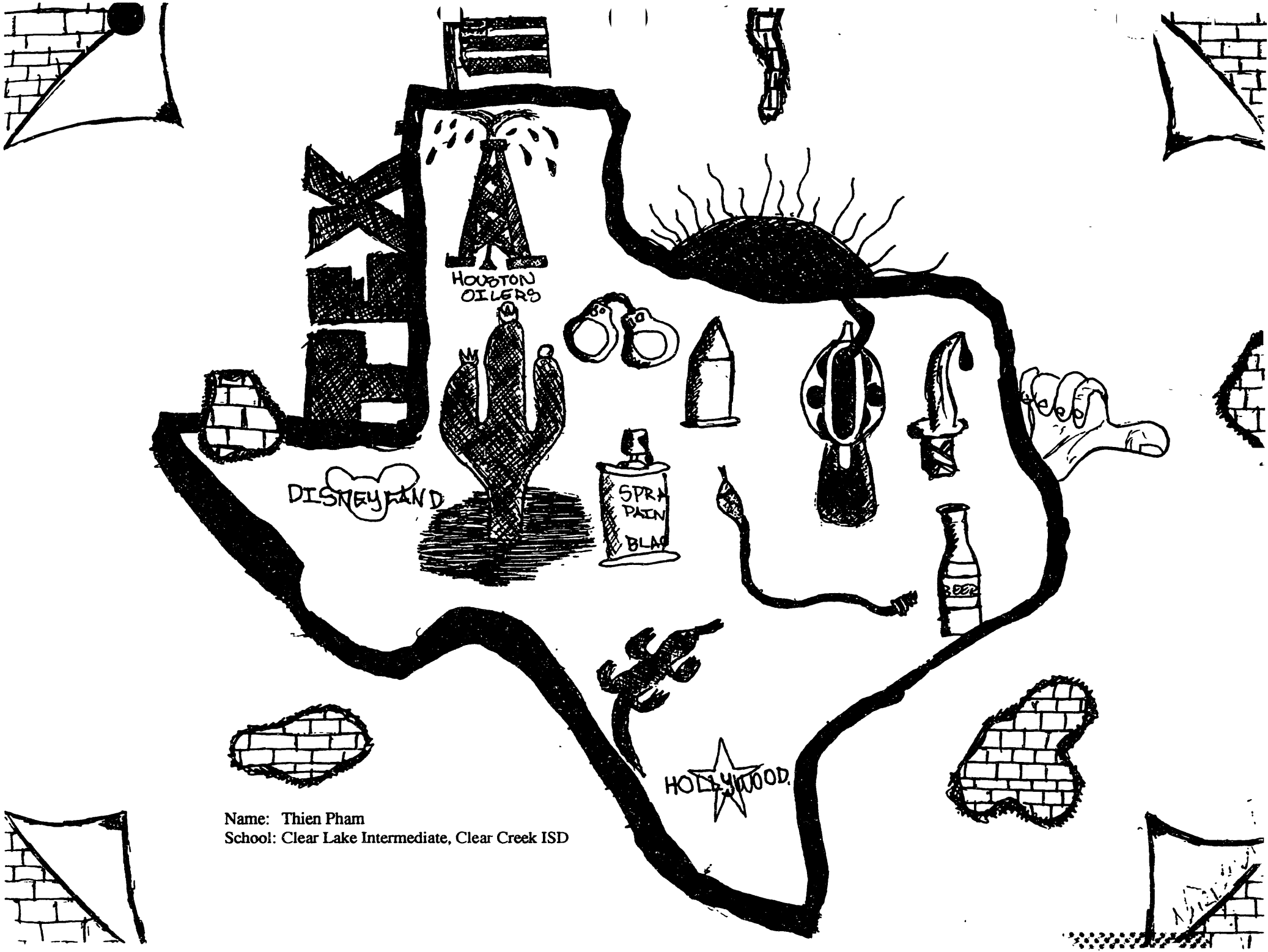
The *Table of TAC Titles Affected* is cumulative for each volume of the *Texas Register* (calendar year).

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.



Name: Tracy Valentine
Grade: 8
School: Clear Lake Intermediate, Clear Creek ISD

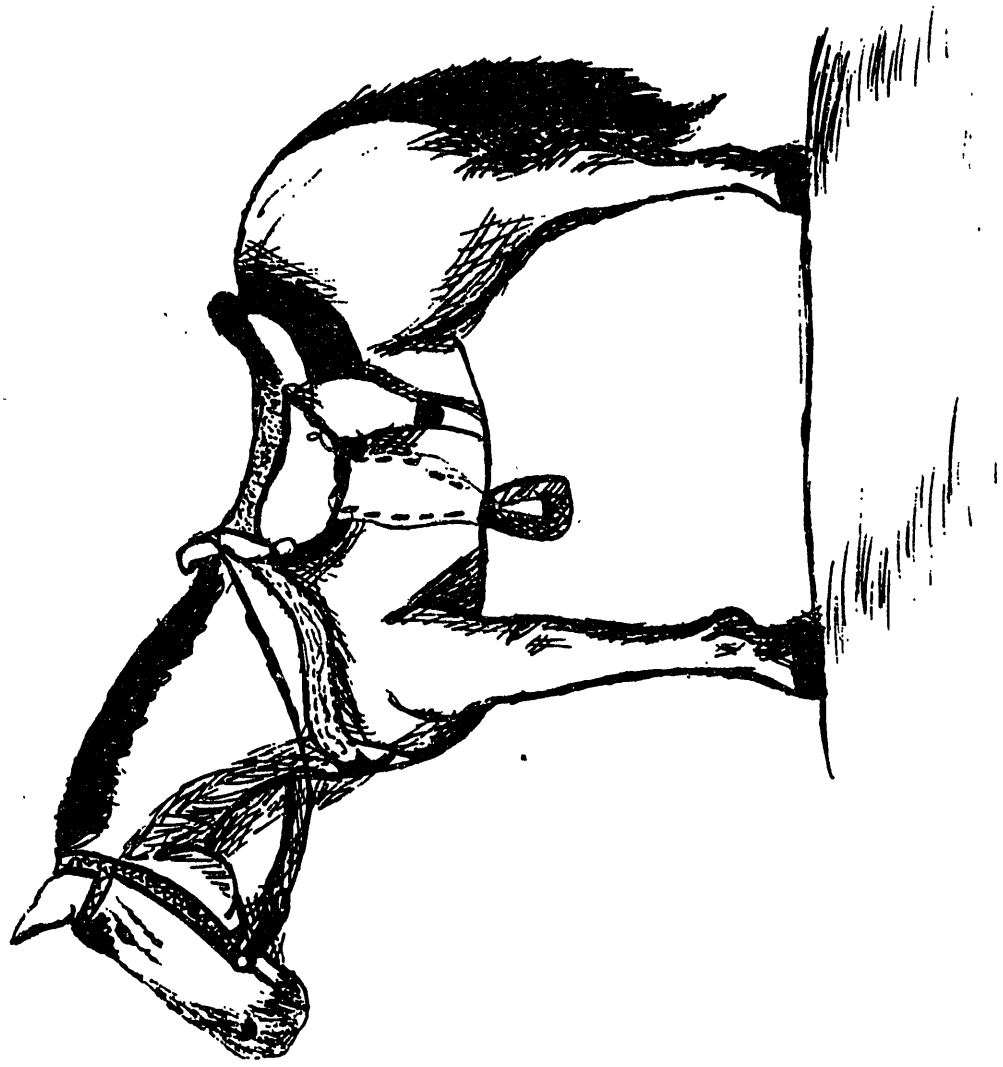
Name: Maryanne Painter
Grade: 7
School: Clear Lake Intermediate Clear Creek ISD



Name: Thien Pham
School: Clear Lake Intermediate, Clear Creek ISD

Name: Leah Bhimani
Grade: 8
School: Clear Lake Intermediate, Clear Creek ISD

Elizabeth Hillery



Name: Elizabeth Hillery
Grade: 8
School: Clear Lake Intermediate, Clear Creek ISD

Name: Lindsay Vaughn
Grade: 8
School: Clear Lake Intermediate, Clear Creek ISD

Lindsay Vaughn

Texas Ethics Commission

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

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

Texas Ethics Commission Opinions

AOR-200. The Texas Ethics Commission has been asked whether an incorporated association may raise funds for a general-purpose political committee in the following manner: [An incorporated association] is in the process of forming a general purpose committee and is looking at options to raise funds for the committee. On option...is including a contribution to the committee on the yearly dues invoice to members. Members would send one check made payable to [the incorporated association] that would include membership dues and a contribution to the committee. For example, dues are $100 and a suggested committee contribution would be $100. A member would send a $200 check made payable to [the incorporated association] with the understanding the $100 of the $200 check is 'earmarked' as a committee contribution. [The incorporated trade association would issue a corporate check to the political committee transferring the earmarked funds.]

AOR-201. The Texas Ethics Commission has been asked to consider questions about an elected state official's distribution of a brochure.

The Texas Ethics Commission is authorized by §1.29 of Subchapter D of Chapter 571 of the Government Code, to issue advisory opinions in regard to the following statutes: (1) Subchapter D of Chapter 572 of the Government Code; (2) Chapter 302, Government Code; (1) Chapter 305, Government Code; (3) Title 15, Election Code; (5) Chapter 36, Penal Code; and (6) Chapter 39, Penal Code.

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

Issued in Austin, Texas, on October 28, 1993.

TRD-9331342 Sarah Woelk
Director, Advisory Opinions
Texas Ethics Commission

Filed: November 1, 1993

♦ ♦ ♦

AOR Number 201. File withdraw by requestor.

The Texas Ethics Commission is authorized by §1.29 of Subchapter D of Chapter 571 of the Government Code, to issue advisory opinions in regard to the following statutes: (1) Subchapter D of Chapter 572 of the Government Code; (2) Chapter 302, Government Code; (1) Chapter 305, Government Code; (3) Title 15, Election Code; (5) Chapter 36, Penal Code; and (6) Chapter 39, Penal Code.

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

Issued in Austin, Texas, on October 28, 1993.

TRD-9331343 Sarah Woelk
Director, Advisory Opinions
Texas Ethics Commission

Filed: November 1, 1993

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Emergency Sections

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

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

TITLE 22. EXAMINING BOARDS

Part XXIV. Texas Board of Veterinary Medical Examiners

Chapter 573. Rules of Professional Conduct

Other Provisions

• 22 TAC §573.64

The Texas Board of Veterinary Medical Examiners adopts on an emergency basis new §573.64, concerning Continuing Education Requirements. The new section clarifies that Continuing Education hours may be used for only one renewal period.

The section is adopted on an emergency basis to comply with the amended Veterinary Licensing Act, Article 8890, §13(g), and will be proposed for public comment at a later date.

The new section is adopted on an emergency basis under the Veterinary Licensing Act, Article 8890, §13(g), which provides the Texas Board of Veterinary Medical Examiners with the authority to establish a minimum number of hours of continuing education required to renew a license under this Act.

§573.64 Continuing Education Requirements.

(a) Requirements.

(1) Effective for the 1995 renewal cycle, 15 attendance hours of acceptable continuing education will be required annually for renewal of all types of Texas licenses. Licensees who successfully complete the Texas State Board Examination will be allowed to substitute the examination for the continuing education requirements of that particular year.

(2) Required continuing education hours must be obtained during the 12-month period immediately preceding the submission for license renewal. Continuing education hours may be used for only one renewal period.

(3) Hardship extensions may be granted by appeal to the Executive Director of the Texas Board of Veterinary Medical Examiners. Should such extension be granted, 30 hours of continuing education shall be obtained in the two-year period of time that includes the year of insufficiency and the year of extension. Documentation of the required continuing education received will be required in these cases, and must be filed with the Board by March 1st of the second year of the hardship period

(b) Proof of Continuing Education The licensee shall be required to sign a statement on the license renewal form attesting to the fact that the required continuing education hours have been obtained. It shall be the responsibility of the licensee to maintain records which support the sworn statements. Such records may include continuing education certificate, attendance records signed by the presenter, and receipts for meeting registration fees These documents must be maintained for the last three complete renewal cycles and will be provided for inspection to Texas Board of Veterinary Medical Examiners investigators upon request

(c) Acceptable Continuing Education Acceptable continuing education hours will be considered by the Board to be hours earned by participation in meetings sponsored by the American Veterinary Medical Association, AVMA's affiliated state veterinary medical associations and/or their continuing education organizations, AVMA recognized specialty groups, regional veterinary medical associations, local veterinary medical associations, and veterinary medical colleges Other offerings of continuing education hours may be approved by the Board Secretary and Executive Director

(d) Distribution of Continuing Education Hours Not more than five hours of required continuing education may be derived from correspondence courses, nor will more than five hours of practice management be acceptable. Continuing Education obtained as part of a disciplinary action is acceptable credit towards the total of 15 hours required annually

Issued in Austin, Texas, on October 25, 1993

TRD-9331121 Ron Allen
Executive Director
Texas Board of Veterinary Medical Examiners

Effective date November 16, 1993

Expiration date March 17, 1994

For further information, please call: (512) 447-1183

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• 22 TAC §573.65

The Texas Board of Veterinary Medical Examiners adopts on an emergency basis new §573 65, concerning Definitions The new section removes the definition for Agricultural Operation and substitutes "mammalians" for bovine, caprine, ovine, swine, and rabbits, under the definition of Food Production Animals Designated Caretaker is amended and limited to food production and equine animals

The section is adopted on an emergency basis to comply with various sections of the amended Veterinary Licensing Act that use terms which have not previously been defined by the Board, and will be proposed for public comment at a later date

The new section is adopted on an emergency basis under the Veterinary Licensing Act, Article 8890, §7(a), which provides the Texas Board of Veterinary Medical Examiners with the authority to make, alter, or amend such rules and regulations as may be necessary to carry into effect the provisions of this Act

§573.65 Definitions.

(a) Accepted Livestock Management Practices (Article 8890, §3(a)(2)). Accepted livestock management practices are defined as those involving animals raised or produced primarily for food, fiber, or other products for human consumption Those practices consist of branding, tattooing, or identifying in any manner, tail-docking of lambs (excludes cosmetic tail-docking that is performed for appearance purposes only), earmarking, routine dehorning (excludes "cosmetic dehorning" that reshapes or alters the poll area for appearance purposes); castration, non-surgical assistance of the birth process, implantation with approved implant products, administration of vaccines and biologicals (unless restricted to administration by a veterinarian), artificial insemination, application of ear tags (excluding official USDA tags) , and application or administration of parasiticides (unless otherwise restricted by other agencies) Accepted equine management practices include tattooing or branding, artificial insemination, shoeing and trimming hooves, aiding in non-surgical birth process, administration of vaccines, biologicals, and parasiticides

(excluding deworming by use of stomach tubing).

(b) Designated Caretaker (Article 8890, §3(a)(1)). An individual to whom the owner of a food production animal has given specific authority to care for such food production animal, and who has not been employed, by using the pretext of being a designated caretaker, to circumvent the Veterinary Licensing Act by engaging in any aspect of veterinary medicine or alternative therapies. It shall be presumed that a designated caretaker who treats a food production animal for a condition that the animal was known or suspected of having prior to the individual being named a designated caretaker is attempting to circumvent the Veterinary Licensing Act unless the designated caretaker is following the instruction of a veterinarian. This presumption is a rebuttable presumption.

(c) Consultation (Article 8890, §3(e). The act of rendering professional advice about a specific case. Consultations are limited to diagnosis and prognosis, and do not include treatment or surgery.

(d) Food Production Animals (Article 8890, §3(a)(4)). Any mammalians, poultry, fowl, fish, or other animals that are raised primarily for human food consumption.

(e) Biologic (Article 8890 §2(A)). Any serum, vaccine, antitoxin, or antigen used in the prevention or treatment of disease.

(f) Pregnancy Testing (Article 8890, §2(D)(11)). Pregnancy testing is the diagnosis of the physical condition of pregnancy by any method other than the gross visual observation of the animal.

Issued in Austin, Texas, on October 25, 1993.

TRD-9331122 Ron Allen
Executive Director
Texas Board of Veterinary Medical Examiners

Effective date: November 16, 1993

Expiration date: March 17, 1994

For further information, please call (512) 447-1183

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• 22 TAC §573.66

The Texas Board of Veterinary Medical Examiners adopts on an emergency basis new §573.66, concerning monitoring compliance.

The new section is adopted on an emergency basis to comply with the Veterinary Licensing Act, Article 8890, §18G, as amended during the 73rd Legislature Session, and will be proposed for public comment at a later date.

The new section is adopted on an emergency basis under the Veterinary Licensing Act, Article 8890, §18G, which provides the Texas Board of Veterinary Medical Examiners with the authority to develop a system for monitoring licensees' compliance with the requirements of this Act, and to include procedures for monitoring a licensee who is ordered by the Board to perform certain acts.

§573.66. Monitoring Licensees' Compliance with Article 8890.

(a) The Board shall conduct a compliance monitoring program in which veterinary practices are inspected on an unannounced basis by Board investigators to ensure that licensees are complying with the requirements of this Act. Those items to be inspected include, but are not limited to, display of licenses, compliance with required consumer information in Article 8890, §18A(b), continuing education requirements, sanitation, patient record completion, drug security, drug accountability, and compliance with other state and federal drug laws.

(b) Inspection reports will be completed by investigators in duplicate. Copy one will be processed and filed in the licensee's personal file when all deficiencies have been corrected by the licensee. Copy two will be left with the licensee.

(c) Licensees will normally be given 45 days to correct deficiencies. Licensees who are delinquent will be contacted by certified mail, requesting them to answer within 15 days of receipt of letter. If no response is received within that time period, the status of "inspection" will be changed to "investigation" and the formal investigative procedure will be followed.

(d) After an initial inspection, investigators may close a compliance inspection discrepancy to "voluntary compliance" within the spirit and intent of the program, except when a violation is identified that involves flagrant disregard of the law, including allowing illegal practice; use of prescription drugs, failure to account for drugs dispensed or administered; and drug diversion and/or abuse. In these instances the compliance inspection shall be terminated and an investigation will be opened and all such matters must be referred to the Chief Investigator for review as a complaint.

(e) When a licensee is inspected sometime after an initial inspection and the licensee is found to have failed to correct those deficiencies noted in the prior inspection, the investigator will advise the licensee that he has continued to violate the Act and/or Rules of Professional Conduct and that those violations will be reported to the Secretary of the Board for whatever disciplinary action he/she deems appropriate

(f) Licensees that are ordered by the Board to perform certain acts may be inspected on an unannounced basis to verify that the licensees perform the required acts. If the licensee is found to have refused or failed to comply with the Board Order, the investigator will advise him that a report will be prepared documenting the failure to comply and that the report will be submitted to the Secretary of the Board for whatever disciplinary action he/she deems appropriate.

Issued in Austin, Texas, on October 25, 1993.

TRD-9331124 Ron Allen
Executive Director
Texas Board of Veterinary Medical Examiners

Effective date: November 16, 1993

Expiration date: March 17, 1994

For further information, please call: (512) 447-1183

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• 22 TAC §573.67

The Texas Board of Veterinary Medical Examiners adopts on an emergency basis new §573.67, concerning temporary suspension of a licensee. The new section inserts the word "Executive" in subsection (a)(1).

The new section is adopted on an emergency basis to comply with the Texas Veterinary Licensing Act, Article 8890, §14C(d), as amended during the 73rd session of the Legislature.

The new section is adopted on an emergency basis under the Veterinary Licensing Act, Article 8890, §14C(d), which provides the Texas Board of Veterinary Medical Examiners with the authority to adopt procedures for the temporary suspension of a license under this section.

§573.67. Temporary Suspension of a Licensee.

(a) During the first Board meeting over which he presides, the President of the Board shall appoint himself and two other Board members to an executive committee that may temporarily suspend the license of a licensee. The suspension may be made without notice or hearing, provided the following conditions are met:

(1) the Executive Committee determines that the continued practice by the licensee constitutes a continuing or imminent threat to the public welfare; and

(2) a hearing on whether disciplinary proceedings should be initiated against the licensee is scheduled not later than 14 days after the date of suspension.

(b) A second hearing shall be held not later than the 60th day after the date of suspension. If the second hearing is not held within the 60 day period, the suspended license is automatically reinstated.

Issued in Austin, Texas, on October 25, 1993.

TRD-9331125 Ron Allen
Executive Director
Texas Board of Veterinary Medical Examiners

Effective date. November 16, 1993

Expiration date: March 17, 1993

For further information, please call: (512) 447-1183

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

Part I. Texas Department of Human Services

Chapter 75. Investigations

Criminal Conviction Checks of Employees in Certain Facilities Serving the Elderly or Disabled

• 40 TAC §75.1001, §75.1002

The Texas Department of Human Services (DHS) adopts on an emergency basis the repeal of §75.1001 and §75.1002, concerning the basis and facilities requirements for criminal conviction checks of employees in certain facilities serving the elderly or persons with disabilities, in its Investigations rule chapter. The purpose for the repeals is to enable DHS to adopt, also on an emergency basis in this issue of the *Texas Register*, new Chapter 76, Criminal History Check of Employees in Facilities for Care of the Aged and Persons with Disabilities. DHS also is proposing the repeals and new rules in this issue of the *Texas Register*.

DHS adopts the repeals on an emergency basis to comply with the Health and Safety Code, Title 4, Chapter 250, which requires that persons convicted of certain crimes may not be employed in most facilities and agencies providing care to the aged and persons with disabilities. Effective September 1, 1993, DHS assumed responsibility for conducting background checks on persons who would be employed in activities requiring direct contact with consumers of the facility.

The repeals are adopted on an emergency basis under the Human Resources Code, Title 2, Chapters 22 and 32, which provides the department with the authority to administer public and medical assistance programs, and the Health and Safety Code, Title 4, Chapter 250, which requires the department to perform criminal history checks on persons employed by certain types of facilities. The repeals implement the Health and Safety Code, Title 4, Chapter 250.

§75.1001. Facilities Requirements.

§75.1002. Facilities Requirements.

Issued in Austin, Texas, on November 3, 1993.

TRD-9331437 Nancy Murphy
Section Manager, Policy and Document Support
Texas Department of Human Services

Effective date: November 3, 1993

Expiration date: March 4, 1994

For further information, please call: (512) 450-3765

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Chapter 76. Criminal History Check of Employees in Facilities for Care of the Aged and Persons with Disabilities

Policy and Procedures

• 40 TAC §§76.101-76.108

The Texas Department of Human Services (DHS) adopts on an emergency basis new §§76.101-76.108, concerning criminal history check of employees in facilities for care of the aged and persons with disabilities. The sections are adopted under new Chapter 76. Also in this issue of the *Texas Register*, DHS is adopting on an emergency basis and simultaneously proposing the repeal of §75.1001 and §75.1002 and new §§76.101-76.108.

The purpose for the new sections is to comply with the Health and Safety Code, Title 4, Chapter 250, which bars persons from employment in most facilities and agencies providing care to the aged and persons with disabilities if those persons have been convicted of certain crimes.

Effective September 1, 1993, DHS assumed responsibility for conducting background checks on persons who would be employed in activities requiring direct contact with consumers of the facility.

The new sections are adopted on an emergency basis under the Human Resources Code, Title 2, Chapters 22 and 32, which provides the department with the authority to administer public and medical assistance programs, and the Health and Safety Code, Title 4, Chapter 250, which requires the department to perform criminal history checks on persons employed by certain types of facilities. The new sections implement the Health and Safety Code, Title 4, Chapter 250.

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

Board-The Board of the Texas Department of Human Services.

Department-The Texas Department of Human Services (DHS).

Direct Contact with a Consumer-Any contact with a resident or client or a family member or visitor of a resident or client in a facility covered by this chapter.

Emergency requiring immediate employment-The urgent need to hire an individual as a result of a survey deficiency on staffing ratios and/or the potential of the facility to fall below their desired staff ratio, thus putting the client's health and safety at risk. A person to be employed under these circumstances must furnish the facility with an affidavit stating that they have not been convicted of a criminal offense described in the Health and Safety Code, §250.005.

Facilities-The following facilities and applicants, included in the requirement of criminal history checks:

(A) nursing homes, custodial care homes, or other institutions licensed under the Health and Safety Code, Chapter 242;

(B) personal care facilities licensed under the Health and Safety Code, Chapter 247;

(C) adult day care facilities or adult day health care facilities licensed under the Human Resources Code, Chapter 103;

(D) facilities for persons with mental retardation licensed or certified by the Texas Department of Health or DHS;

(E) intermediate care facilities for persons with mental retardation certified for participation in the Medicaid program under the Social Security Act, Title XIX;

(F) adult foster care providers contracting with DHS.

§76.102. Pre-employment History Check.

(a) Employees in facilities for the care of the aged and disabled who come into direct contact with consumers must have a pre-employment criminal history check performed by the Texas Department of Human Services. An employee who has a criminal conviction which bars employment or an employee who fails to obtain a clearance of a conviction which potentially bars employment may not be employed in a facility in a capacity which involves direct contact with a consumer in the facility.

(b) Applicants to provide adult foster care are subject to criminal history checks before enrollment in the adult foster care program.

§76.103. Application for Criminal History Check. The facility must apply for a criminal history check for any applicant for employment. If the applicant is provided temporary employment under the emergency employment provision the application must be filed within 72 hours of the time of employment. The application must be filed on forms provided by the Texas Department of Human Services.

§76.104. Presumption of Employability. If no response is received by the facility requesting a criminal history check within 60 days of the request date, the facility may assume the check to have revealed no conviction which would bar or potentially bar employment.

§76.105. Administrative Review. An applicant may request an administrative review of a conviction which would potentially bar employment and/or enrollment as an adult foster care provider. The request must be in writing and be submitted by the 20th day of receipt of the notification. The notice must advise the applicant of the type of information which a review panel considers in determining whether the applicant is unlikely to be a threat to consumers or property of the consumers in a facility and/or adult foster home.

§76.106. Standards for Review.

(a) The applicant may submit and the panel must consider the following:

(1) documentation which demonstrates the misdemeanor or felony classification of the offense at the time of the offense;

(2) the age of the applicant at the time the offense was committed;

(3) the length of time since the offense was committed;

(4) evidence of rehabilitation, including employment history in a facility; and

(5) mitigating circumstances when the offense was committed.

(b) The review panel must also consider other documentation which bears on the question of whether the person is likely to be a threat to the consumers or property of the consumers in a facility.

§76.107. Personal Appearance.

(a) If the review panel determines that the documentation required in §76.106 of this title (relating to Standards for Review) is insufficient to demonstrate that the applicant would be unlikely to be a threat to the consumers or property of the consumers in a facility, the applicant must be provided the opportunity to appear before the panel in person to offer additional information. This notice of opportunity must be:

(1) included in the findings notice by the review panel; and

(2) requested within 10 days of the date of the notice.

(b) If the applicant fails to request the opportunity for a personal appearance in a timely manner, the finding of the panel becomes final.

§76.108. Correction of Mistakes of Fact or Identity in Criminal History Record.

(a) The applicant for employment or enrollment is responsible for correcting errors of fact or identity in the criminal history record reported by the Texas Department of Public Safety (DPS). The applicant should contact DPS directly and provide whatever positive identification information may be required for a verification of the record.

(b) The applicant should request an administrative review of the finding of a conviction which constitutes, or may constitute, a bar to employment at the same time that a correction of the record is sought.

(c) The request for review should clearly indicate that the applicant is seeking a correction in the records as part of the review process. The corrected information should be presented to the administrative review panel as part of the documentation for review.

Issued in Austin, Texas, on November 3, 1993.

TRD-9331436 Nancy Murphy
Section Manager, Policy and Document Support
Texas Department of Human Services

Effective date: November 3, 1993

Expiration date: March 4, 1994

For further information, please call: (512) 450-3765

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Part II. Texas Rehabilitation Commission

Chapter 104. Informal and Formal Appeals by Applicants/Clients of Decisions by a Rehabilitation Counselor or Agency Official

• 40 TAC §§104.1-104.8

The Texas Rehabilitation Commission adopts on an emergency basis new §§104.1-104.8 of Chapter 104 concerning Informal and Formal Appeals by Applicants/Clients of Decisions by a Rehabilitation Counselor or Agency Official. The new sections adopted on an emergency basis are contemporaneously proposed for public comment in this issue of the *Texas Register*

The purpose of the emergency adoption is to comply with the 1992 and 1993 amendments to the Rehabilitation Act of 1973.

The new sections are adopted on an emergency basis under Texas Civil Statutes, Article 6252-13a, §51(d), which provides emergency rulemaking powers, and under Texas Human Resources Code, §111.018, which provides the Texas Rehabilitation Commission with rulemaking powers.

§104.1. Purpose and Scope.

(a) Purpose. The purpose of these rules is to provide the Texas Rehabilitation Commission with a system for the institution, conduct, and determination of "informal" and "formal appeals" as those terms are defined herein. These rules shall be liberally construed in accordance with the purpose for which they were adopted.

(b) Statutory Authority. These rules are created under the authority delegated to the Commission by the Rehabilitation Act of 1973, as amended, 29 United States Code §701 et seq and Department of Education Regulations at 34 Code of Federal Regulations §361.48. The Administrative Procedure and Texas Register Act (APTRA), Texas Civil Statutes, Article 6252-13a, does not apply to these hearings which are conducted pursuant to federal law.

(c) Scope.

(1) This chapter applies to client (applicant) appeals and hearings before the Texas Rehabilitation Commission.

(2) These rules shall be construed to insure fair and expeditious determinations.

(3) These rules supplement the procedures required by law.

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

Act–The Rehabilitation Act of 1973 as amended, 29 United States Code, §701 et seq.

Appellant–An individual who has filed a Petition for Administrative Hearing.

Applicant–An individual who has applied for services under the Act, but for whom an eligibility determination has not been made. As used in these rules, unless specifically denoted, the term "client" and "applicant" are synonymous.

Authorized Representative–An attorney authorized to practice law in the State of Texas and/or, a person designated by the applicant or client to represent them.

Client–An individual who has been determined to be eligible for services by the Commission pursuant to the Act and Commission rules. As used in these rules, unless specifically denoted, the term "client" and "applicant" are synonymous.

Client Assistance Program (CAP)–The program created by the Act which provides assistance in informing and advising clients and applicants of all avail-

able benefits under the Act. CAP provides assistance and advocacy in pursuing legal, administrative, or other appropriate remedies to ensure protection of the client's rights under the Act if requested by the client or the client's authorized representative.

Commission-The Texas Rehabilitation Commission, its officers and agents.

Director of State Unit/Commissioner-The Commissioner of the Texas Rehabilitation Commission.

Formal Appeal-The timely filing of a Petition for Administrative Hearing due to a client's continued dissatisfaction with a decision of the Commission regarding the provision or denial of services.

Hearing-A due process formal appeal conducted under these rules by an Impartial Hearing Officer regarding the nature and scope of the allegations set forth in the client's Petition for Administrative Hearing. This term includes pre-hearing conferences.

Hearing Completion Date-The date set by the Impartial Hearing Officer which closes the period during which the parties may submit further evidence into the record or the date the Impartial Hearing Officer receives the hearing transcript, whichever is later.

Impartial Hearing Officer (IHO)-Individual who is appointed to hear a formal appeal pursuant to 104.5(b) of this title (relating to Formal Appeal).

Informal Appeal or Review-A communication or series of communications of dispute resolution by or between a client and a Commission official which seeks to resolve the client's dissatisfaction with any decision made by a Commission rehabilitation counselor or coordinating official concerning the Commission's furnishing or denial of services.

Inquiries and Hearings Unit-A unit of the Texas Rehabilitation Commission's Office of Special Services which provides, among other functions, administrative support to the Impartial Hearing Officer during the formal appeal process.

Party-An individual or agency named or admitted to participate in a formal appeal before the Commission.

Record-The official record of a formal appeal includes all of the following: pleadings; motions; intermediate rulings; orders; evidence received or considered; statements of matters officially noticed; questions and offers of proof; objections and rulings on objections; the IHO decision; any other decision, opinion, or report by the IHO or Commissioner; and all Commission memoranda or data, including client files, submitted to or considered by the IHO or the Commissioner.

Respondent-The Texas Rehabilitation Commission.

Rule-Any written Commission statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of the Commission. The term includes the amendment or repeal of a prior rule, but does not include statements concerning only the internal management or organization of the Commission and not affecting private rights or procedures. The term does not include certain proceedings excluded by the Act.

Standard of Review-The criteria for the Travis County District Court to remand or overturn a final decision of the Commissioner.

State Plan-The Commission is required by the Act to submit to the Department of Education a state plan covering a three-year period which describes the State's vocational rehabilitation and independent living programs and the plans and policies to be followed in carrying out those programs.

§104.3. General Provisions.

(a) Jurisdiction.

(1) The Impartial Hearing Officer acquires jurisdiction over a case after a client files a Petition for Administrative Hearing and the IHO is appointed pursuant to §104.5(b) of this title (relating to Formal Appeal).

(2) A Petition for Administrative Hearing shall be considered filed on the date the Petition is received and date-stamped by the Inquiries and Hearings Unit.

(3) The IHO's authority is limited to a review of a client's dissatisfaction with the provision or denial of services by a rehabilitation counselor or agency official. The IHO does not have authority to:

(A) change or alter the rules, policies, or procedures of the Commission;

(B) hear alleged violations of the Americans with Disabilities Act, §504 of the Act, or other federal laws; or

(C) hear or decide class actions.

(b) Conduct and Decorum. Appropriate conduct and decorum shall be maintained and enforced by the IHO. Every party, witness, attorney, or other representative shall participate in all proceedings with proper dignity, courtesy, and respect for the Commission, the IHO, and all other parties. Attorneys and other representatives of parties shall observe and practice a high standard of ethical behavior.

(c) Computation of Time.

(1) Unless otherwise required by law in computing any period of time prescribed or allowed by these rules, the date of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless such day is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday, nor legal holiday.

(2) Unless otherwise provided by statute, the time for filing any pleading may be extended by order of the IHO at the request of any party upon written motion duly filed with the Inquiries and Hearings Unit prior to the expiration of the applicable period of time for the filing of same. Said motion shall include a showing that there is good cause for such extension of time and that the need therefore is not caused by neglect, indifference, or lack of diligence of the movant. A copy of any such motion shall be served upon all other parties of record to the proceeding contemporaneously with the filing thereof. Any party may file written pleadings contesting a motion to extend which shall be served upon all other parties contemporaneously with the filing thereof.

(3) The date upon which a pleading or motion is filed is the date on which it is received and date-stamped by the Inquiries and Hearings Unit.

(4) Unless specifically stated otherwise, "days" as used in these rules means calendar days.

(d) Appearances and Right to Representation. Any party may appear on his/her own behalf or may be represented by an attorney at law in good standing with the State Bar of Texas or by an authorized representative. The IHO may require any person appearing in a representative capacity to provide such evidence of his authority as the IHO may deem necessary.

(e) Notice of Right to Formal Appeal.

(1) Subject to the provisions of 34 Code of Federal Regulation §361.48, the Commission is responsible for providing notice to all parties as required therein and by other applicable law.

(2) The IHO shall issue notice of the date, time, and location for the hearing.

(f) Confidentiality. All personal information regarding applicants or clients in the possession of the Commission must be used only for purposes directly connected with the administration of the Act. Information may not be shared with advisory or other bodies which do not have official responsibility for administration of the Act.

(g) Testimony Under Oath or Affirmation. In any hearing, the IHO shall administer an oath or affirmation before permitting testimony from any witness.

(h) Class Actions. Class actions are not permitted under these rules.

(i) Reasonable Accommodation. The Commission shall provide reasonable accommodation to the client or other individuals with disabilities, upon request, for purposes of the appeal process as required by the Americans with Disabilities Act of 1990, 42 United States Code, §12101 et seq and §504 of the Act.

(j) Stay of Official Acts or Services. A request for an informal or formal appeal does not of itself stay an official act of or the provision of services by the Commission unless the official act or services are stayed by controlling law.

(k) Limitations on Number of Witnesses. The IHO has the right in any proceeding under these rules to limit the number of witnesses whose testimony will be repetitious and to set time limits in order to exclude irrelevant, immaterial, or unduly repetitious testimony, so long as all viewpoints are given a reasonable opportunity to be heard.

(l) Mileage and Witness Fees.

(1) An individual who is not a party and who is subpoenaed or otherwise compelled to attend any hearing or proceeding to give testimony or to produce documents is entitled to receive:

(A) mileage, in the same amount per mile as the mileage travel allowance for State employees, for traveling to and returning from the place of the hearing or the place where the deposition is taken, if the place is more than 25 miles from the individual's place of residence; and

(B) a fee of not less than $10 a day for each day or part of a day the individual is necessarily present; provided, in lieu of such $10 fee, a witness will receive a fee equal to the per diem travel allowance of a State employee if such amount exceeds $10.

(2) Mileage and fees to which a witness is entitled under this rule shall be paid by the party at whose request the individual appears or at whose request the deposition is taken.

(m) Continuation of Services. Pursuant to the Act, pending a final decision by the IHO or the resolution of an informal or formal appeal, the Commission shall not institute a suspension, reduction, or termination of services being provided under the individualized written rehabilitation program (IWRP), unless such services have been obtained through misrepresentation, fraud, collusion, or criminal conduct on the part of the client. In the case of a client who has completed a term of training or similar services prior to the appeal, and the next term has not yet begun (prior to the current appeal), it is understood that such training or services are not being provided.

§104.4. Informal Appeal.

(a) A client may seek a timely review of his/her dissatisfaction with a decision by the rehabilitation counselor, the area manager, and the regional program director, in that order. An alternative dispute resolution process may be used upon agreement of the client and the Commission.

(b) An informal appeal may not be used as a means to delay a formal appeal before an IHO unless the parties jointly agree to a delay. The rehabilitation counselor shall immediately inform the client of his/her right to petition for a formal appeal in lieu of initiating the informal appeal process. During the informal appeal process, the Commission shall maintain a file of all documentation, decisions, and actions throughout the process The parties shall jointly agree on the applicable dates, times, and locations for the meetings

§104.5. Formal Appeal.

(a) Formal Appeal. The formal appeal process commences with the filing of a Petition for Administrative Hearing with the Commission's Inquiries and Hearings Unit

(b) Role of the Inquiries and Hearings Unit. Upon receipt of the Petition for Administrative Hearing, the Inquiries and Hearings Unit shall

(1) acknowledge receipt of the Petition for Administrative Hearing (via certified mail, return receipt requested) and advise the Appellant of the availability of the Client Assistance Program, including the address and telephone number within five days of receipt of the Petition for Administrative Hearing;

(2) file stamp the Petition and record a docket control number for the appeal;

(3) select the IHO, who is appointed by the Commissioner, on a random basis from a panel of individuals pursuant to the Rehabilitation Act Amendments of 1992, (Public Law 102-569) within ten days of receipt of the Petition for Administrative Hearing and immediately forward a copy of the Petition for Administrative Hearing to the IHO,

(4) forward a copy of the Petition for Administrative Hearing to the Commission representative and the Legal Services Division within two days of receipt of Petition for Administrative Hearing;

(5) provide administrative support to the IHO as follows:

(A) serve as the custodian of records for all documents, motions, pleadings, etc., directed to the IHO;

(B) coordinate and schedule all dates, meetings, hearings, etc.;

(C) make all necessary arrangements for the formal appeal:

(i) Schedule and set up the hearing location,

(ii) Retain the services of a certified shorthand reporter to prepare a transcript of the proceedings;

(iii) Provide any requested reasonable accommodations;

(6) compile and maintain the official record of the appeal

(c) Impartial Hearing Officer

(1) Qualifications. The IHO

(A) cannot be an employee of a public agency (other than an administrative law judge, hearing examiner, or employee of an institution of higher education),

(B) cannot be a member of the Texas Rehabilitation Advisory Council (of the Act, §105, as amended in 1992); and

(C) must have knowledge of the delivery of vocational rehabilitation services, the State Plan under the Act, §101, the federal regulations, and Commission rules governing the provision of such services and training with respect to the performance of official duties,

(D) must not have been involved in previous decisions regarding the vocational rehabilitation applicant or client,

(E) must have no personal or financial interest that would conflict with his/her objectivity, and

(F) must have, in addition to all of the above, successfully completed impartial hearings training presented by the Commission.

(2) Powers and Duties

(A) The IHO shall have the authority and duty to

(i) Conduct a full, fair, and impartial hearing;

(ii) take action to avoid unnecessary delay in the disposition of the proceeding; and

(iii) Maintain order.

(B) The IHO shall have the power to regulate the course of the hearing and the conduct of the parties and authorized representative(s), including the power to:

(i) administer oaths;

(ii) take testimony;

(iii) rule on questions of evidence;

(iv) rule on discovery issues;

(v) issue orders relating to hearing and pre-hearing matters, including orders granting permission to subpoena witnesses and imposing sanctions regarding discovery;

(vi) limit irrelevant, immaterial, and unduly repetitious testimony and reasonably limit the time for presentations;

(vii) admit or deny party status;

(viii) grant continuance(s);

(ix) require parties to submit legal memoranda, proposed findings of fact, and conclusions of law;

(x) make findings of fact and conclusions of law; and (xi) Issue decisions.

(C) An IHO shall disqualify him/herself or shall excuse him/herself on the same grounds and under the same circumstances as specified in Texas Rules of Civil Procedure (Tex R Civ. P.) 18b.

(D) Substitution of Impartial Hearing Officers.

(i) If for any reason an IHO is unable to continue presiding over a pending hearing or issue a decision after the conclusion of the hearing, another IHO may be designated as a substitute in accordance with applicable law and these rules.

(ii) The substitute IHO may use the existing record and need not repeat previous proceedings, but may conduct further proceedings as necessary and proper to conclude the hearing and render a decision.

(d) Ex Parte Communications. Unless required for the disposition of ex parte matters authorized by law, the IHO may not communicate, directly or indirectly, in connection with any issue of fact or law with the Commissioner or any party or a party's representative, except upon notice to all parties.

(e) Pre-Hearing Procedures.

(1) Pre-hearing Conference(s).

(A) When appropriate, the IHO may hold a pre-hearing conference to resolve matters preliminary to the hearing.

(B) A pre-hearing conference may be convened to address preliminary matters including the following:

(i) issuance of subpoenas;

(ii) factual and legal issues;

(iii) stipulations;

(iv) clarification of the issues at the discretion of the IHO;

(v) requests for official notice;

(vi) identification and exchange of documentary evidence;

(vii) admissibility of evidence;

(viii) identification and qualification of witnesses;

(ix) motions;

(x) discovery disputes;

(xi) order of presentation;

(xii) scheduling;

(xiii) settlement conferences; and

(xiv) such other matters as will promote the orderly and prompt resolution of the issues and conduct of the hearing.

(C) Among other matters, as stated in subsection (b) of this section, an IHO may order:

(i) that the parties jointly discuss the prospects of settlement or stipulations or other dispute resolution methods approved herein and be prepared to report thereon at the pre-hearing conference;

(ii) that the parties file and be prepared to argue preliminary motions at the pre-hearing conference;

(iii) that the parties be prepared to specify the controlling factual and legal issues in the case at the pre-hearing conference; and

(iv) that the parties make a concise statement of undisputed facts and issues at the pre-hearing conference.

(D) At the discretion of the IHO, all or part of the pre-hearing conference may be recorded or transcribed.

(E) The IHO may, after acquiring jurisdiction, issue an order requiring a pre-hearing "Statement of the Case." The parties shall, within 14 days of service, file a statement specifying the party's present position on any or all of the following as required by the IHO. Parties shall supplement this statement on a timely basis. The statement shall include:

(i) the disputed issues or matters to be resolved;

(ii) a brief statement of the facts or arguments supporting the party's position in each disputed issue or matter;

(iii) a list of facts or exhibits to which a party will stipulate;

(iv) a list of the witnesses which each party intends to call at the hearing, including a designation of each as either a fact or expert witness, and a brief statement summarizing the testimony and/or opinions (experts) of each witness; and

(v) a description of the discovery, if any, the party intends to engage in and an estimate of the time needed to complete discovery.

(2) Pre-hearing Orders

(A) The IHO may issue a pre-hearing order reciting the actions taken or to be taken with regard to any matter addressed at the pre-hearing conference

(B) The pre-hearing order shall be a part of the hearing record.

(C) If a pre-hearing conference is not held, the IHO may issue a pre-hearing order to regulate the conduct of the proceedings of the formal hearing.

(3) Settlement Conferences.

(A) Upon request of any party and approval by the IHO, or at the IHO's discretion, a conference may be held to address settlement possibilities through a dispute resolution methodology approved herein.

(B) Settlement discussions shall not be made a part of the case record.

(C) This section is not in derogation of the agency's and the parties' ability to settle cases independently of the Impartial Hearing Officer

(4) Stipulations.

(A) The parties, by stipulation, may agree to any substantive or procedural matter.

(B) A stipulation shall be filed in writing or entered on the record at the pre-hearing (or hearing).

(C) The IHO may require additional development of stipulated matters.

(f) Pleadings.

(1) In a formal appeal all pleadings, including the Petition for Administrative Hearing, for which no other form is prescribed, shall contain:

(A) the name of the party making the pleading;

(B) the names of all other known parties;

(C) a concise statement of the facts alleged and relied upon;

(D) a prayer stating the type of relief, action, or order desired;

(E) any other matter required by law;

(F) a certificate of service, as required by these rules; and

(G) the signature of the party making the pleading or the party's authorized representative.

(2) Any pleading filed pursuant to a formal appeal may be amended up to 14 days prior to the hearing. Amendments filed after that time will be accepted at the discretion of the IHO.

(3) Any pleading may adopt and incorporate, by specific reference thereto, any part of any document or entry in the official files and records of the Commission. All pleadings relating to any matter pending before the Commission shall be filed with the IHO through the Inquiries and Hearings Unit.

(4) All pleadings shall be typed or printed on 8-1/2 by 11-inch paper with a one inch margin. Reproductions are acceptable, provided all copies are clear and permanently legible.

(5) Pleadings shall contain the name, address, and telephone number of the party filing the document or the name, telephone number, and business address of the authorized representative.

(6) The party or the party's designated representative filing the pleading shall include a signed certification that a true and correct copy of the pleading has been served on every other party.

(g) Discovery.

(1) Forms and scope of discovery.

(A) Discovery is the process by which a party may, prior to the hearing, obtain evidence which is relevant to the subject matter of the hearing.

(B) The parties are entitled to conduct the following forms of discovery:

(i) oral or written depositions of any party or non-party;

(ii) requests for Admission;

(iii) interrogatories, and

(iv) requests for production or examination.

(C) Scope of discovery. Parties may obtain discovery regarding any matter which is relevant to the subject matter of the hearing or which is reasonably calculated to lead to the discovery of evidence which would be admissible at the hearing. Unless otherwise specifically stated in this section, discovery is to be conducted pursuant to Tex.R.Civ.P.

(D) All discovery requests should be directed to the party from which discovery is being sought

(E) Copies of discovery requests and documents filed in response thereto shall be served on all parties and should not be filed with the IHO unless directed by the IHO to do so or when in support of objections, motions to compel, motions for protective orders, or motions to quash

(F) All parties will be afforded a reasonable opportunity to file objections and motions to compel with the IHO regarding any and all discovery requests.

(2) Depositions

(A) After the filing of a Petition for Administrative Hearing (TRC-505) any party may take the testimony of any person, including a party, upon oral or written examination. Leave of the IHO is required to take the deposition of a party prior to an appearance date.

(B) Reasonable notice must be served in writing by the party or the party's authorized representative proposing to take a deposition upon oral examination to every other party or the party's authorized representative. The notice shall state the name of the deponent, the time and the place of the taking of the deposition, and if the production of documents or tangible things is desired, a designation of the items to be produced by the deponent which describes each item with reasonable particularity. The notice shall also state the identity of persons who will attend other than the witness, parties, authorized representatives and their employees, and the officer taking the deposition. If any party intends to have any other persons attend, that party must give reasonable notice to all parties of the identity of such other persons.

(C) When the deponent is a party, notice proposing to take a deposition served upon the party or the party's authorized representative shall have the same effect as a subpoena served on the party. If the deponent is an agent or employee who is subject to the control of a party, notice which is served upon the party or the party's authorized representative shall have the same effect as a subpoena served on the deponent. A party or a party's agents, employees, or persons subject to that party's control, may be compelled to produce designated documents or tangible things if the notice sets forth the individual items or categories of items to be produced with reasonable particularity

(D) After the filing of a Petition for Administrative Hearing (TRC-505), any party may take the testimony of any person, including a party, by deposition upon written questions A party proposing to take depositions upon written questions shall serve them upon every other party or the party's authorized representative with written notice ten days before the deposition is to be taken. The notice shall state the name and address of the deponent, the hearing in which the deposition is to be used, the name or descriptive title and address of the officer before whom the deposition is to be taken, and if the production of documents or tangible things is desired, a designation of the items to be produced by the deponent which describes each item with reasonable particularity

(E) Any party may subpoena an individual who is not a party in order to take the testimony of that person upon oral or written examination The procedure for

issuance of subpoenas is set out at paragraph (6) of this subsection.

(F) Upon proof of service of a notice to take a deposition, written or oral, any officer authorized to take depositions and any certified shorthand reporter shall immediately issue and cause to be served upon the witness a subpoena directing him to appear before the officer at the time and place stated in the notice for the purpose of giving a deposition

(G) A witness may be compelled by subpoena duces tecum to produce books, papers, documents, or tangible things within his care, custody or control The subpoena duces tecum shall direct with particularity the witness to produce, at such time and place designated, documents or tangible things which constitute or contain evidence or information relating to any of the matters within the scope of the hearing

(3) Requests for Admission

(A) At any time after filing of the Petition for Administrative Hearing, a party may serve upon any other party a written request for the admission, for purposes of the pending hearing only, of the truth of any matters within the scope of these rules set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request.

(B) Copies of documents shall be served with the request unless they have been, or are otherwise furnished or made available for inspection and copying Whenever a party is represented by an authorized representative, service of a request for admissions shall be made on the party's representative. A true copy of a request for admission or of a written answer or objection, together with proof of the service thereof, shall be filed promptly with the Inquiries and Hearings Unit.

(C) Each matter to which an admission is requested shall be separately set forth. The matter is admitted without necessity of an order unless, within 30 days after service of the request, or within such time as the IHO may allow, or as otherwise agreed by the parties, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or the party's representative If objection is made, the reason therefore shall be stated.

(D) The answer shall specifically deny the matter or set forth in detail the reasons that the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or easily obtainable by him is insufficient to enable him to admit or deny

(E) The IHO may permit withdrawal or amendment of responses and deemed admissions upon a showing of good cause for such withdrawal or amendment if the IHO finds that the parties relying upon the responses and deemed admissions will not be unduly prejudiced and that the presentation of the merits of the action will be subserved thereby Any admission made by a party under this rule is for the purpose of the pending action only and neither constitutes an admission by the party for any other purpose nor may be used against that party in any other proceeding

(4) Interrogatories

(A) Any party may serve upon any other party written interrogatories to be answered by the party served, or the party's authorized representative

(B) When a party has designated an authorized representative, service of interrogatories and answers to interrogatories shall be made on the representative.

(C) Interrogatories may relate to any matters which are relevant to the subject matter of the hearing, but the answers, subject to any objections as to relevance, may be used only against the party answering the interrogatories

(D) The party upon whom the interrogatories have been served shall serve answers on the party submitting the interrogatories within the time specified by the party serving the interrogatories, which specified time shall not be less than 30 days after the service of the interrogatories. The IHO, on motion and notice for good cause shown, may enlarge or shorten the time for serving answers or objections

(E) The number of questions including subsections in a set of interrogatories shall be limited so as not to require more than thirty answers No more than two set of interrogatories may be served by a party to any other party except by agreement or as permitted by the IHO

(5) Requests for Production or Examination.

(A) Any party may serve on any other party a request to produce and permit he requesting party or the party's authorized representative to inspect or copy any designated documents which are relevant to the subject matter of the hearing and which are in the possession, custody, or control of the party to whom he request is directed.

(B) The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner for making the inspection and performing the related acts

(C) The party upon whom the request is served shall serve a written response which shall state, with respect to each item or category of items, that inspection or other requested action will be permitted as requested, and he shall thereafter comply with the request, except only to the extent that he makes objections in writing to particular items, or categories of items, stating specific reasons why such discovery should not be allowed

(D) A party who produces documents for inspection shall produce them as they are kept in the usual course of business, or shall organize and label them to correspond with the categories in the request

(E) The request shall be served upon every party to the action The party upon whom the request is served shall serve a written response and objections, if any, within 30 days after the service of the request. The time for making a response may be shortened or lengthened by the IHO upon a showing of good cause

(6) Subpoenas

(A) Any party may subpoena a witness for the purposes of taking their deposition by oral or written examination or to compel testimony at the hearing

(B) A party may not obtain a subpoena without having petitioned the IHO for an Order Granting the Issuance of a Subpoena upon a showing of good cause as to the need for the subpoena

(C) Upon a finding that good cause exists for the issuing of a subpoena,

the IHO may enter an Order Granting the Issuance of a Subpoena.

(D) The party seeking the subpoena must then present the IHO Order Granting the Issuance of a Subpoena to a certified shorthand reporter or any officer authorized to issue subpoenas who shall immediately issue and cause to be served upon the witness a subpoena directing him to appear at the time and place stated in the Order.

(E) All costs associated with the issuing of a subpoena are to be borne by the requesting party.

(F) The form of the subpoena and the service thereof shall be in conformance with the Tex. R.Civ.P.

(G) If the witness fails to comply with the subpoena, the party requesting the subpoena may bring suit to enforce the subpoena in a district court either in Travis County or in the county in which the subject hearing will be held.

(7) Compelling Discovery.

(A) In the event of a discovery dispute, a party, upon reasonable notice to all other parties, may file a motion to compel or file a motion for protective order with the IHO. Such motions shall contain a sworn certificate by the party filing the motion that efforts to resolve the discovery dispute without the necessity of IHO intervention were attempted and failed.

(B) At the IHO's discretion, an order compelling discovery or a protective order may be issued to protect the movant from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights. The IHO's authority extends to, but is not limited by any of the following:

(i) ordering that requested discovery be answered or produced;

(ii) ordering that the requested discovery not be sought in whole or in part, that the extent or subject matter of discovery be limited, or that it not be undertaken at the time or place specified;

(iii) ordering that the discovery be undertaken only by such method, upon such terms and conditions, or at the time and place directed by the IHO; and

(iv) ordering that, for good cause shown, results of discovery be sealed or otherwise adequately protected, that its distribution be limited, or hat its disclosure be restricted.

(C) Sanctions.

(i) When a party does not comply with the IHO order compelling discovery, the requesting party may, upon reasonable notice to all other parties, apply to the IHO for sanctions. A party may not request sanctions without having first obtained an order compelling discovery.

(ii) If a party, or an officer, director, or an authorized representative of a party, fails to comply with an order compelling discovery, the IHO may, after opportunity for hearing, make orders in response to such failure, including any of the following:

(I) preventing the disobedient party from further discovery of any kind, or of a particular kind;

(II) deeming any facts pertaining to the order, or any other facts, to be established, as claimed by the moving party;

(III) disallowing the disobedient party from supporting or opposing designated claims or defenses, or prohibiting the party from introducing designated matters into evidence; and

(IV) striking pleadings or parts of pleadings, staying further action until the order is obeyed, dismissing the proceeding with or without prejudice, or rendering a default judgment against the disobedient party.

(iii) The IHO may impose any of the sanctions listed above on a party who abuses the discovery process in seeking or resisting discovery or who files a request, response, or answer that is frivolous, oppressive, or made for the purpose of delay.

(iv) A party who fails to respond to or fails to supplement a response to a discovery request may not present evidence that the party was under a duty to provide in a response or supplemental response, and may not offer the testimony of an expert witness or of any other person having knowledge of the discoverable matter, unless the IHO finds good cause to permit the evidence despite the noncompliance. The burden of establishing good cause is upon the party offering the evidence, and good cause must be shown in the record.

(v) Unless permitted by law, party representatives shall not communicate with the IHO or the Commissioner without the knowledge of all other parties . (The IHO may impose sanctions for impermissible communications.)

(vi) The IHO shall state the specific basis for any sanction in the record or in a written order. A sanctioned party has the right to appeal the sanction to the Commissioner.

(h) Dismissal Without Hearing.

(1) The IHO may entertain motions for dismissal without a hearing for the following reasons:

(A) failure to prosecute;

(B) unnecessary duplication of proceedings or res judicata;

(C) withdrawal;

(D) moot questions;

(E) lack of jurisdiction;

(F) failure to raise a material issue in the pleading;

(G) failure of a party to appear at a scheduled hearing.

(2) If the IHO finds that such motion should be granted the IHO will so order, and the Commissioner may enter a final order of dismissal.

(i) Motions.

(1) Unless otherwise provided by these rules the following shall apply.

(A) A party may move for appropriate relief before or during a hearing.

(B) A party shall submit all motions in writing or orally at a hearing.

(C) Written motions shall:

(i) be filed no later than 15 days before the date of the hearing, except where good cause is stated in the motion, the IHO may permit a written motion subsequent to that time;

(ii) state concisely the question to be determined;

(iii) be accompanied by any necessary supporting documentation; and

(iv) be served on each party.

(D) An answer to a written motion shall be filed on the earlier of:

(i) seven days after receipt of the motion; or

(ii) on the date of the hearing.

(E) On written notice to all parties or with telephone consent of all parties, the IHO may schedule a conference to consider a written motion.

(F) The IHO may reserve ruling on a motion until after the hearing.

(G) The IHO may issue a written decision or state the decision on the record.

(H) If a ruling on a motion is reserved, the ruling shall be in writing and may be included in the IHO's decision.

(I) The filing or pendency of a motion does not alter or extend any time limit otherwise established by these rules.

(2) Continuance(s) may be granted by the IHO in accordance with applicable law. Motions for continuances shall be in writing or stated in the record and shall set forth the specific grounds upon which the party seeks the continuance.

(3) Unless made during a prehearing or hearing, a party seeking a continuance, cancellation of a scheduled proceeding, or extension of an established deadline must file such motion no later than ten days before the date or deadline in question. A motion filed less than ten days before the date or deadline in question must contain a certification that the movant contacted the other party(ies) and whether or not it is opposed by any party(ies). Further, if a continuance to a certain date is sought, the motion must include a proposed date or dates and must indicate whether the party(ies) contacted agree on the proposed new date(s).

(j) Hearing.

(1) The IHO shall set the date and time for the hearing. The location shall be the Commission's regional or area office nearest the Appellant's residence or as agreed to by the parties.

(2) Order of Procedure at the Hearing.

(A) The Appellant may state briefly the nature of the claim or defense, what the Appellant expects to prove, and the relief sought. Immediately thereafter, the Respondent may make a similar statement, and any other parties will be afforded similar rights as determined by the IHO. Each party is allowed ten minutes for such statement.

(B) Evidence shall then be introduced by the Appellant. The Respondent and any other parties shall have the opportunity to cross-examine each of the Appellant's witnesses.

(C) Cross-examination is not limited solely to matters raised on direct examination. Parties are entitled to redirect and recross examination.

(D) Unless the statement has already been made, the Respondent may briefly state the nature of the claim or defense, what the Respondent expects to prove, and the relief sought.

(E) Evidence, if any, shall be introduced by the Respondent. The Appellant and any other parties shall have the opportunity to cross-examine each of the Respondent's witnesses.

(F) Any other parties may make statements and introduce evidence. The Appellant and Respondent shall have opportunity to cross-examine the other parties' witnesses.

(G) The parties may present rebuttal evidence.

(H) The parties may be allowed closing statements at the discretion of the IHO.

(I) The IHO may permit deviations from this order of procedure in the interest of justice or to expedite the proceedings.

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

(3) No evidence shall be admitted which is irrelevant, immaterial, or unduly repetitious.

(4) Documentary Evidence and Official Notice.

(A) Documentary evidence may be received in the form of copies or excerpts if the original is not readily available. On request, parties shall be given an opportunity to compare the original and the copy or excerpts.

(B) When numerous similar documents which are otherwise admissible are offered into evidence, the IHO may limit the documents received to those which are typical and representative. The IHO may also require that an abstract of relevant data from the documents be presented in the form of an exhibit, provided that all parties of record or their representatives be given the right to examine the documents from which such abstracts were made.

(C) The following laws, rules, regulations, and policies are officially noticed:

(i) the Rehabilitation Act of 1973, as amended, 29 United States Code, §701 et seq;

(ii) Department of Education Regulations, 34 Code of Federal Regulations, §361.48;

(iii) Texas Human Resources Code, §111 et seq;

(iv) TRC State Plan for Vocational Rehabilitation Services;

(v) TRC Rehabilitation Services Manual; and

(vi) TRC Administrative Policies and Procedures Manual.

(D) Prepared Testimony. In all proceedings and after service of copies upon all parties of record at such time as may be designated by the IHO, 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's being sworn and identifying the same. Such witness shall be subject to cross-examination and the prepared testimony shall be subject to a motion to strike in whole or in part.

(E) Exhibits.

(i) Exhibits shall not exceed 8 1/2 by 11 inches (unless they are folded to that size). Maps, drawings, and other exhibits which are not the required size shall be rolled or folded so as not to unduly encumber the record. Exhibits not conforming to this rule may be excluded.

(ii) Exhibits shall be limited to facts material and relevant to the issues involved in a particular proceeding.

(iii) The original of each exhibit offered shall be tendered to the court reporter for identification.

(iv) In the event an exhibit has been identified, objected to, and excluded, the IHO shall determine whether or not the party offering the exhibit withdraws the offer, and, if so, permit the return of the exhibit. If the excluded exhibit is not withdrawn it shall be given an exhibit number for identification, shall be endorsed by the IHO with a ruling, and shall be included in the record for the only purpose of preserving the exception.

(F) Offer of Proof. When testimony on direct examination is excluded by ruling of the IHO, the party offering such evidence shall be permitted to make an offer of proof by dictating or submitting in writing the substance of the proposed testimony prior to the conclusion of the hearing. Such offer of proof shall be sufficient to preserve the point for review by the Commissioner. The IHO may ask such questions of the witness as deemed necessary to satisfy that the witness would testify as represented in the offer of proof. An alleged error in sustaining an objection to questions asked on cross-examination may be preserved without making an offer of proof.

(5) Failure to Attend Hearing and Default. If, after receiving notice of a hearing, a party fails to attend a hearing, the IHO may proceed in that party's absence and, where appropriate, may issue a decision against the defaulting party.

(k) Impartial Hearing Officer Decision.

(1) Within 30 days of the hearing completion date, the IHO shall issue a decision which shall contain:

(A) findings of fact and conclusions of law, separately stated; and

(B) if appropriate, an order.

(2) The Inquiries and Hearings Unit shall submit the IHO decision to the Commissioner with a copy to each party.

§104.6. Action by the Commissioner.

(a) The Commissioner cannot delegate the responsibility for making any final Commission decision to any other officer or employee of the Commission.

(b) Within 30 days of the mailing of the IHO's decision, the Commissioner will decide whether or not to formally review the decision by studying the decision and the official case record.

(1) If the Commissioner decides not to formally review the IHO's decision, the decision of the IHO becomes the final Commission decision, and the Commissioner will issue an order affirming the decision of the IHO.

(2) If the Commissioner decides to formally review the IHO's decision, written notice of this decision will be sent to the Appellant by certified mail, return receipt requested.

(3) The parties will then have 15 days from the date the notice that the Commissioner has decided to review the IHO's decision is mailed by the Inquiries and Hearings Unit to submit any additional relevant evidence.

(4) Within 30 days of the mailing of notice of intent to review the IHO's decision, the Commissioner shall make a final decision and provide a full report to all parties in writing of that decision, including the findings and grounds for the decision.

(c) The Commissioner's decision to review the IHO's decision will be based on the following standards of review.

(1) The Commissioner may not overturn or modify a decision of an IHO, or part of a decision, that supports the position of the Appellant unless the Commissioner concludes, based on clear and convincing evidence, that the decision of the IHO is clearly erroneous on the basis of being contrary to federal or state law, including policy.

(2) The review shall include all applicable laws, rules, regulations, policies, and procedures.

(3) The review may be made on all questions of law, fact, and written policy and procedure.

(4) The review may result in affirming the decision of the IHO in whole or in part or reversing or remanding the case to the IHO for further proceedings.

(5) The review may result in reversing or remanding the decision of the IHO when the record of the hearing or decision contains any one or more of the following, and the decision is found to be:

(A) in violation of constitutional, statutory, regulatory, or written policy provisions;

(B) in excess of the statutory authority of the Commission;

(C) made upon unlawful procedure;

(D) affected by other error of law, regulation, or written policy;

(E) not reasonably supported by the evidence; or

(F) arbitrary, capricious, or characterized by abuse of or clearly unwarranted exercise of discretion.

(6) When none of the conditions in paragraph (5) of this subsection are present in the record of the hearing or the decision, review shall result in affirming the decision of the IHO.

§104.7. Motions For Rehearing.

(a) A motion for rehearing is prerequisite to a judicial appeal. A motion for rehearing must be filed by a party within 20 days after the date the party receives notice of the Commissioner's final decision or order.

(b) Replies to a motion for rehearing must be filed with the Commission within 15 days after the date the motion for rehearing is filed.

(c) Commission action on the motion for rehearing must be taken within 30 days of receipt of the motion for rehearing. If agency action is not taken within the 30 day period, the motion for rehearing is overruled by operation of law 30 days after the date the motion for rehearing is received by the Commission.

(d) The Commission may, by written order, extend the period of time for filing the motions and replies and taking agency action, except that an extension may not extend the period for Commission action beyond 90 days after the motion for rehearing is received by the Commission.

(e) In the event of an extension, the 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 motion for rehearing is received by the Commission.

§104.8. Judicial Review of Final Order. 29 United States Code §722(d)(1), provides the Commissioner with authority to establish procedures for appealing agency decisions including judicial review. Pursuant to that authority, the Commissioner grants exclusive jurisdiction to the district court of Travis County, to hear appeals of final decisions of the Commission. The standard of review will be by substantial evidence. A party may seek judicial review of the final order of the Commission by appealing to the Travis County District Court within 30 days of receipt of notice that a party's motion for rehearing has been overruled.

Issued in Austin, Texas, on October 21, 1993.

TRD-9331114

Andrea Sargent-Fambles
Legal Examiner
Texas Rehabilitation Commission

Effective date: October 27, 1993

Expiration date: January 26, 1994

For further information, please call: (512) 483-4055

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Proposed Sections

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 any action may be 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 sections, 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 1. ADMINISTRATION

Part IV. Office of the Secretary of State

Chapter 79. Corporations

General Information and Correspondence

- **1 TAC §79.13, §79.14**

The Office of the Secretary of State proposes amendments §79.13 and §79.14, concerning documents submitted with delayed effective dates that become effective upon the occurrence of events or facts that may occur in the future. House Bill 1494 added the Texas Non-Profit Corporation Act, Article 1396-10.07, effective January 1, 1994, allowing non-profit corporations to file documents with delayed effective dates

Carmen I. Flores, director, Corporations Section, Statutory Filings Division, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Ms. Flores also has determined that for each year of the first five years the rules as proposed take effect, the public and the Office of the Secretary of State will benefit from uniformity of procedures concerning delayed effective dates. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Comments on the proposal may be submitted to Carmen I Flores, Director of the Corporations Section, Statutory Filings Division, P.O Box 13697, Austin, Texas

The Texas Non-Profit Corporation Act, Article 1396-9.04, gives the secretary of state the power and authority reasonably necessary to enable the secretary of state to administer this act efficiently and to perform its duties imposed by this act. These amendments are proposed under Texas Civil Statutes, Article 6252-13, which give the Office of the Secretary of State the authority to adopt rules of practice reasonably necessary to carry out its ministerial duties. The statute affected by this rule is the Texas Non-Profit Corporation Act, Article 1396-10.07.

§79.13. Determining the Date of the 90th Day After the Date of Filing.

(a) For purposes of filing documents which will become effective upon the occurrence of events or facts that may occur in the future, pursuant to the Texas Business Corporation Act, Article 10.03, the Texas Revised Limited Partnership Act, Article 2.12, [or] the Texas Limited Liability Company Act, Article 9.03, **or the Texas Non-Profit Corporation Act, Article 1396-10.07,** the date of the 90th day after the date of filing shall be deemed to be 90 days after the document is delivered in person or placed in the United States Post Office or in the hands of a common or contract carrier properly addressed to the Office of the Secretary of State. The postmark or receipt mark (if received by a common or contract carrier) will be prima facie evidence of the date that such statement was deposited with the post office or carrier. The person filing the document may show by competent evidence that the actual date of posting was to the contrary.

(b) If a document submitted with a delayed effective condition pursuant to the Texas Business Corporation Act, Article 10.03, the Texas Revised Limited Partnership Act, Article 2.12, or the Texas Limited Liability Company Act, Article 9. 03, **or the Texas Non-Profit Corporation Act, Article 10.07,** does not conform to law, it will be returned to sender. When the document is corrected and resubmitted, the date of the 90th day after the date of filing may be recalculated and restated in the document to be 90 days after the document is resubmitted by delivery in person or placement in the United States Post Office or in the hands of a common or contract carrier properly addressed to the Office of the Secretary of State The postmark or receipt mark generated in connection with the resubmission (if received by a common or contract carrier) will be prima facie evidence of the date that such statement was deposited with the post office or carrier. The person filing the document may show by competent evidence that the actual date of posting of the resubmission was to the contrary. The secretary of state will refer to the contents of the document to determine the date of the 90th day from the date of filing or refiling

(c) To calculate the date of the 90th day from the date of filing, refer to calendar days as set forth in §71.5 of this title (relating to Times for Taking Action).

§79.14. Statement Regarding Delayed Effective Condition.

(a) Contents. Pursuant to the Texas Business Corporation Act, Article 10.03, the Texas Revised Limited Partnership Act, Article 2.12, [or] the Texas Limited Liability Company Act, Article 9.03, **or the Texas Non-Profit Corporation Act, Article 1396-10.07,** when a condition triggering the effectiveness of a document filing has been satisfied or waived, a statement regarding the delayed effective condition must be submitted to the secretary of state. Such statement must contain the following information:

(1) the name of the business entity;

(2) the charter or file number of the entity;

(3) the document to which the statement applies;

(4) the date of filing of the document to which the statement applies;

(5) the date on which the condition was satisfied or waived; and

(6) the signatures required by the Texas Business Corporation Act, Article 10.03, the Texas Revised Limited Partnership Act, Article 2.12, [or] the Texas Limited Liability Company Act, Article 9.03, **or the Texas Non-Profit Corporation Act, Article 1396-10.07.**

(b) Timeliness Pursuant to the Texas Business Corporation Act, Article 10.03, the Texas Revised Limited Partnership Act, Article 2.12, [or] the Texas Limited Liability Company Act, Article 9.03, or **the Texas Non-Profit Corporation Act, Article 1396-10.07,** the statement regarding the delayed effective condition should be filed in the Office of the Secretary of State by the date of the 90th day from the date of filing as defined in §79.13 of this title (relating to Determining the Date of the 90th Day After the Date of Filing). Statements regarding the delayed effective condition received after the date of the 90th day from the date of filing will be filed for record; however, the secretary of state will not determine substantial compliance with the provisions of the statutes referenced in this section.

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

Issued in Austin, Texas, on October 27, 1993.

TRD-9331141 Audrey Selden
Assistant Secretary of State
Office of the Secretary of State

Earliest possible date of adoption: December 10, 1993

For further information, please call: (512) 463-5701

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Part XIV. Texas National Research Laboratory Commission

Chapter 300. Administration

• 1 TAC §300.8

The Texas National Research Laboratory Commission (commission) proposes new §300.8, concerning advisory committees. The new section is proposed for public comment in this issue of the *Texas Register*. The purpose of the proposed rule is to comply with the provisions of Senate Bill 383 (73rd Legislature), which requires that the commission outline in rule form the purpose, tasks, and duration of each of its advisory committees. In addition to referencing the committee, the new subchapter outlines reporting and membership requirements for the advisory committees.

Robert P. Carpenter, director of fiscal affairs for the Texas National Research Laboratory Commission, has determined that for the first five-year period this section is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering this section.

Mr. Carpenter also has determined that for each of the first five years this section is in effect, the public benefit anticipated as a result of enforcing the section will be from providing the public with the understanding of the purpose and operation of the commission's Research and Development Review Panel advisory committee. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed.

Comments on the proposal may be submitted to Kenneth S. Welch, Associate Director for Administration, Texas National Research Laboratory Commission, 1801 North Hampton, Suite 400, DeSoto, Texas 75115.

The new section is proposed under the Texas Government Code,§465.012, which requires the commission to propose new rules as necessary to carry out its powers and duties

§300.8. Advisory Committees.

(a) Purpose. This subchapter identifies the purposes, tasks, duration, and reporting requirements of advisory committees of the Texas National Research Laboratory Commission.

(b) Application. This subchapter applies to the operations of the commission's Research and Development Review Panel.

(c) Research and Development Review Panel.

(1) Purpose. The Research and Development Review Panel (panel) advises the commission on the content and structure of the high-energy physics research grants and contracts program, conducts a process of peer review of research proposals submitted to the commission, and makes recommendations to the commission as to the merits and appropriate level of funding, if any, for each proposal.

(2) Membership. Panelists are selected based upon their knowledge and expertise in the areas in which proposals are solicited and represent a broad cross-section of the high-energy physics community. In addition, advice is sought from the program directors of the major federal research funding agencies who serve as ex officio members of the panel. Voting members of the panel serve three-year terms, two members rotate off each year.

(3) Task. The panel coordinates the peer review of proposals submitted to the commission for funding. The panel also makes recommendations, in some instances, as to how an original proposal might be modified to improve its usefulness to the Superconducting Super Collider Project.

(4) Reporting. The panel prepares an individual written evaluation for each proposal. The panel then produces a report to the commission with recommendations as to which proposals should be funded and at what levels.

(5) This advisory committee shall be abolished on January 1, 1997, unless reauthorized.

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

Issued in Austin, Texas, on November 1, 1993.

TRD-9331307 Edward C Bingler
Executive Director
Texas National Research Laboratory Commission

Earliest possible date of adoption: December 10, 1993

For further information, please call. (214) 709-3800

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Part XV. Health and Human Services Commission

Chapter 351. Coordinated Planning and Delivery of Health and Human Services

• 1 TAC §351.3

The Health and Human Services Commission (HHSC) proposes new §351.3, concerning the groups and committees that advise the commission. The rule describes the purpose, responsibilities, method of reporting to the commission, and duration of each advisory committee.

Tim Graves, associate commissioner for budget and support, has determined that for the first five-year period the proposed rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Graves 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 is a service delivery system for health and human services that is more responsive to the needs of diverse groups of the population. There will be no effect on small businesses. There is no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Debby Gardner, General Counsel, Health and Human Services Commission, 4807 Spicewood Springs Road, Building 4, Austin, Texas 78759, (512) 502-3200. All written comments must be received by the commission within 30 days of publication in the *Texas Register*

The new rule is proposed under Texas Revised Civil Statutes, Article 4413(502), §18, which give the commission authority to establish advisory committees and Article 6252-33, which requires an agency that is advised by advisory committees to describe in a rule the committees' purpose, tasks, reporting requirements, and duration.

§351.3. Purpose, Task, and Duration of Advisory Committees.

(a) Introduction. The Health and Human Services Commission (HHSC) is advised by advisory committees established under its enabling legislation, and by advisory committees established by other state and federal laws.

(b) Advisory Committee on the Development of a Uniform Assessment Tool.

(1) This advisory committee makes recommendations about a uniform assessment tool for guardianships to the Commissioners of Health and Human Services, Texas Department of Health, Texas Department of Mental Health and Mental Retardation and Texas Department of Human Services, as required by Senate Bill 236, 73rd Texas Legislature, Regular Session, 1993, §23.

(2) The advisory committee will develop a uniform assessment tool to be

used by the staff of a facility regulated or operated by the Texas Department of Health, Texas Department of Human Services, or Texas Department of Mental Health and Mental Retardation to assess the capacity of an elderly person, a person with mental retardation or a person with a developmental disability to make decisions concerning the person's own welfare and financial affairs, including the person's:

(A) need for guardianship and the type of guardianship that is appropriate for the person,

(B) ability to care for the person's own physical health or to manage the person's own financial affairs;

(C) ability to provide food, clothing, or shelter for himself or herself;

(D) decision-making ability; and

(E) ability to communicate a decision.

(3) The advisory committee reports to HHSC regularly through HHSC staff assigned to the committee

(4) This advisory committee will automatically be abolished July 1, 1994.

(c) Texas Information and Referral Project Advisory Committee.

(1) This advisory committee advises HHSC about the creation of an information and referral network for health and human services in Texas. This advisory committee is authorized by Texas Civil Statutes, Article 4413(502), §18.

(2) This advisory committee identifies all Texas information and referral providers, develops mechanisms to enhance communication among them, and provides them with technical assistance to increase their visibility and improve the quality of their services.

(3) The advisory committee reports to HHSC regularly through HHSC staff assigned to the committee.

(4) This advisory committee will automatically be abolished December 1, 1997, at the end of the grant that funds the Information and Referral Project.

(d) Texas Head Start Collaboration Task Force.

(1) This advisory committee provides leadership and vision for the development and implementation of a collaborative plan of action for federal, state, and local public and private policy makers and funding sources serving economically disadvantaged children ages zero to five, and their families. This advisory committee is authorized by Texas Civil Statutes, Article 4413(502), §18.

(2) This advisory committee makes recommendations to HHSC about planning, implementation, evaluation, and funding for Head Start Programs.

(3) The advisory committee reports to HHSC regularly through HHSC staff assigned to the committee.

(4) This advisory committee will automatically be abolished September 30, 1995, at the end of the grant that funds the Head Start Collaboration Project.

(e) Long-Term Care Task Force.

(1) This advisory committee builds broad consensus among individuals and organizations involved in long-term care, and develops recommendations to the HHSC on a comprehensive vision for Texas long-term care services. These recommendations will serve as the basis for the Long-Term Care Plan required by the Texas Human Resources Code §101.031. This task force is authorized by Texas Civil Statutes, Article 4413(502), §18.

(2) The advisory committee will prepare a vision statement to be incorporated into HHSC's coordinated strategic plan and the Long-Term Care Plan, and make recommendations regarding how services should be structured at the local level and what, if any, changes are needed in state level organizations to support that structure.

(3) The advisory committee reports to HHSC regularly through HHSC staff assigned to the committee.

(4) This advisory committee will automatically be abolished January 1, 1995.

(f) Medical Care Advisory Committee.

(1) This advisory committee complies with requirements of the Social Security Act and its implementing regulations for the Medicaid Program. Federal regulations that govern the Medicaid program require HHSC to establish the Medical Care Advisory Committee to advise it See 42 Code of Federal Regulations (CFR) 431.12.

(2) The advisory committee makes recommendations to the State Medicaid Director about rules for the Medicaid Program.

(3) The advisory committee reports to HHSC regularly through HHSC staff assigned to the committee

(4) This advisory committee will continue as long as the federal law that requires it remains in effect. See the Social Security Act, §1902(a)(4)

(g) Physician Payment Advisory Subcommittee of the Medical Care Advisory Committee.

(1) This advisory committee reviews technical issues regarding physician payment for the Medical Care Advisory Committee. Federal regulations that govern the Medicaid program require HHSC to establish the Medical Care Advisory Committee to advise it. See 42 CFR 431.12. This advisory committee is authorized by Texas Civil Statutes, Article 4413(502), §18.

(2) The advisory committee makes recommendations about issues and changes in physician payment policies.

(3) The advisory committee reports to HHSC regularly through HHSC staff assigned to the committee.

(4) This advisory committee will continue as long as its technical assistance is required by the Medical Care Advisory Committee.

(h) Vendor Drug Advisory Subcommittee of the Medical Care Advisory Committee.

(1) This advisory committee reviews technical issues regarding vendor drug policies for the Medical Care Advisory Committee. Federal regulations that govern the Medicaid program require HHSC to establish the Medical Care Advisory Committee to advise it See 42 CFR 431.12. This advisory committee is authorized by Texas Civil Statutes, Article 4413(502), §18.

(2) The advisory committee makes recommendations about issues and changes in vendor drug policies.

(3) The advisory committee reports to HHSC regularly through HHSC staff assigned to the committee.

(4) This advisory committee will continue as long as its technical assistance is required by the Medical Care Advisory Committee.

(i) Hospital Payment Advisory Committee

(1) This advisory committee advises the HHSC about hospital payment methodologies for inpatient hospital prospective payment and on adjustment for disproportionate share hospitals that will ensure reasonable, adequate, and equitable payments to hospital providers and that will address the essential role of rural hospitals. This advisory committee is required by the Texas Human Resources Code, §32.022(e). This statutory advisory committee functions as a subcommittee of the Medical Care Advisory Committee. Federal Regulations that govern the Medicaid program require HHSC to establish the Medical Care Advisory Committee. See 42 CFR 431.12.

(2) The advisory committee makes recommendations about hospital payment methodologies for inpatient hospital prospective payments and for adjustment for disproportionate share hospitals.

(3) The advisory committee reports to HHSC regularly through HHSC staff assigned to the committee.

(4) The statute that requires this advisory committee contains no end date.

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, 1993.

TRD-9331465 Bryan P. Sperry
Deputy Commissioner
Health and Human Services Commission

Earliest possible date of adoption: December 10, 1993

For further information, please call: (512) 502-3294

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TITLE 4. AGRICULTURE

Part I. Texas Department of Agriculture

Chapter 1. General Procedures

Subchapter C. Minority Purchasing

• 4 TAC §§1.71-1.77

The Texas Department of Agriculture (the department) proposes new §§1. 71-1.77, concerning solicitation of minority and female-owned businesses, and historically underutilized businesses (HUBs) to bid for contract and open market purchases of the department and the enhancement of contracting opportunities for these businesses.

Audrey Arechiga, assistant commissioner for administration, has determined that for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Ms. Arechiga 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 the opportunity for an increase in the number of minority and female-owned businesses and HUBs to participate in contracts awarded by the department. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rules as proposed.

Comments on the proposal may be submitted to Joyce Arnold, Administrative Law Judge and Assistant General Counsel, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711.

The new sections are proposed under the Texas Agriculture Code, §12.029, which requires the department to establish policies to encourage minority and female-owned small businesses to bid for contract and open market purchases of the department and to assist those businesses in that bidding. The new sections affect any purchases made or contracts entered into by the department under the authority of the Texas Agriculture Code.

§1.71. Statement of Purpose. The purpose of these sections is to provide a procedure to encourage minority and female-owned small businesses and historically underutilized businesses to bid for contract and open market purchases of the Texas Department of Agriculture and to maximize contracting opportunities for these businesses.

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

Department-The Texas Department of Agriculture.

Minority and female-owned small business-A business enterprise that is:

(A) independently owned and operated, was formed for the purpose of making a profit, has fewer than 100 employees and less than $1 million in annual gross receipts; and

(B) controlled by one or more socially and economically disadvantaged persons who own at least 51% of the business enterprise and are socially disadvantaged because of their identification as members of certain groups, including women, Black Americans, Mexican Americans and other Americans of Hispanic origin, Asian Americans, and American Indians.

Historically underutilized business (HUB) -

(A) a corporation formed for the purpose of making a profit in which at least 51% of all classes of the shares of stock or other equitable securities are owned by one or more persons who:

(i) are socially disadvantaged because of their identification as members of certain groups, including Black Americans, Hispanic Americans, Women, Asian Pacific Americans, and Native Americans; and

(I) have suffered the effects of discriminatory practices or similar insidious circumstances over which they have no control; and

(II) have a proportionate interest and demonstrate active participation in the control, operation, and management of the corporation's affairs;

(B) a sole proprietorship created for the purpose of making a profit that is 100% owned, operated, and controlled by a person described by subparagraph (A)(i) of this definition; or

(C) a partnership formed for the purpose of making a profit in which at least 51% of the assets and interest in the partnership is owned by one or more persons who:

(i) are described by subparagraph (A)(i) of this definition; and

(ii) have a proportionate interest and demonstrate active participation in the control, operation, and management of the partnership affairs;

(D) a joint venture in which each entity in the joint venture is a historically underutilized business; or

(E) a supplier contract between a historically underutilized business and a prime contractor under which the historically underutilized business is directly involved in the manufacture or distribution of the supplies or materials or otherwise warehouses and ships the supplies.

§1.73. Identification of Minority and Female-owned Businesses and HUBs.

(a) The department will obtain the Texas Historically Underutilized Business Certification Directory from the General Services Commission to identify minority and female-owned businesses certified as HUBs in the state.

(b) The department will use the directory to solicit bids from such businesses on all contract and open market purchases for which it has jurisdiction to contract pursuant to the State Purchasing and General Services Act, Texas Civil Statutes, Article 601b.

§1.74. Certification Requirements.

(a) All minority and female-owned businesses and HUBs must be certified under the historically underutilized business program of the General Services Commission to be eligible to participate in contract and open market purchases of the department.

(b) The department will assist minority and female-owned businesses and HUBs to become eligible for certification and participation in bidding on contracts to be awarded by the department.

§1.75. Outreach.

(a) The department will attend forums sponsored by the General Services Commission relating to minority and female-owned businesses and HUBs to improve its efforts in soliciting these businesses for bidding on department contracts.

(b) The department will actively pursue opportunities to distribute brochures, pamphlets, and other literature regarding the department's HUB recruitment program to the public.

§1.76. In-House Training. The department will provide in-house training for all its personnel involved in making purchases on behalf of the department which will focus on soliciting minority and female-owned businesses and HUBs to participate in bidding on contract and open market purchases of the department.

§1.77. Tracking of Progress. The department will maintain a computerized program to keep track of all expenditures and purchases involving minority and female-owned businesses and HUBs.

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 28, 1993.

TRD-9331228 Dolores Alvarado Hibbs
Chief Administrative Law Judge
Texas Department of Agriculture

Earliest possible date of adoption. December 10, 1993

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

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Chapter 3. Boll Weevil Eradication Program

Subchapter A. Election Procedures

• 4 TAC §§3.1, 3.4-3.6

The Texas Department of Agriculture (the department) proposes amendments to §§3.1, and 3.4-3.6, concerning election procedures for the conducting of elections by the Boll Weevil Eradication Foundation. The amendments are made to make the election process more efficient and increase the number of eligible voters. The amendment to §3.1 changes the definition of eligible voter to make that definition consistent with that used in the industry and in implementation of federal cotton programs. An amendment to §3.4 corrects a citation error. An amendment to §3.5 clarifies who is to be represented on the committee canvassing votes in elections. Other amendments change throughout the sections the unit of cotton acreage to be used in determining cotton production of voters and make other changes for purposes of clarification.

Katie Dickie, special assistant for producer relations, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Ms. Dickie has also 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 sections will be an efficient, fair, and uniform election process for conducting of elections by the Boll Weevil Eradication Foundation. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Comments on the proposal may be submitted to Katie Dickie, Special Assistant for Producer Relations, P.O. Box 12847, Austin, Texas 78711, and must be received no later than 30 days from the date of the publication of this proposal in the *Texas Register*

The amendments are proposed under the Texas Agriculture Code, §74.114, which requires the department to adopt procedures for conducting of elections by the Boll Weevil Eradication Foundation. The code affected by this proposal is the Texas Agriculture Code, Chapter 74, Subchapter D.

§3.1. Voter Eligibility.

(a) Any cotton grower having cotton production in a proposed or established eradication zone is entitled to vote in any referendum concerning the establishment of an eradication zone or rate of assessment for that zone. For purposes of this chapter, a grower is an individual ,entity, or joint operator who as owner, landlord, tenant or sharecropper is entitled to share in the cotton available for marketing from the farm, or share in the proceeds thereof, as determined in accordance with 7 Code of Federal Regulations, Part 1413. [who receives direct income on or after June 1, 1992, from the sale of cotton and who will be responsible for paying an assessment established by the Boll Weevil Eradication Foundation (the foundation), i.e., if proceeds of sale go to the grower, he or she will pay, if proceeds go to an absentee landlord, he or she will pay] The term cotton grower includes both the operator and other producers of the crop on the farm [owner of the farm on which the cotton is grown and the owner's tenant or sharecropper], provided that only one vote may be cast representing the same production, i.e., if an entity is voting, only one vote may be cast unless, production is divided for purposes of voting, e.g., if two acres are owned by a partnership [jointly], both partners [owners] cannot vote and both claim two acres[usually the owner paying the assessment will claim both acres, but if both are paying, each may claim one acre].

(b)-(c) (No change.)

§3.4. Ballots.

(a) (No change.)

(b) A ballot for conducting an eradication zone referendum or referenda and board election must include, or be accompanied by:

(1) information about the proposed eradication zone, including:

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

(C) a general summary of rules adopted by the commissioner under §§74.114, 74. 118, and 74.120 of the code including a description of:

(i) (No change.)

(ii) penalties for noncompliance with rules adopted under Chapter 74, Subchapter D [A], of the code;

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

(c)-(d) (No change.)

(e) To be considered valid, a ballot must bear a signature, the amount of [row] acreage of cotton farmed for the full calendar year immediately preceding the election year and the address of the grower.

(f)-(g) (No change.)

§3.5 Canvassing of Ballots.

(a) Ballots in all board elections and referenda will be counted at the headquarters of the foundation by a canvassing committee consisting of a representative of the county judge's office [judge] from the county in which the ballots are counted by the committee, a representative of the Texas Agricultural Extension Service, a representative of the foundation and a representative of the Texas Department of Agriculture.

(b) (No change.)

(c) Votes will be tabulated and recorded by zone, with the following tabulations recorded for each zone:

(1)-(4) (No change.)

(5) total cotton [row] acreage in the zone,

(6) total cotton [row] acreage voting for proposition;

(7) total cotton [row] acreage voting against the proposition;

(8) percentage of cotton [row] acreage voting for the proposition, and

(9) (No change.)

(d) (No change.)

§3.6. Approval of Zones, Assessment Rates, Board Elections.

(a) A referendum or referenda to establish a zone or to set an assessment rate must pass by a favorable vote of at least 2/3 (two-thirds) of those voting on the referendum or of growers who farm more than 50 of the total [row] acreage of cotton in the relevant eradication zone. The total [row] acreage of cotton in each zone shall be determined by use of the latest available figures from the Texas office of the Agricultural Stabilization and Conservation Service.

(b)-(d) (No change.)

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

Issued in Austin, Texas, on November 2, 1993.

TRD-9331433 Dolores Alvarado Hibbs
Chief Administrative Law Judge
Texas Department of Agriculture

Earliest possible date of adoption: December 10, 1993

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

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TITLE 13. CULTURAL RESOURCES

Part IV. Texas Antiquities Committee

Chapter 41. Practice and Procedure

- **13 TAC §§41.5, 41.7-41.9, 41.11, 41.20, 41.21**

The Texas Antiquities Committee (committee) proposes amendments to §41. 5, concerning Definitions, §41.7, concerning Specific Criteria for Evaluating Archeological Sites, §41.8, concerning Specific Criteria for Evaluating Caches and Collections, §41 9, concerning Specific Criteria for Evaluating Shipwrecks, §41.11, concerning Discovery of Potential Landmark During Construction, §41.20, concerning Archeological Permit Categories, and §41.21, concerning Application for Archeological Permit

The proposed amendments identify obsolete, ambiguous, or redundant rules, and clearly stipulate qualifications and standards, and formulize unwritten policy already in effect and to provide for consistent and timely cultural resource review procedures.

The amendment to §41.5 removes terms related to obsolete sections or expired rules, adds new terms, clarifies qualifications, and relocates from repealed sections some essential terms. The amendments to §§41.7-41.9 are needed to enumerate State Archeological Landmark eligibility requirements. The amendments to §§41.11, 41.20, and 41.21 clarify and formalize project review and discovery procedures.

The amendments to §41.20 and §41.21 are also needed to standardize policy into formal rules and to add a condition relating to permit cancellation. Ambiguous rules regarding permit categories and the level of work required under each category are made clear by the proposed amendments. The amendment to §41.21 clarifies the responsibilities of permittees. Lastly, the amendments relocate research design criteria from §41.5 to §41.21.

Dr. James E. Bruseth, deputy state historic preservation officer, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Dr. Bruseth also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be to clearly enumerate project sponsor and permittee responsibilities as well as qualifications under the Antiquities Code of Texas. A second benefit will be the refinement of State Archeological Landmark evaluation criteria to provide for uniform designation, improved management, and protection of significant cultural resources. Finally, the proposed amendments benefit the public by eliminating obsolete and ambiguous sections. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Comments on the proposal may be submitted to Dr. James E. Bruseth, Deputy State Historic Preservation Officer, Texas Historical Commission, Department of Antiquities Protection, P.O. Box 12276, Austin, Texas 78711. Comments will be accepted for 45 days after publication in the *Texas Register*.

The amendments are proposed under the Natural Resources Code, Title 9, Chapter 191 (revised by Senate Bill 231, 68th Legislature, 1983, and by House Bill 2056, 70th Legislature, 1987), §191.02, which provides the Texas Antiquities Committee with authority to promulgate rules and require contract or permit conditions to reasonably effect the purposes of Chapter 191.

§41.5. Definitions. The following words and terms, when used in this chapter and the Antiquities Code of Texas, shall have the following meanings, unless the context clearly indicates otherwise.

[Appraisal-A valuation of property by the estimate of an appraiser.]

[Appraiser-An individual authorized by the Texas Antiquities Committee estimating valuation of property.]

Archeological site-Any place containing evidence of human activity, including, but not limited to, the following:

(A) Habitation sites. Habitation sites are areas or structures where people live or have lived on a permanent or temporary basis. Standing structures may or may not be present. Habitation sites may also contain evidence of activities that are listed in the following as site types in the non-habitation category.

***(i)* Campsites.**

(I) American Indian open campsites were occupied on a temporary, seasonal, or intermittent basis. Evidence of structures may or may not be present. American Indian campsites of both periods may have accumulations of shell or burned rock as well as hearths, hearth fields, bedrock mortars, burials, and/or scatters or accumulations of ceramics, stone debitage, flaked tools, and grinding stones. Campsites vary in size from a few square meters to several hectares. Additionally, American Indian sites near missions, forts, and trading posts were present during the historic period. These sites, termed encampments, are of varying degrees of permanence, with the site generally being continuously occupied but not necessarily by the same group, tribe, or culture.

(II) American Indian rock shelters, in general, are a special kind of campsite. These sites are located in caves or under rock overhangs and have been occupied either temporarily, seasonally, or intermittently. Many articles of perishable materials such as clothing, basketry, sandals, and matting may be preserved if the shelter is located in an arid environment. Shelter sites include not only the shelter area itself, but also the area of debris accumulation located in the immediate vicinity that is the result of activity by those occupying the rock shelter. Associated hearths, burials, bedrock mortars, dumps, etc., may be present. Rock shelters vary in size from an area large enough to accommodate only one person to areas of several hundred meters in the largest dimension.

(III) Non-Indian campsites are the cultural remains of activities by people who are not American Indian. Examples are sites that represent the activities or railroad workers, military units, settlers, slaves, and other groups as yet unidentified. These sites include the area and remains of temporary encampments such as Chinese railroad camps, wagon train campsites, shepherd shelters, line camps, buffalo hunter camps, calvary campgrounds, trail drive camps, camps at river fords, candelilla wax camps, and others.

(ii) Residence sites.

(I) Residence sites are those where routine daily activities were carried out and which were intended for year-round use. A greater degree of permanence is implied in a residence site than a campsite; therefore, structural evidence in the form of post molds, foundations, and so forth is more likely to be present. Examples include remains of cabins, dugouts, farmhouses, ranch headquarters, plantation residences, slave quarters, and urban homes, as well as teepee rings, pueblos, and Caddoan houses constructed by American Indians.

(II) Residence sites resulting from American Indian activities may include additional features and structures including hearths, retaining walls, enclosures, compounds, patios, burials, cemeteries, mounds, platforms, and borrow areas, as well as scatters and accumulations of stone debitage, ceramic debitage, burned rock, flaked tools, grinding tools, grinding stones, and bedrock mortars.

(III) Non-Indian sites may include, in addition to the main structure, out-buildings, water systems, trash dumps, garden areas, driveways, and other remains that were an integral part of the site when it was inhabited. Examples of structures or structural remains which might be present in addition to the residence include, but are not limited to, barns, silos, cisterns, corrals, wells, smokehouses, stables, gazebos, carriage houses, fences, walls, corn cribs, gins or mills, cellars, kitchens, and bunkhouses. Family cemeteries are often associated with early historic sites.

(B) Non-habitation sites. Non-habitation sites result from use during specialized activities and may include standing structures. Descriptions of each kind of site are given.

(i) Rock art and graffiti sites consist of symbols or representations that have been painted, ground, carved, sculpted, scratched, or pecked on or into the surface of rocks, wood, or metal. Names, dates, symbols, and representations of likenesses of people, animals, plants, or objects are common elements in such sites.

(ii) Mines, quarry areas, and lithic procurement sites are those from which raw materials such as flint, clay, coal, minerals, or other materials were collected or mined for future use. Sites where flint was obtained can be identified by the abundance of flint flakes, broken tools, and flint cobbles. Mines often have associated structures such as head frames, support timbers, and transportation facilities.

(iii) Game procurement and processing sites are areas where game was killed or butchered for food or hides. Remnants of structures such as game runs, hunting blinds, and fish weirs as well as stone, bone, and metal tools may be present in association with animal remains. Often the animal remains form a bonebed with cultural material dispersed sparsely among the bones.

(iv) Engineering structures such as aqueducts, irrigation canals and ditches, earthen mounds, ramps, platforms, terraces, dams, bordered and leveled fields, constructed trails, medicine wheels, bridges, tunnels, shafts, roads, rock fences, dams, lighthouses, and railroad, streetcar, and thoroughfare systems are the most common but not the only kinds of engineering structures.

(v) Cemeteries and burials, marked and unmarked, are special locales set aside for burial purposes. Cemeteries contain the remains of more than one person placed in a regular or patterned order. Burials, in contrast, may contain the remains of one or more individuals located in a common grave in a locale not formerly or subsequently used as a cemetery. The site area encompasses the human remains present and also gravestones, markers, containers, coverings, garments, vessels, tools, and other goods which may be present.

(vi) Fortifications, battlefields, and skirmish sites include fortifications of the historic period and the central areas of encounters between opposing forces, whether major battlegrounds or areas of small skirmishes. Trenches, mounds, walls, bastions, and other fortifications may be present. Trash dumps will also be considered a part of the site. Included here are battlefields of the Civil War, the Texas War for Independence, the Mexican War, and skirmish sites between non-Indian and American Indian forces. Standing structures may or may not be present.

(vii) Public service and ceremonial sites include, but are not limited to, kivas, temple mounds, shrines, missions, churches, libraries, museums, educational institutions, courthouses, fire stations, and hospitals. Standing structures may or may not be present.

(viii) Commercial business structures and industrial structures and sites where products or services are produced, stored, distributed, or sold include, but are not limited to, markets, stores, shops, banks, hostels, stables, inns, stage stops, breweries, bakeries, factories, kilns, mills, storage facilities, and railroad, bus, and tramway depots. Trash or dump deposits, outbuildings, wells, cisterns, and other features associated with the principal structures are considered to be a part of these sites.

(ix) Monuments and markers include structures erected to commemorate or designate the importance of an event, person, or place, and may or may not be located at the sites they commemorate. Included in this category are certain markers erected by the Texas Historical Commission and county historical commissions, and markers and statuary located on public grounds such as courthouse squares and the Capitol grounds. Examples of such sites constructed by American Indians will be included in this category upon identification.

(x) Shipwrecks by definition, Texas Natural Resource Code of 1977, Title 9, Chapter 191, §1919.091, also include the wrecks of naval vessels, Spanish treasure ships, coastal trading schooners, sailing ships, steamships, and river steamships, among others.

[Bullion-Uncoined gold or silver or other precious metal in bar or ingot form.]

[Buried Treasure-An item of value as defined herein, any bullion, coins, or jewelry.]

[Coins-Usually flat, round, pieces of metal issued by a governmental authority as money.]

[Comptroller-Comptroller of Public Accounts.]

Committee-Members of the Texas Antiquities Committee and/or staff members of the Texas Historical Commission, Department of Antiquities Protection, Division of Architecture, or the National Register Department as provided for in the Antiquities Code of Texas, §191.108(b).

Council of Texas Archeologists-A non-profit voluntary organization that promotes the goals of professional archeology in the State of Texas.

Council of Texas Archeologists Guidelines-Professional and ethical standards which provide a code of self-regulation for archeological professionals in Texas with regard to field methods, reporting, and curation.

[Cultural group-A group of individuals or an organization of people related through common social structures and customs.

[Cultural resource reconnaissance-A literature search and record review plus an on-the-ground surface examination of selected portions of an area adequate to assess the general nature of the resource probably present. Test excavations may be required

at some sites so that evaluations may be adequately accomplished. this level of investigation is appropriate to preliminary planning decisions and will be of assistance in determining viable project alternatives.]

[Cultural resources survey-An intensive on-the-ground survey of an area sufficient to permit determination of the number and extent of the resources present, their scientific importance, and the time factors and cost of investigating, preserving, recovering or otherwise studying or mitigating adverse effects on them. This level of investigation is appropriate when a construction project has been authorized and finally formulated.]

Data Recovery-An excavation mode of archeology and a form of mitigation. The evidence from a skillfully accomplished archeological excavation provides a detailed picture of the human activities at the site; emphasis is placed on evidence rather that artifacts. In data recovery, the archeological deposits are removed by digging and so destroyed. The destruction can be justified only if:

(A) it is done with such care that appropriate samples of antiquities, cultural, and environmental data in the area excavated are discovered, and if possible, preserved, however faint the surviving trace may be.

(B) appropriate information has been accurately recorded, whether it's importance is immediately recognized or not, to remain available after the site has disappeared; and

(C) the record and results of the investigations are rapidly made available through publication.

Department of Antiquities Protection-A department of the Texas Historical Commission charged with administering some of the archeological programs of the Antiquities Code of Texas and the National Historic Preservation Act of 1966, as amended.

Discovery-The act of locating, recording, and reporting a cultural resource.

Division of Architecture-A department of the Texas Historical Commission charged with administering the archeological programs of the National Historic Preservation Act of 1966, as amended and the Antiquities Code of Texas.

[Ethnic Group-A group of individuals or an organization of people that is of the same race or class of people with common traits or customs.]

[Excavation-The principal recovery mode of archeology. The evidence from a skillfully accomplished archeological excavation provides a detailed picture of the human activities at the site; emphasis is placed on evidence rather than artifacts. In excavation, the archeological deposits are removed by digging and so destroyed. The destruction can be justified only if:

[(A) it is done with such care that all antiquities and all cultural and environmental data in the area excavated are discovered, and if possible, preserved, however faint the surviving trace may be;

[(B) all information has been accurately recorded, whether its importance is immediately recognized or not, to remain available after the site has disappeared; and

[(C) the record and results of the investigation are rapidly made available through publication.]

[Historian-The minimum professional qualifications are a graduate degree in history or closely related field; or a bachelor's degree in history or a closely related field plus on of the following:

[(A) at least two years of full-time experience in research, writing, teaching, interpretation, or other demonstrable professional activity with an academic institution, historical organization or agency, museum, or other professional institution; or

[(B) substantial contribution through research and publication to the body of scholarly knowledge in the field of history.]

Historic time period-For the purposes of State Archeological Landmark designation, this time period is defined as extending from A.D. 1500 to 50 years before the present.

[Informant-Project sponsor or permittee contracting with the comptroller for the payment of a reward for location information about and recovery of reported items of value belonging to the state.]

Investigative Firm-A company or scientific institution which has full-time experienced research personnel capable of handling archeological investigations and which employs a principal investigator. The company or institution must provide adequate field equipment and laboratory facilities for analysis, interpretation, and storage, and must have the technical capability to produce a finished report on any investigation. The company or institution holds equal responsibilities with the principal investigator to complete all requirements under an antiquities permit.

Investigation-Archeological or architectural activity including, but not limited to, reconnaissance or intensive survey, testing, or **data recovery** [excavation]; preservation of rock art; underwater archeological survey, test excavation, or data recovery **excavations;** [and] monitoring; **and measured drawings, or photographic documentation.**

[Items of value-any bullion, coins, or jewelry.]

[Jewelry-Objects of precious metal often set with gems and worn for adornment.]

Mitigation-The amelioration of losses of significant cultural resources, accomplished through preplanned **data recovery** actions to preserve or recover an **appropriate** [the maximum] amount of data by application of current professional techniques and procedures, as defined in the permits' scope of work. **Following any mitigation or data recovery investigation, a clearance letter may be issued by the committee which authorizes destruction of all or part of a cultural resource without an antiquities permit.**

Monitoring-The on-site presence of a professional archeologist or architect to observe construction activities that could or will alter cultural resources and to report findings and affects.

National Register Department-A department of the Texas Historical Commission which administers some of the architectural programs of the National Historic Preservation Act of 1966, as amended.

[Permit application forms-Prior to the issuance of an antiquities permit for either archeological or architectural investigations, the committee must receive a completely filled out permit application form from either the principal investigator, architect, or permittee. These forms supply the proposed scope of work and research design for the investigations. Application forms can be obtained from the Antiquities Committee, P.O. Box 12276, Capitol Station, Austin, Texas 78711-2276.]

Prehistoric time period-For the purposes of State Archeological Landmark destination, a time period that encompasses a great length of time, beginning when man first entered the new world and ending with the arrival of the Spanish Europeans, which has been approximated for purposes of these guidelines at A.D. 1500.

Professional personnel-Appropriately trained specialists required to perform adequate archeological and architectural investigations. These personnel include the following:

(A) Principal investigator and co-principal investigator. A professional archeologist with demonstrated competence in field archeology and laboratory analysis, as well as experience in adminis-

tration, logistics, personnel deployment, report publication, and fiscal management. In addition to these criteria, the principal investigator or co-principal investigator shall:

(i) **hold a graduate degree from an accredited institution of higher education; and/or be accredited by the Society of Professional Archeologists (SOPA) with emphasis in field research, historical archeology, or underwater archeology as appropriate; and/or have successfully completed investigations under an antiquities permit issued prior to June 1, 1993** [have at least three months of full-time experience in a supervisory role involving complete responsibility for a major portion of a project of comparable complexity to that which is to be undertaken under permit];

(ii) **not hold on or more defaulted permits** [have demonstrated the ability to disseminate the results of an archeological investigation in published form conforming to current professional standards];

(iii) **have at least three months of full-time experience in a supervisory role involving complete responsibility for a major portion of a project of comparable complexity to that which is to be undertaken under permit** [not hold one or more defaulted permits];

(iv) **have demonstrated the ability to disseminate the results of an archeological investigation in published form conforming to current professional standards** [remain on-site a minimum of 25% of the time required for the field investigation and whose names must appear on the project report];

(v) **remain on-site a minimum of 25% of the time required for the field investigation and whose names must appear on the project report** [provide a field archeologist to supervise the field investigation and];

(vi) **provide a professional archeologist to supervise the field investigation in his or her absence and** [testify concerning report findings, in the event of controversy or court challenge],

(vii) **testify concerning report findings, in the event of controversy or court challenge.**

(B) **Professional Archeologist. One who has a degree in archeology or closely related field, conducts archeological investigations as a vocation, and whose primary source of income is from archeological work. Qualifications for specialized types of professional Archeologists are listed below** [Project architect. A professional architect who is a qualified [historic] architect and has had full-time experience in a supervisory role on at least one historic preservation project. The project architect must be involved, at a minimum, in 25% of the time required for an historic structures permit project and, when not involved with the project, must assign a qualified historic architect to supervise the preservation project].

(i) **Prehistoric Archeologist. One who is a professional archeologist, and in addition, meets the following conditions:**

(I) has been trained in the field of prehistoric archeology;

(II) has a minimum experience of two comprehensive archeological field seasons on archeological site(s) that contain prehistoric (Pre-16th century) archeological deposits; and

(III) has published the results of those prehistoric archeological investigations in scholarly journals or publications.

(ii) **Historic archeologist. One who is a professional archeologist and, in addition, meets the following conditions:**

(I) has been trained in the field of historical archeology;

(II) has a minimum experience of two comprehensive archeological field seasons on archeological site(s) that contain historic (post-16th century) archeological deposits; and

(III) has published the results of those historical archeological investigations in scholarly journals or publications.

(iii) **Underwater archeologist. One who is a professional archeologist and, in addition, is a competent diver with a minimum of two full seasons in underwater archeological testing or excavation projects. Training and experience sufficient for safe and proficient use of the specialized underwater remote sensing survey, excavation and mapping techniques, and equipment are required.**

(iv) **Underwater archeological surveyor. One who has training and experience sufficient for safe and proficient supervision of appropriate remote sensing survey equipment operation, as well as for interpretation of survey data for anomalies and geomorphic features that may have some probability of association with submerged aboriginal sites and sunken vessels. This individual may represent the archeological interests on board the survey vessel in the absence of an underwater archeologist, as defined in subparagraph (D) of this paragraph.**

(C) **Project architect. professional architect who is a qualified historic architect and has had full-time experience in a supervisory role on at least one historic preservation project. The project architect must be involved, at a minimum, in 25% of the time required for an historic structures permit project and, when not involved with the project, must assign a qualified historic architect to supervise the preservation project.** [Historical archeologist. One who is a professional archeologist and, in addition, has been trained in the field of historical archeology under a competent historical archeologist and has a minimum experience of two comprehensive archeological field seasons on archeological site(s) that contain historic (post-14th century) archeological deposits, and has published the results of those historical archeological investigations in scholarly journals or publications.]

(D) (No change.)

[(E) Professional archeologist. One who:

[(i) has a graduate degree from an accredited institution of higher education or the equivalent as approved by the Antiquities Committee, has a minimum of experience of two comprehensive archeological field seasons under competent supervision, and has published results of archeological investigations in scholarly journals: or

[(ii) is accredited by the Society of Professional Archeologists (SOPA) with emphasis in field research, historical archeology, or underwater archeology as appropriate.

[(F) Underwater archeologist. One who is a professional archeologist and, in addition, is a competent diver with a minimum of two full seasons in underwater archeological testing or excavation projects. Training and experience sufficient for safe and proficient use of the specialized underwater remote sensing survey, excavation and mapping techniques, and equipment are required.

[(G) Underwater archeological surveyor. One who has training and experience sufficient for safe and proficient supervision of appropriate remote sensing survey equipment operation, as well

as for interpretation of survey data for anomalies and geomorphic features that may have some probability of association with submerged aboriginal sites and sunken vessels. This individual may represent the archeological interests on board the survey vessel in the absence of an underwater archeologist, as defined in subparagraph (F) of this definition.]

Project sponsor-An individual, institution, **investigative firm,** or company paying costs of archeological investigation or historic preservation activity.

Public agency-A state agency or political subdivision of the State of Texas.

Reconnaissance-A literature search and record review, plus an on-the-ground surface examination of selected portions of an area adequate to assess the general nature of the resource probably present. Shovel test excavations may be required to help identify some sites. This level of investigation is appropriate to preliminary planning decisions and will assist in determining viable project alternatives. A reconnaissance does not preclude a survey and cannot be used as a proper level of investigation for the purposes of achieving construction clearance.

[Religious organization-Any group of individuals with a prevailing spiritual belief system or that is devoted to an organized system of faith and worship or to furthering such a system.]

Research design-**A theoretical approach taken** [Research designs prepared] prior to implementation of a field study and submitted with an archeological permit application form are essential to the success of scientific objectives, resource management decision-making, and project management. [The following points should be considered during formulation of a research design.

[(A) Research designs present the essential objectives of a project or study and the means by which those objectives will be attained. As such, the research design is an efficient means of communicating with resource managers and the professional community at large.

[(B) The research design provides a logical basis for detailed project planning and assessment of resource significance.

[(C) Research designs may contain a wide range of theoretical and methodological approaches. Similarly, research designs may address quite general research objectives, as well as more focused types of problem orientation. The following criteria must be met.

[(i) Care must be taken to link the research design to existing topical and geographical bodies of data.

[(ii) The nature of the resources under investigations must be considered.

[(iii) The need to address a wide range of cultural and scientific resources must be considered.

[(iv) Applied research that addresses cultural resource management and impact-related issues should be recognized as necessary and incorporated into research designs whenever possible.

[(v) The skills of the investigative personnel must be appropriate to the project goals and specifications in the research design. In many cases it may be desirable to include provisions for consultants with special expertise.

[(D) Research designs should not be conceived as rigid, unchanging plans. Although research designs may place relatively greater emphasis on certain kinds of scientific questions and certain kinds of data collection, as circumstances warrant, the investigator is not relieved of responsibility to recognize ongoing research. Whether such alternative questions and data warrant changes in the ongoing investigation is a question that should be explicitly addressed and answered in the context of pertinent resource management objectives and research goals. It is expected that research designs will be modified as projects develop. A conscious effort should be made to modify research designs to efficiently exploit new information. It is to be expected that some research objectives will, for many reasons, prove less productive than anticipated, while other objectives will become more important than anticipated or perhaps materialize for the first time. The crucial objectives in the modification process are·

[(i) demonstrated progress in solving stated problems; and

[(ii) subsequent modification of a research design on the basis of explicit, rational decisions intended to attain stated goals.]

[Reward-Contracted amount authorized by written contract with the comptroller.]

[Scientific ruins-Sponsoring entities which have full-time experienced research personnel capable of handling major archeological investigations. Such institutions must contain adequate library holdings pertinent to archeological investigation including archeology, architecture history, and environment. The institution must provide adequate field equipment and laboratory facilities for analysis, interpretation, and storage, and must have the technical capability to produce a finished report on any investigation]

Significance-**A trait** [Attributable] to sites, buildings, structures and objects of historical, architectural, archeological (cultural) value **which are eligible for designation to State Archeological Landmark status and protection under the Antiquities Code of Texas** [when such properties are included in or have been determined by the secretary of the interior to be eligible for inclusion in the *National Register of Historic Places*]. Similarly, **a trait attributable to properties included in or determined eligible for inclusion in the *National Register of Historic Places.*** [State Archeological Landmarks protected by the Texas Antiquities Committee.]

Site-**A shortened term meaning** any place containing evidence of human activity, **a cultural resource or an archeological site.**

Sponsor-An agency, individual, institution, **investigative firm** organization, corporation, or company paying costs of archeological investigation or historic preservation activity or that sponsors, funds, or otherwise functions as a party under permit.

Survey-An intensive on-the-ground pedestrian survey to provide for the determination of the number and extent of the resources present and their scientific importance. Shovel testing may be required to locate sites when the ground surface is obscured or to determine the horizontal limit of buried archeological deposits. Following any survey investigation, a clearance letter may be issued by the committee which authorizes destruction of all or part of a cultural resource without an antiquities permit.

Testing-Application of current archeological techniques to the investigation and evaluation of one or more sites. Testing must be accomplished in such a way as to recover the maximum amount of archeological, historical, and scientific data through detailed examination of a representative sample of the site or sites. Testing may [must] result in the recovery of data, specimens, and samples relating to the total cultural content of the site or sites. Results of testing will be utilized in preservation of the remaining portions of the resource. **Following any testing investigation, a clearance letter may be issued by the committee which authorizes destruction of all or part of a cultural resource without an antiquities permit.**

Texas Antiquities Committee-**The nine member board or its staff** [Committee] created by the Natural Resources Code of 1977, Title 9, Chapter 191, the Antiquities Code of Texas, to determine the site of, and to designate, and remove from such designation (if determined to be of no further historical, archeological, educational, or scientific value) State Archeological Landmarks; to contract or otherwise provide for discovery and salvage operations; to consider the requests for and issue permits provided for; and to protect and preserve the cultural resources of Texas.

[Valuation-Act of assigning a monetary worth to an item by an authorized appraiser.]

§41.7. Specific Criteria for Evaluating Archeological Sites. Archeological sites may be considered significant and be recognized or designated as State Archeological Landmarks, provided that at least one of the following conditions is met:

(1) the archeological site is situated on land owned or controlled by the State of Texas or one of its political subdivisions; or

(2) the archeological site is situated on private land which has been specifically designated as a State Archeological Landmark, Texas Natural Resource Code of 1977, Title 9, Chapter 191, Texas Antiquities Committee, §191.094, entitled "Designating a Landmark on Private Land," and fits within at least two of the following criteria:

(A) preservation of materials must be sufficient to allow application of standard archeological techniques to advantage;

(B) the majority of artifacts are in place so that a significant portion of the site's original characteristics can be defined through investigation;

(C) the site has the potential to contribute to cumulative cultural history by the addition of new information;

(D) the site offers evidence of unique or rare attributes; and/or

(E) the site offers a unique or rare opportunity to test techniques, theory, or method of preservation, thereby contributing to scientific knowledge.

§41.8. Specific Criteria for Evaluating Caches and Collections. Caches and collections may be considered significant and be recognized or designated as State Archeological Landmarks, provided that at least one of the following conditions is met:

(1) the cache or collection was assembled with public funds or taken from public lands;

(2) preservation of materials is adequate to allow the application of standard archeological or conservation techniques:

(3) the cache or collection must be of research value, thereby contributing to scientific knowledge; or

(4) the cache or collection is of historic value or contributes to a theme.

§41.9. Specific Criteria for Evaluating Shipwrecks. Shipwrecks may be considered significant and be recognized or designated as State Archeological Landmarks provided that the following conditions are met:

(1) the shipwreck is located on land owned or controlled by the State of Texas or one of its political subdivisions; and

(2) the shipwreck is pre-twentieth century in age; and

(3) the remains consist of a shipwreck sunken, abandoned, or a wreck of the sea, or are represented by the ship's contents or related embedded treasure.

§41.11. Location and Discovery of Cultural Resources and [Potential] Landmarks [During Construction]. The Texas Natural Resource Code of 1977, Title 9, Heritage, Chapter 191, Antiquities Code of Texas, §191.002 (relating to Declaration of Public Policy), declares that it is in the public policy and in the interest of the State of Texas to locate archeological sites and other cultural resources in, on, or under any land within the jurisdiction of the State of Texas. The Antiquities Code, §191.051 (relating to Powers and Duties In General), directs the Committee to provide for the discovery and/or scientific investigation of publicly owned cultural resources. The Antiquities Code of Texas, §191.174 (relating to Assistance from State Agencies, Political Subdivisions, and Law Enforcement Officers), further directs the committee, state agencies, political subdivisions of the state, and law enforcement agencies to work together to locate and protect cultural resources when deemed prudent, necessary, and/or in the best interest of the state. To achieve these mandates, the Committee reviews construction plans for projects on public lands to determine the project's potential impact to cultural resources and invokes it's power to issue and supervise survey level antiquities permit investigations in accordance with Antiquities Code, §191. 054 (relating to Permit for Survey and Discovery, Excavation, Restoration, Demolition, or Study and Supervision). [Contractors working on public lands who discover archeological sites or historic structures which may qualify for designation as a State Archeological Landmark according to the criteria listed in §§41.6-41 10 of this title (relating to Specific Criteria for Evaluating Historic Structures; Specific Criteria for Evaluating Archeological Sites; guidelines for Recognizing Archeological sites; Specific Criteria for Evaluating Caches and Collections; and Specific Criteria for Evaluating Shipwrecks as State Archeological Landmarks) shall report such discovery to the state agency or political subdivisions owning or controlling the property and to the Texas Antiquities Committee, P.O. Box 12276, Capitol Station, Austin, Texas 78711-2776. Upon notification, the committee staff may initiate designation proceedings if it determines the site to be a significant cultural or historical property or the committee staff may issue a permit for mitigative archeological investigations or any other investigations.] These mandates and the review of construction plans may be accomplished in the following manner.

(1) Project notification. Public agencies should notify the committee at least 60 days in advance of proposed public development projects that could take, alter, damage, destroy, salvage, or excavate publicly owned cultural resources and/or landmarks. The notification should contain a brief written scope of work and a copy of the appropriate topographical quadrangle map with the project boundaries clearly marked.

(2) Project review. The Committee will respond within 30 days upon receipt of the review request. The Committee shall review submitted documentation and notify the public agency of the possible need for survey level investigations to locate cultural resources situated in the proposed development tract.

(3) Survey procedure. If a survey investigation is needed, a principal in investigator should perform the investigations under an antiquities permit in accordance with §§41.17, 41.20, and 41.24 of this title (relating to Issuance of Permits, Archeological Permit Categories, and Reports Relating to Archeological Permits).

(4) Construction discovery. Contractors working on public lands who discover archeological sites or historic structures which may qualify for designation as a State Archeological Landmark according to the criteria listed in §§41.6-41.10 of this title (relating to Specific Criteria for Evaluating Historic Structures; Specific Criteria for Evaluating Archeological Sites; guidelines for Recognizing Archeological sites; Specific Criteria for Evaluating Caches and Collections; and Specific Criteria for Evaluating Shipwrecks as State Archeological Landmarks) shall report such discovery to the state agency or political subdivisions owning or controlling the property and to the Texas Antiquities Committee, P.O. Box 12276, Capitol Station, Austin, Texas 78711-2776. Upon notification, the committee staff may initiate designation proceedings if it de-

termines the site to be a significant cultural or historical property or the committee staff may issue a permit for mitigative archeological investigations or any other investigations. The cost of a proper investigation, excavation, or preservation of such a landmark or potential landmark will be borne by the owner or developer of the property rather than by the committee.

§41.17. Issuance of permits.

(a) (No change.)

(b) Special regulations. When a permit is issued, it will contain all special regulations governing that particular investigation; it must be signed by the chairman or his designated representative. [Anyone carrying out an investigation will have a copy of the permit available at the site of the investigation during all working hours.]

(c)-(e) (No change.)

(f) Permit expiration. The expiration date is specified in each permit and is the date by which all terms and conditions must be completed for that permit. It is the responsibility of the permittee(s), sponsors, investigative firms, and principal investigators prior to the expiration date listed on the permit to meet any and all permit submission terms and conditions.

(1) Expiration notification. After October 1, 1992, principal investigators, co-principal investigators, investigative firms, permittee(s), and sponsors will be notified 60 days in advance of permit expiration. The notice regarding expired permits shall state the pending default date, list the terms and conditions to be met to complete permit requirements, and request submission of a good faith plan outlining how the holder will complete their antiquities permit obligations.

(2) Expiration extension Permits may be extended once for any length of time as deemed necessary by the Committee, in consultation with the principal investigator, sponsor, investigative firm, or permittee.

(g) Expiration exemption. Permits expired as of January 1, 1993, are automatically extended to January 1, 1994. [These permits are eligible for one additional extension.]

(h) (No change.)

(i) Permit cancellation. The Committee may cancel an antiquities permit if one or more of the following conditions exist:

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

(4) violation of §41.3 of this title (relating to Compliance with Rules and Regulations).

§41.20. Archeological Permit Categories. Several categories of permits oriented toward specific types of investigation are issued by the Antiquities Committee.

(1) Reconnaissance [or intensive] survey. These permits are designed for the purpose of location, inventory, and assessment of cultural resources of a specific area by conducting archival searches and by searching for sites[, including visual examination of the surface, recording of data, plus use of specialized equipment such as magnetometers and metal detectors. Under these permits, investigation]. Reconnaissance is limited to recording site locations, mapping, photographing, controlled surface sampling, and possible [limited] site testing. A reconnaissance survey does not take the place of an intensive survey and construction clearance cannot be granted relative to this level of research. [Site data will be recorded in the format adopted by the Texas Antiquities Committee and returned to the committee for uniform data processing.]

(2) Intensive survey. An intensive survey is a 100% pedestrian survey of a project or permit area. Such a survey can be performed in many ways but must, at a minimum, include walking transects no more than 75 feet apart in open terrain and 30 feet apart in dense ground cover. Specific requirements are included in the permit. [Testing. This permit allows detailed examination including systematic test excavations of a particular site or area. Testing must be oriented toward sampling a representative portion of a site or sites in all environmental contexts. Specific requirements are included in the permit.]

(3) Testing. This permit allows detailed examination of cultural resources including systematic test excavations of a particular site or area. Testing must be oriented toward sampling a representative portion of a particular site or sites in all environmental contexts and may be conducted to determine if a landmark contains significant materials. Construction clearance may be granted relative to this level of investigation. Specific requirements are included in the permit. [Excavation. This permit covers full investigation and extensive excavation of a particular archeological sites Specific requirements are included in the permit. Testing. This permit allows detailed examination including systematic test excavations of a particular site or area. Testing must be oriented toward sampling a representative portion of a site or sites in all environmental contexts Specific requirements are included in the permit.]

(4) Data Recovery. This permit covers full investigation and extensive excavation of a particular archeological sites. Data recovery must be based on a research design approved by the committee. Construction clearance may be granted relative to this level of investigation. Specific requirements are included in the permit. [Preservation of rock art. This permit is issued for purposes of preserving, removing, recording, and copying all manner of rock art. Preservation techniques which involve application of brushes, heat, chemicals, water, chalk, petroleum products, or other preparations to the rock surfaces are prohibited unless specifically authorized by the Antiquities Committee. Specific requirements are included in the permit.]

(5) Preservation of rock art. This permit is issued for purposes of preserving, removing, recording, and copying all manner of rock art. Preservation techniques which involve application of brushes, heat, chemicals, water, chalk, petroleum products, or other preparations to the rock surfaces are prohibited unless specifically authorized by the Antiquities Committee. Specific requirements are included in the permit. [Underwater survey. Underwater resources include shipwrecks and drowned prehistoric and historic sites. Surveys for these cultural resources are conducted with electronic instrumentation including the proton magnetometer, side scan and subbottom sonar, and radio and radar positioning systems. In some instances divers using scuba gear are used to search for and examine a specific site or structure. Work is conducted under the direct supervision of an underwater archeologist or under a survey technician reporting to all underwater archeologist who is responsible for the quality of the work. Data acquired are to be rendered to the committee along with an analysis and report. Specific requirements are included in the permit.]

(6) Underwater survey. Underwater resources include shipwrecks and drowned prehistoric and historic sites. Surveys for these cultural resources are conducted with electronic instrumentation including the proton magnetometer side scan and subbottom sonar, and radio and radar positioning systems. In some instances divers using scuba gear are used to search for and examine a specific site or structure. Work is conducted under the direct supervision of an underwater archeologist or under a survey technician reporting to an underwater archeologist who is responsible for the quality of the work. Data acquired are to be rendered to the committee along with an analysis and report. Specific requirements are included in the permit. [Underwater test excavations. Significant magnetic and/or acoustic anomalies discovered during survey must be tested by excavation under

the direct supervision of an underwater archeologist in order to determine the cause of the anomalies. Inspection by divers, coring, or other appropriate means must be used to test the nature of suspected prehistoric or historic sites. In the case of magnetic anomalies, sediment must in many cases be removed to allow identification, approximate dating, and determination of importance of objects and sites found. Any artifacts recovered from the state lands are property of the State of Texas. Extensive recovery during testing is discouraged. Accepted standards for provenience control and archeological data recovery must be maintained. Data must be analyzed and rendered to the committee in a written report. Proper conservation of any artifacts recovered must be carried out. Specific requirements are included in the permit.]

(7) **Underwater test excavations. Significant magnetic and/or acoustic anomalies discovered during survey must be tested by excavation under the direct supervision of an underwater archeologist in order to determine the cause of the anomalies. Inspection by divers, coring, or other appropriate means must be used to test the nature of suspected prehistoric or historic sites. In the case of magnetic anomalies, sediment must in many cases be removed to allow identification, approximate dating, and determination of importance of objects and sites found. Any artifacts recovered from the state lands are property of the State of Texas. Extensive recovery during testing is discouraged. Accepted standards for provenience control and archeological data recovery must be maintained. Data must be analyzed and rendered to the committee in a written report. Proper conservation of any artifacts recovered must be carried out. Specific requirements are included in the permit.** [Underwater excavations In order to fulfill justified research objectives, or if damage to significant historic and prehistoric sites cannot be avoided, a full-scale underwater archeological excavation must be carried out under the direct supervision of an underwater archeologist The intensive investigation and excavation this calls for must be preceded by documentary research and, for shipwrecks, detailed magnetometer work Excavations must be supported by adequate equipment and supplies to insure proper recording, preservation, and the recovery of the maximum amount of data. Thorough analysis and a complete report are required Proper antiquities conservation is required for all artifacts, and all specimens recovered are state property Specific requirements are included in the permit]

(8) **Underwater excavations. In order to fulfill justified research objectives, or if damage to significant historic and prehistoric sites cannot be avoided, a full-scale underwater archeological excavation must be carried out under the direct supervision of an underwater archeologist. The intensive investigation and excavation this calls for must be preceded by documentary research and, for shipwrecks, detailed magnetometer work. Excavations must be supported by adequate equipment and supplies to insure proper recording, preservation, and the recovery of the maximum amount of data. Thorough analysis and a complete report are required. Proper antiquities conservation is required for all artifacts, and all specimens recovered are state property. Specific requirements are included in the permit.** [Destruction. Under exceptional circumstances, when all preservation alternatives have been exhausted and the public welfare clearly requires destruction of a State Archeological Landmark, the Antiquities Committee may issue a destruction permit after thorough mitigation has been accomplished]

(9) **Destruction. Under exceptional circumstances, when all preservation alternatives have been exhausted and the public welfare clearly requires destruction of a State Archeological Landmark, the Antiquities Committee may issue a destruction permit after thorough mitigation has been accomplished. Following any permitted archeological investigation, a clearance letter may be issued by the committee which authorizes destruction of all or part of a cultural resource without an antiquities permit.**

§41.21. Application for Archeological Permit.

(a) Justification for investigation Investigations undertaken on **publicly owned cultural resources or to locate or discover such resources** [state archeological landmarks or potential landmarks potential landmarks, or lands owned or controlled agencies or political subdivisions of the state] must be oriented toward solving a particular research problem, preparation of a site for public interpretation, or for the purpose of salvaging information and specimens from a site threatened with immediate destruction

(b) Eligibility for application Permits to conduct investigations of any nature on State Archeological Landmarks or potential landmarks, or for the discovery of potential landmarks, or lands owned or controlled by agencies or political subdivisions of the state will be issued exclusively by the Texas Antiquities Committee under the conditions provided in the Antiquities Code and in these rules and regulations

(1) Permits will be issued by the Texas Antiquities Committee to scientific and educational institutions, nonprofit corporations and organizations, **investigative firms,** and governmental agencies which have demonstrated their ability to carry out proper archeological investigations through their own staffs, including one or more professional archeologists who will supervise the project or through contract with a professional archeologist. Permits may also be issued to individuals and private corporations who:

(A) retain a professional archeologist to be in direct charge of the project from field investigation through preservation of collections and analysis of data to reporting of results; and

(B) **if required by the committee or the terms or conditions of a memorandum of understanding,** provide proof that adequate funds, equipment, facilities, and personnel are available to properly conduct the investigation as proposed to the Antiquities Committee, and to report the results. **The committee may require a performance bond to be posted as part of the application process.**

(2) State or local archeological societies wishing to conduct investigations on State Archeological Landmarks must **have a principal investigator and are limited to non-compliance. Non-alterable investigation activities, including non-collection surveys, do not require the issuance of a permit, but do require the submission of copies of standard state of Texas site forms and field notes to the committee** [be sponsored by or contracted with a professional archeologist or a scientific or educational institution or reputable museum, whose staff includes a professional archeologist to supervise the project].

[(3) Permits for limited investigations may also be issued to particularly qualified individuals who, in the judgment of the Texas Antiquities Committee, are qualified to undertake and complete a specific project of limited scope under the supervision of a professional archeologist.]

(3)[(4)] Principal investigators and co-principal investigators holding one or more defaulted permits are not eligible for additional permits until all terms and conditions of defaulted permits are met

(c) Application for permit Permit application forms may be obtained from the Antiquities Committee, P O Box 12276, Capitol Station, Austin, Texas 78711-2276. Any institution, corporation, organization, museum, investigative firm, or individual desiring a permit for investigations **must** [should] file a [an] **completed** application with the committee at least one month prior to the proposed beginning date of the project Special circumstances may require that a permit be issued on short notice when a

site is threatened with immediate destruction. When a permit is issued for emergency salvage of a site threatened with destruction, the same rules and regulations apply as with all other permits. The permit applications should include:

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

(d) Research design. Research designs are prepared prior to implementation of a field study and submitted with an archeological permit application form are essential to the success of scientific objectives, resource management decision-making, and project management. The following points should be considered during formulation of a research design.

(1) Research designs present the essential objectives of a project or study and the means by which those objectives will be attained. As such, the research design is an efficient means of communicating with resource managers and the professional community at large.

(2) The research design provides a logical basis for detailed project planning and assessment of resource significance.

(3) Research designs may contain a wide range of theoretical and methodological approaches. Similarly, research designs may address quite general research objectives, as well as more focused types of problem orientation. The following criteria must be met.

(A) Care must be taken to link the research design to existing topical and geographical bodies of data.

(B) The nature of the resources under investigations must be considered.

(C) The need to address a wide range of cultural and scientific resources must be considered.

(D) Applied research that addresses cultural resource management and impact-related issues should be recognized as necessary and incorporated into research designs whenever possible.

(E) The skills of the investigative personnel must be appropriate to the project goals and specifications in the research design. In many cases it may be desirable to include provisions for consultants with special expertise.

(4) Research designs should not be conceived as rigid, unchanging plans. Although research designs may place relatively greater emphasis on certain kinds of scientific questions and certain kinds of data collection, as circumstances warrant, the investigator is not relieved of responsibility to recognize ongoing research. Whether such alternative questions and data warrant changes in the ongoing investigation is a question that should be explicitly addressed and answered in the context of pertinent resource management objectives and research goals. It is expected that research designs will be modified as projects develop. A conscious effort should be made to modify research designs to efficiently exploit new information. It is to be expected that some research objectives will, for many reasons, prove less productive than anticipated, while other objectives will become more important than anticipated or perhaps materialize for the first time. The crucial objectives in the modification process are:

(A) demonstrated progress in solving stated problems; and

(B) subsequent modification of a research design on the basis of explicit, rational decisions intended to attain stated goals.

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

Issued in Austin, Texas, on November 1, 1993.

TRD-9331192 Mark H Denton
Staff Archeologist
Texas Antiquities Committee

Proposed date of adoption: December 25, 1993

For further information, please call. (512) 463-6096

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• 13 TAC §§41.10, 41.14, 41.26, 41.29, 41.30

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

The Texas Antiquities Committee (committee) proposes the repeal of §41 10, concerning Guidelines for Recognizing State Archeological Landmarks; §41 14, concerning Management of State Archeological Landmarks, §41 26, concerning Techniques of Archeological Investigation; §41.29, concerning Disposition of Reported Items of Value; and §41.30, concerning Specific Criteria for Evaluation of Historic Significance of Reported Items of Value. The repeals are necessary to remove obsolete definitions, redundant sections, sections no longer applicable or in use, and sections for which the statutory authority has expired.

The repeals of §41.10 and §41.14 are needed to void sections that are dated and no longer applicable. The repeal of §41 26 is proposed to eliminate redundancy. The repeals of §41.29 and §49.30 are necessary because the authorization rider entitled Senate Bill 222, Article V, §111, 71st Legislature, Regular Session 1989, is no longer in effect. The rider was valid only if executed under existing law Chapter 874, Title 70, Heads of Departments, Texas Civil Statutes, Article 4344g (relating to contracts for information by state claims) administered by the comptroller governing payment of rewards for information leading to the recovery of property due the state. Article 4344g expired January 1, 1991 and was reauthorized; however, there is no longer a mechanism for the comptroller to pay a reward for the recovery of buried, state-owned items of value

Dr James E Bruseth, deputy state historic preservation officer, has determined that for the first five-year period the repeals are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeals.

Dr. Bruseth also has determined that for each year of the first five years the repeals are in effect the public benefit anticipated as a result of enforcing the repeals will be elimination of obsolete rules and definitions, clarification of ambiguous language, and discouraged treasure hunting on public lands in accordance with the Antiquities Code of Texas Overall, the repeals will result in the reduction of required sate expenditures The state will no longer be required to pay a reward of 5.0% for any buried treasure recovered on state-owned lands There will be no effect on small businesses There is no anticipated economic cost to persons who are required to comply with the repeals as proposed.

Comments on the proposal may be submitted to Dr. James E. Bruseth, Deputy State Historic Preservation Officer, Texas Historical Commission, Department of Antiquities Protection, P.O Box 12276, Austin, Texas 78711. Comments will be accepted for 45 days after publication in the *Texas Register*

The repeals are proposed under the Natural Resource Code, Title 9, Chapter 191 (revised by Senate Bill 231, 68th Legislature, 1983, and by House Bill 2056, 70th Legislature, 1987), §191 02, which provides the Texas Antiquities Committee with authority to promulgate rules and require contract or permit conditions to reasonably effect the purposes of Chapter 191

§41.10 Guidelines for Recognizing State Archeological Landmarks

§41 14. Management of State Archeological Landmarks.

§41.26. Techniques of Archeological Investigation

§41.29. Disposition of Reported Items of Value.

§41.30. Specific Criteria for Evaluation of Historic Significance of Reported Items of Value.

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, 1993.

TRD-9331191 Mark H. Denton
Certifying Official
Texas Antiquities
Committee

Earliest possible date of adoption: December 10, 1993

For further information, please call: (512) 463-1858

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TITLE 16. ECONOMIC REGULATION

Part I. Railroad Commission of Texas

Chapter 3. Oil and Gas Division

Conservation Rules and Regulations

- **16 TAC §3.31**

The Railroad Commission of Texas proposes an amendment to §3.31, regarding gas well allowables. The proposed amendment is to increase the accuracy and efficiency of the proration system. Due to the complexity of the system and the potential impact of a significant number of well classification changes, it may be necessary to "reset" the Forecast Correction Adjustment on implementation of the proposed changes. If such a "resetting" is necessary, subsection (d)(1)(E)(i)-(iii) will be implemented with months 1-3 being the first through third months following the effective date of the rule. If no "resetting" is necessary, this subparagraph will not be adopted. These amendments will enable the commission to fulfill its statutory mandate to accurately determine market demand, set the reservoir allowable to market demand, and protect correlative rights.

The proposed amendment will also better enable the commission to protect the correlative rights of mineral interest owners in a common reservoir by requiring consent from each operator in a field before administratively suspending the allocation formula in that field. The proposed amendment also clarifies the procedure by which the commission may reinstate the allocation formula.

Rita E. Percival, systems analyst, Oil and Gas Division, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Larry G. Borella, hearings examiner, Legal Division, has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be the economic benefit associated with a more accurate determination of the lawful market demand for gas. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Comments on the proposal may be submitted to Larry Borella, Hearings Examiner, Legal Division, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967. Comments will be accepted for 30 days after publication in the *Texas Register*. The Railroad Commission of Texas will hold a public hearing on the proposed rule on November 29, 1993, at 9:00 a.m. in Room 1-111 of the William B. Travis Building, 1701 North Congress Avenue, Austin. The hearing will be for receipt of oral testimony. Written responsive comments will be accepted for ten days following the hearing. Any individual with a disability who needs auxiliary aids and services in order to have an equal opportunity to effectively communicate and participate in this hearing must request such aids or services at least two weeks prior to the scheduled hearing by notifying the Personnel office of the Railroad Commission of Texas by mail at P.O. Box 12967, Austin, Texas 78711-2967, or by telephone at (512) 463-7327 or TDD Number (512) 463-7284.

The amendment is proposed under the Texas Natural Resources Code, §§81. 051, 81.052, 85.046, 85.053, 85.055, 85.201-85.203, 86.011, 86.012, 86.041, 86. 042, 86.081, 86.083-86.090, 86.094, 111.083, 111.090, and 111.133, which provides the Railroad Commission of Texas with the authority to adopt rules for the following purposes: to govern and regulate persons and their operations under the jurisdiction of the commission; to prevent waste of oil and gas in drilling and producing operations; to determine the status of gas production from all gas reservoirs; to distribute, prorate and apportion allowable production; to determine the lawful market demand for gas to be produced from each reservoir; to adjust correlative rights and opportunities; to determine the daily allowable production for each gas well; to effectuate the provisions and purposes of the Natural Resources Code, Chapter 86; to conserve and prevent waste of gas; to prevent discrimination in the production and purchasing of gas; to prevent monopolistic practices which may be injurious to the general public; and to regulate common purchasers of gas to achieve the prior purposes.

The amendment is proposed to effectuate the provisions and purposes of the Natural Resources Code, Chapter 86.

§3.31. Gas Reservoirs and Gas Well Allowable.

(a)-(c) (No change.)

(d) Determining prorated reservoir allowable and lawful market demand.

(1) On or before the 25th day of **each** [the preceding] month, the commission will determine the lawful market demand for gas to be produced from each reservoir during the upcoming allowable month. The monthly reservoir allowable shall be equal to the lawful market demand for that reservoir. The lawful reservoir market demand for prorated reservoirs shall be equal to the adjusted reservoir market demand forecast adjusted by a forecast correction adjustment, [a supplemental change adjustment,] and a commission adjustment **(i.e., lawful reservoir market demand = adjusted reservoir market demand forecast + forecast correction adjustment + commission adjustment).**

(A) (No change.)

(B) Adjusted reservoir market demand forecast-The sum of **all** [each] operator reservoir market demand **forecasts for a reservoir** [forecast] **after any necessary downward adjustments have been made to individual operator reservoir market demand forecasts and optional operator forecasts** [that has been adjusted downward in order not to] **so that no such forecast will** exceed the total capability of the operator's wells for **the** [each] reservoir during the allowable month.

(C) Operator reservoir market demand forecast-The sum of the operator's well forecasts **for a reservoir** determined by the commission pursuant to this **subsection** [subparagraph].

(i) The commission will determine a forecast for each well that will be active during the allowable month that:

(I) for prorated and limited wells is equal to the well's production during the same allowable month in the prior year; and

(II) for special or administrative special allowable wells is equal to the well's production during the most recently reported production month.

(ii) If the well had no reported production during the **same** allowable month in the prior year **or if a special or administrative special allowable well had no reported production in the most recently reported production month**, the forecast shall be equal to:

(I) the well's [capability, unless the well has] **highest** reported **monthly** production during any of the three most recently reported production months; **or, if no production has been reported for those months;**

(II) the well's capability[, then the largest monthly production during those months will be used instead].

(iii) Alternatively, the operator reservoir market demand forecast may be determined by an optional operator forecast.

(D) Optional Operator Forecast–The commission designated operator may file an optional market demand forecast for all of the operator's wells in the reservoir that is equal to the anticipated market demand for the production from the operator's wells in the field during the allowable month. The optional operator forecast for the operator's wells in the reservoir can be no greater than the total capability of the operator's wells or less than zero. An optional operator forecast must be filed by the **tenth** [fifth] day of the month preceding the allowable month.

(E) Forecast Correction Adjustment–[The difference between the reservoir production and the adjusted reservoir market demand forecast adjusted by the supplemental change adjustment and commission adjustment during the most recently reported production month]

(i) **The (Month 1) Forecast Correction Adjustment shall be the allowable assigned for (Third Prior Month) subtracted from the production reported for (Third Prior Month).**

(ii) **The (Month 2) Forecast Correction Adjustment shall be the allowable assigned for (Third Prior Month) subtracted from the production reported for (Third Prior Month).**

(iii) **The (Month 3) Forecast Correction Adjustment shall be the allowable assigned for (Third Prior Month) subtracted from the production reported for (Third Prior Month).**

(iv) **For (Month 4) and subsequent months, the Forecast Correction Adjustment shall be equal to the Total reservoir production from most recent reported month**

minus

(total adjusted reservoir market demand forecast for the production month + supplemental change adjustment for that month + commission adjustment for that month)

minus

(production from all special and administrative special wells minus allowable assigned to those special wells for that month)

(F)-(G) (No change.)

(2) (No change)

(e) Well Capability.

(1) No gas well shall be given an initial allowable in excess of its capability.

(A) Except as provided in subparagraphs (B) and (C) of this paragraph, a well's capability is defined as the lesser of:

(i) **the well's latest deliverability test on file with the commission; or**

(ii) **the well's highest monthly production during any of the three most recently reported production months.**

(B) If a well is a special or an administrative special allowable well, its capability is defined as the lesser of:

(i) **the well's latest deliverability test on file with the commission; or**

(ii) **the well's most recently reported monthly production.**

(C) If a well is new to a reservoir and has been active for less than six months, its capability shall be defined as the well's latest deliverability test on file with the commission.

[(1) No gas well shall be given an allowable in excess of its capability which is the lesser of the well's latest deliverability test on file with the commission or the wells's highest monthly production during any of the six most recently reported production months. The capability for a well that is new to the reservoir and has been active for less than nine months shall be determined by the well's latest deliverability test on file with the commission.]

(2) An operator may submit a substitute capability determination for **any** [a] well **in a prorated field** that represents the maximum monthly production capability of the well under normal operating conditions for a specific six-month period.

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

(C) The capability determined pursuant to this paragraph shall be used as the well's capability for a period of six months from the effective date of the determination **unless:**

(i) **the operator files a written request that the substitute capability determination be cancelled. If such a request is submitted, the substitute capability may be cancelled by the commission or commission designee; or** [unless]

(ii) **an affected person files a protest alleging, with specificity, the inaccuracy or invalidity of the determination. If a protest is filed, the commission may set the matter for hearing. A protested substitute capability determination shall be effective on the intended effective date, unless the commission orders otherwise. If the commission determines that the protested substitute capability was incorrect, appropriate allowable or status adjustments will be made for the affected well.**

(f) Fields operating under statewide rules.

(1) (No change.)

(2) A statewide exempt field is any gas field in which no special field rules have been adopted and in which no well in the field has a current reported deliverability test of greater than 200 Mcf a day. Wells in statewide exempt fields shall be assigned allowables equal to their **capability** [capacity] to produce **but in no event greater than 200 Mcf a day.**

(g) Definitions of prorated and nonprorated wells and fields.

(1)-(6) (No change.)

(7) An administrative special allowable well is a nonprorated well that has been granted **an** [a fixed] allowable pursuant to subsection (k) of this section.

[(8) Exempt allowable (X) wells are nonprorated wells in an exempt field and are assigned an allowable on a field-wide basis that allows wells to produce at capacity.]

(8)[(9)] The maximum allowable for a well is the largest allowable that can be assigned under applicable rules. For a limited well, the maximum allowable is the allowable the well would receive under the allocation formula. For a special allowable well, the maximum allowable is the allowable assigned pursuant to paragraph (6) of this subsection. For [an] administrative special allowable **wells** [well], the maximum allowable is [the lesser of] 100 Mcf/day **for wells qualifying as administrative special allowable wells under subsection (k)(1) of this section and is** [or] the allowable the well would receive under the allocation formula **for wells qualifying as administrative special allowable wells under subsection (k)(2) of this section.** For a well in a one well field, the maximum allowable is the well's deliverability based on the latest deliverability test of record. For an associated gas well, the maximum allowable is the gas well allowable calculated by §3.49(b)(1) or (2) of this title (relating to Gas-Oil Ratio) (Statewide Rule 49).

(h) Allowable adjustments and balancing provisions for nonprorated wells.

(1) (No change.)

(2) If the most recent production figures reported to the commission show a nonprorated well to be overproduced, the allowable will be revised to cover overproduction **that is in excess of the well's accumulated underproduction,** up to the maximum allowable. **A nonprorated well with accumulated overproduction will be assigned a supplemental allowable that will balance the accumulated overproduction or a supplemental allowable equal to the well's maximum allowable, whichever is smaller.** [If the indicated capability of a nonprorated well to produce, plus its latest recorded overproduction, is less than its maximum allowable, sufficient allowable will be assigned to balance the allowable with production.]

(3) The allowable for wells in nonprorated fields, except for special and administrative special allowable wells, shall be limited to the lesser of:

(A) the well's maximum allowable;

(B) the well's capability as determined by subsection (e) of this section.[; or]

[(C) the highest monthly production during those months averaged to a daily amount for wells that reported production during any of the three most recently reported production months].

(4) The **initial** allowable for special and administrative special allowable wells shall be **the least of the well's:**

(A) capability;

(B) its amount of production during the most recently reported production month; **or**

(C) the amount provided for by the allocation formula.

(i) (No change.)

(j) Suspension of allocation formula.

(1) The commission or a commission designee may administratively suspend the allocation formula for a particular gas field if:

(A) each **operator** [first purchaser] from that field has a market for 100% of the deliverability, as determined by the deliverability tests **on file with the commission,** [available to that purchaser from the field] **for its respective wells; and**

(B) all operators in the field consent [none of the operators or purchasers from the field object] to suspension of the formula.[; and]

[(C) suspension will not cause a pipeline limitation for any field]

(2) Suspension of the allocation formula may be initiated by the commission or a commission designee, or by one of the operators in the field[, or by one of the first purchasers in the field]. **The commission or a commission designee will determine which fields are appropriate for suspension utilizing the criteria of paragraph (1) of this subsection. The allocation formula may be administratively suspended if the applicant provides the commission with a declaration, subject to the false filing penalties provided for in the Natural Resources Code, §91.143, from all operators in the field stating that they have a market for 100% of the deliverability of their wells. If the commission or a commission designee declines to administratively suspend the allocation formula, the applicant may request a hearing as provided for in paragraph (4) of this subsection.**

[(A) The commission or a commission designee will determine which fields are appropriate for suspension utilizing the criteria of paragraph (1) of this subsection. The allocation formula may be suspended administratively by the commission or a commission designee if the applicant has given at least 21 days notice of intent to suspend the allocation formula for a particular field to each of the operators and first purchasers in the field and no protest has been made.

[(B) If it is anticipated that suspension of the allocation formula will cause a pipeline limitation in a field, first purchasers in the field for which suspension of the allocation formula is requested shall notify the commission or a commission designee within 21 days of the mailing date of the notice of intent to suspend the allocation formula.

[(C) The allocation formula may also be suspended administratively if the applicant provides written waivers of objection from all to whom notice would be given. If the commission or a commission designee declines to suspend administratively the allocation formula, the applicant may request a hearing as provided for in paragraph (4) of this subsection.]

(3) Reinstatement of the allocation formula may be initiated by the commission, [or a] commission designee, or by one of the operators in the field. [or by one of the first purchasers in the field.]

(A) **If, for any month,** [the market demand for] gas production from a **well in a field with a suspended allocation formula drops substantially** below 100% **of the well's** deliverability as determined by the deliverability tests at any time, the **operator** [operators and/or first purchasers for the field] shall immediately **provide written notification to** [notify] the commission or a commission designee and give an explanation **for** [of] the reduction [in demand]. **If no explanation is provided, the commission or a commission designee may, with prior notice to the operators in the field, reinstate the allocation formula. If an explanation is provided, the** [The] commission or a commission designee will **determine** [then make a determination of] whether the allocation formula should be reinstated and may, **with notice,** immediately reinstate the allocation formula.

[(B) If a pipeline limitation occurs after suspension of the allocation formula, first purchasers in the field shall immediately notify the commission or a commission designee. The commission or a commission designee will then make a determination of whether the allocation formula should be reinstated and may immediately reinstate the allocation formula.]

(B)[(C)] The allocation formula will be reinstated at the request of an operator from a field with a suspended allocation formula. [An operator or first purchaser may request that the allocation formula for a field be reinstated administratively. The request may be approved administratively by the commission or a commission designee if the applicant provides to the commission written waivers of objection from all operators and first purchasers for a field. If the applicant fails to secure all necessary waivers or if the commission or a commission designee declines to approve the request, the operator may request a hearing as provided for in paragraph (4) of this subsection. If the matter is set for hearing, the allocation formula may be reinstated administratively by the commission or a commission designee pending the result of the hearing. The notice of request for reinstatement shall specify the date on which allocation again becomes effective.]

(4) -(5) (No change.)

(k) Administrative Special Allowable.

(1) A well which has a **deliverability, capability, and six consecutive months of production** [capability] of 100

Mcf per day or less will be assigned an administrative special allowable pursuant to subsection (h) of this section[, unless the operator requests otherwise].

(2) A well in a prorated field whose average monthly production during the last six consecutive months falls below the cut off percentage (determined by the commission at the monthly statewide hearing) of the well's top allowable averaged over that six-month period, will be assigned an administrative special allowable pursuant to subsection (h) of this section. Administrative special allowable wells under this subsection will remain administrative special allowable wells until:

(A) they overproduce the top allowable available under the applicable allocation formula; or

(B) they receive a substitute capability pursuant to subsection (e) of this section; or

(C) the commission resets the cut off percentage below the well's average production level for the last six consecutive months.

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

Issued in Austin, Texas, on November 2, 1993.

TRD-9331416 Mary Ross McDonald
Assistant Director, Legal Division-Gas Utilities/LP Gas
Railroad Commission of Texas

Earliest possible date of adoption: December 10, 1993

For further information, please call: (512) 463-6923

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Chapter 9. Liquefied Petroleum Gas Division

Subchapter A. General Applicability and Requirements

• 16 TAC §§9.2, 9.5, 9.6, 9.14, 9.29

The Railroad Commission of Texas proposes amendments to §§9.2, 9.5, 9. 6, 9.14, and 9.29, relating to definitions; licensing requirements; examination and course of instruction; franchise tax certification and assumed name certificates, and application for an exception to a safety rule.

The proposed amendments to §§9.2, 9.5, 9.14, and 9.29 are to correct typographical errors, and are non-substantive.

The commission proposes an amendment to §9.6 to correct a chart relating to examination and other requirements of licensees. The commission submitted a previous amendment to §9.6 for adoption in the September 21, 1993, issue of the *Texas Register* (18 TexReg 6443), and, through clerical error, included the wrong chart for adoption The amendment is non-substantive

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

Mr. Petru also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be an increase in compliance due to more clearly understandable rules and an increase in safety afforded to the general public due to the updated and revised safety requirements. There is no impact on small businesses There is no anticipated economic cost to persons required to comply with the proposed sections

Comments on the proposal may be submitted to Thomas D Petru, Director, Liquefied Petroleum Gas Division, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967 Comments will be accepted for 15 days after publication in the *Texas Register*

The amendments are proposed under the Texas Natural Resources Code, §113 051, which authorizes the Railroad Commission of Texas to promulgate rules and standards related to the LP-gas industry and its operations, which will protect or tend to protect the health, safety, and welfare of the general public. The amendments implement the Texas Natural Resources Code, §113.051, which requires the Railroad Commission of Texas to promulgate rules and standards related to the LP-gas industry and its operations, which will protect or tend to protect the health, safety, and welfare of the general public.

§9.2. Definitions.

Final approval-The authority issued by the **commission** [Commission] allowing the introduction of LP-gas into a container and system.

Truck camper-A portable unit constructed to provide temporary living quarters for recreational, travel, or camping use, consisting of a roof, floor, and sides, designed to be loaded onto and unloaded from the bed of a pick-up truck. Also see the definition of recreational vehicle in this section

§9.5. Licensing Requirements Renewals. All licenses issued under this chapter expire at midnight on the 31st day of August of each year The commission shall not issue a license or license renewal unless the applicant's representative has met the requirements of this section.

(1) (No change.)

(2) All renewals must be submitted to the commission along with the renewal fee specified for informational purposes in §9.4 of this title (relating to Categories of Licenses [Licensees]) on or before the 31st day of August of each year in order for the licensee to continue LP-gas related activities.

(3)-(6) (No change)

(b)-(f) (No change.)

§9 6. Examination and Course of Instruction

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

LP-GAS EXAMINATION/INSTRUCTION REQUIREMENTS
CATEGORIES OF LICENSES
§ 9.6

		A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
1	Company Representative Management Exam ($25)	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes
2	Operations Supervisor (Branch Manager) Management Exam ($25)	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes
3	Employee Level - Delivery Truck/Service & Installation (including Transport Driver, DOT Cylinder Filling, Motor Fuel Dispenser) Exam ($10) Ultimate Consumer *III			yes	yes	yes	yes	yes	yes	yes	yes	yes		yes	yes	
4	Employee Level - Transport Driver Exam ($10) Ultimate Consumer *III			yes		yes										
5	Employee Level - Carburetion Exam ($10)					yes							yes			
6	Employee Level - DOT Cylinder Filling Exam ($10)					yes	yes			yes	yes					
7.	Employee Level - Recreational Vehicle Technician Exam ($10)					yes								yes		
8	Employee Level - Manufactured Housing Technician Exam ($10)				yes	yes									yes	
9.	Employee Level - Service & Installation Exam ($10) prior to 11/15/90 Exam ($10) after 11/15/90				yes yes	yes yes						yes yes		yes	yes yes	
10	Employee Level - Motor/Mobile Fuel (ASME Fuel Dispenser) Exam ($10)					yes		yes		yes	yes					
11	File LPG Form 16	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes
12	File LPG For 16B *I				yes	yes					yes	yes			yes	
13	40 Hour Course of Instruction (Representative & Operations Supervisor only)					yes										

TABLE 1
(Continued on next page)

LP-GAS EXAMINATION/INSTRUCTION REQUIREMENTS
CATEGORIES OF LICENSES
§ 9.6

		A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
14	One Hour Course of Instruction (Representative & Operations Supervisor only)				yes		yes	yes		yes	yes	yes	yes			
15	Course of Instruction (Representative & Operations Supervisor only)	no	no	no					no					no	no	no
16	Seminar Every 4 years *II				yes	yes	yes	yes		yes						
17	$10 Renewal Fee on or before 5/31 Annually	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes
18	General Installer & Repairmen Exemption *I				yes	yes						yes			yes	
19	Special exemption from Course of Instruction and Examination for Representative or Operations Supervisor (Branch Manager) in qualified status for minimum three years with active licensee prior to taking management exam				yes	yes	yes	yes		yes	yes	yes	yes			
20	Conditional qualifications for Company Representative or Operations Supervisor (Branch Manager) after passing management exam if course of instruction completed within 100 days				yes	yes	yes	yes		yes	yes	yes	yes			

TABLE 1

NOTES TO §9.6, TABLE 1

**I.* *Applies to Company Representative, Operations Supervisor (Branch Manager), and Service & Installation Employee for Categories marked. (Applicable to Number 12 and 18)*

**II* *Applies to Company Representative, Operations Supervisor (Branch Manager), Delivery Truck, Service Installation, DOT Cylinder Filling, and Motor/Mobile Fuel Dispenser Employees for Categories marked (Applicable to Number 16)*

**III* *Any Ultimate Consumer who has purchased, leased, or obtained other rights in any vessel defined as an LP gas transport, including any employee of the ultimate consumer that drives or in any way operates an LP-gas transport must pass one or more employee examination. (Applicable to Numbers 3 and 4)*

§9.14. Franchise Tax Certification and Assumed Name Certificates.

(a) (No change.)

(b) Any applicant for license must list all names on LPG Form 1 under which LP-gas related activities requiring licensing are to be conducted. Any company performing LP-gas activities under an assumed name (doing business as) must file copies of the assumed name certificates which are required to be filed with the respective county clerk's office and/or the Secretary of [or] State's office with the commission.

§9.29. Application for an Exception to a Safety Rule.

(a)-(c) (No change.)

(d) (No change.)

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

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

(3) **In** [in] the case of an exception requested on a nonstationary site, [.] affected parties to whom the applicant must give notice shall include, but not be limited to:

(A) the Texas Department of Public Safety; and

(B) all processed gas loading and unloading facilities utilized by the applicant.

(4) (No change.)

(e)-(j) (No change.)

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

Issued in Austin, Texas, on November 1, 1993.

TRD-9331357 Mary Ross McDonald
Assistant Director, Legal Division-Gas Utilities/LP Gas
Railroad Commission of Texas

Earliest possible date of adoption: December 10, 1993

For further information, please call (512) 463-6949

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Part III. Texas Alcoholic Beverage Commission

Chapter 31. Administration

Administrative Functions of the Commission

• 16 TAC §31.3

The Texas Alcoholic Beverage Commission proposes new §31.3, concerning the procedure for the submission, consideration, and disposition of a petition to the Commission for the adoption of a rule as required by the Government Code, Administrative Procedure Act, §2001.021(b).

Gayle Gordon, general counsel, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Gordon also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be that the public will be provided a simple and clear method by which they can participate in the rule making process. There will be no effect on small businesses. The anticipated economic cost to persons who are required to comply with the section as proposed will be negligible

Comments on the proposal may be submitted to Gayle Gordon, General Counsel, P.O. Box 13127, Austin, Texas 78711, (512) 206-3204.

The new section is proposed under the Alcoholic Beverage Code, §5.31, which provides the commission with the authority to prescribe and publish rules necessary to carry out the provisions of the Alcoholic Beverage Code as well as the Government Code, Administrative Procedure Act, §2001.021(b), which requires each agency to adopt rules setting out the procedures by which the public may petition the commission for the adoption of a rule.

The proposed rule impacts the entire Alcoholic Beverage Code and all rules and regulations promulgated thereunder.

§31.3. Petition for the Adoption of a Rule

(a) The following rule delineates the Texas Alcoholic Beverage Commission's procedures for the submission, consideration, and disposition of a petition to the commission to adopt a rule under the Government Code, Administrative Procedure Act, §2001.021(b)

(b) Submission of the petition.

(1) Any person may petition the commission to adopt a rule

(2) The petition shall be in writing and contain. the petitioner's name and address; a brief explanation of the proposed rule; the text of the proposed rule prepared in a manner to indicate the words to be added or deleted from the current text, if any; a statement of the statutory or other authority under which the rule is to be promulgated; and the public benefits anticipated as a result of adopting the rule or the anticipated injury or inequity which could result from the failure to adopt the proposed rule.

(3) The commission may deny a petition which does not contain the information in paragraph (2) of this subsection.

(4) The petition shall be mailed to the Administrator, Texas Alcoholic Beverage Commission, P.O. Box 13127, Austin, Texas 78711, or hand delivered to the administrator at the Texas Alcoholic Beverage Commission headquarters in Austin.

(c) Consideration and disposition of the petition.

(1) Except as otherwise provided in subsection (d) of this section, the petition shall be submitted to the commission for its consideration and disposition.

(2) Within 60 days after the receipt of the petition by the commission, the commission shall either deny the petition or institute the rule making procedure in accordance with the Government Code, Administrative Procedure Act, §2001.021(c). The commission may deny parts of the petition and/or institute rule making procedures on parts of the petition.

(3) If the commission denies the petition, written notice of the denial shall be given to the petitioner, including the reasons therefore.

(4) If the commission institute rule making procedures, the version of the rule which the commission proposes may differ from the version proposed by the petitioner.

(d) Subsequent petitions to adopt the same or similar rule. All initial petitions for the adoption of a rule shall be presented to and decided by the commission in accordance with the provisions of subsection (b) and (c) of this section. The administrator may refuse to forward to the commission for consideration any subsequent petition for the adoption of the same or similar rule submitted within six months after the date of the initial petition.

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

Issued in Austin, Texas, on November 1, 1993.

TRD-9331461 Gayle Gordon
General Counsel
Texas Alcoholic Beverage Commission

Earliest possible date of adoption. December 10, 1993

For further information, please call: (512) 206-3204

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Chapter 33. Licensing

Application Procedures

• 16 TAC §33.1

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

The Texas Alcoholic Beverage Commission proposes the repeal of §33.1, concerning business conducted under an Assumed Name.

Marc Allen Connelly, assistant attorney general, has determined that for the first five-year period the repeal is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeal.

Mr. Connelly also has determined that for each year of the first five years the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be compliance with new statutory requirements. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed.

Comments on the proposal may be submitted to Gayle Gordon, General Counsel, P.O. Box 13127, Austin, Texas 78711, (512) 206-3204.

The repeal is proposed under the Alcoholic Beverage Code, §5.31, which provides the Texas Alcoholic Beverage Commission with the authority to prescribe and publish rules necessary to carry out the provisions of the Alcoholic Beverage Code. Cross Reference: Alcoholic Beverage Code, §§11.32, 11.33, 61.02, and 61.31.

§33.1. Business Conducted Under An Assumed Name.

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

Issued in Austin, Texas, on November 1, 1993.

TRD-9331460 Gayle Gordon
General Counsel
Texas Alcoholic Beverage Commission

Earliest possible date of adoption: December 10, 1993

For further information, please call: (512) 206-3204

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The Texas Alcoholic Beverage Commission proposes new §33.1, concerning the criminal conviction or deferred adjudication offenses which may form the basis for the denial of an applicant's license or permit. New §109.532(b)(1) of the Alcoholic Beverage Code added additional criteria, namely that a previous criminal conviction or deferred adjudication could form the basis for a determination by the commission that an applicant is not suitable or qualified to hold a license or permit.

Marc Allen Connelly, Assistant Attorney General, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Connelly, 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 compliance with new statutory requirements. He also has determined there will be no anticipated cost of compliance with the section for small business. 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 Gayle Gordon, General Counsel, P.O. Box 13127, Austin, Texas 78711.

The new section is proposed under the Alcoholic Beverage Code, §5.31, which provides the Texas Alcoholic Beverage Commission with the authority to prescribe and publish rules necessary to carry out the provisions of the Alcoholic Beverage Code. Cross reference to statute: Alcoholic Beverage Code, §109.532(b)(1), 109.531, 61.42(a)(6), and 61.43(1).

§33.1. Final Conviction or Deferred Adjudication.

(a) Final conviction or deferred adjudication for the following offenses indicate that the applicant is not qualified or suitable to hold a permit or license under the Alcoholic Beverage Code, §109.532(b)(1), and may be grounds for denial unless three years, or two years for applicants who must only meet the qualifications under the Alcoholic Beverage Code, §61.42-(a)(6) or §61.43(1), have elapsed since the termination of a sentence, parole, or probation served by the applicant for:

(1) any felony offense;

(2) any controlled substance offense;

(3) any firearm or weapons offense;

(4) prostitution;

(5) bookmaking;

(6) gambling or gaming;

(7) bootlegging.

(b) Current permit or license holders who previously qualified for a permit or license and have not been subsequently convicted or received deferred adjudication for any offense listed in this rule are not disqualified from holding a permit or license under the Alcoholic Beverage Code, §109.532.

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

Issued in Austin, Texas, on November 1, 1993.

TRD-9331459 Gayle Gordon
General Counsel
Texas Alcoholic Beverage Commission

Earliest possible date of adoption: December 10, 1993

For further information, please call: (512) 206-3204

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• 16 TAC §33.2

The Texas Alcoholic Beverage Commission proposes new §33.2, concerning requirements to obtain a license or permit issued by the commission.

Brian Guenthner, Acting Director of the Licensing Division, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Guenthner, also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be the creation of new businesses and the orderly administration of the licensing function. There will be no effect on small businesses. He has also determined the anticipated cost to persons who are required to comply with the section will be dependent upon the license or permit that they seek to obtain and annually will be borne by the licensee or permittee.

Comments on the proposal may be submitted to Brian Guenthner, Acting Director, Licensing Division, P.O. Box 13127, Austin, Texas 78711. The telephone number is (512) 206-3360.

The new section is proposed under the Alcoholic Beverage Code, §5.32, which provides the Texas Alcoholic Beverage Commission with the authority to prescribe and publish rules necessary to carry out the provisions of the Alcoholic Beverage Code. Cross reference-Alcoholic Beverage Code, Title 3.

§33.2. Application and Fee Payment Procedures.

(a) Applications for licenses and permits shall be made by an applicant in such a manner as may be directed by the administrator upon forms provided by the commission.

(b) Each application shall include all information required by the administrator to insure compliance with all applicable statutes and rules and regulations of the agency.

(c) Each applicant for an original or renewal license or permit provided for by the Alcoholic Beverage Code, shall submit with the application proof of the payment of all state fees, surcharges, and county fees, if applicable, in accordance with the applicable provisions of the code.

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

Issued in Austin, Texas, on November 1, 1993.

TRD-9331458 Gayle Gordon
General Counsel
Texas Alcoholic Beverage Commission

Earliest possible date of adoption: December 10, 1993

For further information, please call: (512) 206-3204

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Application Procedures

• 16 TAC §33.3

The Texas Alcoholic Beverage Commission proposes new §33.3, concerning requirements to obtain a brewpub license issued by the commission.

Brian Guenthener, acting director of the Licensing Division, has determined that for the first five-year period the section is in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Guenthner, also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be the creation of new businesses and the orderly administration of the licensing function. There will be no effect on small businesses. He has also determined that the anticipated cost to persons who are required to comply with this section as proposed will be $500 per brewpub license that they seek to obtain and annually will be borne by the licensee.

Comments on the proposal may be submitted to Brian Guenthner, Acting Director, Licensing Division, P.O. Box 13127, Austin, Texas 78711. The telephone number is (512) 206-3360.

The new section is proposed under the Alcoholic Beverage Code, §5.32, which provides the Texas Alcoholic Beverage Commission with the authority to prescribe and publish rules necessary to carry out the provisions of the Alcoholic Beverage Code, and Alcoholic Beverage Code, §74.01(b), pertaining to the agency setting the fee for multiple brewpub licenses.

§33.3. Brewpub License Fees.

(a) Each applicant for an original or renewal brewpub license, who also holds or is applying for a wine and beer retailer's permit or retail dealer's on-premise license at the same location, shall submit proof of the payment of all state fees, surcharges, and county fees, if applicable, in accordance with the Alcoholic Beverage Code, §61.35 and §61.48.

(b) Each applicant for an original or renewal brewpub license, who also holds or is applying for a mixed beverage permit at the same location, shall submit with the application a cashier's check(s), certified check(s), or money order(s) for all state fees and surcharges.

(c) The annual state license fee for a brewpub license shall be $500 for each location.

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

Issued in Austin, Texas, on November 1, 1993.

TRD-9331457 Gayle Gordon
General Counsel
Texas Alcoholic Beverage Commission

Earliest possible date of adoption: December 10, 1993

For further information, please call: (512) 206-3204

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• 16 TAC §33.4

The Texas Alcoholic Beverage Commission proposes new §33.4, concerning requirements to obtain a manufacturer's warehouse license issued by the commission.

Brian Guenthner, Acting Director of the Licensing Division, has determined that for the first five-year period the section is in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering this section.

Mr. Guenthner also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be the creation of new businesses and the orderly administration of the licensing function. There will be no effect on small businesses. He has also determined that the anticipated cost to persons who are required to comply with this section will be $300 per manufacturer's warehouse license that they seek to obtain and annually will be borne by the licensee or permittee.

Comments on the proposal may be submitted to Brian Guenthner, Acting Director, Licensing Division, P.O. Box 13127, Austin, Texas 78711. The telephone number is (512) 206-3360.

The new section is proposed under the Alcoholic Beverage Code, §5.32, which provides the Texas Alcoholic Beverage Commission with the authority to prescribe and publish rules necessary to carry out the provisions of the Alcoholic Beverage Code, and the Alcoholic Beverage Code, §62.13, which requires the commission to set the license fee for manufacturer's warehouse licenses.

§33.4. Manufacturer's Warehouse License Fee.

(a) Each applicant for an original or renewal licensed warehouse under the Alcoholic Beverage Code, §62.13, known as a manufacturer's warehouse license, shall submit with the application proof or payment of all state fees, surcharges and county fees, if applicable, in accordance with the Alcoholic Beverage Code, §61.35 and §61.48.

(b) The annual state license fee for each manufacturer's warehouse license shall be $300.

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

Issued in Austin, Texas, on November 1, 1993.

TRD-9331456 Gayle Gordon
General Counsel
Texas Alcoholic Beverage Commission

Earliest possible date of adoption: December 10, 1993

For further information, please call: (512) 206-3204

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• 16 TAC §33.6

The Texas Alcoholic Beverage Commission proposes new §33.6, concerning the renewal of licenses and permits after expiration. New §6.04 of the Alcoholic Beverage Code established a grace period for license and permit renewals and required the agency to adopt necessary rules.

Marc Allen Connelly, Assistant Attorney General, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Connelly also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be that licensees and permittees will have more latitude in renewing licenses and permits. He has also determined there will be no anticipated cost of compliance with the section for small business. 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 Gayle Gordon, General Counsel, P.O. Box 13127, Austin, Texas 78711.

The new section is proposed under the Alcoholic Beverage Code, §5.31, which provides the Texas Alcoholic Beverage Commission with the authority to prescribe and publish rules necessary to carry out the provisions of the Alcoholic Beverage Code as well as the Alcoholic Beverage Code, §6.04, which sets forth the specific requirement for rulemaking.

§33.6. Renewal of Licenses and Permits After Expiration.

(a) In addition to the requirements of the Alcoholic Beverage Code, §61 48 and §5.50, license and permit renewals which are to be filed under §6.04, must also meet the following requirements:

(1) each applicant who files a renewal under the Alcoholic Beverage Code, §61.48, must, prior to the close of business of the tenth calendar day after expiration, submit a fee of $100.

(2) this fee is to be handled by the tax assessor collector's office, in accordance with the Alcoholic Beverage Code, §61.48 and §61 49, and any other applicable provisions of the code and rules of the commission.

(b) In addition to the requirement of the Alcoholic Beverage Code, §§11.32, 11.35, and 5.50, and any pertinent rule or procedure of the commission, license, and permit renewals which are filed under the Alcoholic Beverage Code, §6.04, must also meet the following requirements:

(1) mixed beverage permits, private club registration permits, private club exemption certificate permits, subordinate permits and any permit renewal required to be presented to any of this agency's offices which are filed after expiration must be presented prior to close of business on the tenth calendar day after expiration and must be complete in form, accompanied by all state fees and surcharges as well as the $100 fee required by the Alcoholic Beverage Code, §6.04.

(2) license and permit renewals which are required to be submitted directly to the licensing division in Austin must be postmarked no later than ten calendar days after expiration or received by the commission no later than ten calendar days after expiration. The application must be complete in form and accompanied by all state fees, surcharges, and late fees.

(c) Failure to submit any requested information, corrections or forms within ten days of demand will constitute noncompliance with the Alcoholic Beverage Code, §6.04, and this rule, resulting in the expiration of the license or permit due to the insufficiency of the application.

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

Issued in Austin, Texas, on November 1, 1993

TRD-9331455 Gayle Gordon
General Counsel
Texas Alcoholic Beverage Commission

Earliest possible date of adoption: December 10, 1993

For further information, please call (512) 206-3204

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Chapter 41. Auditing

Records and Reports by Licensees and Permittees

• 16 TAC §41.35

The Texas Alcoholic Beverage Commission proposes an amendment to §41 35 by adding a new subsection (f), concerning recordkeeping and reporting requirements by wineries for wine manufactured and bottled for individuals.

James Russ, supervising auditor-excise tax, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Russ 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 a more detailed and orderly administration of the auditing function in regard to winery production There will be no effect on small businesses The anticipated economic cost to persons who are required to comply with the section as proposed will be negligible.

Comments on the proposal may be submitted to James Russ, Supervising Auditor-Excise Tax, Texas Alcoholic Beverage Commission, P O Box 13127, Austin, Texas 78711, (512) 206-3332

The amendment is proposed under the Alcoholic Beverage Code, §5 31, which provides the Texas Alcoholic Beverage Commission with the authority to enact such rules as are necessary to properly supervise and regulate all phases of the alcohol industry

The following statute will be impacted by the passage of this rule: Alcoholic Beverage Code, §74 01.

§41.35. Daily Bottling Report

(a)-(e) (No change)

(f) Each winery shall maintain a record of the wine manufactured and labeled for individuals. This record shall include date of manufacture, adults name, sample label and total gallons manufactured for each adult. Each record shall be made available to a representative of the commission upon request.

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

Issued in Austin, Texas, on November 1, 1993.

TRD-9331454 Gayle Gordon
General Counsel
Texas Alcoholic Beverage Commission

Earliest possible date of adoption: December 10, 1993

For further information, please call: (512) 206-3204

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• 16 TAC §41.53

The Texas Alcoholic Beverage Commission proposes new §41.53, concerning reporting and filing requirements for brewpub licensees This new rule will prescribe the time, manner, and method to be used in order to create and file reports detailing a brewpub's production, sales, offerings, etc. and set the dates by which the reports and taxes must be filed.

James Russ, supervising auditor-excise tax, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr Russ 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 fair and equitable standards for the regulation of brewpub production. There will be no effect on small businesses. The anticipated economic cost to persons who are required to comply with the section as proposed will be negligible.

Comments on the proposal may be submitted to James Russ, Supervising Auditor-Excise Tax, Texas Alcoholic Beverage Commission, P O. Box 13127, Austin, Texas 78711, (512) 206-3332.

The new section is proposed under the Alcoholic Beverage Code, §§74.01, et seq and §5 31, which provides the Texas Alcoholic Beverage Commission with the authority to enact rules necessary to carry out its regulatory function in respect to the manufacture and regulation of alcoholic beverages.

The following statute will be impacted by the passage of this rule: Alcoholic Beverage Code, §74 01.

§41.53. Required Records for Brewpubs.

(a) Each holder of a brewpub license shall make a monthly report (monthly report of beer, ale, and malt liquor manufactured, brewed, and disposed of) to the commission on forms prescribed by the administrator

(b) The report shall be made and filed by the licensee with the commission at its offices at Austin, on or before the 15th day of the month following the calendar month for which the report is made and shall show

(1) the month for which the report is made, the license number and the name and address of the brewpub;

(2) a full and correct record of each type of malt beverage produced during the month for which the report is made;

(3) the date of each day's operation;

(4) for each day's operation, the opening inventory in bulk gallons for each type of malt beverage;

(5) for each day's operation, the closing inventory in bulk gallons for each type of malt beverage;

(6) for each day's operation, the total gallons produced for each type of malt beverage;

(7) for each day's operation, the total gallons of each type of malt beverage sold, offered without charge, or consumed, and

(8) end of month totals, by type of malt beverage, of:

(A) bulk gallons in closing inventory;

(B) gallons produced;

(C) produced gallons in closing inventory; and

(D) gallons sold, offered without charge, or consumed

(c) Holders of brewpub licenses must pay the tax on the total combined gallons of beer, ale, and malt liquor not later than the 15th day of the month following the month the malt beverages were sold, offered without charge, or consumed. A remittance, less 2.0% of the amount due when submitted within the required time, shall accompany the monthly report hereinbefore provided and shall be payable to the State Treasurer of Texas.

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

Issued in Austin, Texas, on November 1, 1993.

TRD-9331453 Gayle Gordon
General Counsel
Texas Alcoholic Beverage Commission

Earliest possible date of adoption December 10, 1993

For further information, please call. (512) 206-3204

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Chapter 45. Marketing Practices

Subchapter C. Standards of Identity for Malt Beverages

• 16 TAC §45.79

The Texas Alcoholic Beverage Commission proposes an amendment to §45.79, concerning alcoholic content. The amendment to the Texas Alcoholic Beverage Code, §101.41(d)(1), effective September 1, 1993, deleted the label prohibition regarding the alcoholic strength of the product.

Marc Allen Connelly, assistant attorney general, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section

Mr. Connelly 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 to conform with new statutory changes There will be no effect on small businesses There is no anticipated economic cost to persons who are required to comply with the section as proposed

Comments on the proposal may be submitted to Gayle Gordon, General Counsel, P.O. Box 13127, Austin, Texas 78711, (512) 206-3204

The amendment is proposed under the Alcoholic Beverage Code, §5.31, which provides the Texas Alcoholic Beverage Commission with the authority to prescribe and publish rules necessary to carry out the provisions of the Texas Alcoholic Beverage Code

§45.79. Alcoholic Content

(a) The alcoholic content and the percentage and quantity of the original extract **may** [shall not] be stated.

(b) If the alcoholic content is stated, it shall be stated in percentage of alcohol by weight, and shall not be stated by proof or by maximum or minimums.

(c) All portions of any alcoholic content statement shall be of the same size and kind of lettering and of equally conspicuous color.

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

Issued in Austin, Texas, on November 1, 1993.

TRD-9331452 Gayle Gordon
General Counsel
Texas Alcoholic Beverage Commission

Earliest possible date of adoption December 10, 1993

For further information, please call (512) 206-3204

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Chapter 50. Alcohol Awareness and Education-Program Administration

• 16 TAC §§50.2-50.10

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

The Texas Alcoholic Beverage Commission proposes the repeal of §§50. 2-50.10, concerning the minimum substantive and procedural requirements for the approval, conducting, and certification of seller-server training programs.

The repeal is proposed for the purpose of allowing new rules which are more specific to be put in place.

Kristin Sprague, coordinator of seller-server certification, has determined that for the first five-year period the repeals are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeals.

Ms. Sprague also has determined that for each year of the first five years the repeals are in effect the public benefit anticipated as a result of enforcing the repeals will be ease of enforcement and compliance by the rules to be substituted therefore. There will be no effect on small businesses There is no anticipated economic cost to persons who are required to comply with the repeals as proposed.

Comments on the proposal may be submitted to Kristin Sprague, Coordinator of Seller-Server Certification, P.O. Box 13127, Austin, Texas 78711, (512) 206-3420

The code affected by the repeals is the Alcoholic Beverage Code, §106 14.

§50 2. Definitions and Construction.

§50.3. The Law Pertaining to Intoxicated Persons

§50.4. The Law Pertaining to Minors

§50 5 The Law Pertaining to Proper Identification.

§50.6. Detection of Intoxication.

§50.7. Monitoring Customer Behavior.

§50.8 Physiology.

§50.9. Detection of Minors.

§50 10. Invalid Identification.

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, 1993.

TRD-9331101 Gayle Gordon
General Counsel
Texas Alcoholic Beverage Commission

Earliest possible date of adoption December 10, 1993

For further information, please call: (512) 206-3204

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• 16 TAC §50.2

The Texas Alcoholic Beverage Commission proposes new §50.2, concerning definitions (customer, intoxication, seller, student or trainee and construction). The definitions and rules of construction are set out in order to facilitate the interpretation of the other rules proposed under the Alcoholic Beverage Code, Texas Civil Statutes, §106.14.

Kristin Sprague, coordinator of seller-server certification, has determined that there will be no significant fiscal implications as a result of enforcing or administering the section for the first five-year period on either units of state or local government.

Ms. Sprague 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 better education of the public concerning laws involving intoxication and the purchase of alcohol by a minor, which will in turn aid in the enforcement of the Alcoholic Beverage Code. There will be no significant effect on small businesses. The anticipated economic cost to persons who are required to comply with the section as proposed will be negligible

Comments on the proposal may be submitted to Kristin Sprague, Coordinator of Seller-Server Certification, P O. Box 13127, Austin, Texas 78711, (512) 206-3420

The new section is proposed under the Alcoholic Beverage Code, Texas Civil Statutes, §106.14 and §5 31, which provide the Texas Alcoholic Beverage Commission with the authority to pass rules to establish the minimum requirements for seller training programs.

§50.2. Definitions and Construction

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

(1) Customer–a person, patron, or member of an establishment where the certified trainee is an agent or employee The term is not limited to persons who have been sold or served alcoholic beverages by an agent or employee of the establishment

(2) Intoxication–as that term is defined in Texas Civil Statutes, Article 67011-1(a)(2), to wit:

(A) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body; or

(B) having an alcohol concentration of 0 10 or more

(3) Program–seller training program, as that term is used in the Texas Alcoholic Beverage Code, §106.14.

(4) Seller or server–one who sells, serves, dispenses or delivers alcoholic beverages under the authority of a license or permit.

(5) Student or trainee–a seller or server attending or participating in a seller training program.

(b) Each word and term used in this chapter shall have the meaning given to it by:

(1) a definition in this chapter, or

(2) a definition in the Texas Alcoholic Beverage Code, or

(3) a definition in the Texas Penal Code, Titles 1, 2, or 3, or

(4) the commonly accepted meaning if it were used in the Texas Alcoholic Beverage Code. In the event of conflict, the lower-numbered provision in this paragraph shall control

(c) In the event of any doubt, conflict, or ambiguity

(1) this chapter shall be construed as a whole,

(2) the manifest spirit of this chapter shall control over the letter of this chapter

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

Issued in Austin, Texas, on October 27, 1993

TRD-9331100 Gayle Gordon
General Counsel
Texas Alcoholic Beverage Commission

Earliest possible date of adoption. December 10, 1993

For further information, please call (512) 206-3204

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• 16 TAC §50.3

The Texas Alcoholic Beverage Commission proposes new §50 3, concerning the procedures and requirements to become a certified seller-server training program, as well as the program content requirements as necessitated by Texas Civil Statutes, §106 14

Kristin Sprague, coordinator of seller-server certification, has determined that there will be no significant fiscal implications as a result of enforcing or administering the section for the first five year period on either units of state or local government

Ms Sprague also has determined that for each year of the first five years the section as proposed is in effect the public benefits anticipated as a result of enforcing the section will be better education of the public concerning laws involving intoxication and the purchase of alcohol by a minor which will in turn aid in the enforcement of the Alcoholic Beverage Code. There will be no significant effect on small businesses. The anticipated economic cost to persons who are required to comply with the section as proposed will be negligible.

Comments on the proposal may be submitted to Kristin Sprague, Coordinator of Seller-Server Certification, P O. Box 13127, Austin, Texas, 78711, (512) 206-3420.

The new section is proposed under Alcoholic Beverage Code, Texas Civil Statutes, §106.14 and §5.31, which provide the Texas Alcoholic Beverage Commission with the authority to pass rules to establish the minimum requirements for seller training programs.

§50.3. Application for Program Approval.

(a) Application for program approval shall be made by the person, corporation, or other entity who will administer and supervise the actual teaching of the program to Texas sellers and servers. The commission specifically finds that the training entity or school is an inseparable part of the seller training program. The integrity and ability of the people directly engaged in the administration, supervision, and training of the curriculum to seller trainees are an integral part of the program contemplated by the Texas Alcoholic Beverage Code, §106 14 Therefore, a curriculum, alone, is not eligible for approval.

(b) Application for approval shall be made in such manner as may be directed by the administrator upon forms provided by the commission

(c) No licensee or permittee, or his agent, servant, or employee, or any subsidiary or affiliate, may directly or indirectly conduct, sponsor, or support a seller training program approved under this chapter except as provided in the Texas Alcoholic Beverage Code, §106.14(c) and (d).

(d) A licensee or permittee may be a member of an Advisory Board, but not the Governing Board of a non-profit agency which sponsors a seller training program.

(e) A bona fide state trade association qualified under this section may train personnel of its own regular membership and non-members of the same level of the alcoholic beverage industry For the purposes of this subsection, package stores which hold local distributor's permits and private clubs shall be considered to be retailers. State retail trade associations may also train individual members of the general public To qualify under this subsection a trade association must

(1) be a statewide organization with members in at least ten Texas counties;

(2) have been in existence as a statewide organization for at least 20 years,

(3) not be an organization primarily composed of members of a particular retail chain.

(f) The provisions of this section prohibiting the conducting or sponsoring of the training of retail-level sellers by persons engaged directly or indirectly in the manufacturing or wholesaling levels of the industry shall not be construed to prohibit a person or entity engaged in manufacturing alcoholic beverages for national distribution from contributing to the development of a curriculum of seller training being developed for national use provided that any such contribution or involvement shall be at arm's-length and shall not be directly or indirectly tied to the actual offering of training to employees of any retailer, group of retailers, or the general public Such involvement by an alcoholic beverage manufacturer shall be in a primarily noncommercial manner consistent with the spirit and intent of the provisions of the Texas Alcoholic Beverage Code and the rules of the commission prohibiting the tied-house and prohibiting the furnishing of things of value to a retailer of alcoholic beverages.

(g) No licensee, permittee, or other person engaged in the manufacturing or wholesaling level of the alcoholic beverage industry, or any agent, servant, or employee of any of those, may directly or indirectly conduct or sponsor a seller training program for retail level employees or members of the general public. Licensees, permittees, or other persons engaged in the manufacturing or wholesaling level of the alcoholic beverage industry may however provide meeting facilities for seller training programs.

(h) Each application shall be accompanied by a full and complete copy of the curriculum, including a copy of all materials to be used therewith, including workbooks, videos, and examinations The curriculum and other materials shall be indexed and labeled in detail to indicate the location of all of the requirements for program approval specified in this chapter. The amount of time allocated to cover each segment of the curriculum shall be specified with the minimum requirement of four hours including a maximum of 30 minutes for breaks. Programs utilizing a different format from lecturing will be evaluated case by case. Each application shall also be accompanied by a trainer development program which includes a minimum of eight hours of study time, eight hours of observation and eight hours of practice teaching in front of an audience. The initial trainer for a school-program may substitute the eight hours of observation for an additional eight hours of practice teaching (with or without a live audience).

(i) The program shall include.

(1) Section 50.2(a) (2) of this title (relating to The Definition of Intoxication).

(2) The Law Pertaining to Intoxicated Persons. Each approved seller training program shall review and explain all provisions of the Texas Alcoholic Beverage Code pertaining to intoxicated persons and provisions of the Texas Penal Code pertaining to public intoxication and shall include a discussion of any significant court decisions or opinions of the attorney general of Texas which the administrator may from time to time determine to be appropriate.

(A) Texas Alcoholic Beverage Commission rules, §50 2;

(B) the Alcoholic Beverage Code, §101.63(a),

(C) the Penal Code, §42.08(a);

(D) the Alcoholic Beverage Code, §104.01(5);

(E) the Alcoholic Beverage Code, Chapter 2,

(F) the Alcoholic Beverage Code, §106.14; and

(G) El Chico *v* Poole

(3) The Law Pertaining to Minors Each approved seller training program shall review and explain all provisions of the Texas Alcoholic Beverage Code relating to the sale or service of alcoholic beverages to minors, the provisions of the code relating to purchase, possession, or consumption of alcoholic beverages by minors and the provisions of the code relating to a person making alcoholic beverages available to a minor or permitting a minor to possess or consume alcoholic beverages, and shall include a discussion of any significant court decisions or opinions of the attorney general of Texas which the administrator may from time to time determine to be appropriate.

(A) the Alcoholic Beverage Code, §106 01;

(B) the Alcoholic Beverage Code, §106.02;

(C) the Alcoholic Beverage Code, §106 025,

(D) the Alcoholic Beverage Code, §106 03,

(E) the Penal Code, §6.03(d),

(F) the Alcoholic Beverage Code, §106.04 and §106.05;

(G) the Alcoholic Beverage Code, §106.06;

(H) the Alcoholic Beverage Code, §106 07;

(I) the Alcoholic Beverage Code, §106.14; and

(J) the Alcoholic Beverage Code, Chapter 2.

(4) The Law Pertaining to Proper Identification. Each approved seller training program shall review and explain the Texas laws pertaining to false, counterfeit, or deceptively similar identification documents including, specifically, the Texas Traffic Laws, Driver's License, Texas Civil Statutes, Article 6687b, Article II, §11(a) and §14A(a); Article IV, §32(a), §32A(a) and (b), and 33(a); and Article VI, §44A(a), and shall include a discussion of any significant court decisions or opinions of the attorney general of Texas which the administrator may from time to time determine to be appropriate.

(5) Detection of Intoxication.

(A) Each approved seller training program shall explain how to detect possible intoxication. It shall describe the common indicators including slurred speech, mental confusion, impaired balance, impaired motor ability, bloodshot eyes, the smell of alcohol on the breath, dishevelment, nausea, and signs of lost control of bladder or bowels. The program shall note that an intoxicated person may sometimes display none of the common indicators. It shall describe ways to detect an atypical intoxicated person through methods such as conversations calculated to reveal emotional stability or common indicators which might not otherwise be manifest.

(B) Students shall be made aware that serious illness can masquerade as intoxication All students shall be instructed to recognize bracelet and necklace emblems of the Medic Alert Foundation and the significance of such identification and be provided a copy of said Medic Alert Emblem.

(6) Monitoring Customer Behavior.

(A) Each approved seller training program shall describe techniques for monitoring customer behavior for the purpose of implementing timely intervention pursuant to subsections (11) and (12) of this section It shall describe methods to

obtain appropriate information in a commercially acceptable manner, including:

(i) observing customer response during any conversations with the seller;

(ii) observing customer interaction with third parties;

(iii) observing the customer's initial mood and general conduct; and

(iv) observing any change in any of the customer behavior previously mentioned.

(B) Each program shall describe and explain typical warning signs that customer behavior may be degenerating toward illegal behavior. Such warning signs shall include:

(i) the development of any indicator of intoxication other than the smell of alcohol on the breath;

(ii) any continuing argument or physical confrontation with any person; or

(iii) any rapid or pronounced change in mood or emotional state such as excessive euphoria, sadness, confusion, excitability, or aggressiveness.

(7) Physiology.

(A) Each approved seller training program shall include a basic explanation of how the human body reacts to the ingestion of beverage alcohol. It shall use simple language and concepts. It shall explain the effect of variables including body weight and type, gender, muscle/fat ratios, type, and timing of food consumption, fatigue, and common diseases or disorders. It shall explain how alcohol can interact with many types of medicines and other drugs.

(B) Each program shall include a basic discussion of alcoholism as a disease and the addictive property of alcohol.

(C) Each program shall describe the Know Your Limits Chart developed by the Distilled Spirits Council of the United States, Inc., or a similar chart, and provide a copy of the chart.

(D) Each program shall describe Drink Counting, inasmuch as the body eliminates about one drink an hour, to determine the number of drinks remaining in the body.

(8) Detection of Minors.

(A) Each approved seller training program shall explain techniques for determining if a customer is a minor. It shall explain the common signs of underage status including lack of physical maturity. It shall stress that most minors are mature in physical appearance before the age of majority, and that signs of physical maturity are not a reliable guide.

(B) Each program shall describe and explain conduct and mannerisms which might raise a suspicion of minority status. It shall include:

(i) a discussion of current fads and fashions in clothing, accessories, and grooming among minors;

(ii) a description, based upon authoritative sources, of behavior patterns characteristic of minors;

(iii) an explanation of how to look for suspicious behavior such as:

(I) a group of young-appearing persons pooling their money and giving it to the oldest-appearing member;

(II) a youthful appearing person waiting in the background away from the point of purchase or service while an adult obtains more than one serving; and

(III) prior observation that a particular adult has purchased for a youthful appearing person.

(9) Identification.

(A) Each approved seller training program shall explain how to detect invalid identification documents presented in an attempt to establish proof of adult status. This shall include counterfeit and altered official documents. It shall also include unofficial documents which are deceptively similar to official documents. Emphasis shall be placed on drivers licenses and identification cards issued by the state of Texas and other states. Each program shall describe the most common types of counterfeiting and alteration and shall describe warning signs such as erasures, cut-and-paste numerals, substandard or inconsistent graphics and substandard lamination.

(B) Each approved seller training program shall describe valid driver's licenses and identification certificates issued by the Texas Department of Public Safety.

(10) Intervention Pertaining to Minors.

(A) Each approved seller training program shall describe and explain techniques of intervention to prevent or terminate illegal sale, service, possession, or consumption regarding a minor.

(B) Such techniques shall include, when appropriate to the circumstances:

(i) ask for and carefully examine an identification;

(ii) removal of the alcoholic beverages in a non-aggressive manner from the reach or sight of the offender;

(iii) an explanation that the demeanor of the seller or server should never be such that is likely to provoke violence;

(iv) an explanation of the obligation to notify law enforcement authorities in the event that intervention attempts fail; and

(v) specific examples of words and conduct which may be used in an attempt to avoid or terminate illegal activity amicably.

(11) Intervention Pertaining to Intoxication.

(A) Each approved seller training program shall explain effective techniques of intervention with persons who are intoxicated or who appear to be becoming intoxicated. This part of the program is of considerable importance to the public peace and safety and shall therefore receive due emphasis. The program may take into account the fact that permittees, licensees, and their employees will generally desire to avoid alienating a customer whenever possible. Therefore, the program shall describe specific language and conduct of the seller or server which is calculated to terminate or avoid illegal behavior of the customer as amicably as possible.

(B) Such techniques shall include, when appropriate to the circumstances:

(i) an explanation that the demeanor of the seller or server should never be such that is likely to provoke violence;

(ii) removal of the alcoholic beverages in a non-aggressive manner from the reach or sight of the offender;

(iii) specific examples of words and conduct which may be used in an attempt to avoid or terminate illegal activity amicably;

(iv) an explanation of how to slow down service of alcoholic beverages; and

(v) a suggestion that food or snacks be served and an explanation of the types of food most likely to slow or reduce intoxication.

(C) The student shall be made aware that coffee and other caffeine-containing products do not reduce intoxication, but may misleadingly appear to do so.

(D) The student shall be made aware of designated driver programs and shall be encouraged to provide such special services and courtesies to a designated driver as may be allowed by the student's employer.

(E) The student shall be made aware of the obligation to notify law enforcement authorities in the event that intervention attempts fail.

(12) Additional Program Content.

(A) The administrator is hereby delegated the authority to modify or add requirements for the content of approved seller training programs in addition to the requirements specified in this chapter.

(B) Any approved seller training program may contain any additional material except material which the administrator finds under the circumstances tends to be:

(i) a substantial detraction from the effectiveness of the minimum program requirements; or

(ii) a substantial detriment to the health, safety, or welfare of the general public or any segment thereof.

(C) Approved programs are encouraged to exceed the minimum requirements of program content and to develop new methods and techniques designed to fulfill the intent of the Texas Alcoholic Beverage Code, §106.14.

(13) Appropriate testing of trainees in a form and manner adequate to demonstrate the effectiveness of the training program shall be required.

(j) Each application for program approval shall be accompanied by a cashiers check, certified check, or U.S. postal money order in the amount of $250.

(k) Programs found to be acceptable under this chapter shall be approved in writing by the administrator in such form as he may deem to be appropriate.

(l) Approval shall be valid for a period of three years unless earlier revoked.

(m) A person commits an offense under the Texas Alcoholic Beverage Code, §101.61, if he falsely represents to any person that a program has been approved by the commission or administrator, or misleads any person into believing that a program is approved by the commission or administrator when, in fact, it is not.

(n) The developer of a curriculum, or his authorized agent, may for marketing purposes in the normal course of business represent that the basic curriculum is part of an approved program, provided such representation is, in fact, truthful.

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, 1993.

TRD-9331099 Gayle Gordon
General Counsel
Texas Alcoholic Beverage Commission

Earliest possible date of adoption. December 10, 1993

For further information, please call (512) 206-3204

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• 16 TAC §50.4

The Texas Alcoholic Beverage Commission proposes new §50.4, concerning the administration of the program with respect to filing reports, class facilities, eligible trainees, program presentation, testing, and trainee certification.

Kristin Sprague, coordinator of seller-server certification, has determined that there will be no significant fiscal implications as a result of enforcing or administering the section for the first five year period on either units of state or local government.

Ms. Sprague also has determined that for each year of the first five years the section as proposed is in effect the public benefits anticipated as a result of enforcing the section will be better education of the public concerning laws involving intoxication and the purchase of alcohol by a minor, which will in turn aid in the enforcement of the Alcoholic Beverage Code. There will be no significant effect on small businesses The anticipated economic cost to persons who are required to comply with the section as proposed will be negligible

Comments on the proposal may be submitted to Kristin Sprague, Coordinator of Seller-Server Certification, P O Box 13127, Austin, Texas, 78711, (512) 206-3420

The new section is proposed under the Alcoholic Beverage Code, Texas Civil Statutes, §106.14 and §5.31, which provide the Texas Alcoholic Beverage Commission with the authority to pass rules to establish the minimum requirements for seller training programs

§50.4. Program Administration

(a) The Texas Alcoholic Beverage Commission shall receive notification from each school at least three business days prior to the session date. Said notice shall include the date, time, and location of each class and shall be received in the headquarters of the Texas Alcoholic Beverage Commission, P.O Box 13127, Austin, Texas 78711 on forms prescribed by the commission. The commission must be notified by phone of session cancellations prior to the actual session date except when cancellation cannot be anticipated before the session's scheduled start. When cancellation cannot be anticipated, the commission must be notified either in person, by phone or by mail postmarked no later than the next business day.

(b) All training facilities shall contain:

(1) adequate seating facilities for all students;

(2) appropriate space to ensure that visuals can be seen from all seating positions,

(3) private space to limit distractions; and

(4) access to a restroom.

(c) Sessions may be monitored unannounced to evaluate the trainer presentation and the classroom environment

(d) Programs approved under the Texas Alcoholic Beverage Code, §106.14(c) and (d), shall be limited to employees of the said licensee, permittee, or hotel management company

(e) No class may exceed 50 trainees

(f) Discussions must be presented in a manner consistent with the contents of the approved instructor's guide

(g) Each program session will be presented in a continuous block of instruction While instruction may be interrupted for brief breaks, these should be limited in number and duration The program must be presented in its entirety to each student in a language approved for use by the instructor

(h) Each trainee is to be tested immediately following the conclusion of instruction at the program session he or she attends Testing of session participants at any other place or time is prohibited

(i) Each trainee must correctly answer at least 70% of the questions found on the test administered to him Schools are encouraged to set higher completion standards Trainees who receive failing scores may be immediately retested once Otherwise, trainees must repeat the full course.

(j) All tests shall be administered on a closed-book basis

(k) At the trainer's discretion the test may be offered in a language best un-

derstandable by the trainee. Bilingual instructors may, in response to direct inquiries, clarify test questions using another language.

(l) Each test must be maintained by the school for a period of at least four years and be made available to the Commission upon written request.

(m) Application for trainee certification shall be made by the training entity or school to the commission. Applications must be delivered or postmarked within 30 calendar days of the date on which the session was held upon forms prescribed and approved by the administrator.

(n) Each application for trainee certification shall contain the name, social security number, and date of birth of each student in that class who has completed the training program and has passed the required test.

(o) The certified trainer who actually conducted the program shall in connection with the application for trainee certification verify in writing under oath that each designated student has successfully completed the program approved by the commission on the date indicated and shall verify such other facts as the administrator may from time to time direct.

(p) Applications for trainee certification shall be accompanied by a cashiers check, certified check, or U.S. postal money order in the amount of $2.00 per trainee

(q) Unless he determines otherwise under subsection (r) of this section, the administrator shall send the certificates to the school which trained the trainees. Upon receipt, the school shall make a good-faith effort to promptly transmit each certificate to the appropriate trainee. Failure to comply with this requirement is grounds for revoking or suspending approval of the seller training program administered by that school.

(r) The administrator is authorized to distribute the certificates in any other manner which he may determine to be appropriate.

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

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TRD-9331098 Gayle Gordon
General Counsel
Texas Alcoholic Beverage Commission

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For further information, please call (512) 206-3204

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• 16 TAC §50.5

The Texas Alcoholic Beverage Commission proposes new §50.5, concerning the denial, revocation, or suspension of program approval.

Kristin Sprague, coordinator of seller-server certification, has determined that there will be no significant fiscal implications as a result of enforcing or administering the section for the first five year period on either units of state or local government.

Ms Sprague also has determined that for each year of the first five years the section as proposed is in effect the public benefits anticipated as a result of enforcing the section will be better education of the public concerning laws involving intoxication and the purchase of alcohol by a minor, which will in turn aid in the enforcement of the Alcoholic Beverage Code There will be no significant effect on small businesses. The anticipated economic cost to persons who are required to comply with the section as proposed will be negligible

Comments on the proposal may be submitted to Kristin Sprague, Coordinator of Seller-Server Certification, P.O Box 13127, Austin, Texas, 78711, (512) 206-3420

The new section is proposed under Alcoholic Beverage Code, Texas Civil Statutes, §106.14 and §5.31, which provide the Texas Alcoholic Beverage Commission with the authority to pass rules to establish the minimum requirements for seller training programs

§50 5. Denial, Revocation, or Suspension of Program Approval

(a) The administrator may deny approval of any program upon a finding that

(1) the program does not meet the minimum course requirements set out in this chapter, or

(2) the Application for School-Program Certification is not correct or complete; or

(3) any agent of the program has been convicted of a felony or of a misdemeanor related to theft, fraud, or misrepresentation and two years have not passed since the discharge of any sentence imposed as a result of the conviction; or

(4) any agent of a privately sponsored program is an alcoholic beverage licensee or permittee, or

(5) any agent violates this chapter or the Alcoholic Beverage Code, §106 14.

(b) The applicant has the right to request a hearing within ten days after receipt of the notice of denial

(c) The administrator may, after notice and opportunity for hearing, revoke or suspend approval of any program upon a finding that

(1) the manner in which the program is being, or has been, administered has substantially impaired the effectiveness of the program; or

(2) any agent of the program has made a false or misleading statement, report, or representation to the commission regarding the conduct or administration of the program; or

(3) any agent of the program has been convicted of a felony or of a misdemeanor related to theft, fraud, or misrepresentation and two years have not passed since the discharge of any sentence imposed as a result of the conviction, or

(4) the program has failed to make a timely report or has failed to communicate any information to the Texas Alcoholic Beverage Commission required by this chapter; or

(5) any agent violates this chapter or the Alcoholic Beverage Code, §106 14

(d) The entity administering the program has the right to request a hearing within ten days after receipt of the notice of revocation or suspension

(e) A person whose school-program certification is revoked under this section may not apply for another certificate under this chapter until one year has elapsed from the date of revocation

(f) If the applicant or entity fails to request a hearing pursuant to subsection (b) or (d) of this section, the right to a hearing is waived and the administrator's finding and decision is final The administrator may assess a penalty based upon that finding and decision

(g) Denial, revocation, or suspension shall be served at the main offices of the applicant or its registered agent for service either by certified mail or by personal service upon any adult agent or employee of the applicant at the said main offices

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

Issued in Austin, Texas, on October 27, 1993

TRD-9331097 Gayle Gordon
General Counsel
Texas Alcoholic Beverage Commission

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For further information, please call (512) 206-3204

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• 16 TAC §50.6

The Texas Alcoholic Beverage Commission proposes new §50 6, concerning the application for a trainer's certification

Kristin Sprague, coordinator of seller-server certification, has determined that there will be no significant fiscal implications as a result of enforcing or administering the section for the first five year period on either units of state or local government.

Ms. Sprague also has determined that for each year of the first five years the section as proposed is in effect the public benefits anticipated as a result of enforcing the section will be better education of the public concerning laws involving intoxication and the purchase of alcohol by a minor, which will in turn aid in the enforcement of the Alcoholic Beverage Code. There will be no significant effect on small businesses. The anticipated economic cost to persons who are required to comply with the section as proposed will be negligible.

Comments on the proposal may be submitted to Kristin Sprague, Coordinator of Seller-Server Certification, P.O. Box 13127, Austin, Texas, 78711, (512) 206-3420.

The new section is proposed under Alcoholic Beverage Code, Texas Civil Statutes, §106.14 and §5.31, which provide the Texas Alcoholic Beverage Commission with the authority to pass rules to establish the minimum requirements for seller training programs.

§50.6. Application for Trainer Certification.

(a) Only trainers holding currently valid certification under this section shall be eligible to teach an approved seller training program. This requirement is not intended to prohibit the use of an uncertified guest instructor who has special expertise in the field which he teaches. The certified trainer shall be present during guest instruction and shall remain responsible for training quality.

(b) Application for trainer certification shall be made by the person to be certified in such manner as may be directed by the administrator upon forms provided by the commission.

(c) Each application shall include certification by an approved seller training program entity or school that the applicant is qualified and competent to teach that seller training program.

(d) Each application shall be accompanied by a cashiers check, certified check, or U.S. postal money order in the amount of $5.00.

(e) Trainers found to be acceptable under this chapter shall be approved in writing by the administrator in such form as he may deem to be appropriate.

(f) Approval shall be valid for a period of three years unless earlier revoked.

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

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General Counsel
Texas Alcoholic Beverage Commission

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• 16 TAC §50.7

The Texas Alcoholic Beverage Commission proposes new §50.7, concerning the denial, revocation, or suspension for a trainer's certification.

Kristin Sprague, coordinator of Seller-Server Certification, 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. Sprague 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 better education of the public concerning laws involving intoxication and the purchase of alcohol by a minor, which will in turn aid in the enforcement of the Alcoholic Beverage Code. There will be no significant effect on small businesses The anticipated economic cost to persons who are required to comply with the section as proposed will be negligible.

Comments on the proposal may be submitted to Kristin Sprague, Coordinator of Seller-Server Certification, P.O. Box 13127, Austin, Texas 78711, (512) 206-3420.

The new section is proposed under the Alcoholic Beverage Code, Texas Civil Statutes, §106.14 and §5.31, which provide the Texas Alcoholic Beverage Commission with the authority to pass rules to establish the minimum requirements for seller training programs.

§50.7. Denial, Revocation, or Suspension of Trainer Approval

(a) The administrator may deny approval of any trainer upon a finding that:

(1) the applicant for a privately sponsored program is an agent of an alcoholic beverage licensee or permittee; or

(2) the application for trainer certification is not correct or complete, or

(3) the applicant has been convicted of a felony or of a misdemeanor related to theft, fraud, or misrepresentation and two years have not passed since the discharge of any sentence imposed as a result of the conviction.

(b) The applicant has the right to request a hearing within ten days after receipt of the notice of denial.

(c) The administrator may, after notice and opportunity for hearing, revoke or suspend approval of any trainer upon a finding that:

(1) the trainer has conducted a seller training program in an incompetent or ineffective manner; or

(2) the trainer has made a false or misleading statement, report, or representation to the commission regarding the conduct or administration of an approved seller training program; or

(3) the trainer has been convicted of a felony or of a misdemeanor related to theft, fraud, or misrepresentation and two years have not passed since the discharge of any sentence imposed as a result of the conviction; or

(4) the trainer has violated any rule in this chapter or the Alcoholic Beverage Code, §106.14.

(d) The trainer has the right to request a hearing within ten days after receipt of the notice of revocation or suspension.

(e) A trainer whose certification is revoked under this section may not apply for another certificate under this chapter until one year has elapsed from the date of revocation.

(f) If the applicant or trainer fails to request a hearing pursuant to subsection (b) or (d) of this section, the right to a hearing is waived and the administrator's finding and decision is final. The administrator may assess a penalty based upon that finding and decision.

(g) Revocation or suspension shall be served upon the trainer either in person or by certified mail A copy of the revocation or suspension shall be served upon the chief executive officer of each seller training program employing that trainer, either in person or by certified mail directed to the main offices of the seller training program or its registered agent for 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.

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General Counsel
Texas Alcoholic Beverage Commission

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For further information, please call. (512) 206-3204

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• 16 TAC §50.8

The Texas Alcoholic Beverage Commission proposes new §50 8, concerning the certification of trainees who have successfully completed an approved seller training program.

Kristin Sprague, coordinator of Seller-Server Certification, 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. Sprague 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 better education of the public concerning laws involving intoxication and the purchase of alcohol by a minor, which will in turn aid in the enforcement of the Alcoholic Beverage Code There will be no significant impact on small businesses. The anticipated economic cost to persons who are required to comply with the section as proposed will be negligible.

Comments on the proposal may be submitted to Kristin Sprague, Coordinator of Seller-Server Certification, P.O. Box 13127, Austin, Texas 78711, (512) 206-3420

The new section is proposed under the Alcoholic Beverage Code, Texas Civil Statutes, §106.14 and §5.31, which provide the Texas Alcoholic Beverage Commission with the authority to pass rules to establish the minimum requirements for seller training programs.

§50.8. Trainee Certification.

(a) Upon receipt of proper application the administrator shall issue an appropriate certificate to each trainee signifying that the trainer has successfully completed an approved seller training program.

(b) Each certificate shall be valid for two years.

(c) The commission shall require an additional $2.00 for each duplicate certificate issued.

(d) The commission shall maintain a list of currently certified seller trainees by name and social security number. This list shall be a public record by name only. The social security numbers shall not be a public record. However, if the inquiring party submits a name and social security number for verification of certification, the commission may tell the inquiring party whether or not the subject of the inquiry is a currently certified trainee of an approved seller training program

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

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General Counsel
Texas Alcoholic Beverage Commission

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• 16 TAC §50.9

The Texas Alcoholic Beverage Commission proposes new §50 9, concerning the revocation of trainee certification.

Kristin Sprague, coordinator of Seller-Server Certification, 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. Sprague 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 better education of the public concerning laws involving intoxication and the purchase of alcohol by a minor, which will in turn aid in the enforcement of the Alcoholic Beverage Code There will be no significant effect on small businesses. The anticipated economic cost to persons who are required to comply with the section as proposed will be negligible

Comments on the proposal may be submitted to Kristin Sprague, Coordinator of Seller-Server Certification, P.O. Box 13127, Austin, Texas 78711, (512) 206-3420

The new section is proposed under the Texas Alcoholic Beverage Code, Texas Civil Statutes, §106.14 and §5 31, which provide the Texas Alcoholic Beverage Commission with the authority to pass rules to establish the minimum requirements for seller training programs.

§50 9. Revocation of Trainee Certification.

(a) The administrator may, after notice and hearing, revoke certification of any trainee upon finding that the trainee has been finally convicted of two violations of the Texas Alcoholic Beverage Code pertaining to minors or intoxicated persons, or a combination thereof, which occurred within any period of 24 months.

(b) Any violation of section (a) of this section that results in revocation of a trainee certification will prohibit the commission from issuing a new certification to that person for one year from the date of revocation.

(c) Revocation shall be served upon the trainee either in person or by certified mail A copy of the revocation shall be sent to the chief executive officer of the seller training program which trained that trainee.

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

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General Counsel
Texas Alcoholic Beverage Commission

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• 16 TAC §50.10

The Texas Alcoholic Beverage Commission proposes new §50 10, concerning the exemption from administrative action that a licensee/permittee may receive as a result of requiring their employees to attend a commission-approved seller training program.

Kristin Sprague, coordinator of Seller-Server Certification, has determined that for the first five-year period the section is in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the section.

Ms Sprague 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 better education of the public concerning laws involving intoxication and the purchase of alcohol by a minor, which will in turn aid in the enforcement of the Alcoholic Beverage Code. There will be no significant effect on small businesses. The anticipated economic cost to persons who are required to comply with the section as proposed will be negligible.

Comments on the proposal may be submitted to Kristin Sprague, Coordinator of Seller-Server Certification, P.O. Box 13127, Austin, Texas 78711, (512) 206-3420.

The new section is proposed under the Texas Alcoholic Beverage Code, Texas Civil Statutes, §106.14 and §5.31, which provide the Texas Alcoholic Beverage Commission with the authority to pass rules to establish the minimum requirements for seller training programs.

§50.10. Licensee/Permittee Exemption from Administrative Action. The commission shall require each Licensee/Permittee who claims exemption from administrative action under the Texas Alcoholic Code, §106. 14(a)(1), to produce records indicating that every employee who sells, dispenses, or delivers an alcoholic beverage in the course of employment was certified through a commission-approved server trainer program on the day prior to the violation, unless an employee had been employed for less than 30 days at the time of the violation

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

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General Counsel
Texas Alcoholic Beverage Commission

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For further information, please call (512) 206-3204

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Part IV. Texas Department of Licensing and Regulation

Chapter 66. Registration of Property Tax Consultants

- **16 TAC §§66.61-66.63, 66.65, 66.72**

The Texas Department of Licensing and Regulation proposes amendments to §§66.61 and 66.62, and new §§66.63, 66.65, and 66.72, concerning the registration of property tax consultants. The sections define the purpose, method of reporting, procedure for calling meetings, and reimbursement of expenses of the Property Tax Consultants Advisory Council, and provide the means for the department to approve and recognize private providers of property tax consulting continuing education.

James D. Brush, II, director, Policies and Standards Division, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr Brush also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be more effective and efficient functioning of the board and increased efficiency of the process of approval for recognized private providers of property tax consultant education offerings There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Comments on the proposal may be submitted to James D. Brush, II, Director, Policies and Standards Division, Texas Department of Licensing and Regulation, P O. Box 12157, 920 Colorado, Eighth Floor, Austin, Texas 78711.

The new sections are proposed under Texas Civil Statutes, Article 8886, which provides the Texas Department of Licensing and Regulation with the authority to promulgate and enforce a code of rules and take all action necessary to assure compliance with the intent and purposes of the Act

The proposed amendments and new sections implement Texas Civil Statutes, Article 8886, §4, 6, and 10

§66 61. ***Responsibilities*** *[Responsibility] of Department-Examinations*

(a)-(c) (No change.)

§66 62 ***Resonsibilities*** *[Responsibility] of Department-Recognizing Private Providers*

(a) **The commissioner may recognize property tax consultant continuing education providers who apply on a form provided by the commissioner. To be approved as a recognized private provider a person must satisfy the commissioner as to the person's ability to administer, with honesty, trustworthiness, and integrity, continuing education courses approved by the commissioner. The commissioner may** [department shall] recognize [only] property tax consulting education providers which are registered with or exempted by the Texas Education Agency under Title 19, Texas Administrative Code, Chapter 175, Texas Proprietary Schools. [The department shall require submission of either a registration certificate or proof of exemption]

(b) The **commissioner** [department] may approve courses and seminars for upgrade credit and initial continuing education classroom hours, after the provider satisfies the department that the course subject matter is appropriate for the continuing education for property tax consultant registrants and that the information provided in the course will be current and accurate.

(1) (No change.)

(c)-(d) (No change.)

§66.63. Responsibilities of Department-Enforcement.

(a) The department shall investigate complaints which allege acts constituting violations of these sections

(b) The department may conduct on-site audits of any course offered by a recognized private provider An audit report indicating noncompliance with these sections shall be appropriately referred for enforcement.

§66.65 Advisory Council.

(a) The purpose of the Property Tax Consultants Advisory Council is to advise the executive director on standards of practice, conduct, and ethics for registrants, fees, examination contents, and standards of performance for senior property tax consultant examinations, recognition of continuing educational programs and courses, and establishing educational requirements for initial applicants

(b) Recommendations of the Council will be transmitted to the executive director through the director of policies and standards

(c) Council meetings are called by the chair or at the call of a majority of its members. Meetings in excess of those mandated by the Act shall be authorized by the executive director or the executive director's designee.

(d) Expenses reimbursed to council members shall be limited to authorized expenses incurred while on council business and travelling to and from council meetings The least expensive method of travel should be used.

(e) Expenses related to subcommittee meetings will be reimbursed only if authorized by the executive director or the executive director's designee. These expenses will be reimbursed only to the council members appointed to the subcommittee or requested by the chair to assist or appear before the subcommittee.

(f) Expenses paid to council members shall be limited to those allowed by the State of Texas Travel Allowance Guide and Texas Department of Licensing and Regulation policies governing travel allowances for employees.

(g) The council shall consist of three property tax consultant members as specified in the Act and three consumers of services of property tax consultants. The commission may appoint not more than one member who is qualified for exemption under the Act, §2(d)(3).

(h) Members of the council serve for staggered three-year terms with the terms of a property tax consultant member and a consumer member expiring February 1 of each year. Initial terms under this rule will be established so that one property tax consultant position and one consumer position will expire on February 1 of the years 1995, 1996, and 1997

§66.72 Responsibilities of Registrant-Recognized Private Provider.

(a) The following statement shall be used on all advertising and registration forms: "This course has been approved by the Texas Department of Licensing and Regulation for _____ continuing education including _____ hours of legal education pertaining to Property Tax Consulting This course has been approved for _____ credits which count toward qualification for Senior Property Tax Consultant.

(b) Providers shall retain student attendance records for a period of three years, make copies available to former students, and provide copies to the department upon request

(c) Course roster shall be provided to the Department upon request

(d) Providers or instructors shall fully assist any employee of the department in the performance of an audit or investigation of complaint, and shall provide requested information within the time frame set by the department.

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, 1993

TRD-9331464

Jack W Garison
Executive Director
Texas Department of Licensing and Regulation

Earliest possible date of adoption: December 10, 1993

For further information, please call: (512) 463-3127

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Chapter 67. Auctioneers

- **16 TAC §§67.10, 67.41, 67.42, 67.65, 67.100**

The Texas Department of Licensing and Regulation proposes and amendments to §67.10 and §67.100, new §§67.41, 67.42, and 67.65, concerning licensing of Auctioneers. New §67.41 defines terms in connection with the Education and Recovery Fund, §67.42 describes procedures and responsibilities in relation to payment of claims to aggrieved parties and reimbursement by the auctioneer, and §67.65 defines the purpose, method of reporting, procedure for calling meetings, and makeup of the Auctioneer Education Advisory Board. Amended §67.10 clearly defines auctions with and without reserve, and §67.100 changes the notice the auctioneer is required to give the public from a statement that they are bonded to a statement that a Recovery Fund administered by the department is available to pay claims against an auctioneer.

James D. Brush, II, director, Policies and Standards Division of the Texas Department of Licensing and Regulation, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing the section.

Mr. Brush also has determined that for each of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the section will be more effective and efficient functioning of the board. There will be no effect on small businesses. There is no economic cost to persons required to comply with the sections as proposed.

Comments on the proposal may be submitted to James D Brush, II, Director, Policies and Standards Division, Texas Department of Licensing and Regulation, P.O Box 12157, Austin, Texas 78711.

The new and amended sections are proposed under the Texas Civil Statutes, Article 8700, which authorizes the department to promulgate and enforce a code of rules and take all action necessary to assure compliance with the intent and purposes of the Texas Auctioneer Act.

The Article that is affected by the amendments and new rules is Article 8700, §1.

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

Auction without reserve (also called Absolute Auction) -An auction in which property put up for sale is sold to the highest bidder, where the seller may not withdraw the property from the auction after the auctioneer calls for bids unless no bid is made in a reasonable time, and where the seller may not bid himself or through an agent. An auction without reserve may be held with minimum opening bids if notice is given in all advertisements.

Auction with reserve-An auction in which the seller or his agent reserves the right to establish a minimum bid, accept or reject any and all bids, and withdraw the property at any time prior to the announcement of the completion of the sale by the auctioneer.

§67.41. Education and Recovery Fund-Definitions. For the purpose of filing claims against the Recovery Fund, the following terms have the following meanings.

Person-An individual, partnership, corporation, association, or other legal entity.

Contract-A written or verbal agreement between an auctioneer and a person who wishes to sell property at auction.

§67.42. Education and Recovery Fund-Claims.

(a) If the department determines, either with the agreement of the auctioneer or at a hearing held on a disputed amount, that the auctioneer owes to the aggrieved person damages greater than the maximum of $10,000 allowed under the Act, the auctioneer must pay the amount not paid by the department to the aggrieved party. If the department determines that the auctioneer owes damages to more than one aggrieved person arising out of one auction at one location, and the sum of all damages owed exceeds $20,000, the department shall prorate $20,000 from the Recovery Fund among the aggrieved persons, and the auctioneer must pay the amount not paid to each of the aggrieved persons

(b) The total payment from the Recovery Fund of claims against an auctioneer may not exceed $20,000. If additional claims are filed before the auctioneer has reimbursed the Fund and repaid any amounts due an aggrieved party, the department shall hold a hearing to determine if the additional claims must be satisfied by the auctioneer before the commissioner issues a new license, whether probated or not.

(c) If a claim is paid against an auctioneer, and the auctioneer cannot immediately reimburse the Recovery Fund, the commissioner may allow the auctioneer to sign an agreement to reimburse the Fund at the rate of ten percent of the principal each month plus the interest accrued during the prior month.

(d) If an amount is due an aggrieved party, and the auctioneer cannot immediately pay the aggrieved party, the commissioner may allow the auctioneer to sign an agreement to pay the aggrieved party at the rate of ten percent of the principal each month plus interest accrued during the prior month.

§67.65. Advisory Board.

(a) The purpose of the Auctioneer Education Advisory Board is to advise the executive director on educational matters relating to use of the educational trust fund established with fees collected for the Auctioneer Recovery Fund.

(b) Recommendations of the Board will be transmitted to the executive director through the director of policies and standards.

(c) Board meetings are called by the chair. Meetings in excess of those mandated by the Act shall be authorized by the executive director or the executive director's designee.

(d) The Board shall consist of the auctioneer members specified in the Act, the executive director of the Texas Department of Commerce and the commissioner of education or their designees, and three consumers of services provided by licensed auctioneers.

(e) The consumers of services should include at least one person who consigns property to auctioneers for sale and at least one person who regularly buys at auction. Consumer members serve for terms of two years and expire September 1 of the year of expiration

§67.10. Technical Requirements-General

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

(c) Before beginning an auction, the auctioneer must announce, give notice, display notice and/or disclose.

(1) that the auctioneer conducting the sale is licensed by the department and **is covered by a Recovery Fund administered by the department** [bonded in favor of the Sate of Texas];

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

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

Issued in Austin, Texas, on November 1, 1993.

TRD-9331463

Jack W Garison
Executive Director
Texas Department of Licensing and Regulation

Earliest possible date of adoption. December 10, 1993

For further information, please call. (512) 463-3127

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Chapter 75. Air Conditioning and Refrigeration Contractor License Law

• 16 TAC §§75.40, 75.65, 75.100

The Texas Department of Licensing and Regulation proposes amendments to to §75 40 and §75.100, and new §75.65, concerning Air Conditioning and Refrigeration Contractors The new section defines the purpose, method of reporting, procedure for calling meetings, and reimbursement of expenses of the Air Conditioning and Refrigeration Contractors Advisory Board The amendment to §75 40 requires that contractors purchase the required insurance from admitted companies and the amendment to §75 100 conforms the rule for drain piping associated with air conditioning, refrigeration, and process cooling and heating systems to the rule recently adopted by the Texas State Board of Plumbing Examiners, and makes a clearer statement that air conditioning and refrigeration contractors are subject to the boiler law for work subject to that law.

James D. Brush, II, director, Policies and Standards Division of the Texas Department of Licensing and Regulation, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections

Mr. Brush also has determined that for each of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be more protection for the consumer from more reliable insurance coverage and from installation by qualified license holders Some contractors and individuals who operate a small business and have been using unadmitted companies would pay a lower premium for general liability insurance Insurance rates are no longer regulated, and premiums are based on the amount of business a company does in a year, so the savings to the small contractor or persons required to comply with the rules as proposed cannot be estimated

Comments on the proposal may be submitted to James D. Brush, II, Director, Policies and Standards Division, Texas Department of Licensing and Regulation, P.O Box 12157, Austin, Texas 78711

The new section is proposed under Texas Civil Statutes, Article 8861, which authorize the department to license and regulate air conditioning and refrigeration contractors

The Article that is affected by the amendments and new rule is Texas Civil Statutes, Article 8861, §3 and §3A

§75 40. Insurance Requirement

(a)-(b) (No change)

(c) Insurance must be obtained from an admitted company.

(d)[(c)] The certificate of insurance shall list all deductibles. Deductibles shall be limited to $500 for Class B licenses and to $1,000 for Class A licenses Any contractor whose business affiliation is self-insured must provide an affidavit of responsibility and a certified financial statement

(e)[(d)] A license applicant or holder shall furnish to the department a certificate of insurance The license holder's name, business name, and address must be shown as it appears on the license The certificate form to be submitted shall be the form furnished by the department. Each certificate of insurance will reflect all assumed names used by the license holder and registered with this agency Binders and interim certificates of less than 60 days will not be accepted The certificates of insurance shall be issued to each municipality where air conditioning and refrigeration contracting is performed.

(f)[(e)] The certificate of insurance shall state that the insurance carrier shall notify the department at least 45 days prior to cancellation or nonrenewal by the insurance carrier and at least 10 days after nonrenewal or cancellation by the insured

(g)[(f)] License holders whose proof of insurance expires shall be notified by the department that they have an insurance violation Failure to furnish the required proof shall be grounds for revocation of the license in accordance with Texas Civil Statutes, Article 6252-13c

(h)[(g)] All requests to waive the insurance requirements because the license holder does not contract with the public shall be submitted in writing to the department The request shall contain a detailed explanation of the conditions on which the waiver is being requested and confirmation by employer when applicable

§75 65 Advisory Boards

(a) The purpose of the Air Conditioning and Refrigeration Contractors Advisory Board is to advise the executive director in adopting rules, enforcing and administering the Act, and in setting fees

(b) Recommendations of the Board will be transmitted to the executive director through the director of policies and standards

(c) Board meetings are called by the chair Meetings in excess of those mandated by the Act shall be authorized by the executive director or the executive director's designee

(d) Expenses reimbursed to board members shall be limited to authorized expenses incurred while on board business and travelling to and from board meetings The least expensive method of travel should be used

(e) Expenses related to subcommittee meetings will be reimbursed only if authorized by the executive director or the executive director's designee. These expenses will be reimbursed only to the board members appointed to the subcommittee or requested by the chair to assist or appear before the subcommittee.

(f) Expenses paid to board members shall be limited to those allowed by the State of Texas Travel Allowance Guide and Texas Department of Licensing and Regulation policies governing travel allowances for employees.

§75.100 Technical Requirements.

(a) Boilers.

[(1)] The Texas Boiler Law, the Health and Safety Code, Chapter 755, **and rules, regulate** [provides for rules addressing] the safe construction, installation, inspection, operating limits, alteration, and repair of boilers and their appurtenances. **All who perform any work regulated by this law and rules must comply with them, regardless of the type of license held.** [Those who alter or repair boilers or repair, test, set, or seal safety appliances must possess the applicable American Society of Mechanical Engineers certificate of authorization, National Board of Boiler and Pressure Vessel Inspectors Authorization for use of the "R" or "VR" Stamp or, in the case of owner/operators, a certificate of authorization issued by the department. These certificate holders are not required to hold a license as an air conditioning and refrigeration contractor.]

[(2) All others who install, maintain, or service boilers used in the process of environmental air conditioning, commercial refrigeration, or process cooling or heating must comply with the Texas Boiler Law, the Health and Safety Code, Chapter 755, and Chapter 65 of this title (relating to Boilers), and shall also hold the applicable class license as an air conditioning and refrigeration contractor.]

(b) (No change.)

(c) Piping

(1) (No change)

(2) Drain piping associated with environmental air conditioning, commercial refrigeration, or process cooling or heating systems may be installed by a contractor licensed under this law **if the connection is on the inlet side of a properly installed trap.**

(3) (No change)

(d) (No change)

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

Issued in Austin, Texas, on October 27, 1993

TRD-9331227 Jack W. Garison
Executive Director
Texas Department of Licensing and Regulation

Earliest possible date of adoption: December 10, 1993

For further information, please call: (512) 463-3127

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TITLE 22. EXAMINING BOARDS

Part XIV. Texas Optometry Board

Chapter 273. General Rules

• 22 TAC §273.10, §273.11

The Texas Optometry Board proposes new §273.10 and §273.11, concerning Guaranteed Student Loan Corporation requirements for licensure and public participation in meetings, respectively. Students in default on loans to the Guaranteed Student Loan Corporation will be informed of procedures to follow for repayment agreements in order to renew their professional license. The second rule will allow the general public a specified time on board agenda to appear before the Board to discuss any matter under its jurisdiction.

Lois Ewald, executive director, has determined that there will be fiscal implications as a result of enforcing or administering the sections. The effect on state government for the first five-year period the sections will be in effect the estimated additional cost will be $5,000 in 1994; $1,000 in 1995; $1,000 in 1996; $1,000 in 1997; and $1,000 in 1998. There will be no effect on local government for the first five-year period the sections will be in effect.

Ms. Ewald also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be that student loans will be timely repaid to the Guaranteed Student Loan Corporation. Further, that the public will be able to appear before the Board at scheduled Board meetings to discuss any matter within the jurisdiction of the Board. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Comments on the proposal may be submitted to Lois Ewald, Executive Director, Texas Optometry Board, 9101 Burnet Road, Suite 214, Austin, Texas 78758.

The new sections are proposed under Texas Civil Statutes, Article 4552, §2.14, which provide the Texas Optometry Board with the authority to promulgate procedural and substantive rules.

§273.10. Licensee Compliance with Guaranteed Student Loan Corporation.

(a) If, after a hearing or an opportunity for hearing, the Board determines that a licensee is in default on a loan guaranteed by the Texas Guaranteed Student Loan Corporation, the license shall not be renewed unless the licensee presents a certificate issued by the corporation certifying that:

(1) the licensee has entered into a repayment agreement on the defaulted loan; or

(2) the licensee is not in default on a loan guaranteed by the corporation.

(b) If, after a hearing or an opportunity for hearing, the Board determines that a licensee has defaulted on a repayment agreement with the Texas Guaranteed Student Loan Corporation, the license shall not be renewed unless the licensee presents a certificate issued by the corporation certifying that:

(1) the licensee has entered into another repayment agreement on the defaulted loan; or

(2) the licensee is not in default on a loan guaranteed by the corporation or on a repayment agreement.

§273.11. Public Participation in Meetings. A schedule time shall be established on each posted agenda to allow the opportunity for public comment on any issue under the jurisdiction of the Board. The time allowed an individual spokesperson may be limited at the discretion of the chair.

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, 1993.

TRD-9331161 Lois Ewald
Executive Director
Texas Optometry Board

Earliest possible date of adoption: December 10, 1993

For further information, please call: (512) 835-1938

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Chapter 277. Practice and Procedure

• 22 TAC §§277.1-277.5

The Texas Optometry Board proposes amendments to §§277.1-277.5, concerning the filing of complaints, investigation and enforcement, disciplinary proceedings; probation; reinstatement of license; and felony convictions, respectively. The rules are procedural in nature and are intended to inform licensees of the process for handling complaints, sanctions, and disciplinary proceedings once complaints are received. It also serves to fully inform licensees regarding procedures to be followed by the Board in the handling of complaints.

Lois Ewald, executive director, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Ms. Ewald also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be that procedures have been established for the handling of complaints filed by consumers or others, investigation procedures have been defined, and sanctions or disciplinary actions have been defined, not only to inform the general public, but to place licensees on notice of the procedures to be followed when complaints are received. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Comments on the proposal may be submitted to Lois Ewald, Executive Director, 9101 Burnet Road, Suite 214, Austin, Texas 78758.

The amendments are proposed under Texas Civil Statutes, Article 4552, §2. 14, which provide the Texas Optometry Board with the authority to promulgate substantive and procedural rules and to set fees.

The proposed amendments implement Texas Civil Statutes, Article 4552.

§277.1. Complaint Procedures [Filing of Complaint].

(a) Filing Complaints. Complaints may be filed with the agency in person at the board's office, or in any written form, including submission of a completed complaint form. The Board shall adopt the following form as its official complaint form which shall be maintained at the board's office for use at the request of any complainant. At a minimum, all complaints shall contain information necessary for the proper processing of the complaint by the board, including, but not limited to:

(1) complainant's name, address, and phone number;

(2) name, address, and phone number of the optometrist, therapeutic optometrist, or other person, firm, or corporation, if known;

(3) date, time, and place of occurrence of alleged violation; and

(4) complete description of incident giving rise to the complaint.

For Office Use Only:

Assigned to:_____

Date:_____

TEXAS OPTOMETRY BOARD
9101 BURNET ROAD, SUITE 214, AUSTIN, TX 78758-5260
(512) 835-1938

CONSUMER COMPLAINT FORM TO THE TEXAS OPTOMETRY BOARD

1. Information about optometrist or person(s) being reported:

NAME_____LIC. #_____

OFFICE LOCATION_____

_____TELEPHONE NUMBER_____
City State ZIP

2. Complainant information:

NAME_____TELEPHONE NUMBER_____

MAILING ADDRESS_____

_____TELEPHONE NUMBER_____
City State ZIP

3. Incident being reported: [Clearly indicate the nature of your complaint. If more space is needed, attach additional sheet(s). Enclose photocopies of supporting documentation available (records, prescriptions, advertising, etc.]

DATE(S)_____

INCIDENT_____

_____

_____

_____

_____

RESULTS: [Explain briefly what your desired results would be, providing such is within the purview of the Texas Optometry Act.]

_____

_____

_____

The above statements are true and accurate to the best of my knowledge.

_____
Signature Date

[(a) Who may file complaint. Any person may file with the board a complaint alleging violation of the Act against any optometrist or other person, firm, or corporation. Any proceeding under the Act, §4.04, shall be preceded by the filing formal charges in writing and under oath.]

(b) Complaint Investigation and Disposition.

(1) All complaints received shall be sent to the executive director. The board shall distinguish between categories of complaints as follows:

(A) consumer and patient complaints against optometrists and therapeutic optometrists regarding alleged violations of the Texas Optometry Act or duly promulgated rules or orders; and

(B) alleged unauthorized practice of optometry or therapeutic optometry by unlicensed individuals, or by a licensee while a suspension order or restrictive sanction by the Board is in effect;

(C) licensure or reinstatement applications;

(D) alleged advertising violations by optometrists, therapeutic optometrists, persons, firms, or corporations; and

(E) licensee complaints regarding violations of the Act resulting in economic harm.

(2) A complaint shall not be dismissed without appropriate consideration. The board and complainant shall be advised of complaint dismissals.

(c)[(b)] Investigation-Enforcement Committee.

(1) The chair [chairman of the board] shall appoint a committee to consider all complaints filed with the board **The** [Such] committee **shall** [may] be known as the Investigation-Enforcement Committee and shall be composed of board members who are licensed optometrists or **therapeutic optometrists.** The executive director divide the state into with grographic areas, with each member of the Investigation-Enforcement Committee being assigned areas of responsibility within such geographic areas. Each member shall be charged with the responsibility of enforcing the provisions of the Act within **the** [his or her] assigned area and is authorized to initiate investigations. **The executive director shall supervise all investigations.** If, as a result of an investigation within a geographic area, a formal charge is filed against a licensed optometrist, **therapeutic optometrist,** or other person, firm, or corporation by **the** [such] investigator, the member from whose area the formal charge originated shall be the member designated to assist in the handling of the prosecution of such formal charge and disciplinary proceeding, if any [before the board. All complaints received shall be sent to the executive director in Austin.]

(2) The executive director shall forward the complaint to the member in charge of enforcement in the area of the complaint unless in the judgment of the executive director, unusual circumstances exist such that it is more appropriate that the complaint be under province of another member. The Investigation-Enforcement Committee, or any member thereof, **and the executive director** shall have the power to issue subpoenas and subpoenas duces tecum to compel the attendance of witnesses and the production of books, records, and documents, **to issue commissions to take depositions,** to administer oaths and to take testimony concerning all matters within **the assigned** [its, his, or her] jurisdiction. In addition to subpoena power, each member of the committee may [either] **authorize the executive director to** investigate an alleged violation [in person or use in investigator for that purpose].

(3)[(c) Disposition of complaints.] On receipt of a complaint, the member in charge shall [consult with house counsel to] determine:

(A)[(1)] whether to drop the matter and take no further action;

(B)[(2)] whether to send a letter to the person charged reciting that a complaint has been received and that while the investigating member cannot determine or pass upon the merits of the complaint without conducting further investigation that the **subject of the complaint be** asked to review [his practice] **the complaint** to ensure [insure] that the Act is being complied with, and that if the allegations are true, to cease and desist from the alleged violations or words to that effect;

(C)[(3)] whether to conduct further investigations, including conducting investigational hearings **or informal conferences;**

[(4) whether to send the person charged a cease and desist letter;

(D)[(5)] whether to forward to the [chairman of the] board the member's determination that a violation of the Act may have occurred together with a recommendation that proceedings be instituted with the State Office of Administrative Hearings to consider cancellation, revocation, or suspension of a license or refusal to issue a license;

(E)[(6)] whether to forward to the [chairman of the] board the member's determination that some person, firm, or corporation may be practicing optometry without a license or otherwise **violating** [acting without compliance with] the provisions of the Act, along with the member's recommendation that the board notify the attorney general or appropriate district attorney with accompanying request that appropriate action be taken in accordance with law; **and**

(F) whether to forward to the executive director the member's determination of findings applicable to subparagraph (D) and (E) of this paragraph for assessment of administrative penalties.

(4) Basic Competence Violations.

[(d) Complaints alleging violation of §5.12.

[(1) As regards the Act, Article 5, §5.12 (relating to Basic Competence).] **The** [the] following **steps** or combination of omissions shall determine the seriousness of the alleged violation. The alleged omission of the following **steps** or combinations shall be reason for an investigational hearing or informal conference:

(A) Any one of the following steps: Biomicroscopy (lids, cornea, sclera, etc.); internal ophthalmoscopic examination (media, fundus, etc.); subjective findings, far point and near point; and tonometry [numbers four and five, plus one other finding.]

(B) Omission of a total of four of the remaining steps: case history (ocular, physical, occupational and other pertinent information); visual acuity; static retinoscopy, O.D., O.S., or autorefractor; assessment of binocular function; amplitude or range of accommodation; angle of vision, to right and left. [numbers four and six, plus near and far, plus one other finding].

[(C) numbers five and six, near and far, plus two other findings.

[(D) number four and three other findings.

[(E) number five and three other findings.

[(F) number six and three other findings.

[(G) omission of a total of five findings.

[(2) Basic competence includes the following findings (Article 5, §5.12):

[(A) number one. Case history (ocular, physical, occupational and other pertinent information);

[(B) number two. Far point acuity, O.D., O.S., O.U., unaided; with old glasses, if available, and with new glasses, if any;

[(C) number three. External examination (lids, cornea, sclera, etc.);

[(D) number four. Internal ophthalmoscopic examination (media, fundus, etc.);

[(E) number five. Static retinoscopy, O.D., O.S.,

[(F) number six. Subjective findings, far point and near point;

[(G) number seven Phorias or ductions, far and near, lateral and vertical;

[(H) number eight. Amplitude or range of accommodation;

[(I) number nine. Amplitude or range of convergence;

[(J) Angle of vision, to right and to left.]

(C)[(3)] All other omissions or combination of omissions of findings shall be reason to send noncompliance letters [pursuant to subsection (c)(2) of this section]. The absence of [Pupillary distance, lens prescription right and left, color and tint, segment type size or position, and] the optometrist's or therapeutic optometrist's signature on the prescription shall be considered an omission [as omissions of findings when not properly done and recorded].

(D)[(4) When a previous letter pursuant to subsection (c)(2) of this section has been sent to a licensee for alleged violation of Article 5, §5.12,] An [an] investigational hearing or informal conference is required when a [with respect to the] second alleged violation has occurred. Likewise, if a licensee has had a previous investigational hearing or informal conference [formal disciplinary proceeding for alleged violation of Article 5, §5.12, and], a subsequent complaint will result in [for alleged violation of Article 5, §5. 12, is received,] a formal disciplinary hearing [proceeding is required].

§277.2. Disciplinary Proceedings.

(a) General Statement. In a contested case before the board, proceedings shall be governed by the Administrative Procedure Act (APA) [APA], except as specifically provided in the Act. In any contested case, opportunity shall be afforded to all parties to respond and present evidence and argument on all issues involved. Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, [or] default, or dismissal.

(b) Informal Disposition of Contested Case. Prior to the imposition of disciplinary sanctions against a license, the licensee shall be offered an opportunity to attend an informal conference and show compliance with all requirements of law, in accordance with the APA.

(1) Informal conferences shall be attended by the executive director, an attorney employed by the office of the Attorney General, a member of the Investigation-Enforcement Committee, and other representatives of the board as the executive director and legal counsel may deem necessary for the proper conduct of the conference. The licensee and/or the licensee's authorized representative may attend the informal conference and shall be provided an opportunity to be heard.

(2) In any case where charges are based upon information provided by a person who filed a complaint with the board (complainant), the complainant may attend the informal conference, and shall be provided with an opportunity to be heard. Nothing herein requires a complainant to attend an informal conference.

(3) Informal conferences shall not be deemed to be meetings of the board and no formal record of the proceedings at the conferences shall be made or maintained.

(4) Any proposed order shall be presented to the board for its review. At the conclusion of its review, the board shall approve, amend, or disapprove the proposed order. Should the board approve the proposed order, the appropriate notation shall be made in the minutes of the board and the proposed order shall be entered as an official action of the board. Should the board amend the proposed order, the executive director shall contact the respondent to seek concurrence. If the respondent does not concur, the provisions of the next sentence shall apply. Should the board disapprove the proposed order, the case shall be rescheduled for purposes of reaching an agreed order or in the alternative forwarded to the State Office of Administrative Hearings for formal action.

(c)[(b)] Formal Disposition of a Contested Case. [Notice.] All contested cases not resolved by informal conference, shall be referred to the State Office of Administrative Hearings. [In all contested cases, the respondent shall be entitled to reasonable notice of not less than ten days.]

(1) Notice. The respondent shall be entitled to reasonable notice of not less than ten days. Notice shall include the matters specifically required by the APA, [§13(b),] to wit:

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

(B)[(2)] a statement of the legal authority and jurisdiction under which the hearing is being held;

(C)[(3)] a reference to the particular section of the Act and rules involved; and

(D) [(4)] a short and plain statement of the matters asserted.

(2)[(c)] Service of notice The notice of hearing and a copy of the formal complaint shall be served on the respondent's last known address at least ten [10] days prior to the hearing. Service on the respondent shall be complete and effective if the document to be served is sent by registered or certified mail to the respondent at the address shown on the respondent's annual [his or her] renewal certificate.

(3)[(d)] Filing of documents. All pleadings and motions relating to any contested case pending before the State Office of Administrative Hearings [board] shall be filed with the State Office of Administrative Hearings [executive director]. They shall be deemed filed only when actually received.

(4)[(e)] Motion for continuance. Continuances may be granted by the State Office of Administrative Hearings

in accordance with procedural rules established by that agency.

[(1) Continuances may be granted by the chairman of the board for good cause upon the filing of a written motion and affidavit complying with the requirements of paragraph (2) of this subsection; provided, however, that no motion for continuance shall be granted by the chairman of the board unless filed at least three days prior to the hearing.]

[(2) The motion shall be supported by a sworn affidavit detailing reasons for the request for a continuance If the ground for such application be for want of testimony, the respondent shall make affidavit that such testimony is material, showing the materiality thereof and that he or she has used due diligence to procure such testimony, stating such diligence, and the cause of failure, if known. The affidavit shall state that the continuance is not sought for the purpose of delay, but that justice may be done.]

(5) [(f)] Transcription. Proceedings, or any part of them, must be transcribed on the written request of any party. The agency may pay the cost of the transcript or assess the cost to one or more parties.

(6) [(g)] Discovery. Requests for the issuance of subpoenas, requests for depositions and for production of documents, and other discovery matters shall be governed by the APA [, §14 and §14(a).]

§277.3. Probation.

(a) The board shall have the right and may upon majority vote rule that an order denying an application for license or any order canceling, suspending, or revoking any license be probated so long as the probated practitioner conforms to such orders and rule as the board may set out in the terms of the probation. The board at the time of its decision to probate the practitioner, shall set out the period of time which shall constitute the probationary period; provided, however, that the board may at any time while the practitioner remains on probation [hold a hearing and] upon majority vote rescind the probation and enforce the board's original action denying, suspending, or revoking such license for violation of the terms of the probation or for other good cause as the board in its discretion may determine. **To** [The hearing to] rescind the probation shall **require a formal disciplinary hearing and** be conducted as a contested case within the meaning of the APA.

(b) The executive director shall maintain a chronological and alphabetical listing of licensees who have had their license canceled, suspended, or revoked, and shall monitor each consent order in respect to each license holder's specific sanction. Any noncompliance observed as a result of monitoring shall be referred to the board.

§277.4. Reinstatement. Any practitioner whose license to practice has been revoked [or rescinded] for a period of more than one year may, after the expiration of at least one year from the date that such revocation [or suspension] became final, apply to the board, on forms provided by the board, to have the revocation [or suspension] order withdrawn and to have the board reinstate a license to practice optometry **or therapeutic optometry**. In considering the reinstatement of a revoked [or suspended] license, the **State Office of Administrative Hearings** [board] shall consider all factors it deems relevant, and the applicant for reinstatement of a revoked [or suspended] license must appear before the **State Office of Administrative Hearings** [board]. After **consideration of the proposal for decision** [evaluation], the board in its [sole] discretion may.

(1) deny reinstatement of a [suspended or] revoked license;

(2) reinstate a [suspended or] revoked license and probate the practitioner for a specified period of time under specified conditions; or

(3) authorize reinstatement of the [suspended or] revoked license.

§277.5. Felony Convictions. Both the Act, §4.04(a)(3) and Texas Civil Statutes. Article 6252-13(c), provide that the board may suspend or revoke an existing valid license, disqualify a person from receiving a license, or deny to a person the opportunity to be examined for a license because of a person's conviction of a felony or misdemeanor involving moral turpitude if the crime directly relates to duties and responsibilities of the licensed optometrist. In actual practice and by way of guidelines, any proceeding instituted by the board or otherwise, with respect to the statutes mentioned in this section, shall be considered a contested case and all procedural safeguards afforded to a respondent under the APA, the Texas Optometry Act, and these disciplinary rules shall be available. The board shall institute no proceeding with respect to a particular felony or misdemeanor conviction until **a jury verdict or a plea of guilty is entered** [such conviction is finally adjudicated]. In making any determination, the board shall consider all factors and evidence with respect to the elements enumerated in Texas Civil Statutes, Article 6252-13(c), if, and to the extent evidence with respect to such matters is presented to the board. The board, however, shall be under no duty to generate evidence with respect to the matters listed in Texas Civil Statutes, Article 6252-13(c), §4. As in all other contested cases, all relevant evidence will be considered and an opportunity shall be afforded all parties to respond and present evidence and agrument on all issues involved.

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, 1993.

TRD-9331162 **Lois Ewald**
Executive Director
Texas Optometry Board

Earliest possible date of adoption: December 10, 1993

For further information, please call: (512) 835-1938

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• 22 TAC §277.6

The Texas Optometry Board proposes new §277.6, concerning administrative penalties assessed for violations of the Act. House Bill 1479, 73rd Legislature Regular Session amended the Texas Optometry Act to allow the assessment of administrative penalties in regard to violations of the Texas Optometry Act. This rule will inform licensees and others of the penalty process to be followed by the Board in enforcement of the statutes.

Lois Ewald, 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. Ewald 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 procedures have been established for the handling of complaints filed by consumers or others, investigation procedures have been defined, and sanctions or disciplinary actions have been defined, not only to inform the general public, but to place licensees on notice of the procedures to be followed when complaints are received. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Comments on the proposal may be submitted to Lois Ewald, Executive Director, 9101 Burnet Road, Suite 214, Austin, Texas 78758.

The new section is proposed under Texas Civil Statutes, Article 4552, §2. 14, which provide the Texas Optometry Board with the authority to promulgate substantive and procedural rules and to set fees.

§277.6. Administrative Fines and Penalties.

(a) In accordance with the Texas Optometry Act, §4.05, administrative penalties may be assessed for violations of the

Act or rule or order of the board. Either the executive director or a subcommittee of the board, to include at least one public member of the board, may assess a penalty for each violation and present a report to the board concerning the facts on which the determination was based and the amount of penalty. The range of penalty is $500 to $2,500.

(b) The amount of the penalty shall be based on:

(1) the seriousness of the violation, including nature, circumstances, extent and gravity of any prohibited act, and hazard or potential hazard created to the health, safety, or economic welfare of the public;

(2) the economic harm to property or the environment caused by the violation;

(3) the history of previous violations;

(4) the amount necessary to deter future violations;

(5) efforts to correct the violation; and

(6) any other matter that justice may require.

(c) Penalties imposed by the board pursuant to subsections (a) and (b) of this section may be imposed for each violation subject to the following limitations:

(1) imposition of an administrative penalty not to exceed $2,500 for each violation;

(2) each day a violation continues or occurs is a separate violation for purposes of imposing a penalty.

(d) The provisions of subsections (a)-(c) shall not be construed so as to prohibit other appropriate civil or criminal action and remedy and enforcement under other laws.

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, 1993.

TRD-9331163 Lois Ewald
Executive Director
Texas Optometry Board

Earliest possible date of adoption: December 10, 1993

For further information, please call: (512) 835-1938

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Chapter 279. Interpretations

• 22 TAC §279.14

The Texas Optometry Board proposes new §279.14, concerning the definition of patient records and prescription.

Lois Ewald, 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. Ewald also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be the public will be informed and fully understand the difference between a patient's optometric records and a prescription. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Comments on the proposal may be submitted to Lois Ewald, Executive Director, Texas Optometry Board, 9101 Burnet Road, Suite 214, Austin, Texas 78758.

The new section is proposed under Texas Civil Statutes, Article 4552, §2. 14, which provide the Texas Optometry Board with the authority to promulgate substantive and procedural rules, and to set fees.

§279.14. Board Interpretation Number Fourteen.

(a) Patient's optometric records are defined as the patient chart, historical record, or working document during the course of examination and patient care between the doctor and patient. The patient's records may contain information regarding spectacle prescription findings and contact lens prescription findings but do not include a prescription for spectacles or contact lenses.

(b) A prescription for spectacles, contact lenses, ophthalmic devices is defined as a written order signed by the examining optometrist, therapeutic optometrist, or physician. A prescription for medications may be verbal or written.

(c) The dispensing of medications, spectacles, contact lenses, or ophthalmic devices from any document other than a prescription constitutes the unlawful practice of optometry, subject to penalties under the Texas Optometry Act, §5.04 and §5.18.

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, 1993.

TRD-9331164 Lois Ewald
Executive Director
Texas Optometry Board

Earliest possible date of adoption: December 10, 1993

For further information, please call: (512) 835-1938

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Part XXIV. Texas Board of Veterinary Medical Examiners

Chapter 571. Licensing

License Renewals

• 22 TAC §571.59

The Texas Board of Veterinary Medical Examiners proposes an amendment to §571.59, concerning Cancelled Licenses. The amendment reduces the period of a current license to one year and requires practitioners with cancelled licenses to meet with the Board and submit to reexamination for licensure.

Ron Allen, 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.

Mr. Allen 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 to ensure that practitioners that have allowed their license to lapse are current in the practice of veterinary medicine prior to being relicensed. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Comments on the proposal may be submitted by November 8, 1993, to the Texas Board of Veterinary Medical Examiners, 1946 South IH-35, Suite 306, Austin, Texas 78704.

The amendment is proposed under Texas Civil Statutes, Article 8890, §7(a), which provide the Texas Board of Veterinary Medical Examiners with the authority to make, alter, or amend such rules and regulations as may be necessary or desirable to carry into effect the provisions of this Act.

§571.59. Cancelled Licenses [Two Years Delinquency]. Every applicant for license renewal who has failed to renew his/her license for a period of one year and has not been in practice in another state for two (2) years or more [two years] shall be required to appear before the Board to explain why the license was allowed to lapse and the reason for wanting it reinstated. The applicant also needs to submit to reexamination and comply with the requirements and procedures for obtaining an original license [for a personal interview and satisfactorily complete the license examination].

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 18, 1993.

TRD-9331175 Ron Allen
Executive Director
Texas Board of Veterinary Medical Examiners

Proposed date of adoption: February 3, 1994

For further information, please call: (512) 447-1183

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Chapter 575. Practice and Procedure

Practice and Procedure

• 22 TAC §575.27

The Texas Board of Veterinary Medical Examiners proposes new §575.27, concerning Complaints-Receipt, Investigation and Disposition. The new section outlines the investigative process followed by the Board when complaints are filed with the Board.

Ron Allen, 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.

Mr. Allen 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 to provide the public with a detailed description of the investigative process followed when a consumer files a complaint against a licensee. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Comments on the proposal may be submitted by December 30, 1993, to the Texas Board of Veterinary Medical Examiners, 1946 South IH-35, Suite 306, Austin, Texas 78704.

The new section is proposed under Texas Civil Statutes, Article 8890, §7(a), which provide the Texas Board of Veterinary Medical Examiners with the authority to make, alter, or amend such rules and regulations as may be necessary or desirable to carry into effect the provisions of this Act.

§575.27. Complaints-Receipt, Investigation and Disposition.

(a) Receipt of Complaint.

(1) Complainants who wish to complain to the Board by telephone will be advised that their complaints must be submitted in writing, must be signed by the complainant, and that a complaint form adopted by the Board will be mailed to them for their use and submission to the Board. A log will be maintained with names and addresses of complainants who telephone the Board Offices and to whom complaint forms are mailed. Anonymous written complaints will not be investigated, but will be logged and filed for information purposes only.

(2) Violation Code numbers will be utilized by Board staff to distinguish between categories of complaints.

(b) Investigation of Allegations.

(1) All written and signed complaints filed with the Board will be investigated. Normally, written complaints will be investigated in the order received in the Board office. However, if an allegation is determined to be critical in nature, it will be assigned a high priority and the requirement for a written and signed complaint will be waived temporarily, but will be obtained later in the investigative process. Upon receipt of a complaint, a letter of acknowledgment will be promptly mailed to the complainant. Case files will be reviewed every 30 days to ensure cases comply with scheduling. Parties to a complaint will be contacted on at least a quarterly period.

(2) Generally, an investigation will be conducted in accordance with the following guidelines:

(A) After a signed and written complaint is received, a Board investigator will interview the complainant so that he/she has an opportunity to explain or elaborate upon the allegations made in the complaint. The interview may be conducted personally or telephonically. If the allegation is a misunderstanding, outside the jurisdiction of the Board, and/or without merit, the investigator shall submit a report to the Executive Director recommending the case be closed. If the Executive Director concurs with the recommendation, the complainant will be so notified, the case will be closed, and the file will be maintained in a secure file in the Board office. If the Executive Director believes the case should not be closed, the investigation will proceed.

(B) After the complainant's statement has been obtained, and the investigator determines that a potential violation exists, the licensee is furnished with a copy of the complaint, unless the Chief Investigator determines that an undercover investigation is necessary. If no undercover investigation is required, the investigator shall contact the licensee in writing, request any patient records deemed necessary for the investigation and schedule an interview with the licensee. The investigator may obtain a narrative statement via mail or FAX.

(C) After the licensee's response, further investigation may be necessary to corroborate the information provided by the complainant and the licensee. The investigator may include, but is not limited to, additional medical opinions, obtaining supporting documents, and interviewing other witnesses.

(D) Upon the completion of an investigation, the Chief Investigator shall present to the Executive Director the elements of the investigation and a conclusion whether or not that a violation(s) probably exists. If the case requires medical judgement, the Chief Investigator shall review the file and then forward copies of pertinent documents, along with a cover letter, to the Board Secretary, who will determine whether or not the case should be closed, further investigation is warranted, or the licensee should be invited to respond to the allegations at a conference at the Board offices. If the conclusion is that a violation has not occurred, the Executive Director shall notify the complainant and the licensee in writing of the conclusion and that the case is dismissed.

(E) If the conclusion of the Executive Director and/or the Board Secretary is that a violation(s) does exist, the Executive Director shall invite the licensee in writing to an informal conference at the Board office to discuss the allegations made against the licensee.

(c) Informal Conferences.

(1) Informal conferences are conducted by the Executive Director and/or the Chief Investigator. If the Board Secretary or the Executive Director recommends a conference, the Chief Investigator shall, by certified mail, mail to the licensee a "conference letter" with an enclosed list of allegations. The conference is conducted in accordance with the Texas Government Code, Chapter 268, Subchapter C, §§2001.051-2001.054, and is part of the investigatory process. The allegations are presented to the licensee and he is given every opportunity to present his/her side of the issue. The licensee shall also have the right to waive the conference, in which case the investigation shall proceed to the next step in the disciplinary process.

(2) The informal hearing will generally be conducted in the following manner. Routinely in attendance at the conference are the Secretary of the Board, Executive Director, Chief Investigator, the investigator assigned to the case, the licensee, the licensee's attorney if counsel is retained, the Secretary of the Board, and the complainant if he/she desires to attend. The Executive Director or the Chief Investigator shall conduct the informal conference. The informal conference will be opened by the person conducting the conference by explaining the purpose of the conference and the rights of the parties present, and the allegations made of the licensee. The licensee is advised that he/she has the right to counsel and the right to remain silent. The licensee may respond to the allegations. The complainant, if present, may then make comments. The licensee and the complainant will not be allowed to address remarks or questions directly to each other, but shall be directed to the person conducting the meeting. If the person conducting the conference deems it appropriate, he/she may ask either or both parties to leave the room. The Board Secretary, Board employees, or

the Assistant Attorney General may ask questions of either party. When their questions and comments are completed, the parties will be asked to leave the room.

(3) The file and the licensee's and complainant's responses will be reviewed by the Board Secretary with a recommendation from the Assistant Attorney General and the staff as to the disposition of the complaint. If the Board Secretary determines a violation has not occurred, he/she will dismiss the case, and will advise all parties of his/her decision and will explain the reasons why the complaint was dismissed.

(4) If the Board Secretary determines that a violation has occurred and that a penalty is warranted, he/she will advise the licensee of the alleged violations and offer the licensee a settlement that specifies the penalty/disciplinary action. The Secretary must inform the licensee that the licensee has a right to a hearing on the occurrence of the violation, the amount of the penalty and disciplinary action, or both the occurrence of the violation and the amount of the recommended penalty/disciplinary action.

(5) Within 20 days after the date the offer is made to the licensee, the licensee must submit a written response to either accept the Secretary's settlement offer and recommended penalty/disciplinary action or request a hearing before an Administrative Law Judge.

(6) If the licensee accepts the settlement offer, a complaint will be docketed and he/she will sign an agreed order. The Board by order shall approve or amend the agreed order and impose the recommended penalty/disciplinary action at the next scheduled Board meeting. If the Board elects to not accept the agreed order, the case will be scheduled for a hearing before an Administrative Law Judge.

(d) Administrative Law Hearing.

(1) If the licensee declines the settlement offer and requests a hearing, or if the licensee fails to respond timely to the notice, a docketed complaint will be drawn and assigned a docket number. The complaint is reviewed by the Assistant Attorney General, who then returns it to the Board office, where any corrections are made. After the complaint is signed by the investigator before a notary public, the complaint is mailed to the Board Secretary, who signs it and returns the complaint to the Board offices. The date the Secretary signs the complaint is the official date of filing the docketed complaint with the Board. The docketed complaint is then served on the respondent by certified mail or personal service at least ten days prior to a scheduled hearing.

(2) The Executive Director shall then set a hearing and give notice of the hearing to the licensee. The hearing shall be conducted by an administrative law judge of the State Office of Administrative Hearings. If an Administrative Law Judge issues a proposal for decision with findings of fact and conclusions of law, the proposal for decision shall not indicate any recommended penalty as a finding of fact or conclusion of law. If a proposal for decision is issued by the Administrative Law Judge, the Board, based on the findings of fact, conclusions of law, and proposal for decision, may by order find that a violation has occurred, impose a penalty, impose disciplinary action, or may find that no violation occurred. The complainant shall be promptly advised by letter of the final disposition of the complaint.

(e) Contingency. The Board President shall appoint another licensee Board member to assume the duties of the Secretary in the complaint process in the event the Board Secretary is unable to serve in the capacity defined herein.

(f) Report to the Board of Dismissed Complaints. The Executive Director or the Chief Investigator will advise the Board at each scheduled Board meeting of the complaints dismissed since the last Board meeting. The information furnished will consist of a summary of the allegations, investigation conducted, reasons for dismissal, and file number.

(g) Use of Private Investigators. Private investigators may be utilized only in cases involving honesty, integrity, and fair dealing; reinstatement applications; solicitation; and fraud. Further, private investigators will be retained only when it is economically advantageous to the Board or when it is not practical for Board investigators to travel to a distant destination in this state or to another state. Private investigators will be utilized in accordance with existing purchasing rules of the Texas General Services Commission and will be utilized only with the prior written approval of the Executive Director.

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

Issued in Austin, Texas, on October 26, 1993.

TRD-9331186 Ron Allen
Executive Director
Texas Board of Veterinary Medical Examiners

Proposed date of adoption: February 3, 1994

For further information, please call: (512) 447-1183

TITLE 25. HEALTH SERVICES

Part I. Texas Department of Health

Chapter 13. Health Planning and Resource Development

Data Collection

- **25 TAC §§13.11-13.17**

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

The Texas Department of Health (department) proposes the repeal of §§13. 11-13.17 and new §§13.11-13.20, concerning the collection, reporting and dissemination of data from hospitals. The new rules define terms commonly used in the data collection process, identify the types of data to be reported by hospitals, establish standards for the provision of charity care and associated reporting requirements for non-profit hospitals, describe sanctions for non-compliance, and establish procedures for access to data. The existing rules will be repealed and will be replaced by the proposed new rules. Complete reformatting of sections of the existing rules was necessary for clarity.

Carol Daniels, deputy commissioner for programs, has determined that for the first five-year period the repeals are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeals. The rules may have fiscal implications on units of local government that operate hospitals. In some instances, additional recordkeeping may be required of hospitals. However, the cost of implementing these activities will be minor.

Carol Daniels has also determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections as proposed will be the improved delivery of acute care hospital services through the determination of the impact of the provision of uncompensated care on hospitals in the state; the availability of information on hospitals' services, the utilization of these services and the cost of these services; and the availability of information necessary to assess the level of community benefits provided by nonprofit hospitals. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the repeals as proposed.

Comments on the proposal may be submitted to Ann Henry, Bureau of State Health Data and Policy Analysis, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3199, (512) 458-7261. Comments will be accepted for 30 days after publication in the *Texas Register*.

The repeals are authorized under the Health and Safety Code, Chapters 104 and 311. Chapter 104 mandates the collection and dis-

semination of data from health care facilities necessary to facilitate health planning and resource development. Chapter 311 authorizes the collection and reporting of hospital financial, utilization, and patient discharge data to determine the impact of the provision of indigent care on hospitals in the state and to assess the adequacy of the provision of community service provided by nonprofit hospitals. Sections 104.042(a) and 311.032(b) provide the Board of Health with the authority to adopt rules for the performance of every duty imposed by law on the Texas Board of Health, the Texas Department of Health, and the Commissioner of Health.

§13.11. Purpose and Scope.

§13.12. Definitions.

§13.13. Types of Data to be Reported to the Department.

§13.14. Survey Forms.

§13.15. Data Verification Report.

§13.16. Non-compliance with Reporting Requirements.

§13.17. Confidentiality.

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 28, 1993.

TRD-9331202 Susan K. Steeg
General Counsel
Texas Department of Health

Proposed date of adoption: January 28, 1994

For further information, please call: (512) 458-7261

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• 25 TAC §§13.11-13.20

The new sections are authorized under the Health and Safety Code, Chapters 104 and 311. Chapter 104 mandates the collection and dissemination of data from health care facilities necessary to facilitate health planning and resource development. Chapter 311 authorizes the collection and reporting of hospital financial, utilization and patient discharge data to determine the impact of the provision of indigent care on hospitals in the state and to assess the adequacy of the provision of community service provided by nonprofit hospitals. Sections 104.042(a) and 311.032(b) provide the Board of Health with the authority to adopt rules for the performance of every duty imposed by law on the Texas Board of Health, the Texas Department of Health, and the Commissioner of Health.

§13.11. Purpose. The purpose of the sections in this chapter is to implement the Health and Safety Code, Chapter 104, Subchapter D, which requires the department to adopt rules covering the collection of data from health care facilities, such as hospitals, and the dissemination of data to facilitate health planning and resource development; the Health and Safety Code, Chapter 311, Subchapter C, which requires the department to adopt rules covering the collection and reporting of hospital financial, utilization, and patient discharge data including data regarding the provision of levels of charity care by certain nonprofit hospitals, and the submission of a community benefits plan by certain nonprofit hospitals.

§13.12. Scope. The scope of these sections is to describe the criteria and procedures which the department will use in implementing data collection, dissemination, and reporting requirements. These sections will cover the collection and dissemination of data from the public or private hospitals that are included in the definition of the term "health care facilities" in the Health and Safety Code, Chapter 104, Subchapter A. The remaining entities included in the definition of the term "health care facilities" are not covered by these sections. If data covered by these sections will be collected from a public or private hospital that is a general or special hospital licensed under the Health and Safety Code, Chapter 241; a private mental hospital licensed under the Health and Safety Code, Chapter 577; or a treatment facility licensed under the Health and Safety Code, Chapter 464. The data will be collected under authority of and in compliance with the requirements of the Health and Safety Code, Chapters 104 and 311.

§13.13. Definitions. The following words and terms shall have the following meanings unless the context clearly indicates otherwise.

Board-The Texas Board of Health.

Chapter 104-Provisions relating to the data collection responsibilities of the Texas Department of Health as the State Health Planning and Development Agency found within the Health and Safety Code, Title 2

Chapter 311-Provisions relating to the Powers and Duties of Hospitals found within the Health and Safety Code, Title 4.

Charity care-The unreimbursed cost to a hospital of providing, funding, or otherwise financially supporting health care services on an inpatient or outpatient basis to a person classified by the hospital as financially or medically indigent and/or providing, funding, or otherwise financially supporting health care services provided to financially indigent patients through other nonprofit or public outpatient clinics, hospitals, or health care organizations.

Community benefits-The unreimbursed cost to a hospital of providing charity care, government-sponsored indigent health care, donations, education, government-sponsored program services, research, and subsidized health services. Community benefits do not include the cost to the hospital of paying any taxes or other governmental assessments.

Department-The Texas Department of Health.

Donations-The unreimbursed costs of providing cash and in-kind services and gifts, including facilities, equipment, personnel, and programs, to other nonprofit or public outpatient clinics, hospitals, or health care organizations.

Education-related costs-The unreimbursed cost to a hospital of providing, funding or otherwise financially supporting educational benefits, services, and programs including education of medical professionals and health care providers; scholarships and funding to medical schools, colleges, and universities for health professions education; education of patients concerning diseases and home care in response to community needs; and community health education through informational programs, publications, and outreach activities in response to community needs.

Financially indigent-An uninsured or underinsured person who is accepted for care with no obligation or a discounted obligation to pay for the services rendered based on the hospital's eligibility system.

Government sponsored indigent health care-The unreimbursed cost to a hospital of providing health care services to recipients of Medicaid and other federal, state, or local indigent health care programs, eligibility for which is based on financial need.

Health care facility-Regardless of ownership, a public or private hospital, skilled nursing facility, intermediate care facility, ambulatory surgical facility, family planning clinic which performs ambulatory surgical procedures, rural health initiative clinic, urban health initiative clinic, kidney disease treatment facility, inpatient rehabilitation facility, and other facilities as defined by federal law, but does not include the office of physicians or practitioners of the healing arts singly or in groups in the conduct of their profession.

Hospital-A general or special hospital licensed under the Health and Safety Code, Chapter 241; a private mental hospital licensed under the Health and Safety Code, Chapter 577; and a treatment facility licensed under the Health and Safety Code, Chapter 464.

Hospital eligibility system-The financial criteria and procedure used by a hospital to determine if a patient is eligible for charity care. The system shall include income levels and means testing indexed to the federal poverty guidelines; provided,

however, that a hospital may not establish an eligibility system which sets the income level eligible for charity care lower than that required by counties under the Texas Health and Safety Code, §61.023 or higher, in the case of the financially indigent, than 200% of the federal poverty guidelines. A hospital may determine that a person is financially or medically indigent pursuant to the hospital's eligibility system after health care services are provided.

Hospital Data Advisory Committee-An advisory group, appointed by the Board, which assists the department in carrying out its responsibilities under the Health and Safety Code, Chapter 311.

Medically indigent-A person whose medical or hospital bills after payment by third-party payors exceed a specified percentage of the patient's annual gross income, determined in accordance with the hospital's eligibility system, and the person is financially unable to pay the remaining bill.

Nonprofit hospital-A hospital that is eligible for tax-exempt bond financing; or exempt from state franchise, sales ad valorem, or other state or local taxes; and organized as a nonprofit corporation or a charitable trust under the laws of this state or any other state or country. For purposes of these sections, a "nonprofit hospital" shall not include a hospital that:

(A) is exempt from state franchise, sales, ad valorem, or other state or local taxes;

(B) does not receive payment for providing health care services to any inpatients or outpatients from any source including but not limited to the patient or any person legally obligated to support the patient, third-party payors, Medicare, Medicaid, or any other federal, state, or local indigent care program; payment for providing health care services does not include charitable donations, legacies, bequests, or grants or payments for research; and

(C) does not discriminate on the basis of inability to pay, race, color, creed, religion, or gender in its provision of services; or

(D) is located in a county with a population under 50,000 where the entire county or the population of the entire county has been designated as a Health Professional Shortage Area.

Patient data-Information derived from individual, acute care, inpatient and outpatient discharge abstract records.

Subsidized health services-Services provided by a hospital in response to community needs for which the reimbursement is less than the hospital's cost for providing the services and which must be subsidized by other hospital or nonprofit supporting entity revenue sources. Subsidized health services include, but are not limited to, emergency and trauma care, neonatal intensive care, free-standing community clinics and collaborative efforts with local government or private agencies in preventive medicine.

Survey-The annual data collection effort conducted by the department to implement the provisions of the Health and Safety Code, Chapters 104 and 311.

§13.14. Types of Data to be Reported. The types of data which hospitals must report to the Texas Department of Health (department) are as follows:

(1) reporting period data reflecting the 12-month period covering the hospital's most recently completed fiscal year;

(2) organizational structure data reflecting the organization that is responsible for establishing policy for the overall operation of the hospital; the organization that owns the hospital's physical plant; the organization's affiliation with the hospital and any hospital systems of which the hospital is a part; and, the type of service provided to the majority of admissions;

(3) financial data about a facility's revenues and expenses. Financial data is based on the American Institute of Certified Public Accountants Hospital Audit Guide and on generally accepted accounting principles for hospitals and is extracted from the hospital's most recent annual financial statements as follows:

(A) total gross revenue, including Medicare and Medicaid gross revenue, other revenue from state programs, revenue from local government programs, local tax support, charitable contributions, other third-party payments, gross inpatient revenue, and gross outpatient revenue;

(B) total deductions from gross revenue, including contractual allowances and any other deductions;

(C) net patient revenue;

(D) charity care;

(E) bad debt expense; and

(F) total assets and liabilities;

(4) utilization data about the use of a facility and/or its services, including:

(A) total admissions, including Medicare admissions and Medicaid admissions, admissions under a local government program, charity care admissions, and any other type of admission;

(B) total discharges;

(C) total patient days;

(D) average length of stay; and

(E) total outpatient visits; and

(5) additional data as follows:

(A) estimates of unreimbursed costs of subsidized health services reported separately as emergency and trauma care, neonatal intensive care, free-standing community clinics, collaborative efforts with local government or private agencies in preventive medicine, and other subsidized health services;

(B) donations;

(C) total cost of reimbursed and unreimbursed research; and

(D) total cost of reimbursed and unreimbursed education separated into the following categories: education of physicians, nurses, technicians, and other medical professionals and health care providers; scholarships and funding to medical schools, colleges, and universities for health professions education; education of patients concerning diseases and home care in response to community needs; community health education through informational programs, publications, and outreach activities in response to community needs; and other educational services that satisfy the definition of "education-related costs" under the Health and Safety Code, §311.031(6).

§13.15. Survey Forms.

(a) The hospital shall use the survey form developed by the Texas Department of Health (department) for reporting purposes. The department shall mail a survey form to each hospital on an annual basis.

(b) The hospitals shall complete all requested sections on the survey form and return it to the department within 60 days of receipt. The hospitals shall report data for the hospitals' most recently completed fiscal year. A copy of the hospital's eligibility system shall be submitted as an attachment to the survey form.

(c) The department may request missing or incomplete data by written or

telephone request. Hospitals shall complete all requested follow-up in the time frame specified by the department.

(d) A hospital that has applied for consideration or that has been designated as a disproportionate share hospital must submit a completed survey to the department within 30 days of original receipt of the survey form by the hospital.

§13.16. Verification Report. The department shall send each reporting hospital a copy of its data verification report prior to the publication of the results of the survey. The hospital shall review the contents of the computer generated report. If modifications to the report are necessary, the appropriate changes shall be made on the report, and the hospital administrator shall sign and return the report to the department within 31 days of receipt. If no changes are reported within 31 days, the department shall consider the hospital's report verified.

§13.17. Duties of Nonprofit Hospitals.

(a) Annual Community Benefits Plan.

(1) Nonprofit hospitals shall file an annual report of the community benefits plan, as required by the Health and Safety Code, §311.046, with the Texas Department of Health (department) no later than 120 days after the end of the hospital's first complete fiscal year beginning after September 1, 1993.

(2) The nonprofit hospital's annual report of the community benefits plan must include, at a minimum, the hospital's mission statement, a disclosure of the health care needs of the community that were considered in developing the community benefits plan and a disclosure of the amount and types of community benefits, including charity care, actually provided. Charity care shall be reported as a separate item from other community benefits.

(b) Annual Statement of Community Benefits Standard.

(1) Nonprofit hospitals shall file an annual statement with the department no later than 120 days after the end of the hospital's fiscal year, stating which of the standards for providing community benefits have been satisfied. The annual statement filed by a hospital under this subsection shall be based on the most recetly completed and audited prior fiscal year of the hospital. A nonprofit hospital may elect to provide community benefits according to any of the following standards:

(A) charity care and government-sponsored indigent health care are provided at a level which is reasonable in relation to the community needs, as determined through the community needs assessment, the available resources of the hospital, and the tax-exempt benefits received by the hospital;

(B) charity care and government-sponsored indigent health care are provided in an amount equal to at least 4.0% of the hospital's net patient revenue;

(C) charity care and government-sponsored indigent health care are provided in an amount equal to at least 100% of the hospital's tax- exempt benefits, excluding federal income tax;

(D) prior to January 1, 1996, charity care and community benefits are provided in a combined amount equal to at least 5. 0% of the hospital's net patient revenue, provided that charity care and government-sponsored indigent health care are provided in an amount equal to at least 3.0% of net patient revenue; or

(E) after December 31, 1995, charity care and community benefits are provided in a combined amount equal to at least 5.0% of the hospital's net patient revenue, provided that charity care and government-sponsored indigent health care are provided in an amount equal to at least 4.0% of net patient revenue.

(2) Nonprofit hospitals shall use the form developed by the department for reporting under this section and shall submit the form as part of the annual community benefits plan.

(3) The department will accept written revisions of the Annual Statement of Community Benefits Standard for 30 days after the filing date.

(c) Reporting.

(1) The department shall notify nonprofit hospitals in writing that the annual report of a community benefits plan and the statement of community benefits standard must be filed within 120 days after the end of the hospital's fiscal year. The notification will include a form to be used by nonprofit hospitals to file the Annual Statement of Community Benefits Standard.

(2) The department shall determine each nonprofit hospital's filing date based on the fiscal year reporting period used in its 1992 survey form required under §13.15 of this title (relating to Survey Forms). A nonprofit hospital may change its filing date by providing written notification to the department at the initiation of a new fiscal year reporting basis.

(d) Posting of sign. Nonprofit hospitals shall prepare a statement notifying the public that the annual report of the community benefits plan is public information, that it is filed with the department and that it is available on request from the Bureau of State Health Data and Policy Analysis, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756. The statement must be posted in prominent places throughout the hospital, including but not limited to the waiting areas of the emergency room and the admissions office. Nonprofit hospitals shall also print the statement in the patient guide or other materials that provide the patient with information about the hospital's admissions criteria.

§13.18. Non-Compliance with Reporting Requirements.

(a) Data Reporting.

(1) A hospital that does not timely submit requested data to the Texas Department of Health (department) according to the requirements and procedures established in these sections is subject to a civil penalty of not more than $500 for each day of non-compliance, under the provisions of the Health and Safety Code, Chapter 104.

(2) If a hospital does not submit a completed survey form to the department within the 60-day reporting period established in §13.15 of this title (relating to Survey Forms), the department may institute the following procedures.

(A) The department will notify the entity in writing by certified mail, return receipt requested, that the entity is in non-compliance with department reporting requirements and may be in violation of the Health and Safety Code, Chapter 104. The written notification will also state that the commissioner of health will request that the attorney general institute and conduct a suit in the name of the state to recover civil penalties if the hospital fails to submit the requested data to the department within 30 days of the postmark of the notification letter.

(B) If the department does not receive the requested data from the non-responding hospital within the specified time frame, the commissioner of health will notify the attorney general in writing of the entity's non- compliance. The department will send a copy of the written notification to the hospital.

(b) Community Benefits Plans.

(1) A nonprofit hospital that does not timely submit a report of the community benefits plan to the Texas Department of Health (department) according to the requirements and procedures established in these sections is subject to a civil penalty

of not more than $1,000 for each day of non-compliance, under the provisions of the Health and Safety Code, Chapter 311.

(2) If a nonprofit hospital does not submit a report of the community benefits plan to the department within the 120-day reporting period established in §13.17 of this title (relating to Duties of Nonprofit Hospitals), the department may institute the following procedures.

(A) The department will notify the entity in writing by certified mail, return receipt requested, that the entity is in non-compliance with department reporting requirements and may be in violation of the Health and Safety Code, Chapter 311. The written notification will also state that the commissioner of health will request that the attorney general institute and conduct a suit in the name of the state to recover civil penalties if the hospital fails to submit the report to the department within ten days after receipt of the written notification letter.

(B) If the department does not receive the report of the community benefits plan from the non-responding hospital within the specified time frame, the commissioner of health will notify the attorney general in writing of the entity's non-compliance. The department will send a copy of the written notification to the hospital.

§13.19. Confidential Data.

(a) The following data received by the Texas Department of Health (department) from a public or private hospital is confidential under authority of the Health and Safety Code, Chapters 104 and 311:

(1) information relating to a specific patient; and

(2) financial information relating to a provider or hospital that was submitted prior to September 1, 1987. All financial data regarding a provider or facility submitted after September 1, 1987, are no longer confidential.

(b) The department will establish appropriate internal controls to maintain confidentiality.

(c) The department will disclose confidential patient information to a third party only upon receipt of appropriate written consent of the patient.

§13.20. Open Records Request Procedures.

(a) The Texas Department of Health (department) will provide non- confidential information upon receipt of written request and payment for the cost of copies as determined by the department and the General Services Commission.

(b) Individuals may review non-confidential information on the department's premises during normal business hours by scheduling an appointment at least one day in advance of the desired review. Individuals must complete their review of the information within ten days or submit a written request to the department to obtain additional time to review the information.

(c) The department will notify the requester in writing if the requested information is unavailable at the time of the request and establish a date within a reasonable period of time in which the information will be available for inspection or duplication.

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 28, 1993.

TRD-9331201 Susan K. Steeg
General Counsel
Texas Department of Health

Proposed date of adoption: January 28, 1994

For further information, please call: (512) 458-7261

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Chapter 103. Injury Prevention and Control

General Provisions

• 25 TAC §§103.1-103.9

The Texas Department of Health (department) proposes new §§103.1-103.9, concerning injury prevention and control. The new sections cover purpose, definitions, reportable injuries or conditions, reporting requirements, general control measures for reportable injuries, powers and duties of the department, confidential case reporting, investigations, technical advisory committee on injury reporting. The new sections implement the Health and Safety Code, Chapter 87, Injury Prevention and Control, §§87.001-87.009, which requires the department to establish methods by which certain injuries shall be reported to the department and establish an injury technical advisory committee.

Dennis Perrotta, bureau chief, Bureau of Epidemiology, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Dr. Perrotta also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be an expanded ability to define the magnitude of injuries in the state and access to critical information on non-fatal injuries with which to design effective prevention strategies. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed. There will be no impact on local employment.

Comments on the proposal may be submitted to David Zane, M.S., Bureau of Epidemiology, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3180, (512) 458-7266. Comments will be accepted for 30 days from the date of publication of the proposed rules in the *Texas Register*.

The chapter is proposed under the Health and Safety Code, §§87.001-87.009, which requires the department to establish rules for the reporting and control of injuries; and §12.001, which provides the Texas Board of Health with the authority to adopt rules for the performance of every duty imposed by law on the Texas Board of Health, the Texas Department of Health, and the Commissioner of Health.

§103.1. Purpose. These sections implement the Texas Injury Prevention and Control Act, House Bill 343, 73rd Legislature, 1993, which authorizes the Texas Board of Health to adopt rules concerning the reporting and control of injuries.

§103.2. Definitions. The following words and terms, when used in these sections, shall have the following meanings unless the context clearly indicates otherwise.

Board-The Texas Board of Health.

Case-A person in whom an injury is diagnosed by a physician, medical examiner, or justice of the peace, based upon clinical evaluation, interpretation of laboratory and/or roentgenographic findings, and an appropriate exposure history.

Commissioner-The Commissioner of the Texas Department of Health.

Department-The Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3180.

Director-The director of the Texas Department of Health, who is the Commissioner.

Health authority-A physician designated to administer state and local laws relating to public health under the Local Public Health Reorganization Act, the Health and Safety Code, Chapter 121. The health authority, for purposes of these sections, may be the chief administrative officer of a public health district or a local health department, or the physician who is to administer state and local laws relating to public health.

Injury-Damage to the body that results from intentional or unintentional acute exposure to thermal, mechanical, electrical, or chemical energy, or from the absence of essentials such as heat or oxygen.

Reportable injury-Any injury or condition required to be reported under this chapter.

Report of an injury–The notification to the appropriate health authority of the occurrence of a specific injury in a human, including all information required by the rules and forms promulgated by the Board of Health.

Spinal cord–That portion of the central nervous system which extends from the foramen magnum to the cauda equina. All nerve roots within the spinal canal are included.

Spinal cord injury–An acute, traumatic lesion of the neural elements in the spinal canal, resulting in any degree of sensory deficit, motor deficits, or bladder/bowel dysfunction. The neurologic deficit or dysfunction can be temporary or permanent.

Submersion injury–A drowning (a death resulting from suffocation within 24 hours of submersion in water) or near-drowning (survival for at least 24 hours after suffocation from submersion in water).

Suspected case–A case in which an injury is suspected, but the final diagnosis is not yet made.

§103.3. List of Reportable Injuries or Conditions. Spinal cord injuries and submersion injuries are reportable injuries. Reports of these injuries shall include, but not be limited to: patient's name, address, age, gender, race/ethnicity, name of health care facility, and name of attending physician.

§103.4. Reporting Requirements.

(a) The following persons or their designees shall report in writing within 10 working days all newly diagnosed cases or suspected cases of reportable injuries to the local health authority, or where there is no local health authority, the regional health authority:

(1) a physician who diagnoses or treats a reportable injury or a suspected case of a reportable injury; and

(2) a medical examiner; or

(3) justice of the peace.

(b) The reporting physician, medical examiner, or justice of the peace shall make the report in writing on a form or forms prescribed by the Texas Department of Health (department).

(c) A local health authority or regional health authority shall transmit any reports of reportable injuries to the Bureau of Epidemiology, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3180, on a weekly basis.

(d) Transmission of injury reports shall be made by mail, courier, or electronic transfer.

(1) If by mail or courier, the reports shall be placed in a sealed envelope, marked "Confidential Medical Records," and addressed to the attention of the Injury Prevention and Control Program, Bureau of Epidemiology, Texas Department of Health.

(2) If by electronic transmission by telephone, it shall be made in a manner and form authorized by the commissioner or his or her designee in each instance. Any electronic transmission of the reports must provide at least the same degree of protection against unauthorized disclosure as those of mail or courier transmission. The commissioner or his or her designee shall, before authorizing such transmission, establish guidelines for establishing and conducting such transmission.

(e) The department may contact a medical examiner, justice of the peace, or physician attending a person with a case or suspected case of a reportable injury.

§103.5. General Control Measures for Reportable Injuries. The commissioner or his or her duly authorized representative shall, as circumstances may require, proceed as follows.

(1) Investigation may be made by staff of the Texas Department of Health (department) for the purpose of verifying the diagnosis, ascertaining the cause of the injury, obtaining a history of circumstances surrounding the injury, and discovering unreported cases.

(2) Subject to the confidentiality provisions of these sections, the department may collect, or cause to be collected, medical, demographic, or epidemiological information from any medical or laboratory record or file to help the department in the epidemiologic investigation of injuries and their causes.

(3) Information concerning the injury or its prevention may be given to the patient or a responsible member of the patient's household to prevent further injury(ies).

§103.6. Powers and Duties of the Department.

(a) The Texas Department of Health (department) may enter into contracts or agreements as necessary to carry out Injury Prevention and Control Act, the Health and Safety Code, Chapter 87. The contracts or agreements may provide for payment by the state for materials, equipment, and services.

(b) The department may seek, receive, and spend any funds received through appropriations, grants, donations, or contributions from public or private sources for the purpose of identifying, reporting, or preventing those injuries determined by the Board of Health to be harmful or to be a threat to the public health.

(c) Subject to the confidentiality provisions of these sections, the department shall evaluate the reports of injuries to establish the nature and magnitude of the hazards associated with those injuries, to reduce the occurrence of those risks, and to establish any trends involved.

(d) The department may make inspections and investigations as authorized by the Health and Safety Code, Chapter 87, and other law.

§103.7. Confidential Nature of Case Reporting.

(a) All individual injury case reports received by the local health authority or the Texas Department of Health (department), including information from injury investigations, are confidential records and not public records. These records shall be held in a secure place and accessed only by authorized health care personnel.

(b) Information or records relating to any personal injury may not be released or made public on subpoena or otherwise, except that release may be made:

(1) for statistical purposes, but only if a person is not identified;

(2) with the consent of each person identified in the information released; or

(3) to medical personnel in a medical emergency to the extent necessary to protect the health or life of the named person.

(c) The commissioner, the commissioner's designee, or an employee of the department may not be examined in a judicial or other proceeding about the existence or contents of pertinent records of, investigation reports of, or reports or information about a person examined or treated for an injury without that person's consent.

§103.8. Investigations.

(a) The Texas Department of Health (department) shall investigate the causes of injuries and methods of prevention.

(b) The commissioner or the commissioner's designee may enter at reasonable times and inspect within reasonable limits a public place or building, including a public conveyance, in the commissioner's duty to prevent an injury.

(c) The commissioner or the commissioner's designee may not enter a private residence to conduct an investigation about the causes of injuries without first receiving permission from a lawful adult occupant of the residence.

(d) When the department investigates work-related injuries, the Texas Workers Compensation Commission shall be informed at the earliest opportunity.

§103.9. Technical Advisory Committee on Injury Reporting.

(a) A technical advisory committee appointed by the Texas Board of Health (board) shall advise the board of injuries, other than spinal cord injuries and submersion injuries, that should be designated reportable injuries under the Health and Safety Code, Chapter 87.

(b) The technical advisory committee shall be composed of:

(1) three doctors of medicine or doctors of osteopathic medicine licensed to practice in this state;

(2) three hospital representatives, one of whom must represent a public hospital; and

(3) three consumers of services which are provided either by the department or by industries or occupations regulated by the Texas Department of Health (department).

(c) Technical advisory committee members shall serve at the pleasure of the board.

(d) A vacancy on the technical advisory committee shall be filled in the same manner as other appointments to the advisory committee.

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 28, 1993.

TRD-9331203 Susan K Steeg
General Counsel
Texas Department of Health

Proposed date of adoption: January 28, 1994

For further information, please call: (512) 458-7261

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Chapter 141. Massage Therapists

• 25 TAC §§141.1-141.6, 141.8, 141.10-141.13, 141.15-141.20, 141.23

The Texas Department of Health (department) proposes amendments to §§141.1-141.6, 141.8, 141.10-141.13, and 141.15-141.20, concerning the regulation of massage therapists, massage establishments, massage schools, and instructors; and proposes new §141.23, concerning workshops and seminars.

The amendments implement the provisions of Senate Bill 674, 73rd Legislature Regular Session, 1993, and update existing sections. The amendments amend the definitions; increase registrations fees; add consumer information provisions; add criminal convictions related to the profession of massage therapy; and various minor changes which clarify meaning without substantial change, improve grammar and style, and clarify inconsistences in the rules. The new section establishes procedures for massage schools and independent massage instructors to register to offer continuing education courses only.

Becky Berryhill, program director, has determined that there will be fiscal implications as a result of enforcing or administering the rules. The effect on state government will be an estimated increase of revenues of $56,000 in fiscal year 1994, $96,000 in fiscal year 1995 through fiscal year 1998, and estimated additional costs of $96,000 for each year of fiscal years 1994-1998. There will be no fiscal implications for local government as a result of enforcing or administering the sections.

Ms. Berryhill also has determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing the rules will be to assure that the regulation of massage therapists, massage establishments, massage schools, and massage instructors continues to identify competent practitioners and to improve consumer protection. There will also be benefits from a provision to register schools and independent massage instructors who only offer continuing education courses. There will be no fiscal implications for small businesses as a result of enforcing or administering the rules. The economic costs to persons who may be required to comply with the sections are the fees set out in the body of the rules. There will be no impact on local employment.

Comments on the proposal may be submitted to Becky Berryhill, Program Director, Massage Therapy Registration Program, Texas Department of Health, 1100 West 49th Street, Austin, Texas, 78756-3183, (512) 834-6616. All requests for a public hearing on the proposed amendments submitted under the Administrative Procedure Act must be received by the program director not more than 15 calendar days after notice of a proposed change in the rules has been published in the *Texas Register*.

Comments will be accepted for 30 days from the date of publication in the *Texas Register* of the proposed section.

The amendments and new section are proposed under Texas Civil Statutes, Article 4512k, §7, which provides the Texas Board of Health with the authority to adopt rules concerning the regulation and registration of massage therapists, massage instructors, massage schools, and massage establishments; and the Health and Safety Code, §12.001 which provides the Texas Board of Health with authority to adopt rules for the performance of every duty imposed by law on the Texas Board of Health, the Texas Department of Health, and the commissioner of health. These sections implement the Massage Therapists and Massage Establishments Act, Texas Civil Statutes, Article 4512k.

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

Additional program-A program[, seminar or workshop] for compensation, offering instruction related to massage therapy beyond the course of instruction required for registration. This does not include instruction of purely avocational or recreational subjects.

Hydrotherapy-The use of generally accepted methods of external application of water for its **mechanical, thermal, or chemical** [pressure] effect [or the use of water as a means of applying physical energy to the tissues, which includes the use of ice or steam].

Massage therapy-The manipulation of soft tissue. The term includes, but is not limited to effleurage (stroking), petrissage (kneading), tapotement (percussion), compression, vibration, friction, nerve strokes, and Swedish gymnastics, either by hand or with mechanical or electrical apparatus for the purpose of body massage. Massage therapy may include the use of oil, salt glows, heat lamps, hot and cold packs, or tub, shower, or cabinet baths. Equivalent terms for massage therapy are massage, therapeutic massage, massage technology, myotherapy, body massage, body rub, or any derivation of those terms. Massage therapy is a health care service when the massage is for therapeutic purposes. The terms "therapy" and "therapeutic" do not include diagnosis, the treatment of illness or disease, or any service or procedure for which a license to practice medicine, chiropractic, physical therapy, or podiatry is required by law. Massage therapy does not constitute the practice of chiropractic. **Massage therapy includes any discipline not otherwise licensed by the state which practices manipulation of soft tissue including reflexology, Rolfing, Traeger, myofacial release, and cranial sacral therapy. Massage therapy does not include Therapeutic Touch and Rieki.**

Seminars and workshops-Continuing education programs of 55 clock-hours or less in duration which serve to enhance **an individual's** [a student's] career rather than to develop basic skills and fundamental knowledge required for entry into the field of massage therapy. This includes continuing professional education and organized review for the department's massage therapy examination. This does not include seminars and workshops for which no charge is made.

State approved educational institution-An institution which is approved by the Texas Education Agency or which is an institution of higher education as defined in the Texas Codes Annotated, Texas Education Code, Chapter 51, **or a higher-education institution approved by a similar agency in another state.**

Swedish massage therapy techniques–**The manipulation of soft tissue utilizing effleurage (stroking), petrissage (kneading), tapotement (pressure), compression, vibration, friction, nerve stroke,** and [The study of massage techniques including the use of rubbing, kneading, and stroking the superficial parts of the body and] Swedish gymnastics.

§141.2. The Advisory Council.

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

(g) Transaction of official business.

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

(3) **The latest edition of** "Roberts Rules of Order [, Newly Revised"] shall be the basis of parliamentary decision except where otherwise provided by these rules.

(h)-(l) (No change.)

(m) Tasks and charge.

(1) The advisory council shall recommend to the board rules to implement the Act.

(2) The advisory council shall prescribe application forms and registration fees.

(3) The advisory council shall keep a complete record of all registered massage therapists and shall annually prepare a roster showing the names and addresses of all registered massage therapists.

(4) The advisory council shall advise the board concerning rules relating to the definition of "unprofessional conduct."

(5) The advisory council shall advise the department concerning the course of instruction required for registration and examination guidelines.

(6) These tasks shall be formed with the assistance of the department.

(n) Statements or actions by individual council members. The advisory council and the department shall not be bound in any way by any statement or action on the part of any council member except when a statement or action is in pursuance of specific instructions of the council or department.

§141.3. Fees.

(a) The schedule of fees is as follows.

(1) Massage therapists:

(A)-(D) (No change.)

(E) renewal fee–**$40** [$24];

(F) late penalty fee (includes renewal fee)–**$80** [$48];

(2)-(5) (No change.)

(b)-(c) (No change.)

§141.4. Massage Therapist Application Procedures.

(a) (No change.)

(b) General.

(1) (No change.)

(2) The department must receive all required application materials **on or before the deadline prior to each examination set by the department in order to be able to take that examination** [at least 60 days prior to the date the applicant wishes to take the examination].

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

(c) (No change.)

§141.5. Massage Therapist Registration Qualification Requirements.

(a) (No change.)

(b) Each applicant must present evidence satisfactory to the department that the person has:

(1) successfully completed a minimum of a 250 hour supervised course of instruction in massage studies provided by a registered massage therapy instructor, registered massage school, a state-approved educational institution, or a combination of any of these. Course work completed at state-approved educational institutions must have been completed within five calendar years of the date of application in order to be used to meet the coursework requirements for registration. An applicant who holds a current license [in this state] as a physician, chiropractor, physical therapist, **physical therapist assistant,** registered nurse, occupational therapist, licensed vocational nurse, athletic trainer, or meets the requirements for massage school instructors set out in §141.13(b)(1)(B)(ii) of this title (relating to Minimum Standards for Operation of Massage Schools and Massage Therapy Instructors) is exempt from the five calendar-year limit on coursework. An individual who begins the required massage therapy studies on or after January 1, 1992 must successfully complete massage therapy studies in a 300-hour supervised course of instruction that includes a 50-hour internship program;

(2) (No change.)

(3) practiced massage therapy as a profession for not less than five years **immediately preceding the application date** in another state or country that does not have or maintain standards and requirements of practice and licensing or registration that substantially conform to those of this state, as determined by the department. An applicant must have been engaged in the practice of massage therapy as defined in §141.1 of this title (relating to Definitions) for not less than 36 hours per month.

(c) -(e) (No change.)

§141.6. Examinations.

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

(c) Application for examination.

(1) (No change.)

(2) The department shall notify an applicant whose application has been approved [at least 30 days prior to the next scheduled examination]. Applications which are received incomplete or late may cause the applicant to **not be approved to take the examination and to** miss the examination deadline. The notice shall include the examination registration form [and a model eligibility form].

(3) An examination registration form must be completed and returned to the department **on or before the deadline set by the department** by the applicant with the required examination fee [at least 15 days prior to the date of the examination].

(4) The examination will be conducted in the English language. Exceptions will be made when English is not the native or first language of the applicant. The written exam may be taken in their native language if the individual notifies the department at least 60 days in advance, so that the written test would be available. [Applicants with learning disabilities, dyslexia, and those who are emotionally disturbed or blind will be extended the service of oral, tape recorded, or reader services exams with valid proof of condition.] The applicant will be responsible for any fee or consideration to be paid to an acceptable interpreter and/or translator whose services are necessary for the examination. [If the applicant can make arrangements that are acceptable, the examination will be given at the first time available.]

(5) Applicants with disabilities must inform the department of special accommodations requested for examination.

(d)-(i) (No change.)

(j) Equipment for examination. Each applicant taking the practical portion of the examination will serve as a model for another applicant taking the practical portion of the examination on the same day. Applicants will bring massage lubricant in an unbreakable container, and [two towels,]

two twin-sized sheets[, and a completed model eligibility form provided by the department]. A massage table will be provided for the applicant at the examination site. **Each applicant shall complete a model eligibility form provided by the department at the examination site.**

(k) (No change.)

§141.8. Massage Therapist Determination of Eligibility.

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

(c) An application for a registration shall be disapproved if the person has:

(1)-(5) (No change.)

(6) been convicted of a felony or misdemeanor if the crime directly relates to the duties and responsibilities of a registered massage therapist as set out in §141.19 of this title (relating to Registration of Persons with Criminal Backgrounds; [or]

(7) practiced or administered massage therapy at or for a sexually-oriented business; or[.]

(8) violated any provision of state law relating to the practice of massage therapy or to the practice of a health care profession.

(d) (No change.)

§141.10. Massage Therapist Registration Renewal.

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

(e) Late renewal.

(1) The department[, by certified mail,] shall inform a person who has not renewed a registration within 30 days following the expiration of the registration of the amount of the renewal fee required for renewal and the date the registration expired.

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

(f)-(g) (No change.)

§141.11. General Requirements for Massage Schools and Massage Therapy Instructors

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

(c) Financial stability.

(1)-(5) (No change.)

(6) All financial statements must identify the name of the independent public accountant or certified public accountant who prepared the statements and be in accordance with generally accepted accounting principles. Reviews and compilations must be accompanied by the owner's or independent MTI's affidavit that the statements are true and correct.

(d) (No change.)

(e) Additional programs.

(1)-(5) (No change.)

(6) An application shall include notification to the department of which portions of the additional program will or may be offered as a seminar or workshop.

(A) (No change.)

(B) If the seminar or workshop was approved as part of and additional program, the seminar or workshop is governed by the rules applicable to additional programs. Separately approved seminars or workshops are governed by §141.23 of this chapter (relating to Seminars and Workshops). [A seminar or workshop shall only be offered in compliance with the applicable provisions of this chapter.]

(f) MTI. [An MTI desiring to teach an initial or additional program independent of a massage school shall meet the same requirements of this chapter as required of massage schools. An MTI may teach all subjects within the initial program at a registered massage school or independently. Any individual teaching massage therapy in a massage school or independently in an initial or additional program must be an MTI.]

(1) The department shall designate each registered MTI as an independent MTI, a school-based MTI, or both based on the application filed with the department.

(2) An MTI desiring to teach an initial or additional program independent of a massage school must be registered as a independent MTI and shall meet the same requirements of this chapter as required of massage schools.

(3) Any individual teaching massage therapy in a massage school or independently must be a registered MTI.

(4) A registered MTI may teach all subjects within the initial program.

(5) A school-based MTI may only teach massage therapy at a registered massage school.

(6) An independent MTI may teach massage therapy in a registered massage school or independent of a massage school in accordance with this chapter.

(g)-(p) (No change.)

[(q) Memorandum of Understanding (MOU). The MOU as required by the Act, §19, between the Central Education Agency and this department is adopted by reference. A copy is available from the Texas Department of Health, Massage Therapy Registration Program, 1100 West 49th Street, Austin, Texas, 78756-3183. Under the MOU, the schools and instructors which meet the definitions of "massage school" or "massage therapy instructor" in the Act and §141.1 of this title (relating to Definitions) are subject to regulation by this department but other schools, programs or instructors may be subject to regulation by the agency under the Texas Proprietary School Act.]

§141.12. Curriculum.

(a) The course of instruction for registration shall consist of 250 classroom hours, to include:

(1)-(6) (No change.)

(b) An individual who begins the required massage therapy studies on or after January 1, 1992 must successfully complete massage therapy studies in the 300-hour supervised course of instruction that includes a 50-hour internship program as well as the subjects described in subsection (a) of this section.

(1) (No change.)

(2) A student must successfully complete the requirements of the first 250 hours described in subsection (a) of this section before being eligible to enter the internship program.

(3)-(5) (No change.)

(6) A massage school or independent MTI may not require a student to advertise for clients or to obtain clients as part of the internship program. At the student's option and with the school's or MTI's permission, a student may obtain clients for the student's hands-on massage therapy experience.

(c)-(d) (No change.)

(e) A classroom hour shall include at least [constitute] 50 clock minutes of actual classroom time and may include a maximum of 10 minutes of breaktime.

(1) Breaktime for hours which are taught consecutively in one sitting (i.e., in one evening) may be aggregated into a single breaktime during those consecutive hours but not at the end of those hours.

(2) Breaktime may not be aggregated to reduce the total number of hours of the course of instruction.

(f) A massage school or an independent MTI may not offer a course of instruction for registration as a massage therapist which requires the successful completion of more course hours than are required for registration as a massage therapist under the Act.

(g) No change.)

§141.13. Minimum Standards for Operation of Massage Schools and Massage Therapy Instructors.

(a) (No change.)

(b) Each massage school and MTI shall comply with the following standards. (Each MTI shall comply with the standards as applicable to the MTI's type of instruction, i.e., within a massage school or independent of a school).

(1) Personnel.

(A) (No change.)

(B) Instructors.

(i) **A registered** [An] MTI shall instruct the [Swedish] massage therapy technique course of study.[,]**In order to become a registered MTI, a person** shall be a registered massage therapist **(not a temporary registration)**, and shall have:

(I) a high school diploma ,[or] a general-equivalence diploma **or a transcript from an accredited college or university showing successful completion of at least 12 semester hours**; and

[(II) a minimum of two years of practice as a massage therapist. Completion of 100 hours beyond the initial program at a proprietary school approved by the Central Education Agency, a state approved educational institution, or in an additional program approved by the Texas Department of Health (department) may be substituted for six months' experience with a maximum substitution of 200 hours for one year.]

(II)[(III)] attended a course on teaching adult learners or have demonstrated competency in teaching adult learners. Courses attended may include an instructional certification program, a college-level course in teaching adult learners, a continuing education course in teaching adult learners, or an additional program approved by the department in teaching the course of instruction. Demonstrated competency in teaching adult learners may be verified by a letter of reference. Teaching experience may include formal or informal teaching of varied subjects to adult learners.

(ii) **A registered MTI without the experience described in this clause shall only instruct when another registered MTI with such experience is present. An MTI with the following experience need not have another MTI present during instruction:**

(I) a minimum of two years of practice as a massage therapist. Completion of 100 hours beyond the initial program at a proprietary school approved by the central education agency, as a state-approved educational institution, or in an additional program by the Texas Department of Health (department) may be substituted for six months experience with a maximum substitution of 200 hours for one year; or

(II) an individual who holds a current license in this state as a physician, chiropractor, physical therapist, registered nurse, occupational therapists, licensed vocational nurse, or athletic trainer is exempt from the requirement for two years of practice as a massage therapist.

(iii)[(ii)] Qualified personnel may participate as instructors. The instructor shall have attended a course on teaching adult learners, or have demonstrated competency in teaching adult learners. Instructors other than an MTI shall have one of the following specific qualifications.

(I) An instructor must hold a baccalaureate or higher degree from an accredited college or university, and:

(-a-) the baccalaureate or higher degree or other course work must include satisfactory completion of nine semester hours or 12 quarter hours in subjects related to the subject area to be taught; or

(-b-) the instructor must have a minimum of one year of practical experience within the last 10 years in the subject area to be taught.

(II) An instructor must hold an associate degree from an accredited college, university, or recognized postsecondary institution, and:

(-a-) the instructor must have a minimum of one year of practical experience within the last 10 years in the subject area to be taught and the associate degree must include satisfactory completion of nine semester hours or 12 quarter credit hours in subjects related to the subject area to be taught; or

(-b-) the instructor must have a minimum of two years of practical experience within the last 10 years in the subject area to be taught.

(III) An instructor must hold a high school diploma, general equivalency degree (GED), or proof of satisfactory completion of relevant subject(s) from a recognized postsecondary institution or practical experience of a minimum of two years within the last 10 years in the subject area to be taught.

(iv)[(iii)] Each instructor shall be evaluated by the school annually. The report of the evaluation shall be available for review by the department.

(v)[(iv)] The school shall ensure continuity of instruction through the reasonable retention of qualified instructors.

(C) Assistants.

(i) **A person who is not a registered MTI may assist in instruction if the person:**

(I) is a registered massage therapist (not a temporary registration);

(II) has a high school diploma, a GED, or a transcript from an accredited college or university showing successful completion of at least 12 semester hours; and

(II) is supervised (physical presence) by a registered MTI meeting the experience requirements in subparagraph (B)(ii) of this paragraph.

(ii) **No department approval or registration is required for an assistant.**

(iii) **An assistant can not teach the 125 hours of massage therapy techniques or the 50 hour internship in the course of instruction but may assist the registered MTI teaching those hours. An assistant may teach other courses without a supervising MTI only if the assistant meets the qualifications for other instructors in subparagraph (B)(iii) of this paragraph.**

(2)-(4) (No change.)

(5) Cancellation and refund policy.

(A) General. Each school and independent MTI shall develop and implement a cancellation and refund policy as described in this paragraph. **The** [Except for seminars and workshops (see subparagraph (C) of this paragraph), the] policy must provide a full refund of all monies paid by a student if:

(i)-(ii) (No change.)

(B) Refunds. **The** [Except for seminars and workshops, the] policy must provide for the refund of the unused

portion of tuition, fees, and other charges in the event the student, after expiration of the 72-hour cancellation privilege, fails to enter, withdraws from, or is terminated from the program at any time prior to completion. The policy must provide that:

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

(iv) if a student enters a program not more than 18 [12] months in length and is terminated or withdraws, the school or independent MTI may retain $200 of tuition and the minimum refund of the remaining tuition will be:

(I)-(VI) (No change.)

(v)-(viii) (No change.)

[(C) Seminars and workshops. The cancellation and refund policy for seminars and workshops shall provide for a 100% refund of all tuition and fees paid if the student cancels at least four weeks before the first day of the seminar or workshop. Refunds for cancellations made in less than four weeks shall be determined by the school or independent MTI and addressed in the policy.]

(C)[(D)] Computations. In all refund computations, leaves of absence, suspensions, school holidays, days when classes are not offered, and summer vacations shall not be counted as part of the elapsed time for purposes of calculating a student's refund.

(D)[(E)] Evidence of refund attempts. A massage school or independent MTI is considered to have made a good-faith effort to consummate a refund if the student's file contains evidence of the following attempts:

(i) certified mail to student's last known address;

(ii) certified mail to the student's permanent address; and

(iii) certified mail to the address of the student's parent(s), if different from the permanent address and if known.

(E)[(F)] Audit. If the department determines that the method used by the massage school or MTI to calculate refunds is not in compliance with this section and if the massage school or MTI does not provide the correct refund promptly, the massage school or MTI shall submit a report of an audit conducted by a certified public accountant or public accountant registered with the State Board of Public Accountancy of the refunds due former students. The audit opinion letter shall be accompanied by a schedule of student refunds due which shall disclose the following information for the previous four years for each former student:

(i) the name, address(es), and social security number;

(ii) the last date of attendance and date of termination;

(iii) the amount of refund with principal and interest separately stated, date and check number of payment if payment has been made, and any balance due; and

(iv) the reason for refund.

(F) [(G)] Disciplinary action. The department may revoke or suspend a massage school or an MTI's registration for a violation of this subsection; however, the department has no authority to recover a refund on behalf of a student.

(6)-(7) (No change.)

(8) Minimum progress and attendance standards.

(A) Progress. Appropriate standards must be implemented to ascertain the progress of the students enrolled. Progress standards must meet the following requirements.

(i)-(ii) (No change.)

[(iii) Seminars and workshops programs do not need to maintain a progress evaluation system as described in this paragraph.]

(iii)[(iv)] A massage school or MTI shall develop and implement a written policy relating to grading period. A grading period will not cover more than 25% of the required program hours.

(iv)[(v)] A student who is making unsatisfactory progress at the end of a grading period shall be placed on probation for the next grading period. If the student on probation achieves satisfactory progress for the subsequent grading period but has not achieved the required grades to achieve overall satisfactory progress for the program, the student may be continued on probation for one more grading period.

(v) [(vi)] When a student is placed on probation, that student will be counseled prior to returning to class, and the date, action taken, and terms of the probation shall be clearly indicated on the appropriate permanent records.

(vi)[(vii)] If the student on probation fails to achieve satisfactory progress for the first probationary grading period, the student's enrollment may be terminated.

(vii)[(viii)] The enrollment of a student who fails to achieve overall satisfactory progress for the program at the end of two successive probationary grading periods shall be terminated.

(viii)[ix)] A student whose enrollment was terminated for unsatisfactory progress may reenter after a minimum of one grading period.

(ix)[(x)] The cancellation and refund policy required by this section shall apply to a student terminated under this paragraph. The effective date of termination for purposes of refunds shall be the last day of the last probationary grading period.

(x) [(xi)] A student who returns after the enrollment was terminated for unsatisfactory progress shall be placed on probation for the next grading period. The student shall be advised of this action and the student's file documented accordingly. If the student does not maintain satisfactory progress during or at the end of this probationary period, that student will be terminated.

(B) (No change.)

(9)-(19) (No change.)

§141.15. Massage Establishment Registration and Renewal.

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

(c) An applicant must file a registration statement with the department. The registration statement shall contain:

(1)-(5) (No change.)

(6) the number of the valid sales tax permit issued to the massage establishment, **if a sales tax permit is required for the establishment;**

(7) the type of available or proposed facilities and services as follows:

(A) (No change.)

(B) the inspection report of the local fire marshal. **If the document is not required, submit a letter from the county attorney or city official so stating;** and

(C) (No change.)

(8) (No change.)

(d)-(l) (No change.)

(m) Exempt organizations and exemption procedures are as follows.

(1) The following establishments are specifically exempt from the provisions of the Act regulating massage establishments:

(A) (No change.)

(B) a registered massage therapist who practices as a solo practitioner in that therapist's legal name **or uses an assumed name if the person's legal name or massage therapy registration number is used in any advertisement or presentation of the assumed name**[, not an assumed name];

(C)-(F) (No change.)

(G) the office of a physician, chiropractor, physical therapist, or member of another similar licensed profession as determined by the department where the professional is practicing within the scope of the license and where the professional uses a registered massage therapist to practice massage therapy in the professional's office [under the professional's delegated authority];

(H)-(I) (No change.)

(J) a registered massage therapy school in compliance with the Act[.] ;

(K) a beauty shop in compliance with Texas Civil Statues, Article 8451a; or

(L) a barber shop in compliance with Texas Civil Statues, Article 8407a.

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

(4) The commissioner of health **or his/her designee** will make the final decision and provide written notification of his decision to the applicant and the administrator.

(n)-(p) (No change.)

§141.16. Determination of Eligibility of Massage Therapy Instructors, Massage Schools, and Massage Establishments.

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

(c) An application for a registration or renewal shall be disapproved if the person or owner or operator has:

(1)-(6) (No change.)

(7) been convicted of, entered a plea of nolo contendere or guilty, or received deferred adjudication to crimes or offenses involving prostitution or sexual offenses; [or]

(8) been convicted of a felony or misdemeanor as set forth in §141.19 of this title (relating to Registration of Persons with Criminal Backgrounds); or[.]

(9) violated any provision of state law relating to the practice of massage therapy or a health care profession or the ownership or operation of a massage-related or health-related business.

(d) (No change.)

§141.17. Advertising.

(a)-(c) (No change.)

(d) A registrant shall not use advertising that is false, misleading, or deceptive or that is not readily subject to verification.

(1) False, misleading, or deceptive advertising or advertising that is not readily subject to verification includes advertising that:

(A) makes a material misrepresentation of fact or omits a fact necessary to make the statement as a whole not materially misleading;

(B) makes a representation likely to create an unjustified expectation about the results of a health care service or procedure;

(C) compares a health care professional's services with another health care professional's services unless the comparison can be factually substantiated;

(D) contains a testimonial;

(E) causes confusion or misunderstanding as to the credentials, education, or registration of a health care professional;

(F) advertises or represents that health care insurance deductibles or copayments may be waived or are not applicable to health care services to be provided if the deductibles or copayments are required;

(G) advertises or represents that the benefits of a health benefit plan will be accepted as full payment when deductibles or copayments are required;

(H) makes a representation that is designed to take advantage of the fears or emotions of a particularly susceptible type of patient; or

(I) advertises or represents in the use of professional name, a title or professional identification that is expressly or commonly reserved to or used by another profession or professional.

(2) A "health care professional" includes a registered massage therapist, temporary massage therapist, or any other person licensed, certified, or registered by the state in a health-related profession.

(e) When an assumed name is used in a person's practice as a massage therapist or massage establishment, the legal name or registration number of the massage therapist must be listed in conjunction with the assumed name. An assumed name used by a massage therapist must not be false, deceptive, or misleading.

§141.18. Unprofessional Conduct.

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

(e) On the written request of a client, a client's guardian, or a client's parent if the client is a minor, a registrant shall provide, in plain language, a written explanation of the charges for massage services previously made on a bill or statement for the client. This requirement applies even if the charges are to be paid by a third party.

(f) A registrant may not persistently or flagrantly overcharge or overtreat a client.

(g) A registrant shall be subject to disciplinary action by the department if the registrant is issued a public letter of reprimand, is assessed a civil penalty by a court, or has an administrative penalty imposed by the attorney general's office under the Crime Victims Compensation Act, Texas Civil Statues, Article 8309-1.

(h) The following disclosure shall be provided.

(1) A registrant shall notify each client of the name, mailing address, and telephone number of the department for the purpose of directing complaints to the department by providing notification:

(A) on each written contract for services of a registrant;

(B) on a sign prominently displayed in the primary place of business of each registrant; and

(C) in a bill for service provided by a registrant to a client or third party; or

(D) by other written and documented method.

(2) The registrant may use a different notification method listed in paragraph (1) for each client.

§141.19. Registration of Persons with Criminal Backgrounds.

(a) (No change.)

(b) Criminal convictions which directly relate to the occupation of massage therapy or to the ownership or operation of a school or establishment shall be considered by the department as follows.

(1) (No change.)

(2) In considering whether a criminal conviction directly relates, the department shall consider:

(A) (No change.)

(B) the relationship of the crime to the purposes for requiring a registration as a massage therapist, massage school, massage therapy instructor, or massage establishment. The following felonies and misdemeanors directly relate because these criminal offenses indicate an inability or a tendency to be unable to perform as a massage therapist or massage therapy instructor or to own or operate a massage school or massage establishment:

(i)-(ii) (No change.)

(iii) **insurance claim fraud under the Penal Code, §32.55;**

(iv) [(iii)] a misdemeanor or felony offense under various titles of the Texas Penal Code:

(I)-(V) (No change.)

(v)[(iv)] the misdemeanor and felonies listed in clauses (i)-(iv)[(i)-(iii)] of this subparagraph are not inclusive in that the department may consider other particular crimes in special cases in order to promote the intent of the Act and this chapter;

(C)-(D) (No change.)

(c)-(d) No change.)

§141.20. Violations, Complaints, and Disciplinary Actions.

(a) -(c) (No change.)

(d) Investigation of complaints.

(1)-(4) (No change.)

(5) The program administrator shall determine whether the complaint fits within the category of a serious complaint affecting health or safety of clients or other persons.

(6) If an investigation is done, the investigator shall always attempt to contact the complainant to discuss the complaint.

(7)[(5)] If the administrator determines that there are sufficient grounds to support the complaint, the administrator may propose to deny, suspend, revoke, or not renew a registration.

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

§141.23. Seminars and Workshops.

(a) A seminar or workshop may only be offered by a registered massage school or independent MTI. This section applies to activities separately approved as a seminar or workshop and not as part of an approved additional program.

(b) A registered massage school or independent MTI must submit a seminar and workshop application for approval of each seminar or workshop which has not previously been approved as part of any additional program.

(c) A seminar and workshop sponsor which is not yet registered shall submit to the department the application form, appropriate fee, and the application documentation required for registration as a massage school or independent MTI in §141.11 of this chapter (relating to General Requirements for Massage Schools and Massage Therapy Instructors) and §141.13 of this chapter (relating to Minimum Standards for Operation of Massage Schools and Massage Therapy Instructors) except as those requirements are modified by this section.

(d) The following modification of §141.13 of this title apply to seminars and workshops.

(1) Location.

(A) A massage school or independent MTI with a permanent location shall submit:

(i) A certificate of occupancy and current fire inspection certificate. If the documents are not required by the local political subdivision, submit a letter from the county attorney or city official so stating;

(ii) A rental or lease agreement for the physical site of the seminar or workshop if the site is not owned by the applicant; if owned, a statement to that effect;

(iii) A rental or lease agreement for any equipment not owned by the applicant; if all equipment is owned, a statement to that effect;

(iv) A description and floor plan of the site, including room numbers, dimensions of rooms, pupil capacities, and uses of rooms; and

(v) An inventory of furniture, equipment and instructional aids.

(B) A massage schools or independent MTI without a permanent location shall submit a rental or lease agreement for the meeting room stating capacity, furniture, and equipment furnished for the seminar and workshop.

(C) No further location approval is required.

(2) School director. The school director shall have sufficient background and training in the area for which the school director will be responsible.

(3) Admission requirements. The massage school or independent MTI shall submit specific justification for its entry requirements for each seminar and workshop.

(4) Minimum Standard Exemptions. A massage school or independent MTI offering only seminars and workshops does not need to maintain or provide:

(A) a progress evaluation system;

(B) an attendance policy;

(C) a leave of absence policy;

(D) student records and transcripts permanently;

(E) a grievance policy;

(F) documentation of previous education and training; or

(G) pre-enrollment information, receipt, and acknowledge set out in §141.13(b)(2)(D)-(F) of this chapter (relating to Minimum Standards for Operation of Massage Schools and Massage Therapy Instructors).

(5) Cancellation and refund policy. The cancellation and refund policy shall provide for a 100% refund of all tuition and fees paid if the participant cancels at least four weeks before the first day of the seminar or workshop. Refunds for cancellation made in less than four weeks shall be determined by the massage school or independent MTI and provided in the application and on all advertising materials.

(d) A seminar or workshop shall be of such quality, content, and length that it reasonably and adequately imparts to a student the necessary skills or knowledge required for the stated objective.

(e) A seminar and workshop may give only a final examination at the end of the program to determine whether the participant has the knowledge to warrant a certificate of completion.

(f) An application shall be approved or disapproved as in §141.16 of this title (relating to Determination of Eligibility of Massage Therapy Instructors, Massage Schools, and Massage Establishments).

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 29, 1993.

TRD-9331248 Susan K. Steeg
General Counsel, Office of General Counsel
Texas Department of Health

Proposed date of adoption: January 28, 1994

For further information, please call: (512) 834-6616

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Chapter 169. Veterinary Public Health

Meat and Poultry Inspection

• 25 TAC §169.12

The Texas Department of Health proposes an amendment to §169.12 concerning meat and poultry inspection. The section covers definitions and grants of inspection and/or custom exemption. The amendments delete the definition for custom slaughtering and custom processing, add a new definition for custom operations, and expand the species to be included in the requirement for a grant of custom exemption to include all species amenable to inspection by the Texas Meat and Poultry Inspection Act. The new definition is being proposed in order to implement House Bill 395, 73rd Legislature, Regular Session, which amends Health and Safety Code, §433.024.

William W. Rosser, D.V.M, M.A., chief, Bureau of Veterinary Public Health, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Dr. William W. Rosser has also determined that for each year of the first five years the proposed sections are in effect the public benefit of the proposed changes will further protect public health by requiring facilities used for slaughtering and/or processing animals purchased for slaughter and/or processing on the seller's premise meet minimal construction and sanitation standards and by requiring all species of animals custom-slaughtered or processed for food to be slaughtered by persons whose facilities have met minimum standards and who have obtained a grant of custom exemption. In addition, state and local governments will benefit in that there will be less public health risks. There will be no cost for compliance to small business. There is no anticipated economic cost to persons who may be required to comply with the sections as proposed. There will be no impact to local employment.

Comments on the proposal may be submitted to Lee C. Jan, D.V.M, Director, Meat Safety Assurance Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 458-7443. Public comments will be accepted for 30 days after publication of these sections in the *Texas Register*.

The amendments are proposed under the Health and Safety Code, §433.008, which provides the commissioner authority to adopt rules for the efficient execution of the Texas Meat and Poultry Act; and §12.001, which provides the Texas Board of Health with the authority to adopt rules for the performance of every duty imposed by law on the Texas Board of Health the Texas Department of Health, and the Commissioner of Health. The amendment affects Health and Safety Code, Chapter 433.

§169.12. Meat Inspection.

(a) (No change.)

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

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

(3) Custom operations-The slaughtering of an animal or the processing of an inspected and/or uninspected carcass or parts thereof for the owner of that animal, carcass, or parts, or the selling of livestock, inspected carcasses, or parts to be slaughtered and/or processed by the purchaser on premises owned or operated by the seller for the exclusive use of the owner. [Custom processing-The processing of an inspected and/or uninspected carcass or parts thereof for the owner of that carcass or parts for the exclusive use of the owner.]

[(4) Custom slaughtering-The slaughtering of an animal for the owner of that animal for the exclusive use of the owner.]

(4)[(5)] Department-Texas Department of Health.

(5) [(6)] Federal regulations-The regulations contained in the United States Department of Agriculture publication titled "Meat and Poultry Inspection Regulations," and adopted by reference by the department in §169.11 of this title (relating to Federal Regulations on Meat and Poultry Inspection).

(6)[(7)] Grant of custom exemption-An authorization from the department to engage in a business of custom slaughtering and/or processing.

(7)[(8)] Grant of inspection-An authorization from the department to engage in a business subject to inspection under the Act.

(8)[(9)] Person-Any individual, partnership, association, corporation, or unincorporated business organization.

(c) Grant of inspection and/or custom exemption.

(1) Basic Requirements.

(A) (No change.)

(B) A person shall not engage in **custom operations** [a business of custom slaughtering and/or processing] of **livestock** [cattle, swine, sheep, goats, or poultry] unless that person has met the standards established by the Act, the federal regulations, and these sections, and has obtained a grant of custom exemption issued by the department.

(2)-(7) (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 October 28, 1993.

TRD-9331207 Susan K. Steeg
General Counsel
Texas Department of Health

Proposed date of adoption: January 28, 1994

For further information, please call: (512) 458-7261

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Chapter 229. Food and Drug

Issuance of Certificates of Free Sale and Certificates of Origin

• 25 TAC §§229.301-229.304

The Texas Department of Health (department) proposes new §§229. 301-229.304, concerning the requirements for a fee for the issuance of a Certificate of Free Sale and/or Certificate of Origin. The sections define terms commonly used when industry requests a certificate to ship products into foreign countries and established the fees for the certificates, the application procedures to follow, and the minimum requirements to be met to receive a certificate of free sale and/or certificate of origin.

Senate Bill 1058, 73rd Legislature, 1993, amended the Health and Safety Code, Chapter 431, Subchapter K, to allow the depart-

ment to assess a fee for the issuance of a Certificate of Free Sale and Certificate of Origin. These amendments become effective September 1, 1993.

The proposed rule will enable the department to cover the program costs involved in the issuance of Certificates of Free Sale and Certificates of Origin. The rule will enable the department to dedicate personnel to inspecting, approving, and issuing the certificates resulting in more expedient service to the industry by providing shorter turnaround time in the issuance of the certificates.

Dennis E. Baker, acting director, Division of Food and Drugs, has determined that for the first five-year period the sections are in effect there will be fiscal implications as a result of enforcing or administering the sections. The new certificate fees are projected to generate additional revenues of $208,428 per year for state government, which will be used to offset the costs of administering this program. There will be no impact on local government.

Mr. Baker has also determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing or administering the sections will be more expedient service to the industry by providing shorter turnaround time in the issuance of the certificates. There will be an additional cost to small businesses and persons required to comply with the amendments as proposed of a new certificate fee which is based on the number of original certificates requested, the number of products on the request, and $250 if the firm is not licensed by the department and requires an inspection before a certificate can be issued. There will be no effect on local employment.

Comments on the proposal may be submitted to Dennis E. Baker, Acting Director, Division of Food and Drugs, Texas Department of Health, 1100 West 49th Street, Austin, Texas, 78756-3182, (512) 458-7248. Comments will be accepted for 30 days following the date of publication of this proposed section in the *Texas Register*. In addition, a public hearing on the proposed sections will be held at 9:00 a.m., Tuesday, November 16, 1993 in the Texas Department of Health Auditorium, 1100 West 49th Street, Austin.

The sections are proposed under the Health and Safety Code, §431.241, which provides the department with the authority to adopt necessary regulations pursuant to the enforcement of this Chapter; and §12.001, which provides the Texas Board of Health with the authority to adopt rules for the performance of every duty imposed by law on the Texas Board of Health, The Texas Department of Health, and the Commissioner of Health.

§229.301. Purpose. These sections enable the department to assess fees for the issuance of Certificates of Free Sale and Certificates of Origin.

§229.302. Definitions. The following words and terms, when used in these sections, shall have the following meanings unless the context clearly indicates otherwise.

Certificate of Free Sale-A notarized document issued by the Department which certifies that the manufacturer and/or distributor of the food, drugs, cosmetics, or medical device products listed in the document is duly authorized to manufacture, operate, or distribute the products and that the products are sold freely to the public in the United States of America.

Certificate of Origin-A Certificate of Free Sale which also certifies that the products listed in the document originate from the United States of America.

Current inspection-An inspection of a firm conducted by the Division of Food and Drugs within the 12 months immediately preceding a request for Certificate of Free Sale and/or Certificate of Origin.

Currently licensed-Firms regulated by the Texas Department of Health under the Health and Safety Code (Texas Food, Drug, and Cosmetic Act) which possess a current, valid license.

§229.303. Certificate Fees and Procedures.

(a) Certificate fee. All manufacturers of foods, drugs, cosmetics, or medical devices, food, or cosmetics wholesalers/distributors, or wholesale distributors of drugs or devices who request Certificates of Free Sale and/or Origin shall pay fees as follows:

(1) $25 for the first original certificate and $10 for each additional identical original certificate. The $25 fee will entitle the requestor to a maximum of 10 products;

(2) an additional fee of $10 for each additional page of products exceeding the first 10 products. Each additional page shall be limited to 50 products;

(3) the same fee for photocopies of the original certificate as established by the State Purchasing and General Services Commission under the Texas Open Records Act for copies of readily available information shall apply;

(4) the same hourly fee for research and review as established by the State Purchasing and General Services Commission under the Texas Open Records Act for the labor performed by professional staff for copies of information not readily available shall apply; and

(5) $250 for each establishment not required to be licensed by the Texas Department of Health (department) under the Code that requires an inspection prior to the issuance of any certificate.

(b) Application forms. Application forms may be obtained from the Division of Food and Drugs, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3182.

(c) Application statement. The application statement shall be signed, shall be made on an application form furnished by the department, and shall contain the following information:

(1) the name under which the business is conducted;

(2) the address where the business is conducted;

(3) the type of operation conducted by the requesting firm;

(4) the type of certificate required; and

(5) a list of products to be on the certificate.

(d) Pre-certificate inspection. The applicant shall cooperate with any pre-certificate inspection deemed necessary by the department.

§229.304. Minimum Requirements to Receive a Certificate.

(a) All firms required to be licensed by the Texas Department of Health (department) under the Health and Safety Code, Chapter 431, Subchaper K (Code), shall be currently licensed and shall be in substantial compliance with the Code and regulations as they apply to each specific type of operation.

(b) All firms shall have a current inspection and shall be deemed in substantial compliance with the Code and these sections.

(c) A Certificate of Free Sale or Certificate of Origin shall not be issued if violations exist involving potential health hazards or labeling violations of foods, drugs, medical devices, or cosmetics.

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

Issued in Austin, Texas, on November 1, 1993.

TRD-9331315

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

Proposed date of adoption: January 28, 1994

For further information, please call: (512) 458-7248

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The Texas Department of Health (department) proposes the repeal of existing §§229.341-229.349, and new §§229.341-229.357, concerning the tanning facility permitting standards. New §§229.341-229. 357 cover general provisions, incorporated regulations, definitions, exemptions, permitting of tanning facilities, permitting fees; revocation,

cancellation, suspension, and probation of a permit; report of changes, advertising, warning signs, tanning devices, protective eyewear, operators, records, injury reports, sanitation, and enforcement and penalties.

The new sections contain new language and incorporates language presently located in existing §§229.341-229.349, which are being proposed for repeal. Existing §§229.341-229.349 are being repealed for the purpose of reorganization. The new sections incorporate provisions of the Texas Food, Drug, and Cosmetic Act and include clarifying language.

The purpose of this proposal is to update and clarify the tanning facility permitting standards to correct previous misunderstandings as they relate to the requirements of tanning devices and to further clarify the relationship that exists between these rules and the enforcement provisions of the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431.

Dennis E. Baker, Acting Director, Division of Food and Drugs, has determined that for the first five-year period the sections are in effect there will be no fiscal implications to state or local government as a result of enforcing or administering the rules.

Mr. Baker also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing these sections will be the prevention of serious injury to consumers from the use of misbranded and adulterated tanning devices. This injury prevention will be achieved through the additional clarification and understanding of tanning device requirements provided by this proposal and through the reinforcement of alternative enforcement measures available to the department under the Texas, Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431. There is no anticipated economic cost to small or large businesses to comply with the sections as proposed and no economic cost for persons required to comply with the rules as proposed. There will be no effect on local employment.

Comments on the proposed rule may be submitted to Dennis E. Baker, Acting Director, Division of Food and Drugs, Texas Department of Health, 1100 West 49th Street, Austin, Texas, 78756 (512) 458-7248. Comments will be accepted for 30 days following the date of publication of this proposed section in the Texas Register. In addition, a public hearing on the proposed rule will be held at 9:00 a.m., Monday, November 22, 1993, in the Texas Department of Health Auditorium, 1100 West 49th Street, Austin.

Tanning Facilities

• 25 TAC §§229.341-229.349

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

The repeals are proposed under the Texas Health and Safety Code, §145. 011, which provides the Department with the authority to adopt necessary regulations pursuant to the enforcement of this Chapter; and §12.001, which provides the Texas Board of Health with the authority to adopt rules for the performance of every duty imposed by law on the Texas Board of Health, The Texas Department of Health, and the Commissioner of Health.

§229.341. General Provisions.

§229.342. Definitions.

§229.343. Permitting of Tanning Facilities.

§229.344. Permitting Fee.

§229.345. Revocation, Cancellation, Suspension, and Probation of a Permit.

§229.346. Report of Changes.

§229.347. Advertising.

§229.348. Construction and Operation of Tanning Facilities.

§229.349. Enforcement 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 1, 1993.

TRD-9331313 Susan K Steeg
General Counsel, Office of General Counsel
Texas Department of Health

Proposed date of adoption. January 28, 1994

For further information, please call: (512) 458-7248

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• 25 TAC §§229.341-229.357

The new sections are proposed under the Texas Health and Safety Code, §145.011, which provides the Department with the authority to adopt necessary regulations pursuant to the enforcement of this Chapter; and §12.001, which provides the Texas Board of Health with the authority to adopt rules for the performance of every duty imposed by law on the Texas Board of Health, The Texas Department of Health, and the Commissioner of Health.

§229.341. Purpose. These sections provide for the permitting and regulation of tanning facilities using ultraviolet lamps as required by applicable federal and state laws and regulations.

§229.342. Applicable Laws and Regulations.

(a) The "Tanning Facility Regulation Act," Health and Safety Code, Chapter 145, requires the Texas Board of Health to adopt rules regulating tanning facilities.

(b) Tanning devices are both electronic products and medical devices as defined by the Federal Food, Drug and Cosmetic Act, 21 United States Code, et seq, and as such are subject to the provisions of that act as well as those of the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431, which requires the Texas Department of Health to adopt rules regulating devices, i.e. tanning devices.

(c) Tanning devices used in tanning facilities are required to comply with applicable laws and regulations referenced in these sections which include, but are not limited to the following:

(1) 21 Code of Federal Regulations (CFR), Part 801, (1993) (Labeling);

(2) 21 CFR, Subchapter J, Radiological Health (1993);

(3) 21 CFR, Part 1010, Performance Standards for Electronic Products-General (1993); and

(4) 21 CFR, §1040.20, Sunlamp Products and Ultraviolet Lamps Intended for Use in Sunlamp Products (1993).

(d) Reconditioned tanning devices must comply with applicable provisions of the Federal Food, Drug and Cosmetic Act and the regulations adopted thereunder and are subject to the provisions of the Texas Food, Drug, Device and Cosmetic Salvage Act, Health and Safety Code, Chapter 432.

(e) The effective date for all referenced federal regulations refers to the regulations on the date specified and do not include any additions or deletions subsequent to the date specified.

(f) Nothing in these sections shall relieve any person of responsibility for compliance with other pertinent Texas and federal laws and regulations.

(g) Copies of these laws and rules are indexed and filed in the office of the Division of Food and Drugs, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, and are available for inspection during normal working hours.

§229.343. Definitions. The following words and terms, when used in these sections, shall have the following meanings, unless the context clearly indicates otherwise.

Act-The Tanning Facility Regulation Act (Act), Texas Civil Statutes, Article 8910 (House Bill 2352, 71st Legislature, Regular Session, 1989), codified as Health and Safety Code, Chapter 145.

Adulterated-Has the meaning given in the Texas Food, Drug, and Cosmetic Act,

Health and Safety Code, Chapter 431, as interpreted in the rules of the board and judicial decision.

Authorized agent-An employee of the department designated by the commissioner to enforce the Act.

Commissioner-The commissioner of health.

Department-The Texas Department of Health.

Health authority-A physician designated to administer state and local laws relating to public health.

Misbranded- Has the meaning given in the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431, as interpreted in the rules of the board and judicial decision.

Operate-To own, manage, or control a tanning a tanning facility, or to offer tanning services to the public.

Operator-A tanning facility owner, or an agent of a tanning facility owner, or a person who operates a tanning facility.

Person-An individual, partnership, corporation, or association.

Phototherapy device-A piece of equipment that emits ultraviolet radiation and that is used by a health care professional in the treatment of disease.

Radiation-Ultraviolet radiation.

Radiation machine-Any device capable of producing radiation.

Tanning device- A device, as defined in the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431, that emits electromagnetic radiation with wavelengths in the air between 200 and 400 nanometers and that is used for tanning of human skin, including a sunlamp, tanning booth, or tanning bed. A tanning device is also classified as a medical device, as defined in the Federal Food, Drug and Cosmetic Act and the applicable Code of Federal Regulations. The term also includes any accompanying equipment, including protective eyewear, timers, and handrails.

Tanning facility-A business that provides persons access to tanning devices.

§229.344. Exemptions.

(a) These sections do not apply to a phototherapy device used by or under the supervision of a licensed physician trained in the use of phototherapy devices.

(b) Personal use of a tanning device by an individual is exempt from the provisions of these sections to the extent that such individual owns the tanning device exclusively for personal use and no fee or other compensation is involved in the use of the tanning device.

§229.345. Permitting of Tanning Facilities.

(a) A person may not operate a tanning facility without a current and valid permit to operate the facility that is issued by the Texas Department of Health (department).

(b) The permit shall be displayed in an open public area of the tanning facility.

(c) Each person acquiring or establishing a tanning facility after the effective date of these sections shall apply to the department for a permit of such facility prior to beginning operation.

(d) Unless the department revokes or suspends a permit as provided in §229.347 of this title (relating to Revocation, Cancellation, Suspension and Probation of a Permit), the initial permit shall be valid for one year from the date of issuance which becomes the anniversary date.

(e) The renewal permit shall be valid for one year from the anniversary date.

(f) Permits shall not be transferable from one person to another or from one tanning facility to another.

(g) The application required in subsections (c) and (d) of this section shall be completed on forms provided by the department and shall contain all the information required by such forms and any accompanying instructions.

(h) On the forms provided for applying for permitting of each tanning facility, the facility shall provide the:

(1) name, physical address, mail address, and telephone number of the tanning facility;

(2) if a proprietorship, the name of the proprietor; if a partnership, the names of all partners; if a corporation, the names of the corporate officers and/or directors, a copy of the articles of incorporation, and the name and address of its registered agent in the state; or if any other type of association, the names of the principals of such association;

(3) the names, mailing addresses, telephone numbers, and valid driver's license number of:

(A) the proprietor, in the case of a sole proprietorship;

(B) the managing partner in the case of a partnership;

(C) the officers and/or directors in the case of a corporation;

(D) the operator in charge of the tanning facility;

(4) hours of operation of each tanning facility;

(5) manufacturer(s), model number(s), and type(s) of ultraviolet lamp(s) for all tanning devices located at the tanning facility;

(6) name(s) of the tanning device supplier(s), installer(s), and service agent(s);

(7) copies of any posted warnings or notices which are required by this section and which address the safety and proper use of tanning devices;

(8) copies of the consent forms and statements which the consumer, parent or guardian will sign as required in §229.354 of this title (relating to Records);

(9) procedures which the operator(s) will be required to follow for the correct use of tanning device(s), to include:

(A) instructions to the consumer;

(B) use of protective eyewear;

(C) suitability of prospective consumers for tanning device use;

(D) determination of duration of tanning exposures;

(E) periodic testing of tanning device(s) and timer(s);

(F) handling of complaints of injury from consumers; and

(G) records to be maintained on each consumer; and

(10) application form which shall be verified and signed by the owner.

(i) Failure to complete the application form may result in the denial of a permit.

§229.346. Permitting Fees.

(a) All tanning facilities in Texas shall pay an initial permit fee of $50.

(b) All tanning facilities shall pay an annual renewal fee of $35 each year following issuance of the initial permit.

(c) All tanning facilities shall pay a $25 delinquency fee if the permit renewal application is filed after the expiration date of the current permit.

§229.347. Revocation, Cancellation, Suspension and Probation of a Permit.

(a) The department may revoke, cancel, suspend, or probate a permit to operate a tanning facility if the facility has:

(1) failed to pay a permit fee or an annual renewal fee for a permit;

(2) obtained or attempted to obtain a permit by fraud or deception;

(3) violated any of the provisions of the Act; or

(4) violated any of the provisions of these sections.

(b) Prior to revoking, canceling, suspending, or probating a permit, the department shall give the permit holder written notice of the proposed action, including the reasons and an opportunity for a hearing.

(c) Any hearing for the revoking, canceling, suspending, or probating of a permit shall be in accordance with the department's formal hearing procedures in Chapter 1 of this title (relating to Texas Board of Health).

(d) A permit issued under these sections shall be returned to the department if the tanning facility:

(1) ceases business or otherwise ceases operation on a permanent basis;

(2) relocates; or

(3) change in ownership. For a corporation, an ownership change is deemed to have occurred, resulting in the necessity to return the permit to the department, when 5.0% or more of the share of stock of a corporation is transferred from one person to another.

§229.348. Report of Changes. The permit holder shall notify the department in writing within ten days of any change which would render the information contained in the application for the permitting, reported pursuant to §229.345 of this title (relating to Permitting of Tanning Facilities), no longer accurate. Failure to inform the department within ten days of a change in the information required in the application for a permit may result in a suspension or revocation of the permit. This requirement shall not apply for changes involving replacement of designated original equipment lamp types with lamps which have been certified with the United States Food and Drug Administration (FDA) as "equivalent" lamps under the FDA regulations and policies applicable at the time of replacement of the lamps. The facility operator shall maintain lamp manufacturer's labeling at the facility, demonstrating the equivalence of any replacement lamps.

§229.349. Advertising. No person, in any advertisement, shall refer to the fact that the person or the person's facility is permitted with the department pursuant to the provisions of §229.345 of this title (relating to Permitting of Tanning Facilities), and no person shall state or imply that any activity under such permit has been approved by the department. A tanning facility may not claim, or distribute promotional materials that claim, that using a tanning device is safe or free from risk or that using the device will result in medical or health benefits. The only claims that may be made for tanning are cosmetic.

§229.350. Warning Signs.

(a) A tanning facility operator shall post a warning sign in a conspicuous location where it is readily visible by persons entering the establishment. The sign shall have dimensions of no less than 36 inches to a side and shall have the following wording and appearance:

DANGER

ULTRAVIOLET RADIATION

Repeated exposure to ultraviolet radiation may cause chronic sun damage characterized by wrinkling, dryness, fragility, and bruising of the skin, and skin cancer.

Failure to use protective eyewear may result in severe burns or permanent injury to the eyes. Medications or cosmetics may increase your sensitivity to ultraviolet radiation. Consult a physician before using a sunlamp if you are using medications, have a history of skin problems, or believe you are especially sensitive to sunlight. Pregnant women or women taking oral contraceptives who use this product may develop discolored skin.

IF YOU DO NOT TAN IN THE SUN, YOU WILL NOT TAN FROM USE OF AN ULTRAVIOLET OR SUNLAMP.

(b) A tanning facility operator shall post a warning sign, one sign for each tanning device, in a conspicuous location that is readily visible to a person about to use the device. The sign shall have dimensions of no less than 24 inches to a side and shall have the following wording and appearance:

DANGER
ULTRAVIOLET RADIATION

1. Follow the manufacturer's instructions for use of this device.
2. Avoid too frequent or lengthy exposure. As with natural sunlight, exposure can cause serious eye and skin injuries and allergic reactions. Repeated exposure may cause skin cancer.
3. Wear protective eyewear. Failure to use protective eyewear may result in severe burns or permanent damage to the eyes.
4. Do not sunbathe before or after exposure to ultraviolet radiation from sunlamps.
5. Medications or cosmetics may increase your sensitivity to ultraviolet radiation. Consult a physician before using a sunlamp if you are using medication, have a history of skin problems, or believe you are especially sensitive to sunlight. Pregnant women or women using oral contraceptives who use this product may develop discolored skin.

IF YOU DO NOT TAN IN THE SUN, YOU WILL NOT TAN FROM USE OF THIS DEVICE.

(c) The lettering on each warning sign shall be red on white background. Letters shall be at least ten millimeters high for all words shown in capital letters and at least five millimeters high for all lower case letters.

§229.351. Tanning Devices.

(a) Only tanning devices manufactured and certified to comply with 21 Code of Federal Regulations (CFR) Part 1040, §1040.20, "Sunlamp products and Ultraviolet Lamps Intended for Use in Sunlamp Products," shall be used by or sold to tanning facilities. Tanning devices that have been reconditioned must comply with federal and state requirements. Tanning device reconditioners must be licensed under the Texas Food, Drug, Device, and Cosmetic Salvage Act, Health and Safety Code, Chapter 432. Compliance shall be based on the standard in effect at the time of manufacture as shown on the device identification label required by 21 CFR Part 1010, §1010.3. Tanning devices must also comply with the medical device labeling requirements of 21 CFR Part 801.

(b) All tanning devices shall have a timer which complies with the requirements of 21 CFR Part 1040, §1040.20(c)(2). The maximum timer interval shall not exceed the manufacturer's maximum recommended exposure time. No timer interval shall have an error greater than plus or minus 10% of the maximum timer interval for the product.

(c) The operator shall limit the exposure time of a customer on a tanning device to the maximum exposure time recommended by the manufacturer, taking the customer's skin type into consideration.

(d) Tanning device timers shall be located so that the customer may not set or reset the customer's own exposure time.

(e) No operator shall sell, or otherwise make available to any user of a tanning device, tokens required to operate the tanning device in quantities greater than the tanning device manufacturer's maximum recommended exposure time for the user.

(f) The facility operator shall control the temperature of a tanning device and the surrounding area so that it may not exceed 100 degrees Fahrenheit.

(g) There shall be physical barriers to protect consumers from injury induced by touching or breaking the lamps.

(h) The tanning devices shall be maintained in good repair.

(i) Defective or burned-out lamps or filters shall be replaced with a type intended for use in that device as specified on the device label, or with lamps or filters that are "equivalent" under the Federal Drug Administration (FDA) regulations and policies applicable at the time of lamp manufacture.

(j) A tanning device used by a tanning facility must comply with all applicable state and local electrical code requirements.

(k) When a tanning device is being used by an individual, no other person shall be allowed to remain in the tanning device area.

(l) In addition, stand-up booths shall:

(1) have physical barriers or other means such as handrails or floor markings to indicate the proper exposure distance between ultraviolet lamps and the consumer's skin;

(2) be constructed to withstand the stress of use and the impact of a falling person;

(3) have rigid doors which open outward; and

(4) have handrails and non-slip floors.

§229.352. Protective Eyewear.

(a) Each consumer shall be provided with protective eyewear and instructions for their use. The operator may not allow a person to use a tanning device if that person does not use the protective eyewear.

(b) Before each use of a tanning device, the operator shall ensure that each tanning device is accompanied by clean and properly sanitized protective eyewear that protects the eyes from ultraviolet radiation and allows adequate vision to maintain balance.

(c) Protective eyewear shall be located in the immediate proximity of each tanning device.

(d) Protective eyewear shall meet the requirements of 21 Code of Federal Regulation Part 1040, §1040.20(c)(4).

§229.353. Operators.

(a) A tanning facility shall have an operator present during operating hours.

(b) Each operator must be sufficiently trained and knowledgeable in the correct operation of the tanning devices used at the facility to adequately inform and assist each customer in the proper use of the tanning devices. A record of all training received by each operator shall be kept at the tanning facility where the operator is employed. The record shall be signed by the operator and the owner. The operator must be able to demonstrate such knowledge concerning the:

(1) requirements of these sections and the Tanning Facility Regulation Act;

(2) procedures for correct operation of the facility;

(3) recognition of injury or overexposure;

(4) manufacturer's procedures for operation and maintenance of all tanning devices;

(5) emergency procedures in case of injury;

(6) exposure times for all skin types; and

(7) maintenance of records required by §229.354 of this title (relating to Records).

(c) The operator must understand, be competent to explain, and at a minimum, inform each customer using a tanning device for the first time of:

(1) the potential hazards and protective measures associated with ultraviolet radiation exposure;

(2) the requirement to wear protective eyewear while using the tanning device;

(3) the possibility of photosensitivity and photoallergenic reaction of some persons to drugs, medicine, and other agents when subjected to sun and ultraviolet radiation exposure;

(4) the correlation between skin type and exposure time; and the maximum exposure time of the facility's devices;

(5) the biological process of tanning; and

(6) the dangers and necessity of avoiding overexposure.

(d) If an operator suspects that possible harm may result from tanning, the consumer should be advised to consult their private physician.

§229.354. Records.

(a) Liability notice.

(1) A tanning facility operator shall give each customer a written statement warning that:

(A) failure to use the eye protection provided to the customer by the tanning facility may result in permanent damage to the eyes;

(B) overexposure to ultraviolet light causes burns;

(C) repeated exposure may result in premature aging of the skin and skin cancer; and

(D) abnormal skin sensitivity or burning may be caused by reactions of ultraviolet light to certain:

(i) foods;

(ii) cosmetics; or

(iii) medications, including:

(I) tranquilizers;

(II) diuretics;

(III) antibiotics;

(IV) high blood pressure medicines; or

(iv) birth control pills; and

(E) any person taking a prescription or over-the-counter drug should consult a physician before using a tanning device.

(2) Compliance with the notice requirements does not affect the liability of a tanning facility operator or a manufacturer of a tanning device.

(b) Signed warning statement.

(1) Each time a customer uses a tanning facility or each time a person executes or renews a contract to use a tanning facility, the person shall sign a written statement acknowledging that the person has read and understood the required warnings in §229.350 of this title (relating to Warning Signs) before using the device and agrees to use the protective eyewear.

(2) Before any person under the age of 18 years uses a tanning device, the person shall give the tanning facility operator a statement signed by the person's parent or legal guardian stating that the parent or legal guardian has read and understood the warnings given by the tanning facility operator, consents to the minor's use of a tanning device, and agrees that the minor will use the protective eyewear. When a person under 14 years of age is using a tanning device, a parent or legal guardian must be present at the tanning facility.

(3) For illiterate or visually handicapped persons, the warning statement

shall be read by the operator in the presence of a witness. Both the witness and the operator shall sign the statement.

(c) Consumer log information. An individual record shall be kept by the facility operator of each consumer's total number of tanning visits, exposure lengths in minutes, times and dates of the exposures, and any injuries or illnesses resulting from the use of a tanning device. The operator must ensure that no individual is allowed to use a tanning device more than once every 24 hours.

(d) Record retention. All records required by this section shall be maintained at the tanning facility for a minimum of three years.

(e) Access to records. A person who is required to maintain records under this section or a person who is in charge of custody of those records shall, at the request of an authorized agent or health authority, permit the authorized agent or the health authority at all reasonable times access to and to copy and verify the records.

(f) Electronic records. Records required by these sections which are maintained by the tanning facility on computer systems shall be regularly copied, at least monthly, and updated on storage media other than the hard drive of the computer. An electronic record must be retrievable as a printed copy.

(g) Forms. Forms which have been developed by the Texas Department of Health for use by tanning facilities will be provided upon request as camera ready copies for reproduction purposes.

§229.355. Injury Reports. A written report of any tanning injury shall be forwarded to the department within five working days of its occurrence or knowledge thereof. The report shall include:

(1) the name of the affected individual;

(2) the name and location of the tanning facility involved;

(3) the date of the injury;

(4) the nature of the injury;

(5) identification of the tanning device involved in the injury;

(6) the name and address of health care provider, if any;

(7) the name of the operator on duty at the time of injury; and

(8) any other information considered relevant to the situation.

§229.356. Sanitation.

(a) The tanning facility shall be kept clean and sanitary at all times. The interior of a tanning facility shall be maintained in good repair and in a safe, clean, sanitary condition, free from all accumulation of dirt and rubbish.

(b) Protective eyewear shall be sanitized before each use with a sanitizer registered with the United States Environmental Protection Agency (USEPA). Exposure to the ultraviolet radiation produced by the tanning equipment itself is not considered a sanitizing agent.

(c) All tanning device surfaces that come in contact with human skin shall be sanitized after each use with a sanitizer registered with the USEPA.

(d) A test kit or other device that accurately measures the concentration of the sanitizing solution in parts per million shall be used to measure the strength of the sanitizing solution at least once per day of tanning facility operation or more frequently as needed to ensure sufficient strength of the sanitizing solution.

(e) The operator shall provide the consumers of the tanning facility access to toilet and handwashing facilities with hot and cold running water.

(f) Each tanning facility shall provide to its customers cloth towels or disposable paper towels which may not be shared. Cloth towels must be laundered with soap or detergent after each use.

(g) Floors in rooms containing tanning devices are to be constructed of nonabsorbent, easily cleanable materials. New tanning facilities shall not include carpeting in rooms containing tanning devices. Existing facilities with carpeting in rooms containing tanning devices shall remove the carpeting from such rooms whenever the facilities are extensively remodeled.

(h) Floors are to be made dry prior to each individual's use.

(i) Dogs, cats, birds, reptiles, and other pets shall not be permitted in tanning facilities. This exclusion does not apply to guide dogs or fish in aquariums.

§229.357. Enforcement and Penalties

(a) Inspections. The commissioner or an authorized agent shall have access at all reasonable times to any tanning facility to inspect the facility to determine if the Tanning Facility Regulation Act or these sections are being violated.

(b) Criminal penalty.

(1) A person, other than a customer, commits an offense if the person knowingly or recklessly violates the Tanning Facility Regulation Act (Act) or rules adopted under the Act.

(2) An offense under the Act is a Class C misdemeanor.

(c) Injunction.

(1) If the commissioner, an authorized agent, or a health authority finds that a person has violated, or is violating or threatening to violate the Act and that the violation or threat of violation creates an immediate threat to the health and safety of the public, the commissioner, authorized agent, or health authority may petition the district court for a temporary restraining order to restrain the violation or threat of violation.

(2) If a person has violated, or is violating or threatening to violate the Act, the commissioner, an authorized agent, or a health authority may petition the district court for an injunction to prohibit the person from continuing the violation or threat of violation.

(3) On application for injunctive relief and a finding that a person is violating or threatening to violate the Act, the district court shall grant any injunctive relief warranted by the facts.

(d) Venue., Venue for a suit brought under the Act shall be in the county in which the violation or the threat of violation is alleged to have occurred or in Travis County.

(e) Adulterated or Misbranded tanning device. If the department identifies an adulterated or misbranded tanning device, the department may enforce the applicable provisions of Subchapter C of the Texas Food, Drug, and Cosmetic Act (Health and Safety Code, Chapter 431) including, but not limited to: detention, condemnation, civil penalties, criminal enforcement, and/or administrative penalties, using the Severity Levels set out in §229.261 of this title (relating to Assessment of Administrative or Civil 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 1, 1993.

TRD-9331312

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

Proposed date of adoption: January 28, 1994

For further information, please call: (512) 458-7248

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Chapter 289. Radiation Control

Texas Regulations for the Control of Radiation

- **25 TAC §§289.111, 289.113, 289.116, 289.122, 289.126**

The Texas Department of Health (department) proposes amendments to §§289.111, 289.113, 289.116, 289.122, and 289.126, concerning the control of radiation. Section 289.111 adopts by reference Part 11 of the Texas Regulations for Control of Radiation (TRCR) titled "General Provisions." The amendment to Part 11 includes the deletion of the term "controlled area"; clarification of certain radiation protection terms; and provisions for inspections and inspection intervals for mammography systems. Section 289.113 adopts by reference Part 21 of the TRCR titled "Standards for Protection Against Radiation." The amendment to Part 21 reflects the deletion and clarification of terms proposed in Part 11. Section 289.116 adopts by reference Part 32 of the TRCR titled "Use of Radiation Machines in the Healing Arts and Veterinary Medicine." The amendment to Part 32 provides for expansion of quality control requirements and additional definitions related to mammography. Section 289.122 adopts by reference Part 42 of the TRCR titled "Registration of Radiation Machine Use and Services." The amendment to Part 42 provides for certification and renewal requirements for mammography systems and expands the criteria for mobile services. It also provides for persons applying for use of accelerators, industrial radiography machines, and providers of equipment to obtain a certificate of registration prior to using their machines or providing services. Section 289.126 adopts by reference TRCR Part 12 titled "Fees for Certificates of Registration, Radioactive Material(s), Emergency Planning and Implementation, and Other Regulatory Services." The amendment to Part 12 reflects increases in fee amounts for mammography system certification necessitated by the changes in TRCR Parts 11, 32, and 42. The amendment also increases fees for all healing arts and veterinary radiation machines to reflect the cost of training inspectors of radiation machines. The amendment provides for deletion of fees for uranium recovery facilities and rearranges and further defines categories in the industrial radiography fee section. Considering the current budget status of the state, it is now necessary to recover 100% of the costs of regulating sources of radiation in Texas. The amendments for mammography systems and fees and the amendment for training x-ray inspectors and fees are the result of the passage of House Bills 63 and 781, respectively, by the 73rd Texas Legislature, Regular Session.

Bill Harris, chief of staff services for the environmental and consumer health protection associateship, has determined that for each of the first five years the sections are in effect, there will be fiscal implications as a result of enforcing or administering the sections as proposed. The effect on state government will be an increase in revenue of approximately $239,455 for fiscal year 1994 and approximately $230,100 for each of the fiscal years 1995-1999 for mammography systems; an increase in revenue of approximately $130,660 for each year of fiscal years 1994-1999 for training x-ray inspectors.

Ruth E. McBurney, C.H.P. director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be to ensure appropriate and adequate regulatory control of mammographic operations and radiation machines and certification of mammography systems which could pose a health risk to workers and the general public. This is accomplished by requiring facilities offering mammography to establish quality assurance programs that address equipment and equipment operations, equipment operator training and continuing education, training for physicians reading mammograms, and continuing education to ensure protection of the general public, especially women; and by requiring additional training for inspectors of radiation machines There will be a varying impact on small businesses and individuals who are required to comply with the sections. For Part 32 of the TRCR, facilities with current American College of Radiology (ACR) accreditation will have no start-up costs. Facilities with dedicated mammographic equipment will have estimated start up costs of $2,100 to $2,600 for quality assurance equipment and $575 to $675 for equipment operator training and medical physicist support. For facilities intending to begin mammography operations, the start-up equipment, operator training, and physicist support costs range from $73,100 to $104,000. Costs for facilities offering mammography as a result of implementing regulations are estimated to be $375 to $475 for operator continuing education and medical physicist support Fees will be $260 per machine for the initial certification for ACR-accredited mammography machines and $385 per machine for non ACR-accredited mammography machines. The annual fee thereafter is $325 per machine for both ACR-accredited and non-accredited machines. For healing arts and veterinary facilities, the base fee will increase $10 annually. There is no anticipated economic cost to persons required to comply with the amendments as proposed. No impact is anticipated on local employment as a result of implementing these sections.

Comments on the proposals may be presented in writing to Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3189. Public comments will be accepted for 30 days following publication of these proposed amendments in the *Texas Register*. In addition, a public hearing will be held at 9:00 a.m., Tuesday, November 30, 1993, in conference room N-218, Texas Department of Health, Bureau of Radiation Control, located at The Exchange Building, 8407 Wall Street, Austin, Texas.

The amendments are proposed under the Health and Safety Code, Chapter 401, which provides the Board of Health with the authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which provides the Board of Health with authority to adopt rules to implement every duty imposed by law on the board, the department, and the commissioner of health.

§289.111. General Provisions.

(a) The Texas Department of Health adopts by reference Part 11, "General Provisions" of the Department's document titled Texas Regulations for Control of Radiation, as amended in **February, 1994** [July, 1993].

(b) (No change.)

§289.113. Standards for Protection Against Radiation.

(a) The Texas Department of Health adopts by reference Part 21, "Standards for Protection Against Radiation" of the department's document titled Texas Regulations for Control of Radiation, as amended in **February, 1994** [July, 1993].

(b) (No change)

§289.116 Use of Radiation Machines in the Healing Arts and Veterinary Medicine

(a) The Texas Department of Health adopts by reference Part 32, "Use of Radiation Machines in the Healing Arts and Veterinary Medicine" of the Department's document titled Texas Regulations for Control of Radiation, as amended in **February, 1994** [July, 1993].

(b) (No change)

§289.122. Registration of Radiation Machine Use and Services

(a) The Texas Department of Health adopts by reference Part 42, "Registration of Radiation Machine Use and Services" of the Department's document titled Texas Regulations for Control of Radiation as amended in **February, 1994** [July, 1993].

(b) (No change.)

§289.126. Fees for Certificates of Registration, Radioactive Material(s), Emergency Planning and Implementation, and Other Regulatory Services.

(a) The Texas Department of Health adopts by reference Part 12, "Fees for Certificates of Registration, Radioactive Material(s), Emergency Planning and Implementation, and Other Regulatory Services" of the Department's document titled Texas Regulations for Control of Radiation, as amended in **February, 1994** [July, 1993].

(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 1, 1993.

TRD-9331314 Susan K. Steeg
General Counsel, Office of General Counsel
Texas Department of Health

Proposed date of adoption: January 28, 1994

For further information, please call: (512) 834-6688

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Chapter 295. Occupational Health

Hazard Communication

• 25 TAC §295.6, §295.9

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

The Texas Department of Health (department) proposes the repeal §295.6 and §295.9, concerning hazard communication. Section 295.6 concerns employer responsibilities for filing hazardous chemical inventory reports under community right-to-know and §295.9 concerns fees for filing these reports. Both of the repealed sections are no longer applicable to the Hazard Communication Act, Chapter 502 of the Health and Safety Code, because of the revision of the Act the by the 73rd Legislature. The community right-to-know provisions of the original Act are now contained in Chapters 505, 506, and 507 of the Health and Safety Code and new rules applicable to these chapters are proposed in this issue of the *Texas Register.*

Jerry Lauderdale, director, Division of Occupational Health, has determined that for the first five-year period the repeals are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeals.

Mr. Lauderdale has also determined that for each year of the first five years the repeals are in effect the public benefit anticipated as a result of enforcing the repeals will be a better understanding by the regulated community of the requirements for filing hazardous chemical information and fees for community right-to-know purposes. There will be no cost to individuals and no impact on local employment.

Comments on the proposed repeals may be submitted to Jerry Lauderdale, Director, Division of Occupational Health, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 834-6600. Mr. Lauderdale will accept comments for 30 days after publication of the proposed repeals in the *Texas Register.* In addition, a public hearing will be held at 9 a.m., Tuesday, November 23, 1993, in the Tower Building, Room 607, 1100 West 49th Street, Austin. Individuals with disabilities who need auxiliary aid or assistance should contact Richard Butler at (512) 458-7695 or T.D.D. (512) 458-7708 at least two days prior to the meeting.

The repeals are proposed under the Health and Safety Code, §502.019, which provides the Texas Board of Health with authority to adopt rules to carry out the purposes of this chapter; and the Health and Safety Code, §12, which provides the board with the authority to adopt rules necessary to implement every duty imposed by law on the board, the department, and the commissioner of health. The sections proposed for repeal implement Chapter 502 of the Health and Safety Code.

§295.6. Compliance Deadlines.

§295.9. Fees for Workplace Chemical Lists.

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 28, 1993

TRD-9331206 Susan K Steeg
General Counsel
Texas Department of Health

Proposed date of adoption: January 28, 1994

For further information, please call. (512) 458-7261

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Texas Asbestos Health Protection

• 25 TAC §295.71

The Texas Department of Health (department) proposes new §295.71, concerning enforcement of the United States Environmental Protection Agency's (EPA) regulations pertaining to emissions of asbestos to the air. House Bill 1680 (73rd Legislature) amended Texas Civil Statutes article 4477-3a, §12, (Texas Asbestos Health Protection Act) by adding subsections (k)-(n) The amendments to the Act provide the department with the authority to adopt rules to implement and enforce the provisions of the National Emission Standards for Hazardous Air Pollutants (NESHAP), 40 Code of Federal Regulations, Part 61, Subpart M, commonly referred to as the Asbestos NESHAP.

The new section establishes authority for the department to conduct inspections and enforcement actions for asbestos NESHAP; such authority has transferred from the Texas Air Control Board (now a part of the Texas Natural Resource Conservation Commission) to the department.

Jerry Lauderdale, director, Division of Occupational Health, has determined that for the first five year period the section will be in effect, there will be fiscal implications as a result of administering the section as proposed. The effect on state government will be an estimated reduction in cost of approximately one million dollars each year as a result of transferring the responsibility of the Asbestos NESHAP enforcement to the department, since it will combine with similar duties now being administered by the department in connection with the Act. It is anticipated that this section will not impact local government.

Mr. Lauderdale also has determined that for each year of the first five year period that the new section will be in effect, the public benefit anticipated as a result of enforcing or administering the section will be that approximately one million dollars will be saved due to the combination of duties under one authority and the resultant savings passed on in the form of not increasing the notification fee to the extent necessary to fund the cost of conducting similar enforcement activities in two separate agencies. In addition, enforcement will much more effectively protect the public from unnecessary asbestos exposure. In the period of time after the first five years, it is anticipated that the asbestos industry will begin to decline and that the cost savings will decline by an equivalent percentage. There is no fiscal impact on small or large businesses, nor on individuals or local employment.

Comments on the proposed rules may be directed to Jerry Lauderdale, Director, Division of Occupational Health, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 834-6610. Mr. Lauderdale will accept comments for 30 days after publication of the proposed rule in the *Texas Register.* In addition, a public hearing will be held at 9 a.m., Monday, November 15, 1993, in the Tower Building, Room T607, 1100 West 49th Street, Austin. Individuals with disabilities who need auxiliary aid or assistance should contact Richard Butler at (512) 458-7695 or T.D.D. (512) 458-7708 at least two days prior to the meeting

The new section is proposed under Texas Civil Statutes, Article 4477-3a, §12, which provides the Texas Board of Health with the authority to adopt rules covering asbestos removal, encapsulation, or enclosure, including licensure and regulation; and the Health and Safety Code, §12.001, which provides the board with the authority to adopt rules necessary to implement every duty imposed by law on the board, the department and the commissioner of health. This new section implements Texas Civil Statutes, Article 4477-3a, Section 12.

§295.71. National Emission Standards for Hazardous Air Pollutants (NESHAP) Compliance.

(a) Authority. The Texas Department of Health (department) adopts by reference rules regarding demolition and renovation activities covered under 40 Code of Federal Regulations (CFR), Part 61, Subpart M, §§61.140, 61.141, 61.145, 61.146, 61.148, and 61.157.

(b) Scope. An owner or operator of a demolition of renovation activity (as defined in 40 CFR §61.141) shall assure compliance with NESHAP (40 CFR, Part 61, Subpart M, §§61.140, 61.141, 61.145,

61.146, 61.148, and 61.157) for all covered activities.

(c) Inspections. The department may enter any facility to inspect and investigate conditions to determine compliance.

(d) Disposal. The department shall develop a memorandum of understanding with the Texas Natural Resource Conservation Commission (TNRCC) concerning the inspection of solid waste facilities that receive asbestos waste.

(e) Enforcement. The department will enforce the provisions of the NESHAP in accordance with §295. 70 of this title (relating to Compliance: Administrative Penalty) and with the Texas Asbestos Health Protection Act, Article 4477-3a.

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 28, 1993.

TRD-9331208 Susan K Steeg
General Counsel
Texas Department of Health

Proposed date of adoption. January 28, 1994

For further information, please call. (512) 458-7261

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Hazardous Chemical Right-to-Know

• 25 TAC §§295.181-295.183

The Texas Department of Health (department) proposes new §§295.181-295 183, concerning hazardous chemical information which must be accessible to the public and emergency response personnel. New §295.181 concerns chemical information which must be provided by manufacturing facilities; new §295.182 concerns chemical information which must be provided by public employers; and new §295.183 concerns chemical information which must be provided by non-manufacturing facilities. The new sections specify standards for filing annual facility chemical reports with the department and local emergency response agencies, procedures for providing direct citizen access to facility chemical information, violations and administrative penalties, and filing fees which must be paid to the department These sections are proposed to specify how chemical information will be submitted by facility operators and public employers for emergency planning and public interest purposes.

Jerry Lauderdale, director, Division of Occupational Health, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Lauderdale has also determined that for each year of the first five years the sections as proposed will be in effect the public benefit anticipated as a result of enforcing the sections will be a potential increase in the available hazardous chemical information for emergency response personnel and private citizens and uniform hazardous chemical reporting thresholds for all facility operators and public employers which are required to comply with the sections. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Comments on the proposed section may be submitted to Jerry Lauderdale, Director, Division of Occupational Health, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 834-6600 Mr. Lauderdale will accept comments for 30 days after publication of the proposed sections in the *Texas Register*. In addition, a public hearing will be held at 9 a.m., Tuesday, November 23, 1993, in the Tower Building, Room 607, 1100 West 49th Street, Austin. Individuals with disabilities who need auxiliary aid or assistance should contact Richard Butler at (512) 458-7695 or T D D (512) 458-7708 at least two days prior to the meeting

The new sections are proposed under the Health and Safety Code, §§505. 016, 506.017, and 507.013, which provide the Texas Board of Health with authority to adopt rules to carry out the purposes of these chapters; and the Health and Safety Code, §12, which provides the board with the authority to adopt rules necessary to implement every duty imposed by law on the board, the department and the commissioner of health. These new sections affect Chapters 505, 506, and 507 of the Health and Safety Code.

§295.181. Manufacturing Facility Community Right-to-Know.

(a) Purpose and scope.

(1) The purpose of these rules is to provide the public with access to information on hazardous chemicals in their communities, to enhance community awareness of chemical hazards and facilitate community planning and response to chemical emergencies.

(2) In order to avoid confusion among manufacturing employers and persons living in this state, the Texas Department of Health (department) shall implement the Manufacturing Facility Community Right-To-Know Act compatibly with the federal Emergency Planning and Community Right-To-Know Act of the United States Environmental Protection Agency (EPA).

(b) Definitions. The following words, acronyms, and terms shall have the following meanings unless the context clearly indicates otherwise

(1) Act–The Manufacturing Facility Community Right-To-Know Act.

(2) EPCRA or SARA, Title III–The federal Emergency Planning and Community Right-To-Know Act, also known as the Superfund Amendments and Reauthorization Act of 1986, Title III, Public Law Number 99-499 et seq.

(3) EHS or extremely hazardous substance–Any substance as defined in EPCRA, §302, or listed by the United States EPA in Title 40 Code of Federal Regulations, Part 355, Appendices A and B.

(4) Workplace chemical list–A list of hazardous chemicals developed under Title 29 Code of Federal Regulations, §1910.1200(e)(i).

(c) Responsibility for implementation of program. The director's responsibilities under the Act are carried out through the Texas Department of Health, Division of Occupational Health, Hazard Communication Branch. Compliance documents and routine inquiries regarding this Act shall be addressed, until further notice by the director, to: Texas Department of Health, Division of Occupational Health, Hazard Communication Branch, 1100 West 49th Street, Austin, Texas 78756.

(d) Facility chemical list.

(1) A facility operator covered by this section shall compile and maintain a facility chemical list using the most current version of the Texas Tier Two Cover Sheet and Texas Tier Two Chemical Description Sheet, or a federal Tier Two Emergency and Hazardous Chemical Inventory form accompanied by a Texas Tier Two Cover Sheet. The Tier Two form must be typed or may be mechanically reproduced (subject to approval of the department) for all hazardous chemicals and extremely hazardous substances present at the facility in quantities that meet or exceed current thresholds as determined by the EPA in Title 40 Code of Federal Regulations, Part 370.

(2) A Texas Tier Two Cover Sheet and either a Texas Tier Two Chemical Description Sheet or a federal Tier Two Emergency and Hazardous Chemical Inventory form shall be used to comply with reporting requirements of EPCRA §311 and §312

(3) Facility operators shall file an annual Tier Two form, accompanied by the appropriate filing fee as provided under the Act, §505.016(b), with the Hazard Communication Branch no later than March 1st of each year, covering the previous calendar year. A facility operator beginning operation shall file a Tier Two form and the appropriate fee no later than the 90th day after the date on which the operator begins operation. The facility operator shall furnish a copy of each Tier Two form to the fire chief of the fire department having jurisdiction over the facility and to the appropriate Local Emergency Planning Committee.

(4) A facility operator shall file an updated Tier Two form with the depart-

ment not later than the 90th day after the date on which the operator has a reportable addition of a previously unreported hazardous chemical or EHS. No fee will be charged for filing this report. The facility operator shall furnish a copy of each updated Tier Two form to the fire chief and to the appropriate Local Emergency Planning Committee.

(5) A facility operator shall maintain in the workplace a copy of the facility's current Tier Two form until such time as the facility operator files the following year's Tier Two form with the department.

(6) For the purpose of paperwork reduction, companies reporting multiple facilities having the same hazardous chemicals in the same reporting ranges may report those multiple facilities on the same Tier Two form. Instructions for the department's policy on paperwork reduction shall be available from the Hazard Communication Branch upon request.

(e) Direct citizen access to information.

(1) A facility must provide within 10 working days of the date of receipt of a citizen's request under the Act, §505.007(a), a copy of the facility's existing workplace chemical list or a modified version of the most recent Tier Two form using a 500-pound threshold. Except as otherwise provided in this section, such documents shall be furnished or mailed to the citizen requesting the information. The modified version of the most recent Tier Two form must include completed chemical description blocks for each chemical reported.

(2) Any facility that has received requests equal to or in excess of those designated under the Act, §505.007(c) , may elect to furnish the material to the department.

(3) Any facility electing to furnish materials to the department must notify the department in writing, and must provide to the department copies of the previous requests which meet the request frequency rate as specified in §505. 007(c). The facility must inform persons making requests of the availability of the information fro.n the department.

(f) Complaints and investigations.

(1) The director or his designated representative shall investigate in a timely manner a complaint relating to an alleged violation of the Act.

(2) Complaints are not necessary to conduct an inspection under this section. The director or his designated representatives may enter a facility at reasonable times to conduct random compliance inspections. An employer who refuses to allow such an inspection shall be in violation of the Act.

(3) The department may find multiple violations by a facility based on specific requirements of the Act.

(g) Administrative penalties.

(1) Inspections may be conducted by the director or his designated representative to determine if persons are in violation of the Act or the rules adopted by the Board of Health to enforce the Act. Persons found to be in violation will be notified in writing of the violation.

(2) Employers found to be in violation of the Act are subject to administrative penalties as authorized by the Act. Each violation will be assessed as a separate penalty. The total penalty will be the sum of all individual violation penalties.

(3) Violations will be classified in one of three levels:

(A) a minor violation, which poses a minimal threat to the health and safety of the public;

(B) a serious violation, which is a threat to the health and safety of the public; or

(C) a critical violation, which has caused or is likely to cause harm to the health and safety of the public.

(4) Penalties will be charged based on the following schedule:

Seriousness of violation	First Occurrence	Second Occurrence	Subsequent Occurrence
Minor (Level 1)	$100	$200	$300
Serious (Level 2)	$200	$300	$400
Critical (Level 3)	$300	$400	$500

(5) A penalty shall be assessed for each day a violation continues, with a total penalty not to exceed $5,000 per violation. The cap of $5,000 is per specific violation and not per day.

(6) Individual violations may be reduced or enhanced based on consideration of the history of previous violations, good-faith efforts made to correct violations promptly, and on any other consideration that justice may require. A maximum reduction or enhancement of 50% per individual violation may be considered, based on the facts presented to the department.

(7) Followup inspections may be made to confirm the status of abatement of violations. Any violation found on such followup inspections will be subject to an additional administrative penalty. If the first 15-day notice period has expired, that penalty will be due and a second or subsequent notice will be provided for determining second or subsequent penalty due dates.

(8) Failure to file an annual Tier Two form and necessary updates with the department will be considered a violation of the Act which may not require an inspection. Other violations may be confirmed by the department through correspondence with authorized company officials and may not warrant an inspection.

(9) At its option, the department may accept appropriate documentation provided by the facility as evidence of compliance status.

(10) Examples of violations for the various severity levels include, but are not limited to:

(A) Minor Violation-Level 1:

(i) failure to include up to 10% of reportable quantity hazardous chemicals on the annual facility chemical list (Tier Two form) submitted to the department, the fire chief of the fire department having jurisdiction over the facility, or the Local Emergency Planning Committee;

(ii) failure to maintain a copy of the annual facility chemical list at the facility; and

(iii) failure to complete

the chemical description information required for each hazardous chemical on the facility chemical list;

(B) Serious Violation-Level 2:

(i) failure to include up to 30% of reportable quantity hazardous chemicals on the annual facility chemical list submitted to the department, the fire chief of the fire department having jurisdiction over the facility, or the Local Emergency Planning Committee;

(ii) failure to file update facility chemical list information with the department, the fire chief of the fire department having jurisdiction over the facility, or the Local Emergency Planning Committee, within 90 days after the date on which the operator begins operation or the facility exceeds the reporting threshold for a previously unreported hazardous chemical;

(iii) failure to submit the appropriate annual facility chemical list filing fee to the department;

(iv) failure to provide one or more material safety data sheets, on request, to the department, the fire chief of the fire department having jurisdiction over the facility, or the Local Emergency Planning Committee;

(v) failure to provide to the fire chief or the Local Emergency Planning Committee additional information on types and amounts of any hazardous chemicals, when requested for emergency planning purposes; and

(vi) failure to provide a copy of the facility's existing workplace chemical list, or a modified version of the most recent Tier Two form using a 500 pound threshold, to a citizen making such a request; and

(C) Critical Violation-Level 3:

(i) failure to include greater than 30% of reportable quantity hazardous chemicals on the annual facility chemical list submitted to the department, the fire chief of the fire department having jurisdiction over the facility, or the Local Emergency Planning Committee;

(ii) failure to submit the annual facility chemical list to the department, the fire chief of the fire department having jurisdiction over the facility, or the Local Emergency Planning Committee;

(iii) failure to allow a representative of the department to conduct a compliance inspection of a facility; and

(iv) failure to allow the fire chief or the fire chief's representative to conduct an on-site inspection of a facility.

(h) Fees.

(1) The department shall charge a fee for each Tier Two form submitted under subsection (d)(3) of this section (relating to the facility chemical list). The fee must accompany the Tier Two form when submitted to the department.

(2) Annual fees are based on the number of hazardous chemicals present at a facility and shall be:

(A) $100 for each required submission having no more than 25 hazardous chemicals;

(B) $200 for each required submission having no more than 50 hazardous chemicals;

(C) $300 for each required submission having no more than 75 hazardous chemicals;

(D) $400 for each required submission having no more than 100 hazardous chemicals; and

(E) $500 for each required submission having more than 100 hazardous chemicals.

(3) For the purpose of minimizing fees, the department shall provide for consolidated filing of multiple Tier Two forms for facility operators if:

(A) each of the Tier Two forms contain fewer than 25 chemicals;

(B) no more than 25 facilities are consolidated under one filing fee;

(C) Tier Two forms are filed under the same owner or operator name and address; and

(D) all consolidated Tier Two forms are mailed to the department in the same package.

(4) Fees paid by mail must be paid by check or money order (cash payments are not acceptable) to the Texas Department of Health and must be addressed to: Texas Department of Health, Division of Occupational Health, Hazard Communication Branch, 1100 West 49th Street, Austin, Texas 78756.

(5) No receipt will be provided for payment of fees which are mailed, but a cancelled check may be considered adequate proof of payment.

(6) The department may refund a fee overpayment to an employer provided that:

(A) the employer provides, in writing, proof of payment, the date(s) on which the workplace chemical list and fees were sent to or received by the department, the circumstances that caused the overpayment, and the reasons why it would have been considered an overpayment under the Act and rules in force at the time of the original filing;

(B) the employer requests the refund in writing within six months of the date on which the workplace chemical list and fee were received by the department; and

(C) the employer provides to the department, in the form of a refund reduction, a handling fee of $10 per refund.

§295.182. Public Employer Community Right-To-Know.

(a) Purpose and scope.

(1) The purpose of these rules is to provide the public with access to information on hazardous chemicals in their communities, to enhance community awareness of chemical hazards, and facilitate community planning and response to chemical emergencies.

(2) In order to avoid confusion among public employers and persons living in this state, the Texas Department of Health (Board) shall implement the Public Employer Community Right-To-Know Act compatibly with the federal Emergency Planning and Community Right-To-Know Act of the United States Environmental Protection Agency (EPA).

(b) Definitions. The following words, acronyms, and terms shall have the following meanings unless the context clearly indicates otherwise.

(1) Act-The Public Employer Community Right-To-Know Act.

(2) EPCRA or SARA, Title III-The federal Emergency Planning and Community Right-To-Know Act, also known as the Superfund Amendments and Reauthorization Act of 1986, Title III, Public Law Number 99-499 et seq.

(3) EHS or extremely hazardous substance-Any substance as defined in EPCRA, §302, or listed by the United States EPA in Title 40 Code of Federal Regulations, Part 355, Appendices A and B.

(4) Workplace chemical list-A list of hazardous chemicals developed under the Texas Hazard Communication Act, §502.005(a).

(c) Responsibility for implementation of program. The director's responsibilities under the Act are carried out through the Texas Department of Health, Division of Occupational Health, Hazard Communication Branch. Compliance documents and routine inquiries regarding this Act shall be addressed, until further notice by the director, to: Texas Department of Health, Division of Occupational Health, Hazard Communication Branch, 1100 West 49th Street, Austin, Texas 78756.

(d) Facility chemical list.

(1) A facility operator covered by this section shall compile and maintain a facility chemical list using the most current version of the Texas Tier Two form published by the department. The Texas Tier Two form must be typed or may be mechanically reproduced (subject to approval of the department) for all hazardous chemicals and extremely hazardous substances present at the facility in quantities that meet or exceed current thresholds as determined by the EPA in Title 40 Code of Federal Regulations, Part 370.

(2) Facility operators shall file an annual Texas Tier Two form, accompanied by the appropriate filing fee as provided by the Act, §506.107(b), with the Hazard Communication Branch no later than March 1st of each year covering the previous calendar year A facility operator beginning operation shall file a Texas Tier Two form and the appropriate fee no later than the 90th day after the date on which the operator begins operation. The facility operator shall furnish a copy of each Texas Tier Two form to the fire chief of the fire department having jurisdiction over the facility and to the appropriate Local Emergency Planning Committee.

(3) A facility operator shall file an updated Texas Tier Two form with the department not later than the 90th day after the date on which the operator has a reportable addition of a previously unreported hazardous chemical or EHS. No fee will be charged for filing this report. The facility operator shall furnish a copy of each updated Texas Tier Two form to the fire chief and to the appropriate Local Emergency Planning Committee.

(4) A facility operator shall maintain in the workplace a copy of the facility's current Texas Tier Two form until such time as the facility operator files the following year's Texas Tier Two form with the department.

(5) For the purpose of paperwork reduction, companies reporting multiple facilities having the same hazardous chemicals in the same reporting ranges may report those multiple facilities on the same Texas Tier Two form Instructions for the department's policy on paperwork reduction shall be available from the Hazard Communication Branch upon request.

(e) Direct citizen access to information.

(1) A facility must provide within ten working days of the date of receipt of a citizen's request under the Act, §506.007(a), a copy of the facility's existing workplace chemical list or a modified version of the most recent Texas Tier Two form using a 500-pound threshold. Except as otherwise provided in this section, such documents shall be furnished or mailed to the citizen requesting the information. The modified version of the most recent Tier Two form must include completed chemical description blocks for each chemical reported.

(2) Any facility that has received requests equal to or in excess of those designated under the Act, §506.007(c), may elect to furnish the material to the department

(3) Any facility electing to furnish materials to the department must notify the department in writing, and must provide to the department copies of the requests which meet the request frequency rate specified in the Act, §506 007(c). The facility must inform persons making requests of the availability of the information from the department

(f) Complaints and investigations

(1) The director or his designated representative shall investigate in a timely manner a complaint relating to an alleged violation of the Act.

(2) Complaints are not necessary to conduct an inspection under this section. The director or his designated representatives may enter a facility at reasonable times to conduct random compliance inspections. An employer who refuses to allow such an inspection shall be in violation of the Act.

(3) The department may find multiple violations by a facility based on specific requirements of the Act.

(g) Administrative penalties.

(1) Inspections may be conducted by the director or his designated representative to determine if persons are in violation of the Act or the rules adopted by the Board of Health to enforce the Act Persons found to be in violation will be notified in writing of the violation.

(2) Employers found to be in violation of the Act are subject to administrative penalties of $50 per violation as authorized by the Act. Due to the low maximum penalty, no enhancement or reduction will be made based on the severity of the violation. Each violation will be assessed as a separate penalty. The total penalty will be the sum of all individual violation penalties.

(3) A penalty shall be assessed for each day a violation continues, with a total penalty not to exceed $1,000 per violation. The cap of $1,000 is per specific violation and not per day.

(4) Followup inspections may be made to confirm the status of abatement of violations. Any violation found on such followup inspections will be subject to an additional administrative penalty. If the first 15-day notice period has expired, that penalty will be due and a second or subsequent notice will be provided for determining second or subsequent penalty due dates.

(5) Failure to file an annual Texas Tier Two form and necessary updates with the department will be considered a violation of the Act which may not require an inspection. Other violations may be confirmed by the department through correspondence with authorized company officials and may not warrant an inspection.

(6) At its option, the department may accept appropriate documentation provided by the facility as evidence of compliance status

(h) Fees.

(1) The department shall charge a fee for each Texas Tier Two form submitted under subsection (d)(2) of this section (relating to the facility chemical list). The fee must accompany the Texas Tier Two form when submitted to the department.

(2) Annual fees are based on the number of hazardous chemicals present at a facility and shall be.

(A) $50 for each required submission having no more than 75 hazardous chemicals; or

(B) $100 for each required submission having more than 75 hazardous chemicals.

(3) For the purpose of minimizing fees, the department shall provide for consolidated filing of multiple Texas Tier Two forms for facility operators if:

(A) each of the Texas Tier Two forms contain fewer than 25 chemicals;

(B) no more than 25 facilities are consolidated under one filing fee;

(C) Texas Tier Two forms are filed under the same owner or operator name and address; and

(D) all consolidated Texas Tier Two forms are mailed to the department in the same package.

(4) Fees paid by mail must be paid by check or money order (cash payments are not acceptable) to the Texas Department of Health and must be addressed to: Texas Department of Health, Division of Occupational Health, Hazard Communication Branch, 1100 West 49th Street, Austin, Texas 78756.

(5) No receipt will be provided for payment of the fee provided by mail, but a cancelled check may be considered adequate proof of payment.

(6) The department may refund a fee overpayment to an employer provided that:

(A) the employer provides, in writing, proof of payment, the date(s) on which the workplace chemical list and fees were sent to or received by the department, the circumstances that caused the overpayment, and the reasons why it would have been considered an overpayment under the Act and rules in force at the time of the original filing;

(B) the employer requests the refund in writing within six months of the date on which the workplace chemical list and fee were received by the department; and

(C) the employer provides to the department, in the form of a refund reduction, a handling fee of $10 per refund.

§295.183. Nonmanufacturing Facilities Community Right-To-Know.

(a) Purpose and scope.

(1) The purpose of these rules is to provide the public with access to information on hazardous chemicals in their communities, to enhance community awareness of chemical hazards and facilitate community planning and response to chemical emergencies.

(2) In order to avoid confusion among nonmanufacturing facilities and persons living in this state, the board shall implement the Nonmanufacturing Facilities Community Right-To-Know Act compatibly with the federal Emergency Planning and Community Right-To-Know Act of the United States Environmental Protection Agency (EPA).

(b) Definitions. The following words, acronyms, and terms shall have the following meanings unless the context clearly indicates otherwise.

(1) Act-The Nonmanufacturing Facilities Community Right-To-Know Act.

(2) EPCRA or SARA, Title III-The federal Emergency Planning and Community Right-To-Know Act, also known as the Superfund Amendments and Reauthorization Act of 1986, Title III, Public Law Number 99-499 et seq.

(3) EHS or extremely hazardous substance-Any substance as defined in EPCRA, §302, or listed by the United States EPA in Title 40 Code of Federal Regulations, Part 355, Appendices A and B.

(4) Hazardous chemical category-As defined by the American Petroleum Institute (API), means a group or class of hazardous chemicals with similar uses or production methods in a specified industrial process or processes. An example of a hazardous chemical category from oil and gas production operations is "produced hydrocarbons," a hazardous chemical category including, but not limited to, crude oil and natural gas.

(c) Responsibility for implementation of program. The director's responsibilities under the Act are carried out through the Texas Department of Health, Division of Occupational Health, Hazard Communication Branch. Compliance documents and routine inquiries regarding this Act shall be addressed, until further notice by the director, to: Texas Department of Health, Division of Occupational Health, Hazard Communication Branch, 1100 West 49th Street, Austin, Texas 78756.

(d) Facility chemical list.

(1) A facility operator covered by this section shall compile and maintain a facility chemical list using the most current version of the Texas Tier Two Cover Sheet and Texas Tier Two Chemical Description Sheet or a federal Tier Two Emergency and Hazardous Chemical Inventory form accompanied by a Texas Tier Two Cover Sheet. For purposes of reporting hazardous chemicals at oil and gas exploration and production (standard industrial classification code 13) facilities, the API Generic Tier Two Inventory form may be substituted for the federal Tier Two Emergency and Hazardous Chemical Inventory form. The Tier Two form must be typed or may be mechanically reproduced (subject to approval of the department) , for all hazardous chemicals, hazardous chemical categories, and extremely hazardous substances present at the facility in quantities that meet or exceed current thresholds as determined by the EPA in Title 40 Code of Federal Regulations, Part 370

(2) A Texas Tier Two Cover Sheet and either a Texas Tier Two Chemical Description Sheet or a federal Tier Two Emergency and Hazardous Chemical Inventory form (or API generic Tier Two inventory form, as appropriate) shall be used to comply with reporting requirements of EPCRA, §311 and §312.

(3) Facility operators shall file an annual Tier Two form, accompanied by the appropriate filing fee as provided by the Act, §507.013(b), with the Hazard Communication Branch no later than March 1st of each year covering the previous calendar year. A facility operator beginning operation shall file a Tier Two form and the appropriate fee no later than the 90th day after the date on which the operator begins operation. The facility operator shall furnish a copy of each Tier Two form to the fire chief of the fire department having jurisdiction over the facility and to the appropriate Local Emergency Planning Committee.

(4) A facility operator shall file the updated Tier Two form with the department not later than the 90th day after the date on which the operator has a reportable addition of a previously unreported hazardous chemical or EHS. No fee will be charged for filing this report. The facility operator shall furnish a copy of each updated Tier Two form to the fire chief and to the appropriate Local Emergency Planning Committee.

(5) A facility operator shall maintain in the workplace a copy of the facility's current Tier Two form until such time as the facility operator files the following year's Tier Two form with the department.

(6) For the purpose of paperwork reduction, companies reporting multiple facilities having the same hazardous chemicals or hazardous chemical categories in the same reporting ranges may report those multiple facilities on the same Tier Two form. Instructions for the department's policy on paperwork reduction shall be available from the Hazard Communication Branch upon request.

(e) Complaints and investigations.

(1) The director or his designated representative shall investigate in a timely manner a complaint relating to an alleged violation of the Act.

(2) Complaints are not necessary to conduct an inspection under this section. The director or his designated representatives may enter a facility at reasonable times to conduct random compliance inspections. An employer who refuses to allow such an inspection shall be in violation of the Act.

(3) The department may find multiple violations by a facility based on specific requirements of the Act.

(f) Administrative penalties.

(1) Inspections may be con-

ducted by the director or his designated representative to determine if persons are in violation of the Act or the rules adopted by the Board of Health to enforce the Act. Persons found to be in violation will be notified in writing of the violation.

(2) Employers found to be in violation of the Act are subject to administrative penalties of $50 per violation as authorized by the Act. Each violation will be assessed as a separate penalty. The total penalty will be the sum of all individual violation penalties.

(3) A penalty shall be assessed for each day a violation continues, with a total penalty not to exceed $1,000 per violation. The cap of $1,000 is per specific violation and not per day.

(4) Follow-up inspections may be made to confirm the status of abatement of violations. Any violation found on such followup inspections will be subject to an additional administrative penalty. If the first 15-day notice period has expired, that penalty will be due and a second or subsequent notice will be provided for determining second or subsequent penalty due dates.

(5) Failure to file an annual Tier Two form and necessary updates with the department will be considered a violation of the Act which may not require an inspection. Other violations may be confirmed by the department through correspondence with authorized company officials and may not warrant an inspection.

(6) At its option, the department may accept appropriate documentation provided by the facility as evidence of compliance status.

(g) Fees.

(1) The department shall charge a fee for each Tier Two form submitted under subsection (d)(3) of this section (relating to the facility chemical list). The fee must accompany the Tier Two form when submitted to the department.

(2) Annual fees are based on the number of hazardous chemicals present at a facility and shall be:

(A) $50 for each required submission having no more than 75 hazardous chemicals or hazardous chemical categories; or

(B) $100 for each required submission having more than 75 hazardous chemicals or hazardous chemical categories

(3) For the purpose of minimizing fees, the department shall provide for consolidated filing of multiple Tier Two forms for facility operators if:

(A) each of the Tier Two forms contain fewer than 25 chemicals;

(B) no more than 25 facilities are consolidated under one filing fee;

(C) Tier Two forms are filed under the same owner or operator name and address; and

(D) all consolidated Tier Two forms are mailed to the department in the same package.

(4) Fees paid by mail must be paid by check or money order (cash payments are not acceptable) to the Texas Department of Health and must be addressed to: Texas Department of Health, Division of Occupational Health, Hazard Communication Branch, 1100 West 49th Street, Austin, Texas 78756.

(5) No receipt will be provided for payment of fees which are mailed, but a cancelled check may be considered adequate proof of payment.

(6) The department may refund a fee overpayment to an employer provided that:

(A) the employer provides, in writing, proof of payment, the date(s) on which the workplace chemical list and fees were sent to or received by the department, the circumstances that caused the overpayment, and the reasons why it would have been considered an overpayment under the Act and rules in force at the time of the original filing;

(B) the employer requests the refund in writing within six months of the date on which the workplace chemical list and fee were received by the department; and

(C) the employer provides to the department, in the form of a refund reduction, a handling fee of $10 per refund.

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 28, 1993.

TRD-9331205 Susan K Steeg
General Counsel
Texas Department of Health

Proposed date of adoption. January 28, 1994

For further information, please call: (512) 458-7261

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Part II. Texas Department of Mental Health and Mental Retardation

Chapter 402. Client Assignment and Continuity of Services

Subchapter A. Admissions, Transfers, Absences, and Discharges-Mental Health Facilities

• 25 TAC §§402.1-402.44

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

The Texas Department of Mental Health and Mental Retardation (TXMHMR) proposes the repeal of §§402.1-402.44 of Chapter 402, Subchapter A, concerning admissions, transfers, absences, and discharges-mental health services. The sections would be replaced by new §§402.1-402.5 and 402.7-402.30 on the same topic, which are proposed contemporaneously for public comment in this issue of the *Texas Register*. The repeal of these sections would affect the Texas Health and Safety Code, Title 7, Subtitle C (the Mental Health Code).

The purpose of the repeal is to permit the adoption of new sections which would comply with provisions of Senate Bill 834 of the 73rd Legislature, which requires that persons with a single diagnosis of chemical dependency are to be admitted to facilities designated by the Texas Commission on Alcohol and Drug Abuse (TCADA); Senate Bill 205 which amends portions of the Texas Health and Safety Code, Title 7, Subtitle C, concerning the admission of minors and procedures for intake, admission, assessment, and transfer; and Senate Bill 1067, which requires a defendant to be transferred to the nearest appropriate mental health facility if the county sheriff provides evidence that the defendant is a person with mental illness or mental retardation and may constitute danger to self or others.

Leilani Rose, director, Financial Services Department, has determined that for the first five-year period the repeal of the sections is in effect there will be no significant fiscal impact on state or local government.

Steven Shon, M.D., deputy commissioner, Mental Health Services, has determined that for each year of the first five years the repeal is in effect the anticipated public benefit would be the existence of department rules consistent with state law.

Written comments on the proposal may be sent 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 repeal is proposed under the Texas Health and Safety Code, §532.015, which provides the Texas Board of Mental Health and Mental Retardation Board with rulemaking authority.

§402.1. Purpose.

§402.2. Application.

§402.3. Definitions.

§402.4. Admissions: Purpose for Establishment for Admission Criteria.

§402.5. Admissions: Clinical and Social Grounds Necessary to Justify Admission.

§402.6. Admissions: Applicability of Criteria.

§402.7. Admissions: Criteria for Adults.

§402.8. Admissions: Criteria For Children and Adolescents.

§402.9. Admissions: Criteria for Vernon State Hospital Adolescent Drug Treatment Unit.

§402.10. Admissions: Criteria for Waco Center For Youth.

§402.11. Admissions: Voluntary Inpatient Mental Health Services.

§402.12. Admissions: Voluntary Inpatient Chemical Dependency Services.

§402.13. Admissions: Mental Health Emergency Detention.

§402.14. Admissions: Chemical Dependency Emergency Detention.

§402.15. Admissions: Persons Court-Ordered to Inpatient Mental Health Services.

§402.16. Admissions: Persons Court-Ordered to Inpatient Chemical Dependency Services.

§402.17. Admissions: Transportation of Persons Court-Ordered to Inpatient Services at the Mental Health Facility.

§402.18. Admissions: Persons Court-Ordered to Outpatient Mental Health Services.

§402.19. Admissions: Persons Court-Ordered to Outpatient Chemical Dependency Services.

§402.20. Admissions: Reexamination of Persons Court-Ordered to Extended Mental Health Services.

§402.21. Admissions: Contraindications.

§402.22. Discharges: General Principles for Mental Health Services.

§402.23. Discharges: Persons Admitted for Voluntary Chemical Dependency Services.

§402.24. Discharges: Persons with Mental Retardation.

§402.25. Discharges: Persons Court-Ordered to Inpatient and Outpatient Mental Health Services.

§402.26. Discharges: Persons Court-Ordered to Chemical Dependency Services.

§402.27. Discharges: Inappropriate Admissions under Court Order.

§402.28. Discharges: Change of Status from Involuntary to Voluntary of Persons Receiving Mental Health Services.

§402.29. Discharges: Continued Inpatient Mental Health Services for Person Served on Voluntary Basis Who Meets the Discharge Criteria.

§402.30. Transfers: General Principles.

§402.31. Transfers: Types of Transfers.

§402.32. Transfers: Between Maximum Security Unit at Vernon State Hospital and Non Security Facility.

§402.33. Transfers: From One State Mental Health Facility to Another.

§402.34. Transfers: Between Mental Retardation and Mental Health Facilities.

§402.35. Transfers: Between Mental Health Facilities and Other Mental Health Facilities, Private Mental Hospitals, or Hospitals Operated by the United States.

§402.36. Transfers: From Department of Corrections or County Jail to Mental Health Facility.

§402.37. Interstate Transfers.

§402.38. Absence for Trial Placement (Furlough): General Principles.

§402.39. Absence for Trial Placement (Furlough): Specific Provisions.

§402.40. Absence (Furlough) Under Court-Ordered Temporary or Extended Inpatient Mental Health Services.

§402.41. Absence (Furlough) Under Court-Ordered Inpatient Chemical Dependency Services.

§402.42. Absence for Trial Placement (Furlough) or Discharge: Alternate Residential Facility Placement.

§402.43. Distribution.

§402.44. References.

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

Issued in Austin, Texas, on November 1, 1993.

TRD-9331422

Ann K. Utley
Chairman
Texas Board of Mental Health and Mental Retardation

Earliest possible date of adoption: December 10, 1993

For further information, please call: (512) 465-4670

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• 25 TAC §§402.1-402.5, 402.7-402.30

The Texas Department of Mental Health and Mental Retardation (TXMHMR) proposes new §§402.1-402.5 and 402.7-402.30 of Chapter 402, Subchapter A, concerning admissions, transfers, absences, and discharges-mental health services. The new sections would replace existing §§402.1-402.44 of Chapter 402, Subchapter A, governing admissions, transfers, absences, and discharges-mental health facilities which are proposed contemporaneously for repeal in this issue of the *Texas Register*. The new sections would affect the Texas Health and Safety Code, Title 7, Subtitle C (Mental Health Code).

The purpose of the proposed sections is to comply with provisions of: Senate Bill 834 of the 73rd Legislature which requires that persons with a single diagnosis of chemical dependency are to be admitted to facilities designated by the Texas Commission on Alcohol and Drug Abuse (TCADA), Senate Bill

205 which amends portions of the Texas Health and Safety Code, Title 7, Subtitle C, concerning the admission of minors and procedures for intake, admission, assessment, and transfer; and Senate Bill 1067, which requires a defendant to be transferred to the nearest appropriate mental health facility if the county sheriff provides evidence that the defendant is a person with mental illness or mental retardation and may constitute danger to self or others.

Leilani Rose, director, Financial Services Department, has determined that for the first five-year period the sections are in effect there will be no significant fiscal impact on state or local government as a result of enforcing the sections as proposed.

Steven Shon, M.D., deputy commissioner, Mental Health Services, has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections as proposed will be an improvement in the coordination of admissions to state facilities and greater consistency in determinations of the least restrictive treatment environment. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Written comments on the proposal may be sent 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.

A public hearing will be held to accept testimony on the new subchapter as proposed and on a closely related proposal governing continuity of services-mental health which is published contemporaneously for public comment in this issue of the *Texas Register*. The hearing will be Wednesday, December 1, 1993, at 2:00 p.m. in the TXMHMR Central Office Auditorium at 909 West 45th Street, Austin, Texas 78756. If interpreters for the hearing impaired are required, please notify Ms. Logan 72 hours prior to the hearing by calling 512/206-4670.

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

§402.1. Purpose. The purpose of this subchapter is to establish criteria and guidelines:

(1) to govern admissions, transfers, absences, and discharges of persons served by mental health facilities of the department; and

(2) for designation by the Texas Mental Health and Mental Retardation Board of a mental health authority as a single-portal authority pursuant to the Texas Health and Safety Code, §533. 014.

§402.2. Application. This subchapter applies to all:

(1) mental health facilities of the Texas Department of Mental Health and Mental Retardation;

(2) mental health authorities; and

(3) single-portal authorities.

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

Absence-When a person is physically away from a campus-based location (ward or dorm). Specific absence codes are used for tracking by Client Assignment and Registration (CARE).

Board-The Texas Mental Health and Mental Retardation Board.

CARE-The TXMHMR computerized database which contains assignment and treatment information about persons receiving services.

Commissioner-The commissioner of the department.

Department-The Texas Department of Mental Health and Mental Retardation.

Executive director-The executive director of a mental health authority (MHA).

DSM-The Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association.

Head of the facility-The superintendent or director of a mental health facility or a mental retardation facility of the department.

Legal holiday-A state holiday specified in Texas Civil Statutes, Article 4591, or an officially declared county holiday that applies to a court in which proceedings under this subchapter are held.

MHA (mental health authority)-An agency designated by the commissioner to directly operate, facilitate, and/or coordinate services to persons with mental illness or with a dual diagnosis of mental illness and chemical dependency as are required to be performed at the local level by state law and by the department.

Mental health facility-A state hospital or state center that provides mental health services.

MRA (mental retardation authority)-An agency designated by the commissioner to directly operate, facilitate, and/or coordinate services to persons with mental retardation as are required to be performed at the local level by state law and by the department.

Mental retardation facility-A facility of the department that provides mental retardation services.

Psychiatric hospital-As defined in Chapter 401, Subchapter J of this title (relating to Standards of Care and Treatment in Psychiatric Hospitals):

(A) an establishment licensed by the Texas Department of Health under the Texas Health and Safety Code, Chapter 577, offering inpatient services, including treatment, facilities, and beds for use beyond 24 hours, for the primary purpose of providing psychiatric assessment and diagnostic services and psychiatric inpatient care and treatment for mental illness. Such services must be more intensive than room, board, personal services, and general medical and nursing care. Although substance abuse services may be offered, a majority of beds (51%) must be dedicated to the treatment of mental illness in adults and/or children. Services other than those of an inpatient nature are not licensed or regulated by the department and are considered only to the extent that they affect the stated resources for the inpatient components; or

(B) that identifiable part of a hospital in which diagnosis, treatment, and care for persons with mental illness is provided and that is licensed by the Texas Department of Health under the Texas Health and Safety Code, Chapter 241.

Single-portal authority (SPA)-A mental health authority which has been designated by the board to serve as the agency with responsibility for coordinating and facilitating the delivery of mental health services to court-committed persons in its local service area.

§402.4. Designation and Responsibilities of a Single-Portal Authority.

(a) A MHA may request designation by the board as a single-portal authority pursuant to the Texas Health and Safety Code, §533. 014, if it:

(1) provides or contracts for an appropriate array of core services;

(2) serves its priority population; and

(3) is in compliance with the terms of its performance contract with the department.

(b) If the MHA satisfies the criteria listed in subsection (a) of this section, it shall submit a written plan to the deputy commissioner for mental health services which describes:

(1) the responsibilities the MHA will assume for ensuring persons who are court-committed receive mental health services in the most appropriate setting;

(2) the involvement of local officials; and

(3) the processes which will enable implementation.

(c) The deputy commissioner for mental health services shall review and

evaluate the MHA's plan and then confer with the commissioner, who shall make recommendations to the board regarding the designation of the MHA as a single-portal authority.

(d) If the board determines the MHA's plan can appropriately, effectively, and efficiently provide mental health services to court-committed persons then the board shall designate the MHA as a single-portal authority. Upon designation of a single-portal authority:

(1) the written plan shall become an addendum to the MHA's performance contract with the department,

(2) the designation shall extend for the duration of the performance contract; and

(3) the written plan shall be re-evaluated during the performance contract review.

(e) In absence of a MHA's request to be designated as a single-portal authority or when the board does not designate a MHA as a single-portal authority, the deputy commissioner for mental health services may negotiate with neighboring mental health authorities to submit a plan for that service area.

(f) Following designation of a single-portal authority the department shall notify each judge who has probate jurisdiction in the service area and any other person the single-portal authority considers necessary of the designation and the new procedures required in the area.

(g) All commitments pursuant to the Texas Health and Safety Code, Chapter 574, shall be made to the single-portal authority which serves the area, with the exception of:

(1) commitments to psychiatric hospitals under the Texas Health and Safety Code, §574.042;

(2) commitments to federal facilities under the Texas Health and Safety Code, §574.043;

(3) commitments to facilities of the institutional division of the Texas Department of Criminal Justice under the Texas Health and Safety Code, §574.044; and

(4) evaluations and commitments under the Texas Code of Criminal Procedure, Articles 46.02 and 46.03.

(h) The single-portal authority shall file a recommendation for treatment with the court prior to the commitment hearing date pursuant to the provisions of the Texas Health and Safety Code, §574. 012.

(i) Inpatient mental health facilities operated by the department shall admit a court-committed person on an emergency basis when obtaining approval from a single-portal authority to which the person should have been committed could result in a delay which might endanger the person or others.

(j) The single-portal authority and the department's facility, if necessary, shall cooperate to ensure services to court-committed persons in the most appropriate location as soon after admission as possible.

(k) The board shall revoke or suspend the designation of single-portal authority if it finds that there has been a substantial failure by the mental health authority to comply with the rules of the department.

§402.5. General Provisions for Admission

(a) For a person to be considered for admission to a mental health facility, there must be a reasonable presumption of mental impairment. This does not, in and of itself, justify admission; but if the mental impairment is present in certain types or in certain degrees of severity or in combination with any of the following social conditions, the admission may be considered as appropriate. The social conditions include

(1) ideational or behavioral indications of dangerousness to self or others,

(2) impairment of social, familial, or occupational functioning of sufficient severity to require the structure or safety of inpatient psychiatric services, and/or

(3) inability to meet own basic life and health needs; social support and/or familial support which is inadequate or detrimental.

(b) The written consent of the parent, managing conservator, or guardian is required for voluntary admission of persons under 16 years of age.

(1) If the guardian or managing conservator is an employee or agent of the State of Texas or a political subdivision thereof and is acting in an official capacity, the minor also must consent

(2) A minor of any age may apply for and receive services for psychiatric problems arising from child abuse or neglect, or suicidal ideation without the consent of any other party.

(c) The following are contraindications to admission to mental health facilities:

(1) a medical or psychiatric condition which the mental health facility is not equipped to treat,

(2) the applicant for voluntary services is too toxic, confused, or disoriented, in the opinion of the admitting physician, to understand that application may result in inpatient admission to a mental health facility;

(3) a diagnosis of mental retardation, epilepsy, or senility unless the applicant also has a mental illness and meets the admission criteria,

(4) antisocial behavior not resulting from mental illness,

(5) for an applicant under age 16, failure or refusal of the parent, guardian, or managing conservator to sign the application, or failure or refusal of the applicant to sign the consent when request for admission is made by a person or agency appointed as a guardian or managing conservator in its capacity as an employee or agent of the State of Texas or a political subdivision thereof; and

(6) failure or refusal of a minor 16 years of age or older to sign consent.

(d) An order of commitment which is invalid on its face is an absolute contraindication to admission to a mental health facility The executive director of the single-portal authority shall notify the court of any irregularities

(e) Whenever an admission is refused, an alternate disposition shall be recommended with regard to the needs of the applicant, and the responsible single-portal authority must be contacted and advised of the recommendation within 24 hours.

§402 7 Special Criteria for Vernon State Hospital Adolescent Unit.

(a) A resident of Texas who applies for services provided by the Vernon State Hospital Adolescent Unit shall be considered for admission if the applicant.

(1) is 13 through 17 years of age,

(2) will not be prosecuted during the treatment period for criminal offenses for which the applicant has been charged prior to admission,

(3) has exhausted available community resources for treatment, and

(4) on the basis of a clinical evaluation, is currently in need of specialized inpatient mental health and chemical dependency treatment

(b) The Vernon State Hospital Adolescent Unit may accept the following types of admissions

(1) commitments under the Texas Health and Safety Code, Title 7, Subtitle C,

(2) voluntary admissions to fulfill a condition of probation or a condition of parole, and

(3) admissions under orders of protective custody or under other valid court orders.

(c) The head of the facility may admit, on a voluntary basis, a person who is not seeking admission to fulfill a condition of probation or parole if there is evidence that an emergency exists which threatens the life or health of the applicant.

§402.8. Special Criteria for Waco Center For Youth.

(a) A resident of Texas who applies for services provided by the Waco Center for Youth shall be considered for admission provided that the applicant:

(1) is 10 through 17 years of age (age at admission must allow adequate time for treatment programming prior to reaching age 18);

(2) is diagnosed as emotionally and/or behaviorally disturbed and is not acutely psychotic, suicidal, homicidal, or seriously violent;

(3) is either in the managing conservatorship of the Texas Department of Protective and Regulatory Services (PRS) or is served by a mental health facility or a MHA;

(4) displays a history of behavior adjustment problems;

(5) is clinically determined not to have mental retardation as defined in the latest edition of the DSM; and

(6) needs a structured treatment program in a residential facility or a transitional program following discharge from intensive inpatient care in a mental health facility.

(b) No emotionally disturbed juvenile who has been found to have engaged in delinquent conduct or conduct indicating a need for supervision under Title 3 of the Texas Family Code shall be admitted to the Waco Center for Youth.

(c) All referrals shall be reviewed by the admission committee of the Waco Center, including the PRS liaison worker as required. Notification of acceptance or rejection shall be made directly to the referring agency prior to initiating the admissions process. The Waco Center shall review referrals for admission of children and adolescents who meet the eligibility criteria and who:

(1) are under the managing conservatorship of PRS; or

(2) have been discharged from a mental health facility and are referred directly to the Waco Center by the single-portal authority serving the area where the person resides.

(d) Persons under the managing conservatorship of PRS as described in subsection (c)(1) of this section shall be referred directly by that agency to the PRS liaison worker stationed at the Waco Center. Other individuals served by PRS may be referred to the local MHA for mental health services and for possible referral to the Waco Center.

(e) In all other regards, admissions to the Waco Center shall be pursuant to the provisions of the Texas Health and Safety Code, Title 7, Subtitle C.

§402.9. Voluntary Inpatient Mental Health Services.

(a) A written application for admission to a mental health facility for voluntary inpatient services shall be filed with the MHA serving the area in which the applicant resides. The application shall be signed:

(1) by the person to be served if the person is 16 years of age or older; or

(2) as described in §402.5(b) of this subchapter (relating to General Provisions for Admission) if the person is under 16.

(b) The application shall state that the person agrees to remain voluntarily in the mental health facility as an inpatient and that the person consents to the diagnosis, observation, care, and treatment to be provided until discharged, or until the expiration of four hours after written request for release is filed with the head of the facility by the person or the individual responsible for the person's admission.

(c) The MHA shall screen applicants for inpatient services as described in Chapter 402, Subchapter B, of this title (relating to Continuity of Services-Mental Health).

(d) If there is evidence that the person meets the criteria for court-ordered mental health services, an application for court-ordered mental health services may be filed for a person receiving voluntary inpatient care. The facility shall coordinate the application process with the appropriate single-portal authority.

(e) Prior to admission, the person for whom voluntary inpatient services is sought must be informed of the rights that person has as described in Chapter 404, Subchapter E, of this title (relating to Rights of Persons Receiving Mental Health Services).

§402.10. Emergency Detention.

(a) The department shall neither admit nor detain any person for emergency observation and treatment unless:

(1) a warrant has been obtained from a magistrate pursuant to the Texas Health and Safety Code, Chapter 573, Subchapter B;

(2) an application by a peace officer for emergency detention has been presented pursuant to the Texas Health and Safety Code, Chapter 573, Subchapter A; or

(3) the single-portal authority has determined that inpatient services in the facility are indicated as described in §402.4 of this chapter (relating to Designation and Responsibilities of a Single-Portal Authority.)

(b) If appropriate inpatient mental health services are not available, the person shall be transported to another facility deemed appropriate by the single-portal authority for that service area.

(c) Within 24 hours following apprehension of the person, an examining physician acceptable to the single-portal authority for that area shall prepare a specific and detailed written statement in compliance with the provisions of the Health and Safety Code, §573.022. The person shall not be detained if the person has:

(1) mental retardation but not a mental illness; or

(2) mental retardation and a mental illness but does not meet the criteria for emergency admission.

(d) If, during the period of emergency detention, any of the conditions described in the statement required subsection (c) of this section are determined to no longer apply, the person shall be released and transportation arrangements made as required in the Texas Health and Safety Code, §574.024.

(e) If, during the period of emergency detention, a determination is made that the person requires further treatment, the appropriate single-portal authority shall be notified. A written application for court-ordered treatment shall be filed by the single-portal authority as required in the Health and Safety Code, §574.002, and an Order of Protective Custody shall be obtained under the Texas Health and Safety Code, §574.021.

(f) A person admitted for emergency detention shall be advised of rights that person has as described in Chapter 404, Subchapter E, of this title (relating to Rights of Persons Receiving Mental Health Services).

§402.11. Admission of Persons Court-Ordered to Mental Health Services.

(a) The clerk of the county court which commits a person for mental health services shall provide a certified transcript

of the commitment proceedings as required in the Texas Health and Safety Code, §574.047, to the single-portal authority. The single-portal authority shall acknowledge the acceptance of the person and any personal property as required in the Texas Health and Safety Code, §574.048.

(b) If a commitment order is valid on its face, but there exists a reason to believe that the requirements for a proper commitment have not been met, the person must be admitted and the court notified of suspected irregularities.

(c) After the person has been admitted and a thorough psychiatric evaluation has been conducted, if one or more of the contraindications described in §402.5(c) of this subchapter (relating to General Provisions for Admission) are present, the person shall be discharged in accordance with the Texas Health and Safety Code, §574.086 and §574.087. The facility and the single-portal authority shall consult with each other before the discharge is initiated.

(d) A person accepted under an order of protective custody pursuant to the Texas Health and Safety Code, §§574.021-474.023, must be provided a probable cause hearing within 72 hours of the time detention begins as described in the Texas Health and Safety Code, §574.025.

(e) An order for temporary mental health services under the Texas Health and Safety Code, §574.034, or extended mental health services under the Texas Health and Safety Code, §574.035, is not valid if the person currently is charged with a Class A or Class B misdemeanor or a felony. An order of protective custody may be issued for a person charged with a criminal offense if the head of the facility designated to detain the person consents to the proposed custody.

§402.12. Transportation of Persons Court-Ordered to Inpatient Services.

(a) As described in the Health and Safety Code, §574.045, transportation of a person court-ordered to inpatient services may be handled by:

(1) a relative of the person or other responsible person;

(2) the mental health portal authority, if personnel are available and the executive director consents; or

(3) the sheriff or constable.

(b) The rights of the person shall be protected while being transported as described in Chapter 404, Subchapter E, of this title (relating to Rights of Persons Receiving Mental Health Services.

(c) The costs of transportation shall be assumed by the committing county, if necessary.

§402.13. Admission of Persons Court-Ordered to Outpatient Mental Health Services.

(a) A court order for outpatient services through the department issued pursuant to the Texas Health and Safety Code, §574.037, must name the executive director of the single-portal authority or a designee as responsible for service delivery.

(b) Pursuant to the Texas Health and Safety Code, §574.061, an order for inpatient services may be modified by the court to require outpatient services upon request by the single-portal authority.

§402.14. Reexamination of Persons Court-Ordered to Extended Mental Health Services. The responsible court may, upon good cause, order a reexamination and rehearing for any person court-ordered to extended mental health services. When the executive director of the single-portal authority is notified of the need to reexamine a committed person, an examination shall be arranged in accord with the Texas Health and Safety Code, §574.066.

(1) If the person no longer meets the criteria for court-ordered extended mental health services, the head of the facility or designee shall discharge the person.

(2) If the facility head or designee determines that the criteria are still met, a certificate of medical examination (CME) may be filed with the court within 10 days after the request for reexamination and hearing is filed.

§402.15. General Provisions for Discharges.

(a) Any person who upon reexamination is found to have no mental impairment shall be discharged within the shortest possible time consistent with orderly discharge planning and the necessary coordination with the single-portal authority and the court, if appropriate.

(b) Continuity of care procedures established in Chapter 402, Subchapter B, of this title (relating to Continuity of Services-Mental Health) shall be followed.

(c) An individual filing a request for release of a person receiving services shall be notified that the individual assumes all responsibility for the person upon discharge. The notification shall be made even if the individual filing for release is the person receiving services.

(d) The mental health facility and the attending physicians shall not be liable for any discharge of a person admitted for voluntary care and treatment where a written request for release was filed and not withdrawn and where the person or the individual filing the written request for release is notified that all responsibility for the person upon discharge is assumed by the person or the individual.

§402.16. Discharge of Persons with Mental Retardation.

(a) If, for any reason, a person with mental retardation is admitted to a mental health facility as an inpatient under any type of commitment order pursuant to the Texas Health and Safety Code, Title 7, Subtitle C, and the person does not meet the criteria for such an order, that person shall be discharged as soon as the discharge can be appropriately arranged.

(b) The department shall give advance notice of such discharge to the local mental retardation authority (MRA) for the county of residence of the person and to the person or agency who originally delivered the person with mental retardation to the facility. In addition, the court that issued the order under which the admission was accomplished shall be notified.

(c) Following determination that a person with mental retardation no longer requires inpatient mental health services, the MRA and the mental health facility shall formulate an aftercare plan for that person.

(d) If the MRA can implement a suitable aftercare plan, the person must be discharged from the mental health facility within 45 days from the date of determination.

(e) If barriers exist, expediting reviews are to be performed by the MRA toward securing the discharge and placement of the person in appropriate mental retardation programs.

§402.17. Discharge of Persons Court-Ordered to Inpatient and Outpatient Mental Health Services.

(a) Persons court-ordered to inpatient mental health services must be discharged in accord with the following provisions:

(1) A person court-ordered to inpatient mental health services who upon re-examination is found to be mentally impaired, but who meets all of the following criteria, shall be discharged within the shortest possible time consistent with orderly discharge planning, including appropriate coordination with the court and aftercare referral:

(A) There are no significant ideational or behavioral indices of causing serious harm to self or others nor does the person continue to suffer severe and abnor-

mal mental, emotional, or physical distress resulting in continued deterioration of the person's ability to function independently coupled with an inability to decide on treatment voluntarily.

(B) The individual is able to function to the extent that the structure of inpatient mental health services is not required to maintain reasonable safety.

(2) This subchapter is intended to protect the right of a person who is court-committed not to be confined against that person's will beyond the point at which the person no longer requires inpatient mental health services. There is no option as to whether or not to discharge a person who is court-committed and who meets these criteria

(3) Consistent with orderly discharge planning and coordination with the court, the head of the facility in which the person is detained in protective custody shall immediately release the person from custody if:

(A) no notice is received of a probable cause hearing having been held within 72 hours of detention (excluding weekends and holidays);

(B) a final order for court-ordered mental health services has not been entered by the court before the expiration of 14 days or before the expiration of 30 days from the time of filing the original application if an order of continuance has been granted;

(C) the head of the facility or designee determines that the person no longer presents a substantial risk of serious harm to self or others if not immediately restrained; or

(D) a court order for temporary mental health services expires (not to exceed 90 days) or a court-order for extended mental health services expires (not to exceed 12 months) and no additional order, emergency detention, or voluntary admission is forthcoming.

(b) Persons court-ordered to outpatient mental health services must be discharged in accord with the following provisions

(1) The facility or MHA shall discharge the person upon expiration of the court order

(2) A discharge under this subsection terminates the court order. Any person discharged under this subsection shall not again be compelled to submit to mental health services except pursuant to a new order entered in accord with the Texas Health and Safety Code, Title 7, Subtitle C.

(3) Upon discharging a person under this subsection, the individual responsible for providing outpatient mental health services shall file a certificate of discharge with the court that entered the order.

(4) If the facility or MHA at which the person is detained does not receive notice that a modification hearing has been held within 72 hours of the time detention begins pursuant to an order of temporary detention, excepting weekends, legal holidays, and extreme weather emergencies authorizing the temporary detention to continue, the head of the facility shall immediately release the person from custody. If the person is released because the modification hearing has not been held within the required time, the person shall continue to be subject to the conditions of the court order for outpatient services issued prior to the order for temporary detention if it has not already expired.

§402.18. Change of Admission Status from Commitment to Voluntary.

(a) The court-committed person who is found to have some mental impairment and who meets the discharge criteria stated in of §402.17(a) of this subchapter (relating to Discharges of Persons Court-Ordered to Inpatient and Outpatient Mental Health Services) may remain at the mental health facility after signing a voluntary application, provided:

(1) the person has not been judicially declared incompetent and is otherwise competent to consent to the voluntary admission, and

(2) there is a reasonable expectation of further improvement which could not be expected or would be inordinately delayed in an alternate setting.

(b) The single-portal authority shall be responsible for evaluating the person.

§402.19. Continued Inpatient Mental Health Services for Persons Served on Voluntary Basis Who Meet the Discharge Criteria.

(a) A person voluntarily admitted who upon examination is found to have some mental impairment and who meets the discharge criteria stated in §402.17 of this subchapter (relating to Discharges of Persons Court-Ordered to Inpatient and Outpatient Mental Health Services) may continue to receive inpatient services provided:

(1) the person or a legally authorized representative gives consent, and

(2) there is a reasonable expectation of further improvement which could not be expected or would be inordinately delayed in an alternate setting.

(b) The single-portal authority shall be responsible for evaluating the person.

§402.20. General Principles Relating to Transfers.

(a) The need for transfer of a person from one facility or institution to another is determined by circumstances which are highly specific to the individual case. The primary consideration is always the best interest of the person. The following general principles govern all transfers:

(1) The person, whether voluntarily admitted or court-committed, shall be involved, to the maximum extent possible, in planning for the transfer.

(2) The person's family shall be consulted, if appropriate.

(3) Transfers shall be by mutual agreement of the facilities and the MHAs involved and in accord with admission policies, except where otherwise provided by law.

(4) If the head of the transferring facility has been notified by a prosecuting attorney that the person to be transferred has criminal charges pending, then the prosecutor shall be informed of the transfer by the transferring facility.

(5) The medical record of the person must reflect the reasons for the transfer.

(6) Copies of medical records or relevant portions, personal property, and trust fund accounts shall be transferred with the person. A psychiatric hospital or an agency of the United States is required to send the medical records of a person transferred to a mental health facility.

(7) During transfers from one mental health facility to another, attending staff shall ensure that all appropriate physical care needs of the person are met and that the person's rights under departmental rules are preserved.

(8) Transportation shall be arranged by the family if feasible and not clinically contraindicated.

(b) The following types of transfers are permitted:

(1) transfers between the Maximum Security Unit at Vernon State Hospital and a nonsecurity facility;

(2) transfers from one state mental health facility to another;

(3) transfers between mental retardation and mental health facilities;

(4) transfers between mental health facilities and psychiatric hospitals or hospitals operated by the United States;

(5) transfers from the Texas Department of Corrections or county jails to mental health facilities; and

(6) transfers to a hospital for medical treatment.

(c) Interstate transfers shall be handled as described in Chapter 403, Subchapter H, of this title (relating to Interstate Transfer.)

§402.21. Transfers Between the Vernon Maximum Security Unit and a Nonsecurity Facility.

(a) Within 60 days following arrival at the Vernon Maximum Security Unit, person admitted pursuant to the Code of Criminal Procedure, Article 46.02, §2 and §5, or Article 46.03, shall be transferred to a nonsecurity unit of a mental health or mental retardation facility designated by the department, unless the person is determined to be manifestly dangerous by a review board of the department as described in Chapter 402, Subchapter C, of this title (relating to Transfer to Vernon Maximum Security Unit).

(1) If the head of the mental health or mental retardation facility to which the person was committed or transferred received written notice from a court or prosecuting attorney that criminal charges were pending against the person, the head of the facility shall notify the court in writing at least 14 days prior to the discharge of the person.

(2) A written report as to competency of the person to stand trial shall accompany the notice of discharge.

(3) Prior to discharge, the court shall be contacted to verify the lack of further court order.

(b) Persons committed to a nonsecurity unit of a mental health or mental retardation facility who are thought to be manifestly dangerous may be transferred to the Maximum Security Unit at Vernon State Hospital in accord with procedures as described in Chapter 402, Subchapter C, of this title (relating to Transfer to Vernon Maximum Security Unit.) Evidence must be established with the transferring facility's institutional review board that all available treatment programs have been attempted with no significant results.

§402.22. Transfers From One State Mental Health Facility to Another.

(a) Transfers from one state mental health facility to another may be made when deemed advisable by the head of the facility with the agreement of the receiving facility and the responsible single-portal authority based on:

(1) geographic residence of the person;

(2) program availability;

(3) geographical proximity to family; and

(4) condition and desires of person.

(b) If appropriate, the committing court shall be notified as a matter of courtesy.

(c) The request for transfer to another mental health facility may be initiated by the person, the person's guardian, staff, or other interested persons.

(d) The single-portal authority shall evaluate the person being considered for transfer.

(e) If the head of the transferring facility has been notified by a prosecuting attorney that the person to be transferred has criminal charges pending, then the prosecutor shall be informed of the transfer by the transferring facility.

§402.23. Transfers Between Mental Retardation and Mental Health Facilities.

(a) The transfer from a mental health facility to a mental retardation facility of a person who was court-committed and whose treatment is of long-term nature shall be made pursuant to the Texas Health and Safety Code, §575.013. All of the following criteria shall be applied:

(1) The person is determined by the treating physician not to be in need of inpatient mental health services.

(2) The person has been determined to have mental retardation as described in Chapter 405, Subchapter D, of this title (relating to Determination of Mental Retardation and Appropriateness of Admission to Mental Retardation Services).

(3) No appropriate resources are available in the community.

(b) A transfer thought to be long-term in nature of a person who was court-committed from a mental retardation to a mental health facility shall be made pursuant to the Texas Health and Safety Code, Chapter 594, Subchapter C (Persons with Mental Retardation Act, Transfer to State Mental Hospital).

§402.24. Transfers Between Mental Health Facilities and Other Mental Health Facilities, Psychiatric Hospitals, or Hospitals Operated by the United States

(a) Upon giving notice to the committing court and the single-portal authority, the head of a psychiatric hospital may, for any reason, transfer a court-committed person to a mental health facility designated by the single-portal authority pursuant to the Texas Health and Safety Code, §575.011 and §575.014.

(b) The transfer of a person court-committed to an agency of the United States shall be made pursuant to the Texas Health and Safety Code, §575.015.

(c) During transfers between mental health facilities, attending staff shall ensure that all appropriate physical care needs of the person are met and that the rights of the person under Chapter 404, Subchapter E, of this title (relating to Rights of Persons Receiving Mental Health Services) and other applicable rules of the department are preserved.

(d) If the person has mental retardation as well as a mental illness, the commissioner or designee must first determine that space is available on a unit designed to provide appropriate services to that person

§402.25. Transfers: From Department of Corrections or County Jail to Mental Health Facility.

(a) Although the Code of Criminal Procedure, Article 46.01, authorizes the transfer of prisoners to a mental health facility with certification by a prison physician or county health officer, federal case law also requires provision of due process by the Texas Department of Criminal Justice (TDCJ) facility or county jail prior to transfer.

(b) Following due process prior to transfer, the head of the mental health facility must also advise that resources are available and that the prisoner is eligible for treatment.

(c) When a prisoner is to be transferred from a TDCJ facility or county jail to the Maximum Security Unit at Vernon State Hospital, staff at Vernon State Hospital shall request transmittal of the following to accompany the person at time of transfer:

(1) documentation of determination of mental illness in the form of the prison physician's report or the county medical examiner's certificate of examination,

(2) street clothes, and

(3) personal funds

(d) notice to single-portal authority.

§402.26 Absence for Trial Placement (Furlough): General Principles. Furlough shall be used only when a person has reached an improved level of mental and social functioning that, in and of itself, does not justify discharge under the discharge criteria, but does indicate that trial placement outside an inpatient mental health setting is compatible with treatment goals A

justified use of ATP-absence for trial placement, is to evaluate the adjustment of the person to home or an alternate placement setting.

§402.27. Absence for Trial Placement (Furlough): Special Provisions.

(a) Justification of use of furlough (ATP-absence for trial placement) as opposed to discharge must be adequately documented in the person's record.

(b) Furloughs shall not be for more than an initial period of 30 days.

(c) Extension of furlough is to be considered only after a thorough review of the case and consultation with the referral source on the progress of the person. An extension is to be limited to a 30-day period. When additional time may be beneficial in implementing a specific plan of care for a person, the period may be extended beyond 60 days with the coordination and approval of executive director of the single-portal authority. In no instance, however, shall furlough be extended beyond the ending date of commitment.

(d) A person admitted voluntarily who is on furlough who requires inpatient mental health services may be returned only with the person's consent. If there is a question of competency or of willingness to consent to return, the usual procedure for commitments must be followed in order to ensure the person's right to due process of law.

(e) Continuity of care procedures established in Chapter 402, Subchapter B, of this title (relating to Continuity of Services-Mental Health) shall be followed in granting authorizations for furloughs (ATP-absence for trial placement) to persons served.

§402.28. Absence (Furlough) Under Court-Ordered Temporary or Extended Inpatient Mental Health Services.

(a) The head of a facility may permit absences for persons under a court order for temporary or extended inpatient mental health services. The absence may be subject to specified conditions in coordination with single-portal authority and the court must be notified of issuance of absences exceeding three days.

(b) A person who is permitted to leave the facility on an absence may be detained and returned if conditions of the authorization are violated or if the person's condition deteriorates so that return as an inpatient to the mental health facility is necessary.

(c) The head of the facility, a magistrate, or a peace or health officer may initiate the process of taking into custody, detaining, and returning the person who is under an order for temporary or extended inpatient mental health services.

(d) Each head of a mental health facility shall designate one or more administrative hearing officers to conduct administrative hearings concerning revocation of an absence of more than three days. The hearing officer may be a mental health professional, but may not be directly involved in the treatment of the person.

(e) An administrative hearing must be held within 72 hours of a person's return to the facility when the return is based upon the person violating the conditions of the furlough (absence) or when the return is based upon the deterioration of the person to the extent that the person's continued absence from the facility is no longer appropriate. The reason for the return from furlough (absence) shall be documented in the person's record. The hearing shall be informal with both the facility staff and the person given the opportunity to present information and arguments. If the person desires, a member of the staff may act as advocate.

(f) The hearing officer shall determine within 24 hours of the conclusion of the hearing whether the person has violated the conditions of furlough (absence) or whether the person's condition has deteriorated to the extent that continued absence from the facility is no longer appropriate. The hearing officer shall put his or her decision in writing and shall include an explanation of the reasons for the decision and the information relied upon. If the hearing officer determines that the furlough (absence) shall be revoked, the decision shall be placed in the file of the person. If the hearing officer determines that the furlough (absence) shall not be revoked, the person shall be permitted to leave the facility pursuant to the conditions of the absence.

§402.29. Distribution.

(a) These rules shall be distributed to:

(1) all members of the Texas MHMR Board;

(2) deputy commissioners, associate deputy commissioners, and assistant deputy commissioners;

(3) program and management staff in Central Office;

(4) superintendents and directors of all department facilities;

(5) executive directors of all community mental health and mental retardation centers;

(6) all county judges; and

(7) all psychiatric hospitals.

(b) The superintendents/directors and executive directors shall provide a copy of this subchapter to appropriate staff.

(c) A copy of these rules shall be provided upon request to any person served by a mental health facility or MHA or the person's attorney.

§402.30. References. Reference is made to the following statutes and rules:

(1) Texas Code of Criminal Procedure, Article 46. 01;

(2) Texas Code of Criminal Procedure, Article 46.02;

(3) Texas Code of Criminal Procedure, Article 46.03;

(4) Texas Civil Statutes, Article 4355;

(5) Texas Civil Statutes, Article 4476, §14;

(6) the Texas Health and Safety Code, Title 7, Subtitle C (Mental Health Code);

(7) the Texas Health and Safety Code, Title 7, Subtitle D (Persons with Mental Retardation Act;

(8) the Texas Family Code, §54.04;

(9) the Texas Family Code, §55.02;

(10) Chapter 402, Subchapter B, of this title (relating to Continuity of Services-Mental Health);

(11) Chapter 402, Subchapter C, of this title (relating to Transfer to Vernon Maximum Security Unit);

(12) Chapter 403, Subchapter H, of this title (relating to Interstate Transfer);

(13) Chapter 405, Subchapter D, of this title (relating to Determination of Mental Retardation and Appropriateness of Admission to Mental Retardation Services); and

(14) Chapter 404, Subchapter E, of this title (relating to Rights of Persons Receiving Mental Health 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 November 1, 1993.

TRD-9331421 **Ann K Utley**
Chairman
Texas Board of Mental Health and Mental Retardation

Earliest possible date of adoption: December 10, 1993

For further information, please call: (512) 465-4670

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Subchapter B. Continuity of Services-Mental Health

• 25 TAC §§402.51-402.61

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

The Texas Department of Mental Health and Mental Retardation (TXMHMR) proposes the repeal of §§402.51-402.61, concerning continuity of services-mental health. The repeal of the subchapter is proposed contemporaneously with the proposal of the subchapter that would replace it, also known as Chapter 402, Subchapter B. The proposed repeal would affect the provisions of the Texas Health and Safety Code, Subtitle C.

The purpose of the proposed repeal is to allow for the adoption of a new subchapter which updates and clarifies procedures relating to continuity of services for persons receiving mental health services. In addition, the new subchapter implements provisions of House Bill 1713 and Senate Bills 160 and 252 (73rd Legislature).

Leilani Rose, director, Office of Financial Services, has determined that there will be no significant fiscal implications for state or local government as a result of the proposal. There is no anticipated cost to small businesses as a result of complying with the rules as proposed. There is no anticipated local economic impact. There is no anticipated cost to persons required to comply with the proposed repeal.

Dr. Steven Shon, deputy commissioner, Mental Health Services, has determined that the public benefit is the repeal of outdated rules to enable the adoption of rules that update provisions addressing procedures for ensuring appropriate continuity of care of persons receiving mental health services.

Comments on the proposal may be submitted to Linda Logan, director, Policy Development, Texas Department of Mental Health and Mental Retardation, P.O. Box 12668, Austin, Texas 78711-2668, within 30 days of publication.

The repeals are proposed under the Texas Health and Safety Code, §532.015, which provides the Texas Department of Mental Health and Mental Retardation with broad rulemaking powers.

§402.51. Purpose.

§402.52. Application.

§402.53. Definitions.

§402.54. Areas of Responsibility.

§402.55. Preadmission Screening, Referral, and Determination of the Least Restrictive Environment.

§402.56. Periodic Reevaluation of Facility Treatment.

§402.57. Development of Community Support Plan.

§402.58. Absence for Trial Placement/Discharge and Development of Aftercare Plan and Services.

§402.59. Entry into Private Treatment Program of a Person Served.

§402.60. References.

§402.61. Distribution.

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

Issued in Austin, Texas, on November 2, 1993.

TRD-9331419 Ann K Utley
Chairman
Texas Board of Mental Health and Mental Retardation

Earliest possible date of adoption: December 10, 1993

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

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• 25 TAC §§402.51-402.67

The Texas Department of Mental Health and Mental Retardation (TXMHMR) proposes new §§402.51-402.67 of this title, concerning continuity of services-mental health. The repeal of the subchapter the sections would replace (Chapter 402, Subchapter B, also concerning continuity of services-mental health), is proposed contemporaneously in this issue of the *Texas Register.*

The proposed new rules implement provisions of House Bill 1713 and Senate Bills 160 and 252 (73rd Legislature). The proposed new rules would affect the provisions of the Texas Health and Safety Code, Subtitle C

In addition to a general reorganization to improve the comprehensibility of the subchapter, the proposal clarifies continuity of care procedures for individuals discharged to a county jail and includes a new section addressing special considerations for aftercare planning for minors. The terms "community support plan" and "aftercare plan" are redefined in response to comment from field staff, and a definition of "individual treatment plan" is included to better reflect the fact that only one plan exists, although it develops in distinct phases (i.e., community support plan, aftercare plan, etc.). Additionally, a provision permitting admission of an individual to a mental health facility which is not the designated MHA for the local service area who has not been prescreened by the MHA when there is a referral to the mental health facility by a physician is deleted.

Leilani Rose, director, Office of Financial Services, has determined that there will be no significant fiscal implications for state or local government as a result of the proposal. There is no anticipated cost to small businesses as a result of complying with the rules as proposed. There is no anticipated local economic impact. There is no anticipated cost to persons required to comply with the proposed new sections.

Dr. Steven Shon, deputy commissioner, Mental Health Services, has determined that the public benefit is the adoption of updated provisions addressing procedures for ensuring appropriate continuity of care of individuals receiving mental health services.

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.

A public hearing will be held to accept testimony on the sections as proposed on Wednesday, December 1, 1993, at 2:00 p.m., in the TXMHMR Central Office Auditorium at 909 West 45th Street, Austin, TX 78756 The hearing will be held in conjunction with a public hearing on proposed Chapter 402, Subchapter A (relating to Admissions, Transfers, Absences, and Discharges-Mental Health). If interpreters for the hearing impaired are required, please notify Linda Logan at (512) 206-4516 at least 72 hours prior to the hearing.

These sections are proposed under the Texas Health and Safety Code, §532. 015, which provides the Texas Board of Mental Health and Mental Retardation with rulemaking powers.

§402.51. Purpose. The purpose of this subchapter is to outline uniform procedures to ensure continuity of services for persons with mental illness who:

(1) are admitted to mental health facilities of the Texas Department of Mental Health and Mental Retardation (TXMHMR);

(2) are absent for trial placement (furlough) or discharged from TXMHMR mental health facilities to community-based mental health services; or

(3) transfer from one mental health authority to another.

§402.52 Application. The provisions of this subchapter apply to all mental health facilities of the Texas Department of Mental Health and Mental Retardation, to mental

health authorities, and to mental retardation authorities serving persons who are dually diagnosed with a primary diagnosis of mental illness.

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

Absence–When a person is physically away from a campus-based location (ward or dorm). A person may be absent for hospitalization, a home visit, a special activity, transfer to another component, unauthorized departure, other reasons, or trial placement (furlough) . The facility may permit absences of less than 72 hours (pass) or more than 72 hours (furlough). In the event of a furlough for a person who is involuntarily committed, the court which issued the order must be notified. Specific absence codes are used for tracking by the Client Assignment and Registration (CARE) system.

Client Assignment and Registration System (CARE)–The TXMHMR computerized database which contains assignment and treatment information about persons served.

Community-based service (CBS)–Refers to services provided through community programs under the jurisdiction of the Texas Department of Mental Health and Mental Retardation, by community mental health and mental retardation centers, and by independent contract providers established pursuant to Texas Civil Statutes, Article 5547-202, et seq.

Continuity of services–The activities designed to ensure coordination of services to the person served, particularly between services within the TXMHMR system, to include: joint discharge planning, development of an aftercare plan, development of an interim plan for services, designation of a continuity of services staff person for all individuals admitted to the MHA, planning/linking activities prior to transfer or addition of services, development of a community support plan, implementation of the community support plan treatment recommendations and revisions, obtaining adequate resources to meet the person's needs, and other activities as outlined in the TXMHMR MH Community Services Standards.

Continuity of services staff person–A staff person specifically designated by the mental health authority to conduct continuity of services activities, e.g , caseworker, case manager, liaison worker.

County of admission–The county where a person needs or requests services

County of residence–The county where a person resides. County of residence is determined by the person's address with no minimum time being considered.

Department–The Texas Department of Mental Health and Mental Retardation.

Discharge–The termination of treatment of a person served by a facility or a CBS which denotes the end of active treatment by the facility or CBS.

Individualized treatment plan–The plans which an individual and his or her provider develop to address the problems, goals, and direction of service delivery. Throughout the process of hospitalization and transfer to the community the ITP evolves in several distinct stages, each addressing the particular needs which are primary at that particular time. Those stages, listed here chronologically, are referred to as:

(A) Comprehensive inpatient plan–A plan which is developed by the treatment team of the person served (of which the person served is a member) and which generally focuses on alleviating those symptoms of mental illness which have led to hospitalization and supporting the patient's motivation and capacity to experience further growth in community-based treatment programs.

(B) Aftercare plan–A plan which is developed jointly by the facility, mental health authority, person served, and other interested individuals prior to the furlough or discharge of a person served by a state facility to ensure linkage to an appropriate service delivery system. The needs addressed in the aftercare plan are based on those outlined in the comprehensive inpatient plan, but generally focus on transition issues. In addition, the aftercare plan includes information about the individual's MHA liaison, follow-up appointments, and identification of a location to which the individual will be discharged/furloughed.

(C) Community support plan–A plan which is developed by the mental health authority and the person served within three weeks of his/her discharge or furlough. The community support plan may be based on the aftercare plan, and takes into consideration any issues that have arisen since discharge from the more intensive care provided in the state facility.

Interim plan for services–The initial treatment plan completed by the MHA and the consumer upon admission to services at a new MHA or upon transfer from one MHA to another. The plan should be written in clear, straightforward language which provides the person with necessary information and provides guidance for the staff. As outlined in §402.62 of this title (relating to Development of Interim Plan for Services for Individuals who Change MHAs) this plan serves as the foundation for the individualized treatment plan.

Local service area–A geographic area made up of one or more counties which serves to define and delimit the population of persons residing in the area, including the subpopulation of persons with mental illness and mental retardation, and the extent of the responsibilities of the local mental health and mental retardation authorities for the area.

Mental health authority (MHA)–The entity designated by the department to direct, operate, facilitate, or coordinate such services to persons with mental illness or with a dual diagnosis of mental illness and chemical dependency as are required to be performed at the local level by state law and by the department.

Mental health facility–All state hospitals and state centers providing mental health services and any other agency which is now or may hereafter be a facility of the Texas Department of Mental Health and Mental Retardation. The term includes the Harris County Psychiatric Center.

Mental retardation authority (MRA)–The entity designated by the department to direct, operate, facilitate, or coordinate such services to persons with mental retardation as are required to be performed at the local level by state law and by the department.

Personal care home–An establishment, including an establishment formerly known as a board and care home, that:

(A) furnishes, in one or more facilities, food and shelter to four or more persons who are unrelated to the proprietor of the establishment;

(B) provides personal care services, and

(C) provides minor treatment under the direction and supervision of a physician licensed by the Texas State Board of Medical Examiners, or services which meet some need beyond basic provision of food, shelter, and laundry.

Planning-linking activities–Those activities which facilitate communication between the person served, CBS staff, facility staff, and others (as appropriate), to the end of assuring the coordination and delivery of services. Such activities may include, but are not limited to, visits by the person served to the program/placement under consideration for transfer/discharge, familiarizing the person with a program, and introducing the person to program staff.

Screening–A procedure to determine appropriateness and eligibility for admission to state mental health facilities or community-based services.

Service district–County or counties for which a facility has responsibility to provide inpatient services to individuals residing in that area.

State facility–Any state hospital, state school, state center, or other agency which is now or may hereafter be a facility

of the Texas Department of Mental Health and Mental Retardation.

TXMHMR service system-All state facilities and all community mental health and mental retardation centers.

§402.54. General Principles Regarding Continuity of Services.

(a) The concept of continuity of services is designed to ensure that individuals moving from the structured environment of the state facility to the community or from one MHA to another are provided every support available to enable a successful transition.

(b) The individualized treatment plan is a tool which is utilized to facilitate the transition process, and, as a result, is a dynamic document. As the individual's needs change throughout the transition process, the plan is revised to reflect those changes. Key points in that comprehensive development process are identified in this subchapter as the aftercare plan and the community support plan (see definition of individualized comprehensive treatment plan in §405.53 of this title).

§402.55. Areas of Responsibility.

(a) The department has designated mental health authorities (MHAs) within each of the local service areas as responsible for effecting continuity of services for persons served by the department in their local service areas. The MHA will ensure continuity of services activities, including the assignment of a continuity of services staff person to each person served at admission to any TXMHMR service and at all times, regardless of transfer, until discharge from the TXMHMR service system.

(b) To facilitate continuity of services, the department shall have a contract or memorandum of understanding with each MHA which requires that the facility keep the MHA informed regarding plans, progress, and proposals for resumption of outpatient treatment, and which requires that the MHA provide:

(1) a good faith effort to make available and accessible those services specified in the aftercare plans and community support plans of those persons being discharged, placed on absence for trial placement (furlough), or transferred to the MHA, for as long as the MHA determines that the person needs services, with documentation of clinical justification for changing or discontinuing services in the person's record;

(2) documentation of personal or telephone contact within ten calendar days (unless specified to be accomplished earlier in the aftercare plan), the scheduling of follow-up appointments for persons referred for community support, and documentation of the MHA's efforts to have persons served meet those appointments;

(3) documentation in records of persons served to reflect the MHA's efforts to extend services specified in the community support plan to all persons served, including those who are hard to reach, i.e. , who miss without rescheduling one or more significant service contacts (such as an appointment with a physician, case manager, or caseworker, or another activity important to achieving the primary treatment goal) within 90 days of an absence for trial placement (furlough) or discharge, unless the person expressly refuses the services offered, in which case the rejection of services should be documented in the record of persons admitted or in a log for persons not admitted to services;

(4) a good faith effort to make available case management services to those persons who qualify according to TXMHMR criteria, with documentation of any exceptions;

(5) a good faith effort to arrange for nonclinical support such as food, clothing, and shelter in cases in which the department's assessment indicates that long-term hospitalization, and chronicity of mental illness, justify such action. This provision will apply only in situations in which no other resources are available. Documentation of the assessment of each person's need for nonclinical support services will be filed in the plan of service using the "Non-Clinical Support Needs Assessment" form, which is referred to in §402. 65 of this title (relating to Exhibits) as Exhibit A; and

(6) adherence to the timeframes contained in the "Nursing Facility Aftercare Assessment Schedule," which is referred to in §402.65 of this title (relating to Exhibits) as Exhibit B.

(c) Non-MHAs which contract with the department to provide community-based extended, transitional, or geriatric care must sign a memorandum of agreement with the local MHA outlining the responsibilities for continuity of services and monitoring.

(d) Placements to personal care homes will be made only to facilities licensed by the Texas Department of Human Services (TDHS) Facilities which appear to be operating as unlicensed personal care homes will be reported to TDHS. Facility/MHA staff who have questions should contact the TDHS Bureau of Long-Term Care at (512) 834-6697.

(e) In the event an individual is discharged to a county jail, the discharging mental health facility treatment team will determine if continued mental health services will be required. If ongoing mental health services are necessary, the mental health facility will coordinate with the MHA in the area to which the individual is being discharged to determine whether the services will be provided by the county jail or the local MHA. If the local MHA is identified as the responsible agent, the provisions of this subchapter shall be followed. If the county jail will be providing ongoing mental health care, this will be documented by the mental health facility.

§402 56. Determining County of Residence.

(a) The local MHA for each person served will generally be determined by the county of residence as established by completing the "Mental Health Services County of Residence Determination Worksheet," which is referred to in §402.65 of this title (relating to Exhibits) as Exhibit C.

(b) The local MHA will not be determined by the county of residence in the following situations.

(1) In cases in which a dually diagnosed person is receiving services from both an MHA and an MRA, the local authority with responsibility for the person will be the one at which the person receives priority services. The MHA and the MRA must document the arrangement for provision of continuity of services responsibilities in the form of a written agreement for each person served.

(2) Consideration will be given to a request for another MHA to assume responsibility for provision of services for individuals who have a valid justification to receive services outside of the county in which he or she resides. The determination to transfer responsibility will be made by the receiving MHA after giving due consideration to the needs and wishes of the consumer and family. In such instances, the continuity of services staff person at each MHA will ensure compliance with the requirements of this subchapter, consistent with §402.59 of this title (relating to Development of an Interim Plan for Services for Individuals who Change MHAs).

(3) Emergency mental health services will be provided to individuals by the MHA for the county where the person is found to be in need of or requests services.

(4) In cases in which an MHA assumes financial responsibility for a residential placement or support costs, it will remain the responsible MHA unless the MHA where the residential placement is located agrees to accept the responsibility.

(5) In cases where the county of residence cannot be determined, the MHA for the county of admission will be responsible.

(c) If a person who requires MHA community support services is discharged or is absent for trial placement (furloughed)

from a facility into a private service system outside the MHA's local service area, the MHA shall coordinate with the MHA serving the receiving local service area and determine whether transfer of MHA responsibilities is in the person's best interest to ensure provision of all needed services. Provisions of §402.64 of this title (relating to Entry into Private Treatment Program of a Person Served) are to be followed.

§402.57. Preadmission Screening, Referral, and Determination of the Least Restrictive Environment.

(a) Prior to a person's admission to a mental health facility, the appropriate MHA will be responsible for screening the person to determine the most appropriate placement in the least restrictive environment.

(b) Persons admitted to a mental health facility which is not designated as the MHA for the local service area must receive a preadmission screening by the MHA, except in situations in which:

(1) there is a memorandum of understanding between the mental health facility and the MHA where it is stated that the facility will perform the screening;

(2) there is an emergency admission; or

(3) a person is physically present at the mental health facility and contact with the MHA determines that appropriate community-based services are not readily available.

(c) The MHA must communicate information necessary for optimum treatment to the state facility prior to or at the time of admission, to include:

(1) identifying data, including address;

(2) legal status;

(3) pertinent medical and medication information;

(4) behavioral data; and

(5) other pertinent treatment information.

(d) If a person seeks voluntary admission to a mental health facility without having been properly screened by the MHA, facility staff should follow the procedures provided in §402.11 of this title (relating to Admissions, Transfers, Absences, and Discharges–Mental Health Facilities).

(e) If a person is admitted to a mental health facility on an emergency commitment or order of protective custody without being prescreened by the appropriate MHA, the facility will immediately notify the appropriate MHA.

(f) In instances where an MHA screens a person who resides in another county, the screening MHA will immediately notify the MHA for the county of residence.

§402.58. Periodic Reevaluation of Facility Treatment.

(a) The person's treatment team at the mental health facility, with participation from the MHA continuity of services staff shall review the comprehensive inpatient plan at regular intervals in accord with relevant law and departmental standards in order to make necessary revisions in the plan and to determine whether continued mental health facility treatment is in the person's best interest. Mental health facility staff shall notify the MHA of the scheduled time for individual treatment plan reviews.

(b) The MHA will assign a continuity of services staff person, whose function will be to:

(1) assist the facility in updating information on available community resources; and

(2) participate in and document planning-linking conferences with facility staff and the person served, and, to the degree legally appropriate and practical, with the parent/guardian, at admission to the mental health facility, treatment plan review, and prior to absence for trial placement (furlough) from the facility and/or discharge from the facility; and

(3) communicate with the person served and/or facility staff to ascertain the person's status and progress, share this information with appropriate MHA staff, and document status and progress in the person's record maintained by the MHA.

§402.59. Development of Aftercare Plan.

(a) The decision to place a person on absence for trial placement (furlough) or to discharge the person from a mental health facility is the professional responsibility of the facility treatment team. Criteria for discharge have been outlined in Chapter 402, Subchapter A of this title (relating to Admissions, Transfers, Absences, and Discharges Mental Health Facilities). In making this decision, consideration should be given to available community alternatives and the willingness of the MHA to provide appropriate levels of treatment and care.

(b) Prior to the person being placed on absence for trial placement (furlough) or discharge from a mental health facility, an aftercare plan shall be developed by:

(1) the mental health facility treatment team/coordinator;

(2) the MHA representative;

(3) the person served and/or his/her legal representative;

(4) family members with the consent of the person served or his/her legal representative; and

(5) other appropriate individuals requested by the person served or his/her legal representative.

(c) The aftercare plan must contain at least the "Aftercare Plan (MHRS 4-6 form), which is referred to in §402.65 of this title (relating to Exhibits) as Exhibit D; the "Referral Instructions" (MHRS 4-7 form), which is referred to in §402.65 of this title (relating to Exhibits) as Exhibit E; and copies of all available pertinent current summaries and assessments. Copies of these documents will be mailed, faxed, or otherwise delivered to the appropriate MHA within 24 hours of discharge or absence for trial placement.

(d) The aftercare plan will identify a safe and appropriate living situation that will be available to the person served if absent for trial placement (furlough) or discharged. Documentation in the person's record established by the MHA will reflect the discussion of the placement with the person and indicate the person's reaction (acceptance or refusal) to the proposed placement.

(e) If circumstances preclude joint meetings between the facility treatment team/coordinator and the MHA representative, consensus on the plan should be achieved via telephone prior to absence for trial placement (furlough) or discharge. Such consensus between the facility and the MHA shall be documented in the person's record, including the names of the staff who developed the plan, by the MHA and documented in the aftercare plan by the facility.

(f) The person served or legal representative, as appropriate, shall sign the aftercare plan, or documentation of the reason for failure to sign shall be made. The plan shall include a statement that persons signing the plan understand that it and supporting documents will be sent to the MHA.

(g) A person who is absent for trial placement (furlough) is the responsibility of the MHA unless there is an interagency agreement which specifies services are to be provided by the facility.

(h) An aftercare plan is not necessary for persons on unauthorized departures from facilities. For nursing facility placements, the "Initial Aftercare Form," which is referred to in §402.65 of this title (relating to Exhibits) as Exhibit F, should be completed.

(i) Within fourteen days of discharge or absence for trial placement, the

facility shall mail, fax, or otherwise deliver a copy of the individual's discharge summary to the appropriate MHA.

§402.60. Special Considerations for Aftercare Planning for Minors.

(a) Every effort should be made to ensure participation of the parents/conservator of the minor in the aftercare planning process. If the parents/conservator are unable to attend in person, arrangements for attendance via teleconference should be pursued. Other means of keeping the individual(s) informed, including weekly phone calls, should be considered.

(b) Upon admission to services, an estimated length of stay should be developed in order to ensure that sufficient time is permitted to complete aftercare planning for minors.

(c) Under no circumstances shall a minor be discharged or furloughed without the identification of a specific location where the minor will be located for trial placement or discharge. Although the minor may, in some circumstances, be discharged/furloughed to the custody of the state, the aftercare plan may not simply identify the state agency as the location of trial placement or discharge.

(d) Minors age 16 and over who are voluntarily admitted to mental health services and request discharge must be afforded the procedures outlined in §404.157 of this title (relating to Rights of Persons Voluntarily Admitted to Inpatient Services). However, every effort should be made to ensure that the minor is released to a specific individual or location. The aftercare planning process should address the issue of procedures upon the minor's request for release early in the minor's stay.

§402.61. Absence for Trial Placement/Discharge and Development of Community Support Plan and Services.

(a) No later than 24 hours prior to an absence for trial placement (furlough) or discharge, the facility will notify the MHA by telephone, fax, or written document of:

(1) identifying data, including address;

(2) legal status;

(3) when and where the person will be located for trial placement or discharged;

(4) pertinent medical information;

(5) current medications;

(6) behavioral data; and

(7) other pertinent treatment information, including information in the individual treatment plan.

(b) The MHA, through its assigned continuity of services staff person, is responsible for implementing community-based aspects of the aftercare plan from the time that absence for trial placement (furlough) or discharge from the facility begins.

(c) A community support plan must be developed by the MHA within three weeks after the person is absent for trial placement (furloughed) or discharged from the facility. The community support plan is part of the comprehensive treatment plan of the person. Development of the plan requires the participation of the MHA representative, the person served and/or legal representative and:

(1) family members with the consent of the person served or his/her legal representative; and

(2) other appropriate individuals requested by the person served or his/her legal representative.

(d) The community support plan will be tailored according to treatment plan standards in the TXMHMR MH Community Services Standards and other applicable references.

(e) Mental health and other health care services provided in the mental health facility which are needed in the community by the person served will be included in the community support plan. The plan will also identify residential, vocational, educational, social, financial, and other supportive services including case management, which are necessary and available to enhance or sustain the capacity of the person to function in the community. Involvement of family and/or community resources as support systems will be addressed.

(f) The community support plan will contain the person's date of admission to community-based services and a description of any needs the person may have that cannot be addressed by present treatment.

(g) Should the person implicitly or explicitly refuse services, full documentation of this refusal must be made in the person's record to include staff actions to overcome the refusal and the person's response. The person's continuity of services staff person is responsible for ensuring that the person understands that continued services on an outpatient basis might prevent a readmission.

(h) Thirty days after admission of the person to community-based services, the designated continuity of services staff person from the MHA will conduct a follow-up review of community support plans and community adjustment. This review must include a summary of contacts, interventions implemented, and the response of the person served to problems/goals/objectives. The review should also address any interventions which have not been implemented and the reasons why. Subsequent reviews are to follow TXMHMR MH Community Services Standards and other applicable standards.

(i) As stipulated in recent negotiations and in the 1992 RAJ Settlement Agreement, the provision of community support services to persons discharged from a state hospital and reassigned to an MHA will self-monitor their community support services and provide a quarterly report to the RAJ coordinator.

§402.62. Development of an Interim Plan for Services for Individuals Who Change MHAs.

(a) When a person relocates to another county and seeks services from the MHA without prior knowledge of the original MHA, the MHA where the person is seeking services will promptly notify the original MHA.

(1) The original MHA will forward information, including information outlined in TXMHMR MH Community Services Standards (standard 6.3.P.), to the new MHA within ten calendar days of notification. The original MHA will maintain the person's case in open status until notified that the person has been admitted to services at the new MHA, or for 90 days, whichever comes first.

(2) Upon admission, the new MHA arranges for the transfer of county of residence in CARE by the original MHA and develops an interim plan for services with the person requesting services.

(3) Within 45 days following the development of the interim plan for services, an individualized treatment plan is developed.

(b) When a person relocates to a new county with the knowledge of the original MHA, the original MHA maintains the person in open status until the new MHA admits to services, or for 90 days, whichever comes first. The following steps are followed to implement the transfer:

(1) The assigned continuity of services staff person at the original MHA notifies the new MHA of the person's request for services, and discusses any clinically relevant information which might help the new MHA to meet the person's needs.

(2) The assigned continuity of services staff person:

(A) obtains an initial appointment with the new MHA;

(B) provides the person with sufficient medication until the initial appointment date at the new MHA; and

(C) forwards, within ten calendar days, information pertinent to the person's treatment, including information outlined in TXMHMR MH Community Services Standards (standard 6.3.P.).

(3) Upon admission, the new MHA arranges for the transfer of county of residence in CARE by the original MHA and develops an interim plan for services with the person requesting services.

(4) Within 45 days following the development of the interim plan for services, an individualized treatment plan is developed.

(c) When an individual requests relocation while residing in a state facility, the original MHA maintains the person's case in open status until notified by the new MHA that the person is admitted to services, or for 90 days, whichever comes first. To implement admission relocation, the following steps are followed.

(1) Representatives from the original MHA and the MHA serving the county where the person wishes to reside meet with appropriate facility staff and the person prior to his or her release from the facility to develop a joint discharge plan. The meeting is documented in the person's record at the facility and at each affected MHA. The meeting may take place by phone if distance prevents meeting in person, with arrangements documented in the person's record at the facility and at each affected MHA.

(2) All responsibilities for continuity of services and community support are assumed by the new MHA after the individual is admitted to services unless specified otherwise in a written agreement between the MHAs and the person.

(3) Transfer of county of residence in CARE by the original MHA must be arranged for by the new MHA when the person is admitted to services.

§402.63. Nursing Facility Placement/Community Support.

(a) Prior to placement into a nursing facility it is recommended that representatives of the MHA and the nursing facility adopt a memorandum of understanding that establishes respective responsibilities for community support services. The MOU should address pertinent issues such as access to resident and records by MHA staff, frequency of contact, notification in the event of relocation, crisis, and/or death.

(b) Community support assessments and services are required for all direct placements from mental health facilities into nursing facilities.

(1) An initial community support assessment form shall be completed by mental health facility staff as a part of the aftercare plan within 24 hours of placement. A copy of the initial assessment form shall be forwarded to the MHA at the time of placement. Mental health facility staff should ensure and document that nursing facilities and MHAs involved in community support have received all critical clinical information at the time of placement. Mental health facility staff shall indicate in CARE that the individual is being furloughed or discharged to a nursing facility.

(2) Following placement, minimal community support assessments are to be completed by the MHA in accordance with the schedule outlined in the "Nursing Facility Community Support Assessment Schedule," which is referred to in §402.65 of this title (relating to Exhibits) as Exhibit B. A community support assessment form is completed at the time of each assessment, and the MHA documents assessment date and type of contact (face-to-face or telephone) in CARE. When individuals are furloughed it is the responsibility of the mental health facility to indicate discharges in CARE as they occur.

(3) In addition to conferring with the consumer and reviewing the nursing facility plan of care, the MHA may, in monitoring the nursing facility resident's condition, confer with the facility administrator, the director of nursing, the activity director, the attending physician, the MHA physician, family members, and other appropriate knowledgeable and interested persons to evaluate the consumer's total functioning. Consent shall be obtained from the person served or his/her legal representative prior to contacting family members and other persons not directly responsible for the person's clinical care.

(4) MHA staff should document any problems or unmet needs in the areas of medication, physical, independent functioning, and adherence to the aftercare and/or community support plan.

(5) If during the course of community support assessment it is established that the nursing facility resident is receiving substandard care or if it appears that the nursing facility is not adequately providing for the care of the individual the community support worker should report the situation to his/her supervisor, document the existence of the situation, develop and document a plan of action, and take necessary action to attempt to remedy the problem. The MHA should develop procedures to address unmet consumer needs in the alternative placement. It may be necessary to increase assessments and advocacy and/or provide technical assistance to improve service. Severe, recurrent, or unaddressed problems in nursing facility care or situations of abuse and neglect shall be reported to the complaint hotline operated by the Texas Department of Human Services (1-800-458-9858).

(6) Community support services may be discontinued if the consumer meets MHA criteria for terminating services and they have been in placement a minimum of one year and have not been receiving psychoactive medication for a minimum of sixty days. When services are discontinued this action should be indicated in CARE.

§402.64. Entry into Private Treatment Program of a Person Served. When a person is absent for trial placement (furlough) or discharged to a private service system such as private inpatient care, private psychiatric services, private residential facility, or private intermediate care facility (e.g., nursing, ICF/MR), the MHA and facility staff shall develop the aftercare plan prior to the person's entry into the private treatment program. The aftercare plan should also be developed with the private provider whenever practicable. After the person is discharged from the facility and enters the private treatment program, the MHA relinquishes its responsibility for community support services unless such services (e.g., outpatient services, psychosocial rehabilitation, case management, etc.) are required in the aftercare plan. If so, a community support plan shall be developed in accord with §402.58 of this title (relating to Absence for Trial Placement/Discharge and Development of Community Support Plan and Services).

§402.65. Exhibits. Copies of the following exhibits are available from the Texas Department of Mental Health and Mental Retardation, P. O. Box 12668, Austin, Texas 78711.

(1) Exhibit A-Non-Clinical Support Needs Assessment.

(2) Exhibit B-Nursing Facility Community Support Assessment Schedule.

(3) Exhibit C-Mental Health Services County of Residence Determination Worksheet.

(4) Exhibit D-Aftercare Plan (MHRS 4-6 form).

(5) Exhibit E-Referral Instructions (MHRS 4-7 form).

(6) Exhibit F-Nursing Facility Community Support Assessment Form.

§402.66. References. Reference is made to the following:

(1) Texas Health and Safety Code, §571.001, et seq;

(2) Texas Health and Safety Code, §531.001, et seq;

(3) Texas Health and Safety Code, §591.001, et seq;

(4) Texas Health and Safety Code, §§571.001-.005;

(5) 42 Code of Federal Regulations, Part 2;

(6) Chapter 402, Subchapter A of this title, relating to Admissions, Transfers, Absences, and Discharges-Mental Health Facilities;

(7) Chapter 403, Subchapter K of this title, relating to Client-Identifying Information;

(8) TXMHMR Mental Health Record System;

(9) TXMHMR MH Community Services Standards; and

(10) 1992 RAJ Settlement Agreement.

§402.67. Distribution.

(a) The provisions of this subchapter shall be distributed to members, Texas Board of Mental Health and Mental Retardation; the medical director, deputy commissioners, associate deputy commissioners, assistant deputy commissioners, and directors of Central Office; superintendents/directors, all TXMHMR facilities; and executive directors and chairpersons, board of trustees, all community mental health and mental retardation centers.

(b) The superintendent/director or executive director is responsible for distributing this subchapter to appropriate staff.

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

Issued in Austin, Texas, on November 2, 1993.

TRD-9331420 Ann K. Utley
Chairman
Texas Board of Mental Health and Mental Retardation

Earliest possible date of adoption: December 10, 1993

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

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TITLE 28. INSURANCE

Part II. Texas Workers' Compensation Commission

Chapter 152. Attorneys' Fees

• 28 TAC §§152.1, 152.3, 152.4

The Texas Workers' Compensation Commission proposes amendments to §152. 1, §152.3, and §152.4, concerning general provisions that apply to all fees, commission action on receipt of the fee application, and guidelines for the fees that attorneys can charge. Rule 152.1 establishes that only attorneys with active licenses can receive a fee, that the fee has to be approved by the commission, the limits to the amount of the fee, the point in time that the fee becomes payable, that lump sums for attorneys' fees have to be approved by the commission, that discharge does not necessarily defeat an attorney's right to collect a fee for services rendered prior to discharge, and what happens when the attorney fee is based on assisting an employee to obtain contested supplemental income benefits. Rule 152.3 sets out the requirements for requesting approval of a fee, the actions which the commission can take regarding the request, who gets copies of the application and the resulting commission order, apportionment of fees, the effect of the commission order, how to appeal a commission order of attorney fees, and how overpayments are recovered. Rule 152.4 establishes a guideline for the number of hours attorneys and their legal assistants may be paid for various activities related to a workers' compensation claim and the hourly rate for attorney and legal assistant services.

These rules are based on the provisions of the Texas Labor Code, §408.147, §408.185, §408.221, and §408.222.

Janet Chamness, chief of budget, has determined that for the first five-year period the rules are in effect there will be no fiscal implications to the state or local government as a result of enforcing or administering these rules.

Since attorney fees are, for the most part, paid out of the increased compensation an attorney obtains for the injured employee, business large and small alike, will not be affected by these rules.

Ms. Chamness has determined that for each year of the first five years the rules as proposed is in effect the public benefit anticipated as a result of enforcing the rules will be appropriately documented attorney fee applications, charges and payments that reflect actual and reasonable time spent rendering services to clients, and an efficient process for submitting and approving or denying attorney fee applications.

There are no anticipated economic costs to persons who are required to comply with the rules as proposed because attorneys are already required to submit applications for attorney fee approvals and because fees may be approved in excess of the guideline hours where justified. Setting a maximum hourly rate may limit fees for attorneys who would otherwise charge more than the maximum.

Comments on the proposal will be accepted for at least 30 days after publication of this document in the *Texas Register* and may be submitted to Ken Forbes, Policy and Rules Administrator, Mail Stop #4D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH-35, Austin, Texas 78704-7491.

The amendments are proposed under the Texas Labor Code, §402.061, which authorizes the commission to adopt rules necessary to administer the Act, and the Texas Labor Code §408.147 which describes attorney fees related to contests of entitlement to supplemental income benefits, the Texas Labor Code, §408.185, which describes attorney fees related to disputes as to beneficiaries in death cases, the Texas Labor Code, §408.221, which describes attorney fees paid to claimant's counsel as well as the commission mandate for developing rules providing guidelines, and the Texas Labor Code, §408.222, which describes attorney fees for defense counsel.

The following codes are affected by this rule: Labor Code, §§402.061, 408. 147, 408.185, 408.221, and 408.222.

§152.1. Attorney Fees: General Provisions.

(a) To be eligible to earn a fee, an attorney representing any party shall hold an active license to practice law in Texas and not be currently under suspension for any reason.

(b) An attorney may [shall] receive a fee for representation of any party before the commission only after the commission approves the amount of the fee. An attorney shall not receive an amount greater than the fee approved by the commission, notwithstanding any agreements between the parties, including retainer fee agreements.

(c) The fee [fixed and] approved by the commission shall be **limited to 25% of each weekly income benefit payment to the employee, up to 25% of the total income benefits allowed and shall also be** based on the attorney's time and expenses, subject to the guidelines and standards set forth in the Texas Workers' Compensation Act (the Act) and [established in this chapter of the] commission rules. **An attorney's fee for representing an injured employee becomes a lien against income benefits due the injured employee once the carrier receives the commission order approving the fee. The carrier must begin payment out of the approved income benefits by mailing a check to the attorney within 14 days after receiving the commission order and thereafter whenever income benefits are paid until the fee has been paid or income benefits cease.**

(d) An attorney's fee for representing a claimant may **upon commission approval** be commuted to a lump sum upon

request by the attorney or the carrier [, and may be approved by the commission]. The lump sum payment shall be discounted for present payment at the rate provided under the Act, §1.04. A commuted fee shall be recouped by the carrier out of the future income benefits paid to the represented claimant, **not to exceed recoupment of more than 25% of the weekly income benefit out of any single weekly payment.** The fee for representing a claimant for death benefits cannot be commuted where the only dispute involves identification of the proper beneficiaries.

(e) A client who discharges an attorney does not, by that [this] action, defeat the attorney's right to claim a fee **for services performed by that attorney prior to discharge.**

(f) An attorney for an employee who **prevails when a carrier** [successfully] contests a commission determination of eligibility for supplemental income benefits shall be eligible to receive a reasonable and necessary attorney's fee, including expenses. **This fee is payable by the carrier, not out of the employee's benefits and the fee shall not be limited to a maximum of 25% of the employee's recovery.** [, from the insurance carrier, in accordance with the Act, §4.28(1)(2).] All provisions of these rules, except §152.4, of this title (relating to Guidelines For **Legal** [Maximum Hours for Specific] Services **Provided to Claimants and Carriers** [Performed by a Claimant's Attorney]), apply [, except that such fee shall not be limited to a maximum of 25% of the employee's recovery].

*§152.3. Approval **or Denial** of Fee by the Commission*

(a) To claim a fee, an attorney representing any party shall submit [written evidence of the attorney's time and expenses on] Form TWCC-152, Application and Order for Attorney's Fees **with time, hourly rate, and expenses itemized separately for the attorney and for any legal assistant. Additional justification, described in §152.4 of this title (relating to Guidelines For Legal Services Provided to Claimants and Carriers), must be attached to the application form for any fee which exceeds the guideline. The commission may also require additional justification for fees which do not exceed the guideline.** A copy of the form shall be sent simultaneously to the attorney's client.

(b) **The commission shall review each fee application submitted. If the application is for actual time and expenses which are reasonable given the circumstances of the specific claim and which are equal to or less than those allowed by the guideline established in §152. 4 of this chapter, the commission may approve the application, and, if approved, shall issue an order for payment. If the fee application is for more than the guidelines allow, the commission shall issue an order to pay the fees which are reasonable given the circumstances of the specific claim and which are adequately justified in writing with any necessary supporting documentation. The commission shall deny any portion of the fee which exceeds the guideline and which is not adequately justified.** [The commission shall review each request for an attorney fee and fix and approve a fee based on the evidence submitted, but may ask for additional documentary evidence to fairly evaluate the fee claim. The commission shall consider the guidelines for maximum charges for services provided in §152.4 of this title (relating to Guidelines for Maximum Hours for Specific Services Performed by a Claimant's Attorney), the factors set forth in the Texas Workers' Compensation Act (the Act), § 4.09(c), for claimant's attorneys, and, for a defense attorney representing a carrier, analogous factors as well as the nature and length of the professional relationship to the client. In considering whether a defense counsel's fee is reasonable and necessary, the commission shall also consider the guidelines set out in §152.4 of this title (relating to Guidelines for Maximum Hours for Specific Services Performed by a Claimant's Attorney). The commission shall further consider whether the attorney has raised all issues timely and efficiently, given the facts known to the attorney, in order to avoid multiple proceedings on the same claim.]

[(c) An order of the commission that fixes and approves a fee of a claimant's attorney that is the maximum fee allowed under the Act, § 4.09, shall state this fact.]

(c)[(d)] The aggregate attorney fee for representing a claimant shall not exceed 25% of the claimant's recovery. The commission shall apportion the fee between attorneys when more than one attorney claims a fee for representing the same party. The commission shall consider each claim based upon the factors and guidelines outlined in the Act and these rules. [The aggregate fee for attorneys representing a claimant shall not exceed 25% of the claimant's recovery.]

[(e) The carrier shall pay, pursuant to the order of the commission, an attorney's fee no later than 14 days after receipt of approval by the commission. For purposes of this section, the date of payment is the date that the initial check for the attorney's fee is mailed.]

(d)[(f)] Except as provided in subsection (e)[(g)] of this section, an attorney, claimant, or carrier who contests the fee fixed and approved by the commission shall request a benefit contested case hearing. The request shall be made by personal delivery or first class mail and be filed with the commission field office handling the claim or the central office of the commission no later than the 15th day after receipt of the commission's order. A claimant may request a hearing by contacting the commission in any manner no later than the 15th day after receipt of the commission's order. The contesting party **other than a claimant** shall send a copy of the request by personal delivery or first class mail to the carrier and the other parties, including the claimant **and attorney**.

(e)[(g)] An attorney, claimant, or carrier who contests the fee ordered by a hearing officer after a benefit contested case hearing shall request review by the appeals panel pursuant to the provisions of §143.3 of this title (relating to Requesting the Appeals Panel to review the Decision of the Hearing Officer).

(f)[(h)] The commission's order to pay attorney fees is binding during the pendency of a contest or an appeal of the order. Notice of a contest or an appeal shall not relieve the carrier of the obligation to pay according to the commission order.

(g)[(i)] If an attorney has been paid more than authorized by the final order of the commission, the commission shall order that the excessive amount be reimbursed.

(h)[(j)] If the final order of the commission or a court requires an attorney to reimburse funds, the reimbursement shall be made no later than 15 days after receipt of the final order by mailing or personally delivering a check as directed by the commission or a court.

*§152.4. Guidelines for **Legal** [Maximum Hours for Specific] Services **Provided to Claimants and Carriers** [Performed by a Claimant's Attorney].*

(a) The guidelines outlined in this rule shall be considered by the commission along with the factors, and maximum fee limitations, set forth in **the Texas Labor Code, §408.221 and §408. 222** [the Texas Workers' Compensation Act §4.09] and **applicable** [the] commission rules [applicable to claimant's attorney's fees].

[(b) As part of the application for attorney fees, a claimant's attorney shall submit a statement of hours expended on the case by attorneys, paralegal, and law clerks.]

(b)[(c)] An attorney may request, **and the commission may approve** [approval for] a number of hours greater than those allowed by these guidelines, **if the attorney demonstrates** [but must demonstrate] to the satisfaction of the commission that the higher fee was justified **based on the Texas Labor Code, §408.221 and §408.222** [by the effort necessary to pre-

serve the client's interest, or the complexity of the legal and factual issues involved].

(c)[(d)] **The guidelines for legal services provided to claimants and carriers are as follows:** [Except when approved by the commission under subsection (c) of this section, an attorney's claim for a service shall not exceed the time limits contained in the following table:]

SCHEDULE A: PENALTIES FOR NURSING FACILITIES

DESCRIPTION OF CONDITIONS AND ELEMENTS OF CONDITIONS	FIRST OFFENSE (1)	SECOND OFFENSE (2)	THIRD OR SUBSEQUENT OFFENSE (3)
A. - Q. (No change.)			
R. Failure to submit a renewal or change of ownership license application as required in accordance with §§90.15 or 90.16 of this title (relating to Renewal Procedures and Qualifications and Change of Ownership).			
1. The facility does not submit a license renewal application at least 45 days before the current license expiration date.	**500**	**1,000**	**1,500**
2. During a change of ownership process, the prospective purchaser does not submit a license application to the licensing program at least 30 days before the anticipated sale date.	**500**	**1,000**	**1,500**

SCHEDULE B: PENALTIES FOR FACILITIES SERVING PERSONS WITH MENTAL RETARDATION AND/OR RELATED CONDITIONS

DESCRIPTION OF CONDITIONS AND ELEMENTS OF CONDITIONS	FIRST OFFENSE (1)	SECOND OFFENSE (2)	THIRD OR SUBSEQUENT OFFENSE (3)
A. - G. (No change.)			
H. Failure to submit a renewal of change of ownership license application as required in accordance with §§90.15 or 90.16 of this title (relating to Renewal Procedures and Qualifications and Change of Ownership).			
1. 1. The facility does not submit a license renewal application at least 45 days before the current license expiration date.	500	1,000	1,500
2. 2. During a change of ownership process, the prospective purchaser does not submit a license application to the licensing program at least 30 days before the anticipated sale date.	500	1,000	1,500

(d)[(e)] The maximum hourly rate for legal services shall be as follows: Hourly rate:

(A) Attorney-$150,

(B) Legal assistant (not to include hours for general office staff) $50 [When an attorney's only service has been to assist a claimant with completing and filing claim forms and other documents, and the claim is not disputed, the range of hours allowed shall be in the range of one to three hours, depending upon the extent of services rendered.]

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 29, 1993

TRD-9331266 Susan Cory
General Counsel
Texas Workers' Compensation Commission

Earliest possible date of adoption December 10, 1993

For further information, please call. (512) 440-3592

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TITLE 30. ENVIRONMENTAL QUALITY

Part I. Texas Natural Resource Conservation Commission

Chapter 116. Control of Air Pollution by Permits For New Construction or Modification

Subchapter B. New Source Review Permits

Permit Application

• **30 TAC §116.110, §116.115**

The Texas Natural Resource Conservation Commission (TNRCC) proposes amendments to §116.110, concerning Applicability; §116.115, concerning Special Provisions; §116.211, concerning the Standard Exemption List; and §116.311(b) and (c), concerning Permit Renewal Applications. Also, TNRCC proposes a new Subchapter F, Standard Permits, containing new §§116.610, 116.611, 116.614, and 116.617, to establish a category of standard permits. The proposed changes have been developed in response to recommendations by the Permits Workshop Task Force and directives from the former Texas Air Control Board to streamline the permit process. The proposed changes to the Standard Exemption List consist of revisions to Standard Exemption (SE) 75, SE 107, SE 113, and a new SE 124. The proposed revisions to SE 107, regarding vapor degreasers, and SE 113, regarding thermoset resin operations, were recommended by the Permits staff. The proposed new SE 124, relating to auto body shops, and revised SE 75, relating to surface coating facilities, were developed by the Auto Body Shop Task Force to provide a means for the thousands of auto body shops located in Texas to comply with Chapter 116 requirements.

The proposed new Subchapter F establishes a new category of new source review permits referred to as standard permits. The standard permit simplifies and accelerates the permit review process by establishing standardized conditions targeting a specific industry or type of facility. The permit will contain specific conditions and requirements pertaining to a specific industry or source type. If an applicant can meet all of the conditions of a standard permit, then it would not be necessary to submit a general application under the requirements of §116.111. This will streamline the agency review process, and allow more rapid approval than would be possible under the generalized permit review process. The first two standard permits will be for emission control projects required by rule and voluntary emission control projects. Standard Permit Number 1 will authorize the installation of emission control equipment or implementation of control techniques for emission control

projects required by rule. The replacement of component parts or appurtenances of a production facility will be allowed under Standard Permit Number 1, but the installation of a new production facility or the complete replacement of an existing production facility will not be authorized. The guideline for determination of whether or not the replacement of parts and appurtenances is considered to be a new production facility is based on the federal definition of reconstruction as defined in 40 Code of Federal Regulations §60.15(b)(1) and (c). The agency will address the need to develop additional standard permits to authorize the installation or complete replacement of existing production facilities in the near future. Such standard permits may include the requirement that new or replacement production facilities utilize the best available control technology (which will be specified by rulemaking) and will clarify whether emission reductions beyond those otherwise required by rule are fully creditable for netting and offset purposes. In addition, standard permits for specific source categories may be added in future rulemaking similar to the procedure that is used with the standard exemption list. Section 116.610 establishes the requirements to qualify for a standard permit, §116.611 lists the requirements to register a facility under a standard permit, §116.614 states the application fee requirements, and §116.617 begins a list of standard permits and states the specific conditions applicable to each standard permit.

The staff is requesting comments from the public and the regulated community regarding permit fees for standard permits. The proposed rules retain the current fee structure that is used for new source review permits in Subchapter B. The staff invites comments that either support the proposed fee structure, recommend elimination of fees for standard permits, or suggest alternative fee structures.

The staff also requests comments, particularly from the regulated community and U.S. Environmental Protection Agency, regarding the requirements in the proposed §116.617(1)(D)(iii). Section 116.617(1) covers Standard Permit Number 1 which authorizes the installation of emission control equipment or control techniques required by rule. Subparagraph (D) provides that the determination of whether a project will result in a significant net increase in emissions of any criteria pollutant are to be made without consideration of other increases or decreases not related to the project. Subparagraph (D)(iii) further clarifies that the owner or operator obtaining the standard permit does not have to perform the netting calculations that would normally be required if any associated emissions increase is above the level that would trigger netting for either PSD or nonattainment review. However, subparagraph (D)(iii) also provides that the emission increases and decreases from the project must be included in future netting calculations required by subsequent projects if otherwise creditable. Since Prevention of Significant Deterioration (PSD) and nonattainment netting rules specifically exclude the use of reductions which are required by rule, industry believes that they should not be required to include the increases which result from controls required by rule in those same netting calculations. However, at the same time, they would still like to use any decreases which go beyond those required by rule in the netting exercise.

The language in §116.617(1)(D)(i) and §116.617(1)(E) is intended to echo the language in the Federal Register, Volume 57, Number 140, page 32314, the so-called WEPCO fix, in both the nonattainment and PSD rules. In the WEPCO language, if a project is a pollution control project which meets the requirements similar to those contained in §116.617(1)(D)(i), it is not considered to be a physical change or change in the method of operation. A strict reading of this exclusion could mean that the change should not be included in any netting calculation. Although this strict interpretation would have some effect on those projects required by rule as in Standard Permit Number 1, it has an even greater effect on voluntary projects involving the installation of control equipment which are covered by Standard Permit Number 2 (§116.617(2)). Standard Permit Number 2 also contains the WEPCO language This interpretation would mean that companies who voluntarily install pollution control equipment would not be allowed to use reductions obtained as a result of the project in future netting exercises Since the staff does not wish to take this position, subparagraph (D)(iii) was added to both Standard Permit Numbers 1 and 2.

The proposed amendment to §116.110 will add reference to standard permits as an applicable new source review permit. The proposed amendment to §116. 115 will authorize the inclusion of special and general provisions in standard permits.

The proposed amendment to §116.211 will change the date of the Standard Exemption List to identify the date of revisions to SE 75, SE 107, SE 113, and the new SE 124, relating to auto body shops. The staff recommended changes to SE 75 will improve recordkeeping and facility maintenance requirements and expand the scope of the exemption to allow more facilities to qualify. The proposed changes to SE 107 are basically staff recommended clarifications. The proposed changes to SE 113 expand the scope to include all thermoset resin facility types and revise the ventilation requirements based on a new effects screening level which has been lowered from 430 micrograms per cubic meter to 215 micrograms per cubic meter. The new SE 124 establishes the requirements for auto body shops to qualify for a standard exemption. There is a correction to §116.211(a)(2)(iv) that volatile organic compounds (VOC) emissions allowed under standard exemption in ozone nonattainment areas must also be less than 25 tpy as specified for attainment areas. Also, §116 211(b) will be revised to clarify that the subsection only applies to nonattainment review and PSD review.

The proposed amendment of §116.311(b) will revise the requirements for compliance history considerations in the permit renewal review process. The proposed amendment of §116.311(c) will change the permit renewal schedule from five years to ten years to be consistent with recent changes to the statutory language.

Mr. Stephen Minick, division of budget and planning, has determined that for the first five-year period the rules are in effect, there will be fiscal implications for state government as a result of enforcing and administering the rules. The costs to state government will be approximately $522,000 in the first year and $469,000 in each succeeding year of the five-year period. These costs are associated with the increased workload in reviewing standard exemption applications authorized under proposed §116.211. Approximately 10, 000 automotive body and paint operations are anticipated to seek to qualify for standard exemptions over the five-year period. The costs to state government for review of the proposed standard exemptions will be significantly less than the costs of reviewing permit applications on an individual basis; however, no estimate of the potential cost savings under the current proposal has been made. There are no additional costs to state government related to other provisions of these sections as proposed. No effects on state revenues are anticipated There may be effects on some local governments. The effects on local governments will be limited to those associated with vehicle maintenance and repair operations potentially undertaken by local governments. Local jurisdictions not engaged in such activities subject to standard exemption under these rules will not be affected.

Mr. Minick also has determined that for each year of the first five years the rules are in effect the public benefit from the proposed changes to the Standard Exemption List will be improved capture and control of VOC emissions and better enforcement of existing rules due to the recordkeeping requirements. The establishment of standard permits will provide better utilization of staff resources by allowing the Permits staff to allocate more time on the review of permit applications for complex facilities, and to reduce the review time on the smaller facilities that have a less significant impact on ambient air quality. The changes to the compliance history rules will make the compliance history requirements for permit renewals consistent with the recommendations of the Compliance History Task Force. The change in the renewal period to ten years will provide consistency with statutory requirements.

There will be costs to small businesses affected by the proposed changes to the standard exemption list (primarily for the auto body shops affected by SE 124) including the cost to prepare an exemption registration and the additional emissions control measures and recordkeeping required to meet the conditions of the exemption. Auto body shops qualifying for the standard exemption will not be required to obtain a preconstruction permit and will avoid increased costs of preparation of a permit application. The cost per facility to comply with SE 124 is estimated at an average of $5,000 per facility for a total of $50 million statewide over the first five years the exemption is in effect. There will be no significant expense to small business for the other proposed rule changes. There are no other anticipated economic costs to persons required to comply with the rules as proposed

Public hearings on the proposal will be held December 2, 1993, at 2:00 p.m. in the City of Houston Pollution Control Building Auditorium, 7411 Park Place Boulevard, Houston, and on December 3, 1993, at 10:00 a.m. in the Auditorium (Room 201S) of the TNRCC Central Office, Air Quality Planning Annex, located at 12118 North IH-35, Park 35 Technology Center, Building E, Austin. The hearings are structured for the receipt of oral or written comments by interested persons. Interrogation or cross-examination is not permitted; however, a TNRCC staff member will discuss the proposal 30 minutes before the hearing and will be available to answer questions.

Written comments not presented at the hearing may be submitted to the TNRCC, Air Quality Planning Division, P.O. Box 13087, Austin, Texas 78711 through December 17, 1993. Material received by the Regulation Development Section by 4:00 p.m. on that date will be considered by the Commission prior to any final action on the proposed sections. Copies of the proposal are available at the TNRCC Air Quality Planning Annex located at 12118 North IH-35, Park 35 Technology Center, Building E, Austin, Texas 78753, and at all TNRCC regional offices. For further information, contact Mr. Gary McArthur at (512) 908-1917.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 908-2245. Requests should be made as far in advance as possible.

The amendments are proposed under the Texas Health and Safety Code, the Texas Clean Air Act (TCAA), §382.017, which provides the TNRCC with the authority to adopt rules consistent with the policy and purposes of the TCAA.

§116.110. Applicability.

(a) Permit to construct. Any person who plans to construct any new facility or to engage in the modification of any existing facility which may emit air contaminants into the air of this state shall obtain a permit pursuant to §116.111 of this title (relating to General Applications), **satisfy the conditions for a standard permit pursuant to the requirements in Subchapter F of this chapter (relating to Standard Permits),** or satisfy the conditions for exempt facilities pursuant to Subchapter C of this chapter (relating to Permit Exemptions) before any actual work is begun on the facility. Modifications to existing permitted facilities may be handled through the amendment of an existing permit.

(b)-(e) (No change.)

§116.115. Special Provisions. Permits, special permits, **standard permits,** and exemptions may contain general and special provisions. The holders of permits, special permits, **standard permits,** and exemptions shall comply with any and all such provisions. Upon a specific finding by the Executive Director that an increase of a particular pollutant could result in a significant impact on the air environment, or could cause the facility to become subject to review under the undesignated heads of this subchapter relating to Nonattainment Review or Prevention of Significant Deterioration Review, the permit may include a special provision which states that the permittee must obtain written approval from the Executive Director before constructing a source under a standard exemption or **standard permit.**

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, 1993.

TRD-9331447 Mary Ruth Holder
Director, Legal Division
Texas Natural Resource Conservation Commission

Earliest possible date of adoption February 1, 1994

For further information, please call (512) 463-8159

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Subchapter C. Permit Exemptions

• 30 TAC §116.211

The amendment is proposed under the Texas Health and Safety Code, the Texas Clean Air Act (TCAA), §382.017, which provides the Texas Natural Resource Conservation Commission with the authority to adopt rules consistent with the policy and purposes of the TCAA

§116.211 Standard Exemption List

(a) Pursuant to the Texas Clean Air Act (TCAA), §382.057, the facilities or types of facilities listed in the Standard Exemption List, dated **October 13, 1993** [July 16, 1993], as filed in the Secretary of State's Office and herein adopted by reference, are exempt from the permit requirements of the TCAA, §382.0518, because such facilities will not make a significant contribution of air contaminants to the atmosphere. A facility shall meet the following conditions to be exempt from permit requirements

(1) (No change.)

(2) Total actual emissions authorized under standard exemption from the proposed facility which is located in a nonattainment area shall not exceed

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

(D) in an ozone nonattainment area, the applicable major modification threshold of [VOC or] NO_x in Table 1 of the definition of "major modification" in §116.012 of this title (relating to Nonattainment Review Definitions).

(3)-(6) (No change.)

(b) Notwithstanding the provisions of this section, any facility which constitutes a new major source, or any modification which constitutes a major modification under [the FCAA,] nonattainment review or Prevention of Significant Deterioration review as amended by the FCAA Amendments of 1990, and regulations promulgated thereunder, shall be subject to the requirements of §116.110 of this title (relating to Applicability) rather than this section.

(c)-(f) (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 3, 1993.

TRD-9331448 Mary Ruth Holder
Director, Legal Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: February 1, 1994

For further information, please call (512) 463-8159

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Subchapter D. Permit Renewals

• 30 TAC §116.311

The amendment is proposed under the Texas Health and Safety Code, the Texas Clean Air Act (TCAA), §382.017, which provides the TNRCC with the authority to adopt rules consistent with the policy and purposes of the TCAA.

§116.311 Permit Renewal Application

(a) (No change.)

(b) The TNRCC shall review the compliance history of the facility in consideration of granting a permit renewal. The compliance history review shall be conducted in accordance with the undesignated head in Subchapter B relating to Compliance History. In order for the permit to be renewed, the application shall include information demonstrating that the facility is or has been in substantial compliance with the provisions of the TCAA and the terms of the existing permit. If the facility has a history which demonstrates failure to maintain substantial compliance with the provisions of the TCAA or the terms of the existing permit, the renewal shall not be granted [If the facility has any unresolved

nonclerical violations of the TNRCC rules, the renewal shall not be granted unless the facility is brought into compliance or is complying with the terms of an applicable board order or court order prior to the expiration of the permit as identified in subsection (c) of this section.] **If it is found that violations in the compliance history constitute a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process, including failure to make a timely and substantial attempt to correct the violations, the renewal shall be denied. If a contested case hearing has not been called, then the staff must notify the applicant of the intent to recommend denial and state the basis of the findings. The applicant will be given an opportunity to respond to the notice. If the findings reflect a pattern of disregard for applicable regulations which do not warrant denial, additional conditions may be placed in the permit.**

(c) A permit holder that fails to submit an application for review and renewal within 90 days after receiving notification from the TNRCC pursuant to subsection (a) of this section will cause the subject permit to expire, unless the time period for the submission of the application is extended by the Executive Director. Permits are subject to the following renewal schedule.

(1) (No change.)

(2) Any permit issued on or after December 1, 1991, is subject for review every **ten** [five] years after the date of issuance.

(3) For cause, a permit issued on or after December 1, 1991, for a facility at a nonfederal source may contain a provision requiring the permit to be renewed at a period of between five and ten years.

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, 1993.

TRD-9331449 Mary Ruth Holder
Director, Legal Division
Texas Natural Resource Conservation Commission

Proposed date of adoption. February 1, 1994

For further information, please call. (512) 463-8159

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Subchapter F. Standard Permits

• 30 TAC §§116.610, 116.611, 116.614, 116.617

The new rules are proposed under the Texas Health and Safety Code (Vernon 1990), the Texas Clean Air Act (TCAA), §382.017, which provides the TNRCC with the authority to adopt rules consistent with the policy and purposes of the TCAA.

§116.610 Applicability.

(a) Pursuant to the Texas Clean Air Act (TCAA), §382.051, projects involving the types of facilities or physical or operational changes to facilities which meet the requirements for a standard permit listed in §116.617 of this title (relating to Standard Permits List) are hereby entitled to the standard permit; provided, however, that

(1) Any project which results in a net increase in emissions of air contaminants from the project other than those for which a National Ambient Air Quality Standard has been established must meet the emission limitations of Standard Exemption 106(c) or (d) or Standard Exemption 118(c)

(2) Construction or operation of the project shall be commenced prior to the effective date of a revision to §116.617 of this title, (relating to Standard Permits List), under which the project would no longer meet the requirements for a standard permit.

(3) The proposed project shall comply with the applicable provisions of the Federal Clean Air Act (FCAA), §111 (regarding Federal New Source Performance Standards) and §112 (regarding Hazardous Air Pollutants).

(4) There are no permits under the same Texas Natural Resource Conservation Commission (TNRCC) account number that contain a condition or conditions precluding use of a standard permit or standard permits under this subchapter.

(5) The owner or operator of the facility registers the proposed project in accordance with §116.611 of this title (relating to Registration Requirements).

(b) Any project which constitutes a new major source, or major modification under the new source review requirements of Part C (Prevention of Significant Deterioration review) or Part D (nonattainment review) of the FCAA and regulations promulgated thereunder shall be subject to the requirements of this rule.

(c) No persons shall circumvent by artificial limitations the requirements of this rule

(d) The emissions from the facility shall comply with all applicable rules and regulations of the TNRCC adopted under the Texas Health and Safety Code, Chapter 382, and with the intent of the TCAA, including protection of health and property of the public, and all emissions control equipment shall be maintained in good condition and operated properly during operation of the facility.

(e) All representations with regard to construction plans, operating procedures, and maximum emission rates in any registration for a standard permit become conditions upon which the facility or changes thereto shall be constructed and operated. It shall be unlawful for any person to vary from such representations if the change will affect that person's right to claim a standard permit under this rule. Any change in conditions such that a person is no longer eligible to claim a standard permit under this rule requires proper authorization under this rule. The owner or operator of the facility must notify the TNRCC of any other change in conditions which will result in a change in the method of control of emissions, a change in the character of the emissions, or an increase in the discharge of the various emissions Notice of changes in representations must be received by the TNRCC no later than 30 days after the change

(f) All records relating to the applicability of and compliance with the terms of a standard permit shall be maintained by the permittee for at least two years and made available for review by authorized representatives of the TNRCC, U.S. Environmental Protection Agency, or local air pollution control agencies.

(g) All changes authorized by standard permit to a facility previously permitted pursuant to this rule shall be administratively incorporated into that facility's permit at such time as the permit is amended or renewed.

§116.611. Registration Requirements.

(a) Registration for a standard permit shall be sent by certified mail, return receipt requested, or hand-delivered to the Texas Natural Resource Conservation Commission (TNRCC) Office of Air Quality and appropriate Regional Office before a standard permit can be claimed. The registration shall:

(1) document compliance with the requirements of this section, including, but not limited to: the basis of emission estimates, quantification of all emission increases and decreases associated with the project being registered, sufficient information as may be necessary to demonstrate that the project will comply with §116.610(b) of this title (relating to Applicability), information that describes efforts to be taken to minimize any collateral emissions increases that will result from the project, a description of the project and

related process, and a description of any equipment being installed; and

(2) be received by the TNRCC no later than 45 days prior to the commencement of the project. Work may begin on the project any time upon receipt of written notification from the TNRCC that there are no objections to the project or 45 days after receipt by the TNRCC of the registration for the project, whichever occurs first.

§116.614. Standard Permit Fees. Any person who applies for a standard permit shall remit, at the time of registration, a fee based on the estimated capital cost of the project. The fee will be determined as set forth in Subchapter B of this chapter under the undesignated head entitled Permit Fees.

§116.617. Standard Permits List. Pursuant to the Texas Clean Air Act, §382.051, projects involving the types of facilities or physical or operational changes to facilities listed in this rule qualify for a standard permit subject to the conditions stated in §116.610 of this title (relating to Applicability).

(1) Installation of emissions control equipment or implementation of control techniques as required by any state or federal rule, standard, or regulation.

(A) Installation of the control equipment or implementation of the control technique must not result in an increase in the facility's production capacity unless the capacity increase occurs solely as a result of the requirement to install the control equipment or implement the control technique on existing units required to meet applicable emission limitations. Any production capacity increase resulting from the installation of control equipment or implementation of control techniques shall not be utilized until the owner or operator obtains any necessary authorization pursuant to §116.110 of this title (relating to Applicability).

(B) Any emission increase of an air contaminant must occur solely as a result of the requirement to install an emission control device or implement a control technique.

(C) Installation of emission control equipment or implementation of a control technique shall not include the installation of a new production facility, reconstruction of a production facility as defined in 40 Code of Federal Regulations (CFR), §60.15(b)(1) and (c), or complete replacement of an existing production facility.

(D) If the project, without consideration of any other increases or decreases not related to the project, will result in a significant net increase in emissions of any criteria pollutant, a person claiming this standard permit shall submit, with the registration, information sufficient to demonstrate that the increase will meet the conditions of clause (i) of this subparagraph.

(i) The emissions increase shall not:

(I) considering the emission reductions that will result from this project, cause or contribute to a violation of any national ambient air quality standard; or

(II) cause or contribute to a violation of any Prevention of Significant Deterioration (PSD) increment; or

(III) cause or contribute to a violation of any PSD visibility limitation.

(ii) For purposes of this rule, "significant net increase" means those emissions increases resulting solely from the installation of control equipment or implementation of control techniques that are equal to or greater than subclauses (I) or (II) of this clause:

(I) the major modification threshold listed in §116.012 of this title (relating to Nonattainment Review Definitions), Table I, for pollutants for which the area is designated as nonattainment;

(II) significant as defined in Title 40 CFR §52.21(b)(23) for pollutants for which the area is designated attainment or unclassifiable.

(iii) Although netting is not required when determining whether this demonstration must be made for the proposed project, the increases and decreases resulting from this project must be included in any future netting calculation if they are determined to be otherwise creditable.

(E) For purposes of compliance with the PSD and nonattainment new source review provisions of the Federal Clean Air Act, Parts C and D, and regulations promulgated thereunder, an increase that satisfies the requirements of subparagraph (D) of this paragraph shall not constitute a physical change or a change in the method of operation. For purposes of compliance with the Standards of Performance for New Stationary Sources regulations promulgated by the U.S. Environmental Protection Agency at 40 CFR §60.14, an increase that satisfies the requirements of subparagraph (D) of this paragraph shall satisfy the requirements of 40 CFR 60.14(e)(5).

(2) Voluntary installation of emissions control equipment.

(A) Installation of the control equipment must not result in an increase in the facility's production capacity unless the capacity increase occurs solely as a result of the installation of control equipment on existing units. Any production capacity increase resulting from the installation of controls shall not be utilized until the owner or operator obtains any necessary authorization pursuant to §116.110 of this title (relating to Applicability)

(B) Any emission increase of an air contaminant must occur solely as a result of installing an emission control device.

(C) Installation of emission control equipment shall not include the installation of a new production facility, reconstruction of a production facility as defined in 40 CFR §60.15(b)(1) and (c), or complete replacement of an existing production facility.

(D) If the project, without consideration of any other increases or decreases not related to the project, will result in a significant net increase in emissions of any criteria pollutant, a person claiming this standard permit shall submit, with the registration, information sufficient to demonstrate that the increase will meet the conditions of clause (i) of this subparagraph.

(i) The emissions increase shall not:

(I) considering the emission reductions that will result from this project, cause or contribute to a violation of any national ambient air quality standard; or

(II) cause or contribute to a violation of any PSD increment; or

(III) cause or contribute to a violation of any PSD visibility limitation.

(ii) For purposes of this rule, "significant net increase" means those emissions increases resulting solely from the installation of control equipment or implementation of control techniques that are equal to or greater than subclauses (I) or (II) of this clause:

(I) the major modification threshold listed in §116.012 of this title, Table I, for pollutants for which the area is designated as nonattainment;

(II) significant as defined in Title 40 CFR, §52. 21(b)(23) for pollutants for which the area is designated attainment or unclassifiable.

(iii) Although netting is not required when determining whether this demonstration must be made for the proposed project, the increases and decreases resulting from this project must be included in any future netting calculation if they are determining to be otherwise creditable.

(E) For purposes of compliance with the PSD and nonattainment new source review provisions of the Federal Clean Air Act, Parts C and D, and regulations promulgated thereunder, an increase that satisfies the requirements of subparagraph (D) of this paragraph shall not constitute a physical change or a change in the method of operation. For purposes of compliance with the Standards of Performance for New Stationary Sources regulations promulgated by the U.S. Environmental Protection Agency at 40 CFR, §60.14, an increase that satisfies the requirements of subparagraph (D) of this paragraph shall satisfy the requirements of 40 CFR, §60.14(e)(5).

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, 1993.

TRD-9331450 Mary Ruth Holder
Director, Legal Division
Texas Natural Resource Conservation Commission

Proposed date of adoption. February 1, 1994

For further information, please call. (512) 463-8159

Chapter 290. Water Hygiene

Water Saving Performance Standards

- **30 TAC §§290.251, 290.253-290.256, 290.260, 290.265, 290.266**

The Texas Natural Resource Conservation Commission (Commission) proposes amendments to §§290.251, 290 253-290 256, 290 260, 290 265, and 290.266 concerning definitions, the plumbing fixture list, conditions for removal from the list, fees, exemptions, labeling, administrative and civil penalties, respectively

Section 290.251 is amended to delete the definitions of "Texas Department of Health," the "Board of Health," and "Commissioner of Health," and provide definitions for the "Texas Natural Resource Conservation Commission" and the executive director. The amendments also revise a current definition of the term "order."

Sections 290.253, 290.254, and 290.255 are amended to delete references to the Texas Department of Health and replace with appropriate references to the Texas Natural Resource Conservation Commission. Section 290.254 is amended to define the hearing process.

Section 290.256 is amended to restrict the exemption provisions.

Section 290.260 concerning labeling has been changed to include clothes washing machines, dish washing machines, and lawn sprinklers. Labeling requirements for plumbing fixtures and plumbing fittings have been clarified.

Section 290.265 and §290.266 are amended to delete references to the Texas Department of Health and replace with appropriate reterences to the Commission.

Section 290.266 is amended to delete the bond requirement and condition requiring payment of an assessed penalty by a party seeking judicial review of a commission decision.

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 no significant fiscal implications as a result of enforcement and administration of the sections. There are no significant implications anticipated for state or local governments. Generally, new requirements under these sections are consistent with existing state law and federal requirements under the National Energy Policy Act of 1992 or the National Appliance Energy Conservation Act of 1987. While there are costs associated with compliance with labeling requirements, the specific provisions proposed in these sections are not anticipated to represent significant additional costs to product manufacturers above the costs of compliance with existing statutory authority The extension of the effective date for the labeling requirements to March will have cost savings implications for manufacturers required to label plumbing fixtures, but this savings has not been determined.

Mr. Minick also has determined that for the first five years these sections are in effect the public benefit anticipated as a result of enforcement of and compliance with the sections will be improvements in consumer awareness of the water usage features of plumbing fixtures and appliances and increases conservation of public water supplies. There are no significant implications for small businesses. There are no known costs to any persons required to comply with these sections as proposed.

Written comments on the proposal may be submitted to James M Highberg, R.S., Program Manager, Water Saving Fixture Program, Water Utilities Division, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087. In order to be considered, written comments must be received by the Water Utilities Division by 5:00 p.m. (DST) 30 days after the publication date of this proposal.

The amendments are proposed under the authority of the Health and Safety Code, Chapter 372, and the Texas Water Code, §5.103, which authorizes the Commission to adopt and enforce rules necessary to carry out its powers and duties. Former Health and Safety Code Chapter 421 was renumbered as Chapter 372 pursuant to Senate Bill 587, First Called Session, 72nd Legislature, effective August 12, 1991.

§290.251. Purpose, Authority, and Definitions.

(a) (No change).

(b) Authority. The authority for these sections is the Health and Safety Code, Chapter 372 [421], titled "**Environmental** [Water Saving] Performance Standards **for Plumbing Fixtures.**"

(c) Definitions. The following words and terms, when used in these sections, shall have the following meanings, unless the context clearly indicates otherwise.

(1) (No change.)

(2) **ASME-The American Society of Mechanical Engineers** [Board-The Board of Health].

(3) **Commission-The Texas Natural Resource Conservation Commission** [Commissioner-The Commissioner of Health].

[(4) Department-The Texas Department of Health.]

(4) Executive director-The executive director of the Texas Natural Resource Conservation Commission.

(5)-(7) (No change.)

(8) Model-A type or design of a plumbing fixture Order.

(9)[(8)] Order-A request to purchase plumbing fixtures from a manufacturer, major supplier or importer [with a merchandise delivery date not to exceed 90 days from the date of the request].

(10)[(9)] Plumbing Fixture-A sink faucet, lavatory faucet, faucet aerator, shower head, urinal, toilet, flush valve toilet, or drinking water fountain.

(11)[(10)] Toilet-A toilet or water closet except a wall mounted toilet that employs a flushometer valve.

(12)[(11)] **APA** [APTRA]-The Administrative **Procedures** [Procedure and Texas Register] Act. [Texas Civil Statutes, Article 6252-13a].

§290.253. Plumbing Fixture List.

(a) The commission [Texas Department of Health (department)] shall make and maintain a current list of plumbing fixtures that are certified to the commission [department] by the manufacturer or importer to meet the water saving performance standards established by §290.252(b) [§337.252(b)] of this title (relating to Design Standards). To have a plumbing fixture included on the commission's [department's] current list, a manufacturer or importer must:

(1) (No change.)

(2) submit an identified sample plumbing fixture to the commission [department] for testing and verification of water saving performance standards by the department; and

(3) (No change.)

(b) The commission [department] retains the right to request a sample of the plumbing fixture for testing.

§290.254. Removal from List.

(a) A plumbing fixture listed in §290.253 [§337.253] of this title (relating to Plumbing Fixture List) shall be removed from the list if:

(1) the commission [Texas Department of Health (department)] finds the manufacturer's or importer's certification to be inaccurately certified;

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

(b) Prior to removal of the plumbing fixture from the list, a manufacturer or importer shall have the right to seek a hearing with the commission. **A hearing held pursuant to this section shall be held in accordance with the Administrative Procedures Act (APA) and the commission's formal hearing procedures.** [department in accordance with the department's formal hearing procedures in Chapter 1 of this title (relating to Texas Board of Health).]

(c) (No change.)

§290.255. Fees. An initial fee of $50 per plumbing fixture model will be assessed for certification review, inspection, identification and listing by the commission [Department of Health (department)]. An annual renewal fee of $25 per plumbing fixture model will also be assessed for maintenance of current listing. This fee will be payable to the commission [department] by the manufacturer or importer of the listed plumbing fixture before October 31 of each year.

§290.256. Exemptions. These sections do not apply to a plumbing fixture:

(1) that has been ordered by or is in the inventory of a building contractor or a wholesaler or retailer in Texas [of plumbing fixtures] on or before January 1, 1992;

(2)-(4) (No change)

§290.260. Labeling

(a) Labeling requirements A person may not sell, offer for sale, distribute or import into this state [State of Texas] a plumbing fixture unless the plumbing fixture, including each component of a toilet, flush valve toilet or urinal and the associated packaging are marked and labeled in accordance with these sections. The labeling requirements in these sections shall take effect on March 1, 1994 [1993].

(1) Each water closet, urinal, and flush valve shall be marked or labeled in accordance with the National Energy Policy Act of 1992 (42 United States Code §6294 et seq) and as amended.

(2) Each water closet, urinal, and flush valve package shall be marked or labeled in accordance with the National Energy Policy Act of 1992 (42 United States Code §6294 et seq) and as amended.

(3) Each faucet, aerator, and showerhead shall be marked in accordance with the National Energy Policy Act of 1992 (42 United States Code §6294 et seq) and as amended, except that each showerhead, flow restricting or controlling spout end device and aerator shall bear a permanent legible mark indicating the flow rate, expressed in gallons per minute (gpm). The flow rate shall be the actual flow rate or the maximum flow rate specified in §290.252 of this title (relating to Design Standards).

(4) Each faucet, aerator, and showerhead package shall have the flow rate expressed in gallons per minute (gpm) clearly marked on the front.

(b) Prohibitions. A person may not sell, offer for sale, distribute or import into this state a new commercial or residential clothes washing machine, dish washing machine or lawn sprinkler unless the clothes washing machine, dish washing machine or lawn sprinkler is marked or labeled in accordance with these sections:

(1) each clothes washing machine and dish washing machine shall have an attached label that shows the amount of water used per cycle; and

(2) each lawn sprinkler shall be marked with the water usage expressed in gallons per minute (gpm) by either a permanent mark on each sprinkler, or a label or tag attached to each sprinkler.

(c) Exemptions. This section does not apply to those clothes washing machines and dish washing machines that are subject to and are in compliance with the labeling requirements of the National Appliance Energy Conservation Act of 1987, public law 100-12 (42 United States Code 6294) and as amended.

§290.265. Administrative Penalty.

(a) A person who violates these sections shall be assessed an administrative penalty [by the Texas Department of Health (department)] in an amount described in paragraphs (1)-(3) of this subsection but not to exceed $5,000 for each violation and for each day of a continuing violation.

(1) The penalty for sale, offering for sale, distributing, or importing a plumbing fixture which does not meet the requirements of these sections shall be a minimum of $25 and a maximum of $500 for each unit sold, offered for sale, distributed, or imported The amount of the assessed penalty will be based upon subsequent cooperation by the violators with the commission [department].

(2) The penalty for sale, offering for sale, distributing, or importing a plumbing fixture not labeled in accordance with these sections shall be a minimum of $25 and a maximum $500 for each unit sold, offered for sale, distributed, or imported. The amount of assessed penalty will be based upon subsequent cooperation by the violators with the commission [department]

(3) (No change)

(b) A person against whom an administrative penalty is assessed is entitled to a notice and hearing on the assessment of the penalty in accordance with the Administrative Procedures Act [Procedure and Texas Register Act, Texas Civil Statutes, Article 6252-13a], and the commission's [department's] formal hearing procedures as described in 30 TAC Chapter 337 (relating to Enforcement) [Chapter 1 of this title (relating to Board of Health)]

(c) Not later than the 30th day after the date on which the commission's [Commissioner of Health's (commissioner)] order assessing the administrative penalty is final, the person assessed the penalty shall pay the full amount of the penalty or file a petition for judicial review. [If the person seeks judicial review, the person shall send the amount of the penalty to the commissioner for placement in escrow or post with the commissioner a bond in a form acceptable to the commissioner for the amount of the penalty The bond shall be effective until

the judicial review of the order is final.] A person who fails to comply with this subsection waives judicial review.

§290.266. Civil Penalty, Injunction.

(a) (No change.)

(b) If it appears that a person has violated, is violating, or is threatening to violate these **rules** [sections], the **commission** [Department of Health (department)], a county, or a municipality may bring a civil action in a district court in Travis County, the county in which the defendant resides or the county where the violation occurred, is occurring or is threatened for.

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

(c) The **commission** [department] is an indispensable party in a suit brought by a county or municipality under this section.

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

Issued in Austin, Texas, on November 1, 1993.

TRD-9331309 Mary Ruth Holder
Director, Legal Division
Texas Natural Resource Conservation Commission

Earliest possible date of adoption: December 10, 1993

For further information, please call (512) 463-8069

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Chapter 305. Consolidated Permits

Subchapter C. Application for Permit

• 30 TAC §305.50

The Texas Natural Resource Conservation Commission (TNRCC) proposes an amendment to §305 50, concerning application for permit The amendments are proposed in order to clarify certain hazardous waste permit application requirements regarding financial information and assurances stemming from provisions of the Texas Solid Waste Disposal Act, Chapter 361, Texas Health and Safety Code (Vernon's Supplement 1993) enacted by the legislature in Senate Bill 1099, 72nd Legislature, 1991.

Section 305 50, regarding additional requirements for applications for solid waste permits, is proposed to be amended by deleting existing §305. 50(4)(B)(i)-(iv) and adding new §305 50(4)(b)(i)-(vii) Under proposed §305.50(4)(B), new requirements for hazardous waste permit applicants include those relating to financial statement preparation and contents, and require the commission to protect confidential information, insofar as the information submitted under this paragraph is considered confidential under applicable law. Additionally, subparagraph (B) is proposed to be amended to require the submittal of certain minimum financial information specified under proposed clauses (i)-(vii), in order to demonstrate that the applicant has sufficient financial resources to operate the facility in a safe manner and in compliance with the permit and all applicable rules, including, but not limited to, how an applicant intends to obtain financing for construction of the facility, and to close the facility properly

New §305 50(4)(B)(i) is proposed to require that a hazardous waste permit application include a statement signed by an authorized signatory explaining in detail how the applicant demonstrates sufficient financial resources to construct, safely operate, properly close, and provide adequate liability coverage for the facility The proposed amendment also would require this statement to address how the applicant intends to comply with the closure, post-closure care, and liability coverage requirements of Title 40 Code of Federal Regulations, Part 264, Subpart H

New §305.50(4)(B)(ii) is proposed to apply to hazardous waste permit applicants for which audited financial statements have been prepared at least the previous two years, and to require the following financial statements which include a balance sheet, income statement, cash flow statement, notes to the financial statements, and accountant's opinion letter: audited financial statements for the previous two years, and the most current quarterly financial statement prepared according to generally accepted accounting principles

New §305.50(4)(B)(iii) is proposed to apply to hazardous waste permit applicants for which audited financial statements have not been prepared the previous two or more years, and to require certified copies of certain tax returns and financial statements which include a balance sheet, income statement, cash flow statement, notes to the financial statements, and accountant's opinion letter

New §305.50(4)(B)(iv) is proposed to require submittal of copies of Securities and Exchange Commission Form 10-K for the previous two years and the most recent Form 10-Q, for hazardous waste permit applications for publicly traded companies For privately-held companies, proposed §305 50(4) (B)(v) requires written disclosure of information normally found in Form 10-K, with a listing of specific minimum requirements

New §305 50(4)(B)(vi) is proposed to require submittal of estimates of capital costs for expansion and/or construction, for hazardous waste permit applications encompassing hazardous waste management facility or capacity expansion or new construction for hazardous waste management activities

New §305 50(4)(B)(vii) is proposed to require submittal of certain financial information for applicants who cannot or choose not to otherwise demonstrate sufficient financial resources under this subparagraph and who must or choose to obtain additional financing through a new stock offering or new debt issuance for hazardous waste management facility or capacity expansion or new construction for hazardous waste management activities; and for safe operation, proper closure, and adequate liability coverage of the hazardous waste management facility. The proposed financial information includes a financial plan accompanied by opinion letters from financial experts certifying certain aspects of the financial plan, and written details concerning hazardous waste management facility operating costs and cash flow projections.

Finally, existing §305.50(12)(E) is proposed to be changed to new §305. 50(12)(F) with no changes except the subparagraph designation. Proposed §305. 50(12)(E) would require submittal of a written statement signed by an authorized signatory explaining how an applicant for a new commercial hazardous waste management facility intends to provide the required financial assurance for emergency response.

Stephen Minick, division of budget and planning, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Minick 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 to clarify requirements for hazardous waste permit applications. There will be no effect on small businesses There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Comments on the proposal may be submitted to Raymond Austin, Waste Policy Division, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087. Comments will be accepted for 30 days after the date of this publication.

The amendment is proposed under the Texas Water Code, §§5.103, 5.105, and 26.011, which provides the commission the authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state. The amendment is also proposed under the Solid Waste Disposal Act, §3 and §4, which provides the commission the authority to regulate industrial solid wastes and hazardous municipal wastes and to adopt rules and promulgate rules consistent with the general intend and purposes of the Act.

§305 50. Additional Requirements for an Application for a Hazardous or Industrial Solid Waste Permit. Unless otherwise stated, an application for a permit to store, process, or dispose of solid waste shall meet the following requirements.

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

(4) An application for a permit, permit amendment, or permit modification to store, process, or dispose of hazardous waste shall be subject to the following requirements, as applicable.

(A) (No change.)

(B) An application for a permit to store, process or dispose of hazardous waste shall also contain financial information sufficient to demonstrate to the satisfaction of the executive director that the applicant has sufficient financial resources to operate the facility in a safe manner and in compliance with the permit and all applicable rules, including, but not limited to, how an applicant intends to obtain financing for construction of the facility, and to close the facility properly. **Financial statements required under clauses (ii) and (iii) of this subparagraph shall be prepared in accordance with generally accepted accounting principles and include a balance sheet, income statement, cash flow statement, notes to the financial statements, and accountant's opinion letter. If the information submitted under this subparagraph is considered confidential under applicable law, the commission shall protect the information accordingly. During hearings on contested applications, the commission may allow disclosure of confidential information only under an appropriate protective order.** [Such financial] **Financial** information submitted under this subparagraph shall [may] include[, but is not limited to] at least the following:

(i) a statement signed by an authorized signatory in accordance with §305.44(a) of this title (relating to Signatories to Applications) explaining in detail how the applicant demonstrates sufficient financial resources to construct, safely operate, properly close, and provide adequate liability coverage for the facility. This statement shall also address how the applicant intends to comply with the financial assurance requirements for closure, post-closure care, and liability coverage in accordance with Title 40 Code of Federal Regulations, Part 264, Subpart H as adopted by reference under §335.152(a)(6) of this title (relating to Standards);

(ii) for applicants for which audited financial statements have been prepared the previous two or more years, the following financial statements which include the items listed in subparagraph (B) of this paragraph:

(I) audited financial statements for the previous two years; and

(II) the most current quarterly financial statement prepared according to generally accepted accounting principles;

(iii) for applicants for which audited financial statements have not been prepared the previous two or more years, the following copies of tax returns and financial statements which include the items listed in subparagraph (B) of this paragraph:

(I) copies of tax returns for the previous two years, each certified by original signature of an authorized signatory as being a "true and correct copy of the return filed with the Internal Revenue Service;"

(II) financial statements for the previous two years; and

(III) additionally, an audited financial statement for the most recent fiscal year;

(iv) for publicly traded companies, copies of Securities and Exchange Commission Form 10-K for the previous two years and the most current Form 10-Q;

(v) for privately-held companies, written disclosure of the information that would normally be found in Securities and Exchange Commission Form 10-K including, but not limited to, the following:

(I) descriptions of the business and its operations;

(II) identification of any affiliated relationships;

(III) credit agreements and terms;

(IV) any legal proceedings involving the applicant;

(V) contingent liabilities; and

(VI) significant accounting policies;

(vi) for applications encompassing facility expansion, capacity expansion, or new construction, estimates of capital costs for expansion and/or construction; and

(vii) for an applicant who cannot or chooses not to otherwise demonstrate sufficient financial resources under this subparagraph and who must or chooses to obtain additional financing through a new stock offering or new debt issuance for facility expansion, capacity expansion, or new construction; and for safe operation, proper closure, and adequate liability coverage, the following information:

(I) a financial plan sufficiently detailed to clearly demonstrate that the applicant will be in a position to readily secure financing for construction, operation, and closure if the permit is issued. The submitted financial plan must be accompanied by original letters of opinion from two financial experts, not otherwise employed by the applicant, who have the demonstrated ability to either finance the facility or place the required financing. The opinion letters must certify that the financing plan is reasonable; certify that financing is obtainable within 180 days from permit issuance; and include the time schedule for securing the financing. Only one opinion letter from a financial expert, not otherwise employed by the applicant, is required if the letter renders a firm commitment to provide all the necessary financing; and

(II) written detail of the annual operating costs of the facility and a projected cash flow statement including the period of construction and first two years of operation. The cash flow statement must demonstrate the financial resources to meet operating costs, debt service, and financial assurance for closure, post-closure care, and liability coverage requirements. A list of the assumptions made to forecast cash flow shall also be provided.

[(i) current and two previous years audited financial statements prepared in accordance with generally accepted auditing standards, including an opinion as to the fairness of the financial statements and accompanying notes;

[(ii) current and two previous years Form 10-K annual reports filed with the Securities and Exchange Commission,

[(iii) relevant information concerning investors and stockholders, and

[(iv) information required by Title 40, Code of Federal Regulations, Part 264, Subpart H.]

(C)-(E) (No change.)

(5)-(11) (No change.)

(12) In the case of an application for a permit to store, process, or dispose of hazardous waste at a new commercial hazardous waste management facility, the application shall also contain the following:

(A)-(D) (No change.)

(E) a written statement signed by an authorized signatory in accordance with §305.44(a) of this title (relating to Signatories to Applications) explaining how the applicant intends to provide emergency response financial assurance to meet the requirements of subparagraphs (C) or (D) of this paragraph; and

(F) a summary of the applicant's experience in hazardous waste management and in the particular hazardous waste management technology proposed for the application location, and, for any applicant without experience in the particular hazardous waste management technology, a conspicuous statement of that lack of experience.

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, 1993.

TRD-9331446 Mary Ruth Holder
Director, Legal Division
Texas Natural Resource Conservation Commission

Earliest possible date of adoption: December 10, 1993

For further information, please call: (512) 463-8069

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Chapter 335. Industrial Solid Waste and Municipal Solid Waste

Subchapter J. Industrial Solid Waste and Hazardous Waste In General

• 30 TAC §§335.321-335.323, 335.325-335.329, 335.331-335.332

The Texas Natural Resource Conservation Commission proposes amendments to §§335.321-335.323, 335.325-335.329, 335.331, and 335.332, concerning industrial solid waste and hazardous waste fee system The Health and Safety Code, Chapter 361, Subchapter D, authorizes the commission to establish an industrial solid waste and hazardous waste fee system related to the generation and disposition of waste and the operation of waste management facilities subject to permits. Under the current fee program, annual assessments are levied based on the quantities of industrial solid waste and hazardous waste generated and the capacity of permitted treatment, storage, and disposal facilities. In addition, monthly fees are assessed based on the actual amounts of waste which are managed at permitted facilities. Senate Bill 1201, Acts of the 73rd Legislature, 1993, amended the Health and Safety Code, Chapter 361, Subchapter D, to require certain changes in the fee program. Senate Bill 1201 authorizes increases in the maximum fees that may be assessed for the generation of wastes and the treatment, storage, or disposal of wastes at both commercial and non-commercial facilities. The maximum annual generation fee is increased from $1,000 to $10,000 for Class I non-hazardous industrial solid waste and from $25,000 to $50,000 for hazardous waste. The maximum fee for management of waste is increased from $20 per ton to $40 per ton. The assessment of fees on a monthly basis for treatment, storage, and disposal of hazardous waste is expanded to include assessments on the commercial disposal of Class I non-hazardous industrial solid waste. Fees for disposal of Class I waste are proposed to be set at the limits authorized by Senate Bill 1201, that is, 20% of the applicable rate for disposal of hazardous waste. In addition, the commission is authorized under the bill to establish penalties and interest charges for late payment of fees which do not exceed rates charged by the Comptroller of Public Accounts for the payment of delinquent sales taxes. Under this revised authority the commission proposes to amend rate schedules and increase maximum fees assessed. The maximum fee for disposal of hazardous waste is proposed to be increased from $20 per ton to $30 per ton This amount is less than the maximum authorized by statute, but will enable the commission to exercise discretion in the future regarding the maximum fees to be established and revenues to be collected. The commission also proposes to amend the basis for determination of fees assessed for the disposal of certain hazardous waste streams in underground injection wells. In addition to increasing the base rate for injection of hazardous wastes, the commission proposes alternative procedures for the determination of the dry-weight measurement of hazardous wastes which are high in inorganic salts or brines. Numerous references in the subchapter to "hazardous waste" are changed to include "industrial solid waste" consistent with the expansion of authority for disposal fees to include Class I non-hazardous industrial solid waste Also, references to the "Texas Water Commission are changed in this subchapter to reflect the incorporation of the former commission's programs and responsibilities into the Texas Natural Resource Conservation Commission, created by Senate Bill 2, Acts of the 72nd Legislature, 1st Called Session, 1991.

Section 335.321 (relating to Purpose) is amended by the addition of new §335.321(a)(3) to add fees for commercial disposal of Class I industrial solid waste to the fees authorized under Chapter 335, Subchapter J. Section 335.321(b)(2)(C) is amended by adding a reference to the new Class I waste disposal fees authorized to be deposited to the hazardous and solid waste fee fund and changing the reference to §335.325 to reflect the amended section title which is expanded to include industrial solid waste disposal fees. Section 335 321(c)(2)(A) is amended to add Class I waste disposal fees to those authorized sources of revenue to the hazardous and solid waste remediation fee fund. Section 335 321(d) is also amended by deleting the term "hazardous" from references to the types of waste subject to assessment. Section 335.322 (relating to Definitions) is amended by deleting a definition of "primary metals high volume, low hazard waste" which is no longer relevant under current authority for fee assessment Section 335.323 (relating to Generation Fee Assessment) is amended at subsection (a) to refer to the increased maximum annual generation fee assessments of $10,000 for Class I waste and $50,000 for hazardous waste

Section 335.325 (relating to Hazardous Waste Management Fee Assessment) is retitled to refer more broadly to industrial solid waste in addition to hazardous waste. Section 335.325(g) is amended to refer to the newly-authorized maximum waste management fee of $40 per ton for wastes generated in state Existing §335.325(j) is divided into new paragraphs (1) and (2), containing rate schedules for hazardous waste and Class I non-hazardous waste, respectively. For clarity, both schedules are shown as new and the existing schedule is deleted The subsection is further amended to change a reference to existing subsections (k)-(o) to reflect the addition of new subsections (p) and (q) The rate schedule for waste management fees is amended to include proposed fee rates for each category of hazardous waste management and new rates under §335 325(j)(2) are added for disposal of Class I industrial solid waste New subsection (p) is added to include an alternative fee rate for disposal in non-commercial injection wells of certain hazardous wastes which demonstrate high dry-weight ratios. New §335 325(q) is added to clarify the assessment of fees for commercial facilities which are subject to assessment under §335 325 and also receive wastes which are subject to assessment under Chapter 330 of this title, relating to Municipal Solid Waste Generally, throughout §335 325, references to "industrial solid waste" are added or the term "hazardous" deleted, as appropriate, in order to correctly refer to the broader application of the section to both hazardous waste and Class I non-hazardous waste fees

Section 335 326 (relating to Dry Weight Determination) is amended at subsection (a) to clarify that the calculation of the dry weight of a waste stream is required for the assessment of fees under §335.325 (relating to Industrial Solid Waste and Hazardous Waste Management Fee Assessment) as it is proposed to be re-titled New §335 326(c) is proposed to authorize an alternative determination of dry weight of a waste stream if certain conditions associated with salt or brine content of the waste exist Section 335 326(c), reconfigured as subsection (d), is amended by changing a reference to the retitled §335 325 Generally, changes are made to both §335 326 and 335 327 (relating to Alternate Methods of Dry Weight Determination) to include both industrial solid waste and hazardous waste in references to the types of fees authorized for waste disposal

Section 335.328 (relating to Fees Payment) is amended to change references to "Texas Water Commission" to "Texas Natural Re-

source Conservation Commission" consistent with the transfer of agency responsibilities under Senate Bill 2. References to waste fees are changed to reflect the addition of new industrial solid waste fees and the references to the re-titled §335.325 are amended. Section 335 328(c) is amended to increase the minimum payments that require reporting and payment on a monthly basis. In §335.329 (relating to Records and Reports), references to waste fees and other terms are changed to reflect the addition of new industrial solid waste disposal fees and the references to the re-titled §335 325 are amended Section 335.331 (relating to Failure to Make Payment or Report) is amended at subsection (b) to incorporate penalty and interest provisions for late payment consistent with those under the Tax Code, as authorized by Senate Bill 1201. The facilities and the types of waste covered under the section are also clarified consistent with other amendments under this subchapter. Section 335 332 (relating to Appendices I and II) is amended to reflect the expansion of the subchapter to include commercial disposal fees on non-hazardous waste. The titles of the appendices are amended to refer to both industrial solid waste as well as hazardous waste Also, the explanations of the equations used to determine dry weight are amended to more clearly define the calculations performed

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 an increase in revenue of approximately $5 million in fiscal year 1994, $6 4 million in fiscal year 1995, and $6 million in each of the fiscal years 1996-1998. There are no significant increases in costs to state government anticipated. There are no anticipated costs to local governments Revenue to local governments will increase by approximately $300,000 in fiscal year 1994, $400,000 in fiscal year 1995 and 375,000 in each of the fiscal years 1996-1998. Costs to industrial solid waste and hazardous waste facilities as a group are anticipated to increase by $5 million to $6.4 million annually during the next five-year period The largest generators of Class I nonhazardous waste will pay annual generation fees up to a higher maximum of $10,000, a potential increase of $9,000 for generators producing more than 20,000 tons of Class I waste per year Fee increases for generation of Class I waste will affect only an estimated 263 larger generators, those producing more than 2,000 tons annually. The average increase will be approximately $3,900 Fees for almost 90% of Class I waste generators, those producing less than 2,000 tons per year, will not increase under this proposal Fees for generators of hazardous waste will increase by as much as $25,000 for the largest generators, those producing more than 12,500 tons annually The average increase for this group, which is less than 2 0% of all reporting hazardous waste generators, is approximately $18,300. Fees for the remaining generators of hazardous waste will not be increased under this proposal

Fees for management of waste will increase by a maximum of $10 per ton under these rules The fee rate for commercial landfilling of hazardous waste will increase from $20 per ton to $30. Fee rates for other methods of commercial hazardous waste management will increase by lesser amounts, from $8 per ton for land treatment to $2 per ton for energy recovery. Fees for commercial disposal of Class I waste are proposed to be 20% of the amount set for disposal of hazardous waste. Fees for non-commercial waste management are set at 50% of the commercial rate. Fee rates for management of wastes which are imported into the state are proposed to be set at 1.25 times the rate for wastes from in-state. This represents a fee increase for imported wastes, however, the ratio is reduced from the current factor of 1.5 times the in-state rate. This reduction in fee ratio is intended to insure that the additional assessment against imported wastes are limited to and commensurate with the other fees, taxes, and charges that out-of-state generators are not subject to and which are collected from in-state generators to support regulatory programs Fees for storage are proposed to be equal for both imported and in-state wastes The fee rate for treatment of waste is proposed to be reduced by $2 per ton. The fee rates for both commercial processing and incineration of hazardous waste fuels are increased by $2 per ton to $6 and $8 per ton, respectively. Under the proposal for hazardous waste management fees, those operators using the services of commercial treatment, storage, or disposal facilities will realize changes in costs related to fee assessments depending on the extent to which commercial operators directly recover the increased costs by way of increased service charges.

Mr Minick also has determined that for each year of the first five years these sections are in effect the public benefit anticipated as a result of enforcement of and compliance with the sections will be improvements in enforcement of the provisions of the Health and Safety Code and the regulations of the Texas Natural Resource Conservation Commission regarding the generation and management of industrial solid wastes and hazardous wastes; the protection of the quality of the water resources of the state and human health and the environment; the equity of assessments under the revenue programs supporting the commission's regulator activities; and the ability of these assessments to provide adequate resources to support these regulatory activities. Some of the users of commercial services, directly or indirectly, may be small businesses There are no other direct effects anticipated for small businesses. There is no anticipated economic cots to persons required to comply with the rules as proposed

Comments on this proposal may be submitted to Stephen Minick, Division of Budget and Planning, P O. Box 13087, Austin, Texas 78711. The deadline for submission of written comments will be 30 days after the date of publication of this proposal in the *Texas Register*

The amendments are proposed under the Health and Safety Code, Chapter 361, as amended by Senate Bill 1201, Acts of the 73rd Legislature, 1993, which provides the Texas Natural Resource Conservation Commission with the authority to establish an industrial solid waste and hazardous waste fee program and implement fee assessments for industrial solid waste and hazardous waste generators, waste management facilities, and permit applicants.

The proposed amendments implement provisions of Health and Safety Code, §§361.013, 361.131-361.134, 361.136, and 361.139-361.140.

§335.321. Purpose.

(a) It is the purpose of this subchapter to establish an industrial solid waste and hazardous waste fee program. Under this program the following fees are imposed:

(1) an annual fee on each generator of Class I industrial solid waste or hazardous waste;

(2) an annual fee on each facility which either holds a Class I industrial solid waste or hazardous waste permit or operates Class I industrial solid waste or hazardous waste management units subject to permit authorization;

(3) **a fee on the operator of a commercial solid waste disposal facility for Class I industrial waste which is disposed on-site by the facility;**

(4) a fee on the operator of a hazardous waste storage, processing or disposal facility for hazardous waste which is managed on site by the facility, **and**

(5)[(4)] a fee on each application for a permit for an industrial solid waste or hazardous waste facility assessed under §305.53 of this title (relating to Application Fees).

(b) Hazardous and Solid Waste Fees Fund.

(1) The hazardous and solid waste fees fund shall be used for the purpose of regulation of industrial solid waste and hazardous waste, including payment to other state agencies for services provided under contract relating to enforcement of the Health and Safety Code, Chapter 361.

(2) The fund shall consist of:

(A) generation fees assessed under §335 323 of this title (relating to Generation Fee Assessment),

(B) facility fees assessed under §335.324 of this title (relating to Facility Fee Assessment);

(C) hazardous waste management fees **and Class I industrial waste disposal fees** assessed and apportioned under §335.325 of this title (relating to **Industrial Solid Waste and** Hazardous Waste Management Fee Assessment),

(D) application fees assessed under §305.53 of this title (relating to Application Fees); and

(E) interest penalties for late payment of industrial solid waste and hazardous waste fees imposed by §335. 331 of this title (relating to Failure to Make Payment or Report).

(c) Hazardous and Solid Waste Remediation Fee Fund.

(1) (No change.)

(2) The fund shall consist of:

(A) hazardous waste management fees and **Class I industrial waste disposal fees** assessed and apportioned under §335.325 of this title (relating to **Industrial Solid Waste and** Hazardous Waste Management Fee Assessment);

(B) interest and penalties imposed under §335.331 of this title (relating to Failure to Make Payment or Report);

(C) money paid by a person liable for facility cleanup and maintenance under provisions of the Health and Safety Code, §361.197;

(D) interest received from the investment of the fund in accounts under the charge of the treasurer; and

(E) monies collected on behalf of the commission or transferred from other agencies under any applicable provisions of the Health and Safety Code, including §361.138 (relating to fees on lead-acid batteries), or grants from any person made for the purpose of remediation of facilities under the Health and Safety Code, Chapter 361.

(d) **Waste** [Hazardous waste] management fees collected under §335.325 of this title (relating to **Industrial Solid Waste and** Hazardous Waste Management Fee Assessment) shall be credited to the funds of the state as follows:

(1) One quarter, or 25%, of the [hazardous] waste management fee collected from a commercial waste storage, processing, or disposal facility shall be credited to the hazardous and solid waste fees fund to be distributed to the county in which the facility paying the fee is located. Funds due the affected county shall be paid by the commission within 60 days of the receipt and verification of payments from a commercial hazardous waste facility in the county.

(2) The remaining amount of commercial [hazardous] waste management fees and the total amount of noncommercial [hazardous] waste fees shall be deposited as follows:

(A) One half, or 50%, of each amount shall be credited to the hazardous and solid waste remediation fee fund.

(B) One half, or 50%, of each amount shall be credited to the hazardous and solid waste fees fund.

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

Affidavit of exclusion-A sworn statement by a permit applicant in support of an exclusion or exemption from permitting pursuant to §335.2(c) of this title (relating to Permit Required) or §335.43(b) of this title (relating to Permit Required).

Authorized hazardous waste management unit-A unit at a hazardous waste management facility which is authorized by permit or which is identified in an application submitted pursuant to and in accordance with §335.2(c) of this title (relating to Permit Required) or §335.43(b) of this title (relating to Permit Required).

Captured facility-A manufacturing or production facility which generates an industrial solid waste or hazardous waste which is routinely stored, processed, or disposed, on a shared basis, in an integrated waste management unit owned and operated by and located within a contiguous manufacturing facility.

Class I waste-Any industrial solid waste or mixture of industrial solid wastes meeting the definition of Class I waste under §335.1 of this title (relating to Definitions).

Class I nonhazardous waste-Any Class I waste which is not a hazardous waste as defined in this section.

Commercial hazardous waste storage, processing and disposal facility-Any facility which accepts a hazardous waste for storage, processing (including incineration), or disposal from an off-site generator for a charge.

Commercial waste storage, processing and disposal facility-Any facility which accepts an industrial solid waste or a hazardous waste for storage, processing (including incineration), or disposal for a charge.

Dry weight-The weight of all constituents other than water.

Generator-Any person whose act or process produces industrial solid waste or hazardous waste or whose act first causes an industrial solid waste or a hazardous waste to become subject to regulation by the commission.

Generator of hazardous waste or generator-Any person whose act or process produces hazardous waste or whose act first causes a hazardous waste to become subject to regulation by the commission.

Hazardous waste-Those solid wastes not otherwise exempted which have been identified or listed as hazardous wastes by the administrator of the United States Environmental Protection Agency pursuant to the federal Solid Waste Disposal Act, 42 United States Code, §6901 et seq, as amended.

Hazardous waste fuel-A hazardous waste or blend of hazardous wastes to be burned for energy recovery which, for the purposes of assessment of fees under this section, is not subject to regulation under 40 Code of Federal Regulations, Part 264 (or Part 265), Subpart O, relating to incinerators.

Industrial solid waste-A solid waste meeting the definition of industrial solid waste under §335.1 of this title (relating to Definitions).

Injection well-As provided in the Texas Water Code, §27.002(11).

Interim status-The status of any person who owns or operates a facility required to have a permit under this chapter, and who is required to submit an application for a permit pursuant to §335.2(c) of this title (relating to Permit Required) or §335.43(b) of this title (relating to Permit Required).

Land disposal facility-Any landfill, surface impoundment (excluding an impoundment treating, processing, or storing waste that is disposed pursuant to Texas Water Code, Chapter 26 or Chapter 27), waste pile, facility at which land farming, land treatment, or a land application process is used, or an injection well. Land disposal does not include the normal application of agricultural chemicals or fertilizers.

Noncommercial waste storage, processing, or disposal facility-Any facility that accepts an industrial solid waste or a hazardous waste for storage, processing, (including incineration), or disposal for no charge or that stores, processes, or disposes of wastes generated on site by the facility.

On-site land disposal facility-A hazardous waste unit which meets the definition of land disposal facility of this section and onsite disposal as defined in §335.1 of this title (relating to Definitions).

[Primary metals high volume, low hazard waste-Hazardous waste from the extraction, beneficiation, and processing of ores, minerals, or scrap metal and whose constituents, which are subject to the criteria for the identification or listing as a hazardous waste pursuant to the Resource Conservation and Recovery Act, §3001(a), 42 United States Code, §6901 et seq, account for 10% or less of its total dry weight volume.]

Processing-For the purposes of this subchapter, the term "processing" has the

same meaning as defined in §335.1 of this title (relating to Definitions).

Recycled-For the purposes of this subchapter, a waste is recycled if it is used, reused, or reclaimed in a manner consistent with the definition of a recyclable material or nonhazardous recyclable material under §335.17 of this title (relating to Special Definitions for Recyclable Materials and Nonhazardous Recyclable Materials) and §335.24 of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials).

§335.323. Generation Fee Assessment.

(a) An annual generation fee is hereby assessed each generator which generates Class I industrial solid waste or hazardous waste or whose act first causes such waste to become subject to regulation under Subchapter B of this chapter (relating to Hazardous Waste Management-General Provisions) on or after September 1, 1985. These fees shall be deposited in the hazardous and solid waste fee fund. The amount of a generation fee is determined by the total amount of Class I nonhazardous waste or hazardous waste generated during the previous calendar year. The annual generation fee may not be less than $50. The annual generation fee for hazardous waste shall not be more than **$50,000** [$25,000] and for nonhazardous waste not more than **$10,000** [$1,000].

(b)-(g) (No change.)

*§335.325. **Industrial Solid Waste and** Hazardous Waste Management Fee Assessment.*

(a) A fee is hereby assessed on each owner or operator of a [commercial or noncommercial hazardous] waste storage, processing, or disposal facility, except as provided in subsections (b)-(e) of this section. [,] **A fee is assessed** for hazardous wastes which are stored, processed, disposed, or otherwise managed **and for Class I industrial wastes which are disposed at a commercial facility** [on or after October 1, 1991]. For the purpose of this section, the storage, processing, or disposal of hazardous waste for which no permit is required under §335.2 of this title (relating to Permit: Required) or §335.41 of this title (relating to Purpose, Scope, a.. ' Applicability) is not subject to a hazardous waste management fee.

(b) A fee imposed on the owner or operator of a commercial hazardous waste storage, processing, or disposal facility for hazardous wastes which are generated in this state and received from an affiliate or wholly-owned subsidiary of the commercial facility, or from a captured facility, shall be the same fee imposed on a noncommercial facility. For the purpose of this section, an affiliate of a commercial hazardous waste facility must have a controlling interest in common with that facility.

(c) The storage, processing, or disposal of **industrial solid waste or** hazardous wastes generated in a removal or remedial action accomplished through the expenditure of public funds from the hazardous and solid waste remediation fee fund shall be exempt from the assessment of a waste management fee under this section.

(d) A fee shall not be imposed on the owner or operator of a waste storage, processing, or disposal facility for the storage of hazardous wastes if such wastes are stored within the time periods allowed by and in accordance with the provisions of §335.69 of this title (relating to Accumulation Time).

(e) A fee may not be imposed under this section on the operation of a facility permitted under the Water Code, Chapter 26, or the federal National Pollutant Discharge Elimination System program for wastes treated, processed, or disposed of in a wastewater treatment system that discharges into surface waters of the state. For the purpose of this section, the management of a hazardous waste in a surface impoundment which is not exempt from assessment under this subsection will be assessed the fee for processing under subsection (j) of this section.

(f) The [hazardous] waste management fee authorized under this section shall be based on the total weight or volume of a [hazardous] waste except for wastes which are disposed of in an underground injection well, in which case the fee shall be based on the dry weight of the waste, measured in dry weight tons (dwt), as defined in §335.322 of this title (relating to Definitions) and §335.326 of this title (relating to Dry Weight Determination).

(g) The hazardous waste management fee for wastes generated in this state shall not exceed **$40** [$20] per ton for wastes which are landfilled.

(h) The operator of a [hazardous] waste storage, processing, or disposal facility receiving **industrial solid waste** or hazardous waste from out-of-state generators shall be assessed the fee amount required on wastes generated in state plus an additional increment to be established by rule, except as provided in subsection (k) of this section.

(i) for the purposes of subsection (j) of this section, I energy recovery means the burning or incineration of a hazardous waste fuel and fuel processing means the handling of a waste fuel, including storage and blending, prior to its disposal by burning.

(j) Except as provided in subsections (k) -(g) [(o)] of this section, [hazardous] waste **management** fees shall be assessed according to the following schedule:

(1) Hazardous Waste

	Noncommercial		Commercial	
Disposition	In State	Imported	In State	Imported
Landfill	$15/ton	$19/ton	$30/ton	$37.50/ton
Land Treatment	$12/ton	$15/ton	$24/ton	$30/ton
Underground Injection	$9/dwt	$11/dwt	$18/dwt	$22.50/dwt
Incineration	$8/ton	$10/ton	$16/ton	$20/ton
Processing	$4/ton	$5/ton	$8/ton	$10/ton
Storage	$1/ton	$1/ton	$2/ton	$2/ton
Energy Recovery	$4/ton	$4/ton	$8/ton	$8/ton
Fuel Processing	$3/ton	$3/ton	$6/ton	$6/ton

(2) Class I Non-hazardous Waste

	Noncommercial		Commercial	
Disposition	In State	Imported	In State	Imported
Landfill	N/A	N/A	$6/ton	$7.50/ton
Land Treatment	N/A	N/A	$4.80/ton	$6/ton
Underground Injection	N/A	N/A	$3.60/dwt	$4.50/dwt
Incineration	N/A	N/A	$3.20/ton	$4/ton

[Disposition	[Noncommercial In State	Imported	Commercial In State	Imported
[Landfill	$10/ton	$15/ton	$20/ton	$30/ton
[Land Treatment	$8/ton	$12/ton	$16/ton	$24/ton
[Underground Injection	$7/dwt	$10/dwt	$14/dwt	$21/dwt
[Incineration	$6/ton	$9/ton	$12/ton	$18/ton
[Processing	$5/ton	$8/ton	$10/ton	$15/ton
[Storage	$1/ton	$1.50/ton	$2/ton	$3/ton
[Energy Recovery	$3/ton	$3/ton	$6/ton	$6/ton
[Fuel Processing	$2/ton	$2/ton	$4/ton	$4/ton]

(k) For [hazardous] wastes which are generated out of state, the fee will be that specified in subsection (j) of this section, except that the fee for the storage, processing, incineration, and disposal of hazardous waste fuels shall be the same for wastes generated out of state and in state.

(l) Except as provided in subsection (m) of this section, only one [hazardous] waste management fee shall be paid for a [hazardous] waste managed at a facility. In any instance where more than one fee could be applied under this section to a specific volume of waste, the higher of the applicable fees will be assessed.

(m) A fee for storage of hazardous waste shall be assessed in addition to any fee for other waste management methods at a facility. No fee shall be assessed under this section for the storage of a hazardous waste for a period of less than 90 days as determined from the date of receipt or generation of the waste (or the effective date of this section). The fee rate specified in the schedule under subsection (j) of this section shall apply to the quantity of waste in any month which has been in storage for more than 90 days or the number for which an extension has been granted under §335.69 of this title (relating to Accumulation Time).

(n) A facility which receives waste transferred from another facility shall pay any waste management fee applicable under this section and shall not receive credit for any fee applied to the management of the [hazardous] waste at the facility of origin.

(o) The fee rate for incineration of aqueous wastes containing 5.0% or less of total organic carbon will be 10% of the fee for incineration under the schedule in subsection (j) of this section.

(p) An operator of a noncommercial hazardous waste injection well electing to separately measure inorganic salts in the determination of dry weight under the provisions of §335.326(c) of this subchapter shall pay a fee equivalent to 40% of the fee for underground injection assessed in subsection (j) of this section for the components of the waste stream determined to be inorganic salts.

(q) A commercial waste disposal facility receiving solid waste not subject to assessment under this section shall pay any assessment due under Chapter 330, Subchapter P, of this title (relating to

Fees and Reports). No fee for disposal of a solid waste under Chapter 330, Subchapter P, shall be assessed in addition to a fee for disposal under this section.

§335.326. Dry Weight Determination.

(a) The method of calculating the dry weight of each [hazardous] waste stream **subject to assessment under §335.325 of this title (relating to Industrial Solid Waste and Hazardous Waste Management Fee Assessment)** shall be determined initially and at any time the waste stream undergoes a significant change in water content using the appropriate method(s) as specified in this section. Determinations shall be made from a representative sample collected by grab or composite. Collection methods and sample preservation shall be by methods to minimize volatilization.

(1) **Wastes** [Hazardous wastes] which contain suspended solids greater than or equal to 15% of the sample on a weight basis shall have the dry weight determination calculated using the method specified in Appendix I in §335.332 of this title (relating to Appendices I and II).

(2) Aqueous-based [hazardous] wastes which contain suspended solids less than 15% of the sample by weight basis and which contain a single liquid phase shall have the dry weight determination calculated using Standard Methods for the Examination of Water and Wastewater, 15th Edition; Method 209A; pages 92-93 or equivalent method in later editions.

(3) Organic-based [hazardous] wastes which contain suspended solids less than 15% of the sample by weight and which contain a single liquid phase shall have the dry weight determination calculated using:

(A) 1981 Annual Book of ASTM Standards, Part 30; Method E203, pages 803-812 or equivalent method in later editions; or

(B) the method specified in Appendix II in §335.332 of this title (relating to Appendices I and II).

(4) **Wastes** [Hazardous wastes] which do not meet any of the criteria specified in paragraphs (1)-(3) of this subsection shall have the dry weight determination calculated using:

(A) the 1981 Annual Book of ASTM Standards, Part 23; Method D96, pages 64-81 or equivalent method in later editions; or

(B) the method specified in Appendix II in §335.332 of this title (relating to Appendices I and II); or

(C) the 1981 Annual Book of ASTM Standards, Part 23; Method D95, pages 59-63 or equivalent method in later editions. Method D96 determines the water and sediment content of the sample. The calculations shall be modified to determine only the water content.

(5) The method for calculating the dry weight shall be that method specified in Appendix I in §335.332 of this title (relating to Appendices I and II) or an alternate method selected by the generator pursuant to §335. 327 of this title (relating to Alternate Methods of Dry Weight Determination), if the [hazardous] waste cannot be analyzed by one of the other required methods of this section due to interfering constituents. Documentation identifying the method of analysis and describing the interference shall be maintained by the generator.

(b) **Wastes** [Hazardous wastes] containing free liquids which are designated for disposal in a landfill and must be solidified prior to disposal shall have the dry weight determination made on the [hazardous] waste, prior to the addition of the solidification agent.

(c) If the dry weight ratio of a hazardous waste as measured under this section exceeds 5.0%, an operator of a non-commercial hazardous waste injection well may elect to determine the composition of the waste stream that is inorganic salts or brines and separately record the weight of such inorganic salts for the purpose of assessment of the fee under §335.325(p) of this subchapter. The methods used to determine the weight of inorganic salts in a hazardous waste stream are subject to review and approval by the executive director. This subsection does not apply to any component of a waste stream that is a hazardous constituent or is a constituent for which the waste is designated as hazardous.

(d)[(c)] For purposes of a fee assessed under §335.325 of this title (relating to **Industrial Solid Waste and Hazardous** Waste Management Fee Assessment), the dry weight of a [hazardous] waste disposed in an underground injection well, to which brine, inorganic salts, or other authorized agents are added to maintain density control to assure compliance with no-migration requirements of 40 Code of Federal Regulations 148, Subpart C, shall be determined prior to the addition of the agent No solid waste, as defined by the Health and Safety Code, §361.003(37), may be excluded from the determination of dry weight under this subsection

§335.327. Alternate Methods of Dry Weight Determination.

(a) Generators may select other test methods for the purpose of calculating the dry weight of their [hazardous] waste where one of the methods provided in §335.326 of this title (relating to Dry Weight Determination) is not applicable. Technical justification must be sent to the executive director, demonstrating that the proposed method will produce an accurate determination of the dry weight ratio of the waste unless the executive director has provided written approval for use of the alternate method. Use of an evaporation temperature above 75 degrees Celsius will be allowed only on demonstration that the waste stream contains appreciable volatile compounds that exhibit higher evaporation temperatures. Where practicable, results from the proposed test methods and the required method should be compared. Applicability of this item to such dry weight determinations is subject to review by the executive director

(b) Generators may elect to declare the total wet weight of the [hazardous] waste as the dry weight

§335.328. Fees Payment

(a) Generation and facility fees are payable each year for all Class I industrial solid waste and hazardous waste generators, permittees, and facilities Fees must be paid by check, certified check, or money order payable to **Texas Natural Resource Conservation Commission** ["Texas Water Commission"] Annual facility fees are payable by permittees, owners, or operators regardless of whether the facility is in actual operation All annual generation and facility fees shall be due by a date to be established by the **Texas Natural Resource Conservation Commission** [Texas Water Commission] at the time payment is requested

(b) Except as provided in subsection (c) of this section, [hazardous] waste management fees are to be paid monthly by each operator of a [hazardous] waste storage, processing, or disposal facility for wastes managed subject to the provisions of §335 325 of this title (relating to **Industrial Solid Waste and** Hazardous Waste Management Fee Assessment) in that month. Fees must be paid by check, certified check, or money order to **Texas Natural Resource Conservation Commission** ["Texas Water Commission"] and shall be due by the 25th day following the end of the month for which payment is due

(c) An owner or operator required to pay a [hazardous] waste management fee who owes less than **$500** [$50] for a calendar month or less than **$1,500** [$150 00] for a calendar quarter is not required to file a

monthly report under §335.329 of this title (relating to Records and Reports) but should file a quarterly report with and pay a quarterly fee to the commission.

§335.329. Records and Reports.

(a) Generators are required to:

(1) keep records of all hazardous waste and industrial solid waste activities regarding the quantities generated, stored, processed, and disposed on-site or shipped off-site for storage, processing, or disposal in accordance with the requirements of §335.9 of this title (relating to Recordkeeping and Annual Reporting Procedures Applicable to Generators),

(2) keep records of the dry weight amount of each [hazardous] waste designated for disposal in an underground injection well and records of the amounts of any solidification agents, brine, or other authorized material added to a waste stream which may be excluded from the determination of dry weight under §361 326 of this title (relating to Dry Weight Determination),

(3) provide each operator of an [a hazardous waste] underground injection well a certificate of computation of the dry weight of a [hazardous] waste to be disposed. For each off-site shipment, the dry weight amount of each hazardous waste to be disposed in an underground injection well is to be recorded in Item J of the Uniform Hazardous Waste Manifest as required under §335.30 of this title (relating to Appendix I); and

(4) submit the appropriate reports required under §335.13(b) of this title (relating to Recordkeeping and Reporting Procedures Applicable to Generators Shipping Hazardous Waste or Class I Waste and Primary Exporters of Hazardous Waste) on forms furnished or approved by the executive director.

(b) Owners or operators of [hazardous] waste storage, processing or disposal facilities are required to:

(1) for on-site facilities, keep records of all hazardous waste and industrial solid waste activities regarding the quantities stored, processed, and disposed on-site or shipped off-site for storage, processing, or disposal in accordance with the requirements of §335. 9 of this title (relating to Recordkeeping and Annual Reporting Procedures Applicable to Generators);

(2) for off-site facilities, submit the appropriate reports required under §335.15(2) of this title (relating to Recordkeeping and Reporting Requirements Applicable to Owners or Operators of Storage, Processing or Disposal Facilities);

(3) record the dry-weight amount of each [hazardous] waste disposed in an underground injection well at the facility,

(4) document the basis for the assessment of any applicable fee as determined under §335.325 of this title (relating to **Industrial Solid Waste and** Hazardous Waste Management Fee Assessment), including any adjustment to or exemption from assessment, and

(5) except as provided in §335 328 of this title (relating to Fees Payment), submit a monthly summary of on-site [hazardous] waste management activities subject to the assessment of fees under §335.325 of this title (relating to **Industrial Solid Waste and** Hazardous Waste Management Fee Assessment) on forms furnished or approved by the executive director. This summary report shall be due by the 25th day following the end of the month (or quarter) for which a report is made An owner or operator required to comply with this subsection shall continue to prepare and submit monthly (or quarterly) summaries, regardless of whether any storage, processing, or disposal was made during a particular month (or quarter), by preparing and submitting a summary indicating that no [hazardous] waste was managed during that month (or quarter) .

(c) Records or reports required to be kept under this section shall be retained for a minimum of three years after the date the record or report is made.

(d) The periods of record retention required by this section are automatically extended during the course of any unresolved enforcement action regarding the regulated activity.

§335.331. Failure to Make Payment or Report.

(a) Failure to make payment in accordance with this subchapter constitutes a violation subject to enforcement pursuant to the Health and Safety Code, §361.137 and §361.252.

(b) Generators and owners or operators of a facility failing to make payment of the fees imposed under the Health and Safety Code, Chapter 361, **when due**, shall be assessed **a penalty of 5.0% of the amount due, and if the fees are not paid within 30 days after the day on which the fees are due, an additional 5.0% penalty shall be imposed. An annual** interest [at annual rate] rate of **12%**, [15%] **compounded monthly, shall be imposed on delinquent fees beginning 60 days** [of the amount of the fee due accruing] from the date on which the fee is due.

(c) Operators of [hazardous] waste management facilities submitting late reports concerning the management of [hazardous] waste under the Health and Safety Code, §361.136 are subject to a civil penalty of **$100** for each day the violation continues.

(d) Any interest or penalties collected by the commission shall be deposited in the appropriate fund.

§335.332. Appendices I and II. The following appendices will be used for the purposes of this subchapter. (Appendix I-Dry Weight Determination for Solids-Based **Industrial Solid Waste and** Hazardous Waste, Appendix II-Dry Weight Determination for Oil-and Organic-Based **Industrial Solid Waste and** Hazardous Waste)

APPENDIX I

DRY WEIGHT DETERMINATION FOR SOLIDS BASED

INDUSTRIAL SOLID WASTE AND HAZARDOUS WASTE

The dry weight determination provisions of §335.326 of this title (relating to Dry Weight Determination) specify that the generator must determine the dry weight of each [hazardous] waste stream. This appendix outlines the method to be used by the generator.

1. Collect a representative sample by grab or composite. Collection methods and sample preservation shall be by methods to minimize volatilization.

2. An aliquot of about 100 grams or more shall be weighed in a tared evaporating dish, casserole or similar container. Record tare weight as "A" and container plus sample as "B".

3. This sample shall be evaporated at 73° to 75°C for two hours. Cool and weigh the sample plus container and record weight as "C".

4. Evaporate sample again in a drying oven at 103° to 105°C per "Standard Methods", 15th Edition, Method 209A. Cool and weigh sample plus container and record weight as "D".

All work should be done with all laboratory precautions necessary, including use of fume hoods and absence of ignition sources as appropriate.

Weight of water = C - D

Weight of Water-free Waste = (B-A) - (C-D)

= Weight of original sample minus weight of water

Dry Weight Ratio = $\frac{(B-A) - (C-D)}{(B-A)}$

= Weight of water-free waste divided by weight of original sample

APPENDIX II

DRY WEIGHT DETERMINATION FOR OIL AND ORGANIC BASED

INDUSTRIAL SOLID WASTE AND HAZARDOUS WASTE

The dry weight determination provisions of §335.326 of this title (relating to Dry Weight Determination) specify that the generator must determine the dry weight of each hazardous waste stream. This appendix outlines the method to be used by the generator.

1. Collect a representative sample by grab or composite. Collection methods and sample preservation shall be by methods to minimize volatilization.

2. An aliquot of about 25 grams or more shall be weighed to the nearest 0.1 mg in a tared evaporating dish or beaker. Record tare weight as "A" and container plus sample as "B".

3. Dilute sample with 100 ml of hexane. Filter sample through a crucible with a glass fiber filter (Whatman grade 934AH and 984H; Gelman Type A/E; millipore type AP40; or equivalent. Available in diameters of 2.2 cm to 4.7 cm.). Rinse evaporating dish or beaker with two 20 ml portions of hexane and filter through the crucible. Discard the solids and filter and save the filtrate.

4. Weigh approximately 25 grams of predried, anhydrous magnesium sulfate ($MgSO_4$) in a 400 ml beaker to the nearest 0.1 mg. Record the weight of the beaker and $MgSO_4$ as "C". Add the filtrate from Step 3 and stir for a few minutes with a glass rod. (Caution: Heat may be generated upon addition of filtrate.) Carefully decant the liquid portion in the beaker.

5. Dry the beaker at 73° - 75°C for one hour. Cool and weigh the beaker and record the weight as "D".

All work shall be done with all laboratory precautions necessary, including use of fume hoods and absence of ignition sources as appropriate.

Weight of water = D - C

Weight of Water-free Waste = (B-A) - (D-C)

= Weight of original sample minus weight of water

Dry Weight Ratio = $\frac{(B-A) - (D-C)}{(B-A)}$

= Weight of water-free waste <u>divided by</u> weight of original sample

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 28, 1993.

TRD-9331199 Mary Ruth Holder
Director, Legal Division
Texas Natural Resource Conservation

Earliest possible date of adoption. December 10, 1993

For further information, please call: (512) 463-8069

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TITLE 34. PUBLIC FINANCE

Part III. Teacher Retirement System of Texas

Chapter 25. Membership Credit

Military Service

• **34 TAC §25.67**

The Teacher Retirement System of Texas (TRS) proposes new §25.67, concerning the purchase of special military credit with TRS. The 73rd Texas Legislature, Regular Session authorized the purchase of this service credit by eligible TRS participants The legislation which added Government Code, §823 3021 offers TRS retirement credit incentives to attract into Texas public education employment United States military personnel who cannot otherwise qualify for retirement because of an early separation from military duty under reduction in force policies of the federal government. The statute conditions this special TRS service credit upon payment to TRS of the actuarial cost of the credit The proposed rule adopts by reference the specific actuarial tables, published by the TRS actuary, The Wyatt Company, which make the actuarial cost for this service credit a definitely determinable amount. The proposed rule also clarifies how the amount of the service credit is to be determined and the elements of the costs required to purchase the credit The rule was first adopted as an emergency basis on September 10, 1993.

Michael Barron, TRS chief financial officer, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr Barron 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 is that the purposes of the legislation can be effected without cost to the state or TRS trust funds because the actuarial cost of the credit will be obtained at the time the credit is awarded. There will be no effect on small businesses. The anticipated economic cost to persons who are eligible to obtain credit under the rule will vary with the age of the TRS participants purchasing the credit, their compensation upon entering TRS covered employment, and the number of years of the special credit purchased The actuarial cost will vary significantly depending upon these variables. For example, a 30 year old person with an initial $30,000 salary in public education would pay $14,790 plus membership fees of $30 for three years for this credit, and a 40 year old with a $30,000 annual salary would pay $102,810 plus membership fees of $100 for ten years of the special credit.

Comments on the proposal to be considered by the executive director and the board of trustees must be submitted in writing within 30 days of publication of the proposed section in the *Texas Register*, to Wayne Blevins, Executive Director, Teacher Retirement System of Texas, 1000 Red River, Austin, Texas 78701-2698.

The new section is proposed under the Texas Government Code, §823.3021(f) (1), which specifically provides for adoption of actuarial rates and tables for the purchase of the special military service credit

The new section is also proposed under the Government Code, §825 102, which authorizes TRS to adopt rules governing the administration of its funds and the transaction of its business.

§25 67 Special Military Service Credit

(a) A member who has become a classroom teacher after participating in a special military service separation benefits program established under federal law may be eligible to purchase special military service credit for previous military service under the provisions of Government Code, §823 3021

(b) The number of years of special military service credit shall be determined under the retirement system's rules for crediting normal membership service credit subject to the limitations contained in Government Code, §823 3021

(c) The cost of this special military service credit is the sum of.

(1) the annual membership fees that would have been paid by the member if the military service being credited had been performed as a participating member of the retirement system, and

(2) the actuarial present value of the special military service credit being purchased, determined in accordance with subsection (d) of this section.

(d) The actuarial present value of the special military service credit is a lump sum amount at the time of purchase equal to the annual salary rate of the member during the first year the person becomes a member of the retirement system after separation from military service multiplied by the applicable factor from the table entitled "Price to Purchase Special Military Service Per $1 of Entry Salary" provided by the retirement system's consulting actuary The Wyatt Company, on August 24, 1993, and adopted herein by reference. Information regarding and/or copies of this table may be obtained by contacting the Teacher Retirement System of Texas, 1000 Red River, Austin, Texas 78701-2698, (512) 397-6400.

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

Issued in Austin, Texas, on November 2, 1993

TRD-9331467 Wayne Blevins
Executive Director
Teacher Retirement System of Texas

Proposed date of adoption: December 10, 1993

For further information, please call: (512) 370-0506

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Joint Service with Employees Retirement System

• **34 TAC §25.113**

The Teacher Retirement System of Texas (TRS) proposes new §25 113, concerning the transfer of credit between TRS and the Employees Retirement System (ERS) implementing Government Code, Chapter 805 which allows persons with both TRS and ERS credit to retire under one system The rule clarifies the benefits available under the transfer legislation It establishes the procedures for eligible members to apply for the transfer of credit and to establish credit for withdrawn accounts in the respective systems It provides procedures for determining the amount of average salary and service credit for those transferring credit between the systems It applies the respective systems' laws requiring one month's separation from employment after an effective retirement date to those with transferred credit. It provides special provisions necessary for certain state employees subject to a mandatory transfer from TRS to ERS membership and for participants in the Optional Retirement Program The rule states necessary conditions for applying the transfer law to death benefits Finally, the rule provides for the interagency procedures to administer the law, including provisions for the determination of the funds to be transferred between the agencies The rule was adopted on an emergency basis on September 10, 1993, except that subsection (i) relating to cancellation of retirement upon employment within 30 days has been substantially reworded.

P Michael Barron, TRS chief financial officer, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section

Mr. Barron also has determined that for each

year of the first five years the section is in effect that the public benefit anticipated from the section is that the law enacted by the 73rd Texas Legislature providing for the transfer of credit between TRS and ERS will be implemented in an orderly fashion to accomplish legislative intent and to preserve the actuarial soundness of TRS. There will be no effect on small business. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Comments on the proposal to be considered by the executive director and the board of trustees must be submitted in writing within 30 days of publication of the proposed section in the *Texas Register*, to Wayne Blevins, Executive Director, Teacher Retirement System of Texas, 1000 Red River, Austin, Texas 78701-2698. The new section is proposed under the Texas Government Code, §825.102, which authorizes the Board of Trustees of the Teacher Retirement System to adopt rules for eligibility for membership, administration of the funds of the system, and the transaction of its business.

The new section is also proposed under the *Texas Government Code*, §805. 009, which authorizes the Board of Trustees to adopt rules to administer the transfer law.

§25.113. Transfer of Credit Between TRS and ERS.

(a) Purpose. These rules are intended to implement the provisions of the Government Code, Chapter 805, concerning the transfer of credit between the Teacher Retirement System of Texas and the Employees Retirement System of Texas.

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

(1) Receiving system-The system which will pay benefits based upon service credit transferred from the other system.

(2) Transferring system-The system from which service credit is transferred for the purpose of obtaining additional benefits from the other system.

(3) TRS-The Teacher Retirement System of Texas.

(4) ERS-The Employees Retirement System of Texas.

(5) Crediting system-The system in which service credit is established prior to any transfer.

(6) ORP-The Optional Retirement Program described in Government Code, Chapter 830.

(c) Forms.

(1) Applicants for transfer must use forms prescribed by the receiving system.

(2) Applicants for the establishment of any service credit must use the forms prescribed by the crediting system.

(3) The systems will cooperate in adopting forms necessary to facilitate the exchange of information between the systems.

(d) Notice.

(1) A person electing to transfer service credit pursuant to these rules must file the appropriate form with the receiving system not later than said effective date.

(2) A beneficiary eligible to transfer service to the receiving system for the payment of death benefits shall make the election on an application form not later than 90 days after the date of death of the member.

(3) The receiving system will notify the transferring system of the pending transfer not later than 30 days following date of receipt of an application form

(e) Manner of Transfer.

(1) Service credit and assets will be transferred through electronic and hard copy documentation pursuant to these rules, and the receiving system will maintain records of such transfers permanently.

(2) The transferring system shall provide documentation of years of credit, periods of service, military service credit, average salary, method of calculation of service credit and average salary, information necessary to comply with all federal tax regulations, interest credited, fees and interest paid, and any other dollar amount which will be a part of the transfer.

(f) Calculation of asset value. The value of assets transferred pursuant to these rules will be calculated on the basis of the 1983 Group Annuity Mortality Table and a discount rate necessary to determine the actuarial value of the benefit payable by the receiving system that represents the percentage of the total amount of the member's service credited in both systems that was credited in the transferring system. In the absence of an agreement by the two retirement systems, the "actuarial value" shall be based on a discount rate equal to the rate adopted by the receiving system for the actuarial value of its general benefit liabilities.

(g) Purchase of withdrawn service credit.

(1) An ERS member with at least 36 months service credit in ERS may purchase service credit in TRS that was canceled by the person's withdrawal of a TRS membership account prior to September 1, 1993.

(2) Such purchase of TRS credit shall be in the amounts and rates applicable to TRS members eligible to repurchase such credit.

(3) A TRS member with three years' service credit may repurchase, through ERS, service credit canceled by withdrawal of an ERS membership account prior to September 1, 1993.

(4) No service credit may be transferred based in whole or in part upon repurchased credit under this section unless the applicant meets all conditions for membership, amount of service credit, and payments required for the reinstatement of the credit.

(5) Any TRS membership service credit repurchased under this subsection may be applied toward the service credit requirements of TRS laws and rules for the purchase of out-of-state, military, or other special service credit.

(h) Termination of membership. The transfer of TRS service credit to ERS will terminate TRS membership and cancel all rights to benefits from TRS based on that service.

(i) Service in the month following retirement. Both TRS and ERS laws require a separation from employment for a period following a member's effective retirement date as a condition for retirement with a benefit from the respective system. With respect to a service retirement by persons using credit transferred between the systems

(1) An ERS retiree, whose last place of employment is with a TRS covered employer must be off the payroll at the TRS covered employer for the 30 days following retirement at ERS or the ERS retirement will be canceled. A TRS retiree, whose last place of employment is with an ERS covered agency must be off the payroll at the ERS agency for the 30 days following retirement at the TRS or the TRS retirement will be canceled.

(2) An ERS retiree, whose last place of employment is with an ERS covered agency, may return to work with a TRS covered employer without restrictions A retiree from the TRS, whose last place of employment is with a TRS covered employer, may go to work for an ERS agency without restrictions.

(j) Average salary. In determining average salary used in computing benefits available to a person transferring credit under this section, the receiving system will use the higher of the average compensation factors derived solely from the service originally established in each system respectively. Each system will be responsible for determining its respective average salary factor The transferring system will certify its average salary factor to the receiving system. If there is insufficient service to determine an average salary factor in the transferring system, benefits will be based upon the average salary factor of the receiv-

ing system.

(k) Transfer of certain state employees to ERS.

(1) Certain state employees are being transferred to ERS membership as a result of legislation enacted by the 73rd Texas Legislature, Regular Session. Among these are employees of the Texas Education Agency, employees of the Texas Surplus Property Agency transferred to the General Services Commission, and some employees of the Texas Rehabilitation Commission. Such employees are eligible to transfer TRS credit to ERS for benefit purposes under the Government Code, Chapter 805 subject to the modifications contained in this section.

(2) Employees whose agencies have been transferred to ERS coverage, including the Texas Education Agency and the Texas Rehabilitation Commission, may not retire under TRS after the effective date of the transfer, unless they again become TRS members based on other employment and subsequently obtain TRS service credit qualifying them for TRS retirement

(3) Employees described in paragraph (1) of this subsection are not eligible for TRS death benefits other than a return of accumulated contributions.

(4) Notwithstanding subsection (j) of this section, the average compensation of employees described in paragraph (1) of this subsection qualifying for ERS benefits may be determined by combining monthly rates of pay while a TRS member with ERS credited monthly salary to obtain the highest 36 months of pay

(l) Death benefits. Service credit of a person may not be transferred between systems if;

(1) one of the systems has paid or begun to pay death benefits based on the person's account, or

(2) the beneficiaries for death benefits in each system are not identical

(m) Service credit.

(1) TRS will make and accept transfers of service credit in whole plan year increments based upon TRS rules for crediting service. No partial years will be transferred

(2) TRS and ERS credit in a plan year will not be combined to obtain a year of TRS service credit

(n) ORP participants A person who has elected to participate in ORP but who is an ERS member may repurchase TRS service credit canceled by the election of ORP for purpose of transferring it to ERS under the Government Code, Chapter 805, provided TRS will not transfer or pay benefits for such service credit if the member participates in ORP between the date the TRS service credit is purchased and the date of the member's retirement or death. TRS will refund without interest any amounts deposited for such credit in the event the person returns to ORP participation. The person must agree to refund the amount of any benefits erroneously paid to the person as a result of any such return to ORP

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

Issued in Austin, Texas, on November 2, 1993

TRD-9331466 Wayne Blevins
Executive Director
Teacher Retirement
System of Texas

Earliest possible date of adoption December 10, 1993

For further information, please call (512) 370-0506

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Chapter 41. Insurance

• 34 TAC §41.11

The Teacher Retirement System of Texas (TRS) proposes new §41.11, concerning the collection by TRS of an annual fee required by law to be paid by each person employed full-time by a public school district in order to obtain funds to initiate a possible statewide group health insurance program for public school district employees Section 44(d), Chapter 812 (House Bill 2711), Acts of the 73rd Texas Legislature, Regular Session, 1993, requires a study of group health insurance for public school employees, with a report due June 30, 1994, to be funded in whole or in part by a portion of these funds Further, the funds will be placed in a trust fund to establish the insurance reserves which may be needed if a public school employees group health insurance program is implemented by the 74th Texas Legislature The rule clarifies who is a full-time employee, what is a public school district, how the fees are to be obtained by the school districts from their employees, and how they are to be submitted to TRS The rule was first adopted on an emergency basis on September 10, 1993

P Michael Barron, the TRS chief financial officer, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section The funds raised will be placed in a trust fund outside the State Treasury to be used exclusively for the purposes provided by the statute

Mr Barron 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 collected in an orderly manner that will maximize the amount available through collection and investment of the funds There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Comments on the proposal to be considered by the executive director and the board of trustees must be submitted in writing within 30 days of publication of the proposed section in the *Texas Register*, to Wayne Blevins, Executive Director, Teacher Retirement System of Texas, 1000 Red River, Austin, Texas 78701-2698. The new section is proposed under the Texas Government Code, §825 102, which authorizes the Board of Trustees of the Teacher Retirement System to adopt rules for eligibility for membership, administration of the funds of the system, and the transaction of its business

The new section is also proposed under Section 44(d), Chapter 812, Acts of the 73rd Texas Legislature, Regular Session, 1993, which specifically authorizes adoption of rules for the collection of these fees.

§41.11 Active Member Insurance Contingency Reserve Fee.

(a) Each member of the retirement system who is employed full-time by a public school district in this state, with the first contribution to the member savings account of the retirement fund in each fiscal year, must pay to the retirement system the annual insurance contingency reserve fee required by Section 44(d), Chapter 812, Acts of the 73rd Texas Legislature Regular Session, 1993 The member must pay the fee in the same manner as provided by the Government Code, §825 403, for the payment of membership contributions.

(b) The executive director may establish further procedures to be followed in reporting and depositing the fee in accordance with law and this section.

(c) For the purposes of this rule, full-time employment is that employment defined in §25 1 of this title (relating to Full-time Service) as regular, full-time service eligible for membership in the retirement system

(d) For the purposes of this rule, public school district shall be any employer whose employees are covered by the retirement system but are not covered by a group health insurance program for state employers or employees of public institutions of higher education

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

Issued in Austin, Texas, on November 2, 1993

TRD-9331468 Wayne Blevins
Executive Director
Teacher Retirement
System of Texas

Proposed date of adoption December 10, 1993

For further information, please call (512) 370-0506

• 34 TAC §41.12

The Teacher Retirement System of Texas (TRS) proposes new §41.12, concerning the certification by school districts of their compliance with Education Code, §13.913(a), which requires Texas public school districts to provide employee health insurance coverage to its employees comparable to that provided by the State of Texas to its employees. Section 32, Chapter 812 (House Bill 2711) Acts of the 73rd Texas Legislature, Regular Session, 1993, requires each school district to certify compliance with Education Code, §13 913(a) to the executive director of TRS in the manner required by the TRS board of trustees. The proposed rule establishes February 1 of each year as the deadline by which the certification for a school year must be filed and provides that the TRS executive director may promulgate the specific format of the certification

P. Michael Barron, TRS chief financial officer, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section

Mr Barron also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section as proposed is that it will assist in determining if the school districts are complying with the requirements of the Education Code, §13 913(a) There will be no effect on small businesses There is no anticipated economic cost to persons who are required to comply with the section as proposed

Comments on the proposal to be considered by the executive director and the board of trustees must be submitted in writing within 30 days of publication of the proposed section in the *Texas Register*, to Wayne Blevins, Executive Director, Teacher Retirement System of Texas, 1000 Red River, Austin, Texas 78701-2698

The new section is proposed under the Texas Government Code, §825 102, which authorizes the Board of Trustees of the Teacher Retirement System to adopt rules for eligibility for membership, administration of the funds of the system, and the transaction of its business

The new section is also proposed under Education Code, §13 913(a), which authorizes the TRS board of trustees to specify the manner of the certification

§41 12 Certification of Insurance Coverage

(a) Each public school district shall certify the districts compliance with the Education Code, §13 913(a), to the executive director of the Teacher Retirement System of Texas by February 1 of each year

(b) The executive director may establish the necessary procedures to be followed in certifying compliance The certification must include a copy of the district's current contract for group health coverage The certification procedures may require the district to compare its plan to specific features of the coverage provided under the Texas Employees Uniform Group Insurance Benefits Act (Vernon's Texas Insurance Code, Article 3.50-2).

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

Issued in Austin, Texas, on November 2, 1993.

TRD-9331469 Wayne Blevins
Executive Director
Teacher Retirement
System of Texas

Earliest possible date of adoption December 10, 1993

For further information, please call: (512) 370-0506

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Chapter 51. General Administration

• 34 TAC §51.1

The Teacher Retirement System of Texas (TRS) proposes new §51.1, concerning the determination of the amount and manner of compensation to advisory committee members. This section is being adopted to comply with state law that may require a rule governing payments of members of these committees in order for TRS to continue to receive these services which the board has found to be necessary for the performance of its duties The state law governing payments to members of these advisory committees is Texas Government Code, §825 114(b) The rule was adopted on an emergency basis on September 10, 1993.

Michael Barron, TRS chief financial officer, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section The fiscal impact on TRS administered trust funds will be as follows $254,300 in 1994, $263,500 in 1995, $268,500 in 1996, $274, 600 in 1997, and $279,600 in 1998.

Mr Barron 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 permit the TRS board of trustees to obtain appropriate advice in carrying out its fiduciary responsibilities for the investment of TRS trust funds, in securing appropriate medical determinations with respect to medical disability retirement applications, and in designing and implementing the retired public school employees' group health insurance program. There will be no effect on small businesses There is no anticipated economic cost to persons who are required to comply with the section as proposed

Comments on the proposal to be considered by the executive director and the board of trustees must be submitted in writing within 30 days of publication of the proposed section in the *Texas Register*, to Wayne Blevins, Executive Director, Teacher Retirement System of Texas, 1000 Red River, Austin, Texas 78701-2698.

The new section is proposed under the Texas Government Code, §825 102, which authorizes TRS to adopt rules governing the administration of its funds and the transaction of its business.

The new section is also proposed under the Government Code, §825.114, which specifically authorizes the rule.

§51.1. Advisory and Auxiliary Committees.

(a) The following committees are created for an indefinite period to advise or otherwise serve the retirement system and are deemed necessary to assist the Board of Trustees in performing its duties.

(1) a Medical Board, composed of three board physicians as provided by Government Code, §825 204;

(2) an Investment Advisory Committee composed of private sector investment professionals in accordance with the retirement system's investment policies,

(3) a Real Estate Finance Committee composed of investment professionals as provided by the retirement system's investment policies; and

(4) a Retirees Advisory Committee for the Texas Public School Retired Employees Group Insurance Program, composed as provided by the Insurance Code, Article 3 50-4, §6.

(b) The duties of these committees are established by applicable statute or policies of the Board of Trustees.

(c) Except for such retirement system personnel as may serve ex officio on such committees, the members of the Medical Board, Investment Advisory Committee, and Real Estate Finance Committee shall be paid, as independent contractors' fees and expenses in accordance with contracts negotiated by the executive director or his designee subject to the applicable resolutions, policies, and annual budget adopted by the Board of Trustees To the extent such committees are composed of independent contractors they are to be considered consultants employed by the retirement system under the authority recognized by Texas Civil Statutes, Article 6252-11c, §2(a)

(d) Members of the Retirees Advisory Committee for the Texas Public School Retired Employees Group Insurance Program are entitled only to reimbursement for actual and reasonable expenses incurred in performing functions as members of the committee.

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

Issued in Austin, Texas, on November 2, 1993.

TRD-9331470 Wayne Blevins
Executive Director
Teacher Retirement System of Texas

Proposed date of adoption: December 10, 1993

For further information, please call: (512) 370-0506

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

Part III. Texas Youth Commission

Chapter 91. Discipline and Control

Disciplinary Practices

• 37 TAC §91.10

The Texas Youth Commission (TYC) proposes an amendment to §91.10, concerning protective custody for treatment. There is no substantial change in the content of this section. The amendment clarifies that procedures herein apply to youth in community placements rather than TYC institutions. Existing procedures provide for movement of a TYC youth to a residential treatment center or psychiatric hospital.

John Franks, director of fiscal affairs, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Franks also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be a more efficient method of treating youth at risk of causing substantial bodily injury to himself or herself. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Comments on the proposal may be submitted to Gail Graham, Policy and Manuals Coordinator, Texas Youth Commission, 4900 North Lamar Boulevard, P.O. Box 4260, Austin, Texas 78765.

The amendment is proposed under the Human Resources Code, §61.034, which provides the Texas Youth Commission with the authority to make rules appropriate to the proper accomplishment of its functions.

The proposed amendment implements the Human Resources Code, §61.076.

§91.10. Protective Custody for Treatment.

(a) Policy. A youth **in any placement other than a TYC institution** who has been found to have intentionally caused, attempted to cause, or threatened to cause substantial bodily injury to himself or herself may be placed in a residential treatment center or psychiatric hospital when the placement is necessary to provide protective custody and specialized treatment which unavailable at the youth's present location. The placement will be for a period only as long as the youth's need for protection and specialized treatment exists. **For youth placed in a TYC institution in need of similar services see §87.17 of this title, relating to Commitment to Mental Health Facilities (GOP 49.17).**

(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 October 29, 1993

TRD-9331377 Jay Lindgren
Acting Executive Director
Texas Youth Commission

Earliest possible date of adoption December 10, 1993

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

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

Part I. Texas Department of Human Services

Chapter 4. Medicaid Programs–Children and Pregnant Women

Eligibility Requirements

• 40 TAC §4.1006

The Texas Department of Human Services (DHS) proposes an amendment to §4.1006, concerning requirements for application, in its Medicaid Programs–Children and Pregnant Women Program rule chapter The purpose for the amendment is to eliminate sanctions against pregnant women who fail to comply with child support requirements, until the end of their pregnancy

Burton F. Raiford, commissioner, has determined that for the first five-year period the proposed amendment will be in effect there will be fiscal implications as a result of enforcing or administering the amendment. The effect on state government for the first five-year period the amendment will be in effect is an estimated additional cost of $5,557 for fiscal year 1994; $17,290 for fiscal year 1995, $19,760 for fiscal year 1996; $20,584 for fiscal year 1997; and $22,230 for fiscal year 1998. There will be no effect on local government as a result of enforcing or administering the amendment.

Mr. Raiford also has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment will be to ensure that needy pregnant women receive the prenatal care they need. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

Questions about the content of the proposal may be directed to Rita King at (512) 450-4148 in DHS's Client Self-Support Services. Comments on the proposal may be submitted to Nancy Murphy, Agency Liaison, Policy and Document Support-227, Texas Department of Human Services W-402, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*

The amendment is proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which provides the department with the authority to administer public and medical assistance programs and under Texas Civil Statutes, Article 4413 (502), §16, which provide the Health and Human Services Commission with the authority to administer federal medical assistance funds. The amendment implements the Human Resources Code, §22 001 and §32 040.

§4 1006. Requirements for Application. To be eligible for the Medicaid Programs for Children and Pregnant Women (CPW) Program, clients must meet the following requirements.

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

(4) Child support requirements. The **responsible relative** [caretakers] of deprived Medicaid children must cooperate with the establishment of medical support from the absent **parent(s)** [parent]. **Exception: Pregnant women are not sanctioned for noncooperation with child support requirements.**

(5)-(9) (No change.)

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

Issued in Austin, Texas, on November 2, 1993.

TRD-9331386 Nancy Murphy
Section Manager, Policy and Document Support
Texas Department of Human Services

Proposed date of adoption January 1, 1994

For further information, please call: (512) 450-3765

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Chapter 19. Long Term Care Nursing Facility Requirements for Licensure and Medicaid Certification

Subchapter Q. Medical Review and Re-evaluation

• 40 TAC §19.1608, §19.1613

The Texas Department of Human Services (DHS) proposes amendments to §19. 1608 and §19.1613, concerning retroactive medical necessity determinations and reconsideration of medical necessity (MN) determinations and effective dates, in its Long Term Care Nursing Facility Requirements chapter. The purpose of the amendments is to combine the functions of Purpose Codes E and 6 which are entered on the patient's CARE form.

Burton F. Raiford, commissioner, has determined that for the first five-year period the proposed amendments will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amendments.

Mr. Raiford also has determined that for each year of the first five years the amendments will be in effect the public benefit anticipated as a result of enforcing the amendments will be a reduction in paperwork and increased time for providing patient care. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed amendments.

Questions about the content of the proposal may be directed to Susan Syler at (512) 450-3111 in DHS's Institutional Programs Section. Comments on the proposal may be submitted to Nancy Murphy, Agency Liaison, Policy and Document Support-209, Texas Department of Human Services W-402, P.O Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

The amendments are proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which provide the department with the authority to administer public and medical assistance programs and under Texas Civil Statutes, Article 4413 (502), §16, which provides the Health and Human Services Commission with the authority to administer federal medical assistance funds. The amendments implement the Human Resources Code, §22.002 and §32.024.

§19.1608. Retroactive Medical Necessity Determinations. Private-pay individuals living in Medicaid-certified nursing facilities, or distinct parts, who do not receive SSI cash benefits and who make application for Medicaid may be eligible for "three months prior" vendor payments. To ensure that vendor payments begin on the date that an individual's financial resources are exhausted, the potential recipient must have a valid medical necessity (MN) determination [and the nursing facility staff should maintain his clinical records in compliance with the Medicaid utilization review (UR) requirements].

(1) [To be in compliance with UR requirements, potential recipients' clinical records must be maintained and reviewed as follows.

[(A) The physician's plan of care must be dated no more than 30 days before the date that the facility administrator learned about the patient's application for Medicaid assistance, or before authorization for vendor payment

[(B) The physician's recertifications and plans of care must be maintained and reviewed according to the requirements described in §19.1603 of this title (relating to Definition of the Review Process); §19.1002 of this title (relating to Physician Visits); and §19.1007 of this title (relating to Certification and Recertification Requirements); and §19.1901 of this title (relating to Administration)

[(2)] If a recipient is found to be otherwise eligible for vendor payments for all or part of the three months prior to the date of his application for Medicaid assistance, Texas Department of Human Services (DHS) Medicaid eligibility staff will notify facility staff. Facility staff **should** [must review the applicant's clinical record to ensure that it meets the UR requirements and] submit a request for MN determination form (CARE) for the retroactive period (Purpose Code **E** [6]) [Facility staff must ensure that the form.

[(A) indicates potential eligibility for Medicaid,

[(B) clearly identifies, in the form's comment section, the applicable retroactive period(s) for which payment is requested; and

[(C) includes, in the form's comment section, a statement of certification that the applicant required NF services during the applicable period(s) This statement must be initialed by the attending physician.]

(2)[(3)] If an applicant meets all other eligibility criteria for three-months-prior coverage, DHS makes retroactive vendor payments according to the assigned Texas Index for Level of Effort (TILE) level for the period indicated on the CARE form submitted for retroactive coverage

(3)[(4) DHS makes retroactive vendor payments for only that period of time during which physician-certification, plan-of-care, and medical necessity requirements are met. After establishment of any retroactive medical necessity, verification may be done to show that the applicant's record includes the physician's certification, recertification, and plans of care, and that the plans were reviewed as required during the applicable period(s).]

[(5)] The effective date of the new MN determination for the retroactive period of eligibility is the first day of the earliest month in which the applicant qualified for a medical necessity determination. If the recipient has paid for the retroactive time period, the facility must reimburse him the vendor portion that DHS paid

§19.1613 Reconsideration of Medical Necessity (MN) Determination and Effective Dates. When a facility provides care for a recipient for a period of time not covered by an effective MN determination at admission or between reviews, the Texas Department of Human Services (DHS) will reconsider the medical necessity effective dates

(1)-(3) (No change)

(4) The request for reconsideration must be stamped-in by the URC by the 95th day after the last day services were provided without the recipient having medical necessity effective dates

[(A)] The URC will accept a request after the 95th day and up to 12 months following the last day that service was provided only when the facility experiences circumstances beyond its control

[(B) The manager of the DHS Institutional Program Section will review documentation submitted and determine whether the above criteria are met when submission of a request is received after the 95th day]

(5) [The following documentation must be submitted to the Utilization Review Committee

[(A) a letter requesting reconsideration,

[(B) a copy of

[(i) the Minimum Data Set (MDS) and Comprehensive Care Plan in effect for the days that services were provided without a MN determination in effect,

[(ii) a copy of all notes (nursing, therapy, etc) for the days that services were provided without a MN determination in effect, and

[(C) a completed DHS CARE form, using Purpose Code E, that describes the condition of the recipient during the period of time services were deliv-

ered and there was no MN determination in effect. The requested effective dates (beginning-through) must be in the Comment section. A CARE form submitted with a Purpose Code E does not require a physician's signature.]

[(6)] The Utilization Review Committee will notify the facility of the results of the reconsideration within 45 days. The facility may initiate an appeal, when reconsideration is denied, by submitting a request in writing as outlined in Chapter 79 of this title (relating to Legal Services). The facility must initiate the appeal within 10 workdays of receipt of notification that a reconsideration was denied

(6)[(7)] The facility may neither charge nor take any other recourse against Medicaid recipients, their family members, or their representatives for any claim denied or reduced because of the facility's failure to comply with any DHS rule, regulation, or procedure pertaining to reimbursement

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

Issued in Austin, Texas, on November 2, 1993

TRD-9331387 Nancy Murphy
Section Manager, Policy and Document Support
Texas Department of Human Services

Proposed date of adoption: January 1, 1994

For further information, please call: (512) 450-3765

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Subchapter S. Reimbursement Methodology for Nursing Facilities

• 40 TAC §19.1807

The Texas Department of Human Services (DHS) proposes an amendment to §19 1807, concerning rate setting methodology, in its Long Term Care Nursing Facility Requirements. The purpose for the amendment is to delete the experimental pediatric care reimbursement class The only provider operating a pediatric nursing facility has asked to withdraw from participation and returned to the standard nursing facility reimbursement class. DHS foresees no reason to maintain the pediatric class

Burton F. Raiford, commissioner, has determined that for the first five-year period the proposed amendment will be in effect there will be fiscal implications as a result of enforcing or administering the amendment. The effect on state government for the first five-year period the amendment will be in effect is an estimated additional cost of $57,363 for fiscal year 1994; $88,236 for fiscal year 1995; $88,236 for fiscal year 1996; $88,236 for fiscal year 1997, and $88,236 for fiscal year 1998. There will be no fiscal implications for local government as a result of enforcing or administering the amendment.

Mr Raiford also has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment will be elimination of an obsolete, experimental reimbursement class and retention of the standard reimbursement class There will be no effect on small businesses There is no anticipated economic cost to persons who are required to comply with the proposed amendment

Questions about the content of the proposal may be directed to Jack Boland at (512) 450-4055 in DHS's Provider Reimbursement Section. Comments on the proposal may be submitted to Nancy Murphy, Agency Liaison, Policy and Document Support-265, Texas Department of Human Services W-402, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

The amendment is proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which provides the department with the authority to administer public and medical assistance programs and under Texas Civil Statutes, Article 4413 (502), §16, which provide the Health and Human Services Commission with the authority to administer federal medical assistance funds. The amendment implements the Human Resources Code, §32 028 and §32.029.

§19.1807 Rate Setting Methodology

(a)-(b) (No change)

(c) Experimental reimbursement class

[(1) Description.] DHS may define experimental reimbursement classes of service to be used in research and demonstration projects on new reimbursement methods Demonstration or pilot projects based on experimental reimbursement classes may be implemented on a statewide basis or may be limited to a specific region of the state or to a selected group of providers

[(2) Pediatric Care Reimbursement Class DHS is developing an experimental reimbursement class for nursing facilities that primarily serve pediatric recipients The purpose of this experimental reimbursement class is to determine what service and cost differences may exist between pediatric and geriatric recipients This experimental class will be in effect from April 1, 1990, through March 1, 1995 During this period, DHS will test a facility-specific reimbursement methodology in qualifying facilities

[(A) Definitions

[(i) Pediatric Care Reimbursement Class-To qualify for the pediatric care reimbursement class, a facility must have had an average daily census of 85% or more children for the six-month period prior to its entry into the class. The census must be based on the entire licensed facility and not a distinct part. Additionally, the facility must maintain an average daily census of 85% or more children to remain in this experimental reimbursement class.

[(ii) Children-For the purposes of this experimental reimbursement class, children are defined as being at or below 22 years of age.

[(B) Rate determination. The Texas Board of Human Services determines rates based on staff recommendations. Staff formulate rate recommendations in accordance with the provisions of Chapter 24 of this title (relating to Reimbursement Methodology). Rate recommendations are formulated in the following manner:

[(i) Rates for this reimbursement class will be determined prospectively on a facility-specific basis. A facility's reimbursement rate will be determined by applying clause (iii) of this subparagraph to the most recent cost report deemed acceptable to DHS. In order for a cost report to be considered acceptable, it must reflect a facility's incurred costs at a census level of 85% or more children as specified in subparagraph (A)(i) of this paragraph, and the cost report must be completed as specified in §19 1802 of this title (relating to Cost Reporting Procedures). The reported costs must be verifiable by review or by on-site audit as specified in §19 1802 of this title (relating to Cost Reporting Procedures) If no acceptable cost report is available, providers will be required to submit a cost report covering the time period specified by DHS.

[(ii) Section 19.1801(a) and (b) of this title (relating to General Reimbursement Information) and §19.1807(a) and (b) of this title (relating to Rate Setting Methodology) will not apply to the rate determination for this experimental reimbursement class All other sections of the reimbursement methodology apply to the pediatric care reimbursement class.

[(iii) The facility-specific rate is determined in accordance with §24.102 of this title (relating to Methodology) and is determined as follows: The total of each cost area from the most recent cost report is adjusted to account for disallowed costs and inflation as specified in §19. 1806 of this title (relating to Cost Finding Methodology). The adjusted total for each cost area is then divided by the number of total recipient-days of service for the cost report period. The resulting costs per day for each of the cost areas are summed to determine the total per diem amount. The total per diem amount is multiplied by a factor of

1.03 to determine the final facility-specific rate.

[(iv) As specified in §19.1806 of this title (relating to Cost Finding Methodology), costs are projected from facility's cost report base period to the rate period.

[(C) Payment of the facility-specific rate. The reimbursement rate for the pediatric care reimbursement class will be paid for all Medicaid-eligible residents of a qualifying facility. If the facility's average daily census falls below 85% children, payment of the facility-specific reimbursement rate will cease and the facility will be reimbursed under the case mix methodology. If the facility wishes to reenter the pediatric care reimbursement class, it must requalify under the requirements specified in subparagraph (A)(i) of this paragraph, and it must submit a new application to DHS as specified in subparagraph (E) of this paragraph.

[(D) Frequency of rate determination. DHS determines facility-specific rates for the pediatric care reimbursement class at least annually

[(E) Application to the Pediatric Care Reimbursement Class Nursing facilities wishing to be reimbursed under the pediatric care reimbursement class must submit a written request to the commissioner of DHS.

[(F) Start date for payment of the facility-specific rate. If DHS determines that the facility qualifies for the pediatric care reimbursement class, payment of the facility-specific rate will begin on the first day of the month following the date of receipt of the written request. If a facility requests a review or appeal of the cost report audit (as provided in §24.601 of this title (relating to Reviews and Administrative Hearings), the facility will continue to be reimbursed under the case mix methodology or the facility-specific rate currently in effect until the dispute is resolved. Based on the result of the review or hearing, the facility's rate will be retroactively adjusted.]

(d)-(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.

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TRD-9331388 Nancy Murphy
Section Manager, Policy and Document Support
Texas Department of Human Services

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For further information, please call: (512) 450-3765

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Chapter 73. Civil Rights

Subchapter OO. Administrative Fraud Disqualification Hearings

• 40 TAC §§73.4001, 73.4005, 73.4006, 73.4008, 73.4010-73.4012

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

The Texas Department of Human Services (DHS) proposes the repeal of §§73.4001, 73.4005, 73.4006, 73.4008, 73.4010, 73.4011, 73.4012, and 73. 4101-73.4115, concerning administrative fraud disqualification hearings and hearing procedure in its Civil Rights chapter. The purpose of the repeals is to enable DHS to move these rules to its Legal Services chapter. DHS is proposing adding the rules to Chapter 79 in this issue of the *Texas Register*.

Burton F. Raiford, commissioner, has determined that for the first five-year period the repeals will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeals.

Mr. Raiford also has determined that for each year of the first five years the repeals are in effect the public benefit anticipated as a result of enforcing the repeals will be that DHS's rules concerning administrative fraud disqualification hearings will be located more appropriately in its Legal Services rule chapter. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed repeals.

Questions about the content of the proposal may be directed to Donna Burns at (512) 450-4878 in DHS's Hearings Department. Comments on the proposal may be submitted to Nancy Murphy, Agency Liaison, Policy and Document Support-055, Texas Department of Human Services W-402, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

The repeals are proposed under the Human Resources Code, Title 2, Chapter 22, which provides the department with the authority to administer public assistance programs. The repeals implement the Human Resources Code, §33. 002(c).

§73.4001. Introduction and Legal Basis.

§73.4005. Designation of Hearing Officer.

§73.4006. Disqualification of Hearing Officer.

§73.4008. Hearing Officer's Powers and Duties.

§73.4010. Scheduling the Hearing.

§73.4011. Advance Notice of Hearing.

§73.4012. Participation while Hearing is Pending.

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

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Subchapter PP. Hearing Procedure

• 40 TAC §§73.4101-73.4115

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

The repeals are proposed under the Human Resources Code, Title 2, Chapter 22, which provides the department with the authority to administer public assistance programs. The repeals implement Human Resources Code, §33.002(c).

§73.4101. Conduct of Hearing.

§73.4102. Attendance at Hearing.

§73.4103. Household Member's Rights during Hearing.

§73.4104. Consideration of the Case by the Hearing Officer.

§73.4105. Failure of Household Member to Appear.

§73.4106. Postponements.

§73.4107. Recessing the Hearing.

§73.4108. Findings of the Hearing Officer.

§73.4109. The Hearing Record and Decision.

§73.4110. Effect of an Administrative Determination of Intentional Program Violation.

§73.4111. Notification of Hearing Decision.

§73.4112 Court Actions in Relation to Administrative Disqualification.

§73.4113. Presentation of the Department's Case.

§73.4114 Effect of Nondetermination of Intentional Program Violation.

§73.4115. Consolidation of Administrative Disqualification Hearings and Fair Hearing.

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

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Texas Department of Human Services

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Chapter 75. Investigations

Criminal Conviction Checks of Employees in Certain Facilities Serving the Elderly or Disabled

- **40 TAC §75.1001, §75.1002**

(Editor's Note The Texas Department of Human Services proposes for permanent adoption the repeals it adopts on an emergency basis in this issue The text of the repeals is in the Emergency Rules section of this issue)

The Texas Department of Human Services (DHS) proposes the repeal of §75 1001 and §75 1002, concerning the basis and facilities requirements for criminal conviction checks of employees in certain facilities serving the elderly or persons with disabilities, in its Investigations rule chapter. The purpose for the repeals is to enable DHS to propose new Chapter 76, Criminal History Check of Employees in Facilities for Care of the Aged and Persons with Disabilities DHS is proposing the new sections and also is adopting the repeals and new sections on an emergency basis in this issue of the *Texas Register.*

The purpose for the repeals is to comply with the Health and Safety Code, Title 4, Chapter 250, which requires that persons convicted of certain crimes may not be employed in most facilities and agencies providing care to the aged and persons with disabilities. Effective September 1, 1993, DHS assumed responsibility for conducting background checks on persons who would be employed in activities requiring direct contact with consumers of the facility.

Burton F. Raiford, commissioner, has determined that for the first five-year period the proposed repeals will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeals.

Mr. Raiford also has determined that for each year of the first five years the repeals are in effect the public benefit anticipated as a result of enforcing the repeals will be an effective means of screening potential employees of facilities serving the aged and persons with disabilities to ensure they are not barred from employment because of certain criminal offenses. There will be no effect on small businesses There is no anticipated economic cost to persons who are required to comply with the proposed repeals.

Questions about the content of the proposal may be directed to Jim Tennison at (512) 450-3151 in DHS's Institutional Care Section Comments on the proposal may be submitted to Nancy Murphy, Agency Liaison, Policy and Document Support-262, Texas Department of Human Services W-402, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register.*

The repeals are proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which provides the department with the authority to administer public and medical assistance programs, and the Health and Safety Code, Title 4, Chapter 250, which requires the department to perform criminal history checks on persons employed by certain types of facilities The repeals implement the Health and Safety Code, Title 4, Chapter 250

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

Issued in Austin, Texas, on November 3, 1993.

TRD-9331435 Nancy Murphy
Section Manager, Policy and Document Support
Texas Department of Human Services

Proposed date of adoption January 1, 1994

For further information, please call (512) 450-3765

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Chapter 76. Criminal History Check of Employees in Facilities for Care of the Aged and Persons with Disabilities

Policy and Procedures

- **40 TAC §§76.101-76.108**

(Editor's Note· The Texas Department of Human Services proposes for permanent adoption the new sections it adopts on an emergency basis in this issue. The text of the new sections is in the Emergency Rules section of this issue.)

The Texas Department of Human Services (DHS) proposes new §§76.101-76. 108, concerning criminal history check of employees in facilities for care of the aged and persons with disabilities. The sections are proposed under new Chapter 76. Also in this issue of the *Texas Register*, DHS is adopting the new sections and the repeal of §75.1001 and §75.1002 on an emergency basis and simultaneously proposing the repeal of §75 1001 and §75.1002.

The purpose for the new sections is to comply with the Health and Safety Code, Title 4, Chapter 250, which bars persons from employment in most facilities and agencies providing care to the aged and persons with disabilities if those persons have been convicted of certain crimes.

Effective September 1, 1993, DHS assumed responsibility for conducting background checks on persons who would be employed in activities requiring direct contact with consumers of the facility.

Burton F Raiford, commissioner, has determined that for the first five-year period the proposed sections will be in effect there will be fiscal implications as a result of enforcing or administering the sections. The effect on state government for the first five-year period the sections will be in effect in an estimated additional cost of $37,273 for fiscal year (FY) 1994, $35,333 for FY 1995, $35,333 for FY 1996; $35,333 for FY 1997; and $35,333 for FY 1998. There will be no fiscal implications for local government as a result fo enforcing or administering the sections.

Mr. Raiford also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be an effective means of screening potential employees of facilities serving the aged and persons with disabilities to ensure they are not barred from employment because of certain criminal offenses There will be no effect on small businesses There is no anticipated economic cost to persons who are required to comply with the proposed sections.

Questions about the content of the proposal may be directed to Jim Tennison at (512) 450-3151 in DHS's Institutional Care Section. Comments on the proposal may be submitted to Nancy Murphy, Agency Liaison, Policy and Document Support-262, Texas Department of Human Services W-402, P.O Box 149030, Austin, Texas 78714-9030, within 30 days of

publication in the *Texas Register*.

The new sections are proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which provides the department with the authority to administer public and medical assistance programs, and the Health and Safety Code, Title 4, Chapter 250, which requires the department to perform criminal history checks on persons employed by certain types of facilities. The repeals implement the Health and Safety Code, Title 4, Chapter 250 The new sections implement the Health and Safety Code, Title 4, Chapter 250

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

Board-The Board of the Texas Department of Human Services

Department-The Texas Department of Human Services (DHS)

Direct Contact with a Consumer-Any contact with a resident or client or a family member or visitor of a resident or client in a facility covered by this chapter

Emergency requiring immediate employment-The urgent need to hire an individual as a result of a survey deficiency on staffing ratios and/or the potential of the facility to fall below their desired staff ratio, thus putting the client's health and safety at risk. A person to be employed under these circumstances must furnish the facility with an affidavit stating that they have not been convicted of a criminal offense described in Health and Safety Code, §250.005

Facilities-The following facilities and applicants, included in the requirement of criminal history checks.

(A) Nursing homes, custodial care homes, or other institutions licensed under the Health and Safety Code, Chapter 242.

(B) Personal care facilities licensed under the Health and Safety Code, Chapter 247.

(C) Adult day care facilities or adult day health care facilities licensed under Human Resources Code, Chapter 103

(D) Facilities for persons with mental retardation licensed or certified by the Texas Department of Health or DHS

(E) Intermediate care facilities for persons with mental retardation certified for participation in the Medicaid program under the Social Security Act, Title XIX

(F) Adult foster care providers contracting with DHS

§76.102 Pre-employment History Check.

(a) Employees in facilities for the care of the aged and disabled who come into direct contact with consumers must have a pre-employment criminal history check performed by the Texas Department of Human Services. An employee who has a criminal conviction which bars employment or an employee who fails to obtain a clearance of a conviction which potentially bars employment may not be employed in a facility in a capacity which involves direct contact with a consumer in the facility.

(b) Applicants to provide adult foster care are subject to criminal history checks before enrollment in the adult foster care program

§76 103 Application for Criminal History Check. The facility must apply for a criminal history check for any applicant for employment If the applicant is provided temporary employment under the emergency employment provision the application must be filed within 72 hours of the time of employment The application must be filed on forms provided by the Texas Department of Human Services

§76 104 Presumption of employability If no response is received by the facility requesting a criminal history check within 60 days of the request date, the facility may assume the check to have revealed no conviction which would bar or potentially bar employment

§76.105. Administrative Review An applicant may request an administrative review of a conviction which would potentially bar employment and/or enrollment as an adult foster care provider. The request must be in writing and be submitted by the 20th day of receipt of the notification The notice must advise the applicant of the type of information which a review panel considers in determining whether the applicant is unlikely to be a threat to consumers or property of the consumers in a facility and/or adult foster home.

§76 106 Standards for Review

(a) The applicant may submit and the panel must consider the following

(1) documentation which demonstrates the misdemeanor or felony classification of the offense at the time of the offense,

(2) the age of the applicant at the time the offense was committed,

(3) the length of time since the offense was committed,

(4) evidence of rehabilitation, including employment history in a facility, and

(5) mitigating circumstances when the offense was committed.

(b) The review panel must also consider other documentation which bears on the question of whether the person is likely to be a threat to the consumers or property of the consumers in a facility.

§76 107. Personal Appearance.

(a) If the review panel determines that the documentation required in §76.106 of this title (relating to Standards for Review) is insufficient to demonstrate that the applicant would be unlikely to be a threat to the consumers or property of the consumers in a facility, the applicant must be provided the opportunity to appear before the panel in person to offer additional information. This notice of opportunity must be:

(1) included in the findings notice by the review panel, and

(2) requested within 10 days of the date of the notice

(b) If the applicant fails to request the opportunity for a personal appearance in a timely manner, the finding of the panel becomes final

§76 108 Correction of Mistakes of Fact or Identity in Criminal History Record.

(a) The applicant for employment or enrollment is responsible for correcting errors of fact or identity in the criminal history record reported by the Texas Department of Public Safety (DPS) The applicant should contact DPS directly and provide whatever positive identification information may be required for a verification of the record

(b) The applicant should request an administrative review of the finding of a conviction which constitutes, or may constitute, a bar to employment at the same time that a correction of the record is sought.

(c) The request for review should clearly indicate that the applicant is seeking a correction in the records as part of the review process. The corrected information should be presented to the administrative review panel as part of the documentation for review

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

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Nancy Murphy
Section Manager, Policy and Document Support
Texas Department of Human Services

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For further information, please call: (512) 450-3765

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Chapter 79. Legal Services

Subchapter T. Administrative Fraud Disqualification Hearings

• 40 TAC §§79.1901-79.1922

The Texas Department of Human Services (DHS) proposes new §§79 1901-79.1922 concerning administrative fraud disqualification hearings, in its Legal Services chapter The purpose for the proposal is to move administrative fraud disqualification hearings rules from Chapter 73, Civil Rights, to Chapter 79. DHS believes the rules belong more appropriately in the Legal Services chapter The repeal of the sections from Chapter 73 is proposed in this issue of the *Texas Register*

In addition to moving and renumbering the rules, DHS proposes changes in §§79 1901, 79 1911, 79.1914, 79.1915, 79 1917, 79 1918, and 79 1919 (old §§73 4001, 73.4104, 73 4107, 73 4108, 73.4110, 73.4111, and 73 4112) which makes these sections consistent with amendments DHS adopted in the May 12, 1992, issue of the *Texas Register* (17 TexReg 3477) Those amendments implemented federal regulations for Aid to Families with Dependent Children (AFDC) program administrative disqualification hearings and made the process the same as established procedures for Food Stamp program intentional program violations In addition, DHS has added provisions of federal waivers in §§79 1905(a), 79 1906, 79 1912(a)-(c), 79 1913, 79 1914(b), 79 1916(b), and 79 1918

Burton F Raiford, commissioner, has determined that for the first five-year period the proposed sections will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections

Mr Raiford also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be proper placement of DHS's administrative disqualification hearings rules in Chapter 79, consistency in AFDC and Food Stamp Program requirements, and implementation of federal waiver requirements There will be no effect on small businesses There is no anticipated economic cost to persons who are required to comply with the proposed sections

Questions about the content of the proposal may be directed to Donna Burns at (512) 450-4878 in DHS's Hearings Department Comments on the proposal may be submitted to Nancy Murphy, Agency Liaison, Policy and Document Support-055, Texas Department of Human Services W-402, P O Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*

The new sections are proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which provides the department with the authority to administer public and medical assistance programs. The new sections implement the Human Resources Code, §33.002(c).

§79.1901. Introduction and Legal Basis. A household member becomes ineligible to participate in the Food Stamp program and/or Aid to Families with Dependent Children (AFDC) program if a state or federal court or administrative agency determines he has committed an intentional program violation.

§79.1902. Designation of Hearing Officer. Hearings are conducted by an impartial official.

§79.1903. Disqualification of Hearing Officer.

(a) A hearing officer is disqualified if he participates in the decision to:

(1) refer the case to the investigation unit, or

(2) recommend disqualification for intentional program violation

(b) A hearing officer may be disqualified if.

(1) the hearing officer participated in a case conference with the worker, investigator, or the supervisor to make a referral for an intentional program violation decision The hearing officer may not have discussed or evaluated a case or any major points at issue,

(2) the hearing officer reviewed the entire record or a comprehensive summary of the record to make a referral for disqualification,

(3) the hearing officer has a personal interest in the outcome of the hearing decision or has some other conflict of interest,

(4) a household member requests that a certain hearing officer not hold the hearing or makes allegations against the fairness of the hearing officer, and/or

(5) the hearing officer has supervised the worker or investigator although he may not have been involved in the decision

(c) The Texas Department of Human Services (DHS) does not disqualify a hearing officer because he answers a question about DHS policy concerning the case, if the question and answer are stated in broad terms

§79.1904. Hearing Officer's Powers and Duties. The hearing officer

(1) administers oaths or affirmations,

(2) ensures that all relevant issues are considered;

(3) requests, receives, and includes in the record all evidence determined necessary to resolve the issues;

(4) ensures an orderly hearing by regulating the conduct and course of the hearing;

(5) orders an independent medical assessment or professional evaluation, if relevant and useful, from a source mutually satisfactory to the household and DHS;

(6) makes the final administrative decision concerning the hearing in the name of DHS; and

(7) requires the attendance of an agency representative, if necessary and appropriate.

§79.1905. Scheduling the Hearing

(a) The hearing must be held and a written decision issued no later than 90 calendar days from the date the household member is notified of the hearing.

(b) The hearing officer schedules the hearing at a reasonable time and place. He considers the household member's physical condition, location, and access to transportation. The hearing may be held in the field office where the file is located.

§79.1906. Advance Notice of Hearing.

(a) The hearing officer sends the household member an advance notice of the hearing in sufficient time to allow receipt at least 30 calendar days before the scheduled hearing date. The notice is sent by certified mail, return-receipt requested, and marked "do not forward, address-correction requested" to the address where the household member last received benefits. Delivery is not restricted to the addressee. The notice specifies the charges against the household member and a summary of the evidence (including how and where it may be examined)

(b) Advance notice requirements are met when the certified mail receipt is returned showing the notice was delivered, delivery of the notice was refused, or the notice was unclaimed. The hearing is held as scheduled unless the hearing officer grants a postponement.

(c) Advance notice requirements are not met when the notice is returned showing that the household member moved and there is no forwarding address or if there is a new address

(1) If the returned notice shows a new address, another notice is mailed following the procedures in subsection (a) of this section, and the 90-day time require-

ment for issuing a decision begins again with the date that the second notice is mailed.

(2) If the notice is returned showing that the household member has moved and there is no forwarding address, the hearing officer dismisses the case without prejudice.

§79.1907. Participation While Hearing Is Pending.

(a) The Texas Department of Human Services (DHS) may not disqualify a household member for an intentional program violation until the hearing officer determines the person committed an intentional program violation. A pending hearing does not affect the household member's or the household's right to be certified and participate in the program.

(b) DHS reduces or terminates benefits if:

(1) DHS has documentation substantiating the household is ineligible or eligible for fewer benefits (even if these facts suggest an intentional program violation and lead to an administrative disqualification hearing), or

(2) the household fails to request a fair hearing and continued benefits pending the hearing.

(c) DHS may adjust benefits if it has facts substantiating the household's failure to report a change in its circumstances DHS does not yet have to demonstrate that the failure to report was an intentional program violation

(d) Pending the hearing, DHS determines the eligibility and benefit level of the household according to usual procedures. If the suspected action does not affect the household's current circumstances, the household:

(1) continues to receive its allotment based on the latest certification action, or

(2) is recertified based on a new application and current circumstances

(e) DHS terminates benefits, however, if:

(1) the certification period has expired; and

(2) the household fails to reapply after receiving an expiration notice.

§79.1908. Conduct of Hearing.

(a) The hearing officer conducts the administrative disqualification hearing as an informal proceeding, not as a formal court hearing. The participants are placed under oath, but the technical rules of evidence are not required.

(b) At the hearing, the hearing officer must advise the household member or his representative that he may refuse to answer questions during the hearing.

§79.1909. Attendance at Hearing. The hearing is not open to the public; however, at the household member's request, friends and relatives may attend. If space is limited, the hearing officer may limit the number of people attending the hearing.

§79.1910. Household Member's Rights During Hearing. The hearing officer must give the household member or his representative an adequate opportunity to:

(1) examine all relevant documents and records at a reasonable time before and during the hearing. The case record is also available, including the application form and documents of verification used to establish the household's ineligibility or eligibility and allotment amount. If the household member or his representative requests a copy, DHS provides a free copy of the portions of the case record that are relevant to the hearing. Confidential information is protected from release It may include the names of people who have disclosed information about the household without its knowledge Information that identifies the nature or status of pending criminal prosecutions is also confidential. Confidential information and other documents or records that the household may not otherwise have an opportunity to contest or challenge are not introduced at the hearing They do not affect the hearing officer's decision,

(2) present the case or have it presented by a legal counsel or another person,

(3) present witnesses,

(4) present arguments without undue interference;

(5) question or refute any testimony or evidence, including an opportunity to confront and cross-examine adverse witnesses, and

(6) submit evidence to establish all pertinent facts and circumstances in the case.

§79 1911 Consideration of the Case by the Hearing Officer. The hearing officer must base his determination on clear and convincing evidence that the household member committed an intentional program violation, as defined in §79 2001 of this title (relating to Terms and General Policy).

§79 1912. Failure of Household Member to Appear.

(a) If advance notice requirements, as outlined in §79.1906 of this title (relating to Advance Notice of Hearing) are met and the household member or his representative fails to attend a hearing without good cause, the hearing is conducted without him. The household member has ten calendar days from the date of the hearing to present good cause for failing to appear.

(b) If the hearing officer finds the household member committed an intentional program violation but later determines that the household member or his representative did not receive notice of the hearing or had good cause for not appearing, the Texas Department of Human Services (DHS) conducts a new hearing. The previous decision is no longer valid. There is no time limitation for the household member to show good cause for failure to appear because he did not receive notice of the hearing.

(c) If advance notice requirements are not met, the hearing officer:

(1) checks the administrative disqualification record for any contacts from the household member before the hearing date;

(2) phones the client once if the client's current telephone number is listed on the Office of Inspector General's case report form. The purpose of the call is to determine whether the correct household member received the notice The hearing officer must talk to the household member to confirm that the notice was received;

(3) sends another notice if.

(A) the household member has moved, and

(B) an address correction is provided by the postal service; and

(4) dismisses the case without prejudice if:

(A) the household member has moved;

(B) no address correction is provided by the post office; and

(C) the hearing officer is unable to determine that the household member received the notice.

§79.1913. Postponements. Until ten calendar days before the scheduled hearing, the household member or his representative may request one postponement of up to 30 calendar days. The 90-calendar-day limit for issuing a written decision is extended by the number of days that the hearing is postponed.

§79.1914. Recessing the Hearing.

(a) If the household member, the investigator, or the hearing officer requests to have the Food Stamp record at the hearing, the hearing may be recessed to obtain the record. The household member may question or refute any additional testimony or evidence after a recess.

(b) The hearing officer may order a recess to request and receive additional testimony or evidence. He advises the household member or his representative of the reason for the recess and the nature of the additional requested information. The household member may question or refute any additional testimony or evidence after a recess.

§79.1915. Findings of the Hearing Officer

(a) The hearing officer normally makes a determination at the close of the hearing whether or not the household member committed an intentional program violation, as defined in this chapter. The decision of the hearing officer must comply with Texas Department of Human Services (DHS) policy and federal law and regulations, and must be based exclusively on the hearing record.

(b) The hearing officer may not find that the household member committed an intentional program violation unless there is clear and convincing evidence in the record to support a determination that the household member knowingly, willfully, and with deceitful intent committed an act described in §79.1901 of this title (relating to Introduction and Legal Basis). The decision by the hearing officer is DHS's final administrative action concerning a determination of intentional program violation for purposes of administrative disqualification.

§79.1916. The Hearing Record and Decision.

(a) Household members or the representative may inspect the hearing record during work hours They may also copy it at their own expense.

(b) The hearing officer sends written notification of the decision to the household or to the appropriate Texas Department of Human Services (DHS) staff as indicated in §79.1918 of this title (relating to Notification of Hearing Decision and Effect on Remaining Household Members) The hearing officer's decision:

(1) specifies the reasons for the decision. If the case is dismissed because advance notice requirements were not met, the hearing officer specifies that the case is dismissed without prejudice,

(2) identifies the supporting evidence and regulations;

(3) responds to reasoned arguments of the household member or his representative.

(c) The hearing record consists of the official report of the hearing. It also includes all papers and requests filed in the proceeding.

§79.1917. Effect of an Administrative Determination of Intentional Program Violation.

(a) If a hearing officer finds that a household member committed an intentional program violation, the household member is disqualified from the Food Stamp and/or Aid to Families with Dependent Children (AFDC) programs for the following periods.

(1) six months for the first intentional program violation determination,

(2) one year for the second intentional program violation determination, and

(3) permanently for the third intentional program violation determination

(b) The disqualification period does not depend upon the amount of benefits involved The disqualification period set at the time of the hearing is applicable only against months in which the household member would otherwise be eligible The household member may not

(1) appeal the final intentional program violation decision; or

(2) have this decision reversed by a subsequent fair hearing decision The household member is entitled, however, to seek relief in a court having jurisdiction

(c) If one hearing is held for several offenses, the Texas Department of Human Services (DHS) may impose only one disqualification period.

(d) If the hearing officer imposes a six-month disqualification for an initial violation, no further disqualifications may be imposed for violations occurring before the hearing decision that are later discovered These violations may be brought to the hearing officer and, if appropriate, an intentional program violation may be found.

(e) Although the hearing officer's decision regarding the intentional program violation is final, the appellant may appeal the investigator's computation of the amount of overpayment

§79.1918 Notification of Hearing Decision and the Effect on Remaining Household Members

(a) The hearing officer notifies the household member of his decision in writing.

(b) Within 15 calendar days of a hearing officer's written decision to disqualify the household member, the Texas Department of Human Services' (DHS's) Central Disqualification Unit notifies the household member of the effect of the hearing officer's decision In dismissed or nondetermination of intentional program violation cases, the hearing decision is the final notification sent to the household member. If the hearing officer dismisses the case, he sends copies of the decision to the investigator only.

§79.1919 Court Actions in Relation to Administrative Disqualification

(a) The Aid to Families with Dependent Children (AFDC) and Food Stamp federal regulations provide for a court of appropriate jurisdiction to order an individual disqualified from participating in the program for the time periods described in §79.1917 of this title (relating to Effect of an Administrative Determination of Intentional Program Violation)

(b) The state, a political subdivision of the state, or the United States may serve as prosecutor or plaintiff.

(c) If the court fails to impose a disqualification period on a household member who committed an intentional program violation, DHS imposes one of the penalties described in §79 1917 of this title (relating to Effect of an Administrative Determination of Intentional Program Violation) DHS imposes the appropriate penalty unless the court order prohibits the penalty

§79 1920 Presentation of the Texas Department of Human Services' (DHS's) Case The DHS representative is responsible for presenting the department's case in the administrative disqualification hearing The DHS representative may choose to present the case in person or by the use of teleconference equipment If either the hearing officer or the household member requests, the DHS representative must attend the hearing in person Such a request, however, must be made ten days before the hearing

§79.1921 Effect of Nondetermination of Intentional Program Violation If a hearing officer finds that the household member did not commit an intentional program violation, the hearing officer determines whether or not there was an overissuance and determines that the case involved either

(1) client error or misunderstanding; or

(2) agency error

§79.1922. Consolidation of Administrative Disqualification Hearings and Fair Hearings.

(a) The hearing officer may combine a fair hearing and an administrative disqualification hearing to settle the amount of the claim at the same time as determining whether or not an intentional program violation has occurred. To do this, the following conditions must exist.

(1) the factual issues arise out of the same, or related, circumstances and the household receives advance notice that the hearings will be combined, and

(2) disqualification hearing procedures are adhered to.

(b) At the household's request, the hearing officer must allow the household to waive the 30-day advance notice period required when a disqualification hearing and fair hearing are combined If the household does not receive advance notice that the hearings will be combined, but decides to waive the advance notice requirement, the hearing officer obtains the household member's signature on a waiver of notice The hearing officer then proceeds with a fair hearing on the claim.

(c) When the disqualification hearings and fair hearings are combined and the household does not waive the advance notice requirements, the hearing officer follows the time frames for conducting disqualification hearings

(d) When the hearings are combined to settle the amount of the claim while determining whether or not intentional program violation has occurred, the household loses its right to a subsequent fair hearing on the amount of the claim

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

Issued in Austin, Texas, on November 2, 1993.

TRD-9331391 Nancy Murphy
Section Manager, Policy and Document Support
Texas Department of Human Services

Proposed date of adoption January 1, 1994

For further information, please call (512) 450-3765

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Chapter 90. Nursing Facilities and Related Institutions

The Texas Department of Human Services (DHS) proposes amendments to §§90.15, 90 16, and 90 235, concerning renewal procedures and qualifications, change of ownership, and administrative penalties, in its Nursing Facilities and Related Institutions rule chapter The amendments to §§90 15 and 90 16 add definitions for "timely and sufficient application" in relation to applications for licensure or relicensure of a nursing facility or a facility serving persons with mental retardation and/or a related condition The amendment to §90.235 adds administrative penalties for failure to submit required renewals or changes of ownership In addition, §90 15(a) is amended to reflect an amendment to the Health and Safety Code, §242 033, which changed the duration of a license from one year to two years

Burton F Raiford, commissioner, has determined that for the first five-year period the proposed amendments will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amendments

Mr Raiford also has determined that for each year of the first five years the amendments are in effect the public benefit anticipated as a result of enforcing the amendments will be a clearer application process There will be no effect on small businesses There is no anticipated economic cost to persons who are required to comply with the proposed amendments

Questions about the content of the proposal may be directed to Susan Syler at (512) 450-3111 in DHS's Institutional Policy Section Comments on the proposal may be submitted to Nancy Murphy, Agency Liaison, Policy and Document Support-234, Texas Department of Human Services W-402, P O Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*

Subchapter B Application Procedures

• 40 TAC §90.15, §90.16

The amendments are proposed under the Health and Safety Code, Chapter 242, which provides the department with the authority to license long-term care nursing facilities and under Texas Civil Statutes, Article 4413 (502), historical note (Vernon Supplement 1993), 72nd Legislature, which transferred all functions, programs, and activities related to long-term care licensing, certification, and surveys from the Texas Department of Health to the Texas Department of Human Services The amendments implement the Health and Safety Code, §242 032 and §242 033

§90 15 Renewal Procedures and Qualifications

(a) Each license issued under this chapter must be renewed **every two years** [annually]. Each license expires **two years** [12 months] from the date issued A license issued under this chapter is not automatically renewed.

(b) Each license holder must, at least 45 days prior to the expiration of the current license, file an application for renewal with the Texas Department of Human Services **(DHS)** [(Department)]. **DHS considers that an individual has made timely and sufficient application for the renewal of a license, if the facility:**

(1) submits a complete application to DHS, and DHS receives the complete application at least 45 days before the current license expires;

(2) submits an incomplete application to DHS with a letter explaining the circumstances which prevented the inclusion of the missing information, and DHS receives the incomplete application and letter at least 45 days before the current license expires; or

(3) submits an application to DHS, and DHS receives the application during the 45-day period ending on the date the current license expires, and the individual pays a fine under the administrative penalties described in Schedules A(R) and B(H) of §90.235 of this title (relating to Administrative Penalties).

(c) The application for renewal **must** [shall] contain the same information required for an original application as well as payment of the annual licensing fees

(d)[(c)] The renewal of a license may be denied for the same reasons an original application for a license may be denied See §90.17 of this title (relating to Criteria for Denying a License or Renewal of a License)

§90 16. Change of Ownership

(a) During the license term, a license holder may not transfer the license as a part of the sale of the facility Prior to the sale of the facility, the license holder must [shall] notify the Texas Department of Human Services **(DHS)** [(department)] that a change of ownership is requested

(b) The prospective purchaser **must** [shall] submit to **DHS** [the department] a complete application for a license under §90 11 of this title (relating to Criteria for Licensing) at least 30 days **before** [prior to] the anticipated date of sale The applicant must [shall] meet all requirements for a license **DHS considers an individual has made timely and sufficient applica-**

tion for a license if the individual:

(1) submits a complete application to DHS, and DHS receives the complete application at least 30 days before the anticipated date of sale;

(2) submits an incomplete application to DHS with a letter explaining the circumstances which prevented the inclusion of the missing information, and DHS receives the incomplete application and letter at least 30 days before the anticipated date of sale; or

(3) submits an application to DHS, and DHS receives the application during the 30-day period ending on the anticipated date of sale, and the individual pays a fine under the administrative penalties described in Schedules A(R) and B(H) of §90.235 of this title (relating to Administrative Penalties).

(c)[(b)] Pending the review of the prospective purchaser's application, the license holder shall continue to meet all requirements for operation of the facility.

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

Issued in Austin, Texas, on October 29, 1993.

TRD-9331262 Nancy Murphy
Section Manager, Policy and Document Support
Texas Department of Human Services

Proposed date of adoption: January 1, 1994

For further information, please call: (512) 450-3765

Subchapter H. Enforcement

• 40 TAC §90.235

The amendment is proposed under the Health and Safety Code, Chapter 242 which provides the department with the authority to license long-term care nursing facilities and under Texas Civil Statutes, Article 4413 (502), historical note (Vernon Supplement 1993), 72nd Legislature, which transferred all functions, programs, and activities related to long-term care licensing, certification, and surveys from the Texas Department of Health to the Texas Department of Human Services. The amendment implements the Health and Safety Code, §242.032 and §242.033.

§90.235. Administrative Penalties.

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

(i) Conditions and assessments for violations warranting administrative penalties for licensed facilities are described in Schedule A and Schedule B which are as follows.

SCHEDULE A: PENALTIES FOR NURSING FACILITIES

DESCRIPTION OF CONDITIONS AND ELEMENTS OF CONDITIONS	FIRST OFFENSE (1)	SECOND OFFENSE (2)	THIRD OR SUBSEQUENT OFFENSE (3)
A. - Q. (No change.)			
R. Failure to submit a renewal or change of ownership license application as required in accordance with §§90.15 or 90.16 of this title (relating to Renewal Procedures and Qualifications and Change of Ownership).			
1. The facility does not submit a license renewal application at least 45 days before the current license expiration date.	500	1,000	1,500
2. During a change of ownership process, the prospective purchaser does not submit a license application to the licensing program at least 30 days before the anticipated sale date.	500	1,000	1,500

(insert graphic 2)

SCHEDULE B: PENALTIES FOR FACILITIES SERVING PERSONS WITH MENTAL RETARDATION AND/OR RELATED CONDITIONS

DESCRIPTION OF CONDITIONS AND ELEMENTS OF CONDITIONS	FIRST OFFENSE (1)	SECOND OFFENSE (2)	THIRD OR SUBSEQUENT OFFENSE (3)
A. - G. (No change.)			
H. Failure to submit a renewal of change of ownership license application as required in accordance with §§90.15 or 90.16 of this title (relating to Renewal Procedures and Qualifications and Change of Ownership).			
1. 1. The facility does not submit a license renewal application at least 45 days before the current license expiration date.	500	1,000	1,500
2. 2. During a change of ownership process, the prospective purchaser does not submit a license application to the licensing program at least 30 days before the anticipated sale date.	500	1,000	1,500

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 29, 1993.

TRD-9331261 Nancy Murphy
Section Manager, Policy and Document Support
Texas Department of Human Services

Proposed date of adoption: January 1, 1994

For further information, please call: (512) 450-3765

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Part II. Texas Rehabilitation Commission

Chapter 101. General Rules

• 40 TAC §101.11

The Texas Rehabilitation Commission proposes an amendment to §101.11, concerning Administrative Review of Agency Action and Fair Hearing for Applicants and Clients. The amendment clarifies policies and procedures with regard to protests and appeals.

Charles Harrison, controller, 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.

Andrea Sargent-Fambles, legal examiner, has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be that the amendment to this section and adoption of new §104, Informal and Formal Appeals by Applicants/Clients of Decisions by a Rehabilitation Counselor or Agency Official, will result in increased awareness to members of the public and those who represent applicants and clients before the Commission of the substantive rules used by the Commission in applicant and client hearings. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Comments on the proposal may be submitted to Andrea Sargent-Fambles, Legal Examiner, Texas Rehabilitation Commission, 4900 North Lamar Boulevard, Austin, Texas 78751, (512) 483-4050.

The amendment is proposed under the Texas Human Resource Code, §111.018, which provides the Texas Rehabilitation Commission with the authority to make regulations governing personnel standards, the protection of records and confidential information, the manner and form of filing applications, eligibility, investigation, and determination for rehabilitation and other services, procedures for hearings, and other regulations subject to this section as necessary to carry out the purposes of this chapter.

§101.11. Protest and Appeal [Administrative Review of Agency Action and Fair Hearing for Applicants and Clients].

[(a) The commission adopts by reference commission policy and procedures contained in Texas Rehabilitation Commission Rehabilitation Services Manual (TRC RSM) Number 20-2 entitled Appeal Procedures for Applicants and Clients.]

[(b) Copies of the appeal procedures are available for review in the Office of Special Services, Texas Rehabilitation Commission, 4900 North Lamar Boulevard, Austin, Texas 78751. Copies are available on request.]

(a)[(c)] The Commission [commission] adopts [proposes for adoption] by reference Commission TRC APPM 9, Protest and Appeal, with Appendices [Appendixes] 9A, 9B, and 9C.

(b)[(d)] Copies are available for review in the Grants and Contracts Office, Texas Rehabilitation Commission, 4900 North Lamar Boulevard, Austin, Texas 78751. Copies are available on request.

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, 1993.

TRD-9331112 Andrea Sargent-Fambles
Legal Examiner
Texas Rehabilitation Commission

Earliest possible date of adoption: December 10, 1993

For further information, please call: (512) 483-4055

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Chapter 104. Informal and Formal Appeals by Applicants/Clients of Decisions by a Rehabilitation Counselor or Agency Official

• 40 TAC §§104.1-104.8

(Editor's Note: The Texas Rehabilitation Commission proposes for permanent adoption the new sections it adopts on an emergency basis in this issue. The text of the new sections is in the Emergency Rules section of this issue.)

The Texas Rehabilitation Commission proposes new §§104.1-104.8, concerning Informal and Formal Appeals by Applicants/Clients of Decisions by a Rehabilitation Counselor or Agency Official.

Charles Harrison, controller, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Andrea Sargent-Fambles, legal examiner, has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be increased awareness to members of the public and those who represent applicants and clients before the Commission of the substantive rules used by the Commission in applicant and client hearings. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Comments on the proposal may be submitted to Andrea Sargent-Fambles, Legal Examiner, Texas Rehabilitation Commission, 4900 North Lamar Boulevard, Austin, Texas 78751, (512) 483-4050.

The new sections are proposed under the Texas Human Resource Code, §111. 018, which provides the Texas Rehabilitation Commission with the authority to make regulations governing personnel standards, the protection of records and confidential information, the manner and form of filing applications, eligibility, investigation, and determination for rehabilitation and other services, procedures for hearings, and other regulations subject to this section as necessary to carry out the purpose of this chapter.

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

Issued in Austin, Texas, on October 21, 1993

TRD-9331113 Andrea Sargent-Fambles
Legal Examiner
Texas Rehabilitation Commission

Earliest possible date of adoption. December 10, 1993

For further information, please call: (512) 483-4055

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1993 Publication Schedule for the *Texas Register*

Listed below are the deadline dates for the January-December 1993 issues of the *Texas Register*. Because of printing schedules, material s after the deadline for an issue cannot be published until the next issue. Generally, deadlines for a Tuesday edition of the *Texas Regi* Wednesday and Thursday of the week preceding publication, and deadlines for a Friday edition are Monday and Tuesday of the publication. No issues will be published on July 30, November 5, November 30, and December 28. A asterisk beside a publication date i 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.
34 Tuesday, May 4	Wednesday, April 28	Thursday, April 29
35 Friday, May 7	Monday, May 3	Tuesday, May 4
36 Tuesday, May 11	Wednesday, May 5	Thursday, May 6
37 Friday, May 14	Monday, May 10	Tuesday, May 11
38 Tuesday, May 18	Wednesday, May 12	Thursday, May 13
39 Friday, May 21	Monday, May 17	Tuesday, May 18
40 Tuesday, May 25	Wednesday, May 19	Thursday, May 20
41 Friday, May 28	Monday, May 24	Tuesday, May 25
42 Tuesday, June 1	Wednesday, May 26	Thursday, May 27
43 *Friday, June 4	Friday, May 28	Tuesday, June 1
44 Tuesday, June 8	Wednesday, June 2	Thursday, June 3
45 Friday, June 11	Monday, June 7	Tuesday, June 8
46 Tuesday, June 15	Wednesday, June 9	Thursday, June 10
47 Friday, June 18	Monday, June 14	Tuesday, June 15
48 Tuesday, June 22	Wednesday, June 16	Thursday, June 17
49 Friday, June 25	Monday, June 21	Tuesday, June 22
50 Tuesday, June 29	Wednesday, June 23	Thursday, June 24
51 Friday, July 2	Monday, June 28	Tuesday, June 29
52 Tuesday, July 6	Wednesday, June 30	Thursday, July 1
53 Friday, July 9	Monday, July 5	Tuesday, July 6
Tuesday, July 13	SECOND QUARTERLY INDEX	
54 Friday, July 16	Monday, July 12	Tuesday, July 13
55 Tuesday, July 20	Wednesday, July 14	Thursday, July 15
56 Friday, July 23	Monday, July 19	Tuesday, July 20
57 Tuesday, July 27	Wednesday, July 21	Thursday, July 22
Friday, July 30	NO ISSUE PUBLISHED	
58 Tuesday, August 3	Wednesday, July 28	Thursday, July 29
59 Friday, August 6	Monday, August 2	Tuesday, August 3
60 Tuesday, August 10	Wednesday, August 4	Thursday, August 5
61 Friday, August 13	Monday, August 9	Tuesday, August 10
62 Tuesday, August 17	Wednesday, August 11	Thursday, August 12
63 Friday, August 20	Monday, August 16	Tuesday, August 17
64 Tuesday, August 24	Wednesday, August 18	Thursday, August 19

65 Friday, August 27	Monday, August 23	Tuesday, August 24
66 Tuesday, August 31	Wednesday, August 25	Thursday, August 26
67 Friday, September 3	Monday, August 30	Tuesday, August 31
68 Tuesday, September 7	Wednesday, September 1	Thursday, September 2
69 *Friday, September 10	Friday, September 3	Tuesday, September 7
70 Tuesday, September 14	Wednesday, September 8	Thursday, September 9
71 Friday, September 17	Monday, September 13	Tuesday, September 14
72 Tuesday, September 21	Wednesday, September 15	Thursday, September 16
73 Friday, September 24	Monday, September 20	Tuesday, September 21
74 Tuesday, September 28	Wednesday, September 22	Thursday, September 23
75 Friday, October 1	Monday, September 27	Tuesday, September 28
76 Tuesday, October 5	Wednesday, September 29	Thursday, September 30
77 Friday, October 8	Monday, October 4	Tuesday, October 5
Tuesday, October 12	THIRD QUARTERLY INDEX	
78 Friday, October 15	Monday, October 11	Tuesday, October 12
79 Tuesday, October 19	Wednesday, October 13	Thursday, October 14
80 Friday, October 22	Monday, October 18	Tuesday, October 19
81 Tuesday, October 26	Wednesday, October 20	Thursday, October 21
82 Friday, October 29	Monday, October 25	Tuesday, October 26
83 Tuesday, November 2	Wednesday, October 27	Thursday, October 28
Friday, November 5	NO ISSUE PUBLISHED	
84 Tuesday, November 9	Wednesday, November 3	Thursday, November 4
85 Friday, November 12	Monday, November 8	Tuesday, November 9
86 Tuesday, November 16	Wednesday, November 10	Thursday, November 11
87 Friday, November 19	Monday, November 15	Tuesday, November 16
88 Tuesday, November 23	Wednesday, Novmber 17	Thursday, November 18
89 Friday, November 26	Monday, November 22	Tuesday, November 23
Tuesday, November 30	NO ISSUE PUBLISHED	
90 Friday, December 3	Monday, November 29	Tuesday, November 30
91 Tuesday, December 7	Wednesday, December 1	Thursday, December 2
92 Friday, December 10	Monday, December 6	Tuesday, December 7
93 Tuesday, December 14	Wednesday, December 8	Thursday, December 9
94 Friday, December 17	Monday, December 13	Tuesday, December 14
95 Tuesday, December 21	Wednesday, December 15	Thursday, December 16
96 Friday, December 24	Monday, December 20	Tuesday, December 21
Tuesday, December 28	NO ISSUE PUBLISHED	

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