TEXAS REGISTER

IN THIS ISSUE

Volume 21, Number 12 February 13, 1996 *Page 1009-1145*

Part I - Volume 21, Number 12

Contents Continued Inside

Texas Register

a section of the
Office of the
Secretary of State
P.O. Box 13824
Austin, TX 78711-3824
(800) 226-7199
(512) 463-5561
FAX (512) 463-5569

Secretary of State
Antonio O. Garza, Jr.

Director
Dan Procter

Assistant Director
Dee Wright

Circulation/Marketing
Tamara Joiner
Jill S. Ledbetter

Texas Administrative Code Section
Dana Blanton
Madeline Chrisner
Daneane Jarzombek

Documents Section
Roberta Knight
Jamie McCornack
Patty Webster

Production Section
Carla Carter
Ann Franklin
Mimi Sanchez

Receptionist
Roy Felps

Texas Register, ISSN 0362-4781, is published semi-weekly 100 times a year except February 23, March 15, November 8, December 3, and December 31, 1996. Issues will be published by the Office of the Secretary of State, 1019 Brazos, Austin, Texas 78701. Subscription costs: printed, one year $95, six month $75. Costs for diskette and online versions vary by number of users (see back cover for rates). Single copies of most issues for the current year are available at $7 per copy in printed or electronic format.

The *Texas Register* is published under the Government Code, Title 10, Chapter 2002. Second class postage is paid at Austin, Texas.

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

How to Use the Texas Register

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

Governor - Appointments, executive orders, and proclamations.

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

Secretary of State - opinions based on the election laws.

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

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

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

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

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

Open Meetings - notices of open meetings.

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

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

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 21 (1996) is cited as follows: 21 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 "21 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 21 TexReg 3."

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

Texas Administrative Code

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

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

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

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

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

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

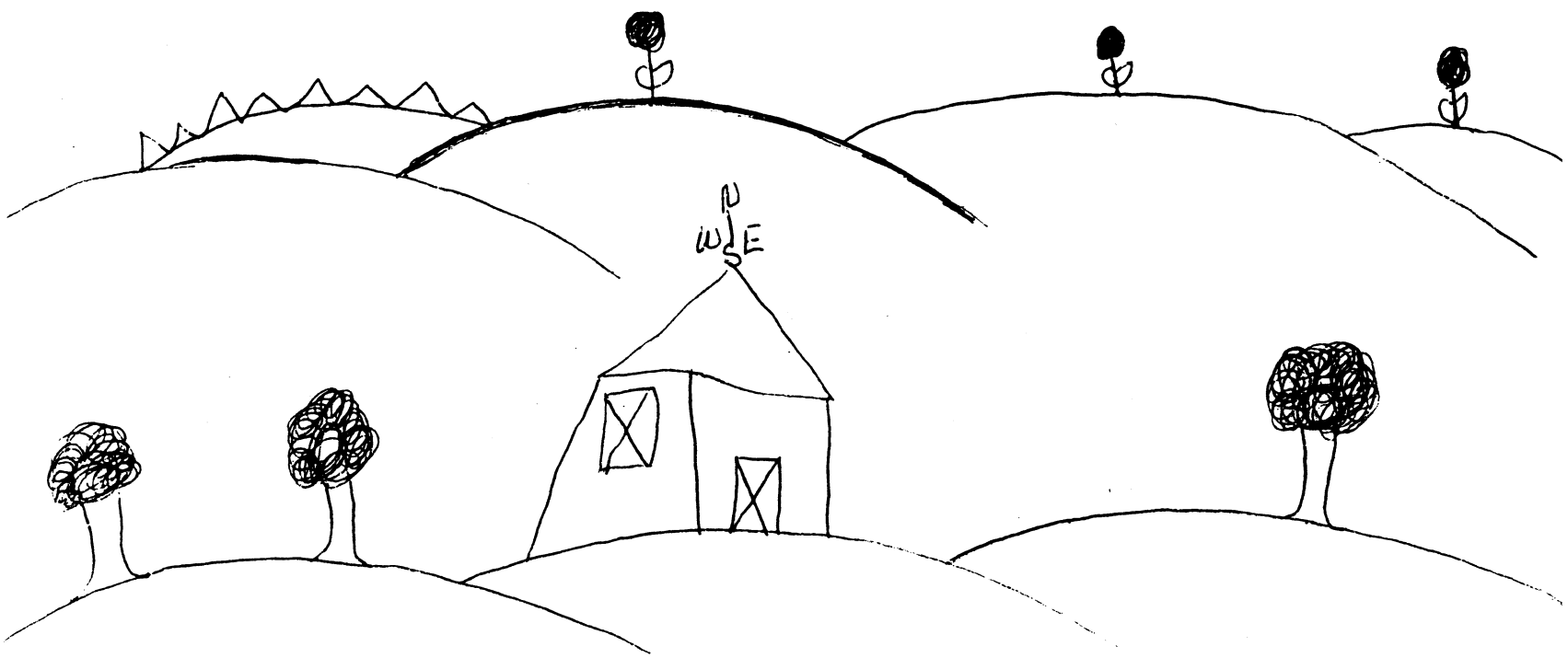
1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the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

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 26, April 9, July 12, and October 8, 1996). 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.dd

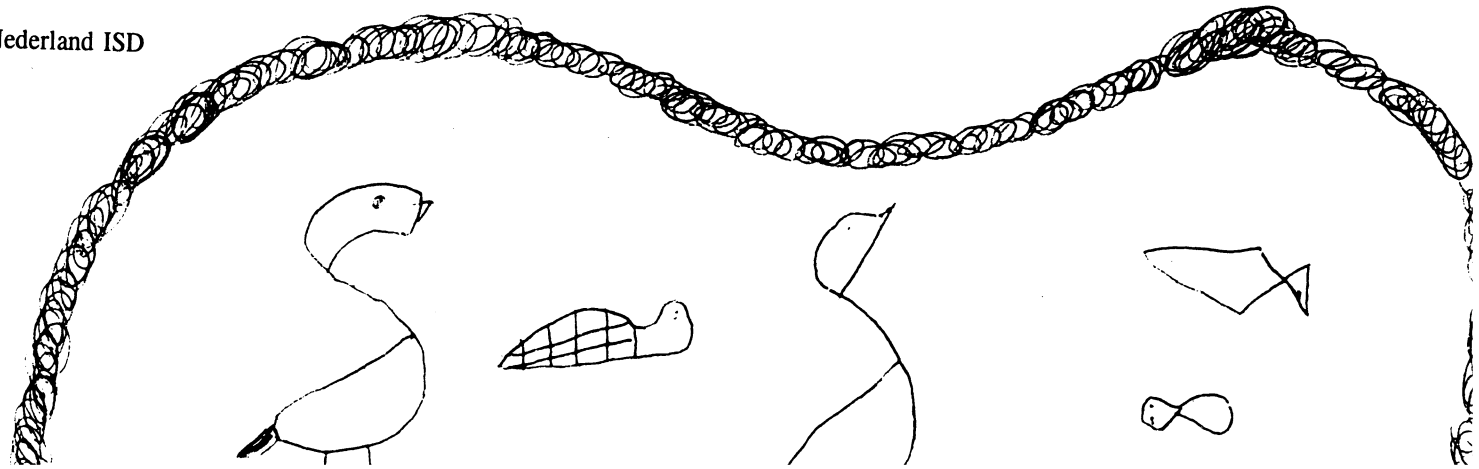
TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

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

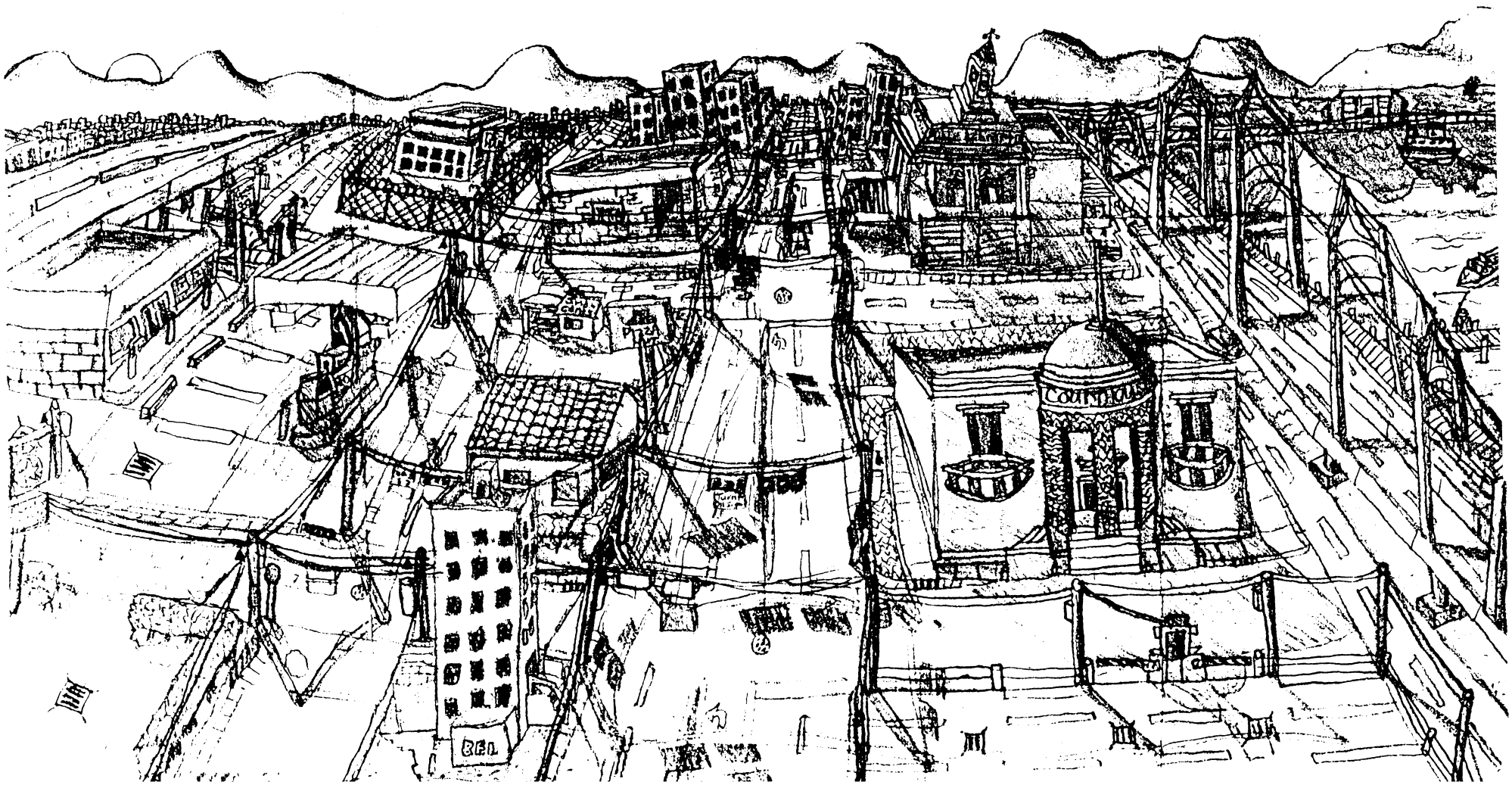
Update by FAX: An up-to-date ***Table of TAC Titles Affected*** is available by FAX upon request. Please specify the state agency and the TAC number(s) you wish to update. This service is free to ***Texas Register*** subscribers. Please have your subscription number ready when you make your request.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



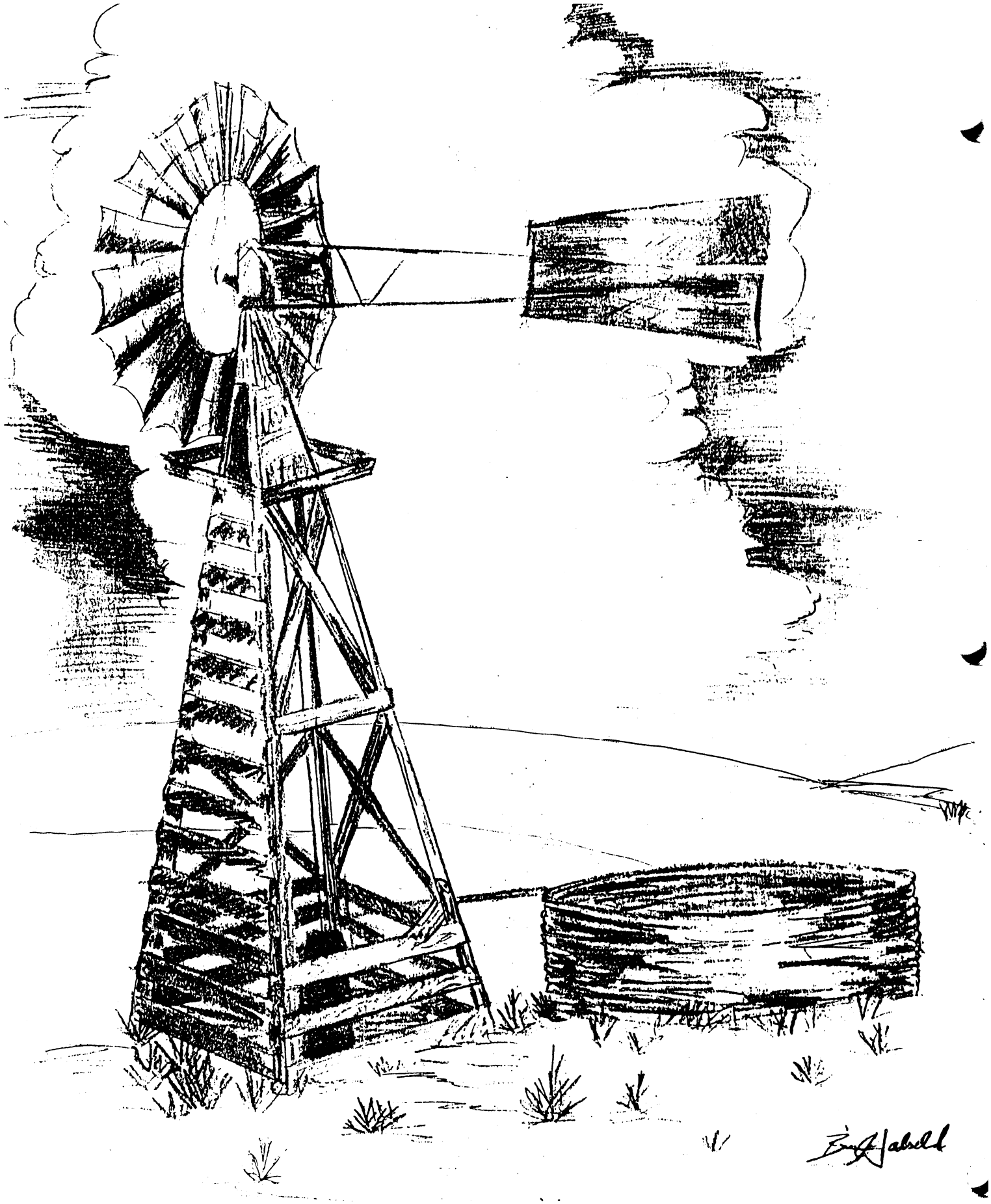
Name: Wendy Kernechel
Grade: 6
School: C.O. Wilson Middle School, Nederland ISD



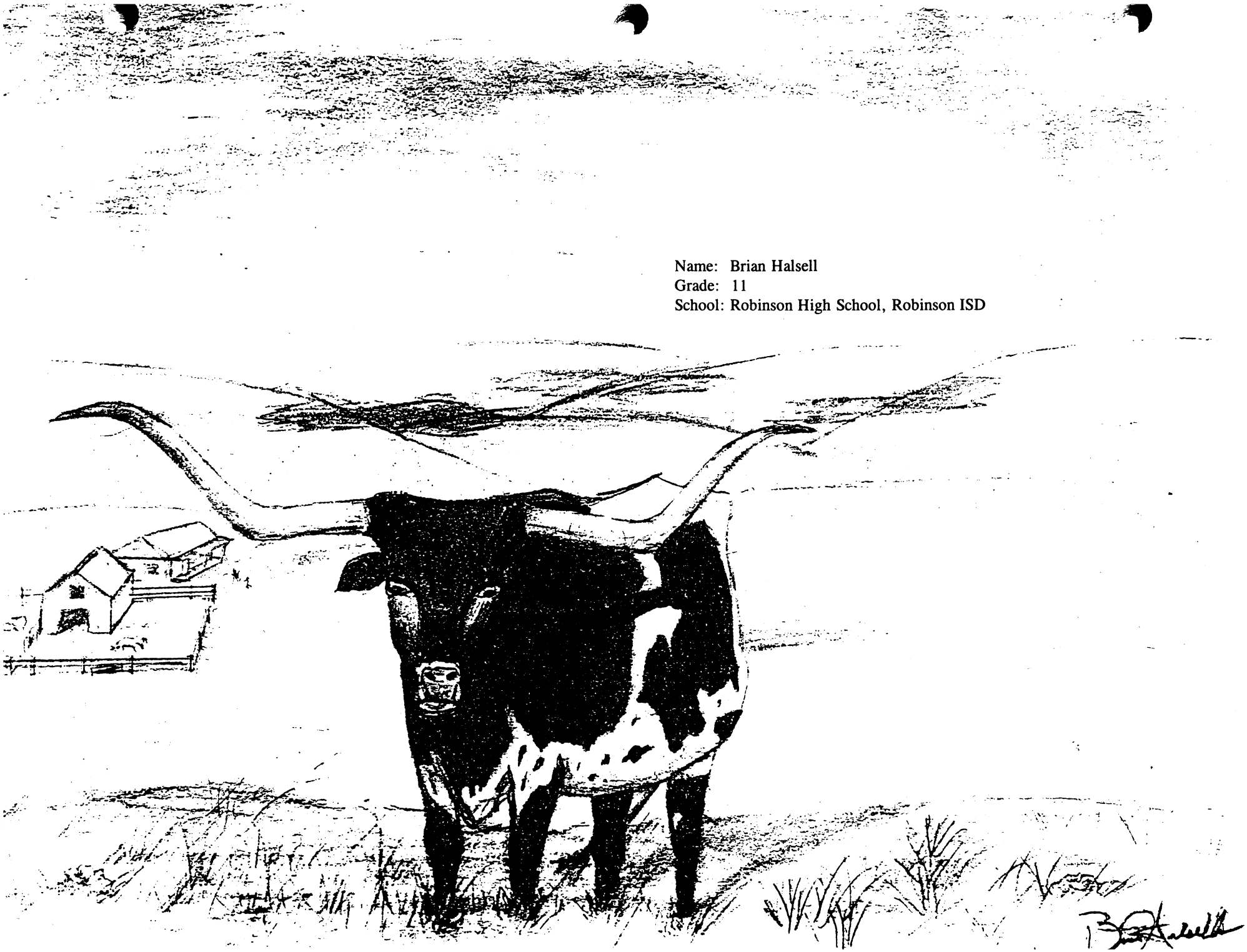
Name: Daniel Trevino
Grade: 9
School: C.E. King High School, Sheldon ISD



Name: April Bradish
Grade: 11
School: C.E. King High School, Sheldon ISD



Name: Brian Halsell
Grade: 11
School: Robinson High School, Robinson ISD



Name: Brian Halsell
Grade: 11
School: Robinson High School, Robinson ISD

Name: Nicole Prince
Grade: 4
School: Sheridan Elementary School, Cypress Fairbanks ISD

PROPOSED RULES

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

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

TITLE 16. ECONOMIC REGULATION
Part VI. Texas Motor Vehicle Commission
Chapter 101. Practice and Procedure

• 16 TAC §101.63

The Motor Vehicle Board of the Texas Department of Transportation proposes an amendment to §101.63, concerning filing of documents for consideration by board members. The amendments require an original and six copies of any document submitted for board consideration be filed with the Motor Vehicle Division 17 days prior to the meeting.

Brett Bray, Director, Motor Vehicle Division, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections. There will be no significant impact on local economies or overall employment as a result of enforcing or administering the sections.

Mr. Bray 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 section will be the more effective scheduling and decision making in contested cases by the Board.

Comments on the proposed rules (ten copies) may be submitted to Brett Bray, Director, Motor Vehicle Division, P.O. Box 2293, Austin, Texas 78768. The Texas Motor Vehicle Board will conduct a public hearing to consider the proposed rules at its meeting on March 7, 1996. The deadline for receipt of comments on the proposed new sections will be 5:00 p.m., on February 21, 1996.

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

§101.63. Filing of Documents for Consideration by Commission Members. Any document filed in a [by a party to a] contested case for consideration by the members of the commission in their decision of the case must be filed with the commission at least 17 [15] days prior to the date of the commission meeting at which the case is scheduled for consideration and decision. Any document not filed within such time will not be considered by the members of the commission at that meeting. No contested case will be scheduled for consideration and decision so as to preclude any party from filing any document required or permitted to be filed in a contested case by law or under the commission's rules, in compliance with the previous filing requirement. For good cause shown, the commission may waive or shorten the **time** requirement for [the] filing of a **document** [all documents] prior to any commission meeting. **Any document filed for consideration by the members of the commission must include six copies along with the original.**

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 February 1, 1996.

TRD-9601525 Brett Bray
Director, Motor Vehicle Division
Texas Motor Vehicle Commission

Proposed date of adoption: April 11, 1996

For further information, please call: (512) 505-5102

♦ ♦ ♦

TITLE 22. EXAMINING BOARDS
Part XIV. Texas Optometry Board
Chapter 275. Continuing Education

• 22 TAC §275.1, §275.2

The Texas Optometry Board proposes amendments to §275.1 and §275.2, to inform licensees and sponsors of continuing education of the procedures to be followed in submitting proof of hours to the Board Office, and to remove the requirement of optometric sponsorship for individual providers of continuing education.

Lois Ewald, executive director of the Texas Optometry Board, has determined that for the first five-year period the rules are in effect there will be no fiscal implications for state and local governments as a result of enforcing or administering the rules.

Ms. Ewald also has determined that for each of the first five years the rules are in effect the public benefit anticipated as a result of enforcing the rules is that licensees will be able to obtain ongoing education from a number of sources enabling each to maintain a license to practice optometry and enhance their practice techniques. 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 Lois Ewald, Executive Director, Texas Optometry Board, 333 Guadalupe Street, Suite 2-420, Austin, Texas 78701-3942. The deadline for furnishing comments is March 15, 1996.

The amendments are proposed under the Texas Optometry Act, Texas Civil Statutes, Article 4552, §2.14 and §4.01B, which provides the Texas Optometry Act with the authority to promulgate rules.

The Texas Optometry Board interprets §2.14 as authorizing it to adopt procedural and substantive rules for the regulation of the optometric profession. The Board interprets §4.01B as authorizing it to interpret the continuing education requirements established by the Act.

§275.1. General Requirements.

(a) The Act requires each optometrist licensed in this state to take 16 hours of continuing education per calendar year **with at least six hours in the diagnosis or treatment of ocular disease.** The calendar year is considered to begin January 1 and run through December 31.

(b) The board accepts for continuing education credit all courses sponsored by any board-accredited college or schools of optometry and such other programs or courses of other organizations

as are approved by the board upon recommendation from the Continuing Education Committee, appointed by the Board Chair. The Continuing Education Committee will consider, among other things in its discretion, the following criteria in approving courses:

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

(3) courses meeting evaluation standards and receiving approval of [the American Optometric Association Commission on Continuing Optometric Education or]the International Association of Boards of Examiners in Optometry will be granted automatic approval;

(4)-(6) (No change.)

[(7) courses sponsored by or given by a contact lens or optical manufacturer or by a commercial concern may be given approval provided that a synopsis of the courses and names and results of the lecturers be provided to the board for approval in sufficient time to receive approval 90 days in advance of the scheduled date of the courses;]

(7)[(8)] **courses sponsored by individual providers may be approved but must supply the committee with a synopsis of the lecture material to be presented, as well as resumes of the lecturers.** [Individual continuing education providers seeking approval of courses must be sponsored by an optometric group and must supply the committee with a synopsis of the lecture material to be presented, as well as a resume.]

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

(f) Written proof of attendance and completion of approved courses must be supplied by the licensed optometrist to the board in conjunction with the renewal application for an optometry license. If the licensed optometrist is practicing in Texas, the licensee should submit the original proof of attendance or the approved sponsors of continuing education may submit to the board written proof of attendance and completion of approved courses on behalf of the licensed optometrist. Information such as the following will be required: sponsoring organizations; location and dates; course names; instructors; names of attendee; number of education hours completed; and any other information deemed necessary by the board. **Proof of attendance supplied by the sponsor should contain at least one signature of the sponsor's designee.** [Forms must be properly signed by the education chairman or an education session assistant verifying attendance at the particular course. Applicable forms will be available from the Texas Optometry Board office.]

§275.2. Required Education.

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

(g) Diagnostic or therapeutic **are required** education courses. [Beginning January 1, 1993, a minimum of six hours of the mandatory sixteen hours will be required per calendar year in diagnostic or therapeutic continuing 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 January 31, 1996.

TRD-9601396 Lois Ewald
Executive Director
Texas Optometry Board

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 305-8500

♦ ♦ ♦

Chapter 277. Practice and Procedure

• 22 TAC §277.1

The Texas Optometry Board proposes an amendment to §277.1, to inform the licensees that a biomicroscopy examination described by the Texas Optometry Act, Texas Civil Statutes, Article 4552, §5.12, requires the use of a slit lamp.

Lois Ewald, executive director of the Texas Optometry Board, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state and local governments as a result of enforcing or administering the rule.

Ms. Ewald also has determined that for each of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to obtain quality eye examinations established as a basic competency requirement of optometrists. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Lois Ewald, Executive Director, Texas Optometry Board, 333 Guadalupe Street, Suite 2-420, Austin, Texas 78701-3942. The deadline for furnishing comments is March 15, 1996.

The amendment is proposed under Texas Civil Statutes, Article 4552, §2.14 and §5.12, which provide the Texas Optometry Board with the authority to promulgate rules.

The Texas Optometry Board interprets §2.14 as authorizing it to adopt procedural and substantive rules for the regulation of the optometric profession. The Board interprets §5.12 as authorizing it to determine that a biomicroscopy examination requires the use of a slit lamp.

§277.1. Complaint Procedures.

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

(c) Investigation-Enforcement Committee.

(1)-(3) (No cChange.)

(4) Basic Competence Violations.

(A) The omission of a single, essential finding shall be reason for an investigational hearing or informal conference. The following findings are essential in the initial examination of a patient:

(i) Biomicroscopy **slit lamp** examination (lids, cornea, sclera, etc.);

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

(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 January 31, 1996.

TRD-9601393 Lois Ewald
Executive Director
Texas Optometry Board

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 305-8500

♦ ♦ ♦

Chapter 279. Interpretations

• 22 TAC §279.5

The Texas Optometry Board proposes an amendment to §279.5, to inform the licensees that a biomicroscopy examination described by the Texas Optometry Act, Texas Civil Statutes, Article 4552, §5.12, requires the use a slit lamp.

Lois Ewald, executive director of the Texas Optometry Board, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state and local governments as a result of enforcing or administering the rule.

Ms. Ewald also has determined that for each of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to obtain quality eye examinations established as a basic competency requirement of optometrists. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Lois Ewald, Executive Director, Texas Optometry Board, 333 Guadalupe Street, Suite 2-420, Austin, Texas 78701-3942. The deadline for furnishing comments is March 15, 1996.

The amendment is proposed under Texas Civil Statutes, Article 4552, §2.14 and §5.12, which provide the Texas Optometry Board with the authority to promulgate rules.

The Texas Optometry Board interprets §2.14 as authorizing it to adopt procedural and substantive rules for the regulation of the optometric profession. The Board interprets §5.12 as authorizing it to determine that a biomicroscopy examination requires the use of a slit lamp.

§279.5. Board Interpretation Number Five.

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

(e) The optometrist or therapeutic optometrist shall, in the initial examination of the patient, make and record, if possible, the following findings of the condition of the patient, but not necessarily limited to the following findings:

(1) biomicroscopy **slit lamp** examination (lids, cornea, sclera, etc.)

(2)-(6) (No change.)

(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 January 31, 1996.

TRD-9601394 Lois Ewald
Executive Director
Texas Optometry Board

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 305-8500

♦ ♦ ♦

• 22 TAC §279.7

The Texas Optometry Board proposes an amendment to §279.7, to inform the licensees that a biomicroscopy examination described by the Texas Optometry Act, Texas Civil Statutes, Article 4552, §5.12, requires the use of a slit lamp.

Lois Ewald, executive director of the Texas Optometry Board has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state and local governments as a result of enforcing or administering the rule.

Ms. Ewald also has determined that for each of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to obtain quality eye examinations established as a basic competency requirement of optometrists. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Lois Ewald, Executive Director, Texas Optometry Board, 333 Guadalupe Street, Suite 2-420, Austin, Texas 78701-3942. The deadline for furnishing comments is March 15, 1996.

The amendment is proposed under Texas Civil Statutes, Article 4552, §2.14 and §5.12, which provide the Texas Optometry Board with the authority to promulgate rules.

The Texas Optometry Board interprets §2.14 as authorizing it to adopt procedural and substantive rules for the regulation of the optometric profession. The Board interprets §5.12 as authorizing it to determine that a biomicroscopy examination requires the use of a slit lamp.

§279.7. Board Interpretation Number Seven.

(a) In order to insure an adequate examination of a patient for whom an optometrist or therapeutic optometrist prescribes contact lenses, in the initial examination of the patient, the optometrist or therapeutic optometrist shall make and record, if possible, the following findings of the condition of the patient:

(1)-(2) (No change)

(3) biomicroscopy **slit lamp** examination (lids, cornea, sclera, etc.);

(4)-(10) (No change.)

(b)-(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 January 31, 1996.

TRD-9601395 Lois Ewald
Executive Director
Texas Optometry Board

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 305-8500

♦ ♦ ♦

Part XX. Texas Board of Private Investigators and Private Security Agencies

Chapter 435. Training Programs

• 22 TAC §435.3

The Texas Board of Private Investigators and Private Security Agencies proposes an amendment to §435.3, concerning Certificate of Completion. This amendment clearly defines the requirements for certificates of completion for Level One, Two, and Three training courses which are required for various members of the private security and private investigation industry. The Board has determined that this amendment is necessary in order to ensure that sufficient training records are kept on all private security and private investigation registrants.

Clema D. Sanders, 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. Sanders 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 all registrants in the private security and private investigation industry have received adequate training. There will be minimal 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 Clema D. Sanders, Texas Board of Private Investigators and Private Security Agencies, P.O. Box 13509, Austin, Texas 78711.

The amendment is proposed under Texas Civil Statutes, Article 4413(29bb), §11(a)(3), which provide the Texas Board of Private Investigators and Private Security Agencies with the authority "to promulgate all rules and regulations necessary in carrying out the provisions of this Act."

The following is the statute that is affected by this amendment: Texas Civil Statutes, Article 4413(29bb).

§435.3. Certificate of Completion.

(a) There shall be **four** [two] separate certificates of completion[, one] for the [basic firearm] training course, **one for each level of training,** and one for the firearm requalification course.

(b) **All** [Both] certificates of completion shall contain the:

(1)-(5) (No change.)

(c) The basic course certificate shall contain both the dates of final completion of the entire course and the specific date of firearm qualification **on Level Three certificates.**

(d) The **Level One** course certificate shall contain the words "has successfully completed the **Level One** [basic security officer] training course approved by the Texas Board of Private Investigators and Private Security Agencies".

(e) The Level Two course certificate shall contain the words "has successfully completed the Level Two training course approved by the Texas Board of Private Investigators and Private Security Agencies".

(f) The Level Three course certificate shall contain the words "has successfully completed the Level Three training course approved by the Texas Board of Private Investigators and Private Security Agencies".

(g) [(e)] The firearm requalification certificate shall contain the words "has successfully completed the firearms requalification training course approved by the Texas Board of Private Investigators and Private Security Agencies".

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 January 30, 1996.

TRD-9601381 Clema D. Sanders
Executive Director
Texas Board of Private Investigators and Private Security Agencies

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 463-5545

♦ ♦ ♦

Chapter 447. Advertisements

• 22 TAC §447.1

The Texas Board of Private Investigators and Private Security Agencies proposes an amendment to §447.1, concerning Address Shown in Advertisements. This amendment will allow licensees the option of using their mailing address in advertisements. The Board has determined that this amendment is necessary because many licensees use their homes as their principal place of business. Requiring these licensees to use their home address in advertisements could place them and their families in jeopardy.

Clema D. Sanders has determined that for the first five-year period the section is in effect there will be no fiscal implications for state and local government as a result of enforcing or administering the section.

Ms. Sanders 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 help ensure the safety of licensees and their families while still providing an address where consumers can contact them. 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 Clema D. Sanders, Texas Board of Private Investigators and Private Security Agencies, P.O. Box 13509, Austin, Texas 78711.

The amendment is proposed under Texas Government Code, Article 4413(29bb), §11(a)(3), which provides the Texas Board of Private Investigators and Private Security Agencies with the authority "to promulgate all rules and regulations necessary in carrying out the provisions of this Act."

The following is the statute that is affected by this amendment: Texas Civil Statutes, Article 4413(29bb).

§447.1. Address Shown in Advertisements. The address shown in advertisements shall be the principal place of business, **mailing address** or a licensee's branch office.

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

Issued in Austin, Texas, on January 30, 1996.

TRD-9601380 Clema D. Sanders
Executive Director
Texas Board of Private Investigators and Private Security Agencies

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 463-5545

♦ ♦ ♦

Part XXII. Texas State Board of Public Accountancy

Chapter 501. Professional Conduct

Client Records

• 22 TAC §501.32

The Texas State Board of Public Accountancy proposes an amendment to §501.32, concerning Records.

The proposed amendment recognizes that computer format information may be client records.

William Treacy, 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. Treacy 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 clear understanding that computer records may be client records. 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 J. Randel (Jerry) Hill, General Counsel, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701-3900.

The amendment is proposed under Texas Civil Statutes, Article 41a-1, §6, which provide the Texas State Board of Public Accountancy with the authority to make such rules as may be necessary or advisable to carry in effect the purposes of the law.

The amendment implements Texas Civil Statutes, Article 41a-1, §6.

§501.32. Records.

(a) Upon request, regardless of the status of the client or former client's account, a certificate or registration holder shall provide to the client or former client any accounting or other records, **whether in the form of hard copy or computer readable format,** belonging to, or obtained from or on behalf of, the client **that** [which] the certificate or registration holder removed from the client's premises or received on behalf of the client. **The** [, but the] certificate or registration holder may make and retain copies of such **records** [documents] when they form the basis **of** [for] work done by him. For a reasonable charge, a certificate or registration holder shall furnish to his client or former client, upon request made within a reasonable time after original issuance of the document in question:

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

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

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

Issued in Austin, Texas, on January 18, 1996.

TRD-9601506 William Treacy
Executive Director
Texas State Board of Public Accountancy

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 505-5566

♦ ♦ ♦

• 22 TAC §501.33

The Texas State Board of Public Accountancy proposes an amendment to §501.33, concerning Working Papers.

The proposed amendment recognizes that computer format information may also be working papers.

William Treacy, 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. Treacy 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 clear understanding that computer records may be client records. 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 J. Randel (Jerry) Hill, General Counsel, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701-3900.

The amendment is proposed under Texas Civil Statutes, Article 41a-1, §6, which provide the Texas State Board of Public Accountancy with the authority to make such rules as may be necessary or advisable to carry in effect the purposes of the law.

The amendment implements Texas Civil Statutes, Article 41a-1, §6.

§501.33. Working Papers.

(a) (No change.)

(b) Working papers, **whether in the form of hard copy or computer readable format,** are those papers developed by the certificate or registration holder incident to the performance of his/her engagement which do not result in changes to the client's records or are not in themselves part of the records ordinarily maintained by the client.

(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 January 18, 1996.

TRD-9601505 William Treacy
Executive Director
Texas State Board of Public Accountancy

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 505-5566

♦ ♦ ♦

Other Responsibilities and Practices

• 22 TAC §501.41

The Texas State Board of Public Accountancy proposes an amendment to §501.41, concerning Discreditable Acts.

The proposed amendment forbids a certificate holder in industry practice from disclosing information to a new employer which a previous employer has not authorized the employee to disclose.

William Treacy, 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. Treacy 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 clearer description of an act considered discreditable by 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 section as proposed.

Comments on the proposal may be submitted to J. Randel (Jerry) Hill, General Counsel, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701-3900.

The amendment is proposed under Texas Civil Statutes, Article 41a-1, §6, which provide the Texas State Board of Public Accountancy with the authority to make such rules as may be necessary or advisable to carry in effect the purposes of the law.

The amendment implements Texas Civil Statutes, Article 41a-1, §6.

§501.41. Discreditable Acts.

(1)-(15) (No change.)

(16) public allegations of a lack of mental capacity of a client which can not be supported in fact; [and]

(17) causing a breach in the security of the CPA examination; **and**[.]

(18) voluntarily disclosing information communicated to the certificate holder by an employer, past or present, or through the certificate holder's employment in connection with accounting services rendered to the employer, except:

(A) by permission of the employer;

(B) pursuant to the Government Code, Chapter 554 (commonly referred to as the "Whistle Blowers Act");

(C) in a court proceeding;

(D) in an investigation or proceeding by the board under the Public Accountancy Act; or

(E) in an ethical investigation conducted by a professional organization of certified public accountants.

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 January 18, 1996.

TRD-9601504 William Treacy
Executive Director
Texas State Board of Public Accountancy

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 505-5566

♦ ♦ ♦

Chapter 511. Certification as CPA

Experience Requirements

• 22 TAC §511.124

The Texas State Board of Public Accountancy proposes an amendment to §511.124, concerning Acceptable Supervision.

The proposed amendment eases one current restriction and allows supervision from someone not physically located in the office of the applicant.

William Treacy, 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. Treacy 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 easing of some current restrictions and allowing for methods of supervision other than from someone physically located in the office of the applicant. 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 J. Randel (Jerry) Hill, General Counsel, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701-3900.

The amendment is proposed under Texas Civil Statutes, Article 41a-1, §6, which provide the Texas State Board of Public Accountancy with the authority to make such rules as may be necessary or advisable to carry in effect the purposes of the law; and §12, which requires applicants to satisfy experience requirements.

The amendment implements Texas Civil Statutes, Article 41a-1, §6 and §12.

§511.124. Acceptable Supervision.

(a) Acceptable supervision must be performed by an individual holding an active license or permit in this state or another state.

(1) Supervision is provided whenever the person being supervised reports to, is instructed by, is reviewed by, and is evaluated directly **by the supervisor**. The supervisor in this capacity may [not be an outside auditor, but may] be in an intermediate level of supervision above the applicant **or may be a CPA in any registered accounting firm if the following conditions are met:**

(A) the CPA firm is engaged to provide supervision, review, and evaluation of work; and

(B) the supervision, review, and evaluation of work is performed on a routine and recurring basis to permit the CPA firm or other supervisor to provide documentation of work experience.

[(2) Supervision is not diminished by short absences from the work site by the licensee/supervisor. For example, absences for meal time, coffee breaks, continuing education programs, vacations, and short-term illness are acceptable.]

(2)[(3)] Telecommunications equipment and computers may be used to **facilitate** [enhance] supervision[; however, these devices may not be used in lieu of supervision on a full-time basis.] The board requires detailed documentation if **such** devices are used to **facilitate** [enhance] supervision.

(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 January 18, 1996.

TRD-9601503 William Treacy
Executive Director
Texas State Board of Public Accountancy

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 505-5566

◆ ◆ ◆

Chapter 523. Continuing Professional Education

Continuing Professional Education Standards

• 22 TAC §523.32

The Texas State Board of Public Accountancy proposes an amendment to §523.32, concerning Ethics Course.

The proposed amendment states what the board expects of ethics courses and ethics instructors.

William Treacy, 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. Treacy 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 more focused and pertinent ethics courses for CPAs. 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 J. Randel (Jerry) Hill, General Counsel, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701-3900.

The amendment is proposed under Texas Civil Statutes, Article 41a-1, §6, which provide the Texas State Board of Public Accountancy with the authority to make such rules as may be necessary or advisable to carry in effect the purposes of the law; and §15A, which requires licensees to complete continuing professional education.

The amendment implements Texas Civil Statutes, Article 41a-1, §6 and §15A.

§523.32. Ethics Course.

(a) **General. Each** [Effective January 1, 1995, each] certificate or registration holder, unless granted retired or permanent disability status or other exemption, is required every three years to successfully complete a four-hour course of comprehensive study on the Rules of Professional Conduct of the board, offered through a board-registered provider of continuing professional education. [Before a provider of continuing professional education can offer this course, the contents of the course must be submitted to the continuing professional education committee of the board for prior approval. The court must be claimed as a non-technical course when reporting continuing professional education hours.]

(b) Course content and board approval. Before a provider of continuing professional education can offer this course, the content of the course must be submitted to the continuing professional education committee of the board for prior approval. Course content shall be approved only after demonstrating, either in a live instructor format or in a self-study format, that the course contains the underlying intent established in the following criteria.

(1) The course shall encourage the certificate or registration holder to educate himself or herself in the ethics of the profession, specifically the Rules of Professional Conduct of the board.

(2) The course shall convey the intent of the board's Rules of Professional Conduct in the certificate or registration holder's performance of professional services, and not mere technical compliance. A certificate or registration holder is expected to apply ethical judgment in interpreting the rules and determining the public interest. The public interest should be placed ahead of self interest, even if it means a loss of job or client.

(3) The primary objectives of a continuing professional education ethics course shall be to:

(A) emphasize the ethical standards of the profession, as described in this section; and

(B) review and discuss the board's Rules of Professional Conduct and their implications for certificate or registration holders in a variety of practices, including:

(i) a certificate or registration holder engaged in the client practice of public accountancy who performs attest and non-attest services, as defined in §501.2 of this title (relating to Definitions);

(ii) a certificate or registration holder employed in industry who provides internal accounting and auditing services; and

(iii) a certificate or registration holder working in education or in government accounting or auditing.

(4) An ethics course shall meet the requirements of the board's continuing professional education rules as described in Chapter 523 of this chapter (relating to Continuing Professional Education). Effective June 1, 1996, prior to offering and scheduling an ethics course, a sponsor shall:

(A) insure that the instructor has completed the board's ethics training program at least every three years or as required by the board;

(B) insure that the instructor's professional license has never been suspended or revoked for violation of the Rules of Professional Conduct; and

(C) provide its advertising materials to the board's CPE Committee for approval. Such advertisements shall:

(i) avoid commercial exploitation;

(ii) identify the primary focus of the course; and

(iii) be professionally presented and consistent with the intent of §501.43 of this title (relating to Advertising).

(c) Evaluation. At the conclusion of each course, the sponsor shall administer testing procedures to determine whether the program participants have obtained a basic understanding of the course content, including the need for a high level of ethical standards in the accounting profession.

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 January 18, 1996.

TRD-9601493 William Treacy
Executive Director
Texas State Board of Public Accountancy

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 505-5566

♦ ♦ ♦

Chapter 527. Quality Review

• 22 TAC §527.9

The Texas State Board of Public Accountancy proposes new §527.9, concerning Procedures for a Sponsoring Organization.

The proposed section states what the board expects of its quality reviews and quality reviewers.

William Treacy, 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. Treacy 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 more focused quality reviews which should result in improved performance by CPAs. 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 J. Randel (Jerry) Hill, General Counsel, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701-3900.

The new section is proposed under Texas Civil Statutes, Article 41a-1, §6, which provide the Texas State Board of Public Accountancy with the authority to make such rules as may be necessary or advisable to carry in effect the purposes of the law; and §15B, which requires licensees to undergo quality reviews of their work and work product.

The new section implements Texas Civil Statutes, Article 41a-1, §15B.

§527.9. Procedures for a Sponsoring Organization.

(a) To qualify as a sponsoring organization, an entity must submit a quality review administration plan to the board for review and approval by the Quality Review Oversight Board (QROB). The plan of administration must:

(1) establish a quality review report committee (QRRC) and subcommittees as needed, and provide professional staff as needed for the operation of the quality review program;

(2) establish a program to communicate to firms participating in the quality review program the latest developments in quality review standards and the most common findings in the quality reviews conducted by the sponsoring organization;

(3) establish procedures for resolving any disagreement which may arise out of the performance of a quality review;

(4) establish procedures to resolve matters which may lead to the dismissal of a firm from the quality review program, and conduct hearings pursuant to those procedures;

(5) establish procedures to evaluate and document the performance of each reviewer, and conduct hearings which may lead to the disqualification of a reviewer who does not meet the AICPA standards;

(6) require the maintenance of records of quality reviews conducted under the program in accordance with the records retention rules of the AICPA; and

(7) provide for periodic reports to the QROB on the results of the quality review program.

(b) A sponsoring organization is subject to review by the board and the QROB.

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 January 18, 1996.

TRD-9601502 William Treacy
Executive Director
Texas State Board of Public Accountancy

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 505-5566

♦ ♦ ♦

• 22 TAC §527.10

The Texas State Board of Public Accountancy proposes new §527.10, concerning Quality Review Report Committees.

The proposed new rule creates a committee and a mechanism for accepting quality review reports.

William Treacy, 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. Treacy 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 closer supervision and review of quality review reports. 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 J. Randel (Jerry) Hill, General Counsel, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701-3900.

The new section is proposed under Texas Civil Statutes, Article 41a-1, §6, which provide the Texas State Board of Public Accountancy with the authority to make such rules as may be necessary or advisable to carry in effect the purposes of the law; and §15B, which requires licensees to undergo quality reviews of their work and work product.

The new section implements Texas Civil Statutes, Article 41a-1, §6 and §15B.

§527.10. Quality Review Report Committee. A quality review report committee (QRRC) is comprised of CPAs practicing public accountancy and formed by a sponsoring organization for the purpose of accepting quality review reports submitted by firms on quality review engagements.

(1) Each member of a QRRC must be active in the practice of public accountancy at a supervisory level in the accounting or auditing function while serving on the committee. The member's firm must be enrolled in an approved practice monitoring program and have received an unqualified report on its most recent quality review. A majority of the committee members must satisfy the qualifications required of on-site peer review team captains as established and reported in the AICPA Standards for Performing and Reporting on Peer Reviews, paragraph 76.

(2) Each member of the QRRC must be approved for appointment by the governing body of the sponsoring organization.

(3) In determining the size of the QRRC, the requirement for broad industry experience, and the likelihood of some members needing to recuse themselves during the consideration of some reviews a result of the members' close association to the firm or having performed the review, shall be considered.

(4) No more than one QRRC member may be from the same firm.

(5) The QRRC members' terms shall be staggered to provide for continuity and should not exceed three years, subject to annual review, except for the governing body's appointment of the committee's chair or for filling a vacancy on the committee.

(6) A QRRC member may not concurrently serve as:

(A) a member of his state's board of accountancy; or

(B) a member of his state's CPA society's ethics committee.

(7) A QRRC member may not participate in any discussion or have any vote with respect to a reviewed firm when the committee member lacks independence as defined in §501.11 of the board's Rules of Professional Conduct of this title (relating to Independence) or has a conflict of interest. Examples of conflicts of interest include, but are not limited to:

(A) the member's firm has performed the most recent quality review of the reviewed firm's accounting and auditing practice;

(B) the member served on the review team which performed the current or the immediately-preceding review of the enrolled firm;

(C) the member serves on the state board of accountancy or state society ethics committee of any state in which any office of the enrolled firm is located; and

(D) the member believes he cannot be impartial or objective.

(8) Each QRRC member must comply with the confidentiality requirements of §15B(c) of the Public Accountancy Act of 1991. The sponsoring organization may annually require its QRRC members to sign a statement acknowledging their appointments and the responsibilities and obligations of their appointments.

(9) A QRRC decision to accept a report must be made by not fewer than three members who satisfy the above criteria.

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 January 18, 1996.

TRD-9601501 William Treacy
Executive Director
Texas State Board of Public Accountancy

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 505-5566

♦ ♦ ♦

• 22 TAC §527.11

The Texas State Board of Public Accountancy proposes new §527.11, concerning Responsibilities of Quality Review Report Committees.

The proposed new section explains the responsibilities of a new committee.

William Treacy, 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. Treacy 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 closer supervision and review of quality review reports. 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 J. Randel (Jerry) Hill, General Counsel, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701-3900.

The new section is proposed under Texas Civil Statutes, Article 41a-1, §6, which provide the Texas State Board of Public Accountancy with the authority to make such rules as may be necessary or advisable to carry in effect the purposes of the law, and §15B.

The new section implements Texas Civil Statutes, Article 41a-1, §6 and §15B.

§527.11. Responsibilities of Quality Review Report Committee.

(a) The QRRC shall establish and administer the sponsoring organization's quality review program in accordance with the AICPA Standards for Performing and Reporting on Peer Reviews.

(b) The QRRC shall, when necessary in reviewing reports on quality reviews, prescribe actions designed to assure correction of the deficiencies in the reviewed firm's system of quality control policies and procedures.

(c) The QRRC shall monitor the prescribed remedial and corrective actions to determine compliance by the reviewed firm.

(d) The QRRC shall resolve instances in which there is a lack of cooperation and disagreement between the committee and review teams or reviewed firms in accordance with the sponsoring organization's adjudication process.

(e) The QRRC shall act upon requests from firms for changes in the timetable of their reviews.

(f) The QRRC shall appoint members to subcommittees and task forces as necessary to carry out its functions.

(g) The QRRC shall establish and perform procedures for insuring that reviews are performed and reported on in accordance with the AICPA Standards for Performing and Reporting on Peer Reviews.

(h) The QRRC shall establish a report acceptance process which facilitates the exchange of viewpoints among committee members.

(i) The QRRC shall communicate to the governing body of the sponsoring organization on a recurring basis:

(1) problems experienced by the enrolled firms in their systems of quality control as noted in the quality reviews conducted by the sponsoring organization;

(2) problems experienced in the implementation of the quality review program; and

(3) a summary of the historical results of the quality review 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.

Issued in Austin, Texas, on January 18, 1996.

TRD-9601500 William Treacy
Executive Director
Texas State Board of Public Accountancy

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 505-5566

♦ ♦ ♦

TITLE 25. HEALTH SERVICES

Part I. Texas Department of Health

Chapter 229. Food and Drug

Administrative or Civil Penalties

• 25 TAC §229.261

The Texas Department of Health (department) proposes an amendment to §229.261, concerning assessment of administrative penalties authorized under Texas Health and Safety Code, Chapter 431 (Texas Food, Drug, and Cosmetic Act), Chapter 432 (Texas Food, Drug, Device, and Cosmetic Salvage Act), Chapter 437 (Regulation of Food Service Establishments, Retail Food Stores, Mobile Food Units, and Roadside Food Vendors), Chapter 466 (Regulation of Narcotic Drug Treatment Programs), Chapter 145 (Tanning Facility Regulation Act), and Chapter 146 (Tattoo Studio Act). The amendment will adjust the penalty ranges for each severity level and will include new examples of violations for each level. The amendments will aiso permit adjustments to penalties based upon successful implementation of an effective Hazard Analysis and Critical Control Point Plan or successful completion of an accredited Food Protection Management Course.

Robert D. Sowards, Jr., Director, Manufactured Foods Division, has determined that for the first five-year period the proposed rule is in effect there would be minimal fiscal implications as a result of enforcing or administering the section as proposed. The effect on state government will be an increase in revenue occurring only as a result of enforced administrative penalties. There will be no fiscal implications to local governments.

Mr. Sowards, Jr., has also determined that for each year of the first five years the section as proposed is in effect, the public benefit will be that public injury and illness will be reduced through more effective penalties and strategies to eliminate adulterated and misbranded foods, drugs, medical devices, and cosmetics from the market. There is no anticipated economic cost to small businesses or persons who may be required to comply with the section, unless they are in violation of these rules. There will be no effect on local employment.

Comments on the proposal may be submitted to Robert D. Sowards, Jr., Director, Manufactured Foods Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 719-0243. Comments will be accepted for 30 days from the date of publication of this proposal.

The amendment is proposed under Texas Codes Annotated, the Health and Safety Code §§431.241, 432.011, 437.056, 466.004, 145.011, 146.015, 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, Chapters 431, 432, 437, 466, 145, and 146.

§229.261. Assessment of Administrative or Civil Penalties.

(a) Proposals for assessment of administrative or civil penalties. The department shall propose to assess administrative or civil penalties in accordance with the requirements **of the Texas Health and Safety Code, Chapters 431, 432, 437, 466, 145, and 146** [of the Texas Food, Drug and Cosmetic Act, Texas Civil Statutes, Article 4476-5; the Texas Food, Drug, Device, and Cosmetic Salvage Act, Texas Civil Statutes, Article 4476-5e; and the Synthetic Narcotic Drug Act, Texas Civil Statutes, Article 4476-11].

(b) Assessment of administrative or civil penalties and conduct of hearings. The department shall assess administrative or civil penalties and conduct hearings pursuant to those administrative penalties in accordance with the appropriate statute in subsection (a) of this section and rules adopted under it; the Administrative Procedure and Texas Register Act, Texas Civil Statutes, Article 6252-13a; and the department's formal hearing procedures in **§§1.21-1.34**[§§1.21-1.33] of this title (relating to Formal Hearing Procedures).

(c) (No change.)

(d) Severity levels.

(1) Violations. The violation shall be categorized by one of the following severity levels.

(A) Severity Level I covers violations that are most significant and have a **significant** [direct] negative impact on the public health and safety including, but not limited to, adulteration, misbranding, or false advertising that results in fraud.

(B)-(E) (No change.)

(2) (No change.)

(3) Examples of severity levels. Several examples are set out in subsection **(h)** [(g)] of this section.

(e) Levels of penalties. **Except as provided for in subsection (f) of this section relating to tattoo studios, the** [The] department will impose different levels of penalties for different severity level violations as follows:

(1) Level I-**$15,000-25,000** [10,000];

(2) Level II-**10,000-15,000** [7,500];

(3) Level III-**5,000-10,000** [5,000];

(4) Level IV-**2,500-5,000**[2,500]; and

(5) Level V-1,000-2,500 [1,250].

(f) Levels of penalties for tattoo studios. The department will impose different levels of penalties for different severity level violations for tattoo studios as follows:

(1) Level I-$4,000-5,000;

(2) Level II-3,000-4,000;

(3) Level III-2,000-3,000;

(4) Level IV-1,000-2,000; and

(5) Level V-250-1,000.

(g)[(f)] Adjustments to penalties. The department may make adjustments to the penalties listed in subsection (e) or **(f)** of this section for any one of the following factors.

(1) Previous violations. The department may consider previous violations. The penalty may be reduced or increased **within the specified range of each severity level** [by as much as 50%] for past performance. Past performance involves the consideration of the following factors: how similar the previous violation was; how recent the previous violation was; the number of previous violations; and the violator's response to previous violation(s) in regard to correction of the problem.

(2) Demonstrated good faith. The department may consider demonstrated good faith. The [base] penalty may be reduced **within the specified range of each severity level** [as much as 50%] if good faith efforts to correct a violation have been, or are being made. Good faith effort will have to be determined on a case-by-case basis and be fully documented.

(3) Hazard to the health and safety of the public. The department may consider the hazard to the health and safety of the public. The [base] penalty may be increased **within the specified range of each severity level** [by as much as 50%] when a direct hazard to the health and safety of the public is involved. It shall take into account, but need not be limited to, the following factors: whether any disease or injuries have occurred from the violation; whether any existing conditions contribute to a situation that could expose humans to a health hazard; whether a hazard to various segments of the population such as children, surgical patients, and the elderly exists; whether the consequences would be of an immediate or long-range hazard.

(4) **Implementation of a Hazard Analysis Critical Control Point (HACCP) Plan.** [Adjustments to the values in paragraphs (1)-(3) of this subsection may not exceed the limitations in the appropriate statutes described in subsection (a) of this section.]

(A) The department may consider implementation of a Hazard Analysis and Critical Control Point (HACCP) plan. The penalty may be reduced within the specified range of each severity level if the firm implements a HACCP plan which is effective in correcting the violations. The HACCP plan is a written document based on the principles of HACCP, a food safety control system, which delineates the procedures to be followed to assure the control of a specific process or procedure. The HACCP plan shall include:

(i) **an analysis of biological, chemical, or physical hazards that may cause a food to be unsafe for consumption and a list of steps in the process where significant hazards occur with descriptions of the preventive measures;**

(ii) **identification of the critical control points (CCPs) in the process at which control can be applied and a food safety hazard can be prevented, eliminated, or reduced to acceptable levels;**

(iii) **critical limits or specifications which must be met for each preventive measure associated with each identified CCP;**

(iv) **CCP monitoring requirements and procedures for using the results to adjust the process and maintain control;**

(v) **corrective actions to be taken when monitoring indicates there is a deviation from established critical limit;**

(vi) **effective record-keeping procedures that document the HACCP system; and**

(vii) **procedures for verification that the HACCP system is working correctly.**

(B) Correction of violations through implementation of the HACCP plan will be determined on a case-by-case basis. The HACCP plan and all required HACCP records shall be provided for review and copying upon request of an authorized agent of the Commissioner. All required HACCP records shall be maintained at the plant for two years or longer if the product remains in distribution.

(5) Requirement of food manager training. The department may consider requirement of attendance and successful completion of a Food Protection Manager Certification course accredited by the department. The penalty may be reduced within the range specified for each severity level upon completion of such course by all managers of a food service or retail food store operation.

(6) Adjustments. Adjustments to the values in paragraphs (1)-(5) of this subsection may not exceed the limitations in the appropriate statutes described in subsection (a) of this section.

(h)[(g)] Examples of severity levels. The following examples of severity levels are neither exhaustive nor controlling. They reflect only the seriousness of the violation and not the history of previous violations, the hazard to the health and safety of the public, or the demonstrated good faith.

(1) Severity I-most significant violations.

(A) **A foodborne disease outbreak occurs at a food establishment. Laboratory tests confirm a bacterial agent frequently associated with poor sanitary conditions. Investigation reveals the firm continued operating during a major sewage back-up in the food processing area.** [A bakery manufacturers a food product that results in a foodborne illness requiring hospitalization for a large number of people. Laboratory results confirm that the product manufactured by the bakery caused the illness. An inspection of the bakery reveals poor sanitary practices].

(B) **A foodborne disease outbreak occurs at a food establishment. Epidemiologic analysis identifies the food as the source of the illness. Follow-up investigation at the establishment reveals food temperature violations that posed a critical health hazard.** [A firm markets a frozen orange juice concentrate. Laboratory results revealed that the product contains only a small amount of orange juice. Several million dollars worth of the product have been produced and sold.]

(C) (No change.)

(D) **A firm manufactures an unapproved drug/medical device that is associated with an injury.** [A manu-

facturer of drugs introduces into commerce a drug product which falsely claims that it is a cure for cancer.]

(E) A firm distributes an unapproved drug/medical device that is associated with an injury, i.e. "cancer cure", "AIDS cure."

(F) A narcotic treatment program's failure to conform to federal and state regulations is associated with the death or permanent injury of a patient.

(G) A tattoo studio does not have an approved sterilizer and has complaints of infection associated with the application of tattoos.

(H) A tanning facility replaces ultraviolet lamps in its tanning device with higher intensity, non-equivalent lamps or installs a timer for its tanning device which causes the device to exceed the maximum allowable exposure time determined by the manufacturer. Either of these changes result in second or third degree burns to a user of a device, requiring the user to seek medical attention.

(I) A tanning facility fails to provide protective eyewear to a user of its tanning device which results in the user suffering corneal burns or other injuries to the eye.

(2) Severity II-very significant violations.

(A) **Inspection** [An inspection] of a [large volume] chocolate candy manufacturer reveals very poor sanitary practices. Laboratory results reveal the presence of pathogenic microorganisms in the candy. No cases of illness that could be traced to the candy have yet been reported.

(B) Inspection of a food establishment reveals food temperature violations posing a potential health hazard. Laboratory tests confirm the food is contaminated with pathogenic microorganisms. No reported foodborne outbreaks have been reported to have occurred at the facility [A wholesale distributor of drugs holds for sale or sells a counterfeit drug].

(C) Inspection of a food establishment reveals the presence of plumbing violations possibly causing contamination of the facility's water supply. Laboratory analysis indicates the water supply is contaminated [A manufacturer of drugs introduces into commerce a drug which has not been shown to be safe and effective and which has not received new drug approval].

(D) A grain dealer has distributed tons of corn for human consumption. Laboratory tests confirm the corn contains aflatoxin exceeding the tolerance.

(E) A firm is distributing counterfeit drugs/medical devices.

(F) A firm is manufacturing a potentially harmful drug/medical device.

(G) A firm diverts dangerous drugs and/or controlled substances outside legal distribution channels or fails to take adequate steps to prevent illegal distribution.

(H) A narcotic treatment program admits a patient or patients into maintenance treatment who does not meet the minimum standards for admission.

(I) Evidence is discovered that a tattoo studio is tattooing minors.

(J) A tanning facility replaces ultraviolet lamps in its tanning device with higher intensity, non-equivalent lamps or installs a timer on its tanning device which causes the device to exceed the maximum allowable exposure time determined by the manufacturer. No injuries were reported to have occurred as a result of either of these changes.

(3) Severity III-significant violations.

(A) **Inspection of a food establishment reveals the presence of pooled sewage near the water well. There is no indication the water supply is contaminated, but there is a great potential for occurrence** [A restaurant owner continues to operate after being warned of potential contamination to the water system through back siphonage problems and sewage accumulation on floor near the dishwasher. No contamination has occurred, but there is a great potential for occurrence].

(B) Inspection of a food establishment reveals food ingredients contaminated by pests. None of the contaminated ingredients has been used for food [Rodents have gained access to a bakery and burrowed into bags of flour and have built nests. Other lots of raw materials have also been rodent defiled in terms of urine stains detected on the outer bagging. Droppings are detected throughout the building and on pieces of equipment. None of the contaminated product was used in the production of food].

(C) A bottling plant has repeatedly produced soft drinks [in returnable containers] that contain foreign objects such as cigarette packages, tooth brushes, and other matter.

(D) Inspection of a food establishment reveals the firm is operating without hot water [An applicant for registration as a wholesale distributor of drugs falsified information required on the registration statement].

(E) Inspection of a food establishment reveals employees touching ready-to-eat foods with unclean hands.

(F) Inspection of a food establishment reveals unclean, unsanitized food contact surfaces of equipment.

(G) The operator of an establishment refuses to permit an authorized agent to conduct an inspection, collect samples, or otherwise perform his official duties.

(H) A firm fails to comply with the current good manufacturing practices for finished pharmaceuticals/medical devices.

(I) An applicant has falsified information on the wholesale drug/medical device application.

(J) A narcotic treatment program delivers narcotic drugs to a patient without a physician's order.

(K) A narcotic treatment program fails to perform any laboratory test.

(L) A firm diverts over the counter drugs outside legal distribution channels or fails to take adequate steps to prevent illegal distribution.

(M) A tattoo facility operator fails to report an injury or illness associated with a tattoo.

(N) A tanning facility operator allows a consumer to be exposed to ultraviolet radiation from its tanning device more than once in a 24-hour period.

(O) A sanitizer used to sanitize the body contact surfaces of a tanning device was tested and found to have an active ingredient concentration that is lower than recommended by the manufacturer. The body contact surfaces of a tanning device are tested and found to be positive for human pathogenic bacteria. No injuries to users were reported to have occurred as a result of this incident.

(P) A tanning facility fails to report to the Texas Department of Health, injuries or illnesses associated with one of its tanning devices.

(4) Severity IV-violations.

(A) A frozen shrimp processor has failed to declare sodium bisulfite [bisulphite] on the labeling of his five-pound [five pound] and ten-pound [ten pound] boxes of shrimp tails.

(B) A cannery discovered a defective part on a closing machine which has resulted in the improper sealing of 360,000 cases of cut green beans. The entire lot has been shipped to five midwestern states. To date, no complaints have been received regarding any part of the lot.

(C) Inspection of a food establishment reveals evidence of current pest activity, but no contaminated foods are identified [A food manufacturer, after receiving notification, has refused to register].

(D) A firm is distributing drugs/medical devices that have been held outside of recommended storage temperatures.

(E) A firm is distributing damaged and expired drugs/medical devices.

(F) A firm is distributing drugs/medical devices labeled only in a foreign language.

(G) An applicant has falsified information on a tattoo/tanning application or a drug/device salvage application.

(H) A physician is administering or dispensing a narcotic drug to treat opiate addiction outside a licensed narcotic treatment program or detoxification hospital, not including addiction treatment performed as an incidental adjunct to medical or surgical treatment of conditions other than addiction.

(I) The work surfaces in a tattoo studio are not properly cleaned and disinfected.

(J) A tanning facility falsifies or fails to maintain information required to be kept in individual consumer records such as ultraviolet radiation exposure times, frequency of ultraviolet radiation exposures, or informed consent for minors.

(5) Severity V-minor violations.

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

(C) A food manufacturer fails to label or misbrands a product resulting in minor public health or fraudulent significance [Laboratory analyses of numerous samples of a particular lot of a vitamin product reveal subpotency in several ingredients].

(D) A firm has failed to obtain a required license or permit from the department [A methadone program fails to collect and test urine samples for the presence of illicit drug].

(E) A firm is distributing drugs/medical devices with inaccurate and misleading ingredient statements [The medical director of a methadone program fails to sign required patient records].

(F) A narcotic treatment program is not providing required counseling services for patients.

(G) An inspection of a tattoo studio shows it to be unsanitary and in general disrepair.

(H) Warning signs required to be posted in a tanning facility do not conform to Texas Department of Health size, design, and content standards for warning signs.

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 January 31, 1996.

TRD-9601402 Susan K. Steeg
General Counsel
Texas Department of Health

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 458-7236

♦ ♦ ♦

Chapter 229. Food and Drug

Licensure of Tanning Facilities

- **25 TAC §§229.341-229.343, 229.345-229.352, 229.354-229. 357**

The Texas Department of Health (department) proposes amendments to §§229.341-229.343, §§229.345-229.352, and §§229.354-229.357, concerning the tanning facility licensure standards. Specifically these sections cover purpose; applicable laws and regulations; and definitions; licensing of tanning facilities; licensing fees; revocation, cancellation, suspension and probation of a license; report of changes; advertising; warning signs; tanning devices; protective eyewear; records; injury reports; sanitation; and enforcement and penalties. The amendments update language to bring the sections into conformance with the statutory amendments passed during the 74th Texas Legislature. The amendments establish new licensure fees to allow the department to recover the costs associated with inspecting tanning facilities and administering the program. In addition, the amendments will prohibit the department from issuing or renewing tanning facility

licenses to persons who operate sexually oriented businesses. The amendments will also allow the department to seek civil and administrative penalties for violations of Health and Safety Code, Chapter 145 (Tanning Facility Regulation Act).

Cynthia T. Culmo, R.Ph., Director, Drugs and Medical Devices Division, Bureau of Food and Drug Safety, 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 these sections as proposed. The effect on state government will be an estimated annual gain of $160,000 in fee-generated revenue. The administrative cost resulting from the increase in monitoring activities will be partially offset by the additional revenue generated by licensure fees. There are no anticipated fiscal implications for local government.

Ms. Culmo has also determined that for each year of the first five years the sections are in effect the public benefit will be increased monitoring of tanning facilities resulting in the prevention of serious injuries to consumers from the use of misbranded and adulterated tanning devices. The anticipated economic cost to persons or small businesses who are required to comply with the sections as proposed will be an additional $115 annually in licensure fees. The increase in fees is necessary in order for the department to comply with recent statutory amendments which require the department to recover at least 50% of the costs associated with inspecting and administering the tanning facility licensure program. There will be no effect on local employment.

Comments on the proposed amendments may be submitted to Thomas E. Brinck, Drugs and Medical Devices Division, Bureau of Food and Drug Safety, Texas Department of Health, 1100 West 49th Street, Austin, Texas, 78756. Telephone inquiries may also be made to Mr. Brinck, at (512) 719-0237. Comments will be accepted for 30 days following the date of publication of this proposal in the *Texas Register*. In addition, a public hearing on the proposed amendments will be scheduled prior to the close of the comment period and will be announced in the *Texas Register*.

The amendments are proposed under 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.

The amendments will affect Health and Safety Code, Chapter 145.

§229.341. Purpose. These sections provide for the **licensing** [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) (No change.)

(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)-(f) (No change.)

(g) Copies of these laws and rules are indexed and filed in the office of the **Drugs and Medical Devices** 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.

Adulterated–Has the meaning given in the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, **§431.111** [Chapter 431], as interpreted in the rules of the board and judicial decision.

Misbranded–Has the meaning given in the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, **§431.112** [Chapter 431], as interpreted in the rules of the board and judicial decision.

Reconditioning–Has the meaning given in the Texas Food, Drug, Device, and Cosmetic Salvage Act, Health and Safety Code, **§432. 003** [Chapter 432], as interpreted in the rules of the board in §229.192 of this title (relating to **Definitions** [Regulation of Food, Drug, Device and Cosmetic Salvage Establishments and Brokers]) and judicial decision.

Tanning device–A device, as defined in the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, **§431.002** [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 or use of tanning devices.

*§229.345. **Licensing** [Permitting] of Tanning Facilities.*

(a) A person **shall** [may] not operate a tanning facility without a current and valid **license** [permit] to operate the facility that is issued by the Texas Department of Health (department). **A separate license is required for each tanning facility.**

(b) The **license** [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 **license** [permit] of such facility prior to beginning operation.

(d) Unless the department revokes or suspends a **license** [permit] as provided in §229.347 of this title (relating to Revocation, Cancellation, Suspension and Probation of a **License** [Permit]), the initial **license** [permit] shall be valid for one year from the date of issuance which becomes the anniversary date.

(e) The renewal **license** [permit] shall be valid for one year from the anniversary date.

(f) **Licenses** [Permits] shall not be transferable from one person to another or from one tanning facility to another.

(g) The **initial** application required in subsections (c) and (h) 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) Each tanning facility shall provide the following information upon **initial** application for a **license** [permit]:

(1)-(7) (No change.)

(8) copies of the **informed** consent forms and statements which the consumer, parent or legal 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)-(E) (No change.)

(F) handling of complaints of injury **or illness** from consumers;

(G) (No change.)

(10) signature of the owner verifying all information on the **initial** application form.

(i) Failure to complete the **initial** application form may result in the denial of a **license** [permit].

(j) The department will not issue a license under this section with respect to a facility that:

(1) is operated under a license or permit as a sexually oriented business issued in accordance with Local Government Code, §243.007;

(2) offers, as its primary business, a service or the sale, rental, or exhibition of a device or other item that is intended to provide sexual stimulation or sexual gratification to a customer; or

(3) is owned or operated by a person who has been convicted of an offense under Penal Code, Chapter 21 or 43; or Penal Code, §71.02(a)(3).

*§229.346. **Licensing** [Permitting] Fees.*

(a) All tanning facilities in Texas shall pay an initial **license** [permit] fee of **$150** [$50].

(b) All tanning facilities shall pay an annual renewal fee of **$150** [$35] each year following issuance of the initial **license** [permit].

(c) All tanning facilities shall pay a **$100** [$25] delinquency fee if the **license** [permit] renewal **fee** [application] is **paid** [filed] after the expiration date of the current **license** [permit].

*§229.347. Revocation, Cancellation, Suspension and Probation of a **License** [Permit].*

(a) The Texas Department of Health (department) may revoke, cancel, suspend, **suspend on an emergency basis,** or probate **by an emergency order of the commissioner, or the commissioner's designee** a **license** [permit] to operate a tanning facility if the facility has:

(1) failed to pay a **license** [permit] fee or an annual renewal fee for a **license** [permit];

(2) obtained or attempted to obtain a **license** [permit] by fraud or deception;

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

(b) The department shall revoke a license issued with respect to a facility if the license may not be renewed under §229.345(j) of this title (relating to licensing of Tanning Facilities).

(c)[(b)] Prior to revoking, canceling, suspending or probating a **license** [permit], the department shall give the **license** [permit] holder written notice of the proposed action, including the reasons and an opportunity for a hearing.

(d)[(c)] Any hearing for the revoking, canceling, suspending, or probating of a **license** [permit] shall be in accordance with the department's formal hearing procedures in Chapter 1 of this title (relating to Texas Board of Health).

(e)[(d)] A **license** [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) changes the name of the business under which the tanning facility operates; or

(4)[(3)] changes ownership. For a corporation, an ownership change is deemed to have occurred, resulting in the necessity to return the **license** [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 Texas Department of Health (department) in writing within ten days of any change which would render the information contained in the **initial** application for the **licensing** [permitting], reported pursuant to §229.345 of this title (relating to **Licensing** [Permitting] of Tanning Facilities), no longer accurate. Failure to inform the department within ten days of a change in the information required in the **initial** application for a **license** [permit] may result in a suspension or revocation of the **license** [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.

(a) No person, in any advertisement, shall refer to the fact that the person or the person's facility is **licensed** [permitted] with the Texas Department of Health (department) pursuant to the provisions of §229.345 of this title (relating to **Licensing** [Permitting] of Tanning Facilities), and no person shall state or imply that any activity under such **license** [permit] has been approved by the department.

(b) A tanning facility **shall** [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.

(c) A business described in §229.345(j) shall not use the word "tan" or "tanning" in a sign or any other form of advertising.

§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.
FIGURE 1: 25 TAC §229.350(a)

(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.
FIGURE 2: 25 TAC §229.350(b)

(c) **Warning signs shall meet the following requirements.** [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.]

(1) The sign shall be printed on white 80 pound gloss coated cover stock and shall be 17 inches wide by 22 inches long.

(2) The lettering on each warning sign shall be brilliant red (Pantone 185) or equivalent on white background.

(3) The major sign heading entitled "DANGER" shall be a minimum of Helvetica Bold 110 point or equivalent.

(4) The subheading entitled "ULTRAVIOLET RADIATION" shall be a minimum of Helvetica Bold 100 point or equivalent.

(5) Body copy shall be Helvetica 35 point or equivalent.

(6) Remaining capitalized copy shall be a minimum of Helvetica Bold 70 point or equivalent.

(d) Camera ready copies of each sign shall be available for reproduction purposes upon written request to: Texas Department of Health, Drugs and Medical Devices Division, 1100 West 49th Street, Austin, Texas 78756-3182.

(e) The Texas Department of Health shall include with a license application a description of the design standards required for signs in this section.

§229.351. Tanning Devices

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

(f) The [facility] operator shall control the temperature of the consumer contact surfaces of a tanning device and the surrounding area so that it **will** [may] not exceed 100 degrees Fahrenheit.

(g)-(l) (No change.)

§229.352. Protective Eyewear.

(a) Each consumer shall be provided with protective eyewear and instructions for their use. The operator **shall** [may] not allow a person to use a tanning device if that person does not use [the] protective eyewear **that meets the requirements of the United States Food and Drug Administration.**

(b) (No change.)

(c) Protective eyewear shall be located in the immediate proximity of each tanning device **and shall be provided without charge to each user of a tanning device.**

(d) (No change.)

§229.354. Records.

(a) (No change.)

(b) Signed warning statement.

(1) Each time a customer **who is 18 years of age or older** uses a tanning facility **device for the first time and** [or] each time a person executes or renews a contract to use a tanning facility **device**, the person shall sign and date 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 **facility** device **for the first time**, the person shall give the tanning facility operator a **written informed consent** statement signed and dated 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. **In addition, when,** [When] a person under 14 years of age is using a tanning device, a parent or legal guardian must **remain** [be present] at the tanning facility **while the person under 14 years of age is using a tanning device.**

(3) (No change.)

(c) **Individual consumer records** [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, **and any written informed consent statement required to be signed in this section.** 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 **at least until the third anniversary of the date of the consumer's last use of a tanning device** [for a minimum of three years].

(e)-(g) (No change.)

§229.355. Injury Reports. A written report of any [tanning] injury **or illness associated with a tanning device** shall be forwarded to the Texas Department of Health (department) within five working days of its occurrence or knowledge thereof. The report shall include:

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

(3) the date of the injury **or illness;**

(4) the nature of the injury **or illness;**

(5) identification of the tanning device involved in the injury **or illness**, including brand and model;

(6) (No change.)

(7) the name of the operator on duty at the time of injury **or illness**; and

(8) (No change.)

§229.356. Sanitation.

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

(c) **The operator shall clean and properly sanitize the body contact surfaces of a tanning device after each use** [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)-(i) (No change.)

§229.357. Enforcement and Penalties.

(a) (No change.)

(b) Administrative penalties. Administrative penalties, as provided in Health and Safety Code, §145.0122, and in §229.261 of this title (relating to Assessment of Administrative or Civil Penalties), may be assessed for violation of these sections.

(c)[(b)] Criminal penalty.

(1) A person, other than a customer, commits an offense if the person [knowingly or recklessly] violates the Act or rules adopted under the Act.

(2) **Except as provided by paragraph (3) of this subsection, an** [An] offense under the Act is a Class A [C] misdemeanor.

(3) An offense under §229.349(c) of this title (relating to Advertising) is a Class C misdemeanor, unless it is shown on the trial of an offense under this subsection that the person has previously been convicted of an offense under this subsection, then the offense is a Class A misdemeanor.

(d)[(c)] **Civil penalty;** Injunction. **If it appears that a person has violated or is violating Health and Safety Code,**

Chapter 145, or an order issued or a rule adopted under authority of Health and Safety Code, §145.011, the commissioner may request the attorney general or the district or county attorney or the municipal attorney of a municipality in the jurisdiction where the violation is alleged to have occurred or may occur to institute a civil suit for:

(1) an order enjoining the violation;

(2) a permanent or temporary injunction, a temporary restraining order, or other appropriate remedy if the department shows that the person has engaged in or is engaging in a violation;

(3) the assessment and recovery of a civil penalty; or

(4) both injunctive relief and a civil penalty.

[(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.]

(e)[(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.

(f)[(e)] Adulterated or misbranded tanning device. If the Texas Department of Health (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).

(g) Emergency order. The commissioner or the commissioner's designee may issue an emergency order relating to the operation of a tanning facility in the department's jurisdiction if the commissioner or the commissioner's designee determines:

(1) operation of the tanning facility creates or poses an immediate and serious threat to human life or health; and

(2) other procedures available to the department to remedy or prevent the threat will result in unreasonable delay.

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 February 1, 1996.

TRD-9601441 Susan K. Steeg
General Counsel
Texas Department of Health

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 458-7236

♦ ♦ ♦

Chapter 241. Shellfish Sanitation

Molluscan Shellfish

• 25 TAC §241.51, §241.55

The Texas Department of Health (department) proposes amendments to §241. 51 and §241.55, concerning Texas molluscan shellfish. Specifically, the sections cover growing area classification and harvesting and handling of shellstock. The amendments will implement the requirements and guidelines established in the *1995 National Shellfish Sanitation Program Manual of Operations*, Part I, dealing with a harvest control to reduce risk of illness attributable to a naturally occurring organism, Vibrio vulnificus. The proposed amendments establish definitions and standards for a time-to-refrigeration matrix which will reduce the amount of time shellfish remain unrefrigerated after harvest and before the harvest boats are unloaded.

Richard E. Thompson, Director, Seafood Safety Division, has determined that for the first five-year-period the sections, as proposed, are in effect there would be minimal fiscal implications for state government. The effect on state government will occur only as a result of enforced administrative penalties. There will be no fiscal implications to local governments.

Mr. Thompson 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 better assurance that molluscan shellfish processed in or imported into Texas will be free of disease or other health hazards transmissible by these products. There is no anticipated economic cost to persons or small businesses who are required to comply with the sections. Cost will only occur as a result of administrative penalties assessed against molluscan shellfish businesses who do not comply. There will be no effect in local employment.

Comments on the proposal may be submitted to Richard E. Thompson, R.S., Director, Seafood Safety Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 719-0215. Comments will be accepted for 30 days from the date of publication of this proposal.

The amendments are proposed under Texas Parks and Wildlife Code, §76.203, which authorizes the Texas Board of Health to adopt rules concerning the regulation of Texas molluscan shellfish; and the Health and Safety Code, §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 amendments affect Texas Parks and Wildlife Code, §76.203.

§241.51. Growing Area Classification.

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

(f) The authority provided to the commissioner of health by the Health and Safety Code, §436.101 has been delegated to the bureau chief of the Bureau of Food and Drug Safety **or his/her designee** under the provisions of the Health and Safety Code, §436.003(a). The bureau chief shall:

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

§241.55. Harvesting and Handling Shellstock.

(a) Boats and trucks.

(1)-(11) (No change.)

(12) Commercial harvesters shall be responsible for control of their shellstock until acceptance by a certified dealer. Commercial harvesters shall be required to deliver shellstock to a certified dealer within the day the shellstock is harvested. For this purpose a day shall be considered to be midnight to midnight. Delivery of the shellstock is considered to be the packing of the shellstock into an approved container, transfer of the shellstock from the boat to **a certified location** [the dock] and acceptance of the

shellstock by the certified dealer. Commercial harvesters shall sell their shellstock only to a currently certified shellfish dealer. It is illegal for commercial harvesters to sell shellstock directly to the public.

(13) Mechanical refrigeration facilities shall be required for purposes of dealer certification at each certified location. Mechanical refrigeration which is mobile shall be immobilized or designated, in writing to the SSD, as the shellfish storage facility. Removal of immobilized or designated refrigeration shall constitute voluntary surrender of certification by the certified dealer for that certified location. Shellstock shall be placed under mechanical refrigeration at air temperatures between 45 degrees Fahrenheit and 35 degrees Fahrenheit within two hours of unloading from the boat. Shellstock shall not be allowed to remain on a dock unrefrigerated for more than two hours. During the period April 1 through **April 30** [October 31], shellstock shall not be harvested before 6:00 a.m. and shall be placed under mechanical refrigeration by 8:00 p.m. each day. Mechanical refrigeration facilities shall be adequate in size and cooling capacity to refrigerate all shellstock on the premises. Each facility shall be equipped with an automatic temperature regulating control (thermostat) and an indicating thermometer installed to accurately measure, within three degrees, the temperature in the warmest location in the storage compartment.

(14) During the period May 1 through October 31, shellfish which may be intended for consumption raw, directly from the shell, shall be refrigerated as designated in paragraph (13) of this subsection, within the times established for each month by the bureau chief of the Bureau of Food and Drug Safety. Each harvester shall maintain records for each date shellfish are harvested that show the time the first shellfish are harvested; the time harvesting ends; and the time the shellfish are unloaded from the boat.

(A) The time from first harvest to refrigeration shall be established based on the average monthly maximum water temperature (AMMWT) and shall be in effect from 12:01 a.m. of the first day of the month until 11:59 p. m. of the last day of the month. The time shall be based on the following AMMWT ranges:

***(i)* AMMWT 65 degrees Fahrenheit - 74 degrees Fahrenheit, 14 hours;**

***(ii)* AMMWT 74 degrees Fahrenheit - 84 degrees Fahrenheit, 12 hours; and**

***(iii)* AMMWT 84 degrees Fahrenheit, 6 hours.**

(B) Any shellfish which may be held without refrigeration for periods of time longer than those established in subparagraph (A) of this paragraph shall not be harvested before 6:00 a.m. and shall be placed under refrigeration as designated in paragraph (13) of this subsection by 8:00 p.m. each day and shall be identified, stored, and processed separately from shellfish that are refrigerated within the time periods.

***(i)* Shellfish harvested and held exempt under this paragraph shall be tagged with a harvester tag meeting all requirements that shall be neon green in color. This neon green harvester tag shall be placed on each container of shellfish at the conclusion of harvesting of these exempt shellfish and before harvesting of any other shellfish. The neon green harvester's tag shall remain attached to each container until the shellfish are shucked.**

***(ii)* If shellfish are harvested and held exempt under this paragraph, the harvester records required shall also include the time that harvesting of these exempt shellfish stops and the time that harvesting of other shellfish begins.**

***(iii)* Shellfish harvested, and held exempt under this paragraph, shall not be commingled with any other shellfish and shall be stored separately on harvest boats and at any certified location.**

***(iv) Shellfish harvested, and held exempt under* this paragraph, shall be shucked and placed in containers bearing the consumer information language adopted by the Interstate Shellfish Sanitation Conference, or an equivalent approved in writing by the SSD prior to use, unless the invoice and bill of lading for shipment of these exempt shellstock to another certified dealer both contain the following statement: "These shellfish shall be shucked and placed in a container bearing the consumer information statement adopted by the Interstate Shellfish Sanitation Conference."**

(15)[(14)] Refrigerated shellstock shall be maintained at internal temperatures between 45 degrees Fahrenheit and 35 degrees Fahrenheit. After initial refrigeration, shellstock removed from refrigeration shall not be permitted to remain in air temperatures above 45 degrees Fahrenheit for more than two hours. The internal air temperature in trailers shall be at or below 45 degrees Fahrenheit when shellstock loading begins.

(16)[(15)] Trucks used to transport shellstock shall have the storage area constructed of a nontoxic, smooth, impervious material so as to protect the shellfish from contamination and shall be kept clean. Shellstock shall be transported on land by harvesters, certified dealers, or any distributor in mechanically refrigerated trucks that can maintain an air temperature between 45 degrees Fahrenheit and 35 degrees Fahrenheit, shall be palletized, and shall be arranged to allow maximum air circulation. Shellstock storage areas shall be similarly constructed.

(17)[(16)] Dogs, cats, or other animals shall not be permitted on vessels, in vehicles, or in any other area where shellstock is held or transported.

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

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

Issued in Austin, Texas, on January 31, 1996.

TRD-9601403 Susan K. Steeg
General Counsel
Texas Department of Health

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 458-7236

♦ ♦ ♦

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

Part I. Texas Department of Human Services

Chapter 19. Nursing Facility Requirements for Licensure and Medicaid Certification

The Texas Department of Human Services (DHS) proposes the repeal of §§19.300-19.315, concerning facility construction, the repeal of §19.1612, concerning Texas Index for Level of Effort (TILE) Assessments, repeal of §§19.1701-19.1727, concerning physical plant and environment, and the repeal of §19.2105, concerning Safe Medical Devices Act of 1990; amendments to §§19.202, concerning building approval, 19.204, concerning applicant disclosure requirements, 19.402, concerning exercise of rights, 19.416, concerning personal property, 19.1210, concerning certification and recertification requirements in Medicaid-certified facilities, 19.1807, concerning rate setting methodology, 19.1918, concerning disclosure of ownership, 19.1921, concerning general requirements for a nursing facility, 19. 2208, concerning standards for certified Alzheimer's facilities, 19.2324, concern-

ing selection and contracting procedures for adding beds in high-occupancy areas, 19. 2326, concerning Medicaid swing bed program for rural hospitals, and 19.2403, concerning utilization review process; and proposes new §§19.300-19.326 and §§19.330-19.343, concerning facility construction, and new §19.1701, concerning physical environment, new §19. 2412, concerning Texas Index for Level of Effort (TILE) Assessments, in its Nursing Facility Requirements for Licensure and Medicaid Certification chapter.

The purpose of the repeal of §§19.300-19.315 is to modify the facility construction requirements. The purpose of the repeal of §19.1612 is to delete rules incorrectly placed in this subchapter and which are now being correctly placed in new §19.2412. The purpose of the repeal of §19.1701-19. 1727 is to transfer the facility construction requirements to §§19.300-19. 326. The purpose of the repeal of §19.2105 is to delete outdated rules.

The purpose of the amendments is to correct references and clarify the rules through other minor corrections.

The purpose of the new sections is to combine the physical plant and environment requirements with the facility construction requirements.

Burton F. Raiford, commissioner, 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 proposal.

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 proposal will be clear and correct rules. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposal.

Questions about the content of this proposal may be directed to Susan Syler at (512) 438-3111 in DHS's Long Term Care Policy Section. Written comments on the proposal may be submitted to Nancy Murphy, Media and Policy Services-313, Texas Department of Human Services E-205, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

Subchapter C. Nursing Facility Licensure Application Process

• 40 TAC §19.202, §19.204

The amendments are proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department 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, §§22.001-22.024 and §§32.001-32.042.

§19.202. Building Approval. All applications for license must include written approval of the local fire authority that the facility and its operation meet local fire ordinances.

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

[(5) Inspection and Plan Review. Any existing building being considered for licensure must either submit a plan for review and approval or request a feasibility inspection to be performed by a representative of DHS to determine construction or renovation requirements. The fees for inspection and/or plan reviews must be in accordance with §19.301 of this title (relating to Fees for Plan Reviews, Construction Inspection Services, and Feasibility Inspection Services).]

§19.204. Applicant Disclosure Requirements.

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

(e) Required ownership and management information for the past two years.

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

(5) The information required by this section must be provided to DHS upon initial application for licensure, and changes in the information must be provided to DHS **upon renewal** [on an annual basis], except that a licensee must notify DHS within 30 days of any change of the facility's administrator or management services.

(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 February 1, 1996.

TRD-9601423 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 438-3765

♦ ♦ ♦

Subchapter D. Facility Construction

• 40 TAC §§19.300-19.315

(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, Chapters 22 and 32, which authorizes the department 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 repeals implement the Human Resources Code, §§22.001-22.024 and §§32.001-32.042.

§19.300. Plans, Approvals, and Construction Procedures.

§19.301. Fees for Plan Reviews, Construction Inspection Services, and Feasibility Inspection Services.

§19.302. Construction and Initial Survey of Completed Construction.

§19.303. Construction Standards for Additions, Remodeling, and New Nursing Facilities.

§19.304. Location and Site.

§19.305. General Considerations.

§19.306. Architectural Space Planning and Utilization.

§19.307. Exit Provisions.

§19.308. Smoke Compartmentation (Subdivision of Building Spaces).

§19.309. Fire Protection Systems.

§19.310. Hazardous Areas.

§19.311. Structural Requirements.

§19.312. Mechanical Requirements.

§19.313. Electrical Requirements.

§19.314. Miscellaneous Details.

§19.315. Elevators.

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 February 1, 1996.

TRD-9601424 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 438-3765

♦ ♦ ♦

• 40 TAC §§19.300-19.326, 19.330-19.343

The new sections are proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department 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 new sections implement the Human Resources Code, §§22.001-22.024 and §§32.001-32.042.

§19.300. General Requirements.

(a) The facility must be designed, constructed, equipped, and maintained to protect the health and ensure the safety of residents, personnel, and the public. If children are admitted to the facility, accommodations, furnishings, and equipment appropriate to children must be provided.

(b) The requirements of this subchapter are applicable to new and existing nursing facilities unless otherwise stated. Refer to §§19.330-19.343 of this title (relating to Facility Construction) for additional requirements for new construction, conversions of existing unlicensed buildings, remodeling, and additions. An existing unlicensed building is defined as any building (or portion thereof) which is not presently licensed as a nursing home.

§19.301. Applicable Codes and Standards.

(a) The facility must meet the applicable provisions of the 1985 edition of the Life Safety Code of the National Fire Protection Association (NFPA). The Life Safety Code is available for inspection at the Office of the *Federal Register* Information Center, Washington, D.C. Copies may be obtained from the NFPA, Batterymarch Park, Quincy, Massachusetts 02200. The New Health Care Occupancies chapter of the Life Safety Code is applicable to new construction, conversions of existing unlicensed buildings, remodeling, and additions. The Existing Health Care Occupancies chapter of the Life Safety Code is applicable to existing nursing homes. Life safety features and equipment that have been installed in existing buildings which are now in excess of that required by the Life Safety Code must continue to be maintained or may be completely removed if prior approval is obtained from the Texas Department of Human Services (DHS).

(b) In addition to the Life Safety Code, facilities must meet any other codes and standards of the NFPA referenced by the Life Safety Code and those listed in this chapter, except as may be otherwise approved or required by DHS.

(c) The following codes, standards, or guidelines generally govern their subject areas for existing construction:

(1) If the municipality has a building code and a plumbing code, those codes govern.

(2) In the absence of municipal codes, nationally recognized codes must be used. To assure continuity, all nationally recognized codes, when used, must be publications of the same group or organization.

(3) Heating, ventilating, and air-conditioning systems must be designed and installed in accordance with NFPA 90A and the Heating, Ventilating, and Air-Conditioning Guide of the American Society of Heating, Refrigeration, and Air-Conditioning Engineers (ASHRAE), except as may be modified in this subchapter.

(4) Electrical and illumination systems must be designed and installed in accordance with NFPA 70 and the Lighting Handbook of the Illuminating Engineering Society (IES) of North America, except as may be modified in this subchapter.

(5) Accessibility for individuals with disabilities must be designed and installed in accordance with the following laws: the Americans with Disabilities Act of 1990 (Public Law 101-336; Title 42, United States Code, Chapter 126); Title 28, Code of Federal Regulations, Part 35; Texas Civil Statutes, Article 9102; and Title 16, Texas Administrative Code, Chapter 68. Plans for new construction, substantial renovations, modifications, and alterations must be submitted to the Texas Department of Licensing and Regulation (Attention: Elimination of Architectural Barriers Program) for accessibility approval under Texas Civil Statutes, Article 9102.

(6) Every building and portion thereof must be capable of sustaining all dead and live loads in accordance with accepted engineering practices and standards.

(7) Each building must be classified as to building construction type for fire resistance rating purposes in accordance with NFPA 220 and the Life Safety Code.

(8) Building insulation materials, unless sealed on all sides and edges in an approved manner with noncombustible material, must have a flame-spread rating of 25 or less when tested in accordance with NFPA 255 and NFPA 258.

§19.302. Waivers. The Texas Department of Human Services (DHS) may grant a waiver for certain provisions of the physical plant and environment which, in DHS's opinion, would be impractical for the facility to meet. In granting the waiver, DHS will determine that there will be no adverse effect on resident health and safety and the requirement, if not waived, would impose an unreasonable hardship on the facility. DHS may require offsetting or equivalent provisions in granting a waiver.

§19.303. Emergency Power.

(a) An emergency electrical power system must supply power adequate at least for lighting all entrances and exits, equipment to maintain the fire detection, alarm, and extinguishing systems, and life-support systems if the normal electrical supply is interrupted. Emergency electrical services by generator or battery must be provided to comply with the provisions of the National Fire Protection Association (NFPA) 70. Battery systems must be capable of sustaining power for a duration of at least one and one-half hours.

(1) Life safety systems must include:

(A) illumination for means of egress, nurse stations, medication rooms, dining and living rooms, and areas immediately outside of exit doors;

(B) exit signs and exit directional signs required by the Life Safety Code;

(C) alarm systems, including fire alarms activated by manual stations, water flow alarm devices of sprinkler systems, fire and smoke detecting systems, and alarms required for nonflammable medical gas systems if installed (where hospital-type functions are included in the nursing home facility, applicable standards apply);

(D) task illumination and selected receptacles at any required or provided generator set location;

(E) selected duplex receptacles, including receptacles in resident corridors, each resident-bed location where patient-care-related electrical appliances are utilized, nurse stations, medication rooms, including biological refrigerator, if a generator is required or provided;

(F) nurse calling systems;

(G) resident room night lights where required;

(H) elevator cab lighting, control, and communication systems;

(I) all facility telephone equipment; and

(J) those paging or speaker systems that are necessary for the communication plan for an emergency. Radio transceivers that are necessary for emergency use must be capable of operating for at least one hour upon total failure of both normal and emergency power.

(2) Where critical systems are provided, there must be a delayed automatic connection.

(3) The emergency lighting must be automatically in operation within ten seconds after the interruption of normal electric power supply. Emergency service to receptacles and equipment may be a delayed automatic connection. Receptacles connected to emergency power must be of a uniform and distinctive color. Stored fuel capacity must be sufficient for not less than four-hour operation of required generator.

(4) Emergency motor generator, if required or provided, must meet the following standards:

(A) any emergency generator must be installed in accordance with NFPA 37 and NFPA 99;

(B) generators located on the exterior of the building must be provided with a noncombustible protective cover or be protected as per manufacturer's recommendations; and

(C) motor generators fueled by public utility natural gas must have the capacity to be manually or automatically switched to an alternate fuel source, as specified in NFPA 70.

(5) Wiring for the emergency system must be in accordance with NFPA 70.

(b) When life support systems are used, the facility must provide emergency electrical power with an emergency generator (as defined in NFPA 99, Health Care Facilities) located on the premises.

§19.304. Space and Equipment.

(a) The facility must:

(1) provide sufficient space and equipment in dining, health services, recreation, and program areas to enable staff to provide residents with needed services as required by these standards and as identified in each resident's plan of care; and

(2) maintain all essential mechanical, electrical, and patient care equipment in safe operating condition.

(b) A wing or area which is separated from the rest of the facility by locked doors for the purpose of securing residents must meet the requirements of §19.2208(a)(6) and (c)(1)-(10) of this title (relating to Standards for Certified Alzheimer's Facilities).

(c) If children are residents of the facility, the facility must provide:

(1) indoor and outdoor recreation areas designed to encourage exploration within the children's capabilities; and

(2) pediatric equipment and supplies in appropriate size for the age and development level of the children. Pediatric emergency supplies and equipment must be readily available for use.

§19.305. Resident Rooms. Resident rooms must be designed and equipped for adequate nursing care, comfort, and privacy of residents.

(1) Bedrooms must:

(A) accommodate no more than four residents. The total number of beds in ward rooms with three or more beds must not exceed 50% of the total facility capacity in existing facilities unless approved by the Texas Department of Human Services (DHS).

(B) measure at least 80 square feet per resident in multiple resident bedrooms and at least 100 square feet in single resident rooms.

(C) have direct access to an exit corridor.

(D) be designed or equipped to assure full visual privacy for each resident. Appropriate measures must be taken through the use of cubicle curtains, screens, or procedures to protect the privacy and dignity of the residents. Curtains and screens must be rendered and maintained flame-retardant.

(E) in facilities initially certified after March 31, 1992, except in private rooms, have ceiling-suspended curtains for each bed, which extend around the bed to provide total visual privacy, in combination with adjacent walls and curtain (see paragraph (4) of this section) .

(F) have at least one operable window to the outside which can readily be opened from the inside without the use of tools. The height of the window sill (opening) must not exceed 36 inches above the floor. The minimum area of windows in each bedroom must equal at least 8.0% of the room area. Operable window sections may be restricted to not more than six nor less than four inches for security or safety reasons if approved in writing by DHS. Each window must be provided with a flame-retardant shade, curtain, or blind.

(G) have a floor at or above grade level.

(2) The facility must provide each resident with:

(A) a separate bed of proper size and height for the convenience of the resident. The bed will be a minimum of 36 inches wide with a headboard of sturdy construction, a clean, comfortable mattress with a moisture-proof cover, and a comfortable pillow. Each bed must be provided with suitable bedspreads and blankets to assure the comfort and warmth of each resident, and must not be passed from resident to resident without first being laundered. The bed of each resident with physician's orders for bedrails must have bedrails affixed to both sides of the bed;

(B) a clean, comfortable mattress;

(C) bedding appropriate to the weather and climate; and

(D) functional furniture appropriate to the resident's needs including a comfortable chair, bedside cabinet, and individual closet space in the resident bedroom with at least 16 inches of hanging space, shelves for personal belongings accessible to the resident, and closeable door(s). Each bedroom must be provided with at least one noncombustible wastebasket.

(3) DHS may permit variations in requirements specified in paragraph (1)(A) and (B) of this section relating to rooms in individual cases when the facility demonstrates in writing that the variations:

(A) are required by the special needs of the residents; and

(B) will not adversely affect residents' health and safety.

(4) The width and length of bedrooms and the arrangement of furniture must assure appropriate resident circulation, especially in relation to emergency evacuation and to usual wheelchair movement. Bedrooms should not be less than ten feet in tne smallest dimension. There must be at least 36 inches between beds and should be at least *18* inches between any bed and the adjacent parallel wall that restricts access by the resident (that is, bed sides should not have to be placed against a wall to meet other spacing requirements). Beds must not extend into the bedroom door opening, nor must any other piece of furnishing or equipment be located where it might preclude or inhibit the removal of any bed or closing and latching of the bedroom door in an emergency.

(5) Each bed must have access to a nurse-call device that is part of an electrical nurse-call system.

(6) Each bed must be provided with an appropriate, safe, durable, nonglare, permanently bed-mounted or wall-mounted reading-light fixture. The fixture must be wired in accordance with National Fire Protection Association (NFPA) 70. These fixtures should be mounted at least five feet, six inches above the floor. The switch must be within reach of a resident in the bed.

(7) At least one duplex receptacle must be provided for each bed. Other duplex receptacles must be provided as needed and/or as required by NFPA 70.

(8) Each bedroom must be assured of having general lighting, either by means of appropriate combination reading light or by means of separate fixture.

(9) For emergency separation from fire and smoke, bedroom doors must be maintained to close completely without dragging or binding, to latch securely, and to fit reasonably tight in the frame. The gap between the floor and the bottom of the closed door must not exceed 3/4 inch.

(10) Vacant bedrooms may not be used for hazardous activities or hazardous storage, unless specifically approved by DHS in writing.

(11) Bedrooms must be identified with a raised or recessed unique number placed on or near the door. Refer to §19.319(c) of this title (relating to Provisions for Persons with Disabilities) and §19.301(c)(5) of this title (relating to Applicable Codes and Standards).

(12) Residents must be permitted and encouraged to have personal possessions in their rooms that do not interfere with their care, treatment, or well-being, or that of other residents. Pediatric resident's rooms should be decorated and furnished in accordance with the age and developmental level of the children and as an expression of their individual preferences.

(13) Locks on bedroom doors are permitted when they meet definite patient needs, including the following situations:

(A) married couples whose rights of privacy could be infringed upon unless bedroom door locks are permitted;

(B) residents for whom the attending physician wants bedroom door locks to enhance their sense of security; and

(C) residents for whom restraint through confinement to their own rooms is necessary for their own and/or other persons' safety.

(14) In situations such as those listed in paragraph (13) of this section, the following guidelines must be met:

(A) bedroom door locks for other than restraining purposes must be of the type which the occupant can unlock at will from inside the room;

(B) all bedroom door locks must be of the type which can be unlocked from the corridor side;

(C) attendants must carry keys which will permit ready accessibility to the locked bedrooms when entrance becomes necessary;

(D) bedroom doors which are locked for resident restraining purposes must be dutch-doors, with only the lower section locked. The upper part of the doorway must be open to permit visual supervision of the residents from the corridor. The dutch door should be easily unlocked by nurses and attendants. Resident restraints of any nature cannot be applied without orders from the attending physician. See §19.601 of this title (relating to Resident Behavior and Facility Practice).

(E) locking of bedroom doors by residents for privacy or security or by nursing facility staff for restraint (dutch door) will not be permitted except when specifically included in the attending physician's written orders or authorized by the nursing facility administrator.

§19.306. Toilet Facilities. Each resident room must be equipped with or located near toilet and bathing facilities.

(1) Bedrooms not provided with their own (or shared) direct-access toilets and baths must have general-use baths and toilets conveniently located for each sex.

(2) Bathtubs or showers must be provided at minimum rate of one for each 20 beds which are not otherwise served by bathing facilities directly accessible from resident bedrooms.

(3) In toilet facilities designed for multi-resident use, water closets must be separated in such a manner that they can be used independently and afford privacy. Toilet paper in a suitable dispenser must be provided within reach of each toilet.

(4) Water closets and lavatories must be provided at a minimum rate of one for each eight beds which are not otherwise served by fixtures directly accessible from resident bedrooms. A lavatory must be provided in or adjacent to each area having a water closet.

(5) Lavatories must be equipped with a mixer faucet and hot and cold water. Resident-use hot water must be provided within the temperature guidelines specified in §19.322(g) of this title (relating to Plumbing).

(6) There must be a sufficient number of toilet rooms and bathing areas designed to accommodate residents in wheelchairs, including sufficient space in or around fixtures. Proper heights, locations, and installations must be made for grab bars, and any mirrors and accessories provided.

(7) Grab bars and lavatories must be substantially anchored to withstand sustained and repeated downward and outward pressure. Grab bars must be provided at all resident water closets and bathing fixtures. New grab bar installations must meet the requirements of the Texas Department of Licensing and Regulation, Elimination of Architectural Barriers Section.

(8) Floors, walls, and ceilings must have a nonabsorbent, cleanable surface. Floors and tub or shower standing surfaces must be slip resistant.

(9) Doors to bathing and toilet facilities must be wide enough for safe and easy passage of residents in wheelchairs. Folding or sliding doors must not be used unless it can be established that no safety hazard exists.

(10) Keys to resident baths or toilets with privacy locks must be kept readily available to staff.

(11) Provision must be made for sanitary hand washing and drying by staff, visitors, or residents at each lavatory.

(12) Bathrooms and toilets rooms must have a negative air pressure in relation to adjacent areas with air exhausted through ducts to the exterior.

(13) Bathing areas must be provided with safe heating.

(14) Bathtubs, showers, and lavatories must be kept clean and in proper working order. They must not be used for laundering or for storage of soiled materials or for the cleaning of mops or brooms.

(15) Nurse-call devices must be provided at resident-use baths and toilets and be within easy reach of residents.

(16) Electrical outlets in wet areas must be provided with ground fault interrupters, excluding toilet rooms where there are no bathing units.

§19.307. Resident Call System.

(a) The nurse's station must be equipped to receive resident calls through a communication system from:

(1) resident rooms; and

(2) toilet and bathing facilities.

(b) The call cord does not have to be accessible in all parts of the room, but must be accessible to the resident. The system must be connected to on and off switches operable at each bed, toilet unit, and bathing unit.

(c) Each call entered into the system must activate a corridor dome light above the bedroom, bathroom, or toilet corridor door that opens onto a corridor.

(d) A visual signal at the nurses station must indicate the room from which the call was placed with an audible signal of sufficient amplitude to be clearly heard by nursing staff. The amplitude or pitch of the audible signal must not be irritating to residents or visitors.

(e) The system must be designed so calls entered into the system may be canceled only at the calling station. Intercom-type systems which meet this requirement are acceptable.

§19.308. Dining and Resident Activities.

(a) Requirements. The facility must provide one or more rooms designated for resident dining and activities. These rooms must be:

(1) well-lighted;

(2) well ventilated, with nonsmoking areas identified;

(3) adequately furnished; and

(4) sufficiently spacious to accommodate all activities.

(b) Resident living areas.

(1) Resident living areas such as living rooms, dayrooms, lounges, recreation rooms, and sunrooms must be provided to meet the needs of the residents' comfort. Combined living and dining areas should be not less than 19 square feet per bed, but must not be less than ten square feet per bed.

(2) No single room less than 100 square feet will be included as part of the acceptable total area required.

(3) At least one living area must have an outside window.

(4) Living areas must be provided with comfortable furniture of substantial construction and be appropriately decorated to provide a pleasant and comfortable environment for residents and visitors. Furnishings and decorations must not obstruct exits or ways of egress.

(5) Nonsmoking areas must be provided and identified.

(c) Dining areas. Dining space must be provided to adequately serve needs of the residents and provide an efficient, sanitary, and pleasant environment for dining.

§19.309. Other Environmental Conditions. The facility must provide a safe, functional, sanitary, and comfortable environment for residents, staff, and the public.

(1) The facility must:

(A) establish procedures to ensure that water is available to essential areas when there is a loss of normal water supply;

(B) have adequate outside ventilation by means of windows, mechanical ventilation, or a combination of the two;

(C) maintain an effective pest control program so that the facility is free of pests and rodents and must be mounted 33 to 36 inches from the floor; and

(D) equip corridors with firmly secured handrails on each side on all walls 18 inches or greater. These rails must be substantially anchored to withstand downward force.

(2) No occupancies or activities undesirable to the health, safety, or well-being of residents will be located in the facility.

(3) For pediatric residents, the environment must be the least restrictive allowable while remaining within the parameters of safety. All areas of the facility accessible to children must be "child proof" for safety hazards. This type of safety proofing is above the normal level of hazard control maintained for adult residents and includes the addition of safety covers on electrical outlets not in use which are accessible to children.

(4) In operations where there is a chance of cross-contamination, clean and soiled operations must be separated to lessen the chance of cross-contamination by facility employees, residents, and others. This separation must be in relation to traffic flow, air currents, air exhaust, water flow, vapors, and other conditions.

(5) An electric water cooler or water fountain must be accessible to residents. When new drinking fountains are provided, at least one must be installed to be accessible to persons in wheelchairs.

(6) Public toilet(s) with sanitary handwashing and drying provisions must be provided or designated.

(7) If deodorant is used for air-freshening purposes, the following procedures must apply:

(A) deodorants or air fresheners are permitted provided the dispensing device is located where it is inaccessible to residents and patients;

(B) these products are not used to cover odors resulting from poor housekeeping practices or unsanitary conditions;

(C) these products are not used in excess;

(D) there is no contra-indication on the label of the product indicating that the product should not be used in the presence of aged or ill persons; and

(E) devices, such as ozone generators, ultra-violet generators, and smoke eliminators, must be approved by the Texas Department of Human Services.

§19.310. Site and Grounds.

(a) Site grades must provide for positive surface water drainage so that there will be no ponding or standing water at or near the building that would present a hazard to health or provide a breeding site or harborage for carriers of disease.

(b) Outdoor activity, recreational, and sitting spaces must be provided for residents as space permits.

(c) Each facility must have parking spaces to satisfy the needs of residents, employees, staff, and visitors. Provisions must be made for handicapped parking and access into the building.

(d) Protection must be provided for resident safety from traffic or other site hazards by the use of appropriate methods, such as fences, hedges, retaining walls, railings, or other landscaping. This protection must not inhibit the free emergency egress to a safe distance away from the building.

(e) Auxiliary buildings located on the site within 20 feet of the main licensed structure and which contain hazardous operations or contents, such as laundries or storage buildings, must meet the same code requirements for safety as the main licensed structure.

(f) Other buildings on the site must meet the appropriate occupancy section or separation requirements of the Life Safety Code.

(g) All outside areas, grounds, and adjacent buildings on the site must be maintained in good condition and kept free of rubbish, garbage, and untended growth that may constitute a fire or health hazard.

(h) Enclosed exterior spaces, such as fenced areas, that are in a means of egress to a public way must meet the requirements of §19. 2208(a)(6) of this title (relating to Standards for Certified Alzheimer's Facilities).

§19.311. Fire Service and Access.

(a) The facility must be served by a paid or volunteer fire department. The fire department must provide written assurance to the licensing agency that the fire department can respond to an emergency at the facility within an appropriately prompt time for the travel conditions involved.

(b) The facility must be served by an adequate water supply that is satisfactory and accessible for fire department use as determined by the fire department serving the facility and by the Texas Department of Human Services (DHS).

(c) There must be at least one approved, readily accessible fire hydrant located within 300 feet of the building. The hydrant must be on a minimum six-inch service line, or else there must be an approved equivalent, such as a storage tank. The hydrant, its location, and service line, or equivalent must be approved by the local fire department and DHS.

(d) The building must have suitable fire lanes for access as required by local fire authorities and DHS.

§19.312. Means of Egress.

(a) Corridors and other means of egress must be kept clear of obstructions and must not be used for any purpose which would interfere with its use as an exit, such as for storage, vending machines, seating, or similar purposes. The corridor width must be maintained at all times.

(b) Ways of egress and exit signs must be illuminated at all times.

(c) In addition to the required normal and emergency illumination, the facility must keep on hand and readily available to night staff no less than one working flashlight per nurses station.

(d) Doors within the means of egress must not be equipped with a latch or lock which requires the use of a key or tool to open from the inside of the building. A latch or other fastening device on a door must be provided with a knob, handle, panic bar, or other simple type of releasing device with an obvious method of operation, even in darkness.

(e) A hold-open device must be installed on each exit door.

§19.313. Interior Finishes-Walls, Ceilings, and Floors.

(a) Interior finishes of walls and ceilings must have limited flame-spread rating as required by the Life Safety Code. Where new interior finishes of walls, ceilings, or floors are applied to existing facilities, the new finishes must meet the requirements for flame-spread ratings for new construction. Fire retardant paints or solutions must not be applied to new materials in an effort to meet flame-

spread requirements for new construction. This description of interior finishes does not apply to furniture or accessories.

(b) Floors of the facility must be level, smooth, and free of any irregularities which might affect safety.

(c) Walls and ceilings not specifically described elsewhere in this chapter must be cleanable, maintained attractively, and in good repair.

(d) Walls and floors must be kept free of cracks. The joint between the walls and floors is to be maintained so as to be free of spaces which might harbor insects, rodents, or vermin.

§19.314. Fire Alarms, Detection Systems, and Sprinkler Systems. Fire alarms, detection systems, and sprinkler systems must be as required by the Life Safety Code, the National Fire Protection Association (NFPA) 72, and NFPA 13.

(1) Components must be compatible and laboratory listed for the use intended.

(2) Wiring and circuitry for alarm systems must meet the applicable requirements for NFPA standards, including NFPA 70, for these systems.

(3) Fire alarm systems must be installed, maintained, and repaired by an agent having a current certificate of registration with the State Fire Marshal's Office of the Texas Commission on Fire Protection, in accordance with state law. A fire alarm installation certificate must be provided as required by the Office of the State Fire Marshal.

(4) The fire alarm system must be designed so that whenever the general alarm is sounded by activation of any device (such as manual pull, smoke sensor, sprinkler, or kitchen range hood extinguisher) the following will occur automatically:

(A) smoke and fire doors which are held open by an approved device must be released to close;

(B) air handlers (air conditioning/heating distribution fans) serving three or more rooms or any means of egress must shut down immediately;

(C) smoke dampers must close; and

(D) the alarm-initiating location must be clearly indicated on the fire alarm control panel(s) and all auxiliary panels.

(5) Consistent fire alarm bells or horns must be located throughout the building for audible coverage. Flashing alarm lights (visual alarms) must be installed to be visible in corridors and public areas including dining rooms and living rooms.

(6) A master control panel which indicates location of alarm and trouble conditions (by zone or device) must be visible at the main nurse station. All control panels must be listed in accordance with the provisions of the Underwriters Laboratories, Inc. (UL) for intended use, such as manual, automatic, and water-flow activation. Alarm and trouble zoning must be by smoke compartments and by floors in multi-story facilities.

(7) Remote annunciator panels, indicating location of alarm initiation by zone or device and common trouble signals, must be located at auxiliary or secondary nurses stations on each floor or major subdivision of single story facilities and indicate the alarm condition of adjacent zones and the alarm conditions at all other nurse stations.

(8) Manual pull stations must be provided at all exits, living rooms, dining rooms, and at or near the nurse stations.

(9) The NFPA 13 sprinkler system must be monitored for flow and tamper conditions by the fire alarm system.

(10) The kitchen range hood extinguisher must be interconnected with the fire alarm system. This interconnection may be a separate zone on the panel or combined with other initiating devices located in the same zone as the range hood is located.

(11) Partial sprinkler systems provided only for hazardous areas must be interconnected to the fire alarm system and comply with the Life Safety Code. Each partial system must have a valve with a supervisory switch to sound a supervisory signal, water-flow switch to activate the fire alarm, and an end-of-line test drain.

§19.315. Portable Fire Extinguishers. Portable fire extinguishers must be provided and maintained to comply with the provisions of the National Fire Protection Association (NFPA) 10. This includes type of extinguishers (A, B, or C), location and spacing, mounting heights, monthly inspections by staff, yearly inspections by a licensed agent, any necessary servicing, and hydrostatic testing as recommended by the manufacturer.

(1) Extinguishers in resident corridors must be spaced so that travel distance is not more than 75 feet. The minimum size of extinguishers must be either 2 1/2 gallon for water type or five pound for ABC type.

(2) Extinguishers must be installed on supplied hangers or brackets or be mounted in cabinets approved by the Texas Department of Human Services (DHS).

(3) Extinguishers must be surface wall-mounted or recessed in cabinets where they are not subject to physical damage or dislodgement.

(4) Extinguishers having a gross weight not exceeding 40 pounds must be installed so that the top of the extinguisher is not more than five feet above the floor. Extinguishers with a gross weight greater than 40 pounds must be installed so the top of the extinguisher is not more than 3-1/2 feet above the floor. The clearance between the bottom of the extinguisher and the floor must not be less than four inches.

(5) Portable extinguishers provided in hazardous rooms must be located as close as possible to the exit door opening and on the latch (knob) side.

(6) Staff must be appropriately trained in the use of each type of extinguisher in the facility.

§19.316. Subdivision of Building Spaces-Smoke Barriers.

(a) Subdivision of building spaces must be as required by the Life Safety Code.

(b) The facility must maintain the integrity of smoke barrier walls, including those parts of walls in attics and other concealed spaces.

(c) The facility must maintain the integrity of smoke dampers in air ducts.

(d) Ducts with smoke dampers must have maintenance panels for inspection. The maintenance panels must be removable without tools. Means of access must also be provided in the ceiling or side wall to facilitate smoke damper inspection readily and without obstruction. Location of dampers must be identified on the wall or ceiling of the occupied area below.

§19.317. Elevators and Escalators. Elevators must comply with the provisions of the Life Safety Code and American National Standard Institute Safety Code for Elevators and Escalators (ANSI/ASME A17.1). Elevators are required for buildings having

residents' facilities, such as bedrooms, dining, or recreation areas; or *services, such as diagnostic or therapy, located on other than the* main entrance floor. Passenger elevators and escalators must be inspected by a qualified agent at least every six months. Freight elevators must be inspected every 12 months.

§19.318. Other Rooms and Areas.

(a) Nurses station. A nurses station is an area designated as the focal point on all shifts for the administration and supervision of resident-care activities for a designated number of resident bedrooms.

(1) All resident bedroom corridors must be observable by direct line of sight or by mechanical means from a designated nurses station or auxiliary station. There must be at least one nurses station per floor in multi-storied buildings.

(2) If all resident bedroom corridors are observable by direct line of sight from inside the nurses station or from within 24 inches of the counter or hall of the nurses station, no auxiliary stations are required, even if resident bedrooms are more than 150 feet from the nurses station.

(3) When resident bedrooms are more than 150 feet from the nurses station and the adjacent corridors are not observable from the station by direct line of sight, an auxiliary station must be established and used.

(4) All corridors adjacent to resident bedrooms that are more than 150 feet from a designated nurses station or auxiliary station must be observable by direct line of sight from the designated nurses station or auxiliary station. Corridors located in the service area of an auxiliary station must be observable, as described in paragraphs (2) and (3) of this subsection, at the auxiliary station.

(5) The 150-foot limitation described paragraphs (2)-(4) of this subsection may be increased to 165 feet in facilities or additions to facilities completed before August 10, 1983.

(b) Auxiliary station. Each auxiliary station must include a work area in which nursing personnel can document and maintain resident data, even if the facility's initial decision is to maintain clinical records at the nurses station.

(1) Auxiliary stations must be staffed by nursing personnel during all shifts.

(2) More than one auxiliary station may be assigned to a designated nurses station, regardless of the distance between stations. More than one corridor may be observed by mechanical means from a designated nurses station or auxiliary station.

(3) A nurse call system, located in the service area or a designated auxiliary station, must register calls at the nurses station to which it is assigned.

(4) Each auxiliary station must have an emergency electrical source adequate to power lights at the station.

(5) Medications and clinical records may be maintained at an auxiliary station.

(6) If a required auxiliary station does not already exist and the facility must establish a new auxiliary station, all applicable standards, particularly those pertaining to the physical plan and the Life Safety Code, must be observed. All renovations and structural changes require prior approval from the Texas Department of Human Services (DHS).

(7) All new construction completed after August 10, 1983, must allow direct line-of-sight observation of all resident bedroom corridors from the nurses station or auxiliary station.

(c) Mechanical means for resident observation.

(1) The nursing facility may use mechanical means, such *as closed-circuit television and mirrors, to observe residents in the* facility.

(2) Closed-circuit television monitoring systems must meet the following criteria:

(A) The camera(s) must be placed to view the entire corridor length, without any "blind spots."

(B) The camera(s) must be capable of providing recognizable images, in minimum and maximum light levels, for the complete viewing area.

(C) The monitor(s) must be installed and be clearly visible to persons in the nurses station or auxiliary station who are assigned to the area monitored by the camera.

(D) The system must be supplied with emergency power that enables the system to function during electrical service failures.

(E) Each camera must have its own separate monitor.

(F) If they perform the minimum basic functions specified in subparagraphs (A)-(D) of this paragraph, television monitoring systems installed before March 1984 may remain in service until the equipment is replaced or the system is expanded. Replacement systems or new component equipment must satisfy subparagraphs (A)-(E) of this paragraph.

(3) Mirrors must meet the following criteria:

(A) The mounting height of the mirror must be no less than six feet and eight inches from the floor to the bottom of the mirror.

(B) The mirror(s) must not extend more than 3-1/2 inches from the face of the corridor wall, unless the bottom of the mirror is more than seven feet and six inches above the floor.

(C) The mirror image must be clear enough that individuals can be recognized, in minimum and maximum light levels, throughout the viewing area.

(4) The monitoring systems described in this section must not be used to deny privacy to staff or residents.

(d) Resident call system. Each nurses station must be equipped to register residents' calls through a communication system from resident areas. See §19.307 of this title (relating to Resident Call System) for specific requirements.

(e) Medication storage area. There must be sufficient, lockable, enclosed medicine storage spaces, medicine room, or medication cart. The medication storage area must be furnished with a refrigerator. There must be sufficient space available for a medication preparation area equipped with a sink having hot and cold water. When not in use, the medication cart must be secured in a designated area. Only authorized personnel must have access to the medication storage area and the medication cart. Medication storage and preparation areas must be adequately ventilated and temperature controlled. See §19.1501 of this title (relating to Pharmacy Services).

(f) Clean utility room. A clean utility room must be provided and must contain a sink with hot and cold water. It must be

part of a system for storage and distribution of clean and sterile supply materials and equipment.

(g) Soiled utility room. A soiled utility room must be provided and contain a flushing fixture and a sink with hot and cold water. It must be part of a system for collection and cleaning or disposal of soiled utensils or materials.

(h) Soiled linen room. Soiled linen rooms must be provided as needed commensurate with the type of laundry system used. In relation to adjacent areas, a negative air pressure must be provided with air exhausted through ducts to the exterior. Air must be exhausted continually whenever there are soiled linens in the room. A soiled linen room may be combined with a soiled utility room.

(i) Clean linen storage. Clean linen storage must be provided, conveniently located to resident bedroom areas.

(j) Kitchens.

(1) Nursing facility kitchens will be evaluated on the basis of their performance in the sanitary and efficient preparation and serving of meals. Consideration will be given to planning for the type of meals served, the overall building design, the food service equipment, arrangement, and the work flow involved in the preparation and delivery of food. Evaluation will be based on the number of meals served.

(2) Kitchen temperature, at peak load, must not exceed a temperature of 85 degrees Fahrenheit measured over the room at the five foot level. Sufficient heating must be provided to maintain an average temperature of not less than 70 degrees Fahrenheit in winter (with exhausts operating) at the five-foot level.

(3) The kitchen must have operational equipment for preparing and serving meals and for refrigerating and freezing of perishable foods, as well as equipment in, and/or adjacent to, the kitchen or dining area for producing ice.

(4) The kitchen must have facilities for washing and sanitizing dishes and cooking utensils. These facilities must be adequate for the number of meals served and the method of serving (such as use of permanent or disposable dishes). The kitchen must contain a multi-compartment sink large enough to immerse pots and pans. In all facilities, a mechanical dishwasher is required for sanitizing dishes. Separation of soiled and clean dish areas must be maintained, including air flow and traffic flow.

(5) The kitchen must have an adequate supply of hot and cold water. Hot water for sanitizing purposes must be 180 degrees Fahrenheit or the manufacturer's suggested temperature for chemical sanitizers, as specified for the system in use. For mechanical dishwashers, the temperature measurement is at the manifold. Hot water for general kitchen use must be 140 degrees Fahrenheit.

(6) A kitchen must have at least one handwashing lavatory in the food-preparation area. The dish washing area must have ready access to a handwashing lavatory or hand sanitizing device. Handwashing lavatories must be provided with hot and cold running water, a sanitary soap dispenser, and paper towel dispenser (or hot air dryer).

(7) Nonabsorbent smooth finishes or surfaces must be used on kitchen floors, walls, and ceilings. These surfaces must be capable of being routinely sanitized to maintain a healthful environment.

(8) A janitor's closet with service sink must be easily and readily accessible to the kitchen.

(9) Kitchen exhaust hood at cooking equipment and its attached automatic chemical extinguisher must comply with National Fire Prevention Association (NFPA) 96. DHS may waive certain details of NFPA 96 for existing kitchen exhausts at cooking equipment provided that basic function and safety are not compromised.

(k) Food storage areas.

(1) Food storage areas must provide for storage of a seven-day minimum supply of nonperishable staple foods and a two-day supply of perishable foods at all times.

(2) Shelves and pallets must be moveable wire, metal, or sealed lumber, and walls must be finished with a nonabsorbent finish to provide a cleanable surface.

(3) Dry food storage must have a venting system to provide for reliable positive air circulation.

(4) The maximum room temperature for food storage must not exceed 85 degrees Fahrenheit at all times. The measurement must be taken at the five-foot level.

(5) Foods must not be stored on the floor. Dunnage carts or pallets may be used to elevate foods not stored on shelving.

(6) Sealed containers must be provided for storing dry foods after the package seal has been broken.

(7) Food storage areas may be located apart from the food preparation area as long as there is space adjacent to the kitchen for necessary daily usage.

(l) Auxiliary serving kitchens (those not contiguous to food preparation and serving areas).

(1) Where service areas other than the kitchen are used to dispense foods, these must be designated as food service areas and must have equipment for maintaining required food temperatures while serving.

(2) Separate food service areas must have handwashing facilities as a part of the food service area.

(3) Finishes of all surfaces except ceilings must be the same as those required for dietary kitchens.

(m) Administrative and public areas. Facilities must have administrative area(s) for normal business transactions and maintenance of records.

(n) Laundry.

(1) Laundry facilities must be located in areas separate from resident rooms. The laundry must be designed, constructed, and equipped and appropriate procedures must be utilized to assure that laundry is handled, cleaned, and stored in a sanitary manner.

(2) Laundry for general linen and clothing must be arranged so as to separate soiled and clean operations as they relate to traffic, handling, and air currents. Suitable exhaust and ventilation must be provided to prevent air flow from soiled to clean areas.

(3) Floors, walls, and ceilings must be nonabsorbing and easily cleanable.

(4) Soiled linen must be stored and/or transported in closed or covered containers. Soiled linen storage or holding rooms must have a negative air pressure in relation to adjacent areas with air exhausted through ducts to the exterior.

(5) Laundry areas must have air supply and ventilation to minimize mildew and odors. Doors must not remain open, for sanitation and safety reasons.

(6) Room size, and number and type of appliances must provide efficient, sanitary, and timely laundry processing to meet the needs of the facility.

(7) The laundry, if located in the facility, must meet Life Safety Code requirements for separation and construction for hazardous areas.

(o) Resident-use laundry. This service, if provided, must be limited to not more than one residential type washer and dryer per

laundry room. This room must be classified as a hazardous area according to the Life Safety Code.

(p) Personal grooming area. Space and equipment must be provided for the hair care and grooming needs of the residents. Hair care and grooming service will be provided in resident bedrooms or in designated areas which are not in a way of egress.

(q) Storage rooms. General and/or specific storage areas must be provided as needed and required for safe and efficient operation of the facility. Items must not be stored in inappropriate places such as corridors or rooms which are not equipped for special hazard protection.

(r) Janitor closets. In addition to the janitors' closet called for in certain departments, other janitors' closets must be provided throughout the facility to maintain a clean and sanitary environment. All janitor closets must have a negative air pressure in relation to adjacent areas with air exhausted through ducts to the exterior.

(s) Disposal facilities. A policy and procedure for the safe and sanitary disposal of special waste must be provided. The facility must comply with Texas Department of Health requirements as described in 25 TAC §§1.131-1.137 (relating to Definitions and Treatment of Special Waste from Health Care Related Facilities). The facility must also comply with Texas Natural Resource Conservation Commission requirements for medical waste management, as specified in 30 TAC Chapter 330, Subchapter Y. Space and facilities must be provided for the sanitary storage and disposal of waste, not classified as special, by incineration, mechanical destruction, compaction, containerization, removal, or contract with outside resources, or by a combination of these techniques.

(t) Maintenance, engineering service, and equipment areas.

(1) The facility must provide storage for building equipment, supplies, tools, parts, and yard maintenance equipment.

(2) Volatile liquids and supplies must not be kept within the main building housing residents.

(3) All equipment requiring periodic maintenance, testing, and servicing must be reasonably accessible. Necessary equipment to conduct these services (such as ladders, specific tools, keys) must be readily available on site.

(u) Oxygen.

(1) The facility must implement procedures that assure the safe and sanitary use and storage of oxygen.

(2) Liquid oxygen containers must be certified by Underwriters Laboratory (UL) or other approved testing laboratory for compliance with NFPA 50 requirements. The storage, handling, assembly, and testing must be in compliance with all applicable NFPA standards, including NFPA 99 and NFPA 50 requirements. The facility is responsible for defining all potential hazards both graphically and verbally to all persons involved in the use of liquid oxygen and ensuring that the liquid-oxygen provider does also.

§19.319. Provisions for Persons with Disabilities. New facilities and additions must meet the requirements of the Texas Department of Licensing and Regulation, Elimination of Architectural Barriers Section. Existing facilities must meet the requirements of the Americans with Disabilities Act and must, at a minimum, comply with the following:

(1) The facility must provide and mark at least one parking space for persons with disabilities.

(2) The facility must provide wheelchair access into the building by use of ramps and curb breaks. Ramps must not slope more than 1:12 (one unit of rise to 12 units of run).

(3) Room identification signs or letters must be installed four feet six inches to five feet above finished floor and located on the corridor walls adjacent to the latch side of the door jamb. Letters or numbers on signs must be raised or recessed at least 1/32 inch minimum. Characters must be at least 5/8 inch in height and no higher than two inches.

(4) Grab bars at toilet and bathing units must be 1/4 inch to 1/2 inch in diameter.

(5) Toilet facilities must be available and of sufficient size to accommodate wheelchairs. There must be at least one public wheelchair-accessible restroom.

(6) Water closet seat height in toilet facilities for persons with disabilities must be 17 to 19 inches from floor.

(7) Mirrors and dispensers for persons with disabilities must be no higher than 40 inches above the floor.

(8) Drinking fountains or coolers must meet American National Standards Institute (ANSI) A117.1 (that is, up front spout and controls no more than 36 inches from floor maximum). Fountains existing at the time of this publication do not have to be altered.

(9) Public telephones, if provided, must meet ANSI A117.1. Mounting height must not exceed 48 inches to coin slot.

§19.320. Lighting and Illumination. Current recommendations of the Illumination Engineering Society of North America must be followed to achieve proper illumination characteristics and lighting levels throughout the facility. Minimum illumination must be ten foot candles in resident rooms and 20 foot candles in corridors, nurses stations, dining rooms, lobbies, toilets, bathing facilities, laundries, stairways, and elevators. Illumination requirements for these areas apply to lighting throughout the space and should be measured at approximately 30 inches above the floor anywhere in the room. Minimum illumination for overbed reading lamps, medication preparation or storage areas, kitchens, and nurse's station desks must be 50 foot candles. Illumination requirements for these areas apply to the task performed and should be measured on the task.

§19.321. Heating, Ventilating, and Air-conditioning Systems (HVAC).

(a) The heating system must be capable of maintaining a temperature of not less than 71 degrees Fahrenheit at the resident level in all resident-use areas. Auxiliary heating devices permanently installed, such as heat strips in ducts, electric ceiling-mounted heating units, and electric baseboards, may be used to augment a central heating system as approved by the Texas Department of Human Services (DHS). See §19.705 of this title (relating to Environment).

(b) The cooling system must be capable of maintaining a temperature suitable for the comfort of the residents in resident-use areas.

(c) Air flow must be directed or adjusted so that a resident is not in direct drafts that could be harmful to the health and comfort of the resident.

(d) Unvented heating units and portable heaters are prohibited.

(e) The facility must be well ventilated through the use of windows, mechanical ventilation, or a combination of both. Rooms and areas which do not have outside windows and which are used by residents or personnel must be provided with functioning mechanical ventilation to change the air on a basis commensurate with the room usage. Air systems must provide for the induction and mixing of at

least 10% outside fresh air into the facility unless otherwise approved by DHS; that is, 100% continuous recirculation of interior air in most areas is not acceptable. When certain rooms or areas are dependent on a central air system for proper ventilation, including exhaust, that central air system fan must run continuously.

(f) Operable outside windows must be provided with insect screens. Outside doors must be self-closing to control entry of insects. All exterior doors must be effectively weather stripped.

(g) Heating and air conditioning systems must be provided with clean and effective air filters.

(h) Ducts and piping subject to surface condensation must be insulated to prevent condensation at least in areas which may affect sanitation or cause building deterioration.

(i) A comfortable temperature for residents when bathing must be provided.

(j) Heating, ventilating, and air conditioning systems must comply with the provisions of applicable National Fire Prevention Association (NFPA) standards. Ducts are to be of a Class A material (noncombustible). Combustion air for gas-fired equipment must be ducted from the exterior.

(k) Air flow must be designed to prevent cross contamination within any area where applicable, such as laundries and kitchens, as well as the system or facility as a whole.

(l) In relation to adjacent areas, a positive air pressure must be provided for clean utility rooms, clean linen rooms, and medication rooms. Conditioned supply air must be introduced into these rooms.

(m) In relation to adjacent areas, a negative air pressure must be provided for soiled utility rooms, soiled laundry rooms, bathrooms, toilets, and other odor-producing rooms. Air from these rooms must not be recirculated, but instead must be exhausted through ducts to the exterior by effective means.

(n) Facility temperature must be maintained for the comfort of residents.

§19.322. Plumbing.

(a) If the municipality has a plumbing code, that code must be used as a basis for determining the correctness of plumbing installation. In the absence of a municipal code, a nationally recognized plumbing code must be used.

(b) The water supply must be of safe, sanitary quality, suitable for use, and adequate in quantity and pressure. The water must be obtained from a water supply system, the location, construction, and operation of which are approved by the Texas Natural Resource Conservation Commission.

(c) Sewage must be discharged into a state-approved sewerage system or the sewage must be collected, treated, and disposed of in accordance with applicable Texas Natural Resource Conservation Commission rules and regulations.

(d) The wastewater drainage and sewage system must assure that sanitation is maintained for residents. Wastewater or sewage must not be discharged on the surface of the ground. Traps must not be allowed to lose their seal. Appliances must have air gaps as required for connections to the sewerage system. Venting must assure a rapid flow of wastewater in the sewage system.

(e) The interior cold water supply system and piping must be so placed or so insulated as to prevent condensation drip in habitable areas and in storage areas.

(f) Backflow preventers or vacuum breakers must be installed with any water supply fixture where the outlet or attachments may be submerged.

(g) Resident-use hot water must be reliably controlled, such as by thermostatic or mixing valves, to not exceed 110 degrees Fahrenheit and not less than 100 degrees Fahrenheit at each fixture.

(h) Hot water for other usages must be provided at the temperatures required for the appliance or fixture or for the operation involved, such as dishwashing and laundry.

(i) The supply quantity of hot water must be adequate for normal peak load usage. Facilities which continue to experience a shortage of hot water must remedy the situation by such means as adding storage tanks, adding or increasing the size of water heaters, or other approved means.

(j) Water heaters must be equipped with pressure temperature relief valves.

§19.323. Housekeeping Services.

(a) The facility must provide sufficient housekeeping and maintenance personnel, equipment, and supplies to maintain the interior, exterior, and grounds of the facility in a safe, clean, orderly, and attractive manner. In a nursing facility, an employee must be designated as responsible for housekeeping services.

(b) Occupied resident rooms must be cleaned and put in order at least daily.

(c) Storage areas must be kept safe and free from accumulations of extraneous materials such as refuse, discarded furniture, and newspapers. Combustibles, such as cleaning rags and compounds, must be kept in closed metal containers and labeled.

(d) Attics, mechanical rooms, boiler rooms, and other similar areas must not be used for storage purposes.

(e) All bleaches, detergents, disinfectants, insecticides, and other poisonous substances must be kept in a safe place accessible only to employees. They must not be kept in containers previously containing food or medicine. Containers must be labeled.

§19.324. Pest Control.

(a) An effective, safe, and continuing pest control system against insects, rodents, and vermin must be in operation in the facility. Pest control services must be provided by nursing facility personnel or by contract with a licensed pest control company. Care must be taken to use the least toxic and least flammable effective insecticides and rodenticides. These compounds must be stored in nonfood preparation and storage areas. Poisons must be under lock.

(b) The facility must protect against harborages and entrances for insects, rodents, and vermin. Outside doors must be self-closing to control entry of pests.

(c) Garbage and trash must be stored in enclosed containers, protected against leakage, contact with disease carriers, and access to animals. It must be stored in areas separate from those used for the preparation and storage of food and must be removed from the premises in conformity with state and local practices. Garbage and trash containers must be maintained free of accumulations and coatings of garbage. Garbage storage areas must be kept clean and in a state of good repair.

§19.325. Linen.

(a) The nursing facility must have available at all times a quantity of linen essential for the proper care and comfort of residents. Linens must be handled, stored, and processed so as to control the spread of infection.

(b) Linen will be maintained in good repair.

(c) Linen must be washed, dried, stored, and transported in a manner which will produce hygienically clean linen. The washing process must have a mechanism for soil removal and bacteria kill.

(d) Clean linen must be stored in a clean linen area easily accessible to the personnel.

(e) Clean towels and washcloths must be provided to each resident as needed or desired. Towels and washcloths must be stored in a sanitary manner between uses by the resident and must not be used by more than one resident between launderings.

(f) Soiled linen and clothing must be stored separately from clean linen and clothing. Soiled linen and clothing must be stored in well ventilated areas, and must not be permitted to accumulate in the facility. Soiled linen and clothing must be transported in accordance with procedures consistent with universal precautions. Bags or containers must not be reused to transport or store clean items.

(g) Soiled linen must not be sorted, laundered, rinsed, or stored in bathrooms, resident rooms, corridors, kitchens, or food storage areas, except soiled linen and clothing which is not contaminated with blood may be rinsed in a resident's bathroom water closet.

(h) Resident's personal clothing that is not soiled with body wastes may be stored in a closed container in the resident's closet. The clothing must be collected and cleaned at least weekly.

(i) Facility staff must wash their hands both after handling soiled linen and before handling clean linen.

§19.326. Safety Operations.

(a) The facility must have a written plan with procedures to be followed in an internal or external disaster and for the care of casualties. Plans dealing with natural disasters, such as hurricanes, floods, and tornadoes, must be coordinated with the local emergency management coordinator. Information about the local emergency management coordinator may be obtained from the office of the local mayor or county judge.

(1) The facility must maintain the plan and procedures at the nurses station and with department managers within the facility. The facility must ensure that the plan and procedures are reviewed at least annually. Changes in administrator, construction, or emergency phone numbers will require the facility to review and possibly modify the disaster plan. All reviews of disaster plans must be documented.

(2) The facility must include in the disaster plan, evacuation routes and procedures to be followed in the event of fire, explosion, or other disaster. The plan must also include procedures for the prompt transfer of casualties, clinical records, medications, and notification of appropriate persons.

(3) All employees must be familiar with the disaster plan and must be instructed in the location and use of the facility's alarm systems, fire-fighting equipment, and procedures. The facility must post fire and explosion evacuation routes prominently throughout the facility. The facility must have a fire safety plan within the disaster plan. The fire safety plan must be rehearsed quarterly on each shift with at least one rehearsal conducted each month. A comprehensive fire drill report form must be completed for each rehearsal of the fire safety plan.

(4) In smaller, simple, one story buildings where all exits are obvious, the Texas Department of Human Services (DHS) may not require the posting of evacuation routes.

(5) The facility must have an emergency contingency plan to ensure the residents' comfort and safety, including the provision of potable water.

(6) Emergency telephone numbers must be clearly posted on or near each phone. Emergency telephone numbers must include the local fire department, ambulance, and police.

(b) The facility must report all fires to DHS on the Fire Report for Long Term Care Facilities Form within 15 days after the fire. The facility must immediately notify DHS by phone of disasters or any fires which caused death or serious injury. Telephone reports must be followed by written reports. Failure of the fire alarm, emergency power, or sprinkler system will require that all facility staff be informed of conditions, and the facility must take special precautions such as establishing a fire watch, appropriate to the situation. These situations must be reported to the local fire authority.

(c) Severe weather drills and other emergency drills must be held as needed and as called for by the facility's policy and procedure manual.

(d) The fire alarm and sprinkler systems must be inspected and tested at least once every three months by a licensed agent. Each quarterly inspection and test must be of the complete system, including smoke dampers and individual sprinkler heads. A standard report form of the inspection must be completed by the agent and kept on file by the facility. The report must include the signature of the person making the inspection and the date of the inspection. The facility must maintain a current contract on file for the services of the inspecting company.

(e) The facility may, at its own discretion, make simple periodic tests of the basic fire alarm system, such as by activating a manual-pull station, particularly when conducting required fire drills. At any time the facility staff verifies or suspects some malfunction of the system, the condition must be immediately investigated and corrected.

(f) Emergency generators, if required or provided, must be maintained in operating condition at all times. These must be inspected and run, under load, for at least 30 minutes each week. A signed or initialed record or log must be kept on file by the facility. The condition and proper operation of the emergency egress lighting should also be checked at this time.

(g) A functional test must be conducted on every required battery emergency lighting system at 30-day intervals for a minimum of 1/2 hour. An annual test must be conducted for a one and 1/2 hour duration. Equipment must be fully operational for the duration of the test. Written records of testing must be kept in the facility for inspection by the authority having jurisdiction.

(h) Automatic, fixed, dry-chemical extinguishers mounted in kitchen range hoods must be inspected and serviced by a licensed agent (type A license with the State Fire Marshal's office) at least once every six months. A written, signed report must be left on file with the facility. The hood, exhaust ducts, and filters must be kept clean and free of accumulated grease.

(i) Portable fire extinguishers must be visually inspected monthly by facility staff and must have maintenance provided annually by a licensed agent in accordance with National Fire Prevention Association (NFPA) 10. A record of the annual maintenance must be kept in the facility. Portable extinguishers must be protected from damage and must be kept on their mounting brackets or in cabinets at all times.

(j) Facilities using gas must have the gas piping lines from the meter and appliances tested for leaks annually by a qualified person. A written, signed report must be made of these tests and kept on file. Any unsatisfactory conditions must be noted and corrected promptly.

(k) Smoking policies must be formulated and adopted by the facility. The policies must comply with all applicable codes, regulations, and standards, including local ordinances. The facility is

responsible for informing residents, staff, visitors, and other affected parties of smoking policies through distribution and/or posting. The facility is responsible for enforcement of smoking policies which must include at least the following provisions:

(1) Smoking tobacco, matches, lighters, or other smoking paraphernalia are not permitted to be kept or stored in a resident's room or in their possession without supervision.

(2) Smoking by residents on the premises is permitted only when supervised by staff of the facility or visitors. The type of supervision (individual versus group supervision) will be determined by the resident's medical condition. The resident must be within direct view of the smoking supervisor, in reasonably close proximity of the supervisor, and the supervisor must be able to quickly respond in the event of an emergency. Additionally, the supervisor, whether staff or visitor, must be aware of these responsibilities. A facility may establish a no-smoking policy for any public areas of the facility.

(3) Smoking is prohibited in any room, ward, or compartment where flammable liquids, combustible gas, or oxygen are used or stored and in any other hazardous locations. These areas must be posted with "No Smoking" signs.

(l) No storage is permitted in rooms with gas-fired equipment. Bulk storage of volatile or flammable liquids or materials is not allowed anywhere within the building.

(m) Medical equipment, carts, wheelchairs, tables, furniture, dispensing machines, and similar physical objects, must not be stored in corridors or other ways of egress.

(n) Smoke doors, fire doors, and doors to hazardous rooms must be kept closed and must not be propped or wedged open. Only approved devices such as alarm-activated electromagnetic hold-open devices may be used to hold these doors open, except doors to rooms classified as severe hazard.

(o) Electrical extension cords must not be used on a permanent or semi-permanent basis as a substitute for approved wiring methods. Approved electrical receptacles must be provided in quantity and location for the normal use of appliances.

(p) All abandoned utilities such as electrical wiring, ducts, and pipes, must be removed from the facility when no longer usable.

§19.330. Construction and Initial Survey of Completed Construction.

(a) Construction phase.

(1) The Texas Department of Human Services (DHS), Architectural Section in Austin, Texas, must be notified in writing of construction start.

(2) All construction must be done in accordance with minimum licensing requirements. It is the sponsor's responsibility to employ qualified personnel to prepare the contract documents for construction of a new facility or remodeling of an existing facility. Contract documents for additions and remodeling and for the construction of an entirely new facility must be prepared by an architect licensed by the Texas State Board of Architectural Examiners. Drawings must bear the seal of the architect. Certain parts of final plans, designs, and specifications must bear the seal of a registered professional engineer approved by the State Board of Registration for Professional Engineers to operate in Texas. These certain parts include sheets and sections covering structural, electrical, mechanical, and sanitary engineering.

(A) Remodeling is the construction, removal, or relocation of walls and partitions, the construction of foundations, floors, or ceiling-roof assemblies, the expanding or altering of safety systems (including, but not limited to, sprinkler, fire alarm, and emergency systems), or the conversion of space in a facility to a different use.

(B) General maintenance and repairs of existing material and equipment, repainting, applications of new floor, wall, or ceiling finishes, or similar projects are not included as remodeling, unless as a part of new construction. DHS must be provided flame spread documentation for new materials applied as finishes.

(b) Contract documents.

(1) Site plan documents must include grade contours; streets (with names); north arrow; fire hydrants; fire lanes; utilities, public or private; fences; unusual site conditions, such as ditches, low water levels, other buildings on-site; and indications of buildings five feet or less beyond site property lines. Site plan documents for nursing facilities may include the developed landscaping plan for resident use as called for in §19.332(f) of this title (relating to Location and Site) .

(2) Foundation plan documents must include general foundation design and details.

(3) Floor plan documents must include room names, numbers, and usages; resident care areas; doors (numbered) including swing; windows; legend or clarification of wall types; dimensions; fixed equipment; plumbing fixtures; and kitchen basic layout; and identification of all smoke barrier walls (outside wall to outside wall) or fire walls.

(4) For both new construction and additions or remodeling to existing buildings, an overall plan of the entire building must be drawn or reduced to fit on an 8-1/2 inch by 11 inch sheet.

(5) Schedules must include door materials, widths, types; window materials, sizes, types; room finishes; and special hardware.

(6) Elevations and roof plan must include, but is not limited to, exterior elevations, including material note indications and any roof top equipment, roof slopes, drains, and gas piping, and interior elevations where needed for special conditions.

(7) Details must include wall sections as needed (especially for special conditions); cabinet and built-in work, basic design only; cross sections through buildings as needed; and miscellaneous details and enlargements as needed.

(8) Building structure documents must include structural framing layout and details (primarily for column, beam, joist, and structural frame building); roof framing layout (when this cannot be adequately shown on cross section); cross sections in quantity and detail to show sufficient structural design and structural details as necessary to assure adequate structural design, also calculated design loads.

(9) Electrical documents must include electrical layout, including lights, convenience outlets, equipment outlets, switches, and other electrical outlets and devices; service, circuiting, distribution, and panel diagrams; exit light system (exit signs and emergency egress lighting); emergency electrical provisions (such as generators and panels); fire alarm and similar systems (such as control panel, devices, and alarms); a nurse call system; and sizes and details sufficient to assure safe and properly operating systems.

(10) Plumbing documents must include plumbing layout with pipe sizes and details sufficient to assure safe and properly operating systems, water systems, sanitary systems, gas systems, other systems normally considered under the scope of plumbing, fixtures, and provisions for combustion air supply.

(11) Heating, ventilation, and air-conditioning (HVAC) documents must include sufficient details of HVAC systems and components to assure a safe and properly operating installation

including, but not limited to, heating, ventilating, and air-conditioning layout, ducts, protection of duct inlets and outlets, combustion air, piping, exhausts, and duct smoke and/or fire dampers; and equipment types, sizes, and locations.

(12) Sprinkler system documents must include plans and details of National Fire Protection Association (NFPA) designed systems; plans and details of partial systems provided only for hazardous areas; electrical devices interconnected to the alarm system.

(13) Other layouts, plans, or details as may be necessary for a clear understanding of the design and scope of the project; including plans covering private water or sewer systems must be reviewed by the local health or wastewater authority having jurisdiction.

(14) Specifications must include installation techniques, quality standards and/or manufacturers, references to specific codes and standards, design criteria, special equipment, hardware, painting, and any others as needed to amplify drawings and notes.

(c) Initial survey of completed construction.

(1) Upon completion of construction, including grounds and basic equipment and furnishings, a final construction inspection (initial survey) of the facility, including additions or remodeled areas, is required to be performed by DHS's architectural section prior to occupancy. A minimum of three weeks advance notice is needed. The completed construction must have the written approval of the local authorities having jurisdiction, including the fire marshal and building inspector.

(2) After the completed construction has been surveyed by a representative of DHS's architectural section and found acceptable, this information will be conveyed to the licensing officer as part of the information needed to issue a license to the facility. In the case of additions or remodeling of existing facilities, a revision or modification to an existing license may be necessary. Note that the building, grades, drives, parking, and grounds must be essentially 100% complete at the time of this initial survey visit for occupancy approval and licensing, including basic furnishings and operational needs.

(3) The following documents must be provided to DHS's architectural inspecting surveyor at the time of the survey of the completed building:

(A) written approval of local authorities as called for in paragraph (1) of this subsection;

(B) written certification of the fire alarm system by the installing agent (the Texas State Fire Marshal's Fire Alarm Installation Certificate);

(C) documentation of materials used in the building which are required to have a specific limited fire or flame spread rating including, but not limited to, special wall finishes or floor coverings, flame retardant curtains (including cubicle curtains), and rated ceilings. This must include a signed letter from the installer verifying that the material installed, such as carpeting, is the same material named in the laboratory test document;

(D) approval of the completed sprinkler system installation by the Texas Department of Insurance or the designing engineer. A copy of the material list and test certification must be available;

(E) service contracts for maintenance and testing of systems, including, but not limited to, alarm systems and sprinkler systems;

(F) a copy of gas test results of the facility's gas lines from the meter;

(G) a written statement from an architect and/or engineer stating that he certifies that the building was constructed to meet NFPA 101, Life Safety Code, and all locally applicable codes, and that the facility is in substantial conformance with minimum licensing requirements; and

(H) the contract documents specified in subsection (b) of this section.

(d) Nonapproval of new construction.

(1) If, during the survey of completed construction, the surveyor finds certain basic requirements not met, DHS will not license the facility or approve it for occupancy. Such basic items may include the following:

(A) construction which does not meet minimum code or licensure standards for basic requirements such as corridor widths being less than eight feet clear width, ceilings installed at less than the minimum seven feet six inches height, resident bedroom dimensions less than required width, and other similar features which would disrupt or otherwise adversely affect the residents and staff if corrected after occupancy;

(B) no written approval by local authorities;

(C) fire protection systems not completely installed or not functioning properly including, but not limited to, fire alarm systems, emergency power and lighting, and sprinkler systems;

(D) required exits are not all usable according to Life Safety Code requirements;

(E) telephone not installed or not properly working;

(F) sufficient basic furnishings, essential appliances and equipment are not installed or not functioning; and

(G) any other basic operational or safety feature which the surveyor, as the authority having jurisdiction, encounters which in his judgment would preclude safe and normal occupancy by residents on that day.

(2) If the surveyor encounters deficiencies that do not affect the health and safety of the residents, licensure may be recommended based on an approved written plan of correction by the facility's administrator.

(3) Copies of reduced size floor plan on an 8-1/2 inch by 11 inch sheet must be submitted in duplicate to DHS for record and/or file use and for the facility to use in evacuation planning and fire alarm zone identification. The plan must contain basic legible information such as overall dimensions, room usage names, actual bedroom numbers, doors, windows, and any other pertinent information.

§19.331. Construction Standards for Additions, Remodeling, and New Nursing Facilities.

(a) This subchapter is written for, and applies to, new construction, including conversions, additions, and remodelings. The requirements of the Life Safety Code, Standard 101 of the National

Fire Protection Association (NFPA), as required under Health and Safety Code, §242.039, and other applicable NFPA codes and standards referenced in NFPA 101 will apply unless otherwise noted or modified in this subchapter. The provisions of the chapter or subchapter and the provisions of the New Health Care Occupancies of the Life Safety Code are applicable.

(1) Life Safety Code, NFPA 101, is a registered trademark of the National Fire Protection Association, Inc., Quincy, Massachusetts 02269.

(2) The definitions listed in §19.101 of this title (relating to Definitions) also apply to this subchapter.

(3) In addition to the Life Safety Code and the standards referenced therein, this subchapter is subject to the codes, standards, and requirements established by the following: Underwriters Laboratories, Inc.; the American National Standards Institute, Inc. (ANSI) ; the National Electrical Code (NFPA 70); the American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE); and the American Society for Testing Materials (ASTM). Various references to these entities will be made throughout these sections.

(b) All applicable local, state, or national codes and ordinances must be met as determined by the authority having jurisdiction for those codes and ordinances and by the Texas Department of Human Services (DHS). Any conflicts must be made known to DHS for appropriate resolution.

(c) The design of structural systems must be done by or under the direction of a professional engineer who is currently registered by the Texas State Board of Registration for Professional Engineers.

(d) If an existing licensed facility plans building additions or remodeling which includes construction of additional resident beds, then the ratio of bathing units must be reevaluated to meet minimum standards and the square footage of dining and living areas must be reevaluated by DHS at a minimum of 19 square feet per bed. Conversion of existing living, dining, or activity areas to resident bedrooms must not reduce these functions to a total area of less than 19 square feet per bed. The dietary department must be evaluated by the facility's registered or licensed dietitian or architect having knowledge in the design of food service operations. This evaluation must be provided to DHS.

(e) No building may be occupied by residents prior to inspection and approval to occupy by DHS.

(f) The words "shall" or "must" are requirements. The word "should" is a recommendation which is expected to be followed unless there is valid reason not to do so.

(g) Nothing in §§19.332-19.343 of this title ((relating to Location and Site, General Considerations, Architectural Space Planning and Utilization, Exit Provisions, Smoke Compartmentation (Subdivision of Building Spaces), Fire Protection Systems, Hazardous Areas, Structural Requirements, Mechanical Requirements, Electrical Requirements, Miscellaneous Details, and Elevators)) may be construed as prohibiting a better type of building or construction, more space, services, features, or greater degree of safety than the minimum requirements.

§19.332. Location and Site.

(a) Site approval is normally required of the local building department and fire marshal having jurisdiction. Any conditions considered to be a fire, safety, or health hazard will be grounds for disapproval of the site by the Texas Department of Human Services (DHS). New facilities may not be built in an area designated as a floodplain of 100 years or less.

(b) Site grades must provide for positive surface water drainage so that there will be no ponding or standing water on the designated site. This does not apply to local government requirements for engineered controlled run-off holding ponds.

(c) A new building (or addition) must be set back at least ten feet from the property lines except as otherwise approved by DHS.

(d) Exit doors from the building must not open directly onto a drive for vehicular traffic, but must be set back at least six feet from the edge of the drive (measured from the end of the building wall in the case of a recessed door) to prevent accidents due to lack of visual warning.

(e) Walks must be provided as required from all exits and must be of non-slip surfaces free of hazards. Walks must be at least 48 inches wide except as otherwise approved. Ramps should be used in lieu of steps where possible for the handicapped and to facilitate bed or wheelchair removal in an emergency.

(f) Outdoor activity, recreational, and sitting spaces must be provided and appropriately designed, landscaped, and equipped. Some shaded and/or covered outside areas are needed. These areas must be designed to accommodate residents in wheelchairs.

(g) Each facility must have parking space to satisfy the needs of residents, employees, staff, and visitors. In the absence of a formal parking study, each facility must provide for a ratio of at least one parking space for every four beds in the facility. This ratio may be reduced slightly in areas convenient to public parking facilities. Space must be provided for emergency and delivery vehicles. No parking space may block or inhibit egress from the outside exit doors. Parking spaces and drives must be at least ten feet away from windows in bedrooms, dining, and living areas.

(h) Barriers must be provided for resident safety from traffic or other site hazards by the use of appropriate methods such as fences, hedges, retaining walls, railings, or other landscaping. These barriers must not inhibit the free emergency egress to a safe distance away from the building.

(i) Open or enclosed courts with resident rooms or living areas opening upon them must not be less than 20 feet in the smallest dimension unless otherwise approved by DHS. Exceptions would be as follows:

(1) Nonparallel wings forming an acute angle may have a maximum of two windows each side less than 20 feet but not less than ten feet.

(2) Windows may be separated by a distance equal to the depth of the court but not less than ten feet.

(3) For unusual or unique site conditions, courts with resident rooms opening upon them on one side only must be not less than ten feet in the smallest dimension, provided that the opposite wing does not contain a hazardous area, and the wall has no openings which could permit fire to reach the resident room side.

(j) Auxiliary buildings located within 20 feet of the main building and which contain hazardous areas such as laundry and storage buildings must meet the applicable Life Safety Code requirements for separation and construction.

(k) Other buildings on the site must meet the appropriate occupancy section or separation requirements of the Life Safety Code.

(l) Fire service and access must be as follows:

(1) The facility must be served by a paid or volunteer fire department. The fire department must provide written assurance to DHS that the fire department can respond to an emergency at the facility within an appropriately prompt time for the travel conditions involved.

(2) The facility must be served by an adequate water supply that is satisfactory and accessible for fire department use as determined by the fire department serving the facility and by DHS.

(3) There must be at least one readily accessible fire hydrant located within 300 feet of the building. The hydrant must be on a minimum six inch service line, or else there must be an approved equivalent, such as a storage tank. The hydrant, its location, and service line, or equivalent must be as approved by the local fire department and DHS.

(4) The building must have suitable all-weather fire lanes for access as required by local fire authorities and DHS. As a minimum, there must be access to two sides of the building by an all-weather lane at least ten feet wide. Fire lanes must have at least 14 feet in clearance width above grade (two feet each side of the ten-foot roadbed) and be kept free of obstructions at all times. All-weather access lanes must be no less than a properly constructed gravel lane.

§19.333. General Considerations.

(a) Services. Nursing facilities must either contain the elements described in this section or the provider must indicate the manner in which the needed services are to be made available. Each element provided in the facility must comply with the requirements of this subchapter. Appropriate modifications or deletions in space requirements may be made when services are shared or purchased.

(b) Sizes. The sizes of the various departments will depend upon program requirements and organization of services within the facility. Some functions requiring separate spaces or rooms in these minimum requirements may be combined provided that the resulting plan will not compromise the best standards of safety and of medical and nursing practices.

(c) Shared or combined services. Nursing facilities may be operated together with hospitals and may share administration, food service, recreation, janitor service, and physical therapy facilities, but must otherwise have clearly identifiable physical separations such as a separate wing or floor. Nursing facilities with different levels of care will require identifiable physical separations. Combined attendant or nurse stations and medication room areas will require some separating construction features.

(d) Exterior finishes. Unless otherwise approved by the Texas Department of Human Services (DHS), the exterior finish material of buildings classified (per the National Fire Protection Association (NFPA 220)) as fire resistive or protected noncombustible must be Class A in the Life Safety Code. All others must be Class A or B in the Life Safety Code. Items of trim may be of combustible material subject to approval by DHS. Roofing must be Underwriter Laboratories listed as Class A or B.

(e) Interior finishes.

(1) Interior finish of walls, ceilings, and floors must meet the Life Safety Code requirements for new construction.

(2) Documentation of finishes, including, but not limited to, copies of lab test reports and material labels is required.

(f) Corridor travel distance. Corridor travel from the nurse station to the farthest resident room must assure prompt service to the resident. The normal travel for nursing efficiency is considered to be not over 85 feet and must not exceed 150 feet.

(g) Accessibility for individuals with disabilities. The facility must meet the provisions and requirements concerning accessibility for individuals with disabilities in the following laws: the Americans with Disabilities Act of 1990 (Public Law 101-336; Title 42, United States Code, Chapter 126); Title 28, Code of Federal Regulations, Part 35; Texas Civil Statutes, Article 9102; and Title 16, Texas Administrative Code, Chapter 68. Plans for new construction, substantial renovations, modifications, and alterations must be submitted to the Texas Department of Licensing and Regulation (Attention: Elimination of Architectural Barriers Program) for accessibility approval under Article 9102.

(h) Handrails. Handrails must be provided on each side of all resident-use corridors. Handrails for other areas should be provided as needed to facilitate resident movement or egress. Design of handrails must be in accordance with the American National Standards Institute (ANSI) A117.1. These handrails may extend into the minimum required corridor width without widening the corridor (that is, in an eight-foot-wide corridor, handrails may project up to 3 1/2 inches on each side). Reference §19.342(a)(8) and (9) of this title (relating to Miscellaneous Details) for handrail details.

§19.334. Architectural Space Planning and Utilization.

(a) Resident bedrooms. Each resident bedroom must meet the following requirements:

(1) The maximum room capacity must be four residents.

(2) No more than 25% of the total licensed beds may be in bedrooms with more than two beds each.

(3) Minimum bedroom area, excluding toilet rooms, closets, lockers, wardrobes, alcoves, or vestibules, must be 100 square feet in single occupancy rooms and 80 square feet per bed in multi-bed rooms.

(4) The minimum allowable room dimension is ten feet. The room must be designed to provide at least 36 inches between beds and 24 inches between any bed and the adjacent (parallel) wall.

(5) Each room must have at least one operable outside window arranged and located so that it can be easily opened from the inside without the use of tools or keys. The maximum allowable sill height (to opening) must not exceed 36 inches above the floor. All operative windows must have insect screens. The minimum area of window(s) in each bedroom must equal at least 16 square feet or 8.0% of the room area, whichever is larger.

(6) Each room must have general lighting, bed reading lights, and night lighting. The night light must be switched just inside the entrance to each resident room with a silent type switch unless otherwise approved by the Texas Department of Human Services (DHS). The light providing general illumination must be switchable at the door of the resident room for use of staff and residents. A durable nonglare (opaque front panel) reading light securely anchored to the wall, integrally wired, must be provided for each resident bed. The switch must be within reach of a resident in the bed.

(7) Two duplex or a fourplex grounding type receptacles must be provided beside the head of each bed. Other walls must have duplex receptacles as needed for TV, radio, razors, hairdryers, clocks, and/or as required by the National Electrical Code, National Fire Protection Association (NFPA 70), which is a registered trademark of the National Fire Protection Association, Inc., Quincy, Massachusetts 02269.

(8) Each resident must have access to a toilet room without entering the general corridor area. One toilet room must serve no more than two resident rooms. The toilet room must contain a water closet and a lavatory. The lavatory may be omitted from a toilet room which serves two bedrooms if each resident room contains a lavatory. See subsection (c)(1) of this section for baths and other toilet facility requirements.

(9) Each resident must have a bed with a comfortable mattress, a bedside stand with at least two enclosed storage spaces, a dresser, and closet or wardrobe space providing privacy for clothing and personal belongings. Clothes storage space must provide at least 22 inches of lineal hanging space per bed and have closable doors.

Chairs and space must be provided for use by residents and/or visitors.

(10) All beds must have castors with wheel-locking devices.

(11) Each room must open onto an exit corridor and must be arranged for convenient resident access to dining, living, and bathing areas.

(12) Visual privacy (such as cubicle curtains) must be available for each resident in multi-bed rooms. Design for privacy must not restrict resident access to entry, lavatory, or toilet, nor may it restrict bed evacuation or obstruct sprinkler flow coverage.

(13) At least one noncombustible wastebasket must be provided in each bedroom.

(14) See the requirements in §19.341(d)(4) of this title (relating to Electrical Requirements) for nurse call systems.

(b) Nursing service areas. The service areas described in this subsection must be located in or readily available to each nursing unit. The size and disposition of each service area will depend upon the number and types of beds to be served. Each service area may be arranged and located to serve more than one nursing unit, but at least one service area must be provided on each nursing floor. The maximum allowable distance from a resident room door to a nurse station is 150 feet. The following requirements are applicable to services areas:

(1) Nurse stations must be provided with space for nurses' charting, doctors' charting, and storage for administrative supplies. Nurses stations must be located to provide a direct view of resident corridors. A direct view of resident corridors is acceptable if a person can see down the corridors from a point within 24 inches of the outside of the nurse station counter or wall.

(2) Lounge and toilet room(s) must be provided for nursing staff.

(3) Lockers and/or security compartments must be provided for the safekeeping of personal effects of staff. These must be located convenient to the duty station of personnel or in a central location.

(4) Clean utility room(s) must contain a work counter, sink with high-neck faucet with lever controls, and storage facilities and must be part of a system for storage and distribution of clean and sterile supply materials.

(5) Soiled utility room(s) must contain a water closet or equivalent flushing rim fixture, a sink large enough to submerge a bedpan with spray hose and high-neck faucet with lever controls, work counter, waste receptacle, and linen receptacle. These utility rooms must be part of a system for collection and cleaning or disposal of soiled utensils or materials. A separate handwash sink must be provided if the bedpan disinfecting sink cannot normally be used for handwashing.

(6) Provision must be made for convenient and prompt 24-hour distribution of medication to residents. The medication preparation room must be under the nursing staff's visual control and contain a work counter, refrigerator, sink with hot and cold water, and locked storage for biologicals and drugs and must have a minimum area of 50 square feet. The minimum dimension allowed is five feet six inches. An appropriate air supply must be provided to maintain adequate temperature and ventilation for safe storage of medications. For purposes of storage of unrefrigerated medications, the room temperature must be maintained between 59 degrees and 86 degrees F.

(7) Provision must be made for separate closets or room for clean linens. Corridors must not be used for folding or cart storage. Storage rooms must be located and distributed in the building for efficient access to bedrooms.

(8) Soiled linen rooms must be provided as required in subsection (l) of this section.

(9) A nourishment station(s) is usually required in all but the smaller facilities and must contain a sink equipped for handwashing, equipment for serving nourishment between scheduled meals, refrigerator, and storage cabinets. Ice for residents' service and treatment must be provided only by icemaker units. This station may be furnished in a clean utility room.

(10) An equipment storage room must be provided for equipment such as intravenous stands, inhalators, air mattresses, and walkers.

(11) Parking spaces for stretchers and wheelchairs must be located out of the path of normal traffic.

(c) Residents' bathing and toilet facilities. The following requirements are applicable to bathing and toilet facilities:

(1) Bathtubs or showers must be provided at the rate of one for each 20 beds which are not otherwise served by bathing facilities within residents' rooms. At least one bathing unit must be provided in each nursing unit. Each tub or shower must be in an individual room or enclosure which provides space for the private use of the bathing fixture, for drying and dressing, and for a wheelchair and an attendant. Each general-use bathing room (those not directly serving adjoining bedrooms) must be provided with at least one water closet (in a stall, room, or area for privacy) and one lavatory. These bathing room(s) must be located conveniently to the bedroom area it serves and must not be more than 100 feet from the farthest bedroom. See requirements in subsection (a)(8) of this section for resident toilets at bedrooms. Each facility must provide at least one whirlpool tub unit as one of the required bathing units.

(2) At least 50% of bathrooms and toilet rooms, fixtures, and accessories must be designed and provided to meet criteria under the Americans with Disabilities Act of 1990 for individuals with disabilities unless otherwise approved by DHS.

(3) All rooms containing bathtubs, sitz baths, showers, and water closets, subject to occupancy by residents, must be equipped with swinging doors and hardware which will permit access from the outside in any emergency.

(4) Bathing areas must be provided with safe and effective auxiliary or supplementary heating. Bathing areas must be free of drafts and must have adequate exhaust ducted to the outside to minimize excess moisture retention and resulting mold and mildew problems.

(5) Tubs and showers must be provided with slip-proof bottoms.

(6) Lavatories and handwashing facilities must be securely anchored to withstand an applied downward load of not less than 250 pounds on the front of the fixtures.

(7) Provision must be made for sanitary hand drying and toothbrush storage at lavatories. There must be paper towel dispensers or separate towel racks and separate toothbrush holders.

(8) Mirrors must be arranged for convenient use by residents in wheelchairs as well as by residents in a standing position, and the minimum size must be 15 inches in width by 30 inches in height, or tilt type.

(9) Rooms with toilets must be provided with effective forced air exhaust ducted to the exterior to help remove odors. Ducted manifold systems are recommended for some multiple-type installations.

(10) Floors, walls, and ceilings must have nonabsorbent surfaces, be smooth, and easily cleanable.

(d) Disposal facilities. Space and facilities must be provided for the sanitary storage of waste by incineration, mechanical destruction, compaction, containerization, removal, or by a combination of these techniques.

(e) Resident living areas. The following requirements are applicable to resident living areas:

(1) Social-diversional spaces such as living rooms, dayrooms, lounges, sunrooms, must be provided on a sliding scale as follows:
See Figure 1 for 40 TAC §19.334(e)(1)

(2) Where a required way of exit (or a service way) is through a living (or dining) area, a pathway equal to the corridor width will normally be deducted for calculation purposes and discounted from that area. These exit pathways must be kept clear of obstructions.

(3) Each resident living room and dining room must have at least one outside window. The window area must be equal to at least 8.0% of the total room floor area. Skylighting may be used to fulfill one-half of the 8.0% minimum area.

(4) See §19.331(d) of this title (relating to Construction Standards for Additions, Remodeling, and New Nursing Facilities) for capacity increases to existing facilities.

(5) Open or enclosed seating space must be provided within view of the main nurse station that will allow furniture or wheelchair parking that does not obstruct the corridor way of egress.

(f) Dining space. Dining space must be adequate for the number of residents served, but no less than ten square feet per resident bed. See §19.331(d) of this title (relating to Construction Standards for Additions, Remodeling, and New Nursing Facilities) for bed capacity increases to existing facilities.

(g) Dietary facilities. The following requirements are applicable to dietary facilities:

(1) Kitchens (main/dietary) must be as follows:

(A) Kitchens will be evaluated on the basis of their performance in the sanitary and efficient preparation and serving of meals to residents. Consideration will be given to planning for the type of meals served, the overall building design, the food service equipment, arrangement, and the work flow involved in the preparation and delivery of food. Plans must include a large-scale detailed kitchen layout designed by a registered or licensed dietitian or architect having knowledge in the design of food service operations.

(B) Kitchens must be designed so that room temperature at peak load (summertime) will not exceed a temperature of 85 degrees Fahrenheit measured over the room at the five-foot level. The amount of supply air must take into account the large quantities of air that may be exhausted at the range hood and dishwashing area.

(C) Operational equipment must be provided as planned and scheduled by the facility consultants for preparing and serving meals and for refrigerating and freezing of perishable foods, as well as equipment in, and/or adjacent to, the kitchen or dining area for producing ice.

(D) Facilities for washing and sanitizing dishes and cooking utensils must be provided. These facilities must be designed based on the number of meals served and the method of serving, that is, use of permanent or disposable dishes. As a minimum, the kitchen must contain a multi-compartment sink large enough to immerse pots and pans. In all facilities, a mechanical dishwasher is required for washing and sanitizing dishes. Separation of soiled and clean dish areas must be maintained, including air flow.

(E) A vegetable preparation sink must be provided, and it must be separate from the pot sinks.

(F) A supply of hot and cold water must be provided. Hot water for sanitizing purposes must be 180 degrees Fahrenheit or the manufacturer's suggested temperature for chemical sanitizers. For mechanical dishwashers the temperature measurement is at the manifold.

(G) A kitchen must be provided with a hand-washing lavatory in the food preparation area with hot and cold water, soap, paper towel dispenser, and waste receptacle. The dish room area must have ready access to a handwashing lavatory.

(H) Staff rest room facilities with lavatory must be directly accessible to kitchen staff without traversing resident use areas. The rest room door must not open directly into the kitchen (that is, provide a vestibule).

(I) Janitorial facilities must be provided exclusively for the kitchen and must be located in the kitchen area.

(J) Nonabsorbent smooth finishes or surfaces must be used on kitchen floors, walls, and ceilings. These surfaces must be capable of being routinely cleaned and sanitized to maintain a healthful environment. Counter and cabinet surfaces, inside and outside, must also have smooth, cleanable, relatively nonporous finishes.

(K) Operable windows must have insect screens provided.

(L) Doors between kitchen and dining or serving areas must have a safety glass view panel.

(M) A garbage can or cart washing area with drain and hot water must be provided.

(N) Floor drains must be provided in the kitchen and dishwashing areas.

(O) Vapor removal from cooking equipment must be designed and installed in accordance with NFPA 96.

(P) Grease traps must be provided in compliance with local plumbing code or other nationally recognized plumbing code.

(Q) See §19.331(d) of this title (relating to Construction Standards for Additions, Remodeling, and New Nursing Facilities) for bed capacity increases to existing facilities.

(2) Food storage areas must be as follows:

(A) Food storage areas must provide for storage of a seven-day minimum supply of nonperishable foods at all times.

(B) Shelves must be adjustable wire type. Walls and floors must have a nonabsorbent finish to provide a cleanable surface. No foods may be stored on the floor; dollies, racks, or pallets may be used to elevate foods not stored on shelving.

(C) Dry foods storage must have an effective venting system to provide for positive air circulation.

(D) The maximum room temperature for food storage must not exceed 85 degrees F at any time. The measurement must be taken at the highest food storage level but not less than five feet from the floor.

(E) Food storage areas may be located apart from the food preparation area as long as there is space adjacent to the kitchen for necessary daily usage.

(3) Auxiliary serving kitchens (not contiguous to food preparation/serving area) must be as follows:

(A) Where service areas other than the kitchen are used to dispense foods, these must be designated as food service areas and must have equipment for maintaining required food temperatures while serving.

(B) Separate food service areas must have handwashing facilities as a part of the food service area.

(C) Finishes of all surfaces, except ceilings, must be the same as those required for dietary kitchens or comparable areas. See paragraph (1)(J) of this subsection.

(h) Administrative and public areas.

(1) The following elements must be provided in the public area:

(A) The entrance must be at grade level, sheltered from the weather, and able to accommodate wheelchairs. A drive-under canopy must be provided for the protection of residents or visitors entering or leaving a vehicle. The latter may be a secondary entrance.

(B) The lobby must include:

(i) storage space for wheelchairs (if more than one is kept available);

(ii) a reception and/or information area (may be obviously adjacent to lobby);

(iii) waiting space(s);

(iv) public toilet facilities for individuals with disabilities (may be adjacent to lobby);

(v) at least one public access telephone(s), installed to meet standards under the Americans with Disabilities Act; and

(vi) drinking fountain(s). These may be provided in a common public area and at least one must be installed to meet standards under the Americans with Disabilities Act; and

(C) A lobby may also be use-designed to satisfy a portion of the minimum area required for resident living room space.

(2) The following must be provided in the administrative area:

(A) General or individual offices(s) for business transactions, medical and financial records, administrative and professional staff, and for private interviews relating to social service, credit, and admissions.

(B) A multipurpose room for conferences, meetings, and health education purposes including facilities for showing visual aids.

(C) Storage and work area for office equipment and supplies must be provided and accessible to the staff using such items.

(3) Toilet facilities for the disabled must be available in the building.

(i) Physical therapy facilities.

(1) Physical therapy facilities must be provided if required by the treatment program. The facilities stated in subparagraph (B) of this paragraph and paragraph (2)(C) -(E) of this subsection may be planned and arranged for shared use by occupational therapy residents and staff if the treatment program reflects this sharing concept. Physical therapy facilities must include the following:

(A) Provision for cubicle curtains around each individual treatment area; handwashing facility(ies) (one lavatory or sink may serve more than one cubicle); and facilities for the collection of soiled linen and other material that may be used in the therapy.

(B) Residents' dressing areas, showers, lockers, and toilet rooms if the therapy is such that these would be needed at the area.

(2) Physical therapy facilities may also include the following:

(A) treatment area(s) with space and equipment for thermotherapy, diathermy, ultrasonics, and hydrotherapy;

(B) an exercise area;

(C) storage for clean linen, supplies, and equipment used in therapy;

(D) service sink located near therapy area; and

(E) wheelchair and stretcher storage.

(j) Occupational therapy. Occupational therapy facilities must be provided if required by the treatment program.

(1) An activities area with a sink or lavatory and facilities for collection of waste products prior to disposal must be provided.

(2) Storage for supplies and equipment used in the therapy must be provided.

(k) Personal grooming area (barber/beauty shop). A separate room with appropriate equipment must be provided for hair care and grooming needs of residents in facilities with over 60 beds.

(l) Laundry and linen services.

(1) On-site processing must be as follows:

(A) Because of the high incidence of fires in laundries, it is highly recommended that the laundry be in a separate building 20 feet or more from the main building. If the laundry is located within the main building it must be separated by minimum one-hour fire construction to structure above, and sprinklered, and

must be located in a remote area away from resident sleeping areas. Access doors must be from the exterior or interior nonresident use area such as a service corridor (not required exit) which is separated from the resident area.

(B) If linen is to be processed on the site, the following must be provided:

(i) A soiled linen receiving, holding, and sorting room with a rinse sink. This area must have a floor drain and forced exhaust to the exterior which must operate at all times there is soiled linen being held in the area.

(ii) A laundry processing room with equipment which can process seven days needs within a regularly scheduled work week. Hand-washing facilities must be provided. The washer area must have

(I) a floor drain;

(II) storage for laundry supplies;

(III) a clean linen inspection and mending room or area and a folding area;

(IV) a clean linen storage, issuing, or holding room or area;

(V) a janitors' closet containing a floor receptor or service sink and storage space for housekeeping equipment and supplies; and

(VI) sanitizing (washing) facilities and a storage area for carts.

(C) Soiled and clean operations must be planned to maintain sanitary flow of functions as well as air flow. If carts containing soiled linens from resident rooms are not taken directly to the laundry area, intermediate holding rooms must be provided and located convenient to resident bedroom areas.

(D) Laundry areas must have adequate air supply and ventilation for staff comfort without having to rely on opening a door that is part of the fire wall separation.

(E) Provisions must be made to exhaust heat from dryers and to separate dryer make-up air from the habitable work areas of the laundry.

(2) For off-site linen processing, the following must be provided on the premises:

(A) a soiled linen holding room (provided with adequate forced exhaust ducted to the exterior);

(B) clean linen receiving, holding, inspection, sorting or folding, and storage room(s); and

(C) sanitizing facilities and storage area for carts.

(3) Resident-use laundry, if provided, must be limited to not more than one residential type washer and dryer per laundry room. This room must be classified as a hazardous area as in accordance with the Life Safety Code.

(m) General storage. The following requirements are applicable to general storage facilities:

(1) A general storage room(s) must be provided as needed to accommodate the facility's needs. It is recommended that a general storage area provide at least two square feet per resident bed. This area would be for items such as extra beds, mattresses, appliances, and other furnishing and supplies.

(2) Storage space with provisions for locking and security control should be provided for residents' personal effects which are not kept in their rooms.

(n) Janitors' closet. In addition to the janitors' closet called for in certain departments, a sufficient number of janitors' closets must be provided throughout the facility to maintain a clean and sanitary environment. These must contain a floor receptor or service sink and storage space for housekeeping equipment and supplies.

(o) Maintenance, engineering service, and equipment areas. Space and facilities for adequate preventive maintenance and repair service must be provided. The following spaces are needed and it is suggested that these be part of a separate laundry building or area:

(1) A storage area for building and equipment maintenance supplies, tools, and parts must be provided.

(2) A space for storage of yard maintenance equipment and supplies, including flammable liquids bulk storage, must be provided separate from the resident-occupied facility.

(3) A maintenance and/or repair workshop of at least 120 square feet and equipment to support usual functions is recommended.

(4) A suitable office or desk space for the maintenance person(s) is recommended (possibly located within the repair shop area) with space for catalogs, files, and records.

(p) Oxygen. The storage and use of oxygen and equipment must meet applicable NFPA standards for oxygen, including NFPA 56F.

§19.335. Exit Provisions. Exit provisions, including doors, corridors, stairways, and other exitways, locks, and other applicable items must conform to the requirements of the Life Safety Code concerning means of egress and of this section in order to assure that residents can be rapidly and easily evacuated from the building at all times, or from one part of the building to a safe area of refuge in another part of the building. Exit provisions are as follows:

(1) Bedroom space arrangement and doors and corridors must be designed for evacuation of bedfast residents by means of rolling the bed to a safe place in the building or to the outside.

(2) Public assembly, common living rooms, dining rooms, and other rooms with a capacity of 50 or more persons or greater than 1,000 square feet must have two means of exit remote from each other. Outswinging doors with panic hardware must be provided for these exits.

(3) Exit doors and ways of egress must be maintained clear and free for use at all times. Furnishings, equipment, carts, and other obstacles must not be left to block egress at any time.

(4) Steps in interior ways of egress are prohibited. If changes of elevation are necessary within ways of egress, approved ramps with maximum slope of 1:12 (one unit of rise to 12 units of run) must be used.

(5) Any remodeling of, construction on, and/or additions to occupied buildings which involve exitways and exit doors must be accomplished without compromising the exits or creating a dead end situation at any time. Acceptable alternate temporary exits may be approved, or resident(s) in the area involved may have to be

relocated until construction blocking the exit is completed. Other basic safety features such as fire alarms, sprinkler systems, and emergency power must also remain operational.

(6) Doors in means of egress must be as follows:

(A) Locking hardware or devices which are capable of preventing or inhibiting immediate egress must not be used in any room or area that can be occupied.

(B) A latch or other fastening device on an exit door must be provided with a knob, handle, panic bar, or similar releasing device. The method of operation must be obvious in the dark, without use of a key, and operable by a well known one-action operation that will easily operate with normal pressure applied to the door or to the device toward the exterior. Locking hardware which prevents unauthorized entry from the outside (only) is permissible. Permanently mounted hold-open devices to expedite emergency egress and prevent accidental lock-out must be provided for exterior exit doors as well as self-closing devices.

(C) No screen or storm door may swing against the direction of exit travel where main doors are required to swing out.

(D) To aid in control of wandering residents, buzzers or other sounding devices may be used to announce the unauthorized use of an exit door. Other methods include approved emergency exit door locks or fencing with a gate outside of exit doors which enclose a space large enough to allow the space to be an exterior area of egress and refuge away from the building.

(E) Inactive leaves of double doors may have easily accessible and easily operable bolts if the active leaf is 44 inches wide. Center mullions are prohibited.

(F) Resident baths or toilets having privacy locks will require that keys or devices for opening the doors are kept readily available to the staff.

(G) Folding or sliding doors must not be used in exit corridors or exitways. Sliding glass doors may be used as secondary doors from residents' bedrooms to grade or to a balcony, or as secondary doors in certain other areas where the primary designated exit door requirements are met. Doors to bathroom and other resident-use areas must be the side-hinged swinging type. Corridor doors to rooms must swing into the room or be recessed so as not to extend into the corridor when open; however, doors ordinarily kept closed may be excepted. Corridor door frames must be steel in accordance with the Life Safety Code.

(7) Horizontal exits, if provided, must be according to the Life Safety Code.

(8) Areas outside of exterior exit doors (exit discharge) must be as follows:

(A) Provision must be made to accommodate and facilitate continuation of emergency egress away from a building for a reasonable distance beyond the outside exit door, especially for movement of nonambulatory residents in wheelchairs and beds. Any condition which may retard or halt free movement and progress outside the exit doors will not be allowed. Ramps must be used outside the exit doors in lieu of steps whenever possible.

(B) The landing outside of each exit door must be essentially the same elevation as the interior floor and level for a distance equal to the door width plus at least four feet. Generally, the difference in floor elevation at an exterior door must not be over 1/2 inch with the outside slope not to exceed 1/4 inch per foot sloping away from the door for drainage on the exterior. In locations north of the +20 Fahrenheit Isothermal Line as defined in the American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE) Handbook of Fundamentals, the landing outside of all exit doors must be protected from ice build-up which would prohibit the door from opening and be a slip hazard.

(C) Emergency egress lighting immediately outside of exit doors is required as a part of the building emergency lighting system. Photocell devices may be used to turn lights off during daylight hours.

(9) The requirements of an emergency lighting system must be in accordance with §19. 341 of this title (relating to Electrical Requirements).

(10) Requirements for interior finishes of ways of egress (flame spread of floor, walls, and ceiling finishes) must be in accordance with the Life Safety Code. The interior finishes of other areas must be in accordance with §19. 333(e) of this title (relating to General Considerations).

§19.336. Smoke Compartmentation (Subdivision of Building Spaces).

(a) Smoke compartmentation must be as described in the Life Safety Code and in this section.

(b) An exit sign must be provided on each side of corridor smoke doors unless otherwise directed by the Texas Department of Human Services (DHS).

(c) The metal frames for the wire glass view panels in smoke doors must be steel, unless otherwise approved by DHS. The bottom of the view panel must not be higher than 54 inches above the floor. Pairs of opposite (double egress) swinging smoke doors in corridors must have push/pull hardware. The door leaves must align in the closed position.

(d) Smoke barrier walls in concealed spaces such as attics, must have prominent signs on each side that read: "Warning: Smoke/fire barrier. Properly seal all openings."

(e) Provisions must be made for reasonable access to concealed smoke barrier walls for maintaining smoke dampers and so that walls and dampers can be visually checked periodically for conformance by facility staff, service persons, and inspectors. Access must provide for visual inspection of both sides of the wall, and of all parts (end-to-end and top-to-bottom). Ceiling access panels must be prefabricated metal panel, or its equivalent, and be at least 20 inches by 20 inches with no obstructions above (such as ducts) to hamper entrance, and it must be fire rated if required to maintain ceiling-roof or ceiling-floor fire rating. Access must be provided for both sides of the wall.

(f) Air systems should be designed to avoid having ducts which penetrate smoke barrier walls, thus eliminating the need for smoke dampers which are often a problem to maintain in proper working condition.

§19.337. Fire Protection Systems.

(a) Fire protection systems include detection, alarm, and communication systems; fixed automatic extinguishment systems; and portable extinguishers. These systems must meet the requirements of the Life Safety Code, and of this section. Components must be compatible and laboratory listed for the use intended.

(b) Fire protection systems must meet the requirements of

all applicable National Fire Protection Association (NFPA) standards, such as NFPA 72 for alarm systems, as referenced in the Life Safety Code. Wiring and circuitry for alarm systems must meet the applicable requirements of NFPA standards including the NFPA 70 for these systems.

(c) Requirements of emergency electrical systems must be in accordance with §19.341 of this title (relating to Electrical Requirements). Requirements for sprinkler systems must be in accordance with §19.340(d) of this title (relating to Mechanical Requirements).

(d) Partial sprinkler systems (those provided only for hazardous areas) must be interconnected with the fire alarm and comply with the Life Safety Code. Each partial system must have a valve with a supervisory switch to sound a trouble signal, water flow switch to activate the fire alarm, and an end-of-line test drain.

(e) Fire alarm systems must be installed, maintained, and repaired by an agent having a current certificate of registration with the State Fire Marshal's office of the Texas Commission on Fire Protection, in accordance with state law. A fire alarm installation certificate must be provided as required by the Office of the State Fire Marshal.

(f) The fire alarm system must be designed so that whenever the general alarm is sounded by activation of any device (such as manual pull, smoke sensor, sprinkler, or kitchen range hood extinguisher), the following must occur automatically:

(1) smoke and fire doors which are held open by approved devices must be released to close;

(2) air handlers (air conditioning and/or heating distribution fans) serving three or more rooms or any means of egress must shut down immediately;

(3) smoke dampers must close; and

(4) the alarm-initiating-device location must be clearly indicated on the fire alarm control panel(s) and all auxiliary panels.

(g) Fire alarm bells or horns must be located throughout the building for audible coverage. Flashing alarm lights (visual alarms) must be installed to be visible in corridors and public areas including dining rooms and living rooms in a manner that will identify exit routes.

(h) A master control panel indicating the location of all alarm, trouble, and supervisory signals, by zone or device, must be visible at the main nurse station. Fire alarm system components must be laboratory-listed as compatible. Alarm and trouble zoning must be by smoke compartments and by floors in multi-story facilities.

(i) Remote annunciator panels, indicating location of alarm initiation, by zone or device, and trouble indication, must be located at auxiliary or secondary nurse stations on each floor, and will indicate the alarm condition of adjacent zones and the alarm conditions at all other nurse stations.

(j) Manual pull stations must be provided at all exits, living rooms, dining rooms, and at or near the nurse stations.

(k) The sprinkler system must be monitored for flow and tamper conditions by the fire alarm system.

(l) The kitchen range hood extinguisher must be interconnected with the fire alarm system. This interconnection may be a separate zone on the panel or combined with other initiating devices located in the same zone as the range hood is located.

(m) Portable fire extinguishers must be provided throughout the facility as required by NFPA Standard 10 and as determined by the local fire department and the Texas Department of Human Services. The following requirements are applicable to fire extinguishers:

(1) Extinguishers in resident corridors must be spaced so that travel distance is not more than 75 feet. The minimum size of extinguishers must be either 2 1/2 gallon for water type or 5 pound for ABC type.

(2) Extinguishers must be installed on hangers or brackets supplied or mounted in approved cabinets. Recessed cabinets are required for extinguishers located in corridors.

(3) Extinguishers installed under conditions where they are subject to physical damage must be protected from impact or dislodgement.

(4) Extinguishers having a gross weight not exceeding 40 pounds must be installed so that the top of the extinguisher is not more than five feet above the floor. Extinguishers having a gross weight greater than 40 pounds must be installed so that the top of the extinguisher is not more than 3-1/2 feet above the floor. In no case may the clearance between the bottom of the extinguisher and the floor be less than four inches.

(5) Portable extinguishers provided in hazardous rooms should be located as close as possible to the exit door opening and nearest the latch (knob) side.

§19.338. Hazardous Areas.

(a) Protection from hazardous areas must be as required in the Life Safety Code, except as required or modified in this section. Gas fired equipment must not be located in attic spaces, except under the following conditions:

(1) the area around the units must be constructed to be one-hour fire rated;

(2) the enclosure must have sprinkler protection; and

(3) combustion and venting air must be ducted from the exterior in properly sized metal ducts.

(b) Laboratories must be protected in accordance with the National Fire Protection Association (NFPA) 99.

(c) Cooking equipment must have exhaust systems designed and installed in accordance with NFPA 96.

(d) Doors to hazardous areas must have closers and be kept closed unless provided with an approved hold-open device such as an alarm activated magnetic hold-open device. Doors must be single-swing type with positive latching hardware. View panels at laundry entrances must be provided and be of materials adequate to maintain the integrity of the door as allowed by the Life Safety Code.

§19.339. Structural Requirements.

(a) Every building and every portion thereof must be designed and constructed to sustain all dead and live loads in accordance with accepted engineering practices and standards.

(b) Special provisions must be made in the design of buildings in regions where local experience shows loss of life or extensive damage to buildings resulting from hurricanes, tornadoes, earthquakes, or floods.

(c) The sponsor is responsible for employing qualified personnel in the preparation of plan designs and engineering and in the construction of the facility to assure that all structural components are adequate, safe, and meet the applicable construction requirements.

(d) The design of the structural system must be done by or under the direction of a professional structural engineer who is currently registered by the Texas State Board of Registration for Professional Engineers in accordance with state law.

(e) The parts of the plans, details, and specifications covering the structural design must bear the legible seal of the engineer on the original drawings from which the prints are made.

(f) If the municipality has a building code, that code must govern the building requirements for the construction involved. The Life Safety Code must be used for fire safety requirements. Should discrepancies between the codes arise, they must be called to the attention of the Texas Department of Human Services for resolution.

(g) In the absence of a local building code, a nationally recognized building code must be used with regard to the construction integrity of the building. The Life Safety Code must be used for fire safety requirements.

(h) Each building must be classified as to building construction type for fire resistance rating purposes in accordance with the National Fire Protection Association (NFPA) 220 and the Life Safety Code.

(i) Enclosures of vertical openings between floors must meet the Life Safety Code.

(j) All interior walls, partitions, and roof structure in buildings of fire resistive and noncombustible construction must be of noncombustible or limited combustible materials.

(k) Building insulation materials, unless sealed on all sides and edges in an approved manner, must have a flame spread rating of 25 or less when tested in accordance with NFPA 255 and NFPA 258.

§19.340. Mechanical Requirements. The design of the mechanical systems must be done by or under the direction of a registered professional (mechanical) engineer approved by the Texas State Board of Registration for Professional Engineers to operate in Texas, and the parts of the plans and specifications covering mechanical design must bear the legible seal of the engineer. Building services pertaining to utilities; heating, ventilating, and air-conditioning systems; vertical conveyors; and chutes must be in accordance with the Life Safety Code. Required plumbing fixtures must be in accordance with the Life Safety Code and §19.334 of this title (relating to Architectural Space Planning and Utilization) in specific use areas.

(1) Plumbing.

(A) All plumbing systems must be designed and installed in accordance with the requirements of the plumbing code of the municipality. In the absence of a municipal code, a nationally recognized plumbing code must be used. Any discrepancy between an applicable code and these requirements must be called to the attention of the Texas Department of Human Services (DHS) for resolution.

(B) Supply systems must assure an adequacy of hot and cold water. An average rule-of-thumb design for hot water for resident usage (at 110 degrees Fahrenheit) is to provide 6-1/2 gallons per hour per resident in addition to kitchen and laundry use.

(C) Water supply must be from a system approved by the Water Utility Division, Texas Natural Resources Conservation Commission, or from a system regulated by an entity responsible for water quality in that jurisdiction as approved by the Water Utility Division, Texas Natural Resources Conservation Commission.

(D) The sewage system must connect to a system permitted by the Watershed Management Division, Texas Natural Resources Conservation Commission, or to a system regulated by an entity responsible for water quality in that jurisdiction as approved by the Water Utility Division, Texas Natural Resources Conservation Commission.

(E) The minimum ratio of fixtures to residents shall be as required in §19.334(c) of this title (relating to Architectural Space Planning and Utilization).

(F) For design calculation purposes, resident-use hot water must not exceed 110 degrees Fahrenheit at the fixture. For purposes of conforming to licensure requirements, an operating system providing water from 100 degrees Fahrenheit to 115 degrees Fahrenheit is acceptable. Hot water for laundry and kitchen use must be normally 140 degrees Fahrenheit except that dish sanitizing, if done by hot water, must be 180 degrees Fahrenheit.

(G) Water closets raised to provide a seat height 17 inches to 19 inches from the floor is required for persons with disabilities.

(H) Showers for wheelchair residents must not have curbs. Tub and shower bottoms must have a slip-resistant surface. Shower and tub enclosures, other than curtains, must be of tempered glass, plastic, and other safe materials.

(I) Drinking fountains must not extend into exit corridors.

(J) Fixture controls easily operable by residents must be provided (such as lever type).

(K) Plumbing fixtures for residents must be vitreous china or porcelain finished cast iron or steel unless otherwise approved by DHS. Bathing units constructed of class B fire rated fiberglass are acceptable for use.

(L) Hand-washing sinks for staff use are required in many areas throughout the facility in accordance with §19.334 of this title (relating to Architectural Space Planning and Utilization). Lavatories are required to be provided adjacent to water closets in each area.

(M) The soiled utility room must be provided with a flushing device such as a water closet with bedpan lugs, a spray hose with a siphon breaker or similar device, such as a high neck faucet with lever controls and a deep sink that is large enough to submerse a bedpan. A sterilizer for sanitizing may be used in place of a deep sink.

(N) Siphon breakers or back-flow preventers must be installed with any water supply fixture where the outlet or attachments may be submerged.

(O) Clean-outs for waste piping lines must be provided and located so that there is the least physical and sanitary hazard to residents. Where possible, clean-outs must open to the exterior or areas which would not spread contamination during clean-out procedures.

(2) Heating, ventilating, and air-conditioning systems.

(A) Heating, ventilating, and air-conditioning systems must be designed and installed in accordance with the Heating, Ventilating, and Air-Conditioning Guide of the American Society of

Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE), except as may be modified by this section.

(B) Heating, ventilating, and air-conditioning systems must meet the requirements of the Life Safety Code and the National Fire Protection Association (NFPA) 90A. The plans must have a statement verifying that the systems are designed to conform to NFPA 90A. Requirements for conditions related to smoke compartmentation must be in accordance with §19.336 of this title (relating to Smoke Compartmentation (Subdivision of Building Spaces)).

(C) Systems using liquefied petroleum gas fuel must meet the requirements of the Railroad Commission of Texas and NFPA 54.

(D) The heating system must be designed, installed, and functioning to be able to maintain a temperature of at least 75 degrees Fahrenheit for all areas occupied by residents. For all other occupied areas, the indoor design temperature must be at least 72 degrees Fahrenheit. The cooling system must be designed, installed, and functioning to be able to maintain a temperature of not more than 78 degrees Fahrenheit. Occupied areas generating high heat, such as kitchens, must be provided with a sufficient cool air supply to maintain a temperature not exceeding 85 degrees Fahrenheit at the five-foot level. Supply air volume must be approximately equal to the air volume exhausted to the exterior for these areas.

(E) Air systems must provide for mixing at least 10% outside air for the supply distribution. Blowers for central heating and cooling systems must be designed so that they may run continuously.

(F) Floor furnaces, unvented space heaters, and portable heating units must not be used. Heating devices or appliances must not be a burn hazard (to touch) to residents.

(G) A combustion fresh air inlet must be provided to all gas or fossil fuel operated equipment in steel ducts or passages from outside the building in accordance with NFPA 54. Rooms must also be vented to the exterior to exhaust heated ambient air in the room. Combustion air will require one vent within 12 inches of the floor and one vent within 12 inches of the ceiling.

(H) The location and design of air diffusers, registers, and return air grilles, must ensure that residents are not in harmful or excessive drafts in their normal usage of the room.

(I) In areas requiring control of sanitation, the air flow must be from the clean area to the dirty area. Air supply to food preparation areas must not be from air which has circulated places such as resident bedrooms and baths.

(J) Air from unsanitary areas such as janitors closets, soiled linen areas, utility areas, and soiled area of laundry rooms, must not be returned and recirculated to other areas.

(K) Intakes for fresh outside air must be located sufficiently distant from exhaust outlets or other areas or conditions which may contaminate or otherwise pollute the incoming fresh air. Fresh air inlets must be appropriately screened to prevent entry of debris, rodents, and animals. Provision must be made for access to such screens for periodic inspection and cleaning to eliminate clogging or air stoppage (see paragraph (3)(C)(i) of this subsection).

(L) Systems must be designed as much as possible to avoid having ducts passing through fire walls or smoke barrier walls. All openings or duct penetrations in these walls must be provided with approved automatic dampers. Smoke dampers at smoke partitions must close automatically upon activation of the fire alarm system to prevent the flow of air or smoke in either direction.

(M) Ducts with smoke dampers must have maintenance panels for inspections. The maintenance panels must be removable without tools. Means of access must also be provided in the ceiling or side wall to facilitate smoke damper inspection readily and without obstruction. Location of dampers must be identified on the wall or ceiling of the occupied area below.

(N) Fusible links are not approved for smoke dampers.

(O) Central air supply systems and/or systems serving means of egress must automatically and immediately shut down upon activation of the fire alarm system. (An exception must be approved, engineered smoke-removal systems.)

(P) Ducts must be of metal or other approved noncombustible material. Cooling ducts must be insulated against condensation drip.

(3) Ventilating and exhaust.

(A) General ventilating systems must be in accordance with paragraph (2) of this subsection.

(B) Provisions for natural ventilation using windows or louvers must be incorporated into the building design where possible and practical. These windows or louvers must have insect screens.

(C) All air-supply and air-exhaust systems must be mechanically-operated. The ventilation rates shown in the table in clause (xi) of this subparagraph must be considered as minimum acceptable rates and must not be construed as precluding the use of higher ventilation rates.

(i) Outdoor air intakes must be located as far as practical (but normally not less than ten feet) from exhaust outlets or ventilating systems, combustion equipment stacks, medical vacuum systems, plumbing vent stacks, or from areas which may collect vehicular exhaust and other noxious fumes.

(ii) The ventilation systems must be designed and balanced to provide the pressure relationship as shown in the table in clause (xi) of this subparagraph. A final engineered system air balance report will be required for the completed system to be furnished and certified by the installer.

(iii) The bottoms of ventilation openings must be not less than three inches above the floor of any room.

(iv) Doors protecting corridors or ways of egress must not have air transfer grilles or louvers. Corridors must not be used to supply air to or exhaust air from any room except that air from corridors may be used as make-up air to ventilate small toilet rooms, janitor's closets, and small electrical or telephone closets opening directly on corridors, provided that the ventilation can be accomplished by door undercuts not exceeding 3/4 inches.

(v) All exhausts must be continuously ducted to the exterior. Exhausting air into attics or other spaces is not permitted. Duct material must be metal.

(vi) All central ventilation or air-conditioning systems must be equipped with filters of sufficient efficiency to minimize dust and lint accumulations throughout the system and building including supply and return plenums and ductwork. Filters with efficiency rating of 80% or greater (based on ASHRAE) are recommended. Filters for individual room units must be as recommended by the equipment manufacturer. Filters must be easily accessible for routine changing or cleaning.

(vii) Static pressures of systems must be within limits recommended by ASHRAE and the equipment manufacturer (upstream and downstream).

(viii) In geographic locations or interior room areas where extreme humidity levels are likely to occur for extended periods of time, apparatus for controlling humidity levels (preferably between 40-60%) are recommended to be installed as a part of central systems and with automatic humidistat controls.

(ix) Exhaust hoods, ducts, and automatic extinguishers for kitchen cooking equipment must be in accordance with NFPA 96.

(x) Forced air exhaust must be provided in laundries, kitchens, and dishwashing areas to remove excess heat and moisture and to maintain air flow in the direction of clean to soiled areas.

(xi) Ventilation requirements for nursing areas must be according to the following table:
See Figure 1 for 40 TAC §19.340(3)(C)(xi)

(xii) With relationship to adjacent areas, a positive air pressure must be provided for clean utility rooms, clean linen rooms, and medication rooms. Conditioned supply air must be introduced into these rooms.

(4) Sprinkler systems. The following requirements are applicable to sprinkler systems:

(A) Sprinkler systems must be in accordance with NFPA 13 and this subchapter.

(B) The design and installation of sprinkler systems must meet any applicable state laws pertaining to these systems and one of the following criteria:

(i) The sprinkler system must be designed by a qualified registered professional engineer approved by the Texas State Board of Registration for Professional Engineers to operate in Texas. The engineer must supervise the installation and provide written approval of the completed installation.

(ii) The sprinkler system must be planned and installed in accordance with NFPA 13 by firms with certificates of registration issued by the office of the state fire marshal that have at least one full-time licensed responsible managing employee (RME). The RME's license number and signature must be included on the prepared sprinkler drawings.

(C) The approved sprinkler plans must be submitted to DHS, Architectural Section, Austin, Texas.

(D) Particular attention should be paid to adequate, safe, and reasonable freeze protection for all piping. The design of freeze protection should minimize the need for dependence on staff action or intervention to provide protection.

§19.341. Electrical Requirements.

(a) The design of the electrical systems must be done by or under the direction of a registered professional electrical engineer approved by the Texas State Board of Registration for Professional Engineers to operate in Texas, and the parts of the plans and specifications covering electrical design must bear the legible seal of the engineer. Requirements pertaining to utilities, heating, ventilating, and air-conditioning systems, vertical conveyors, and chutes must be in accordance with the Life Safety Code, Chapter 7, Building Service and Fire Protection Equipment.

(b) Requirements for fire protection systems must be in accordance with §19.337 of this title (relating to Fire Protection Systems).

(c) Electrical systems must meet the requirements of the NFPA 70.

(d) Specific requirements for lighting and outlets at resident bedrooms must be in accordance with §19.334 of this title (relating to Architectural Space Planning and Utilization).

(1) Emergency electrical service.

(A) To provide electricity during an interruption of the normal electric supply, an emergency source of electricity must be provided and connected to certain circuits for lighting and power.

(B) Emergency electrical connection service must be provided to the distribution systems as required by the Life Safety Code and NFPA 99.

(i) Emergency systems must include the following:

(I) illumination for means of egress, nurse stations, medication rooms, dining and living rooms, group bathing rooms (those not directly connected to resident bedrooms), and areas immediately outside of exit door (egress lighting must not be switched);

(II) exit signs and exit directional signs as required by the Life Safety Code;

(III) alarm systems including fire alarms activated by manual stations, water flow alarm devices of sprinkler systems, fire and smoke detecting systems, and alarms required for nonflammable medical gas systems if installed (where hospital-type functions are included in the nursing home facility, applicable standards will apply);

(IV) task illumination and selected receptacles at the generator set location;

(V) selected duplex receptacles including such areas as resident corridors, each bed location where patient care-related electrical appliances are utilized, nurse stations, and medication rooms including biologicals refrigerator;

(VI) nurse calling systems;

(VII) resident room night lights;

(VIII) a light and receptacle in the electrical and/or boiler room;

(IX) elevator cab lighting, control, and communication systems;

(X) all facility telephone equipment; and

(XI) paging or speaker systems if intended for communication during emergency. Radio transceivers where installed for emergency use must be capable of operating for at least one hour upon total failure of both normal and emergency power.

(ii) Critical systems (delayed automatic or manual connections to critical systems) must include the following:

(I) Heating equipment must provide heating for general resident rooms. This will not be required if:

(-a-) the outside design temperature is higher than 20 degrees Fahrenheit (-6 degrees Celsius);

(-b-) the outside design temperature is lower than 20 degrees Fahrenheit (-6 degrees Celsius) and where selected rooms are provided for the needs of all confined residents, then only those rooms need to be heated; or

(-c-) the facility is served by a dual source of normal power; and

(II) In instances when interruptions of power would result in elevators stopping between floors, throw-over facilities must be provided to allow the temporary operation of any elevator for the release of passengers.

(C) The emergency lighting must be automatically in operation within ten seconds after the interruption of normal electric power supply. Emergency service to receptacles and equipment may be delayed automatic or manually connected. Receptacles connected to emergency power must have red face plates. Stored fuel capacity must be sufficient for not less than four-hour operation of required generator.

(D) The design and installation of emergency motor generators must be in accordance with NFPA 37, NFPA 99, and NFPA 110.

(i) Generators must be a minimum of three feet from the combustible exterior building finish and a minimum of five feet from a building opening if located on the exterior of the building.

(ii) Generators located on the exterior of the building must be provided with a noncombustible protective cover or be protected as per manufacturer's recommendations.

(iii) Motor generators fueled by public utility natural gas must have the capability to be switched to an alternate fuel source in accordance with NFPA 70.

(E) The normal wiring circuit(s) for the emergency system must be kept entirely independent of all other wiring and must not enter the same race-ways, boxes, or cabinets in accordance with NFPA 70.

(2) General Lighting Requirements. General lighting requirements are as follows:

(A) All spaces occupied by people, machinery, equipment, approaches to buildings, and parking lots must have lighting.

(B) All quality, intensity, and type of lighting must be adequate and appropriate to the space and all functions within the space.

(C) Minimum lighting levels can be found in the Illuminating Engineering Society (IES) Lighting Handbook, latest edition. Minimum illumination must be 20-foot candles in resident rooms, corridors, nurses' stations, dining rooms, lobbies, toilets, bathing facilities, laundries, stairways, and elevators. Illumination requirements for these areas apply to lighting throughout the space and should be measured at approximately 30 inches above the floor anywhere in the room. Minimum illumination for overbed reading lamps, medication-preparation or storage area, kitchens, and nurse's station desks must be 50 foot candles. Illumination requirements for these areas apply to the task performed and should be measured on the task.

(D) Nursing unit corridors must have general illumination with provisions for reduction of light levels at night.

(E) Exposed incandescent light bulbs (or other high heat generating lamps) in closets or other similar spaces must be provided with basket wire guards or other suitable shield to prevent contact of combustible materials with the hot bulb and to help prevent breakage.

(F) Exposed incandescent or fluorescent bulbs will not be permitted in food service or other areas where glass fragments from breakage may get into food, medications, linens, or utensils. All fluorescent bulbs will be protected with a shield or catcher to prevent bulb drop-out.

(3) Receptacles (convenience outlets).

(A) Receptacles at bedrooms must be in accordance with §19.334(a)(7) of this title (relating to Architectural Space Planning and Utilization).

(B) Duplex receptacles for general use must be installed in corridors spaced not more than 50 feet apart and within 25 feet of ends of corridors.

(C) Receptacles must be provided for essential needs such as medication refrigerators and life support systems or equipment. At least one outlet in each resident corridor must be provided with emergency electrical service. All receptacles on emergency circuits must be clearly, distinctly, and permanently identified, such as using a red face plate and/or a small label that says "Emergency."

(D) Receptacles in the remainder of the building must be sufficient to serve the present and future needs of the residents and equipment.

(E) Location of receptacles (horizontally and vertically) should be carefully planned and coordinated with the expected designed use of furnishings and equipment to maximize their accessibility and to minimize conditions such as beds or chests being jammed against plugs used in the outlets.

(F) Exterior receptacles must be approved waterproof type.

(G) Ground fault interruption protection must be provided at appropriate locations such as at whirlpools and other wet areas in accordance with the National Electrical Code.

(4) Nurse call systems.

(A) A nurse call system consists of power units, annunciator control units, corridor dome stations, emergency call stations, bedside call stations, and activating devices. The units must be compatible and laboratory listed for the system and use intended.

(B) Each resident bedroom must be served by at least one calling station and each bed must be provided with a call switch. Two call switches serving adjacent beds may be served by one calling station. Each call entered into the system must activate a corridor dome light above the bedroom, bathroom, or toilet corridor door, a visual signal at the nurses station which indicates the room from which the call was placed, and a continuous or intermittent continuous audible signal of sufficient amplitude to be clearly heard by nursing staff. The amplitude or pitch of the audible signal must not be such that it is irritating to residents or visitors. The system must be designed so that calls entered into the system may be canceled only at the calling station. Intercom-type systems which meet this requirement are acceptable.

(C) Nurse calling systems which provide two-way voice communication must be equipped with an indicating light at each calling station which lights and remains lighted as long as the voice circuit is operating.

(D) A nurse call emergency switch(es) must be provided for resident use at each resident's toilet, bath, and shower. These switches must be usable by residents using the fixtures and by a collapsed resident lying on the floor.

§19.342. Miscellaneous Details.

(a) Safety related details. A high degree of safety for the occupants is needed to minimize accidents which are more apt to occur with the elderly and/or infirm residents in a nursing facility. Consideration must be given to the fact that many will have impaired vision, hearing, spatial perception, and ambulation.

(1) Hazards such as sharp corners and edges and unexpected steps must be avoided.

(2) Items such as drinking fountains, telephone booths, vending machines, and portable equipment must be located so as not to restrict corridor traffic or reduce corridor width.

(3) Windows must be designed to prevent residents from accidentally falling through the windows.

(4) Doors which normally stay open or are frequently used must not swing out into the corridor unless otherwise needed or required. Alcoves may be provided for doors which must swing outward toward a corridor or way of egress.

(5) The proper use of safety glass must be adhered to in applicable locations and conditions.

(6) Thresholds and expansion joint covers must be made essentially flush with the floor surface to facilitate use of wheelchairs and carts. See §19.340(a)(8) of this title (relating to Mechanical Requirements) for requirements for such items as shower curbs, surfaces, and doors.

(7) Grab bars must be provided at all residents' toilets, showers, tubs, and sitz baths. The bars must be 1/4 to 1/2 inches in diameter and must have 1/2 inch clearance to walls. Bars must have sufficient strength and anchorage to sustain a concentrated load of 250 pounds. Grab bar standards must comply with standards adopted under the Americans with Disabilities Act of 1990.

(8) Handrails must be provided on both sides of corridors used by residents. A clear distance of 1/2 inches must be provided between the handrail and the wall. Handrails must be securely mounted to withstand downward forces of 250 pounds. Handrails may be omitted on wall segments less than 18 inches. Handrails must be mounted 33 inches to 36 inches above the floor, and must comply with standards adopted under the Americans with Disabilities Act.

(9) Ends of handrails and grab bars must be constructed to prevent snagging the clothes of residents (that is, return ends to wall).

(10) Ceiling fan blades must be at least seven feet above the floor and be located so as not to interfere with the operation of any ceiling-mounted smoke detectors.

(b) General details.

(1) Concrete floors, whether finished by sealant, or similar product, must not be used as the finished floor unless specifically approved in writing by the Texas Department of Human Services. An exception is mechanical equipment rooms and maintenance or similar areas.

(2) Sound separation must be provided in corridor walls and resident room party walls; Minimum Sound Transmission Coefficient 30 per American Society for Testing Material E-90.

(3) Illumination and a safe platform in the attic must be provided at all attic access panels.

(4) Attic access must be provided for building maintenance. Access panels must be prime coated steel flush panels where required to maintain fire rating of ceiling-roof/ceiling-floor assemblies.

§19.343. Elevators. All buildings having residents' facilities (such as bedrooms, dining rooms, or recreation areas) or resident services (such as diagnostic or therapy) located on other than the main entrance floor must have at least one electric or electrohydraulic elevator and must comply with standards adopted under the American National Standards Institute (ANSI) Code, §A17.1.

(1) Number of elevators.

(A) At least one hospital-type elevator must be installed where one to 60 resident beds are located on any floor other than the main entrance floor.

(B) At least two (one of which must be hospital-type) elevators must be installed where 61 to 200 resident beds are located on floors other than the main entrance floor, or where the major inpatient services are located on a floor other than those containing resident beds. Elevator service may be reduced for those floors which provide only partial inpatient services.

(C) At least three (one of which must be hospital-type) elevators must be installed where 201 to 350 resident beds are located on floors other than the main entrance floor or where the major inpatient services are located on a floor other than those containing resident beds. Elevator service may be reduced for those floors which provide only partial inpatient services.

(D) For facilities with more than 350 resident beds, the number of elevators must be determined from a study of the facility plan and the estimated vertical transportation requirements.

(2) Cars and platforms. Cars of hospital-type elevators must have inside dimensions that will accommodate a resident bed and attendants and must be at least five feet wide by seven feet six inches deep. The car door must have a clear opening of not less than three feet eight inches.

(3) Leveling. Elevators must be equipped with an automatic leveling device of the two-way automatic maintaining type with an accuracy of 1/2 inch.

(4) Operation. Elevators, except freight elevators, must be equipped with a two-way special service switch to permit cars to bypass all landing button calls and be dispatched directly to any floor.

(5) Accessibility provisions. Elevator controls, alarm buttons, and telephones, must be accessible to and usable by individuals with disabilities as required under the Americans with Disabilities Act of 1990.

(6) Protection from fire. Elevator call buttons, controls, and door safety stops must be of a type that will not be activated by heat or smoke. Door openings must meet the requirements of the Life Safety Code for protection of vertical openings.

(7) Field inspection and tests. Inspections and tests must be made and the owner must be furnished written certification that the installation meets the requirements set forth in this section and all applicable safety regulations and codes.

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 February 1, 1996.

TRD-9601425 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 438-3765

♦ ♦ ♦

Subchapter E. Resident Rights

• 40 TAC §19.402, §19.416

The amendments are proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department 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 amendments implement the Human Resources Code, §§22.001-22.024 and §§32.001-32.042.

§19.402. Exercise of Rights.

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

(f) Competent adults may issue directives or durable powers of attorney for health care, subject to the requirements of §19.419 [§19.418] of this title (relating to Directives and Durable Powers of Attorney for Health Care).

(g) (No change.)

§19.416. Personal Property. The resident has the right to retain and use personal possessions, including some furnishings, and appropriate clothing as space permits, unless to do so would infringe upon the rights or health and safety of other residents. Reasons for any limitations are documented in the resident's clinical record. See §19.1921(i) [§19.1921(n)] of this title (relating to General Requirements for a Nursing Facility).

(1)-(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 February 1, 1996.

TRD-9601426 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 438-3765

♦ ♦ ♦

Subchapter M. Physician Services

• 40 TAC §19.1210

The amendment is proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department 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, §§22.001-22.024 and §§32.001-32.042.

§19.1210. Certification and Recertification Requirements in Medicaid-Certified Facilities.

(a) The physician participates in the utilization review process as specified in §19.2405 [§19.2404] of this title (relating to Physicians' Certifications and Recertifications).

(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 February 1, 1996.

TRD-9601427 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 438-3765

♦ ♦ ♦

Subchapter Q. Infection Control

• 40 TAC §19.1612

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

The repeal is proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department 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 repeal implements the Human Resources Code, §§22.001-22.024 and §§32.001-32.042.

§19.1612. Texas Index for Level of Effort (TILE) Assessments.

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 February 1, 1996.

TRD-9601428 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 438-3765

♦ ♦ ♦

Subchapter R. Vendor Payment

• 40 TAC §§19.1701-19.1727

(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, Chapters 22 and 32, which authorizes the department 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 repeals implement the Human Resources Code, §§22.001-22.024 and §§32.001-32.042.

§19.1701. General Requirements. §19.1702. Applicable Codes and Standards.

§19.1703. Waivers.

§19.1704. Emergency Power.

§19.1705. Space and Equipment.

§19.1706. Resident Rooms.

§19.1707. Toilet Facilities.

§19.1708. Resident Call System.

§19.1709. Dining and Resident Activities.

§19.1710. Other Environmental Conditions.

§19.1711. Site and Grounds.

§19.1712. Fire Service and Access.

§19.1713. Means of Egress.

§19.1714. Interior Finishes-Walls, Ceilings, and Floors.

§19.1715. Fire Alarms, Detection Systems, and Sprinkler Systems.

§19.1716. Portable Fire Extinguishers.

§19.1717. Subdivision of Building Spaces-Smoke Barriers.

§19.1718. Elevators and Escalators.

§19.1719. Other Rooms and Areas.

§19.1720. Provisions for Persons with Disabilities.

§19.1721. Lighting and Illumination.

§19.1722. Heating, Ventilating, and Air-conditioning Systems (HVAC).

§19.1723. Plumbing.

§19.1724. Housekeeping Services.

§19.1725. Pest Control.

§19.1726. Linen.

§19.1727. Safety Operations.

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 February 1, 1996.

TRD-9601429 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 438-3765

♦ ♦ ♦

Subchapter R. Physical Plant and Environment

• 40 TAC §19.1701

The new section is proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department 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 new section implements the Human Resources Code, §§22.001-22.024 and §§32.001-32.042.

§19.1701. Physical Environment. The facility must be designed, constructed, equipped, and maintained to protect the health and ensure the safety of residents, personnel, and the public.

(1) Life safety from fire.

(A) The facility must meet the applicable provisions of the 1985 edition of the Life Safety Code of the National Fire Protection Association (NFPA) as designated by federal law and regulations (Health and Safety Code, §242.039(b)). The Life Safety Code is available for inspection at the Office of the Federal Register Information Center, Washington, D.C. Copies may be obtained from the NFPA, Batterymarch Park, Quincy, Massachusetts 02200. The New Health Care Occupancies chapter of the Life Safety Code is applicable to new construction, conversions of existing unlicensed buildings, remodeling, and additions. The Existing Health Care Occupancies chapter of the Life Safety Code is applicable to existing nursing homes.

(B) After consideration of the findings of the Texas Department of Human Services (DHS) for Medicare/Medicaid certified facilities, the Health Care Financing Administration (HCFA) may waive specific provisions of the Life Safety Code which, if rigidly applied, would result in unreasonable hardship on the facility, but only if the waiver does not adversely affect the health and safety of residents or personnel.

(2) Emergency power.

(A) An emergency electrical power system must supply power adequate at least for lighting all entrances and exits; equipment to maintain the fire detection, alarm, and extinguishing systems; and life-support systems if the normal electrical supply is interrupted.

(B) When life support systems are used, the facility must provide emergency electrical power with an emergency generator (as defined in NFPA 99, Health Care Facilities) located on the premises.

(3) Space and equipment. The facility must:

(A) provide sufficient space and equipment in dining, health services, recreation, and program areas to enable staff to provide residents with needed services as required by these standards and as identified in each resident's plan of care; and

(B) maintain all essential mechanical, electrical, and patient care equipment in safe operating condition.

(4) Resident rooms. Resident rooms must be designed and equipped for adequate nursing care, comfort, and privacy of residents.

(A) Bedrooms must:

(i) accommodate no more than four residents.

(ii) measure at least 80 square feet per resident in multiple resident bedrooms and at least 100 square feet in single resident rooms;

(iii) have direct access to an exit corridor;

(iv) be designed or equipped to assure full visual privacy for each resident.

(v) in facilities initially certified after March 31, 1992, except in private rooms, have ceiling-suspended curtains for each bed, which extend around the bed to provide total visual privacy, in combination with adjacent walls and curtain;

(vi) have at least one window to the outside; and

(vii) have a floor at or above grade level.

(B) The facility must provide each resident with:

(i) a separate bed of proper size and height for the convenience of the resident;

(ii) a clean, comfortable mattress;

(iii) bedding appropriate to the weather and climate; and

(iv) functional furniture appropriate to the resident's needs and individual closet space in the resident's bedroom with clothes racks and shelves accessible to the resident.

(C) DHS may permit variations in requirements specified in paragraph (1)(A) and (B) of this section relating to rooms in individual cases when the facility demonstrates in writing that the variations:

(i) are required by the special needs of the residents; and

(ii) will not adversely affect residents' health and safety.

(5) Toilet facilities. Each resident room must be equipped with or located near toilet and bathing facilities.

(6) Resident call system. The nurse's station must be equipped to receive resident calls through a communication system from:

(A) resident rooms; and

(B) toilet and bathing facilities.

(7) Dining and resident activities. The facility must provide one or more rooms designated for resident dining and activities. These rooms must be:

(A) well-lighted;

(B) well ventilated, with nonsmoking areas identified;

(C) adequately furnished; and

(D) sufficiently spacious to accommodate all activities.

(8) Other environmental conditions. The facility must provide a safe, functional, sanitary, and comfortable environment for residents, staff, and the public. The facility must:

(A) establish procedures to ensure that water is available to essential areas when there is a loss of normal water supply;

(B) have adequate outside ventilation by means of windows, mechanical ventilation, or a combination of the two;

(C) equip corridors with firmly secured handrails on each side; and

(D) maintain an effective pest control program so that the facility is free of pests and rodents.

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 February 1, 1996.

TRD-9601430 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 438-3765

♦ ♦ ♦

• 40 TAC §19.1807

The amendment is proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department 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 amendment implements the Human Resources Code, §§22.001-22.024 and §§32.001-32.042.

§19.1807. Rate Setting Methodology.

(a) (No change.)

(b) Rate determination. The Texas Board of Human Services determines general reimbursement rates for medical assistance programs for Medicaid recipients under provisions of the Human Resources Code, Chapter 24 (relating to Reimbursement Methodology). The Texas Board of Human Services determines reimbursement rates for nursing facilities based on consideration of Texas Department of Human Services (DHS) staff recommendations. To develop reimbursement rate recommendations for nursing facilities, DHS staff apply the following procedures.

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

(4) Case-mix classification effective periods. The effective periods of case-mix classifications are defined as follows.

(A) A recipient's case-mix classification and associated per diem rate payment remain in effect until the recipient's next required assessment, unless one of the following events takes place:

(i) a provider submits an off-cycle assessment [(Purpose Code R)] as specified in **§19.2412(a) (5)** [§19.1612(a)(4)] of this title (relating to Texas Index for Level of Effort (TILE) Assessments);

(ii) a DHS nurse reviewer revises the recipient's assessment and TILE classification under the provisions of **§19.2412(b)** [§19.1612(b)] of this title (relating to Texas Index for Level of Effort (TILE) Assessments);

(iii) the recipient is discharged from the Medicaid nursing facility vendor payment system for more than 30 days prior to receiving a permanent medical necessity determination.

(B) (No change.)

(5) (No change.)

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

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

Issued in Austin, Texas, on February 1, 1996.

TRD-9601431 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 438-3765

♦ ♦ ♦

Subchapter T. Administration

• 40 TAC §19.1918, §19.1921

The amendments are proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department 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, §§22.001-22.024 and §§32.001-32.042.

§19.1918. Disclosure of Ownership.

(a) (No change.)

(b) The facility must provide written notice to the **Licensing Section of the state office of Long Term Care-Regulatory,** Texas Department of Human Services (DHS) at the time of change if a change occurs in:

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

(c) The notice specified in subsection (b) of this section must include the **identity** [identify] of each new individual or company.

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

§19.1921. General Requirements for a Nursing Facility.

(a)-(i) (No change.)

(j) Criminal History Checks of Certain Employees. Persons convicted of certain crimes may not be employed in nursing facilities. As required by Chapter 250 of the Health and Safety Code and as found in **§§76.101- 76.106 of this title (relating to Criminal History Check of Employees in Facilities for Care of the Aged and Persons with Disabilities)** [40 TAC §§76.101-76.108], the facility must, prior to an offer of employment, conduct criminal history checks on persons whose positions involve direct contact with residents, unless they are licensed under another law.

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 February 1, 1996.

TRD-9601432 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 438-3765

♦ ♦ ♦

Subchapter V. Federal Requirements

• 40 TAC §19.2105

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

The repeal is proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department 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 repeal implements the Human Resources Code, §§22.001-22.024 and §§32.001-32.042.

§19.2105. Safe Medical Devices Act of 1990.

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 February 1, 1996.

TRD-9601433 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 438-3765

♦ ♦ ♦

Subchapter W. Certification of Facilities for Care of Persons with Alzheimer's Disease and Related Disorders

• 40 TAC §19.2208

The amendment is proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department 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 amendment implements the Human Resources Code, §§22.001-22.024 and §§32.001-32.042.

§19.2208. Standards for Certified Alzheimer's Facilities.

(a) (No change.)

(b) Staff.

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

(3) Specially trained staff will be maintained and assigned exclusively to the Alzheimer's unit. Although emergency

scheduling may require substitution of staff, every effort should be made to provide residents with familiar staff members in order to minimize resident confusion. Staff training will meet at least the minimum requirements in **subsection** [§19.2208] (a)(2) of this **section** [title (relating to Standards for Certified Alzheimer's Facilities)].

(4) (No change.)

(c) (No change.)

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

Issued in Austin, Texas, on February 1, 1996.

TRD-9601434 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 438-3765

♦ ♦ ♦

Subchapter X. Requirements for Medicaid-Certified Facilities

• 40 TAC §19.2324, §19.2326

The amendments are proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department 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, §§22.001-22.024 and §§32.001-32.042.

§19.2324. Selection and Contracting Procedures for Adding Beds in High-Occupancy Areas.

(a)-(s) (No change.)

(t) Providers may request an informal review of DHS actions involving this section and **§19.2322** [§19.2323] of this title (relating to Additional Participation Requirements) by writing to Manager, Certification, Enrollment and Billing Services, Long Term Care-Regulatory, Texas Department of Human Services, Mail Code Y-976, P.O. Box 149030, Austin, Texas 78714-9030.

§19.2326. Medicaid Swing Bed Program for Rural Hospitals.

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

(e) Applicability of NF Requirements. From day one of the resident's stay, participating rural hospitals must meet the requirements set forth in §19.101 of this title (relating to Definitions); [§] §19.2304(c) of this title (relating to Federal Requirements); §§19. 1701-19.1715 and 19.1717 of this title (relating to General Requirements; Applicable Codes and Standards; Waivers; Emergency Power; Space and Equipment; Resident Rooms; Toilet Facilities; Resident Call System; Dining and Resident Activities; Other Environmental Conditions; Site and Grounds; Fire Service and Access; Means of Egress; Interior Finishes-Walls, Ceilings, and Floors; Fire Alarms, Detection Systems, and Sprinkler Systems; and Subdivision of Building Spaces-Smoke Barriers); §§19.1901-19.1914 and §19.1917 of this title (relating to Administration; Governing Body; Required Training of Nurse Aides; Proficiency of Nurse Aides; Staff Qualifications; Use of Outside Resources; Medical Director; Laboratory Services; Radiology and Other Diagnostic Services; Clinical Records; Contents of the Clinical Record; Additional Clinical Record Service Requirements; Clinical Records Service Supervisor; Disaster and Emergency Preparedness; and Quality Assessment and Assurance); **§§19. 2601-19.2608 and §19.2610** [§§19.2601-19.2608] of this title (relating to **Subchapter AA**, Vendor Payment); **§§19.2402-19.2405, and 19. 2407-19.2413** [§§19.2402-19.2413] of this title (relating to **Subchapter Y**, Medical Review and Re-evaluation); §§19.1801 and 19. 1902 of this title (relating to General Reimbursement Information and Cost Reporting Procedures); and Appendix A, General Reimbursement Methodology, of DHS's Long Term Care Nursing Facility Requirements for Licensure and Medicaid Certification.

(f) Rural hospital (Medicaid swing bed facility) licensure and certification requirements. Pursuant to the Health and Safety Code §§222.021, 222.024, and 222.025 relating to the duplication of health care inspections and licensing, a rural hospital participating in the Medicaid swing bed program satisfies licensure and certification requirements referenced **in this section** [at §19.2326 of this title (relating to Medicaid Swing Bed Program for Rural Hospitals)] when it is currently licensed and certified as a hospital by the Texas Department of Health. However, in accordance with §32.024 of the Human Resources Code, if the rural hospital's swing beds are used for more than one 30-day length of stay per year, per resident the hospital must comply with the full Nursing Facility Requirements.

(g)-(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 February 1, 1996.

TRD-9601435 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 438-3765

♦ ♦ ♦

Subchapter Y. Medical Review and Re-evaluation

• 40 TAC §19.2403, §19.2412

The amendment and new section are proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department 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 amendment and new section implement the Human Resources Code, §§22. 001-22.024 and §§32.001-32.042.

§19.2403. Utilization Review Process. The Utilization Review Committee determines the need for nursing facility care by evaluating the recipient's medical and/or nursing needs based on facility documentation required by the Texas Department of Human Services (DHS). The medical necessity determination must be made before receiving vendor payment for service delivery, except as provided in §19.2408 of this title (relating to Retroactive Medical Necessity Determinations) and §19.2413 of this title (relating to Reconsideration of Medical Necessity Determination (MN) and Effective Dates).

(1) (No change.)

(2) The review process is initiated when the Utilization Review Committee receives a Texas Nursing Facility Client Assessment, Review, and Evaluation (CARE) form indicating that a Medicaid applicant or recipient is requesting vendor payment for care in a contracted nursing facility.

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

(C) An admission review of a CARE form determines the medical necessity and establishes an authorization for reimbursement and a level of reimbursement. A valid medical necessity determination is an eligibility requirement for Medicaid participation, and vendor payments cannot be made on behalf of recipients who do not have established medical necessity determinations.

(i) (No change.)

(ii) The CARE form must be received by the Utilization Review Committee in accordance with **§19.2404** [§19.2406] of this title (relating to Utilization Review Effective Dates). The admission review and determination of medical necessity (MN) remains valid for up to 180 days from date of admission or the stamp-in date when not received by the Utilization Review Committee within 20 days of admission.

(iii)-(iv) (No change.)

(D)-(E) (No change.)

(3) (No change.)

§19.2412. Texas Index for Level of Effort (TILE) Assessments.

(a) Recipient assessment. Facility nurse assessors assess recipients for TILE determination by completing Texas Nursing Facility Client Assessment, Review, and Evaluation (CARE) forms. These assessments establish TILE classifications as described in paragraphs 1-8 of this subsection. Effective April 1, 1995, nurse assessors must have completed a Texas Department of Human Services (DHS) TILE training course and must be registered with the National Heritage Insurance Company (NHIC).

(1) Preadmission assessments do not establish a TILE classification.

(2) Admissions assessments establish TILE classifications as follows:

(A) If the resident has not previously attained a permanent medical necessity, the nurse assessor submits an admission assessment within 20 calendar days of admission, as provided in §19.2403 (relating to Utilization Review Process). The admission assessment establishes a medical necessity (MN) and a TILE classification for 180 days.

(B) If the resident has previously attained a permanent MN, the admission assessment is completed on an abbreviated form which sets TILE only.

(3) One medical necessity review (MNR) is required 180 days after the effective date of the admission assessment. If the MNR indicates a MN for nursing facility care, DHS will notify the facility of the permanent MN. This notification becomes a part of the resident's permanent medical record. A MN will be lost only if a resident is discharged to home for over 30 days. The MNR may also establish a new TILE classification.

(4) After the establishment of permanent MN, residents with a 211 TILE require no further assessment unless there is a change in their condition. All other TILE levels require a review every 180 days.

(5) If a recipient's medical condition deteriorates to the extent that he qualifies for a different TILE, the provider may submit an off-cycle assessment. Only two off-cycle assessments for any one recipient are permitted per year, one from January through June and one from July through December. The assessment sets a new schedule for submission of forms if permanent MN has been achieved. Prior to permanent MN, the assessment will not set a new schedule for submission of forms.

(6) A CARE form may be submitted for the purpose of allowing a provider to correct errors previously made in the assessment portion of the form (Items 30,31, and 50-99). The submission of the correction does not change the schedule for submission of forms or necessarily change the TILE group. Corrections must be submitted within 60 days from the date of assessment. Requests for changes after 60 days will not be accepted.

(7) If a recipient experiences a significant change related to mental illness, mental retardation, and/or a related condition which indicates that the recipient might benefit from specialized services, an off-cycle request for a recipient Preadmission Screening and Resident Review (PASARR) must be submitted to the local DHS PASARR office using a CARE form.

(8) A facility may submit a request for retroactive payment in the following instances:

(A) when a facility provides care for a recipient for a period of time not covered by an effective MN determination at admission or by assessment CARE forms between reviews (see §19.2413 of this title (relating to Reconsideration of Medical Necessity Determination and Effective Dates)); or

(B) if a recipient is found to be otherwise eligible for Medicaid for the three months prior to the month of his date of application for Medicaid assistance (see §19.2408 of this title (relating to Retroactive Medical Necessity Determinations)).

(b) Review and appeal of case-mix assessments. DHS nurse reviewers conduct desk reviews and in-depth, on-site reviews of samples of Texas Nursing Facility CARE forms completed by providers to verify TILE and medical necessity information. Forms expired over 12 months will not be reviewed.

(1) When a DHS nurse reviewer determines that the TILE classification or permanent MN determination is not substantiated and/or does not accurately reflect the recipient's status, the reviewer will discuss the error and propose corrections with facility staff and make appropriate corrections. The facility administrator will be notified of TILE changes by certified mail or by FAX.

(A) DHS recoups funds previously paid to the provider under incorrect TILE classification. DHS pays the nursing facility any increase due to a change in TILE classification.

(B) The change in TILE classification and per diem rate is effective retroactively to the "effective date" of the assessment reviewed.

(C) The change in MN determination is effective on the date of the review. If discharge results, the procedures in §19.502 of this title (relating to Transfer and Discharge) must be followed.

(2) If a DHS nurse reviewer and a facility nurse assessor are unable to agree about an assessment, the facility nurse assessor requests an informal review by a DHS nurse supervisor. If the provider disagrees with the findings of the nurse supervisor, the provider may initiate a formal appeal, as stated in Chapter 79, Subchapter Q, of this title (relating to Contract Appeals Process) by submitting a request to the Director, Hearings Department, Mail Code W-613, Texas Department of Human Services, P.O. Box 149030, Austin, Texas 78714-9030. The TILE classification and associated per diem rate specified by the DHS nurse reviewer remain in effect during any period of informal review or formal contract appeal. If the informal review or contract appeal process establishes that DHS has changed a TILE classification in error, DHS corrects the error retroactively.

(3) DHS nurse reviewers notify administrators in advance of their on- site visits regarding the recipients whose medical records will be reviewed, the time period covered by the review, the parts of the record to be reviewed, and the accommodations necessary for the review. If the nurse reviewers are prevented from conducting the review, TILE rates on the recipients chosen for review will be lowered to the default TILE rate until the review can be accomplished.

(c) Monitoring. TILE error rates which DHS finds unacceptable may result in a facility's undergoing a monitoring period. Decisions to institute monitoring will be made by the Utilization and Assessment Review (UAR) staff in state office.

(1) During the monitoring period, facilities must submit all Texas Nursing Facility CARE forms to DHS nurse reviewers. Forms may not be submitted to NHIC either electronically or by mail.

(2) The length of the monitoring period is 60 days. If accuracy of forms is still at an unacceptable level at the end of 60 days, DHS may give a one-time, 30-day extension, if the facility has shown an attempt to improve their accuracy. If forms are not accurate at the end of 90 days, DHS places the facility on compliance.

(d) Compliance.

(1) A decision to place a facility on compliance will be made by UAR staff in state office. Compliance may result when a facility has a high error rate on the current review and one of the following:

(A) an unacceptable level of improvement by the end of a monitoring period;

(B) lack of documentation regarding key assessment items;

(C) a history of noncompliance; or

(D) medical records which contain alterations in areas designed to lower the TILE level and increase the payment.

(2) DHS allows a facility a compliance period of 30 days to submit new assessment forms on all recipients not in the original review to DHS nurse reviewers. Facilities may not submit forms to NHIC electronically or by mail.

(3) If an acceptable level of improvement has not been achieved by the end of the compliance period, vendor payments to the facility will be held until an acceptable level of improvement is achieved.

(4) The facility nurse assessor must attend a DHS TILE training course within 60 days of the beginning of the compliance period.

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 February 1, 1996.

TRD-9601436 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 438-3765

♦ ♦ ♦

The Texas Department of Human Services (DHS) proposes the repeal of §90. 60, concerning plans, approvals, and construction procedures; §90.70, concerning fees for plan reviews, construction inspection services, and feasibility inspection services; §90.80, concerning construction and initial survey of completed construction; §§90.92-90.105, concerning general requirements for facility construction; and §90.141, concerning plans, approvals, and construction procedures; and §§90.323-90.325, concerning procedures for inspection of public records and time periods for processing licenses for long term care facilities. DHS also proposes amendments to §90. 12, concerning building approval; §90.15, concerning renewal procedures and qualifications; §90.42, concerning standards for facilities serving persons with mental retardation or related conditions; §90.212, concerning incidents of abuse and neglect reportable by facilities to the Texas Department of Human Services (DHS); and §90.327, concerning notice of changes in key personnel. DHS also proposes new §§90.60-90.74, concerning general requirements for facility construction; new §90.231, concerning warning letter, and new §90. 323, concerning procedures for inspection of public records in its Intermediate Care Facilities Serving Persons with Mental Retardation or a Related Condition chapter.

The purpose of the repeal of §§90.60, 90.70, 90.80, 90.92-90.105, and 90. 141 is to delete rules addressing discontinued department functions. The purpose of the repeal of §§90.323-90.325 is to delete rules inadvertently published in two sections.

The purpose of the amendments to §§90.12, 90.15, and 90.42 is to delete out-dated rules, add a definition of timely filed applications, and correct a misspelled word. The purpose of the amendment to §90.212 is to delete outdated references to nursing facilities. The purpose of the amendment to §90.327 is to delete sections not applicable to Intermediate Care Facilities Serving Persons with Mental Retardation or a Related Condition.

The purpose of new §§90.60-90.74 is to modify the facility construction requirements.

The purpose of new §90.231 is to provide information about DHS's procedure for warning facilities when their non-compliance with licensure rules places them at risk of licensing actions. The purpose of new §90.323 is to provide information on the procedure for the inspection of public records.

Burton F. Raiford, commissioner, 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 proposal.

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 proposal will be clear rules. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Questions about the content of this proposal may be directed to Susan Syler at (512) 438-3111 in DHS's Long Term Care Policy Section. Written comments on the proposal may be submitted to Nancy Murphy, Media and Policy Services-313, Texas Department of Human Services E-205, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register.*

Subchapter B. Application Procedures

• 40 TAC §90.12, §90.15

The amendments are proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department 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, §§22.001-22.024 and §§32.001-32.042.

§90.12. Building Approval.

(a) (No change.)

(b) Local health authority. The following procedures allow the local health authority to provide recommendations to DHS concerning licensure of a facility.

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

[(5) Inspection and plan review. An applicant for licensure who has an existing building must submit either a plan for review and approval or request a feasibility inspection to be performed by DHS to determine construction or renovation requirements. The fees for inspection and plan reviews must be in accordance with §90.19 of this title (relating to License Fees).]

§90.15. Renewal Procedures and Qualifications.

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

(c) If the application is postmarked by the filing deadline, the application will be considered to be timely filed if received in the Licensing Section of the state office of Long Term Care-Regulatory, Texas Department of Human Services, within 15 days of the postmark.

(d)[(c)] The application for renewal must contain the same information required for an original application as well as payment of the annual licensing fees.

(e)[(d)] 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).

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 February 1, 1996.

TRD-9601437 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 438-3765

♦ ♦ ♦

Subchapter C. Standards for Licensure

• 40 TAC §90.42

The amendment is proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department 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, §§22.001-22.024 and §§32.001-32.042.

§90.42. Standards for Facilities Serving Persons with Mental Retardation or Related Conditions.

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

(e) Additional requirements.

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

(5) Specialized nutrition support (delivery of **parenteral** [parental] nutrients and enteral feedings by nasogastric, gastrostomy, or jejunostomy tubes, etc.) must be given in accordance with physician's orders by a registered or licensed nurse.

(6)-(8) (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 February 1, 1996.

TRD-9601438 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 438-3765

♦ ♦ ♦

Subchapter D. General Requirements for Facility Construction

• 40 TAC §§90.60, 90.70, 90.80, 90.92-90.105, 90.141

(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, Chapters 22 and 32, which authorizes the department 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 repeals implement the Human Resources Code, §§22.001-22.024 and §§32.001-32.042.

§90.60. Plans, Approvals, and Construction Procedures.

§90.70. Fees for Plan Reviews, Construction Inspection Services, and Feasibility Inspection Services.

§90.80. Construction and Initial Survey of Completed Construction.

§90.92. Introduction, Application, and General Requirements for Facilities Serving Persons with Mental Retardation or Related Conditions.

§90.93. Site and Grounds.

§90.94. Fire Service.

§90.95. Means of Egress.

§90.96. Fire Alarms, Detection Systems, and Sprinkler Systems.

§90.97. Portable Fire Extinguishers.

§90.98. Accessibility Provisions.

§90.99. Architectural Space Planning.

§90.100. Storage Requirements (All Facilities).

§90.101. Electrical, Heating, Ventilating, and Air-conditioning Systems (HVAC)-All Facilities.

§90.102. Plumbing (All Facilities).

§90.103. Maintenance (All Facilities).

§90.104. Environmental Services.

§90.105. Safety Operations.

§90.141. Plans, Approvals, and Construction Procedures.

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 February 1, 1996.

TRD-9601439 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 438-3765

♦ ♦ ♦

• 40 TAC §§90.60-90.74

The new sections are proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department 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 new sections implement the Human Resources Code, §§22.001-22.024 and §§32.001-32.042.

§90.60. Construction and Initial Survey of Completed Construction.

(a) Construction phase.

(1) The Texas Department of Human Services (DHS), Architectural Section in Austin, Texas, must be notified in writing of construction start.

(2) All construction must be done in accordance with minimum licensing requirements. It is the sponsor's responsibility to employ qualified personnel to prepare the contract documents for construction of a new facility or remodeling of an existing facility. Contract documents for additions and remodeling and for the construction of an entirely new facility must be prepared by an architect licensed by the Texas State Board of Architectural Examiners. Drawings must bear the seal of the architect. Certain parts of final plans, designs, and specifications must bear the seal of a registered professional engineer approved by the State Board of Registration for Professional Engineers to operate in Texas. These certain parts include sheets and sections covering structural, electrical, mechanical, and sanitary engineering.

(A) Remodeling is the construction, removal, or relocation of walls and partitions; the construction of foundations, floors, or ceiling-roof assemblies; the expanding or altering of safety systems (including, but not limited to, sprinkler, fire alarm, and emergency systems); or the conversion of space in a facility to a different use.

(B) General maintenance and repairs of existing material and equipment, repainting, applications of new floor, wall, or ceiling finishes, or similar projects are not included as remodeling, unless as a part of new construction. DHS must be provided flame spread documentation for new materials applied as finishes.

(b) Contract documents.

(1) Site plan documents must include grade contours; streets (with names); north arrow; fire hydrants; fire lanes; utilities, public or private; fences; unusual site conditions, such as ditches, low water levels, other buildings on-site; and indications of buildings five feet or less beyond site property lines.

(2) Foundation plan documents must include general foundation design and details.

(3) Floor plan documents must include room names, numbers, and usages; doors (numbered) including swing; windows; legend or clarification of wall types; dimensions; fixed equipment; plumbing fixtures; and kitchen basic layout; and identification of all smoke barrier walls (outside wall to outside wall) or fire walls.

(4) For both new construction and additions or remodeling to existing buildings, an overall plan of the entire building must be drawn or reduced to fit on an 8 1/2 inch by 11 inch sheet; submit two reduced plans for file record. See §90.80(c)(3) of this title (relating to Construction and Initial Survey of Completed Construction).

(5) Schedules must include door materials, widths, types; window materials, sizes, types; room finishes; and special hardware.

(6) Elevations and roof plan must include exterior elevations, including material note indications and any roof top equipment; roof slopes, drains, and gas piping, and interior elevations where needed for special conditions.

(7) Details must include wall sections as needed (especially for special conditions); cabinet and built-in work, basic design only; cross sections through buildings as needed; and miscellaneous details and enlargements as needed.

(8) Building structure documents must include structural framing layout and details (primarily for column, beam, joist, and structural frame building); roof framing layout (when this cannot be adequately shown on cross section); cross sections in quantity and detail to show sufficient structural design and structural details as necessary to assure adequate structural design, also calculated design loads.

(9) Electrical documents must include electrical layout, including lights, convenience outlets, equipment outlets, switches, and other electrical outlets and devices; service, circuiting, distribution, and panel diagrams; exit light system (exit signs and emergency egress lighting); emergency electrical provisions (such as generators and panels); fire alarm and similar systems (such as control panel, devices, and alarms); sizes and details sufficient to assure safe and properly operating systems; and a staff communication system.

(10) Plumbing documents must include plumbing layout with pipe sizes and details sufficient to assure safe and properly operating systems, water systems, sanitary systems, gas systems, other systems normally considered under the scope of plumbing, fixtures, and provisions for combustion air supply.

(11) Heating, ventilation, and air-conditioning (HVAC) documents must include sufficient details of HVAC systems and components to assure a safe and properly operating installation including, but not limited to, heating, ventilating, and air-conditioning layout, ducts, protection of duct inlets and outlets, combustion air, piping, exhausts, and duct smoke and/or fire dampers; and equipment types, sizes, and locations.

(12) Sprinkler system documents must include plans and details of NFPA designed systems; plans and details of partial systems provided only for hazardous areas; electrical devices interconnected to the alarm system.

(13) Other layouts, plans, or details as may be necessary for a clear understanding of the design and scope of the project; including plans covering private water or sewer systems must be reviewed by the local health or wastewater authority having jurisdiction. If no local authority, then the plans will be reviewed by DHS.

(14) Specifications must include installation techniques, quality standards and/or manufacturers, references to specific codes and standards, design criteria, special equipment, hardware, painting, and any others as needed to amplify drawings and notes.

(c) Initial survey of completed construction.

(1) Upon completion of construction, including grounds and basic equipment and furnishings, a final construction inspection (initial survey) of the facility, including additions or remodeled areas, is required to be performed by DHS (architectural section) prior to occupancy. A minimum of three weeks advance notice is needed. The completed construction must have the written approval of the local authorities having jurisdiction, including the fire marshal, and building inspector.

(2) After the completed construction has been surveyed by a representative of the architectural section of DHS and found acceptable, this information will be conveyed to the licensing officer as part of the information needed to issue a license to the facility. In the case of additions or remodeling of existing facilities, a revision or modification to an existing license may be necessary. Note that the building, grades, drives, parking and grounds must be essentially 100% complete at the time of this initial survey visit for occupancy approval and licensing, including basic furnishings and operational needs.

(3) The following documents must be available to DHS's surveyor at the time of the survey of the completed building:

(A) written approval of local authorities as called for in paragraph (1) of this subsection;

(B) written certification of the fire alarm system by the installing agent (Form FML-009 of the Texas State Fire Marshal);

(C) documentation of materials used in the building which are required to have a specific limited fire or flame spread rating, including, but not limited to, special wall finishes or floor coverings, flame retardant curtains (including cubicle curtains), and rated ceilings. This must include a signed letter from the installer verifying that the material installed is the same material named in the laboratory test document;

(D) approval of the completed sprinkler system installation by the designing engineer. A copy of the material list and test certification must be available;

(E) service contracts for maintenance and testing of systems, including, but not limited to, alarm systems and sprinkler systems;

(F) a copy of gas test results of the facility's gas lines from the meter;

(G) a written statement from an architect/engineer stating that he certifies that the building was constructed to meet NFPA 101, Life Safety Code, and all locally applicable codes, and that the facility is in substantial conformance with minimum licensing requirements; and

(H) the contract documents specified in subsection (b) of this section.

(d) Non-approval of new construction.

(1) If, during the initial on-site survey of completed construction, the surveyor finds certain basic requirements not met, he may recommend to DHS that the facility not yet be licensed and approved for occupancy. Such basic items may include the following:

(A) construction which does not meet minimum code or licensure standards for basic requirements such as corridor widths being less than eight feet clear width, ceilings installed at less than the minimum seven feet six inches height, resident bedroom dimensions less than required width, and other such features which would disrupt or otherwise adversely affect the residents and staff if corrected after occupancy;

(B) no written approval by local authorities;

(C) fire protection systems not completely installed or not functioning properly including, but not limited to, fire alarm systems, emergency power and lighting, and sprinkler systems;

(D) required exits are not all usable according to Life Safety Code requirements;

(E) telephone not installed or not properly working;

(F) sufficient basic furnishings, essential appliances and equipment are not installed or not functioning; and

(G) any other basic operational or safety feature which the surveyor, as the authority having jurisdiction, encounters which in his/her judgment would preclude safe and normal occupancy by residents on that day.

(2) If the surveyor encounters deficiencies that do not affect the health and safety of the residents, licensure may be recommended based on an approved written plan of correction by the facility's administrator.

(3) Copies of reduced size floor plan on an 8 1/2 inch by 11 inch sheet must be submitted in duplicate to DHS for record/file use and for such uses by the facility as evacuation planning and fire alarm zone identification. The plan must contain basic legible information such as overall dimensions, room usage names, actual bedroom numbers, doors, windows, and any other pertinent information.

§90.61. Introduction, Application, and General Requirements for Facilities Serving Persons with Mental Retardation or Related Conditions.

(a) Scope. The requirements of this section are applicable to both new and existing facilities unless stated otherwise.

(b) Purpose.

(1) The concept of requirements for fire safety with regard to the residents is based on evacuation capability as published by National Fire Protection Association (NFPA) in NFPA 101 Life Safety Code. These standards are written with the premise that the residents will be capable of self-evacuation without continuous staff assistance. Residents that are not normally capable of self-evacuation nor capable of negotiating stairs unassisted shall not be housed above or below the floor of exit discharge unless the facility meets the construction requirements of NFPA 101, Chapter 12 titled "New Health Care Occupancies" for large facilities, or the "impractical" requirements for small facilities as found in NFPA 101, Chapter 21 titled "Residential Board and Care Occupancies." Examples of residents who may not be capable of self-evacuation are as follows:

(A) a person with a physical disability of a nature that he/she is not capable of maneuvering in a wheelchair, walker, etc., unaided;

(B) a person with a mental disability who will not take or cannot understand instructions from a staff member; or

(C) a person that is taking medication before bedtime which will make it difficult for a staff member to arouse the person quickly.

(2) The method of determining the evacuation capability of residents under NFPA 101, Chapter 21, is by rating each resident and each staff member to determine an evacuation difficulty score (E-score). If the E-score is 1.5 or less, the evacuation capability of the facility is prompt, greater than 1.5 to five is slow, greater than five is impractical. The worksheets to be completed are located in NFPA 101, 1985 Edition, Appendix F. Intermediate Care Facilities for the Mentally Retarded (ICFs-MR) with 16 beds or less must meet the evacuation requirement for their designated Chapter 21 rating. The ratings and their requirements follow:

(A) Impractical rating.

(i) The facility must have one evacuation and/or fire drill per shift each calendar quarter (minimum of 12 drills per year).

(ii) The facility must actually evacuate clients once a year on each shift.

(iii) All facility staff, including relief and substitute staff, must participate in drills as soon as possible after beginning employment on their shift.

(iv) For initial certification, one client must be admitted.

(v) E-scores are not required for certification under this rating.

(B) Slow rating.

(i) The facility must have one evacuation and/or fire drill per shift each calendar quarter (minimum of 12 drills per year).

(ii) The facility must actually evacuate clients once a year on each shift.

(iii) Staff on each shift must participate in drills.

(iv) New and/or relief or substitute staff must participate in a drill within ten days of employment on their assigned shift.

(v) For initial certification, two clients must be admitted.

(vi) E-scores must be calculated as soon as possible, but within ten calendar days of admission.

(vii) Initial E-scores are based on four drills, as follows:

(I) two conducted during the daytime, and

(II) two conducted during the nighttime, after the first 30 minutes and within the first three hours of sleep.

(viii) After the initial E-scores are obtained, a worksheet for rating residents must be completed for all newly admitted clients to obtain an E-score. The evacuation capability is calculated as described in clause (vii) of this subparagraph.

(ix) E-scores must be updated annually or sooner if significant changes occur in any client's evacuation capability. These updated scores are based on the group's overall performance during fire drills as they are conducted throughout the year. Scores do not have to be calculated in accordance with the drills required for newly admitted clients based on the requirements stated in clause (vii) of this subparagraph.

(C) Prompt rating.

(i) The facility must have one evacuation and/or fire drill per shift each calendar quarter (minimum of 12 drills per year).

(ii) The facility must actually evacuate clients once a year on each shift.

(iii) Staff on each shift must participate in drills.

(iv) New and/or relief or substitute staff must participate in a drill within ten days of employment on their assigned shift.

(v) For initial certification, all six clients must be admitted.

(vi) E-scores must be calculated as soon as possible, but within ten calendar days of admission.

(vii) Initial E-scores are based on four drills, as follows:

(I) two conducted during the daytime, and

(II) two conducted during the nighttime, after the first 30 minutes and within the first three hours of sleep.

(viii) After the initial E-scores are obtained, a worksheet for rating residents must be completed for all newly admitted clients to obtain an E-score. The evacuation capability is calculated as described in clause (vii) of this subparagraph.

(ix) E-scores must be updated annually or sooner if significant changes occur that would affect a client's evacuation capability. These updated scores are based on the group's overall performance during fire drills as they are conducted throughout the year. Scores do not have to be calculated in accordance with the drills required for newly admitted clients based on the requirements stated in clause (vii) of this subparagraph.

(3) The "E" score will determine which NFPA 101 features are to be installed and maintained in the facility. These features include construction, fire alarm systems, smoke detector systems, interior finish, sprinkler systems, separation of bedrooms, and egress from the building.

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

(1) Addition–The addition of floor space.

(2) Large facilities–Facilities with 17 or more resident beds.

(3) Department–Texas Department of Human Services.

(4) Life safety features–Fire safety components required by NFPA 101 such as building construction, fire alarm systems, smoke detection systems, interior finishes, sizes and thicknesses of doors, exits, emergency electrical systems, sprinkler systems, etc.

(5) Remodeling–The altering of the structure, e.g., removal or addition of walls or partitions, floors, ceiling, roof.

(6) Renovation–The restoration to a former better state by cleaning, repairing, or rebuilding, e.g., routine maintenance, repairs, equipment replacement, painting.

(7) Small facilities–Facilities with 16 or fewer resident beds.

(d) Construction.

(1) New construction is any construction work which began on or after October 3, 1988. The provisions of NFPA 101, Chapter 12 are applicable for large facilities, and Chapter 21 for small facilities.

(2) An existing facility is one which was operating with a license as a facility for persons with mental retardation and related conditions before October 3, 1988, and has not subsequently become unlicensed. The provisions of NFPA 101, Chapter 13 titled "Existing Health Care Occupancies," are applicable for large facilities, and Chapter 21 for small facilities.

(3) Alterations or new installations of building services equipment, such as mechanical and electrical systems, generators, fire alarm, and detection systems, etc., must be accomplished in conformance with the requirements for new construction as required by NFPA 101.

(4) Site approval, as required by the local health officer, building department, and/or fire marshal having jurisdiction, must be obtained. Any conditions considered to be a fire, safety, or health hazard will be grounds for disapproval of the site by the department unless applied in an arbitrary or discriminating manner.

(5) Facilities that renovate must provide documentation for the flame spread rate of any new materials applied as an interior finish.

(6) Life safety features and equipment that have been installed in existing buildings and are now in excess of that required by NFPA 101 must continue to be maintained or must be removed at the direction of DHS.

(7) When an existing licensed facility plans building additions or remodeling, which includes construction of additional resident beds, then the ratio of bathing units must be reevaluated to meet minimum standards and the square footage of dining and living areas must be reevaluated by DHS. Conversion of existing living, dining, or activity areas to resident bedrooms must not reduce these functions to an area less than required by minimum standards.

(8) Buildings must be of recognized permanent type construction. They must be structurally sound with regard to actual or expected dead, live, and wind loads according to applicable building codes.

(9) Each building must be classified as to the building construction type for fire resistance rating purposes in accordance with NFPA 220 Standard on Types of Building Construction, and NFPA 101.

(e) Applicable codes and standards. Facilities must meet the requirements of NFPA 101, 1985 edition, and any other codes and standards of NFPA listed in this section, except as may be otherwise approved or required by DHS.

(1) If the municipality has a building code and a plumbing code, then those codes must govern in those areas of construction. Where local codes or ordinances are applicable, the most restrictive parts concerning the same subject item must apply unless otherwise determined by the authority having jurisdiction for local codes and DHS.

(2) In the absence of such governing municipal codes, nationally recognized codes must be used, such as the Standard Building Code and the Standard Plumbing Code, both of the Southern Building Code Congress International, Inc. Such nationally recognized codes, when used, must all be publications of the same group or organization to assure the intended continuity.

(3) Heating, ventilating, and air-conditioning systems must be designed and installed in accordance with NFPA 90A Standard for the Installation of Air Conditioning and Ventilating Systems, and NFPA 90B Standard for the Installation of Warm Air Heating and Air Conditioning Systems, as applicable, and the American Society of Heating, Ventilating, and Air-Conditioning Engineers (ASHRAE), except as may be modified in this subchapter.

(4) Electrical and illumination system must be designed and installed in accordance with NFPA 70 National Electrical Code, and the Lighting Handbook of the Illuminating Engineering Society of North America (IES) except as may be modified in this subchapter.

(5) The facility must meet the provisions and requirements concerning accessibility for individuals with disabilities in the following laws: the Americans with Disabilities Act of 1990 (Public Law 101-336; Title 42, United States Code, Chapter 126); Title 28, Code of Federal Regulations, Part 35; Texas Civil Statutes, Article 9102; and Title 16, Texas Administrative Code, Chapter 68. Plans for new construction, substantial renovations, modifications, and alterations must be submitted to the Texas Department of Licensing and Regulation (Attention: Elimination of Architectural Barriers Program) for accessibility approval under Article 9102.

(f) General requirements.

(1) The facility must provide and maintain furnishings and decorations that meet the needs of the residents.

(2) The building, grounds, and equipment must be maintained in good repair, operational, sanitary, and free of hazards.

(3) There must be at least one telephone (other than a pay phone) in the facility, accessible to residents for use in making calls to summon help in case of emergency.

(4) The facility must have:

(A) floors that are free of irregularities and are substantially level (floor areas may be at different elevations with connecting stairs or ramps);

(B) floors that have a resilient, nonabrasive, and slip-resistant surface;

(C) nonabrasive carpeting, if the area used by residents is carpeted and serves residents who lie on the floor or ambulate with parts of their bodies, other than feet, touching the floor; and

(D) exposed floor surfaces and floor coverings that promote mobility in areas used by residents and promote maintenance of sanitary conditions.

(5) Walls and ceilings must be cleanable and in good repair.

(6) Walls and floors must be kept free of cracks. The joint between the walls and floors is to be maintained so as to be free of spaces which might harbor insects, rodents, or vermin.

(7) An adequate supply of hot water must be provided. The hot water system for resident use must be capable of being regulated to not exceed 110 degrees Fahrenheit at the fixtures.

(8) Draperies, curtains (including cubicle curtains), and other similar furnishings and decorations must be flame resistant in accordance with NFPA 701 Standard Methods of Fire Tests for Flame Resistant Textiles and Films. Documentation must be kept on file in the facility.

(9) Wastebaskets must be of noncombustible material.

(10) An initial pressure test of facility gas lines from the meter must be provided. Additional pressure tests will be required when the facility has major renovations or additions where the gas service is interrupted. All gas heating systems must be checked for proper operation and safety prior to the heating season. Any unsatisfactory conditions must be corrected promptly.

(11) The IES recommendations must be followed to achieve proper illumination characteristics and lighting levels throughout the facility. Minimum illumination must be ten foot candles in resident rooms during the day and 20-foot candles in corridors, staff stations, dining rooms, lobbies, toilets, bathing facilities, laundries, stairways, and elevators during the day. Illumination requirements for these areas apply to lighting throughout the space and should be measured at approximately 30 inches above the floor anywhere in the room. Minimum illumination for medication preparation or storage areas, kitchens, and staff station desks must be 50-foot candles during the day. Illumination requirements for these areas apply to the task performed and should be measured on the tasks.

(12) In addition to the required illumination (normal and emergency), the facility must keep on hand and readily available to night staff, no less than one working flashlight.

(13) Combustible attic areas larger than 3,000 square feet must be divided into compartments not exceeding 3,000 square feet or the attic area must be sprinkled. The separating barrier must be at least one layer of 1/2-inch gypsum board on one side of support members.

§90.62. Site and Grounds.

(a) General (All Facilities).

(1) Site grades shall provide for positive surface water drainage so that there will be no ponding or standing water at or near the building such as would present a hazard to health or provide a breeding site or harborage for disease vectors.

(2) Outdoor activity, recreational, and sitting spaces shall be provided and be accessible to all residents.

(3) Each facility shall have parking space to satisfy the needs of residents, employees, staff, and visitors.

(4) Protection shall be provided for resident safety on facility grounds by the use of appropriate methods, such as fences, hedges, retaining walls, railings, or other landscaping. Such protection shall not inhibit the free emergency egress to a safe distance away from the building.

(5) All outside areas, grounds, adjacent buildings, etc., on the site shall be maintained in good condition and kept free of rubbish, garbage, untended growth, and other conditions which may constitute a fire or health hazard.

(b) Additional site conditions (large facilities only).

(1) Auxiliary buildings located on the site within 20 feet of the main licensed structure and which contain hazardous operations or contents, such as laundries or storage buildings, shall meet the same code requirements for safety as the main licensed structure, or the building shall be moved to be 20 feet or farther away from the main building.

(2) Other buildings on the site shall meet the appropriate occupancy section or separation requirements of National Fire Protection Association (NFPA) 101 Life Safety Code.

(3) A new building (or addition) shall be set back at least ten feet from the property lines except as otherwise approved by DHS.

(4) Exit doors from the building shall not open directly onto a drive for vehicular traffic, but shall be set back at least six feet from the edge of such drive (measured from the end of building wall in the case of a recessed door) to prevent accidents due to lack of visual warning. These doors are to have automatic or self-closures.

(5) Walks shall be provided from all exits and shall be of non-slip surfaces free of hazards. Walks shall be at least 48 inches wide except as otherwise approved. Ramps should be used in lieu of steps where grade change is 21 inches or less, and where possible, for persons with physical disabilities and/or mobility impairment, and to facilitate bed or wheelchair removal in an emergency.

(6) Open or enclosed courts with resident rooms or living areas opening upon them shall not be less than 20 feet in the smallest dimension unless otherwise approved by the department.

(7) There shall be at least one approved readily accessible fire hydrant located within 300 feet of the building. The hydrant shall be on a minimum six-inch service line, or else there shall be an approved equivalent (such as a storage tank). The hydrant, its location, and service line, or equivalent shall be approved by the local fire department and the department.

(8) The building shall have suitable fire lanes for access as required by local fire authorities and DHS.

§90.63. Fire Service.

(a) The facility shall be served by a paid or volunteer fire department. The fire department must provide written assurance to the department that the fire department can respond to an emergency at the facility.

(b) Water supply for fire fighting purposes shall be as required and approved by the fire fighting unit.

§90.64. Means of Egress.

(a) Corridors and other means of egress shall be kept clear of obstructions and shall not be used for any purpose which would interfere with its use as an exit, such as for storage, vending machines, seating, or similar purposes. The corridor width shall be maintained at all times.

(b) Doors within the means of egress shall not be equipped with a latch or lock which requires the use of a key or tool to open from the inside of the building. A latch or other fastening device on a door shall be provided with a knob, handle, panic bar, or other simple type of releasing device, the method of operation of which is obvious, even in darkness. An exception is that large facilities are permitted to have doors which are locked, provided that residents can be rapidly removed by the use of remote control of locks or by keying all locks to keys readily available to staff who are in constant attendance.

§90.65. Fire Alarms, Detection Systems, and Sprinkler Systems.

(a) General. Fire alarms, detection systems, and sprinkler systems shall be as required by National Fire Protection Association (NFPA) 101 Life Safety Code, NFPA 72A Standard for the Installation, Maintenance and Use of Local Protective Signaling Systems, NFPA 13 Standard for the Installation of Sprinkler Systems, or NFPA 13-D Standard for the Installation of Sprinkler Systems in One- and Two-Family Dwellings and Mobile Homes, as specified in NFPA 101, Chapter 21 titled "Residential Board and Care Occupancies" and as modified in this section.

(1) Each building shall have an approved fire alarm system.

(2) Components shall be compatible and laboratory listed for the use intended.

(3) Wiring and circuitry for alarm systems shall meet the applicable requirements of NFPA Codes, including NFPA 70 National Electric Code, for such systems.

(4) Fire alarm systems shall be installed, maintained, repaired, etc. by an agent having a current certificate of registration with the state fire marshal's office of the Texas Commission on Fire Protection, in accordance with the state law. A fire alarm system installation certificate shall be provided as required by the Office of the State Fire Marshal. An exception is that large facilities who have professional engineers on staff that are qualified in electrical and electronic installations are not required to have a certificate of registration with the state fire marshal's office, provided they do not sell, install, or maintain fire alarm systems commercially.

(b) Fire alarm and smoke detection systems for small facilities.

(1) A manual alarm initiating system shall be provided and shall be supplemented by an automatic smoke detection and alarm initiation system in accordance with NFPA 101, Chapter 7, Section 7-6, titled "Building Service and Fire Protection Equipment. "

(2) Smoke detectors shall be installed in resident bedrooms, corridors, hallways, and common living/dining areas. Service areas such as laundries and kitchens may have heat detectors in lieu of smoke detectors.

(3) The fire alarm control panel shall be located to be in view of staff. The primary power source for the complete fire alarm system must be commercial electric.

(4) Emergency power source shall be from storage batteries or on-site engine-driven generator set.

(5) The operation of any alarm initiating device will sound an audible/visual alarm(s) at the site.

(6) The facility shall have a written contract with a fire alarm company or person licensed by the State of Texas to maintain the fire alarm system semiannually.

(c) Fire alarm and emergency systems for large facilities.

(1) The fire alarm system shall be designed so that whenever the general alarm is sounded by activation of any device (manual pull, smoke sensor, sprinkler, kitchen range hood extinguisher, etc.) the following shall occur automatically.

(A) Smoke and fire doors which are held open by approved devices shall be released to close.

(B) Air handlers (air conditioning/heating distribution fans) serving three or more rooms or any means of egress shall shut down immediately.

(C) Smoke dampers shall close.

(D) The proper zone indicating lights shall show on the fire alarm control panel(s), including auxiliary panels.

(2) Fire alarm bells or horns shall be located throughout the building for audible coverage. Flashing alarm lights (visual alarms) of proper intensity shall be installed to be visible in corridors and public areas including dining rooms and living rooms.

(3) A master control panel shall be visible at the main staff station which has alarm and trouble conditions by zones, power-on lights, and required signal devices for trouble conditions. All control panels must be listed in accordance with the provisions of the Underwriters Laboratories, Inc. (UL) for the intended use, i.e., manual, automatic, and water flow activation. Alarm and trouble zoning shall be by smoke compartments and by floors in multi-story facilities.

(4) Remote annunciator panels equipped with alarm by zone and a common trouble signal (both audible and visual) shall be located at auxiliary or secondary staff stations on each floor or major subdivisions of single story facilities, that will indicate the alarm condition of adjacent zones and the alarm conditions at all other staff stations.

(5) Manual pull stations shall be provided at all exits, living rooms, dining rooms, and at or near the staff stations.

(6) The NFPA 13 sprinkler system shall be interconnected with the fire alarm panel as a separate zone for alarm and trouble. Activation of the tamper switch will provide a trouble condition on the fire alarm panel which will not impair the operation of the alarm.

(7) The kitchen range hood extinguisher shall be interconnected with the fire alarm system. This interconnection may be a separate zone on the panel or combined with other initiating devices located in the same zone as the range hood is located.

(8) The fire alarm system shall be arranged to transmit an alarm automatically to the fire department legally committed to serve the area in which the facility is located by the most direct and reliable method allowed by NFPA 101.

(9) Partial sprinkler systems (those provided only for hazardous areas) shall be interconnected to the fire alarm system and comply with NFPA 101. Each partial system shall have a valve with a supervisory switch to sound a trouble signal, water flow switch to activate the fire alarm, and an end of line test drain.

(10) Emergency electrical services shall be provided to comply with the provisions of NFPA 70. This includes such items as emergency power provided by generator or batteries for fire alarm systems, emergency egress lighting, call systems, TV cameras and monitors (if used for corridor observation), life support systems, designated wall receptacles, etc. The system shall comply with NFPA 99 Standard for Health Care Facilities, and NFPA 37 Standard for the Installation and Use of Stationary Combustion Engines and Gas Turbines.

(11) Elevators, escalators, and moving walks. Elevators shall comply with the provisions of NFPA 101 and American National Standards Institute (ANSI) Safety Code for Elevators, Dumbwaiters, Escalators, and Moving Walks (ANSI A17.1). Elevators are required for buildings having resident facilities (such as bedrooms, dining, or recreation areas) or services (such as diagnostic or therapy) located on other than the main entrance floor. Passenger elevators, escalators, and walks shall be inspected by a qualified agent at least every six months. Freight elevators and dumbwaiters shall be inspected every 12 months.

§90.66. Portable Fire Extinguishers.

(a) General. Portable fire extinguishers must be provided and maintained to comply with the provisions of the National Fire Protection Association (NFPA) 10 Standard for Portable Fire Extinguishers. This includes such items as type of extinguishers (A, B, or C), location and spacing, mounting heights, monthly inspections by staff, yearly inspections by a licensed agent (with any necessary servicing), and hydrostatic testing as recommended by manufacturer.

(b) Types of extinguishers.

(1) Extinguishers in resident corridors must be spaced so that travel distance is not more than 75 feet. The minimum size of extinguishers must be either 2 1/2 gallon for water type or five pound for ABC type.

(2) Extinguishers must be installed on supplied hangers or brackets or be mounted in cabinets approved by the Texas Department of Human Services (DHS).

(3) Extinguishers must be surface wall-mounted or recessed in cabinets where they are not subject to physical damage or dislodgement.

(4) Extinguishers having a gross weight not exceeding 40 pounds must be installed so that the top of the extinguisher is not more than five feet above the floor. Extinguishers with a gross weight greater than 40 pounds must be installed so the top of the extinguisher is not more than 3 1/2 feet above the floor. The clearance between the bottom of the extinguisher and the floor must not be less than four inches.

(5) Portable extinguishers provided in hazardous rooms must be located as close as possible to the exit door opening and on the latch (knob) side.

(6) Staff must be appropriately trained in the use of each type of extinguisher in the facility.

§90.67. Accessibility Provisions. The physical plant shall be designed for persons with physical disabilities and/or mobility impairments and must comply with applicable federal, state, and local requirements.

§90.68. Architectural Space Planning.

(a) Large facilities.

(1) Ancillary resident space. The minimum total ancillary resident-use space shall be not less than 35 square feet per bed. Ancillary space includes areas for living, dining, recreation, therapy, training, and other such program areas. It does not include bedrooms, passageways, offices, kitchens, laundries, etc. (more than 35 square feet per bed is usually needed in facilities with less than 60 beds). Facilities which have, or anticipate having, large proportions (approximately 65% or greater) of nonambulatory and/or bedfast residents shall provide at least 50 square feet of ancillary space per bed unless otherwise approved by DHS. Areas providing less space than called for in this paragraph cannot be approved except on an individual basis where clearly justified.

(2) Resident bedrooms.

(A) Bedrooms shall be arranged and equipped for adequate personal care and for comfort and privacy. Bedrooms shall have full height walls that extend from floor to ceiling with doors. (Partial partitions or furnishings are not a substitute.) An exception is that existing facilities constructed prior to October 3, 1988, that have partial partitions in lieu of full-height walls, need not install the full-height walls unless there are major renovations or conversions.

(B) Bedrooms shall provide at least 80 square feet for a single occupancy (one bed) and 60 square feet per bed for multiple occupancy. (Note: room configuration and usability is taken into consideration and there may be instances where the minimum square footage will not be acceptable.) The minimum room dimension shall be at least eight feet for a single room and at least ten feet for a multiple-bed room, unless otherwise approved by the department. An exception is that multi-occupancy bedrooms for persons in wheelchairs shall have 70 square feet per wheelchair occupant bed.

(C) No more than four beds shall be in any one bedroom. An exception is that the department may grant a variance from the limit of four residents per room only if a physician who is a member of the interdisciplinary team and who is a qualified mental retardation professional:

(i) certifies that each resident to be placed in a bedroom housing more than four residents is so severely medically impaired as to require direct and continuous monitoring during sleeping hours; and

(ii) documents the reasons why housing in a room of only four or fewer residents would not be medically feasible.

(D) In the bedrooms and for each resident there shall be a bed with a comfortable mattress and appropriate bedding, functional furniture appropriate to residents' needs, and closet space providing security and privacy for clothing and personal belongings. Closet space shall provide at least 24 inches of lineal hanging space per bed (in certain cases, such as for infants, exceptions may be made). Married couples may share a bed.

(E) Each bedroom shall have at least one outside wall with an operable window giving outside exposure. Unless approved otherwise by the department, the window sill of the required window shall be no higher than 36 inches from the floor and shall be at or above outside grade level. Other window requirements shall be as called for in the National Fire Protection Association (NFPA) 101. The window area for bedrooms shall be equal to at least 10% of the total room floor area.

(F) If a bedroom is below grade level, it must have a window that is usable as a second means of escape by the resident(s) occupying the room. The window shall be no more than 36 inches (measured to the window sill) above the floor.

(G) All resident bedrooms shall open onto an exit corridor, living area, or public area and shall be arranged for convenient resident access to dining, living, and bathing areas.

(3) Social-diversional spaces.

(A) Living rooms, day rooms, lounges, etc., must be provided on a sliding scale as follows (as part of the minimum required ancillary space):
Figure 1: 40 TAC §90.68(a)(3)(A)

(B) Where a required way of exit is through a living area, a pathway equal to the corridor width will normally be deducted from that area. Such exit pathways must be kept clear of obstructions.

(C) Each living room and dining room shall have at least one outside window. Normally, resident classrooms and training areas should also have an outside window unless otherwise approved by the department.

(4) Dining space. Dining space shall provide at least 15 square feet per resident bed for single-shift feeding. If procedure is approved for feeding in two shifts, at least eight square feet per resident bed shall be provided.

(5) Training spaces (academic, behavioral, occupational, physical, and speech therapy, etc.). Classroom type space is anticipated for most training activities. The number and size of such spaces will be evaluated on an individual facility basis and according to program policies and procedures. Generally, training rooms should provide at least 20 square feet per resident trainee within the room except that no training room should be less than 80 square feet. For purposes of calculation, space should be provided for at least one-third of the total population at any one time (i.e., plan space for 33 residents in a 100-bed facility).

(6) Kitchens (main/dietary).

(A) Kitchens shall be evaluated on the basis of their performance in the sanitary and efficient preparation and serving of meals to residents. Consideration shall be given to planning for the type of meals served, the overall building design, the food service equipment, arrangement, and the work flow involved in the preparation and delivery of food. Plans for construction of new facilities shall contain a detailed kitchen layout prepared by, or under the direction of, a registered or licensed dietitian.

(B) Kitchens shall be designed so that room temperature, at peak load, shall not exceed an average temperature of 85 degrees Fahrenheit measured over the room at the five-foot level. The amount of supply air should take into account the large quantities of air exhausted at the range hood and dishwashing area.

(C) Kitchens shall be provided with operational equipment as planned and scheduled by the facility's consultants for preparing and serving meals and for refrigerating and freezing of perishable foods, as well as equipment in, and/or adjacent to, the kitchen or dining area for producing ice.

(D) Kitchens shall be provided with facilities for washing and sanitizing dishes and cooking utensils. Such facilities will be provided for the number of meals served and the method of serving (permanent or disposable dishes, etc.). The kitchen shall contain a compartmented sink large enough to immerse pots and pans. Separation of soiled and clean dish areas shall be maintained, including air flow.

(i) A mechanical dishwasher must be used to sanitize dishes and utensils and must meet requirements specified under 25 TAC §229.166(a)(4) (relating to Cleaning, Sanitization, and Storage of Equipment and Utensils), or

(ii) Dishes and utensils will be manually sanitized in accordance with 25 TAC §229.166(a)(3)(E) prior to placement in the dishwasher.

(E) Kitchens shall be provided with a supply of hot and cold water. Hot water for sanitizing purposes shall be 180 degrees Fahrenheit or the manufacturer's suggested temperature for chemical sanitizers, as specified for the system in use. For mechanical dishwashers the temperature measurement is at the manifold.

(F) Kitchens shall be provided with at least one hand-washing lavatory or hand-sanitizing device. Hand-washing lavatories shall be provided with hot and cold running water, soap, and individual towels, preferably paper towels; common use towels shall not be used.

(G) In new construction, staff restroom facilities with a lavatory shall be accessible to kitchen staff without traversing resident use areas. The restroom door shall not open directly into the kitchen, e.g., provide a vestibule.

(H) In new construction, janitorial facilities shall be provided exclusively for the kitchen and shall be located in and entered from the kitchen.

(I) Nonabsorbent smooth finishes or surfaces shall be used on kitchen floors, walls, and ceilings. Such surfaces shall be capable of being sanitized to maintain a healthful environment.

(J) All operable window openings shall be screened. Doors opening to the outside of the building shall have self-closing devices.

(7) Food storage areas (main/kitchen).

(A) In new construction, food storage areas shall be planned on the basis of the number and type of resident meals to be served. The size and layout of dry foods storage shall be prepared by or designed under the direction of a licensed or registered dietitian.

(B) Food storage areas shall provide for storage of a four-day minimum supply of nonperishable foods at all times.

(C) Shelves shall be movable metal or sealed lumber, and walls must be finished with a nonabsorbent finish to provide a cleanable surface.

(D) Dry food storage shall have an approved venting system to provide for positive air circulation.

(E) The maximum room temperature for food storage shall not exceed 85 degrees Fahrenheit at all times. The measurement shall be taken at the five-foot level.

(F) Food storage areas may be located apart from the food preparation area as long as there is space adjacent to the kitchen for necessary daily stores.

(8) Food services areas.

(A) Where service areas other than the kitchen are used to dispense foods, these shall be designated as food service areas and shall have equipment for maintaining required food temperatures while serving.

(B) Separate food service areas shall have hand-washing facilities as a part of the food service area. An employee toilet shall be provided.

(C) Finishes of all surfaces except ceilings shall be the same as those required for dietary kitchens.

(9) Other spaces.

(A) Bathing units (tubs or showers) shall be provided at a minimum ratio of one per 15 beds. Waterclosets and lavatories shall be provided at a minimum ratio of one per eight beds. Bathing and toilet facilities should be of a type appropriate to the resident's varying needs and disabilities, and designed for privacy within the bathroom.

(B) Adequate storage space must be provided for equipment, carts, wheelchairs, etc., so as to eliminate the problem of such items being left or stored in corridors, or overcrowding bedroom space.

(b) Small facilities.

(1) Bedrooms.

(A) Bedrooms shall be arranged and equipped for adequate personal care and for comfort and privacy. Bedrooms shall have full height walls that extend from floor to ceiling with doors. (Partial partitions or furnishings are not a substitute.)

(B) Bedrooms shall provide at least 80 square feet for a single occupancy (one bed) and 60 square feet per bed for multiple

occupancy. (Note: room configuration and usability is taken into consideration and there may be instances where the minimum square footage will not be acceptable.) The minimum room dimension shall be at least eight feet for a single room and at least ten feet for a multiple-bed room, unless otherwise approved by the department. An exception is that multi-occupancy bedrooms for persons in wheelchairs shall have 70 square feet per wheelchair occupant bed.

(C) No more than four beds shall be in any one bedroom. An exception is that the department may grant a variance from the limit of four residents per room only if a physician who is a member of the interdisciplinary team and who is a qualified mental retardation professional:

(i) certifies that each resident to be placed in a bedroom housing more than four residents is so severely medically impaired as to require direct and continuous monitoring during sleeping hours; and

(ii) documents the reasons why housing in a room of only four or fewer residents would not be medically feasible.

(D) In the bedrooms and for each resident there shall be a bed with a comfortable mattress and appropriate bedding, functional furniture appropriate to residents' needs, and closet space providing security for personal clothing and belongings. Closet space shall provide at least 24 inches of lineal hanging space per bed (in certain cases, such as for infants, exceptions may be made). Married couples may share a bed.

(E) Unless there is a door in the bedroom leading directly outside to grade level or an outside stair, every bedroom shall have at least one outside window that can be readily opened from the inside and provides a clear opening of at least 5.7 square feet (minimum width of 20 inches; minimum height of 24 inches). The bottom of the opening shall be not more than 44 inches above the floor. Minimum dimensions for operable window section are 20 inches wide by 41.2 inches in height, or 24 inches in height by 34.2 inches wide to provide the minimum 5.7 feet of opening.

(F) Bedroom doors shall be 20-minute fire rated or 1 3/4-inch solid bonded core wood. These doors shall have automatic closures and latch in their frames. Exceptions are as follows.

(i) Doors need only be smoke resistant and do not need automatic closure if the building has an approved sprinkler system throughout.

(ii) Doors need only be smoke resistant with automatic closures if the facility is classified "prompt" level of evacuation difficulty.

(G) Each small facility shall have at least two remotely located means of escape that do not involve windows. The arrangement shall be such that there is a primary means of escape from each sleeping room that provides a path of travel to the outside without traversing any corridor or other space exposed to unprotected vertical openings or common living spaces, such as living rooms and kitchens. Exceptions are as follows:

(i) A second means of escape or alternate protection is not required:

(I) if the bedroom has a door leading directly to the outside of the building, at or to grade level; or

(II) if the building is protected with an approved sprinkler system meeting National Fire Protection Association (NFPA) 13 Standard for Installation of Sprinkler Systems or NFPA 13D Standard for Installation of Sprinkler Systems in One- and Two-family Dwellings and Mobile Homes standards.

(ii) Separated primary means of escape is not necessary if the building is single story; has 1 3/4-inch solid bonded core doors to bedrooms or smoke resistant doors with closures; 20-minute fire protection for the structure; Class A or B interior finish; bedroom windows of proper size; total smoke detection coverage of habitable spaces, including loft areas that are tied into the manual fire alarm system; and two remote means of escape.

(2) Living room space. Living room space shall provide at least 15 square feet per resident (with a minimum of 120 square feet regardless of number of residents). Living space can include one or more rooms or areas provided that the first such area is at least 80 square feet each.

(3) Dining space. Dining space must be large enough to accommodate all residents at one sitting, and shall provide at least 15 square feet per resident. Living and dining space may be in one room or area providing a combined total of 30 square feet per resident (15 square feet living plus 15 square feet dining per resident).

(4) Bathrooms. Bathrooms shall provide for individual privacy. Water closets and lavatories shall be provided at a minimum ratio of one for each five residents. There shall be at least one tub or shower for each eight residents. At least one bathroom (with water closets, lavatory, and tub or shower) shall be provided on each sleeping floor accessible to the residents of that floor.

(5) Kitchen. The facility shall have a kitchen to meet the general food service needs of the residents. It shall include provisions for the storage, refrigeration, preparation, and serving of food; for dish and utensil cleaning; and for refuse storage and removal. A mechanical dishwasher shall be provided.

(6) Office. An office or other space shall be available for private individual counseling and for the safekeeping of files and records.

(7) Stairs. Buildings of two or more stories require at least two separate approved exit stairs from the upper floors. Usable space under the stairs is not allowed unless fire separated or protected in accordance with NFPA 101 Life Safety Code. Open interior stairways which constitute an "unprotected vertical opening" to a required exit passageway on the upper floor must be provided with a barrier (wall and door) at either the lower or upper level to prevent the rapid rise of fire or smoke originating on the lower level from rendering the upstairs passageway to the second stair impassable.

(8) Fire rating. Interior wall and ceiling surfaces shall have, as the finished surface or a substrate or sheathing, a fire resistance of not less than 20 minutes, similar to that provided by 3/8-inch gypsum board.

§90.69. Storage Requirements (All Facilities).

(a) Bulk storage of hazardous items such as janitor supplies and equipment shall be provided in closets or spaces separate from resident use areas. Closets or spaces shall be maintained in a safe and sanitary condition and ventilated in a manner commensurate with the use of the closet or space.

(b) There shall be space for equipment for daily out-of-bed activity for all residents.

(c) There shall be suitable storage space accessible to the resident for personal possessions such as toys, televisions, radios, prosthetic equipment, and clothing.

(d) Attics, mechanical rooms, boiler rooms, and other similar areas shall not be used for storage purposes.

§90.70. Electrical, Heating, Ventilating, and Air-conditioning Systems (HVAC)-All Facilities.

(a) Cooling and heating shall be provided, as necessary, for resident comfort. Heating systems in resident use areas shall be capable of maintaining a minimum temperature of 68 degrees Fahrenheit, and cooling of 81 degrees Fahrenheit maximum, with humidity in the normal comfort range.

(b) The facility shall be well ventilated through the use of windows, mechanical ventilation, or a combination of both. Rooms and areas which do not have outside windows and which are used by residents or personnel shall be provided with functioning mechanical ventilation to change the air on a basis commensurate with the room usage.

(c) Air systems shall provide for the induction and mixing of at least 10% outside fresh air into the facility unless otherwise approved by DHS, that is, 100% continuous recirculation of interior air in most areas is not acceptable; or the system shall be designed to meet American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE).

(d) Operable outside windows shall be provided with insect screens that prevent insect entry.

(e) Rooms such as baths, toilets, soiled linen, trash or garbage rooms, soiled utilities, janitor's closets, and other such areas which produce odors, fumes, excessive moisture, etc., shall be provided with an exhaust system ducted to the exterior, meeting nationally recognized standards for capacity and function.

(f) Electrical and mechanical systems shall be safe and in working order. The department may require the facility sponsor or licensee to submit evidence to this effect, consisting of a written report by the local fire marshal, city/county building official having jurisdiction, or a registered professional engineer.

(g) Use of electrical appliances, devices, and lamps shall be such as not to overload circuits.

(h) Portable heaters and open-flame heating devices are prohibited. All fuel burning devices shall be vented. Working fireplaces are acceptable if of safe design and construction, and if screened or otherwise suitably enclosed.

§90.71. Plumbing (All Facilities).

(a) The water supply must be of safe, sanitary quality, suitable for use, and adequate in quantity and pressure. The water must be obtained from a water supply system; the location, construction, and operation of which are approved by the Texas Natural Resources Conservation Commission (TNRCC).

(b) Sewage must be discharged into a state-approved sewerage system or septic system; otherwise, the sewage must be collected, treated, and disposed of in a manner which is approved by TNRCC.

§90.72. Maintenance (All Facilities).

(a) Walls, doors, and ceilings shall be maintained free from holes, cracks, falling plaster or paint, and shall be cleaned and painted.

(b) Paint or plaster inside the building that contains lead shall be removed or covered so that it is not accessible to the residents.

(c) All abandoned utilities such as electrical wiring, ducts, and pipes shall be removed from the facility when no longer usable.

§90.73. Environmental Services.

(a) Pest control.

(1) The facility shall be kept free of insects, rodents, and vermin. The least toxic and least flammable effective chemicals shall be used. Poisons shall not be stored with food products and shall be under lock.

(2) Garbage and trash shall be stored in enclosed containers, protected against leakage, contact with disease vectors, and access to animals. It shall be stored in areas separate from those used for the preparation and storage of food and shall be removed from the premises in conformity with state and local practices. Garbage and trash containers shall be maintained free of accumulations and coatings of garbage. Garbage storage areas shall be kept clean and in good repair.

(b) Storage. Storage items shall be neatly arranged and placed to minimize fire hazard. Gasoline, volatile materials, paint, and similar products, excluding personal items, shall not be stored in the building housing residents except as may be approved by the local fire marshal. Accumulations of extraneous material and refuse shall not be permitted.

(c) Laundry.

(1) There shall be clean linen available at all times, and in a quantity to meet the needs of the residents.

(2) Clean linen shall be stored in a clean storage area, which is easily accessible to the personnel.

(3) Soiled linen and clothing in large facilities shall be transported or stored in approved containers or bags.

(A) Soiled laundry storage shall be in separate, well ventilated areas and shall not be permitted to accumulate in other areas of the facility.

(B) Soiled bags or containers shall not be used to convey clean linens.

(C) Soiled linens shall not be sorted, laundered, rinsed, or stored in bathrooms, resident rooms, corridors, kitchens, or food storage areas.

§90.74. Safety Operations.

(a) Disaster plan. The facility must have a written plan with procedures to be followed in an internal or external disaster and for the care of casualties.

(1) The facility must maintain the plan and procedures within the facility in a location known and accessible to all staff. The facility must ensure that the plan and procedures are reviewed when changes in administration, construction, or emergency phone numbers are made.

(2) The facility must include in the disaster plan evacuation routes and procedures to be followed in the event of fire, explosion, or other disaster. The plan must also include procedures for the prompt transfer of casualties, medical records, medications, and for the notification of appropriate persons.

(3) All employees must be familiar with the disaster plan and must be instructed in the location and use of the facility's alarm systems, fire-fighting equipment, and procedures.

(4) The facility must post emergency evacuation routes prominently throughout the facility. An exception is that in small one-story buildings where all exits are obvious, the department may not require the posting of evacuation routes.

(5) The fire alarm and sprinkler systems shall be inspected and tested at least once every three months by a licensed agent. Each such quarterly inspection and test shall be of the complete system including smoke dampers, individual sprinkler heads, etc. A standard report form of the inspection shall be completed by the agent and kept on file by the facility. The report shall include the signature of the person making the inspection and the date of the inspection. The facility shall maintain a current contract on file for the services of the inspecting company. An exception is that small facilities are only required to have semiannual inspections in lieu of quarterly inspections.

(6) All fires shall be reported to the department within 72 hours. However, any fire causing injury or death shall be reported immediately. A telephone report shall be followed by a written report on a form which is available from the department.

(b) Fire and evacuation drills.

(1) The facility must have a fire safety plan within the disaster plan. A comprehensive fire drill report form shall be completed for each rehearsal of the fire safety plan.

(2) The facility must hold fire evacuation drills at least every quarter for each shift of personnel (12 per year) and under varied times and conditions.

(3) Any direct care staff, including relief staff, must participate in the initial fire drill within ten days of their employment at the facility. An exception is that facilities meeting NFPA 101, Chapter 12 titled "New Health Care Occupancies" or Chapter 13 titled "Existing Care Occupancies," or meeting the impractical evacuation category of Chapter 21 titled "Residential Board and Care," are not required to conduct fire drills within ten days of employment.

(4) The facility must:

(A) actually evacuate residents during at least one evacuation drill each year on each shift;

(B) make special provisions for the evacuation of the physically handicapped, such as fire chutes and mattress loops with poles;

(C) write and file a report and evaluation of each drill and list details, date, time, who participated, and any problems that occurred; and

(D) investigate all accidents and take corrective action to prevent similar accidents in the future.

(5) Drills for other emergencies, such as severe weather, bomb-threats, etc., shall be covered in the facility's policies and disaster plan with drills held according to the policy.

(c) Smoking regulations. Smoking policies shall be formulated and adopted by the facility. The policies shall comply with all applicable codes, regulations, and standards, including local ordinances. It is the responsibility of the facility to inform residents, staff, visitors, and other affected parties of smoking policies through distribution and/or posting. The facility is responsible for enforcement of smoking regulations.

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 February 1, 1996.

TRD-9601446 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 438-3765

♦ ♦ ♦

Subchapter G. Abuse, Neglect, and Exploitation; Complaint and Incident Reports and Investigations

• 40 TAC §90.212

The amendment is proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department 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, §§22.001-22.024 and §§32.001-32.042.

§90.212. Incidents of Abuse and Neglect Reportable by Facilities to the Texas Department of Human Services (DHS).

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

(c) [Reports of abuse or neglect in nursing facilities are to be made to DHS's state office, Austin, Texas, at (512) 834-6778 during normal workday hours, and to 1-800-458-9858 on weekends and holidays.] Reports of abuse or neglect in facilities serving persons with mental retardation or a related condition are to be made to DHS's state office at (512) 834-6671 during normal workday hours, and to 1-800-292-2065 on weekends and holidays. The person reporting must make an oral report immediately on learning of the alleged abuse or neglect. A written investigation report must be sent no later than the fifth calendar day after the oral report.

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 February 1, 1996.

TRD-9601447 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 438-3765

♦ ♦ ♦

Subchapter H. Enforcement

• 40 TAC §90.231

The new section is proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department 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 new section implements the Human Resources Code, §§22.001-22.024 and §§32.001-32.042.

§90.231. Warning Letter. When Texas Department of Human Services (DHS) personnel determine that a facility is out of compliance with licensure rules to a degree that places the facility at risk of the imposition of licensing actions, DHS may send a warning letter to the facility. The warning letter notifies the facility that the violations of licensing rules must be corrected.

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 February 1, 1996.

TRD-9601448 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 438-3765

♦ ♦ ♦

Subchapter L. Provisions Applicable to Facilities Generally

• 40 TAC §§90.323-90.325

(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, Chapters 22 and 32, which authorizes the department 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 repeals implement the Human Resources Code, §§22.001-22.024 and §§32.001-32.042.

§90.323. Procedures for Inspection of Public Records.

§90.324. Time Periods for Processing Licenses for Long Term Care Facilities.

§90.325. Operating a Part of a Facility Under the Standards of a Lesser Licensing Category.

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 February 1, 1996.

TRD-9601449 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 438-3765

♦ ♦ ♦

• 40 TAC §90.323, §90.327

The new section and amendment are proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department 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 new section and amendment implement the Human Resources Code, §§22. 001-22.024 and §§32.001-32.042.

§90.323. Procedures for Inspection of Public Records.

(a) Procedures for inspection of public records will be in accordance with the Texas Government Code, Chapter 552, and as further described in this section.

(b) The Long Term Care-Regulatory, Texas Department of Human Services (DHS), is responsible for the maintenance and release of records on licensed facilities, and other related records.

(c) The application for inspection of public records is subject to the following criteria:

(1) the application must be made to Long Term Care-Regulatory, Texas Department of Human Services, 8407 Wall Street, Austin, Texas 78754;

(2) the requestor must identify himself;

(3) the requestor must give reasonable prior notice of the time for inspection and/or copying of records;

(4) the requestor must specify the records requested;

(5) on written applications, if DHS unable to ascertain the records being requested, DHS may return the written application to the requestor for clarification; and

(6) DHS will provide the requested records as soon as possible; however, if the records are in active use, or in storage, or time is needed for proper de-identification or preparation of the records for inspection, DHS will so advise the requestor and set an hour and date within a reasonable time when the records will be available.

(d) Original records may be inspected or copied, but in no instance will original records be removed from DHS offices.

(e) Records maintained by Long Term Care-Regulatory are open to the public, with the following exceptions:

(1) incomplete reports, audits, evaluations, and investigations made of, for, or by DHS are confidential;

(2) all reports, records, and working papers used or developed by DHS in an investigation of reports of abuse and neglect are confidential, and may be released to the public only as follows:

(A) completed written investigation reports are open to the public, provided the report is de-identified. The process of de-identification means removing all names and other personally identifiable data, including any information from witnesses and others furnished to DHS as part of the investigation; and

(B) the reporter and the facility will be notified of the results of DHS's investigation of a reported case of abuse or neglect, whether DHS concluded that abuse or neglect occurred or did not occur;

(3) all names and related personal, medical, or other identifying information about a resident are confidential;

(4) information about any identifiable person which is defamatory or an invasion of privacy is confidential;

(5) information identifying complainants or informants is confidential;

(6) itineraries of surveys and inspections are confidential;

(7) other information that is excepted from release by the Government Code, Chapter 552, is not available to the public; and

(8) to implement this subsection, DHS may not alter or de-identify original records. Instead, DHS will make available for public review or release only a properly de-identified copy of the original record.

(f) Long Term Care-Regulatory will charge for copies of records upon request.

(1) If the requestor wants to inspect records, the requestor will specify the records to be inspected. DHS will make no charge for this service, unless the director of Long Term Care-Regulatory determines a charge is appropriate based on the nature of the request.

(2) If the requestor wants copies of a record, the requestor will specify in writing the records to be copied on an appropriate DHS form, and DHS will complete the form by specifying the charge for the records, which the requestor must pay in

advance. Checks and other instruments of payment must be made payable to the Texas Department of Human Services.

(3) Any expenses for standard-size copies incurred in the reproduction, preparation, or retrieval of records must be borne by the requestor on a cost basis in accordance with costs established by the State Purchasing and General Services Commission or DHS for office machine copies.

(4) For documents that are mailed, DHS will charge for the postage at the time it charges for the production. All applicable sales taxes will be added to the cost of copying records.

(5) When a request involves more than one long-term care facility, each facility will be considered a separate request.

§90.327. Notice of Changes in Key Personnel.

[(a) A nursing facility must notify the Texas Department of Human Services (department) no later than 30 days after the date of hire of the nursing home administrator, medical director, and director of nursing.

[(b) A maternity facility or a] A facility [serving persons with mental retardation or related conditions] must notify the department no later than 30 days after the date of hire of the administrator [or 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 February 1, 1996.

TRD-9601450 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 438-3765

♦ ♦ ♦

Chapter 92. Personal Care Facilities

The Texas Department of Human Services (DHS) proposes the repeal of §92. 19, concerning fees for plan reviews, construction inspection services, and feasibility inspection services, and the repeal of §92.63, concerning plans, approvals, and construction procedures; amendment to §92.62, concerning general requirements; and new §92.63, concerning construction and initial survey of completed construction, in its personal care facilities chapter.

The purpose of the repeals is to delete rules regarding functions DHS no longer performs. The purpose of the amendment is to update the rule regarding fire extinguishers. The purpose of the new section is to modify the new facility construction procedures.

Burton F. Raiford, commissioner, 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 proposal.

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 proposal will be clear rules. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposal.

Questions about the content of this proposal may be directed to Susan Syler at (512) 438-3111 in DHS's Long Term Care Policy Section. Written comments on the proposal may be submitted to Nancy Murphy, Media and Policy Services-313, Texas Department of Human Services E-205, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

Subchapter B. Application Procedures

• 40 TAC §92.19

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

The repeal is proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department 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 repeal implements the Human Resources Code, §§22.001-22.024 and §§32.001-32.042.

§92.19. Fees for Plan Reviews, Construction Inspection Services, and Feasibility Inspection 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 February 1, 1996.

TRD-9601451 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 438-3765

♦ ♦ ♦

Subchapter D. Facility Construction

• 40 TAC §92.62

The amendment is proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department 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, §§22.001-22.024 and §§32.001-32.042.

§92.62. General Requirements.

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

(i) Portable fire extinguishers. **Portable fire extinguishers must be provided and maintained to comply with the provisions of the National Fire Protection Association (NFPA) 10. This includes such items as type of extinguishers (A, B, or C), location and spacing, mounting heights, monthly inspections by staff, yearly inspections by a licensed agent (with any necessary servicing), and hydrostatic testing as recommended by the manufacturer.**

(1) Extinguishers in resident corridors must be spaced so that travel distance is not more than 75 feet. The minimum size of extinguishers must be either 2 1/2 gallon for water type or five pound for ABC type.

(2) Extinguishers must be installed on supplied hangers or brackets or be mounted in cabinets approved by the Texas Department of Human Services (DHS).

(3) Extinguishers must be surface wall-mounted or recessed in cabinets where they are not subject to physical damage or dislodgement.

[(1) At least one portable Underwriters Laboratory (U.L.) or factory mutual (F.M.)-approved five-pound Class B:C dry chemical fire extinguisher, rechargeable type, is required in each laundry, kitchen and walk-in mechanical room. ABC type extinguishers shall not be used in kitchens. An exception is that in small facilities, ABC type extinguishers will be acceptable for these spaces.

[(2) Portable U.L. or F.M.-approved 2-1/2 gallon stored-pressure water-type fire extinguishers (Class A) must be provided in

areas serving resident bedrooms. One such unit shall be located within 75 feet of any resident bedroom door. Acidic base (ABC) and dry chemical types are not acceptable.

[(3) Extinguishers must be readily accessible. Units must be installed on hangers or brackets, mounted in special cabinets, or set on appropriate shelves. Operating instructions shall face outward. Mounting heights shall not exceed five feet above the floor for extinguishers weighing 40 pounds or more. Alternative locations and arrangements for fire extinguishers may be as approved by the department for small facilities, facilities consisting of separated small building units, or unusual building arrangements.]

(4) Extinguishers having a gross weight not exceeding 40 pounds must be installed so that the top of the extinguisher is not more than five feet above the floor. Extinguishers with a gross weight greater than 40 pounds must be installed so the top of the extinguisher is not more than 3 1/2 feet above the floor. The clearance between the bottom of the extinguisher and the floor must not be less than four inches.

(5) Portable extinguishers provided in hazardous rooms must be located as close as possible to the exit door opening and on the latch (knob) side.

(6) Staff must be appropriately trained in the use of each type of extinguisher in the facility.

(7)[(4)] Regular monthly inspections or "quick checks" must be made by facility representatives to assure that extinguishers are in the proper location, condition, and working order. Annual maintenance or "thorough checks" must be accomplished in accordance with National Fire Protection Association Standard Number 10A (NFPA 10A) by competent personnel licensed or certified to perform servicing by the State Fire Marshal. Unserviceable extinguishers must be replaced.

(j)-(l) (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 February 1, 1996.

TRD-9601452 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 438-3765

♦ ♦ ♦

• 40 TAC §92.63

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

The repeal is proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department 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 repeal implements the Human Resources Code, §§22.001-22.024 and §§32.001-32.042.

§92.63. Plans, Approvals, and Construction Procedures.

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 February 1, 1996.

TRD-9601453 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 438-3765

♦ ♦ ♦

The new section is proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department 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 new section implements the Human Resources Code, §§22.001-22.024 and §§32.001-32.042.

§92.63. Construction and Initial Survey of Completed Construction.

(a) Construction phase.

(1) The Texas Department of Human Services (DHS), Architectural Section in Austin, Texas, must be notified in writing of construction start.

(2) All construction shall be done in accordance minimum licensing requirements. It is the sponsor's responsibility to employ qualified personnel to prepare the contract documents for construction of a new facility or remodeling of an existing facility. Contract documents for additions and remodeling and for the construction of an entirely new facility must be prepared by an architect licensed by the Texas State Board of Architectural Examiners. Drawings must bear the seal of the architect. Certain parts of final plans, designs, and specifications must bear the seal of a registered professional engineer approved by the State Board of Registration for Professional Engineers to operate in Texas. These certain parts include sheets and sections covering structural, electrical, mechanical, and sanitary engineering.

(A) Remodeling is the construction, removal, or relocation of walls and partitions; the construction of foundations, floors, or ceiling-roof assemblies; the expanding or altering of safety systems (including, but not limited to, sprinkler, fire alarm, and emergency systems); or the conversion of space in a facility to a different use.

(B) General maintenance and repairs of existing material and equipment, repainting, applications of new floor, wall, or ceiling finishes, or similar projects are not included as remodeling, unless as a part of new construction. DHS must be provided flame spread documentation for new materials applied as finishes.

(b) Contract documents.

(1) Site plan documents must include grade contours; streets (with names); north arrow; fire hydrants; fire lanes; utilities, public or private; fences; unusual site conditions, such as ditches, low water levels, other buildings on-site; and indications of buildings five feet or less beyond site property lines.

(2) Foundation plan documents must include general foundation design and details.

(3) Floor plan documents must include room names, numbers, and usages; doors (numbered) including swing; windows; legend or clarification of wall types; dimensions; fixed equipment; plumbing fixtures; and kitchen basic layout; and identification of all smoke barrier walls (outside wall to outside wall) or fire walls.

(4) For both new construction and additions or remodeling to existing buildings, an overall plan of the entire building must be drawn or reduced to fit on an 8 1/2 inch by 11 inch sheet; submit two reduced plans for file record. See subsection (d)(3) of this section.

(5) Schedules must include door materials, widths, types; window materials, sizes, types; room finishes; and special hardware.

(6) Elevations and roof plan must include exterior elevations, including material note indications and any roof top equipment; roof slopes, drains, and gas piping, and interior elevations where needed for special conditions.

(7) Details must include wall sections as needed (especially for special conditions); cabinet and built-in work, basic design only; cross sections through buildings as needed; and miscellaneous details and enlargements as needed.

(8) Building structure documents must include structural framing layout and details (primarily for column, beam, joist, and structural frame building); roof framing layout (when this cannot be adequately shown on cross section); cross sections in quantity and detail to show sufficient structural design and structural details as necessary to assure adequate structural design, also calculated design loads.

(9) Electrical documents must include electrical layout, including lights, convenience outlets, equipment outlets, switches, and other electrical outlets and devices; service, circuiting, distribution, and panel diagrams; exit light system (exit signs and emergency egress lighting); emergency electrical provisions (such as generators and panels); fire alarm and similar systems (such as control panel, devices, and alarms); sizes and details sufficient to assure safe and properly operating systems; and a staff communication system.

(10) Plumbing documents must include plumbing layout with pipe sizes and details sufficient to assure safe and properly operating systems, water systems, sanitary systems, gas systems, other systems normally considered under the scope of plumbing, fixtures, and provisions for combustion air supply.

(11) Heating, ventilation, and air-conditioning (HVAC) documents must include sufficient details of HVAC systems and components to assure a safe and properly operating installation including, but not limited to, heating, ventilating, and air-conditioning layout, ducts, protection of duct inlets and outlets, combustion air, piping, exhausts, and duct smoke and/or fire dampers; and equipment types, sizes, and locations.

(12) Sprinkler system documents must include plans and details of NFPA designed systems; plans and details of partial systems provided only for hazardous areas; electrical devices interconnected to the alarm system.

(13) Other layouts, plans, or details as may be necessary for a clear understanding of the design and scope of the project; including plans covering private water or sewer systems must be reviewed by the local health or wastewater authority having jurisdiction. If no local authority, then the plans will be reviewed by DHS.

(14) Specifications must include installation techniques, quality standards and/or manufacturers, references to specific codes and standards, design criteria, special equipment, hardware, painting, and any others as needed to amplify drawings and notes.

(c) Initial survey of completed construction.

(1) Upon completion of construction, including grounds and basic equipment and furnishings, a final construction inspection (initial survey) of the facility, including additions or remodeled areas, is required to be performed by the department (architectural section) prior to occupancy. A minimum of three weeks advance notice is needed. The completed construction shall have the written approval of the local authorities having jurisdiction, including the fire marshal, health department, and building inspector.

(2) After the completed construction has been surveyed by a representative of the architectural section of the department and found acceptable, this information will be conveyed to the licensing officer of the department as part of the information needed to issue a license to the facility. In the case of additions or remodeling of existing facilities, a revision or modification to an existing license may be necessary. Note that the building, grades, drives, and parking must essentially be 100% complete at the time of this initial visit for occupancy approval and licensing, including basic furnishings and operational needs. A facility may accept up to three residents between the time it receives initial approval from the architectural section and the time the license is issued.

(3) The following documents must be available to DHS's surveyor at the time of the survey of the completed building:

(A) written approval of local authorities as called for in paragraph (1) of this subsection;

(B) written certification of the fire alarm system by the installing agency (Form FML-009) of the Texas State Fire Marshal);

(C) documentation of materials used in the building which are required to have a specific limited fire or flame spread rating including special wall finishes or floor coverings, flame retardant curtains (including cubicle curtains), rated ceilings, etc. This must include a signed letter from the installer, in the case of carpeting, etc., verifying that the carpeting installed is named in the laboratory test document;

(D) approval of the completed sprinkler system installation by the designing engineer. A copy of the material list and test certification shall be available;

(E) service contracts for maintenance and testing of alarm systems, sprinkler systems, etc.;

(F) a copy of gas test results of the facility's gas lines from the meter;

(G) a written statement from an architect/engineer stating that he certifies that the building was constructed to meet NFPA 101, Life Safety Code, and all locally applicable codes, and that the facility is in substantial conformance with minimum licensing requirements; and

(H) the contract documents specified in subsection (b) of this section.

(d) Nonapproval of new construction.

(1) If, during the initial on-site survey of completed construction, the surveyor finds certain basic requirements not met, he may recommend to the department that the facility not yet be licensed and approved for occupancy. Such basic items may include the following:

(A) construction which does not meet minimum code or licensure standards for basic requirements such as corridors being less than required width, ceilings installed at less than the minimum seven-foot six-inch height, resident bedroom dimensions less than required, and other such features which would disrupt or otherwise adversely affect the residents and staff if corrected after occupancy;

(B) no written approval by local authorities;

(C) fire protection systems not completely installed or not functioning properly, including, but not limited to, fire alarm systems, emergency power and lighting, and sprinkler systems;

(D) required exits not all usable according to NFPA 101 requirements;

(E) telephone not installed or not properly working;

(F) sufficient basic furnishings, essential appliances, and equipment are not installed or not functioning; and

(G) any other basic operational or safety feature which the surveyor, as the authority having jurisdiction, encounters which in his judgment would preclude safe and normal occupancy by residents on that day.

(2) If the surveyor encounters only less basic (and less important) deficiencies, licensure may be recommended based on an approved written plan of correction from the facility's administrator.

(3) Copies of reduced size floor plans on an 8 1/2 inch by 11 inch sheet shall be submitted in duplicate to the department for record/file use and for the facility's use and for facility's use for evacuation plan, fire alarm zone identification, etc. The plan shall contain basic legible information such as scale, room usage names, actual bedroom numbers, doors, windows, and any other pertinent information.

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 February 1, 1996.

TRD-9601454 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 438-3765

♦ ♦ ♦

Chapter 94. Nurse Aides

• 40 TAC §94.11

The Texas Department of Human Services (DHS) proposes an amendment to §94.11, concerning registry; findings; inquiries, in its Nurse Aides chapter. The purpose of the amendment is to correct a reference.

Burton F. Raiford, commissioner, 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. Raiford 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 clear rules. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Questions about the content of this proposal may be directed to Susan Syler at (512) 438-3111 in DHS's Long Term Care Policy Section. Written comments on the proposal may be submitted to Nancy Murphy, Media and Policy Services-313, Texas Department of Human Services E-205, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

The amendment is proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department 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, §§22.001-22.024 and §§32.001-32.042.

§94.11. Registry; Findings; Inquiries.

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

(d) If an alleged act of abuse, neglect, or misappropriation of resident property by a nurse aide, who also is a permitted medication aide under Chapter 95 of this title (relating to Medication Aides), violates the rules in this chapter and Chapter 95 of this title, the department must comply with the formal hearing procedures under §§79.1601-**79.1614** [79.1612] of this title (relating to Formal Appeals), the Administrative Procedures Act, Title 10 of the Texas Government Code, §§2001.051 et seq, and **§§76. 101-76.106** [§§76.101-76.108] of this title (relating to Criminal History Check of Employees in Facilities for Care of the Aged and Persons with Disabilities), if applicable. Through the formal hearing, determinations are made on both the certificate of nurse aide practice and the permit for medication aide practice.

(e)-(i) (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 February 1, 1996.

TRD-9601455 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 438-3765

♦ ♦ ♦

Chapter 96. Certification of Long Term Care Facilities

The Texas Department of Human Services (DHS) proposes an amendment to §96.6, concerning Informal Administrative Review Process for Intermediate Care Facilities for the Mentally Retarded, and the repeal of §96.9, concerning standards for nursing facilities that participate in the Medical Assistance Program, in its Certification of Long Term Care Facilities chapter. The purpose of the amendment to 96.6 is to correct terminology.

The purpose of the repeal is to delete rules which are no longer applicable.

Burton F. Raiford, commissioner, 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 proposal.

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 proposal will be clear rules. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposal.

Questions about the content of this proposal may be directed to Susan Syler at (512) 438-3111 in DHS's Long Term Care Policy Section. Written comments on the proposal may be submitted to Nancy Murphy, Media and Policy Services-313, Texas Department of Human Services E-205, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

• 40 TAC §96.6

The amendment is proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department 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, §§22.001-22.024 and §§32.001-32.042.

§96.6. Informal Administrative Review Process for Intermediate Care Facilities for the Mentally Retarded.

(a) (No change.)

(b) Application.

(1) (No change.)

(2) Review process.

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

(C) State agency central office review. If the conference with the public health regional administrator does not resolve the issue, a request may be made to the program director, **ICFMR/RC** [MI/MR Services] Section, Long Term Care-Regulatory, Texas Department of Human Services, for an informal administrative review. If the conference with the program director, **ICFMR/RC** [MI/MR Services] Section, does not resolve the issue, a request may then be made to the **commissioner's designated representative** [Associateship, Special Health Services, Office of Quality Assurance, Texas Department of Health,] for an additional review and reconsideration.

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

(e) Central office responsibility. Upon request by the facility or the public health region, the program director of the **ICFMR/RC** [MI/MR Services] Section, will:

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

(3) upon request by the facility or the program director, **ICFMR/RC** [MI/MR Services] Section, the **commissioner's designated representative** [department's Associateship for Special Health Services, Office of Quality Assurance,] will:

(A) (No change.)

(B) determine a resolution and present the resolution to the **commissioner's designated representative** [associate commissioner for Special Health Services] for concurrence; and

(C) (No change.)

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

Issued in Austin, Texas, on February 1, 1996.

TRD-9601456 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 438-3765

♦ ♦ ♦

• 40 TAC §96.9

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

The repeal is proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department 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 repeal implements the Human Resources Code, §§22.001-22.024 and §§32.001-32.042.

§96.9. Standards for Nursing Facilities That Participate in the Medical Assistance 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.

Issued in Austin, Texas, on February 1, 1996.

TRD-9601457 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 438-3765

♦ ♦ ♦

Chapter 98. Adult Day Care Facilities

The Texas Department of Human Services (DHS) proposes the repeal of §98. 21, concerning fees for plan reviews, construction inspection services, and feasibility inspection services and the repeal of §98.61, concerning plans, approvals, and construction procedures; an amendment to §98.43, concerning safety; and new §98.61, concerning construction and initial survey of completed construction, in its Adult Day Care Facilities chapter. The purpose of the repeals is to delete rules regarding functions DHS no longer performs. The purpose of the amendments and new section is to modify new facility construction procedures.

Burton F. Raiford, commissioner, 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 proposal.

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 proposal will be clear rules. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposal.

Questions about the content of this proposal may be directed to Susan Syler at (512) 438-3111 in DHS's Long Term Care Policy Section. Written comments on the proposal may be submitted to Nancy Murphy, Media and Policy Services-313, Texas Department of Human Services E-205, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

Subchapter B. Application Procedures

• 40 TAC §98.21

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

The repeal is proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department 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 repeal implements the Human Resources Code, §§22.001-22.024 and §§32.001-32.042.

§98.21. Fees for Plan Reviews, Construction Inspection Services, and Feasibility Inspection 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 February 1, 1996.

TRD-9601463 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 438-3765

♦ ♦ ♦

Subchapter C. Standards for Adult Day Care and Adult Day Health Care Facilities

• 40 TAC §98.43

The amendment is proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department 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, §§22.001-22.024 and §§32.001-32.042.

§98.43. Safety.

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

(c) Personal safety.

(1) Fire safety.

(A)-(J) (No change.)

(K) **Portable fire extinguishers must be provided and maintained to comply with the provisions of the National Fire Protection Association (NFPA) 10. This includes such items as type of extinguishers (A, B, or C), location and spacing, mounting heights, monthly inspections by staff, yearly inspections by a licensed agent (with any necessary servicing), and hydrostatic testing as recommended by the manufacturer.** [Provide 2 1/2 gallon pressurized water type portable fire extinguishers in client use areas. A portable Underwriters Laboratory or Factory Mutual approved five-pound Class B:C dry chemical fire extinguisher, rechargeable type, is required in each laundry, kitchen, and walk-in mechanical room. An ABC type extinguisher may be used in serving kitchens.]

(L) (No change.)

(2) (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 February 1, 1996.

TRD-9601464 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 438-3765

♦ ♦ ♦

Subchapter D. Facility Construction Procedures

• 40 TAC §98.61

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

The repeal is proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department 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 repeal implements the Human Resources Code, §§22.001-22.024 and §§32.001-32.042.

§98.61. Plans, Approvals, and Construction Procedures.

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 February 1, 1996.

TRD-9601465 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 438-3765

♦ ♦ ♦

The new section is proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department 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 new section implements the Human Resources Code, §§22.001-22.024 and §§32.001-32.042.

§98.61. Construction and Initial Survey of Completed Construction.

(a) Construction phase.

(1) The Texas Department of Human Services (DHS), Architectural Section in Austin, Texas, must be notified in writing of construction start.

(2) All construction shall be done in accordance with minimum licensing requirements. It is the sponsor's responsibility to employ qualified personnel to prepare the contract documents for construction of a new facility or remodeling of an existing facility. Contract documents for additions and remodeling and for the construction of an entirely new facility must be prepared by an architect licensed by the Texas State Board of Architectural Examiners. Drawings must bear the seal of the architect. Certain parts of final plans, designs, and specifications must bear the seal of a registered professional engineer approved by the State Board of Registration for Professional Engineers to operate in Texas. These certain parts include sheets and sections covering structural, electrical, mechanical, and sanitary engineering.

(A) Remodeling is the construction, removal, or relocation of walls and partitions; the construction of foundations, floors, or ceiling-roof assemblies; the expanding or altering of safety systems (including, but not limited to, sprinkler, fire alarm, and emergency systems); or the conversion of space in a facility to a different use.

(B) General maintenance and repairs of existing material and equipment, repainting, applications of new floor, wall, or ceiling finishes, or similar projects are not included as remodeling, unless as a part of new construction. DHS must be provided flame spread documentation for new materials applied as finishes.

(b) Contract documents.

(1) Site plan documents must include grade contours; streets with names; north arrow; fire hydrants; fire lanes; utilities, public or private; fences; unusual site conditions, such as ditches, low water levels, other buildings on-site; and indications of buildings five feet or less beyond site property lines.

(2) Foundation plan documents must include general foundation design and details.

(3) Floor plan documents must include room names, numbers, and usages; numbered doors including swing; windows; legend or clarification of wall types; dimensions; fixed equipment;

plumbing fixtures; and kitchen basic layout; and identification of all smoke barrier walls (outside wall to outside wall) or fire walls.

(4) For both new construction and additions or remodeling to existing buildings, an overall plan of the entire building must be drawn or reduced to fit on an 8 1/2 inch by 11 inch sheet; submit two reduced plans for file record. See subsection (d)(3) of this title (relating to Construction and Initial Survey of Completed Construction).

(5) Schedules must include door materials, widths, types; window materials, sizes, types; room finishes; and special hardware.

(6) Elevations and roof plan must include exterior elevations, including material note indications and any roof top equipment; roof slopes, drains, and gas piping, and interior elevations where needed for special conditions.

(7) Details must include wall sections as needed (especially for special conditions); cabinet and built-in work, basic design only; cross sections through buildings as needed; and miscellaneous details and enlargements as needed.

(8) Building structure documents must include structural framing layout and details (primarily for column, beam, joist, and structural frame building); roof framing layout (when this cannot be adequately shown on cross section); cross sections in quantity and detail to show sufficient structural design and structural details as necessary to assure adequate structural design, also calculated design loads.

(9) Electrical documents must include electrical layout, including lights, convenience outlets, equipment outlets, switches, and other electrical outlets and devices; service, circuiting, distribution, and panel diagrams; exit light system (exit signs and emergency egress lighting); emergency electrical provisions (such as generators and panels); fire alarm and similar systems (such as control panel, devices, and alarms); sizes and details sufficient to assure safe and properly operating systems; and a staff communication system.

(10) Plumbing documents must include plumbing layout with pipe sizes and details sufficient to assure safe and properly operating systems, water systems, sanitary systems, gas systems, other systems normally considered under the scope of plumbing, fixtures, and provisions for combustion air supply.

(11) Heating, ventilation, and air-conditioning (HVAC) documents must include sufficient details of HVAC systems and components to assure a safe and properly operating installation including, but not limited to, heating, ventilating, and air-conditioning layout, ducts, protection of duct inlets and outlets, combustion air, piping, exhausts, and duct smoke and/or fire dampers; and equipment types, sizes, and locations.

(12) Sprinkler system documents must include plans and details of NFPA designed systems; plans and details of partial systems provided only for hazardous areas; electrical devices interconnected to the alarm system.

(13) Other layouts, plans, or details as may be necessary for a clear understanding of the design and scope of the project; including plans covering private water or sewer systems must be reviewed by the local health or waste water authority having jurisdiction. If no local authority, then the plans will be reviewed by DHS.

(14) Specifications must include installation techniques, quality standards and/or manufacturers, references to specific codes and standards, design criteria, special equipment, hardware, painting, and any others as needed to amplify drawings and notes.

(c) Initial survey of completed construction.

(1) Upon completion of construction, including grounds and basic equipment and furnishings, a final construction inspection (initial survey) of the facility, including additions or remodeled areas, is required to be performed by the department (architectural section) prior to occupancy. A minimum of three weeks advance notice is needed. The completed construction shall have the written approval of the local authorities having jurisdiction, including the fire marshal, health department, and building inspector.

(2) After the completed construction has been surveyed by a representative of the architectural section of DHS and found acceptable, this information will be conveyed to the licensing officer of DHS as part of the information needed to issue a license to the facility. In the case of additions or remodeling of existing facilities, a revision or modification to an existing license may be necessary. Note that the building, grades, drives, and parking must essentially be 100% complete at the time of this initial visit for occupancy approval and licensing, including basic furnishings and operational needs. A facility may accept up to three residents between the time it receives initial approval from the architectural section and the time the license is issued.

(3) The following documents must be available to DHS's surveyor at the time of the survey of the completed building:

(A) written approval of local authorities as called for in paragraph (1) of this subsection;

(B) written certification of the fire alarm system by the installing agency (Form FML-009) of the Texas State Fire Marshal);

(C) documentation of materials used in the building which are required to have a specific limited fire or flame spread rating including special wall finishes or floor coverings, flame retardant curtains (including cubicle curtains), rated ceilings, etc. This must include a signed letter from the installer, in the case of carpeting, etc. , verifying that the carpeting installed is named in the laboratory test document;

(D) approval of the completed sprinkler system installation by the designing engineer. A copy of the material list and test certification shall be available;

(E) service contracts for maintenance and testing of alarm systems, sprinkler systems, etc.;

(F) a copy of gas test results of the facility's gas lines from the meter;

(G) a written statement from an architect/engineer stating that he certifies that the building was constructed to meet NFPA 101, Life Safety Code, and all locally applicable codes, and that the facility is in substantial conformance with minimum licensing requirements; and

(H) the contract documents specified in §92.63(b) of this title (relating to Construction and Initial Survey of Completed Construction).

(d) Nonapproval of new construction.

(1) If, during the initial on-site survey of completed construction, the surveyor finds certain basic requirements not met, he may recommend to DHS that the facility not yet be licensed and approved for occupancy. Such basic items may include the following:

(A) construction which does not meet minimum code or licensure standards for basic requirements such as corridors being less than required width, ceilings installed at less than the minimum seven-foot six-inch height, resident bedroom dimensions less than required, and other such features which would disrupt or otherwise adversely affect the residents and staff if corrected after occupancy;

(B) no written approval by local authorities;

(C) fire protection systems not completely installed or not functioning properly, including, but not limited to, fire alarm systems, emergency power and lighting, and sprinkler systems;

(D) required exits not all usable according to NFPA 101 requirements;

(E) telephone not installed or not properly working;

(F) sufficient basic furnishings, essential appliances, and equipment are not installed or not functioning; and

(G) any other basic operational or safety feature which the surveyor, as the authority having jurisdiction, encounters which in his judgment would preclude safe and normal occupancy by residents on that day.

(2) If the surveyor encounters only less basic and less important deficiencies, licensure may be recommended based on an approved written plan of correction from the facility's administrator.

(3) Copies of reduced size floor plans on an 8 1/2 inch by 11 inch sheet shall be submitted in duplicate to DHS for record/file use and for the facility's use and for facility's use for evacuation plan, fire alarm zone identification, etc. The plan shall contain basic legible information such as scale, room usage names, actual bedroom numbers, doors, windows, and any other pertinent information.

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 February 1, 1996.

TRD-9601466 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Earliest possible date of adoption: March 15, 1996

For further information, please call: (512) 438-3765

♦ ♦ ♦

ADOPTED RULES

An agency may take final action on a section 30 days after a proposal has been published in the ***Texas Register***. The section becomes effective 20 days after the agency files the correct document with the ***Texas Register***, unless a later date is specified or unless a federal statute or regulation requires implementation of the action on shorter notice.

If an agency adopts the section without any changes to the proposed text, only the preamble of the notice and statement of legal authority will be published. If an agency adopts the section with changes to the proposed text, the proposal will be republished with the changes.

TITLE 16. ECONOMIC REGULATION

Part VI. Texas Motor Vehicle Commission

Chapter 105. Advertising

- **16 TAC §§105.2, 105.4, 105.5, 105.8, 105.10, 105.17, 105.24, 105.26**

The Motor Vehicle Board of the Texas Department of Transportation adopts amendments to §105.2 concerning general advertising prohibitions, §105.4 concerning definitions, §105.5 concerning availability of vehicles, §105.8 concerning advertising layout, §105.10 concerning dealer price advertising, §105.17 concerning free offers, §105.24 concerning savings claims, and §105.26 concerning lease payment disclosures, without changes to the proposed text as published in the December 8, 1995, issue of the *Texas Register* (20 TexReg 10333).

The amendment to §105.2 extends the prohibition against false, deceptive, unfair or misleading advertising to any person advertising a new or used vehicle. The amendment to §105.5 adds the requirement that a specific used vehicle must be in the possession of the dealer if it is to be advertised for sale. The amendments to §§105.4, 105.8, and 105.17 expand advertising rules to include leased motor vehicles as well as those for sale. The amendment to §105.10 extends the requirements for dealer price advertising to used vehicles. The amendment to §105.24 clarifies that a discount may not be advertised on a used vehicle. The amendment to §105.26 clarifies radio broadcast advertisement requirements for lease disclosures.

The effect of the amendment to §105.2 will be to make uniform the general advertising prohibitions for all persons advertising motor vehicles. The effect of the amendment to §105.5 will be to reduce the potential for bait and switch advertising by requiring an advertised vehicle and its assigned title to be in the possession of the dealer at the time the advertisement is placed. The effect of the amendments to §§105.4, 105.8, and 105.17 will be to extend the advertising requirements of new and used vehicle sales to leased vehicles, thus ensuring uniformity in application. The effect of the amendments to §105.10 and §105.24 clarifies the application of the rules to used motor vehicles. The effect of the amendment to §105.26 will be to better protect the public by clarifying that a radio advertisement is for a leased vehicle.

Written comments on the proposed amendment to §105.24 were received from the Texas Independent Automobile Dealers Association. A public hearing for the purpose of receiving comment was held on January 18, 1996. No comments were received from the public.

The amendments are adopted under the Texas Motor Vehicle Commission Code, §3.06, which provides the board with authority to adopt rules necessary and convenient to effectuate the provisions of the act and to govern practice and procedure before the agency.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's authority.

Issued in Austin, Texas, on February 1, 1996.

TRD-9601524 Brett Bray
Director, Motor Vehicle Division
Texas Motor Vehicle Commission

Effective date: February 26, 1996

Proposal publication date: December 8, 1995

For further information, please call: (512) 505-5100

♦ ♦ ♦

Chapter 111. General Distinguishing Numbers

- **16 TAC §111.10**

The Texas Motor Vehicle Board adopts an amendment to §111.10, concerning motor vehicle dealer operating hours, sign and telephone number requirements, and number of dealers who may be licensed at one location, with changes to the proposed text as published in the December 8, 1995, issue of the *Texas Register* (20 TexReg 10334).

The amendment is necessary to facilitate enforcement of all rules and improve dealer availability to the public by defining normal working hours and limiting the number of dealers licensed in one location.

The effect of the amendment to §111.10(1)(A) and (G) is to define normal working hours for retail and wholesale automobile dealers thus allowing the public to contact the dealers and to facilitate contact for enforcement purposes.

The effect of the amendment to §111.10(1)(B) and (F) will be to limit the number of dealers who may be licensed in one structure, thus facilitating contact by the public with specific dealers and facilitating contact for enforcement purposes.

The effect of the amendment to §111.10(1)(E) and (F)(ii) will be to clarify that each motor vehicle dealer must have a separate telephone number with a fixed land-based telephone company facilitating contact by the public and facilitating contact for enforcement purposes.

Written comments on the proposed amendment were received from the National Vehicle Leasing Association, the Texas Independent Automobile Dealers Association, A H Distributors, Team Advantage, Inc., Larry G. Mills, M&M Auto, Terry's Wholesale Cars, Winter Motor Co., Gerald Farmer's Auto Sales, Jerry William's Autos, Larry Grulich Auto Sales, Roy's Auto Sales, Gary's Auto Sales, T's Auto Sales, Village Leasing, Inc., Slim Jim's, VIP Motors, Attorney Angela Chinn Woodbury, and the Midwest Odometer and Title Fraud Enforcement Association. A public hearing for the purpose of receiving comments was held on January 18, 1996. Comments in favor of the proposed amendment was received from Ed Clark on behalf of the Texas Independent Automobile Dealers Association, Bubba Bashaw on behalf of the Central Texas Independent Dealers Association, Robert Eppes on behalf of the National Highway Traffic Safety Administration, Carol Kent, Assistant Director-Enforcement, Tyna Rodriguez, Motor Vehicle Division investigator and Patrick Psencik, Motor Vehicle Division investigator. Comments opposing the proposed amendments or parts thereof were received from David Nichols of American Auto Dealers Network, Inc. , Paul Teas of Auto Dealer Network Corp., Ollie W. Williamson of Team Advantage, Inc., Larry Mills, Larry Certain of Prime Pre-Owned Vehicles, Nicholas Lambiase of A H Distributors, and Attorney Bruce Allegar.

The Board considered comments that the definition of normal working hours was too restrictive on part-time dealers, and on those who spend extensive time at auctions or otherwise need to be away from their business locations. Staff reported the lack of defined business hours

seriously hampered contact with dealers. The board agreed with staff and other comments that the proposed requirement was not restrictive and promoted responsible contact between dealers and the public.

The alternative to a normal business hours for wholesale dealers, who do not deal with the public, was generally supported by all those commenting and determined by the Board to be sufficient for contact for enforcement purposes.

The limit on the number of dealers who may be located in one structure as proposed in §111.10(B) and (F) was opposed by those who felt co-locating a number of dealers allowed the new dealers to learn from more experienced dealers at their location, and cut costs, thus allowing small businessmen to survive. Representatives of dealerships currently operating at multi-dealer locations opposed the proposed amendment, citing the potential for putting large numbers of small dealers out of business due to increased overhead costs. Proponents of the proposed amendment included Robert Eppes, Special Investigator with the National Highway Traffic Safety Administration who noted that many multi-dealer sites masked for criminal activity. The staff presented photographs of three multi-dealer sites which were under investigation. Motor Vehicle Division investigators described the difficulties involved in contacting and auditing dealers at these and other multi-dealer sites. The Board determined that there was little evidence to support the business need for large numbers of dealers to co-locate. Further, the availability of dealers to the public and enforcement of all rules would be facilitated by limiting the number of dealers at one location.

There were no comments on the new requirement that dealers must have a separate sign and separate telephone listing with a land-based telephone company. The Board determined these to be legitimate requirements to facilitate contact with dealers by the public and enforcement personnel.

The Board reduced the required number of days dealers must be open to four days per week to allow time for participation in auto auctions, but otherwise approved the language of the amendment as supported by staff and three dealer associations.

The amendment is adopted under the Texas Motor Vehicle Commission Code, §3.06, which provides the Board with authority to adopt rules necessary and convenient to effectuate the provisions of the act and to govern practice and procedure before the agency.

§111.10. Established and Permanent Place of Business. All dealers must meet the following requirements at each location where vehicles are sold or offered for sale.

(1) Office requirements.

(A) A dealer's office facility must be open to the public during normal working hours. Normal working hours are defined as at least four days per week for a continuous period of time not less than four hours per day between the hours of 8:00 a.m. and 8:00 p.m. The dealer's business hours for each day of the week must be posted at the main entrance of the dealer's office, and the owner or a bona fide employee of the dealer must be at the dealer's location during the posted business hours for the purpose of buying, selling, exchanging, or leasing vehicles. In the event the owner or a bona fide employee is not available to conduct business during the dealer's posted business hours, a separate sign must be posted indicating the date and time such owner or a bona fide employee will resume dealer operations. In addition, such dealership must notify the division in writing of any subsequent change in the dealer's standard business hours.

(B) With the exception of dealers holding only a wholesale license, no more than four dealers may be located in a business or residential structure. The structure must be of sufficient size to accommodate the usual office furniture and equipment, such as a desk, file cabinet, chairs, etc. As a minimum, the office must be equipped with a desk and chairs from which the dealer transacts his business and be equipped with a working telephone instrument listed in the name under which the dealer does business. If a dealer's office is located in a residential structure, the office must be completely separated from and have no direct access into the residential quarters and be in compliance with all applicable local zoning ordinances and deed restrictions. Such an office shall not be used as a part of the living quarters and must be readily accessible to the public without having to pass into or through any part of the living quarters.

(C) Portable-type office structures may qualify, provided they meet the minimum requirements as set forth herein.

(D) If a dealer conducts business in conjunction with another business owned by the same person, the same telephone instrument may be used for both businesses. However, if the name of the dealer differs from that of the other business, a separate telephone listing and a separate sign for the dealer is required.

(E) A dealer may conduct business in conjunction with another business not owned by the same person, however, the same telephone number may not be used by both businesses; the dealer shall have a separate sign, a separate desk, a separate working telephone instrument, and a separate telephone number and listing in the name of the dealer. The dealer must either own the property or have a separate lease agreement from the owner meeting the requirements of paragraph (4) of this section.

(F) More than one, but no more than eight dealers who hold only a wholesale license may occupy the same business structure and conduct their respective dealer operations under different names, as long as no retail dealers are located in the same structure; provided, however, each wholesale dealer must, in addition to having a qualifying dealer's sign conspicuously displayed on the premises, have:

(i) a separate desk from which that dealer transacts business;

(ii) a separate working telephone instrument, number, and listing in the dealer's name with a fixed, land-based telephone company, and,

(iii) a separate lease agreement meeting the requirements of paragraph (4) of this section.

(G) Dealers who hold only a wholesale license will not be required to be present during normal working hours if they keep on file with the Motor Vehicle Division, notice of a designated period of time in which the dealer and the dealer's records will be available for inspection by the Motor Vehicle Division at the dealer's licensed location. The period of time will be no less than two consecutive hours, between the hours of 8:00 a.m. and 5:00 p.m., on any one day of the week, except Saturday or Sunday.

(2)-(4) (No change.)

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's authority.

Issued in Austin, Texas, on February 1, 1996.

TRD-9601523 Brett Bray
Director, Motor Vehicle Division
Texas Motor Vehicle Commission

Effective date: March 31, 1996

Proposal publication date: December 8, 1995

For further information, please call: (512) 505-5100

Part VIII. Texas Racing Commission

Chapter 303. General Provisions

Subchapter A. Organization of the Commission

• 16 TAC §303.3

The Texas Racing Commission adopts an amendment to §303.3, concerning the commission's offices, without changes to the proposed text as published in the December 19, 1995, issue of the *Texas Register* (20 TexReg 10873). The amendment is adopted to ensure the public and the commission's licensees have accurate information regarding the commission's location.

The amendment changes the physical address, phone number, and fax number of the commission's main office in Austin to reflect an office relocation in January 1996.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Texas Civil Statutes, Article 179e, §3. 02, which authorize the commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on January 31, 1996.

TRD-9601410 Paula Cochran Carter
General Counsel
Texas Racing Commission

Effective date: February 22, 1996

Proposal publication date: December 19, 1995

For further information, please call: (512) 833-6699

♦ ♦ ♦

Subchapter D. Texas Bred Incentive Programs Programs for Horses

• 16 TAC §303.95

The Texas Racing Commission adopts an amendment to §303.95, concerning races for accredited Texas-bred horses, without changes to the proposed text as published in the December 19, 1995, issue of the *Texas Register* (20 TexReg 10874). The amendment is adopted to ensure the commission's rules are consistent with state law.

The amendment clarifies the requirements of a racetrack regarding the conducting of races for accredited Texas-bred horses and deletes language that, due to an expiration date, is no longer applicable.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Texas Civil Statutes, Article 179e, §3. 02, which authorize the commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; §6.08, which authorizes the commission to adopt rules to administer Texas-bred incentive programs; and §9.03, which establishes the requirements for racetracks to conduct accredited Texas-bred races.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on January 31, 1996.

TRD-9601411 Paula Cochran Carter
General Counsel
Texas Racing Commission

Effective date: February 22, 1996

Proposal publication date: December 19, 1995

For further information, please call: (512) 833-6699

♦ ♦ ♦

Chapter 321. Pari-mutuel Wagering

Subchapter B. Distribution of Pari-mutuel Pools

• 16 TAC §321.111

The Texas Racing Commission adopts an amendment to §321.111, concerning the twin trifecta pool, without changes to the proposed text as published in the November 7, 1995, issue of the *Texas Register* (20 TexReg 9242) and in the November 14, 1995, issue of the *Texas Register* (20 TexReg 9361). The amendment is adopted to ensure that pari-mutuel wagering will be of the highest caliber and will be conducted with the utmost integrity.

The amendment clarifies the procedures relating to the dissemination of information about the pool and for paying the pool if a race animal is prevented from starting.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Texas Civil Statutes, Article 179e, §3. 02, which authorize the commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; §6.06, which authorizes the commission to adopt rules relating to all aspects of the operation of pari-mutuel racetracks; and §11.01, which authorizes the commission to adopt rules regulating pari-mutuel wagering.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on January 31, 1996.

TRD-9601412 Paula Cochran Carter
General Counsel
Texas Racing Commission

Effective date: February 22, 1996

Proposal publication date: November 7 and November 14, 1995

For further information, please call: (512) 833-6699

♦ ♦ ♦

TITLE 22. EXAMINING BOARD

Part XIV. Texas Optometry Board

Chapter 280. Therapeutic Optometry

• 22 TAC §280.5

The Texas Optometry Board adopts an amendment to §280.5, relating to therapeutic optometry, with changes to the proposed text as published in the December 15, 1995, issue of the *Texas Register* (20 TexReg 10736).

Amended §280.5 is adopted to clarify the use of cocaine eye drops for diagnostic purposes by therapeutic optometrists. As amended the section clearly denotes that cocaine eye drops may be possessed and administered but not prescribed. As adopted §280.5 differs from the published text in that the word "Administration" is substituted for the word "Agency" in the title "United States Drug Enforcement Administration". Additionally, the phrase "possessed and administered" is substituted for the word "dispensed" in (j)(4) to clarify the fact that therapeutic optometrists may not prescribe or dispense cocaine eye drops.

Comments were received from the Texas Department of Public Safety (DPS), the Texas State Board of Pharmacy (TSBP), the Texas Ophthalmological Association (TOA), and the Texas Medical Association (TMA).

The DPS commented that it has no problems with the amendment as proposed.

The TSBP commented that the correct name for the DEA is the Drug Enforcement Administration rather than Agency. The TSBP also commented against the use of the word "dispensed" in the proposed amendment because its use could lead to misunderstandings. The Board agrees with these comments. The amendment as adopted contains the language recommended by the TSBP.

The TOA and TMA commented against the amendment. Their first comment was that the amendment violates an agreement reached between the TOA, the TMA, the Texas Optometric Association, and the Texas Association of Optometrists during the 72nd Legislature. The Board is unable to agree or disagree with this comment. The Board was not a party to any political negotiations during the 72nd Legislature.

The TOA and TMA also commented that the Texas Optometry Act limits a therapeutic optometrist to diagnosing and treating visual defects, abnormal conditions, and diseases of the eye and adnexa. According to the commenter, cocaine eye drops are used to assist in the diagnosis of Horner's Syndrome, a neurological disease. Horner's Syndrome is not a condition or disease of the eye. The Board disagrees with this comment for the following reasons: Horner's Syndrome is a systemic disease for which therapeutic optometrists receive training to diagnose in optometry college. The ocular symptoms and signs of Horner's Syndrome include miosis, ptosis, and peri-ocular and/or facial anhydrosis. If a patient presents with these symptoms, the therapeutic optometrist is responsible for diagnosing the condition so that the appropriate referral may be made. Therapeutic optometrists are often challenged to diagnose conditions they do not treat. For example, pituitary tumors cause bitemporal hemianopsia, loss of side vision. Therapeutic optometrists perform a visual field test to diagnose this condition for the purpose of making a proper referral. Cocaine eye drops have uses other than for the diagnosis of Horner's Syndrome. These drops may be used as a corneal anesthetic to assist in the manipulation of tissue for superficial foreign body removal. The choice of the proper corneal anesthetic is a matter of professional judgment for the therapeutic optometrist. Finally, the Texas Optometry Act, Texas Civil Statutes, Article 4552, §1.03(g) holds therapeutic optometrists to the same standard of professional care and judgment as ophthalmologists practicing under the Medical Practice Act. If optometrists are held to same standard of professional care as ophthalmologists, it logically follows that they should have the same diagnostic tools as ophthalmologists for the purpose of treating those conditions and diseases of the eye as are within therapeutic optometrists' authorized scope of practice and for making proper referrals of patients whose conditions and diseases are beyond the scope of therapeutic optometric authority.

The amendment is adopted under the provisions of the Texas Optometry Act, Texas Civil Statutes, Article 4552, §1.03 and §2.14, which provides the Texas Optometry Board with the authority to promulgate rules.

The Board interprets §1.03 as authorizing therapeutic optometrists to utilize cocaine eye drops for diagnostic purposes. The Board interprets §2. 14 as authorizing it to adopt substantive and procedural rules for the regulation of the profession of optometry.

§280.5. Prescription and Diagnostic Drugs for Therapeutic Optometry.

(a)-(i) (No change.)

(j) A therapeutic optometrist may possess and administer cocaine eye drops for diagnostic purposes. The cocaine eye drops must be no greater than 10 percent solution in prepackaged liquid form.

(1) A therapeutic optometrist must observe all requirements of the Texas Controlled Substances Act, the Health and Safety Code, Chapter 481, and all requirements of the Texas Department of Public Safety (DPS) Drug Rules in making application and maintaining renewal of a United States Drug Enforcement Agency (DEA) registration number for possession of the cocaine eye drops, a Schedule II controlled substance.

(2) A therapeutic optometrist must obtain a registration number from the DPS for the principal office of practice. Application may be made for a separate registration for the practice of optometry at a satellite office but all requirements of this rule shall apply in all locations.

(3) The therapeutic optometrist must use the required DEA form for the purchase of the cocaine eye drops and shall maintain a complete and accurate record of purchases (to include samples received from pharmaceutical manufacturer representatives) and dispensing of controlled substances. The maximum amount to be purchased and maintained in an office of practice shall be no more than two vials, one opened and one in inventory.

(4) The recordkeeping listed in this section shall be subject to inspection at all times by the Texas Department of Public Safety, the U.S. Drug Enforcement Administration, and the Texas Optometry Board and any officer or employee of the governmental agencies shall have the right to inspect and copy records, reports, and other documents, and inspect security controls, inventory and premises where such cocaine eye drops are possessed or administered.

(5) Minimum security controls shall be established to include but not be limited to:

(A) establishing adequate security to prevent unauthorized access and diversion of the controlled substance,

(B) during the course of business activities, not allowing any individual access to the storage area for controlled substances except those authorized by the therapeutic optometrist,

(C) storing the controlled substance in a securely locked, substantially constructed cabinet or security cabinet which shall meet the requirements under the DPS Drug Rules,

(D) not employ in any manner an individual that would have access to controlled substances who has had a federal or state application for controlled substances denied or revoked, or have been convicted of a felony offense under any state or federal law relating to controlled substances or been convicted of any other felony, or have been a licensee of a health regulatory agency whose license has been revoked, canceled, or suspended.

(6) Failure of the therapeutic optometrist to maintain strict security and proper accountability of controlled substance shall be deemed to be a violation of the Texas Optometry Act, §4.04.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's authority.

Issued in Austin, Texas, on February 1, 1996.

TRD-9601460 Lois Ewald
Executive Director
Texas Optometry Board

Effective date: February 22, 1996

Proposal publication date: December 15, 1995

For further information, please call: (512) 305-8500

♦ ♦ ♦

Part XXII. Texas State Board of Public Accountancy

Chapter 501. Professional Conduct

Professional Standards

• 22 TAC §501.25

The Texas State Board of Public Accountancy adopts an amendment to §501. 25, without changes to the proposed text as published in the December 5, 1995, issue of the *Texas Register* (20 TexReg 10248).

The amendment allows a licensee's certificate to be revoked for at least 12 months upon the licensee's third suspension for failing to satisfy the board's continuing professional education requirements.

The amendment will function by imposing a minimum one-year revocation of certificate on licensees who repeatedly fail to complete continuing professional education requirements.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Civil Statutes, Article 41a-1, §6, which provide the Texas State Board of Public Accountancy with the authority to make such rules as may be necessary or advisable to carry in effect the purposes of the law; and §15A, which requires licensees to complete continuing professional education.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on January 18, 1996.

TRD-9601494 William Treacy
Executive Director
Texas State Board of Public Accountancy

Effective date: February 26, 1996

Proposal publication date: December 5, 1995

For further information, please call: (512) 505-5566

♦ ♦ ♦

Other Responsibilities and Practices

• 22 TAC §501.37

The Texas State Board of Public Accountancy adopts new §501.37, without changes to the proposed text as published in the December 5, 1995, issue of the *Texas Register* (20 TexReg 10248).

The new section allows a Certificate to be revoked for at least 12 months upon the Certificate holder's third occasion of practicing without a license or through an unregistered entity.

The section will function by requiring licensees to timely obtain the appropriate licenses or registrations or face severe penalties for repeated failures.

No comments were received regarding adoption of the new section.

The new section is adopted under Texas Civil Statutes, Article 41a-1, §6, which provide the Texas State Board of Public Accountancy with the authority to make such rules as may be necessary or advisable to carry in effect the purposes of the law; §8, which prohibits the practice of accountancy without a license; and §10, which requires individuals and practice units to register with the Board.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on January 18, 1996.

TRD-9601495 William Treacy
Executive Director
Texas State Board of Public Accountancy

Effective date: February 26, 1996

Proposal publication date: December 5, 1995

For further information, please call: (512) 505-5566

♦ ♦ ♦

Chapter 505. The Board

• 22 TAC §505.10

The Texas State Board of Public Accountancy adopts an amendment to §505. 10, without changes to the proposed text as published in the December 5, 1995, issue of the *Texas Register* (20 TexReg 10248).

The amendment increases the number of Board members on committees to at least two.

The amendment will function by ensuring every Board committee has at least two Board members.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Civil Statutes, Article 41a-1, §6, which provide the Texas State Board of Public Accountancy with the authority to make such rules as may be necessary or advisable to carry in effect the purposes of the law.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on January 18, 1996.

TRD-9601496 William Treacy
Executive Director
Texas State Board of Public Accountancy

Effective date: February 26, 1996

Proposal publication date: December 5, 1995

For further information, please call: (512) 505-5566

♦ ♦ ♦

Chapter 519. Practice and Procedure

• 22 TAC §519.5

The Texas State Board of Public Accountancy adopts an amendment to §519. 5, with changes to the proposed text as published in the December 5, 1995, issue of the *Texas Register* (20 TexReg 10249). The changes are the replacement of the word "working" with the word "calendar" before the word "day" in subsections (b) and (c).

The amendment corrects a citation to the Administrative Procedure Act, requires a request for a public hearing on a proposed rule to be filed with the Board at least ten calendar days before the rulemaking meeting, and requires persons wishing to testify at a rulemaking meeting to provide written copies of their testimony at least five calendar days before the rulemaking meeting.

The amendment will function by enhancing scheduling of Board meeting agendas and will allow Board members more time in which to consider witnesses' comments.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Civil Statutes, Article 41a-1, §6, which provide the Texas State Board of Public Accountancy with the authority to make such rules as may be necessary or advisable to carry in effect the purposes of the law; and Government Code, §2001.029, which requires state agencies to hold public hearings in rulemaking proceeding if properly requested.

§519.5. Rulemaking Proceedings.

(a) Service of a proposed section or amendment of any existing section shall be governed by the Administrative Procedure Act, §2001.023 and §2001. 024.

(b) A request for a public hearing to receive comments on a proposed rulemaking must be received in the offices of the board no later than 5:00 p.m. of the tenth calendar day prior to the board meeting scheduled to consider the adoption of the proposed rule.

(c) A person wishing to testify at a public hearing to receive comments on a proposed rulemaking or revision must file a written copy of his or her testimony in the offices of the board by no later than 5:00 p.m. of the fifth calendar day prior to the public hearing unless the board announces a different filing date.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on January 18, 1996.

TRD-9601497 William Treacy
Executive Director
Texas State Board of Public Accountancy

Effective date: February 26, 1996

Proposal publication date: December 5, 1995

For further information, please call: (512) 505-5566

♦ ♦ ♦

• 22 TAC §519.26

The Texas State Board of Public Accountancy adopts an amendment to §519. 26, without changes to the proposed text as published in the December 5, 1995, issue of the *Texas Register* (20 TexReg 10249).

The amendment describes the options available to the board when it considers agreed consent orders and allows removal of the prohibition against using as evidence information discovered or disclosed in an informal conference.

The amendment will function by clarifying the two options available to the Board when it considers agreed consent orders, and removing unnecessary restrictions on the use of information obtained during an informal conference.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Civil Statutes, Article 41a-1, §6, which provide the Texas State Board of Public Accountancy with the authority to make such rules as may be necessary or advisable to carry in effect the purposes of the law; Government Code, §2001.054, which requires that licensees be afforded an opportunity to show their compliance with the law; and Government Code, §2001.056, which allows for the informal disposition of contested cases.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on January 18, 1996.

TRD-9601498 William Treacy
Executive Director
Texas State Board of Public Accountancy

Effective date: February 26, 1996

Proposal publication date: December 5, 1995

For further information, please call: (512) 505-5566

♦ ♦ ♦

• 22 TAC §519.27

The Texas State Board of Public Accountancy adopts an amendment to §519. 27, without changes to the proposed text as published in the December 5, 1995, issue of the *Texas Register* (20 TexReg 10250).

The amendment allows the Board to improve scheduling of its meeting agenda.

The amendment will function by requiring timely filing of requests which affect the Board's meeting agenda and scheduling.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Civil Statutes, Article 41a-1, §6, which provide the Texas State Board of Public Accountancy with the authority to make such rules as may be necessary or advisable to carry in effect the purposes of the law.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on January 18, 1996.

TRD-9601499 William Treacy
Executive Director
Texas State Board of Public Accountancy

Effective date: February 26, 1996

Proposal publication date: December 5, 1995

For further information, please call: (512) 505-5566

♦ ♦ ♦

TITLE 25. HEALTH SERVICES
Part I. Texas Department of Health
Chapter 91. Cancer
Prostate Cancer Advisory Committee

• 25 TAC §91.21

The Texas Department of Health (department) adopts new §91.21, concerning the creation of the prostate cancer advisory committee, with changes to the proposed text as published in the October 31, 1995, issue of the *Texas Register* (20 TexReg 8959).

The prostate cancer advisory committee will provide advice on the strategies for educating the public on the health benefits of the early detection, prevention and treatment of prostate cancer. The creation of the committee is required by Health and Safety Code, §91.003. The new section is required by Texas Civil Statutes, Article 6252-33 relating to state agency advisory committees.

The department deleted proposed subsection (p) relating to an effective date of January 1, 1996, and corrected a minor clerical error in proposed subsection (f)(2).

The following comments were received during the comment period.

Comment: A commentator suggested that the committee members should be individuals who are current contributors to this field and practitioners in their respective areas of expertise. The commentator also suggested that the committee composition include urologists, epidemiologists, individuals who have clinical testing and cancer screening expertise (pathologist and/or clinical chemist), public health and education.

Response: Department staff agree in part with this comment. However, in addition to the clinical specialties identified above, staff believe it is important to include prostate cancer survivors or caregivers of individuals with prostate cancer as consumer representatives of this committee.

Comment: A commentator stated that the regulations governing the structure of the new committee are appropriate and recommends appointment of the committee as soon as possible.

Response: Staff concur with comment.

These comments were submitted by individuals representing MD Anderson Cancer Center, Houston, Texas and Baylor College of Medicine, Houston, Texas.

The commenters were generally in favor of the rules as proposed.

The new section is adopted under Texas Health and Safety Code, §91.003, which requires the creation of the prostate advisory committee; Article 6252-33, §5, which sets standards for the evaluation of advisory committees by the agencies for which they function; under Health and Safety Code, §12. 001, which provides the board with authority to adopt rules for the performance of every duty imposed by law upon the board, the department, and the commissioner of health; and Health and Safety Code, §11.016, which allows the board to establish advisory committees.

§91.21. The Prostate Cancer Advisory Committee.

(a) The committee. An advisory committee shall be appointed under and governed by this section.

(1) The name of the advisory committee shall be the Prostate Cancer Advisory Committee (committee).

(2) The committee is required to be established by the Texas Board of Health (board) by Health and Safety Code §91.003.

(b) Applicable law. The committee is subject to Texas Civil Statutes, Article 6252-33 relating to state agency advisory committees.

(c) Purpose. The purpose of the committee is to provide advice to the board on strategies for educating the public on the health benefits of the early detection, prevention, and treatment of prostate cancer.

(d) Tasks.

(1) The committee shall advise the board concerning rules relating to educating the public on the health benefits of the early detection, prevention, and treatment of prostate cancer.

(2) The committee shall carry out any other tasks given to the committee by the board.

(e) Review and duration. By September 1, 2002, the board will initiate and complete a review of the committee to determine whether the committee should be continued, consolidated with another committee, or abolished. If the committee is not continued or consolidated, the committee shall be abolished on that date.

(f) Composition. The committee shall be composed of eleven members appointed by the board. The composition of the committee shall include:

(1) four consumer representatives; and

(2) seven other representatives.

(g) Terms of office. The term of office of each member shall be six years.

(1) Members shall be appointed for staggered terms so that the terms of a substantial equivalent number of members will expire on December 31st of each even-numbered year.

(2) If a vacancy occurs, a person shall be appointed to serve the unexpired portion of that term.

(h) Officers. The advisory committee shall elect a presiding officer and an assistant presiding officer at its first meeting after August 31st of each year.

(1) Each officer shall serve until the next regular election of officers.

(2) The presiding officer shall preside at all committee meetings at which he or she is in attendance, call meetings in accordance with this section, appoint subcommittees of the committee as necessary, and cause proper reports to be made to the board. The presiding officer may serve as an ex-officio member of any subcommittee of the advisory committee.

(3) The assistant presiding officer shall perform the duties of the presiding officer in case of the absence or disability of the presiding officer. In case the office of presiding officer becomes vacant, the assistant presiding officer will serve until a successor is elected to complete the unexpired portion of the term of the office of presiding officer.

(4) A vacancy which occurs in the offices of presiding officer or assistant presiding officer may be filled at the next committee meeting.

(5) A member shall serve no more than two consecutive terms as presiding officer and/or assistant presiding officer.

(6) The committee may reference its officers by other terms, such as chairperson and vice-chairperson.

(i) Meetings. The committee shall meet only as necessary to conduct committee business.

(1) A meeting may be called by agreement of department staff and either the presiding officer or at least three members of the committee.

(2) Meeting arrangements shall be made by department staff. Department staff shall contact committee members to determine availability for a meeting date and place.

(3) Each meeting of the committee shall be announced and conducted in accordance with the Open Meetings Act, Texas Government Code, Chapter 551.

(4) Each member of the committee shall be informed of a committee meeting at least five working days before the meeting.

(5) A simple majority of the members of the committee shall constitute a quorum for the purpose of transacting official business.

(6) The committee is authorized to transact official business only when in a legally constituted meeting with quorum present.

(7) The agenda for each committee meeting shall include an item entitled public comment under which any person will be allowed to address the committee on matters relating to committee business. The presiding officer may establish procedures for public comment, including a time limit on each comment.

(j) Attendance. Members shall attend committee meetings as scheduled. Members shall attend meetings of subcommittees to which the member is assigned.

(1) A member shall notify the presiding officer or appropriate department staff if he or she is unable to attend a scheduled meeting.

(2) It is grounds for removal from the committee if a member cannot discharge the member's duties for a substantial part of the term for which the member is appointed because of illness or disability, is absent from more than half of the committee and subcommittee meetings during a calendar year, or is absent from at least three consecutive committee meetings.

(3) The validity of an action of the committee is not affected by the fact that it is taken when a ground for removal of a member exists.

(4) The attendance records of the members shall be reported to the board. The report shall include attendance at committee and subcommittee meetings.

(k) Staff. Staff support for the committee shall be provided by the department.

(l) Procedures. *Roberts Rules of Order, Newly Revised*, shall be the basis of parliamentary decisions except where otherwise provided by law or rule.

(1) Any action taken by the committee must be approved by a majority vote of the members present once quorum is established.

(2) Each member shall have one vote.

(3) A member may not authorize another individual to represent the member by proxy.

(4) The committee shall make decisions in the discharge of its duties without discrimination based on any person's race, creed, gender, religion, national origin, age, physical condition, or economic status.

(5) Minutes of each committee meeting shall be taken by department staff.

(A) A draft of the minutes approved by the presiding officer shall be provided to the board and each member of the committee within 30 days of each meeting.

(B) After approval by the committee, the minutes shall be signed by the presiding officer.

(m) Subcommittees. The committee may establish subcommittees as necessary to assist the advisory committee in carrying out its duties.

(1) The presiding officer shall appoint members of the committee to serve on subcommittees and to act as subcommittee chairpersons. The presiding officer may also appoint nonmembers of the committee to serve on subcommittee.

(2) Subcommittees shall meet when called by the subcommittee chairperson or when so directed by the committee.

(3) A subcommittee chairperson shall make regular reports to the committee at each committee meeting or in interim written reports as needed. The reports shall include an executive summary or minutes of each subcommittee meeting.

(n) Statement by members. The board, the department, and the committee shall not be bound in anyway by any statement or action on the part of any committee member except when a statement or action is in pursuit of specific instructions from the board, department, or committee.

(o) Reports to board. The committee shall file an annual written report with the board.

(1) The report shall list the meeting dates of the committee and any subcommittees, the attendance records of its members, a brief description of actions taken by the committee, a description of how the committee has accomplished the tasks given to the committee by the board, the status of any rules which were recommended by the committee to the board, anticipated activities of the committee for the next year, and any amendments to this section requested by the committee.

(2) The report shall identify the costs related to the committee's existence, including the cost of agency staff time spent in support of the committee's activities.

(3) The report shall cover the meetings and activities in the immediate proceedings 12 months and shall be filed with the board each January. It shall be signed by the presiding officer and appropriate department staff.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's authority.

Issued in Austin, Texas, on February 1, 1996.

TRD-9601472 Susan K. Steeg
General Counsel
Texas Department of Health

Effective date: February 22, 1996

Proposal publication date: October 31, 1995

For further information, please call: (512) 458-7236

♦ ♦ ♦

Chapter 289. Radiation Control

Control of Radiation

• 25 TAC §289.6

The Texas Department of Health adopts the repeal of existing §289.6, concerning the control of radio-frequency electromagnetic radiation, without changes to the proposed text as published in the September 26, 1995, issue of the *Texas Register* (20 TexReg 7792).

The section is being repealed because it is not applicable to current technologies, nor is it consistent with federal requirements, and is therefore obsolete.

No public comments were received concerning the proposal.

The repeal is adopted under the Health and Safety Code, Chapter 401, which provides the Texas Board of Health with authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which authorizes the board to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's authority.

Issued in Austin, Texas, on February 1, 1996.

TRD-9601442 Susan K. Steeg
General Counsel
Texas Department of Health

Effective date: February 22, 1996

Proposal publication date: September 26, 1995

For further information, please call: (512) 458-7236

♦ ♦ ♦

Chapter 295. Occupational Health

Texas Enviromental Lead Reduction

• 25 TAC §§295.201-295.216, 295.218-295.220

The Texas Department of Health (department) adopts new §§295.201-295. 216 and §§295.218-295.220, concerning Texas Environmental Lead Reduction (TELR). Sections 295.201-295.214, 295.216 and 295.218-295.220 are adopted with changes to the proposed text as published in the December 12, 1995, issue of the *Texas Register* (20 TexReg 10476). Section 295.215 is adopted without changes and therefore will not be republished. Proposed §295.217 is being withdrawn from consideration as a rule.

The new sections comply with Senate Bill 544 (SB 544), 74th Legislature, 1995, pertaining to regulation of lead-based paint activities in target housing. The sections allow Texas governmental entities to apply for and expend federal funds. The new sections include new requirements for accreditation of training providers, for certification of persons involved in lead-based paint abatement, and for standards of safe lead-based paint activities. SB 544 provides the department with the authority to collect fees to cover the costs to administer the program, and provides the department the authority to assess administrative, civil, and criminal penalties for violation of the Act.

The new sections provide a means for reducing the prevalence of lead-based paint related diseases in children. It is estimated that over 5% of Texas children have elevated blood-lead levels. Availability of federal funding to conduct lead abatement will permit more rapid accomplishment of the department's objective to reduce the number of children with lead-based paint related illnesses.

The following is a summary of comments received. Following each comment is the department's response.

Comment: Concerning §295.201(a), one commenter suggested that it is not customary to have background information included in the regulations where it has the effect of law, and, if kept, should be moved to the preamble.

Response: The department feels that some background information on the history of lead may be useful to the regulated community. Therefore, no changes were made as a result of the comment.

Comment: Concerning §295.201(a), one commenter suggested that the word "lead" be inserted between ". . . Blood levels . . ." in the last sentence.

Response: The department agrees, and the change has been made.

Comment: Concerning §295.201(a), one commenter stated that the statement that 1.7 million children in the U.S. have elevated blood levels (EBLs) is misleading as it might be construed as meaning that the children had EBLs merely because of their exposure to deteriorated lead-based paint. The commenter requested this change because, in the case of at least one Texas county, the causes of EBLs in children are the result of other factors.

Response: The department acknowledges that there are other sources of lead exposure that can result in lead poisoning in children. However, the department disagrees that this information, which was obtained from published literature, is misleading. The department feels that the statistic of 1.7 million children having EBLs as the result of exposure to lead is representative of childhood lead exposure in the U.S.

Comment: Concerning §295.201(c), it appears that a part of (c)(1) was left out of the published rules. Is this correct?

Response: The department agrees with the reviewer's observation and has inserted the missing wording in the final rules.

Comment: Concerning §295.201(c)(2), one commenter requested that local health departments be exempted from these rules because of the financial burden that would be placed on them if they were required to obtain training and state certification. If this is not possible, the commenter suggested that the department fund training for local health inspectors. Two commenters asked that the certification fees for local health departments be waived.

Response: The department disagrees that local health officials be exempted from the certification requirements, as there is a definite need for all persons involved in handling lead hazards to be properly trained, and to ensure that the health of the public, especially children, is protected.

Comment: Concerning §295.201(c)(2), one commenter asked the department to clarify this sentence: "These sections also do not apply to persons who perform lead activities within residences that they own, unless the residence is occupied by a person or persons other than the owner or the owner's immediate family while the activities are being conducted." If a residence is vacant at the time when the lead activity will be conducted, does this mean the rules will not apply?

Response: The statement means that homeowners themselves may do lead abatement in their homes whether occupied by the homeowner or their immediate family, or vacant, without being certified. The homeowner may not do abatement without being certified if the home is occupied by nonfamily members. However, if the homeowner hires a firm to do abatement in his home, whether it is vacant or not, then the firm must be certified.

Comment: Concerning §295.201(c)(2), one commenter requested that the department delete the word "target" from the first sentence in this paragraph since "target housing" is defined in §295.202 and housing for the elderly is specifically excluded from that definition.

Response: The department agrees and the change was made.

Comment: Concerning §295.202, Definitions, one commenter requested that "unless the context clearly indicates otherwise" be deleted by the department as "this type of language appears to leave the door open for subjective decisions by inspectors or contractors as to the appropriateness of any one rule or the use of any group of rules."

Response: The department agrees and the change was made.

Comment: Concerning §295.202, one commenter requested changes or additions be made to the definitions of "abatement," "bare soil," "certified firm," and "encapsulant" that would change the scope of those definitions.

Response: Making the requested changes and/or additions will affect the intent of the definition and cannot be done. The department is required by SB 544 to not exceed the EPA minimum requirements, while at the same time, not being less than the EPA minimum so that the state can obtain EPA accreditation. Based on the department's latest communication with the EPA, the proposed definition as written meets this required objective.

Comment: Concerning §295.202, one commenter requested the addition of the definition of "operation and maintenance" to the rules' glossary as it is used frequently in the asbestos industry.

Response: The department does not believe the addition of this definition would help clarify the rules and could cause some confusion.

Comment: Concerning §295.202 and §295.212(d)(8), one commenter asked that specific post abatement clearance levels listed in the referenced HUD and EPA documents be given in the rules for clarification.

Response: The department agrees that the inclusion of specific dust clearance levels would clarify this section. There are no specific post abatement clearance levels required by the federal government, only federal guidelines that are given in the documents listed in §295.203. We cannot adopt federal guidelines as rules at this time. We anticipate adopting the federal post abatement clearance levels when established by the federal government. In the interim, we strongly recommend that the post abatement clearance levels in the federal guidelines be used.

Comment: Concerning §295.202, definition for "Abatement," one commenter suggested that in the definition of abatement, the phrase "in target housing" be added after "permanently eliminate lead-based paint hazards."

Response: The department believes that the purpose of these rules as stated in §295.201(b) makes it clear that the rules apply to target housing only; therefore, the department does not feel that the requested addition is necessary.

Comment: Concerning §295.202, definition for "Abatement" subparagraph (A), one commenter noted that for the department "to include the word any at the beginning of this definition would seem to include all the disciplines necessary to cause the abatement action, to include the inspector, risk assessment, project design as well as physical lead hazard removal," whereas in §295.212(d), only a department-certified worker or supervisor can conduct abatements. The commenter stated that if the inspector and the risk assessor are involved in an abatement project, §295.212 requires them to also be certified as a worker or a supervisor. The commenter requested clarification.

Response: Any person performing abatement, i.e., measures intended to permanently remove lead-based paint hazards, as stated in §295.212, is required to be certified as a worker or a supervisor. Persons in the other disciplines, e.g., inspectors and risk assessors, that remove lead in performing their responsibilities, e.g., taking a paint sample for laboratory analysis, would not be considered as performing abatement and thus would not be required to be certified as a worker or supervisor.

Comment: Concerning §295.202, definition for "Abatement" subparagraph (A) (i), one commenter suggested the term "replacement" should be changed to "removal" of lead-painted surfaces and fixture, as replacing a component is not a lead-based paint activity and is not covered by these rules as it involves installing a lead-free component.

Response: The department agrees and has made the change.

Comment: Concerning §295.202, definition for "Abatement" subparagraphs (A) (i) and (B)(ii), one commenter wanted clarification of the following: dust removal is considered as abatement and interim controls are excluded as abatement in the rules, but HUD defines dust removal as an interim control.

Response: Dust removal by a homeowner while cleaning the home would be considered a temporary "interim control," but dust removal by a lead abater during abatement or during the final cleanup would be considered permanent removal or abatement of the dust.

Comment: Concerning §295.202, definition for "Abatement" subparagraph (A) (iii)(II), one commenter suggested that §295.205 should read §§295.206-295. 211 and that ": Application and Renewals" be replaced with "Requirements."

Response: The department agrees and the change has been made.

Comment: Concerning §295.202, definition for "Abatement" subparagraph (B), one commenter recommended that demolition of dangerous buildings be specifically excluded from the rules.

Response: The department agrees that demolition of buildings is not specifically mentioned in the rule, and demolition is not mentioned in the EPA proposed rules. To further clarify this issue, the department has added language in §295.202 under the definition of abatement that will exclude the demolition of buildings.

Comment: Concerning §295.202, definition for "Adequate quality control", one commenter noted that the department's definition failed to identify the person who is responsible for that function, thus making it appear as if this service could be provided by any non-certified individual applying whatever standard deemed appropriate.

Response: The rules state that inspectors, risk assessors, workers, and supervisors have specific adequate quality control requirements. Refer to §295.212(a)(3), §295.212(b)(3), §295.212(c)(7), and §295.212(d)(8)(C).

Comment: Concerning §295.202, definition for "Clearance levels", one commenter asked that the phrase "and other EPA-issued guidance documents" be deleted in this definition, as it is too vague.

Response: The department agrees and has deleted the language.

Comment: Concerning §295.202, definition for "Hands-on skills assessment", one commenter suggested that in this definition, the words "contained in" be replaced with "used by" for clarity.

Response: The department agrees and the change has been made.

Comment: Concerning §295.202, definition for "Inspection", one commenter suggested that this definition should begin as a new paragraph.

Response: The department noted the error as a publication error. The department's intention was that "inspection" be a separate definition.

Comment: Concerning §295.202, definition for "Lead-based paint activity", one commenter requested that the department define "risk reduction" as used in this definition.

Response: The department feels that "risk reduction" has a plain and ordinary meaning and no special definition is required.

Comment: Concerning §295.202, definition for "Recognized laboratory", one commenter suggested that in this definition, the comma after the word "recognized" should be located after the word "EPA."

Response: The department agrees and the change has been made.

Comment: Concerning §295.202, definition for "X-Ray Fluorescence Analyzer (XRF)", one commenter requested that in this definition the word "estimate" should be changed to "determine."

Response: The department agrees and the change has been made.

Comment: Concerning §295.203, one commenter stated that the provisions in the adopted by reference section are confusing. The commenter asked if these references are adopted for informational purposes only, or is TDH going to enforce these provisions?

Response: The department removed the adoption by reference language to reflect that these were only guidelines. The referenced documents in this section are intended by the federal government as guidelines and thus they will not be enforced.

Comment: Concerning §295.203, one commenter suggested that the department adopt by reference the OSHA Lead Standard for worker protection (29 CFR 1926. 62) unless the department was not going to enforce the worker protection rules during lead activities.

Response: The department does not have the authority to enforce the OSHA Lead Standard for worker protection. However, the department reserves the right to make referrals to OSHA concerning infractions of the OSHA Lead Standard.

Comment: Concerning §295.203(a), one commenter asked that the following be adopted by reference: 1) The Occupational Safety and Health Administration (OSHA) Regulations: 29 CFR Part 1926.53 (Ionizing Radiation) and 29 CFR Part 1910.96 (Ionizing Radiation); 2) 40 CFR Parts 260-279 (relating to hazardous waste) of the Resource Conservation and Recovery Act (RCRA); 3) 49 CFR Parts 100 through 199 (relating to the transportation of hazardous materials) of the Department of Transportation (DOT) regulations; 4) 30 Texas Administrative Code (TAC) Section 335, State of Texas Hazardous and Solid Waste Regulations; and 5) Texas Regulations for the Control of Radiation (TRCR).

Response: SB 544 did not give the department the authority to enforce these regulations and therefore these regulations cannot be adopted by reference in these rules.

Comment: Concerning §295.203(a), one commenter questioned the purpose of this section since the documents appear to be guidelines that are not enforceable by the department, and there are a variety of guidance documents that can be used.

Response: The department agrees that the documents in §295.203(a) are guidelines and there are other available guidelines, but the department believes these guidelines are important and valuable resources, and that some persons may not know that they exist.

Comment: Concerning §295.203(a), one commenter suggested that there are regulations that should be included in this section, such as the TNRCC's Subchapter S, regulation on Risk Reduction Standards.

Response: The department is aware that there are other regulations that may be applicable when performing lead abatement, including TNRCC and OSHA regulations. However, the SB 544 does not give the department the authority to enforce TNRCC and OSHA regulations, and therefore these regulations cannot be cited in this section.

Comment: Concerning §295.203(a)(2), one commenter noted that the title for 60 CFR 47248 is incomplete, and that the following words should be added: " . . . , Lead-Contaminated Dust, and Lead-Contaminated Soil" to the title.

Response: The department agrees and this language has been added.

Comment: Concerning §295.204(c)(1)(B), one commenter suggested that the wording be changed to read "a list of courses for which the training program provider is applying for accreditation."

Response: The department agrees and the change has been made.

Comment: Concerning §295.204(c)(2)(E), one commenter stated that the referenced materials in §295.203 are guidance materials with which compliance by training providers is not practical and may even be impossible. The commenter noted that since it is possible to make copies of the documents in §295.203(a) available to students, §295.204(c)(2)(E) should be reworded to require compliance with §295.203(b).

Response: The department agrees with the commenter and made the change.

Comment: Concerning §295.204(c)(3), one commenter stated that the department by stating that it "may also request additional materials retained by the training program provider under paragraph (1) of this subsection," "leaves the door open for a witch-hunt at the discretion of any compliance officer." The commenter stated that "the regulated community has a right to know what, if any, additional documentation may be required for licensure." The commenter asked for specific clarification or elimination of this sentence.

Response: The intent of the sentence is not to withhold any licensure requirement from the regulated community or encourage overzealousness by its compliance officers. However, to make a proper compliance evaluation of this section, occasionally more information is necessary. To help clarify the intent the words, "If necessary to determine compliance with this subsection, . . . " have been added to this section.

Comment: Concerning §295.204(d)(2)(B), one commenter was concerned about trainers not finding "approved" training courses to take as there are no Texas accredited courses presently available. The commenter requested that a "grandfather" clause be added for those prospective trainers who have worked or trained on lead remediation projects using the existing TNRCC and OSHA rules.

Response: The reference section above refers to training requirements for principal instructors, not trainers. If the commenter's concern is training for the trainer those requirements are covered under §295.204(d)(1) and does not require taking an approved or Texas accredited course. Concerning training for principal instructors, for a few years, trainers in Texas and in other states have used the EPA model course curriculum to provide training in most of the lead disciplines, which would meet the requirements for principal instructors. As the department must not exceed the minimum EPA requirements as required by SB 544, the grandfather clause using the existing TNRCC and OSHA rules cannot be added.

Comment: Concerning §295.204(d)(2)(B), one commenter preferred that the requirement to take at least 24 hours of training for a principal instructor be changed to a 32-hour requirement.

Response: The proposed rule states "at least" and does not prohibit more training time, if desired. The EPA proposed rules have 24 hours, and per SB 544 the department cannot exceed this amount at this time.

Comment: Concerning §295.204(d)(2)(C), two commenters asked for clarification of what is meant by "lead discipline."

Response: Discipline is defined in §295.202. A lead discipline means a specific type or category of the lead-based paint activities for which individuals may receive training from accredited programs and become certified by the department.

Comment: Concerning §295.204(d)(2)(C), one commenter requested that the statement "(C) at least one year of experience in a lead discipline" be deleted because "certifications in the lead disciplines won't exist until someone is trained and the trainer of such persons must be certified prior to commencing training."

Response: The department disagrees with the commenter, since §295.204(d) (2)(C) requires experience, not certification, in a lead discipline.

Comment: Concerning §295.204(d)(6)(D) and §295.204(e)(4), one commenter recommended that the project designer course be changed from the proposed eight-hour course to a 40-hour course including additional subject materials and a hands-on portion to better prepare the designer for planning actual abatement jobs. The commenter also stated that covering all of the subjects listed in the proposed curriculum in the eight-hour proposed time is difficult for a training provider.

Response: The department agrees that additional course time may be better. However, the department must be in compliance with the minimum EPA requirements as required SB 544. Our best information from the EPA indicates these are their minimum course requirements.

Comment: Concerning §295.204(d)(6)(E) and §295.204(e)(5), one commenter recommended that the lead abatement worker course be changed from the proposed 16-hour course to a 24-hour course that would include the additional subjects of respiratory protection and personal hygiene practices. The commenter also stated that covering all of the subjects listed in the proposed curriculum in the 16-hour proposed time is difficult for a training provider.

Response: The department agrees that additional course time may be better. However, the department must be in compliance with the minimum EPA requirements as required SB 544. Our best information from the EPA indicates these are their minimum course requirements.

Comment: Concerning §295.204(d)(8)(A), two commenters asked that requirement for listing the address of the trainee on the training certificates issued by the lead training providers be deleted due to space constraints on the certificate. Also, one of the commenters mentioned that trainees move frequently so it is difficult to have a current address on the certificate. The use of a social security number in lieu of the address was suggested.

Response: The department agrees that requiring the trainee address to be on the training certificate would be unnecessarily burdensome. The §295.204(d) (8)(A) has been changed to delete the address requirement. The §295.204(d)(8) (A) requires a unique number to be put on the training certificate, which may be the person's social security number.

Comment: Concerning §295.204(d)(8)(C), one commenter noted that the requirement to identify the "test passage date" on the training certificate is redundant and should be deleted. The commenter noted that there is no course completion without test passage.

Response: The department agrees the test passage date does not have to be on the training certificate and it has been deleted as a requirement on the certificate, but will require the test results to be kept by the training manager by adding the words "and test passage date:" after the word certificate §295.204(j)(1)(F).

Comment: Concerning §295.204(d)(8)(E), one commenter suggested that the word "provider" be inserted after "program."

Response: The department agrees and has made the addition.

Comment: Concerning §295.204(d)(9)(B), one commenter stated that review of instructor competency may not be necessary. However, if the department feels that it is, then that function should be left to the department and not to the training program manager. The commenter requested that this paragraph be deleted from the rules.

Response: The department disagrees with deletion of §295.204(d)(9)(B). It is an important function and duty of the training managers to periodically review the competency of their instructors. This will not prevent the state's own evaluation of an instructor's competency.

Comment: Concerning §295.204(d)(10), one commenter asked that the word "paint" be inserted between "lead-based" and "activities" in the last sentence.

Response: The department agrees and has made the addition.

Comment: Concerning §295.204(e)(3)(M), one commenter asked if the department is requiring that TNRCC's Subchapter S rules to be included in the training, and whether the department will require compliance with them?

Response: The department is not requiring the inclusion of TNRCC rules in the lead training for supervisors and will not require compliance with TNRCC rules with the provisions of these rules.

Comment: Concerning §295.204(e)(4), one commenter recommended that the minimum training curriculum requirements for project designers be changed to include instruction in cleanup and waste disposal methods.

Response: The department agrees that these additions to the curriculum may be better. However, the department must be in compliance with the minimum EPA requirements as required in SB 544. Our best information from the EPA indicates these are their minimum course requirements.

Comment: Concerning §295.204(f)(3), one commenter suggested revising the last sentence in this paragraph to read "passing students who have met all of the requirements of the training program provider will be provided with a refresher course completion certificate." The commenter noted that a trainer with a more stringent requirement than the department's may withhold a training certificate.

Response: The department disagrees with the requested change. Based on the department's latest communication with the EPA, the language in this section, as written, is expected to be the same as in the EPA's final lead rules, and as required by SB 544, the department's rules must meet but not exceed minimum Federal final rules and regulations.

Comment: Concerning §295.204(f)(6), one commenter suggested that in the last sentence, the term "provider" be inserted after "program" and that the phrase "after the reason for disapproval has been corrected," be added after "time."

Response: The department agrees and the language has been added.

Comment: Concerning §295.204(i)(2), §295.219(d), and §295.220(g), one commenter noted that the Act does not require the department to conduct formal hearings and recommends that the informal hearing procedures be adopted instead.

Response: The department agrees and has changed these sections accordingly to allow the department's informal hearing procedures to be followed.

Comment: Concerning §295.204(j)(1), one commenter requested the department change "programs" to "program providers."

Response: The department agrees and has made the change.

Comment: Concerning §295.204(j)(2), one commenter noted that it is more cost effective to the training provider and saves training space to store student records that are more than one year old at an off-site location. The commenter stated that on-site storage of records is an inappropriate requirement and should be removed from the rules.

Response: The department must have on-site access to important documents during audits. Since certificates are now issued for a three-year period, a minimum of three years and six months for on-site storage is a reasonable requirement, so the statement will remain.

Comment: Concerning §295.204(j)(3), one commenter requested that "or transferring the records" be deleted from this paragraph, since such a requirement is inappropriate.

Response: The department disagrees with deletion of the statement. The department needs to be aware of the location of the training records for compliance inspections. Additionally, based on the department's latest communication with the EPA, the language in this section, as written, is expected to be the same as in the EPA's final lead rules, and as required by SB 544, the department's rules must meet but not exceed minimum Federal final rules and regulations.

Comment: Concerning §295.205, one commenter noted that this section does not address the overall requirements for a person wishing to become certified in the various lead disciplines. The commenter suggested that §§295.206-295. 211 be referenced in this section as well.

Response: The department agrees and the addition was made to §295.205(a).

Comment: Concerning §295.205(a), one commenter requested that the word cashier be added in front of check or money order to prevent the department from accepting personal checks. This will ensure that there is no delay in application processing as a cashier's check can be cashed immediately, while there is sometimes a waiting period for personal checks to be cleared.

Response: The department concurs with the recommendation and has made the change.

Comment: Concerning §295.205(c)(1), one commenter asked for the TDH to clarify the meaning of "substantial violations."

Response: The department agrees that this needs clarification. The words "substantial violations" were replaced with "assessed penalties from violations" for clarity

Comment: Concerning §295.205(c)(14), one commenter asked if something was missing in the phrase ". . . any part of or its environment . . . "

Response: The department agrees. Language was inadvertently omitted. The phrase was changed to reads ". . . any part of target housing or its environment."

Comment: Concerning §295.205(g) and §295.204(g)(2), one commenter stated that the time requirements of these two sections conflict with each other, and asked that the renewal application time requirements be left as recommendations.

Response: The department disagrees with the commenter. Section 295.205(g) is for certification renewal, whereas §295.204(g)(2) is for re-accreditation of a trainer. These requirements are independent and provide adequate review time for each application.

Comment: Concerning §295.206, §295.207, §295.209, one commenter recommended that all inspectors, risk assessors, and project designers applying for department certification be required to show proof of professional liability coverage, not less than $1 million per claim, for protection from claims arising out of performance of professional services. Two commenters also suggested that persons applying to become a certified firm under §295.211 be required to have insurance. One commenter specified a lead-based paint endorsement to their Commercial General Liability policy with minimum bodily injury and property damage limits of $1 million per occurrence and products/completed operations coverage with a separate aggregate of $1 million. The policy should not exclude lead-based paint or any hazardous materials or pollution defined as lead-based paint, and should provide "occurrence" coverage without a sunset clause.

Response: The department agrees that certification requirements of firms and persons under these rules should include some kind of financial assurance such as liability insurance. However, the EPA has no requirements in their proposed rules regarding any type of financial assurance that can be used to set the proper amount or type of assurance. The $1 million is an amount that was set based on the needs regarding asbestos abatement and are probably not applicable regarding lead abatement. After the department can determine a proper amount and method of financial assurance, the rules will be amended to include financial assurance.

Comment: Concerning §295.206(a), §295.207(a), and §295.209(a), one commenter, in order to restrict the scope of work of a lead inspector, a lead risk assessor, and a lead project designer, suggested that the phrase "shall not engage in lead-based paint abatement or removal of lead-based paint hazards" be added to their certification requirements.

Response: The department disagrees that the requested changes should be made to this section, based on the department's latest communication with the EPA, with the understanding that these requirements, as written, are likely to be the same as or similar to those in the EPA's final lead rules. As required by SB 544, the department's rules must not exceed minimum Federal final rules and regulations.

Comment: Concerning §§295.206(a)-295.210(a) and §295.211(b), two commenters felt that TDH requiring annual recertification in these subsections exceeds the EPA's proposed rule recertification requirement of three years.

Response: The department concurs that annual certification exceeds the EPA's proposed three-year recertification requirement. These sections will be changed to provide three-year term certificates. However, the fee will be prorated annually and be collected annually to fulfill the requirement that the fees are set to recover the cost of the program.

Comment: Concerning §§295.206(b)-295.210(b), one commenter felt that the requirement for annual refresher courses exceeds minimum federal requirements.

Response: The department acknowledges that the requirement for annual refresher courses exceeds the proposed minimum federal requirements. The requirement has been changed to a three-year period as in the EPA proposed rules. However, the department strongly encourages persons who are conducting lead-based paint activities in target housing to keep abreast of current regulations and lead abatement procedures by taking annual refresher courses.

Comment: Concerning §§295.206(c), 295.207(c), and 295.208(c), one commenter asked if the disciplines for these sections will be required to take and pass an examination other than the course completion exam?

Response: The department, at this time, requires only the passing of the course completion exam. However, a third party exam may be required in the future.

Comment: Concerning §295.206(c)(2), one commenter suggested that the department require on-the-job training or experience as part of the inspector certification requirements. The commenter requested that the department substitute the language in §295.206(c)(2) with "Six months of on-the-job experience as an assistant to an "inspector" under the direct supervision of a "project designer," "risk assessor" or an "inspector" with one year minimum experience."

Response: The department agrees that on-the-job training would be beneficial, but cannot make the requested change at this time. Based on the department's latest communication with the EPA, the language in this section, as written, is expected to be the same as in the EPA's final lead rules, and as required by SB 544, the department's rules must meet but not exceed minimum Federal final rules and regulations.

Comment: Concerning §295.206(d)(2), one commenter recommended that the word "of" replace the word "in" before the words "target housing" for clarity.

Response: The department concurs and has made the recommended change.

Comment: Concerning §295.207(c)(1)(B)(i), one commenter requested that "public health" be added as a related field.

Response: The department agrees and has added public health to this section.

Comment: Concerning §295.207(c)(1)(B)(ii), four commenters requested that "Certified Safety Professionals (CSP)" be included to meet or exceed additional experience and/or education requirements to become a risk assessor. One commenter requested that "registered sanitarian" and "public health nurse" be added.

Response: The department agrees and has added these suggested categories to this section.

Comment: Concerning §295.207(c), one commenter noted that there were no requirements for on-the-job training or experience as part of the risk assessor certification requirements, and suggested adding a new paragraph in this section to read "Six months of on-the-job experience under the direct supervision of a Project Designer or a Risk Assessor with one year minimum experience."

Response: The department agrees that on-the-job training would be beneficial, but cannot make the requested change at this time. Based on the department's latest communication with the EPA, the language in this section, as written, is expected to be the same as in the EPA's final lead rules, and as required by SB 544, the department's rules must meet but not exceed minimum Federal final rules and regulations.

Comment: Concerning §295.207(d), two commenters recommended that the following statement be added to this section, since a risk assessor must also complete a lead inspector course: (6) perform lead inspector responsibilities as provided in §295.206(d) (relating to Inspector Certification Requirements) .

Response: The department disagrees and is not in favor of placing the additional responsibilities on the risk assessor discipline. Although the risk assessor is authorized to collect lead samples and perform the same functions as the lead inspector, the two disciplines are distinct and separate from the other. The risk assessor may become certified as an inspector if these responsibilities are needed.

Comment: Concerning §295.208(a), the commenter asked that language be added to require that a certified lead abatement supervisor be employed by a certified firm to engage in lead-based paint abatement or removal of lead-based paint hazards.

Response: The department disagrees that the requested change should be made to this section, as it is based on the department's latest communication with the EPA, with the understanding that these requirements, as written, are likely to be the same as or similar to those in the EPA's final lead rules. As required by SB 544, the department's rules must not exceed minimum Federal final rules and regulations.

Comment: Concerning §295.208(c)(1)(B)(ii), one commenter requested that this section be changed to read "at least two years of experience in environmental remediation work such as asbestos abatement or storage tank removal."

Response: The department disagrees with the requested change. The language, as written in the rule would allow experience in both asbestos abatement and storage tank removal, and it has a broader scope of allowable experience. Additionally, based on the department's latest communication with the EPA, the language in this section, as written, is expected to be the same as in the EPA's final lead rules, and as required by SB 544, the department's rules must meet but not exceed minimum Federal final rules and regulations.

Comment: Concerning §295.208(d)(6), one commenter felt that a supervisor should "restrict" accessibility rather than "maintain" accessibility.

Response: The department disagrees, as "maintaining accessibility" refers to the supervisor, not the work site. The supervisor must be available either directly, or through a pager or answering service, to be present at the work site in no more than two hours, in accordance with §295.212(d)(2).

Comment: Concerning §295.209, one commenter believes that project designer certification should be eliminated and that the work of the designer done by the risk assessor, because a certified risk assessor is capable of performing the duties of a project designer. Also, by including the project designer's responsibilities as written, the department is shifting the project design responsibilities to a different category.

Response: The department disagrees that the lead project designer certification should be eliminated. Based on the department's latest communication with the EPA, it is our understanding that these requirements are likely to be the same as or similar to the EPA's final lead rules.

Comment: Concerning §295.209(c)(1)(A), one commenter asked that since there are no lead project designer courses being offered that use the EPA model course curriculum, would it be possible for individuals who have received either inspector, risk assessor, or contractor/supervisor training from a trainer utilizing the EPA model course curriculum prior to January 1, 1996 to become eligible for certification as a project designer?

Response: There are lead project designer courses being offered that use the EPA model course curriculum that would fulfill the requirements. The department will be glad to help locate one of these courses.

Comment: Concerning §295.209(c)(1)(B)(i)-(ii), one commenter requested that the work experience requirements for a lead project designer be changed to include the same requirements needed to become an "individual asbestos consultant" in the State of Texas as both persons would have similar responsibilities.

Response: The department disagrees that the work experience requirements for a lead project designer should be the same as those of an "individual asbestos consultant." The listed work experience and educational requirements are based on the department's latest communication with the EPA, with the understanding that these requirements are likely to be the same as or similar to those in the EPA's final lead rules.

Comment: Concerning §295.209(d)(1) and (2), one commenter said these responsibilities of the project designer are the duties of the firm and wanted clarification. What are the department's opinion and intent of these sections?

Response: These sections list the required responsibilities that a certified project designer must follow and the department intends to enforce. They could be considered duties of the certified firm that employs the designer.

Comment: Concerning §295.209(d)(2), one commenter asked if the pre-abatement plan mentioned in this subsection is the same as the occupant protection plan mentioned throughout the other sections of the rules.

Response: The pre-abatement plan may be similar to the occupant protection plan if the target housing is occupied.

Comment: Concerning §295.211, one commenter suggested that certified firms receive some type of training, such as the contractor/supervisor or inspector/risk assessor course.

Response: In the context of the rules, certified firms are companies and therefore cannot be trained, only its employees can be trained. The employees of a firm must receive training and become certified by the department for their specific job (i.e., worker, supervisor, etc.), before the firm can be certified by the department.

Comment: Concerning §295.211(a), one commenter suggested that the phrase "shall not also engage in lead-based paint inspection and testing, risk assessment, risk reduction, lead abatement project design or planning, and post-abatement clearance testing" be added to this section.

Response: The department cannot make the requested change, as the proposed language is based on the department's latest communication with the EPA, with the understanding that these requirements, as written, are likely to be the same as or similar to those in the EPA's final lead rules. As required by SB 544, the department's rules must not exceed minimum Federal final rules and regulations.

Comment: Concerning §295.211(a), one commenter thought that this subsection required the training firms to become certified in the lead disciplines and requested that the language in this subsection be changed.

Response: The department disagrees with the commenter and no change will be made. Training is not defined as a "lead-based paint activity," and therefore this section has no effect on a training activity.

Comment: Concerning §295.211(c)(1), one commenter noted that the term "owner" may be too restrictive.

Response: The department agrees and replaced "owner" with "owner or authorized agent of the owner" in this section and other relevant locations in the rules.

Comment: Concerning §295.211(c)(1)(A), one commenter recommended that the following phrases be added: "(A) (after paint) . . . abatement or removal of lead-based paint hazards."

Response: The department's intent was to allow firms to employ individuals in all the disciplines and not limit them to abatement type activities.

Comment: §295.211(d), one commenter recommended adding "(6) to conduct abatement activities in accordance with the procedures and requirements of the occupant protection plan as well as industry accepted standards and guidelines" to the section.

Response: The department disagrees with making the addition; §295.211(d) (1) covers the same requirements and it does not need to be restated again.

Comment: Concerning §295.211(d)(1), one commenter asked why transportation of lead-based paint waste was not addressed in the proposed rules and gave some detailed examples of possible transportation requirements.

Response: The department does not have the authority to regulate the transport of lead-based paint waste. The Texas Natural Resource Conservation Commission and the United States Department of Transportation have that authority.

Comment: Concerning §295.212, one commenter recommended that lead inspections conducted by local health departments should not be covered by these rules. Also, the commenter recommended that lead inspectors should recognize other lead hazards such as water and folk remedies.

Response: The department disagrees that lead inspections conducted by local health officials be exempted from the rules because all inspections should be conducted according to the same basic standards. While recognizing that there are causes of lead exposure to children other than deteriorating LBP, these rules were specifically designed in accordance with SB 544 to regulate activities involving LBP. These rules in no way prevent local health departments or other persons from following up on other potential sources of lead exposure.

Comment: Concerning §295.212, §295.212(a)(1) and (d)(1), one commenter requested that in §295.212 the phrase "in target housing" be added at the end of the heading, and in §295.212(a)(1) after the phrase "lead-based paint inspections," in order to clarify that these standards do not apply to any other buildings; and in §295.212(d)(1) after the phrase "an abatement," to clarify that only abatements in target housing must use certified workers or supervisors.

Response: The department believes that the purpose of these rules as stated in §295.201(b) makes it clear that the rules apply to target housing only. Therefore, the department does not feel that the requested addition is necessary.

Comment: Concerning §295.212(a)(4)(I), one commenter recommended that the department reference the following with regard to X-ray fluorescence analyzers (XRFs): The Texas Regulations for the Control of Radiation-licensure, requirements for the radiation safety officer, and safety procedures; the OSHA 20 CFR 1910.96 and 1926.53-safety procedures, exposure monitoring; the DOT 49 CFR Part 173; and the Nuclear Regulatory Commission (NRC) requirements.

Response: The department feels that persons purchasing XRFs are already aware of the regulations concerning radiation safety and licensure.

Comment: Concerning §295.212(b)(2)(A), one commenter requested that the following phrase be added to this section: "(A) (after dwelling) . . . and common area."

Response: The department concurs and has made the change.

Comment: Concerning §295.212(b)(2)(B) and §295.212(c)(2), one commenter requested that the word "representative" be added to read "... each representative surface with deteriorated paint shall be tested for the presence of lead-based paint".

Response: The department agrees and has added the word "representative" as requested.

Comment: Concerning §295.212(b)(4) and §295.212(c)(8), one commenter requested the definition of "detectable levels of lead," as it relates to the collection and analyses of paint chip dust or soil samples.

Response: Detectable level would be the lower limit of detection of lead content of the sample and would be determined based on the method used in the analysis; §295.212(e)(2) gives the laboratory standard to ensure the proper detection limit is met. Concerning §295.212(c)(9)(B)-(C), one commenter suggested that the phrase "address of residential dwelling" be added in place of "residences and buildings" in these two sections.

Response: The department concurs with this request. To further clarify the language " . . . residential dwelling, multi-family dwelling and unit" replaces "residences and buildings."

Comment: Concerning §295.212(d)(3), one commenter noted that this subsection mentions a "certified contractor," and as this is not mentioned elsewhere in the rules, the commenter recommends that this term be deleted.

Response: The department concurs with this comment, and the words "contractor or" have been deleted from the rules.

Comment: Concerning §295.212(d)(6)(A) and §295.212(d)(6), one commenter recommended that the department include the following methods: propane fueled heat grids; chemical stripping practices which utilize methylene chloride, and uncontained hydro blasting or high pressure washes.

Response: The department agrees that these methods for lead abatement should be prohibited. However, the department cannot make the requested changes, as the proposed language is based on the department's latest communication with the EPA, with the understanding that these requirements, as written, are likely to be the same as or similar to those in the EPA's final lead rules.

Comment: Concerning §295.212(d)(6)(B), one commenter noted that the "99. 997" should be "99.97".

Response: The department agrees and the change has been made.

Comment: Concerning §295.212(d)(7), one commenter asked that the department define the standard for "non-contaminated soil" that must be used to replace lead-contaminated soil.

Response: The department cannot provide this standard until the federal government establishes one first, per the requirement of SB 544. However, based on the guideline referenced in §295.203(a)(2) a reasonable guideline to use for "non-contaminated soil" would be 400 ppm or less of lead until a specific standard is developed.

Comment: Concerning §295.212(d)(8), one commenter suggested that a third party clearance testing and conflict of interest provisions be included.

Response: The department acknowledges that these provisions would be appropriate additions to the rules, but EPA is not proposing these provisions in their rules. Therefore, the department cannot include these provisions at this time as the department cannot exceed minimum federal requirements.

Comment: Concerning §295.212(d)(8)(E), one commenter requested that the "to" be replaced with "on" in the phrase ". . . conducted in or to the target housing . . .", so it would read: (E) (before abatement activities) conducted in or on the target housing.

Response: The department concurs and has made the recommended change.

Comment: Concerning §295.212(d)(8)(E), and §295.212(d)(8)(E)(iii), one commenter requested that the following words and phrases be added: "(E) (before abatement activities) on the target housing, and (iii) (before bare soil) in common areas, and on the dripline or next to the foundation below any abated exterior surface."

Response: The department concurs and has made the recommended changes.

Comment: Concerning §295.212(d)(8)(E)(ii), one commenter noted that this section mentions conducting an abatement with "no containment," and the commenter wanted to know when this could occur.

Response: Chapter 8 of the document referenced in §295.203(a)(1) discusses abatement procedures that do not require containment.

Comment: Concerning §295.212(d)(9), one commenter requested that the department define "random sampling" as it applies to clearance testing.

Response: The department feels that "random sampling" has a plain and ordinary meaning and no special definition is required.

Comment: Concerning §295.212(d), one commenter requested that the department add the following phrase: "(12) The certified firm is responsible for the safe and proper treatment, storage, transportation, and disposal of lead-based paint waste in accordance with applicable federal, state, and local requirements."

Response: The department agrees that the addition of this statement may be useful. However, the department cannot make the requested changes, as the proposed language is based on the department's latest communication with the EPA, with the understanding that these requirements, as written, are likely to be the same as or similar to those in the EPA's final lead rules.

Comment: Concerning §295.212(g), one commenter requested that the word "in" in the last sentence be deleted and replaced with "and 40 CFR 745."

Response: The department agrees and the change has been made.

Comment: Concerning §295.213, one commenter suggested that the first sentence indicates that lead-based paint activities must be conducted using only the standards found in §295.212, which the commenter feels are too vague. The commenter believes that the first sentence should be deleted, as the proposed rules reference other procedures and standards that must be followed.

Response: The department disagrees to delete the sentence. First, the department believes that the standards in §295.212 are not vague and provide sufficient guidance. The language in §295.212 and the first sentence in §295.213, is based on the department's latest communication with the EPA, with the understanding that these requirements, as written, are likely to be the same as those in the EPA's final lead rules.

Comment: Concerning §295.213, one commenter requested that local health departments conducting inspections on target housing, not related to abatement, should be exempted from this section.

Response: The department disagrees that local health departments conducting inspections on target housing, not related to abatement, should be excluded. Inspections involving LBP must meet the minimum requirements §295.212, and must be conducted by certified individuals.

Comment: Concerning §295.213, one commenter requested that the phrase "target housing" be added to clarify that the procedures and standards only apply to target housing.

Response: The department believes that the purpose of these rules as stated in §295.201(b) makes it clear that the rules apply to target housing only; therefore, the department does not feel that the requested addition is necessary.

Comment: Concerning §295.214, one commenter stated that if inspection and risk assessment are considered lead abatement activities under §295.202, then local health departments should not be kept from conducting inspections for the ten working day period required by the notification.

Response: The department disagrees that inspection and risk assessment are considered to be lead abatement activities under §295.202; they are considered to be "lead-based paint activities" by the definition in §295.202. Referring to §295.214(a), it is stated that notifications will be required for "any lead-based paint abatement activity in target housing."

Comment: Concerning §295.214(a), one commenter asked whose "original signature" is required on the notification form, and who is responsible for notifying the department of any lead-based paint abatement activity.

Response: The department agrees that this section should be clarified. In §295.214(a), the original signature of the certified firm's owner or an authorized agent of the owner will be acceptable on the notification form. Also for clarity, in §295.214(b), the certified firm or its designated agent will be responsible for notifying the department. Language has been added to clarify these two subsections.

Comment: Concerning §295.214(c), one commenter suggested that notice to the department should only be required for those planned and intended abatement activities, not "operations and activities" which "may" or "might" disturb lead.

Response: The department agrees with this suggestion, and language has been added to indicate that only planned or intended abatement activities shall require notification to the department, except in the case of emergency notifications. The department has also clarified that the "start date" is the first day that lead abatement activities commence.

Comment: Concerning §295.214(d), one commenter suggested that the words "department shall" be changed to "the certified firm shall" to reflect who needs to take the action; and then reword the two following subparagraphs to correspond with the change.

Response: The department agrees and the appropriate changes have been made.

Comment: Concerning §295.214(h), one commenter asked if there are any fees for amended notifications.

Response: The department does not intend to charge fees for amended notifications.

Comment: Concerning §295.214(h)(1) and (h)(3), one commenter asked if the $50 notification fee applied to a building or structure and not to individual units or residential dwellings within those buildings. The commenter also suggested that the following phrase be added to §295.214(h)(3) to clarify the term "project": "all dwelling units at the same street address constitute one project for the purposes of computing notification fees."

Response: The department agrees with the suggested change and has included it in the final rules.

Comment: Concerning §295.216, two commenters asked the department to clarify which fees are included in this exemption. One commenter asked if state government includes state agencies and suggested state agencies be included in the language.

Response: The fees that are exempt are the accreditation fees for training programs that are operated by Federal, State, or local governments and nonprofit entities. Not exempt are: 1) the certification fees for the various disciplines and firms, and 2) the accreditation fees for the training programs operated for profit. The language in this section was reworded for better clarity. State agencies would be included under state governments and need not be stated in the language.

Comment: Concerning §295.216, one commenter stated that there is no valid reason to exempt any group from paying the certification fee and that it will prevent control if no fee is required.

Response: The department disagrees with the requested change for two reasons. First, the department will have the same control on the fee exempt trainer since all the other requirements are enforceable including de-accreditation, if warranted. Secondly, the department is required by SB 544 to become an authorized State program by the federal government, and Title X, section 402(a)(3) requires that authorized State programs exempt Federal, State, or local governments, and nonprofit entities from paying a fee.

Comment: Concerning §295.216, one commenter felt that the fact nonprofit training programs are exempted from paying an accreditation fee to the department puts the private training programs, that have to pay the fee, at a competitive disadvantage. Therefore, the commenter recommended that nonprofit training programs should also be required to pay the fee.

Response: The department is required by SB 544 to become an authorized State program by the federal government. Title X, section 402(a)(3) requires that authorized State programs exempt nonprofit training entities from paying the fee.

Comment: Concerning §295.217, one commenter requested that this provision be deleted because it is contradictory in that it mentions "voluntary efforts, " but also indicates legal action will be taken for noncompliance making it unclear what is voluntary. The commenter also felt that this provision is duplicative because the agency's enforcement authority is explained in §295. 220.

Response: The department agrees and has withdrawn §295.217 from permanent adoption.

Comment: Concerning §295.218(c), one commenter recommended that this section be deleted as the SB 544 does not give the department the right of entry.

Response: The department agrees and has deleted §295.218(c), and the subsections (d) and (e) have been changed to (c) and (d), respectively.

Comment: Concerning §295.218(c), one commenter suggested the following changes to clarify why an inspector would enter various areas: "A department representative, upon presenting the department ID card, shall have the right to enter at all reasonable times the storage or office areas or vehicles to review records of lead-based paint activities in target housing to determine compliance with these regulations."

Response: This subsection has already been deleted (see previous comment and response), so no response is necessary.

Comment: Concerning §295.218(d), one commenter requested that the phrase in (d) "in accordance with these regulations" be added after "in the course of his official duties."

Response: The department agrees with the requested change, and language has been added to the final rule to reflect this change.

Comment: Concerning §295.218(e), one commenter suggested that the phrase "in target housing" be added after lead-based paint activities.

Response: The department believes that the purpose of these rules as stated in §295.201(b) makes it clear that the rules apply to target housing only; therefore, the department does not feel that the requested addition is necessary.

Comment: Concerning §295.220(b) and (f)(1), one commenter stated that the penalty of up to $10,000 per day per violation is in excess of the $5,000 penalty stipulated in SB 544.

Response: The department agrees that the $10,000 per day per violation is in excess of the $5,000 penalty mentioned in SB 544. Section 295.220(b) and (f) (1) has been reduced to a penalty of $5,000 per day per violation

Comment: Concerning §295.220(e), one commenter noted that this section references doubling a penalty for a second violation and raising the penalty up to five times, which would be in excess of the $5,000 limit.

Response: The department concurs that with the proposed rule language the doubling or raising a penalty up to five times could increase the penalty in excess of the $5,000 limit. However, the department believes this rule is necessary to discourage repeat violations that are serious or significant in nature. To clarify the limit provided by law, language has been added to the rule stating that limit in any case may not exceed $5,000.

Comment: Concerning §295.220(f)(3)(E), one commenter recommended that the statement "(E) proper risk assessment report not prepared" be removed, as the proposed rules do not specify when an inspection, risk assessment, or lead hazard screen must be performed. The commenter asked for a clarification as to when an inspection, a lead hazard screen, or a risk assessment must be performed.

Response: The department disagreed and made no change. The purpose of the referenced statement is to require a report to be prepared when a risk assessment is performed. The documents listed in §295.203(a) provide the guidelines for when an inspection, a lead hazard screen, or a risk assessment must be performed.

Comment: Concerning a general comment, one commenter stated that TDH has the authority to impose both civil and criminal penalties, but that there is no reference to this in the rules. Is this an oversight?

Response: SB 544 gives the department the authority to seek both criminal and civil remedies through the judicial system. As the procedures for carrying out these provisions are addressed in the judicial process, the department elected to not reiterate these provisions in the rules.

Comment: Concerning a general comment, one commenter noted that the word "certification" was used instead of "licensing" and asked what was the difference and whether the wording will be changed once the EPA's model accreditation comes out.

Response: The department uses the word "certification" because it is used in the legislation requiring these rules as well as in the EPA's proposed rules. Licensing in the context of these rules has no significant difference from certification. There are no plans to change to licensing.

Comment: Concerning a general comment, one commenter asked that a clause be added that would allow training by department staff for use and access to an XRF by local health departments, or that the number of samples allowed to be submitted to the TDH lab be less restrictive.

Response: This clause would exceed the federal requirements to be included in these rules. The department wishes it had enough funds to perform more lab sample analyses and purchase sufficient XRF analyzers for use by all local health departments, but it does not at this time. However, the department will be glad to work with the local heath departments to do what it can to resolve particular problems.

Comment: Concerning a general comment, regarding interfacing with existing state and federal lead regulations, one commenter asked whether the department's rules are intended to apply to all environmental consultants engaged in lead remediation activities, and how does the department propose to interface with the existing TNRCC rules.

Response: These rules are applicable only to lead-based paint activities in target housing and are not applicable to lead remediation sites as regulated by TNRCC.

Comment: Concerning a general comment, one commenter asked in exactly what way cities would be impacted by $15,000 in fees per year as referenced on page one of the rules.

Response: This amount is the department's estimate of certification fees the local governments will pay to the state to have their employees certified to conduct lead-based paint activities.

Comment: Concerning a general comment, one commenter noted that the fee structures for certification as a Firm, Risk Assessor, Project Designer, and an Inspector are high and well beyond similar requirements for asbestos licensure in Texas or other neighboring states.

Response: The department disagrees. The Texas legislature and Title X, §402(a) requires that the program collect fees that will cover the cost of operating the program. The certification fees in this program are identical or very close as those presently being charged for licensing similar disciplines by the Texas asbestos program. At this time, the established fees are the best estimates of the amount necessary to cover the program's cost. In the future, the fee amounts will be evaluated and revised, either by decreasing or increasing, as necessary just to cover the program costs.

Comment: Concerning a general comment, one commenter proposed adding the following provision that allows a violator 14 days to come into compliance before the administrative penalty is assessed: "A person found to be in violation of these rules must comply not later than the 14th day after the date of the finding. A person that does not comply before the 15th day after the date of the written notification of the violation is subject to an administrative penalty."

Response: The department agrees that there should be some latitude to allow persons failing to comply with the rules some time to get into compliance; however, the department will not adopt a written policy at this time. The department anticipates that our compliance officers will have some discretion in determining what constitutes major versus minor infractions of the rules, and the department hopes for cooperative efforts between the regulated community and the department compliance officers.

Several individuals and the following organizations provided the comments: U.S. Environmental Protection Agency, the City of Austin Department of Public Works and Transportation, the City of Austin Safety and Worker's Compensation Division, the City of Houston Health and Human Services Department, The University of Texas System Office of Environmental Affairs, Scientific Investigation and Instruction Institute, Texas Natural Resource Conservation Commission, Professional Safety Training Inc., San Antonio Metropolitan Health District, NATEC, Austin/Travis County Health and Human Services Department Environmental Health Services Division, The Texas A&M University System Texas Engineering Extension Service, Harris County Health Department, Phase One Technologies, Construction Safety and Health Inc., American Society of Safety Engineers, American Society of Safety Engineers-Central Texas Chapter, and Texas Department of Health staff. The commenters were generally supportive of the rules. However, they had questions, comments, suggestions and concerns about specific sections.

Comments were received from the El Paso City-County Health and Environmental District after the closing date. There was not sufficient time to address their comments, however, these comments will be considered the next time these rules are amended. The District stated that they "understand the problem related to lead in paint and fully supports the proposed lead regulations."

The new sections are adopted under the Texas Revised Civil Statutes, Article 9029, §3, which provide the department with the authority to adopt rules necessary to carry out its powers, duties, and responsibilities relating to establishment of a program for certification of a person involved in a lead-based paint activity in target housing and for accreditation of training providers in compliance with federal law and rules; and Texas Health and Safety Code, §12.001(b)(1) which requires the department to adopt rules for the performance of every duty imposed upon it by law.

§295.201. General Provisions.

(a) History. Lead has long been known to be a poison. A primary source of lead in the residential environment is lead-based paint, which was widely used in household paints before 1978. The exposure to lead-based paint in residential environments comes directly from deteriorating or damaged painted surfaces as well as from dusts and soils that have been contaminated by lead-based paint. Adults and particularly children can be affected by lead-based paint. It is estimated that 1.7 million American children have elevated blood lead levels as a result of their exposure to lead.

(b) Purpose. The purpose of these sections is to establish the means to control and minimize public exposure to lead by regulating lead-based paint activities in target housing.

(c) Scope (for the purposes of certification and accreditation).

(1) Rules application, These sections contain procedures and requirements for the accreditation of lead training providers, procedures and requirements for the certification of individuals and firms engaged in lead-based paint activities in target housing, and standards for performing such activities. These sections also require that all lead-based paint activities in target housing be performed by certified individuals.

(2) Exclusions. These sections do not apply to housing for the elderly or persons with disabilities, unless a child who is younger than six years of age resides or is expected to reside in that housing, nor do these sections apply to target housing with zero bedrooms. These sections also do not apply to persons who perform lead activities within residences which they own, unless the residence is occupied by a person or persons other than the owner or the owner's immediate family while the activities are being conducted.

(d) Severability. Should any section or subsection in this chapter be found to be void for any reason, such finding shall not affect all other sections.

§295.202. Definitions. The following words and terms, when used with these sections, shall have the following meaning.

Abatement–

(A) Includes any measure or set of measures designed to permanently eliminate lead-based paint hazards. Abatement includes, but is not limited to:

(i) the removal of lead-based paint and lead-contaminated dust, the permanent containment or encapsulation of lead-based paint, the removal of lead-painted surfaces or fixtures, and the removal or covering of lead-contaminated soil;

(ii) all preparation, cleanup, disposal, and post-abatement clearance testing activities associated with such measures; and

(iii) abatement projects, which specifically include, but are not limited to:

(I) projects for which there is a written contract or other documentation, which provides that an individual or firm will be conducting activities in target housing that:

(-a-) shall result in the permanent elimination of lead-based paint, lead-contaminated dust or soil, and other lead-based paint hazards; or

(-b-) are described in subsections §295.202(A)(i) and (ii) of this paragraph;

(II) projects involving the permanent elimination of a lead-based paint hazard, lead-based paint, and lead-contaminated dust or soil, conducted by persons certified in accordance with the sections relating to the certification requirements unless such projects are covered by subparagraph (B) of this section;

(III) projects involving the permanent elimination of a lead-based paint hazard, lead-based paint, and lead-contaminated dust or soil, conducted by persons who, through their company name or promotional literature, represent, advertise, or hold themselves to be in the business of performing lead-based paint activities as identified and defined by this section, unless such projects are covered by subparagraph (B) of this section; or

(IV) projects involving the permanent elimination of lead-based paint hazards, lead-based paint, or lead-contaminated dust or soil, that are conducted in response to State or local abatement orders.

(B) Excludes:

(i) renovation, remodeling, or landscaping activities, which are not designed to permanently eliminate lead-based paint hazards, but, instead, are designed to repair, restore, or remodel a given structure or dwelling, even though these activities may incidently result in a reduction or elimination of lead-based paint hazards; and

(ii) interim controls, operations and maintenance activities, or other measures and activities designed to temporarily, but not permanently, reduce lead-based paint hazards ;and

(iii) demolition of target housing buildings.

Accredited training program–A training program that has been accredited by the Texas Department of Health (department) to provide training for persons engaged in lead-based paint activities.

Act–Senate Bill 544 as passed in the 74th Legislature, 1995.

Adequate quality control–A plan or design to ensure the authenticity, integrity, and accuracy of lead-based paint samples, including dust, soil, and paint chip or paint film samples. Adequate quality control also includes provisions for representative sampling.

Bare soil–Soil not covered with grass, sod, or some other similar vegetation. Bare soil includes sand.

Board–The Texas Board of Health.

Certified firm–A company, contractor, partnership, corporation, sole proprietorship, association, or other business entity that performs lead-based paint activities, and that has been certified by the department.

Certified inspector–A person who has been certified by the department to conduct lead inspections and sample for the presence of lead in paint, dust, and soil for the purposes of abatement cleanup and clearance testing.

Certified lead worker–A person who has been certified by the department to perform abatements, as defined by this section.

Certified project designer–A person who has been certified by the department to plan and design abatement projects.

Certified risk assessor–A person who has been certified by the department to conduct lead risk assessments. Risk assessors also sample dust and soil for the purposes of lead abatement cleanup and clearance testing.

Certified supervisor–A person who has been certified by the department to supervise and conduct lead abatements, or has been certified by the department to plan and design abatement projects involving fewer than ten units.

Clearance levels–Values that indicate the maximum amount of lead permitted in dust on a surface following completion of an abatement activity. Clearance levels that are appropriate for the purposes of this section may be found in the Environmental Protection Agency *Guidance on Residential Lead-Based Paint, Lead-*

Contaminated Dust, and Lead-Contaminated Soil (60 *Federal Register* 47248 (1995).

Commissioner–The Texas Commissioner of Health.

Common area–A portion of target housing that is generally accessible to all occupants. Such an area may include, but is not limited to, hallways, stairways, laundry and recreational rooms, playgrounds, community centers, garages, and boundary fences.

Component or building component–A specific design or structural elements or fixtures of a target housing that are distinguished from each other by form, function, and location. These include, but are not limited to, interior components such as: ceilings, crown molding, walls, chair rails, doors, door trim, floors, fireplaces, radiators and other heating units, shelves, shelf supports, stair treads, stair risers, stair stringers, newel posts, railing caps, balustrades, windows and trim (including sashes, window heads, jambs, sills or stools and troughs), built-in cabinets, columns, beams, bathroom vanities, counter tops, and air conditioners; and exterior components such as: painted roofing, chimneys, flashing, gutters and downspouts, ceilings, soffits, fascias, rake boards, cornerboards, bulkheads, doors and door trim, fences, floors, joists, lattice work, railings and railing caps, siding, handrails, stair risers and treads, stair stringers, columns, balustrades, window sills or stools and troughs, casings, sashes and wells, and air conditioners.

Containment–A regulated area that has been sealed and designed to prevent the release of lead-containing dust or materials into surrounding areas.

Course agenda–An outline of the key topics to be covered during a training course, including the time allotted to teaching each topic.

Course test–An evaluation of the overall effectiveness of the training which shall test the trainees' knowledge and retention of the topics covered during the course.

Course test blue print–Written documentation of the proportion of course test questions devoted to each major topic in the course curriculum.

Department–The Texas Department of Health.

Deteriorated paint–Paint that is cracking, flaking, chipping, chalking, or peeling from a building component or unit.

Discipline–One of the specific types or categories of lead-based paint activities for which individuals may receive training from accredited programs and become certified by the department. For example, "lead worker" is a discipline.

Distinct painting history–The application history, as indicated by its visual appearance or a record of application, over time, of paint or other surface coatings to a component, room, or unit of a building structure.

Documented methodologies–Methods or protocols used to sample for the presence of lead in paint, dust, and soil. Documented methodologies may be found in the United States Department of Housing and Urban Development (HUD) *Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing*; the EPA *Guidance on Residential Lead-Based Paint, Lead-Contaminated Dust, and Lead-Contaminated Soil*(60 *Federal Register* 47248 (1995); the EPA Residential Sampling for Lead: Protocols for Dust and Soil Sampling, EPA report number 747-R-95-001 (March, 1995) and other EPA sampling guidance.

Encapsulant–A substance that forms a barrier between lead-based paint and the environment using a liquid-applied coating (with or without reinforcement materials) or an adhesively bonded covering material.

Encapsulation–The application of an encapsulant.

Enclosure–A process that makes lead-based paint inaccessible by providing a physical barrier that is mechanically attached to a surface.

EPA–The United States Environmental Protection Agency.

Federal Law and Rules–Applicable federal laws and regulations adopted in these sections:

(A) Toxic Substances Control Act (15 United States Code, §2681 et seq) Title IV, and the rules adopted by the EPA under that law for authorization of state programs;

(B) Title X, Residential Lead-Based Paint Hazard Reduction Act of 1992, and any regulations or requirements adopted by the HUD regarding eligibility for grants to states and local governments; and

(C) any other requirements adopted by a federal agency with jurisdiction over lead hazards.

Guest instructor–An individual designated by the training program manager to provide instruction specific to the lecture, hands-on activities, or work practice components of a course.

Hands-on skills assessment–An evaluation which tests the trainees' ability to perform satisfactorily the work practices and procedures used by a discipline, as well as any other skills covered in a training course.

Historical records–Documentation which identifies the material makeup (including brand, color type, and lead content) and dates of application of paint and other surface coatings.

HEPA–A high-efficiency particulate air filter, capable of trapping and retaining 99.97% of mono-dispersed airborne particles 0.3 microns or larger in diameter.

HUD–The United States Department of Housing and Urban Development.

HVAC–Heating, ventilation, and air conditioning systems.

Inspection–A surface-by-surface investigation by a certified inspector to determine the presence of lead-based paint.

Interim certification–The status of an individual who has successfully completed the appropriate training course in a discipline from an accredited training program, and has fulfilled the department's fee and application requirements, but has not yet received formal certification in that discipline from the department. Interim certification will be granted upon receipt of a complete application and fee, and shall expire within six months, or upon issuance or denial of department certification.

Interim controls–A set of measures designed to temporarily reduce human exposure or likely exposure to lead-based paint hazards, including specialized cleaning, repairs, maintenance, painting, temporary containment, ongoing monitoring of lead-based paint hazards or potential hazards, and the establishment and operation of management and resident education programs.

Lead-based paint–Paint or other surface coatings that contain lead in excess of 1.0 milligrams per centimeter squared or more than 0. 5% by weight.

Lead-based paint activity–Inspection, testing, risk assessment, risk reduction, lead abatement project design or planning, or abatement or removal of lead-based paint hazards.

Lead-based paint hazard–Any condition that causes exposure to lead from lead-contaminated dust, lead-contaminated soil, or lead-contaminated paint that is deteriorated or present in accessible surfaces, friction surfaces, or impact surfaces that would result in adverse human health effects as established by documented methodologies.

Lead-contaminated dust–Surface dust in target housing that contains an area or mass concentration of lead at or in excess of levels determined to be hazardous as established by documented methodologies.

Lead-contaminated soil–Bare soil at target housing that contains lead at or in excess of levels determined to be hazardous as established by documented methodologies.

Lead-hazard screen–A risk assessment activity that involves limited paint and dust sampling to determine the presence of lead-based paint or a lead-based paint hazard.

Living area–Areas of a target housing unit used by one or more children younger than six years of age, including, but not limited to, living rooms, kitchen areas, dens, play rooms, and children's bedrooms.

Multi-family dwelling–A building that has more than one residential dwelling unit.

OSHA–The Occupational Safety and Health Administration of the United States Department of Labor.

Permanently covered soil–Soil which has been separated from human contact by the placement of a barrier consisting of solid, relatively impermeable materials, such as pavement or concrete. Grass, mulch, and other landscaping materials are not considered permanent covering.

Person–An individual, corporation, company, contractor, subcontractor, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, governmental entity, or any other association of individuals.

Principal instructor–The individual who has the primary responsibility for organizing and teaching a particular course.

Recognized laboratory–An environmental laboratory recognized by EPA, pursuant to the Toxic Substances Control Act (TSCA) §405(b), as being capable of performing an analysis for lead content in materials, including paint, soil, and dust.

Residential dwelling–A dwelling that is:

(A) a detached single family dwelling unit, including attached structures such as porches and stoops; or

(B) a single family dwelling unit in a structure that contains more than one separate residential dwelling unit, which is used or occupied, or intended to be used or occupied, in whole or in part, as the home or residence of one or more persons.

Risk assessment–An assessment consists of:

(A) an on-site investigation conducted by a certified risk assessor to determine the existence, nature, severity, and location of lead-based paint hazards; and

(B) a report by the person or the firm conducting the risk assessment, explaining the results of the investigation and options for reducing lead-based paint hazards.

Room–An enclosed or semi-enclosed living space within a residential dwelling.

Target housing–Any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is younger than six years of age resides or is expected to reside in such housing) or any 0-bedroom dwelling. As defined in this section, target housing includes the terms residential dwelling, multi-family dwelling, and unit.

Training curriculum–An established set of course topics for instruction in an accredited training program for a particular discipline designed to provide specialized knowledge and skills.

Training hour–At least 50 minutes of actual teaching, including, but not limited to, time devoted to lecture, learning activities, small group activities, demonstrations, evaluations, and/or hands-on experience.

Training manager–The individual responsible for administering a training program and monitoring the performance of principal instructors and guest instructors.

Unit–A room or connected group of rooms used or intended to be used by a single tenant or owner.

Visual inspection for clearance testing–The visual examination of a residential dwelling or a room following an abatement to determine whether or not the abatement has been successfully completed, as indicated by the absence of visible residue, dust, and debris.

Visual inspection for risk assessment–The visual examination of a residential dwelling or a room to determine the existence of deteriorated lead-based paint or other potential sources of lead-based paint hazards.

X-Ray Fluorescence Analyzer (XRF)–An instrument used to determine the concentration of lead in a sample; readings are in milligrams per square centimeter (mg/cm^2).

§295.203. Federal Guidelines.

(a) The following federal guidelines provide additional information for conducting lead-based paint activities:

(1) United States Department of Housing and Urban Development (HUD), titled "Guidelines for the Evaluation and Control of Lead-based Paint Hazards in Housing", June 1995, issued pursuant to Section 1017 of the Residential Lead-Based Paint Hazard Reduction Act of 1992;

(2) "Guidance on Residential Lead-Based Paint, Lead-Contaminated Dust, and Lead-Contaminated Soil", Environmental Protection Agency, 60 *Federal Register* 47248 (1995); and

(3) "Residential Sampling for Lead: Protocols for Dust and Soil Sampling", EPA, EPA report number 747-R-95-001 (March 1995).

(b) Copies of the documents in subsection (a) of this section are available for review at any department-accredited training provider or the Texas Department of Health, Division of Occupational Health, Austin, Texas, and may be reviewed during normal business hours.

§295.204. Accreditation of Training Program Providers.

(a) Accreditation requirement.

(1) A training program provider may seek accreditation from the department to offer courses in any of the following disciplines:

(A) inspector;

(B) risk assessor;

(C) supervisor;

(D) project designer; and

(E) worker.

(2) A training program provider may also seek accreditation to offer refresher courses for each of the disciplines listed in paragraph (1) of this subsection.

(3) A training program provider shall not provide, offer, or claim to provide department-accredited training courses without applying for and receiving accreditation from the department as required under subsection (c) of this section.

(b) Fee. An annual fee for lead training program provider accreditation shall be $500. The fee payment must accompany the application. After accreditation the fee shall be paid in full each year on or before the day of the month of the expiration date given on the certificate.

(c) Application process. The following are procedures a training program provider shall follow to receive department accreditation to offer lead-based paint activities courses.

(1) A training program provider seeking accreditation shall submit a written application to the department containing the following information:

(A) the training program provider's name, address, and telephone number;

(B) a list of courses for which the training provider is applying;

(C) a statement signed by the training program manager certifying that the training program meets the minimum requirements established in this section. If a training program provider uses EPA-developed model training materials, the training program manager shall include a statement certifying that, as well. If a training program provider does not use EPA-developed or department-developed training materials, its application for accreditation shall include:

(i) a copy of the student and instructor manuals to be used for each course; and

(ii) a copy of the course agenda for each course, which must include the time allotted for teaching each course topic.

(2) All training program providers shall include in their application for accreditation the following:

(A) a description of the facilities and equipment available for lecture and hands-on training;

(B) a copy of the course test blueprint for each course;

(C) a description of the activities and procedures that will be used for conducting the assessment of hands-on skills for each course;

(D) a copy of the quality control plan as described in subsection (d)(9) of this section; and

(E) a statement certifying compliance with §295.203(b) of this title (relating to Federal Guidelines).

(3) The department shall approve or disapprove an application for accreditation no more than 30 days after receiving a complete application from a training program provider. In the case of approval, a certificate of accreditation shall be sent to the applicant within 60 days of the applicant meeting all accreditation requirements and receipt of all acceptable documents at the department. In the case of disapproval, a letter describing the reasons for disapproval shall be sent to the applicant. Prior to disapproval, the department may, at its discretion, work with training program providers to address inadequacies in the application for accreditation. If necessary to determine compliance with this subsection the department may also request additional materials retained by the training program provider under paragraph (1) of this subsection. If a training program provider's application is disapproved, the program may reapply for accreditation at any time by following the procedures in subsections (b) and (c) of this section.

(4) A training program provider may apply for accreditation to offer courses or refresher courses in as many training disciplines as it chooses. A training program provider may seek accreditation for additional courses at any time as long as the program can demonstrate that it meets the requirements of this section.

(d) Minimum requirements for the accreditation of training program providers. For a training program provider to obtain accreditation from the department to offer courses in lead-based paint activities, the program shall meet the following minimum requirements for each discipline for which the program is seeking accreditation.

(1) The training program provider shall employ a training manager who has:

(A) at least one year of experience in managing an occupational health and safety training program specializing in environmental hazards; and at least two years of experience, education, or training in teaching adults; or

(B) a bachelor's or graduate degree in building construction technology, engineering, industrial hygiene, safety, public health, education, or business administration or program management; or

(C) two years of experience in managing an occupational health and safety training program specializing in environmental hazards.

(2) The training program manager shall designate a qualified principal instructor for each course who has:

(A) demonstrated experience, education, or training in teaching workers/adults;

(B) successfully completed at least 24 hours of instruction from a trainer utilizing the EPA model course curriculum; or at least 24 hours of lead-specific training from a department-accredited training provider; and

(C) at least one year of experience in a lead discipline.

(3) The principal instructor shall be responsible for the organization of the course and oversight of the teaching of all course material. The training program manager may designate guest instructors as needed to provide instruction specific to the lecture, hands-on activities, or work practice components of a course.

(4) The following documents shall be recognized by the department as proof that training managers and principal instructors meet the relevant education, work experience, and/or training requirements specifically listed in paragraphs (1) and (2) of this subsection. This documentation need not be submitted with the accreditation application, but shall be retained and verified by the training program provider as required by the recordkeeping requirements contained at subsection (j) of this section. Those documents include the following:

(A) official academic transcripts, as proof of meeting the education requirements;

(B) resumes, letters of reference, or documentation of work experience, as records of meeting the work experience requirements; and

(C) certificates from train-the-trainer courses and lead-specific training courses, as proof of meeting the training requirements.

(5) The training program provider shall ensure the availability of and provide adequate facilities for the delivery of the lecture, course test, hands-on training, and assessment activities. This includes providing training equipment that reflects current work practices and maintaining or updating the equipment and facilities as needed.

(6) To become accredited in the following disciplines, the training program provider shall provide training courses that meet the following training hour requirements.

(A) The inspector course shall last a minimum of 24 training hours, with a minimum of eight hours devoted to hands-on training. The curriculum for the inspector course is contained in subsection (e)(1) of this section.

(B) The risk assessor course shall last a minimum of 16 training hours. The curriculum for the risk assessor course is contained in subsection (e)(2) of this section, and must include at least four hours of hands-on training activities.

(C) The supervisor course shall last a minimum of 32 training hours, with a minimum of eight hours devoted to hands-on activities. The curriculum for the supervisor course is contained in subsection (e)(3) of this section.

(D) The project designer course shall last a minimum of eight training hours. The curriculum for the project designer course is contained in subsection (e)(4) of this section.

(E) The lead abatement worker course shall last a minimum of 16 training hours, with a minimum of eight hours devoted to hands-on training activities. The curriculum for the worker course is contained in subsection (e)(5) of this section.

(7) For each course offered, the training program provider shall conduct a course test and a hands-on skills assessment at the completion of the course. Each individual must successfully complete the hands-on skills assessment and receive a passing score of 70% or above on the course test to pass any course.

(A) The training manager is responsible for maintaining the validity and integrity of the hands-on skills assessment to ensure that it accurately evaluates the trainees' performance of the work practices and procedures associated with the course topics contained in subsection (e) of this section.

(B) The training manager is responsible for maintaining the validity and integrity of the course test to ensure that it accurately evaluates the trainees' knowledge and retention of the course topics.

(C) The course test shall be developed in accordance with the test blueprint submitted with the training accreditation application.

(8) Training program providers shall issue unique course completion certificates to each individual who passes the training course. The course completion certificate shall include:

(A) the name and a unique identification number or social security number of the individual;

(B) the name of the particular course that the individual completed;

(C) the date of course completion;

(D) the expiration date of training certification, which shall be one year from the date of course completion; and

(E) the name, address, and telephone number of the training program provider.

(9) The training manager shall develop and implement a quality control plan. The plan shall be used to maintain and improve the quality of the training program over time. This plan shall contain at least the following elements:

(A) procedures for periodic revision of training materials and the course test to reflect innovations in the field; and

(B) procedures for the training manager's annual review of instructor competency.

(10) Training program providers must offer courses which teach the standards for conducting lead-based paint activities contained in §295.212 of this title (relating to Standards for Conducting Lead-Based Paint Activities), and other such standards adopted by the department. These standards shall be taught in the appropriate courses to provide trainees with the knowledge needed to perform the lead-based paint activities they are responsible for conducting.

(11) The training manager shall be responsible for ensuring that the training program complies at all times with all of the requirements in subsection (e) of this section.

(12) The department may audit the training program provider to verify the contents of the application for accreditation as described in subsection (c) of this section.

(13) If the applicant is a Texas corporation, a certificate of good standing issued by the Texas State Comptroller's Office must be submitted with the application for accreditation.

(e) Minimum training curriculum requirements. To become accredited to offer lead-based paint activities instruction in the specific disciplines listed in paragraphs (1)-(5) of this subsection, training program providers must ensure that their courses of study include the following course topics. Requirements beginning with an asterisk (*) indicate areas that require hands-on activities as an integral component of the course.

(1) Inspector instruction:

(A) role and responsibilities of inspector;

(B) background information on lead and its adverse health effects;

(C) background information on Federal, State, and local regulations that pertain to lead-based paint;

(D) *lead-based paint inspection methods, including selection of components for sampling or testing;

(E) *paint, dust, and soil sampling methodologies;

(F) *clearance standards and testing, including random sampling;

(G) *formulation and implementation of the final inspection report; and

(H) recordkeeping.

(2) Risk assessor instruction:

(A) role and responsibilities of the risk assessor;

(B) collection of background information to perform a risk assessment;

(C) sources of environmental lead contamination such as paint, surface dust and soil, water, air, packaging, and food;

(D) *visual inspection for the purposes of identifying lead-based paint, lead-contaminated dust, and lead-contaminated soil;

(F) lead hazard screen protocol;

(F) *sampling for other sources of lead exposure;

(G) *interpretation of lead-based paint and other lead sampling results;

(H) development of hazard control options, the role of interim controls, and operations and maintenance to reduce lead hazards; and

(I) preparation of a final risk assessment report.

(3) Supervisor instruction:

(A) role and responsibilities of the supervisor;

(B) background information on lead and its adverse health effects;

(C) background information on Federal, State, and local regulations that pertain to lead-based paint abatement;

(D) liability and insurance issues relating to lead-based paint abatement;

(E) contract specifications and cost estimation;

(F) community relations;

(G) project management and supervisory techniques;

(H) *risk assessment and inspection report interpretation;

(I) development and implementation of an occupant protection plan;

(J) *hazard recognition and control;

(K) *lead-based paint abatement and lead hazard reduction methods, including restricted practices;

(L) *interior dust abatement/cleanup or lead hazard control and reduction methods;

(M) *soil and exterior dust abatement or lead hazard control and reduction methods;

(N) clearance standards and testing;

(O) cleanup and waste disposal; and

(P) recordkeeping.

(4) Project designer instruction:

(A) role and responsibilities of project designer;

(B) contract specifications and cost estimation for abatement projects of ten units or larger;

(C) development and implementation of an occupant protection plan for abatement projects of ten units or larger;

(D) lead-based paint abatement and lead hazard reduction methods, including restricted practices for abatement projects of ten units or larger;

(E) interior dust abatement/cleanup or lead hazard control and reduction methods for abatement projects of ten units or larger;

(F) clearance standards and testing for abatement projects of ten units or larger; and

(G) integration of lead-based paint abatement methods with modernization and rehabilitation projects for abatement projects of ten units or larger.

(5) Lead abatement worker instruction:

(A) role and responsibilities of lead abatement worker;

(B) background information on lead and its adverse health effects;

(C) background information on Federal, State and local regulations that pertain to lead-based paint abatement;

(D) *hazard recognition and control;

(E) *lead-based paint abatement and lead hazard reduction methods, including restricted practices;

(F) *interior dust abatement methods/cleanup or lead hazard reduction; and

(G) *soil and exterior dust abatement methods or lead hazard reduction.

(f) Minimum requirements for the accreditation of refresher training program providers. A training program provider may apply for accreditation to teach as many different refresher training courses as it chooses. To teach an accredited refresher course, a training program provider must be accredited, or concurrently applying for accreditation, to provide instruction in the corresponding full course (e.g., lead-based paint inspector, abatement supervisor). To obtain

department accreditation to offer refresher training, a training program provider must meet the following minimum requirements.

(1) An accredited refresher training course for each discipline shall address the following topics:

(A) an overview of current safety practices relating to lead-based paint activities in general as well as discipline specific information;

(B) current laws and regulations relating to lead-based paint activities in general as well as discipline specific information; and

(C) current technologies relating to lead-based paint activities in general as well as discipline specific information.

(2) The course shall last a minimum of eight training hours.

(3) Each student shall be required to pass a course test that covers all of the topics contained in the course. Passing students shall be provided with a refresher course completion certificate.

(4) A training program provider seeking refresher course accreditation shall submit to the department a written application containing the following:

(A) the training program provider's name, address, and telephone number;

(B) a list of the refresher courses for which it is applying for accreditation;

(C) a copy of student and instructor manuals for the course; and

(D) a statement signed by the training program manager certifying that the program complies at all times with all requirements in this subsection.

(5) If a training program provider applies for accreditation of a refresher course concurrently with its application for accreditation of the corresponding training course, the department shall use the approval procedure described in subsection (c) of this section.

(6) If an application for refresher training accreditation is received apart from an application for accreditation as described in subsection (c) of this section, the department shall approve or disapprove a request for refresher training accreditation within 30 days of receiving a complete application. In the case of approval, a certificate of refresher training accreditation shall be sent to the applicant within 60 days of the applicant meeting all accreditation requirements and receipt of all acceptable documents at the department. In the case of disapproval, a letter describing the reasons for disapproval shall be sent to the applicant. The department may, at its discretion, work with training program providers to address inadequacies in the application for refresher accreditation. If a training program provider's application is disapproved, the training program provider may reapply at any time after the reason for disapproval has been corrected.

(g) Re-accreditation of training programs.

(1) Unless re-accredited, a training program provider's accreditation shall expire three years after the date of issuance. If a training program meets the requirements of this section, the training program provider shall be re-accredited.

(2) A training program provider seeking re-accreditation shall submit an application to the department no later than 60 days before its accreditation expires. If a training program provider does not submit its application for re-accreditation by that date, the department cannot guarantee the application will be reviewed and acted upon before the end of the provider's accreditation period.

(3) The training program provider's application for re-accreditation shall contain:

(A) the training program provider's name, address, and telephone number;

(B) a list of courses for which it is applying for re-accreditation;

(C) a description of any changes or updates to the training facility or equipment since its last application was approved; and

(D) a certified statement signed by the program manager stating:

(i) the training program provider complies at all times with all requirements in subsection (d) of this section; and

(ii) the recordkeeping and reporting requirements of subsection (j) of this section will be followed.

(4) The department may audit the training program provider to verify the contents of the application for re-accreditation as described in paragraph (3) of this subsection.

(h) Suspension, deaccreditation, and modification of accredited training programs.

(1) The department may, after notice and an opportunity for hearing, suspend, deaccredit, or modify training program accreditation if a training program, training manager, or other person with supervisory authority over the training program has:

(A) misrepresented the contents of a training course to the department and/or the student population;

(B) failed to submit required information or notifications in a timely manner;

(C) failed to maintain required records;

(D) falsified accreditation records, instructor qualifications, or other accreditation information;

(E) failed to comply with the training standards and requirements in this section;

(F) failed to comply with Federal, State, or local lead-based paint statutes or regulations; or

(G) made false or misleading statements to the department in its application for accreditation or re-accreditation which the department relied upon in approving the application.

(2) In addition to an administrative or judicial finding of violation, execution of a consent agreement in settlement of an enforcement action constitutes, for purposes of this subsection, evidence of a failure to comply with relevant statutes or regulations.

(i) Procedures for suspension, deaccreditation or modification of training program accreditation.

(1) When the department decides to suspend, deaccredit, or modify the accreditation of a training program, it shall notify the affected entity in writing of the following:

(A) the assertion of laws and facts upon which the suspension, deaccreditation, or modification is based;

(B) the commencement date and duration of the suspension, deaccreditation, or modification;

(C) actions, if any, which the affected entity may take to avoid suspension, deaccreditation, or modification, or to receive accreditation in the future;

(D) the opportunity and method for requesting a hearing prior to final departmental action to deaccredit, or suspend or modify accreditation; and

(E) any additional information, as appropriate, which the department may provide.

(2) If a hearing is requested by the accredited training program pursuant to subsection (h)(1) of this section, the person charged shall be given the opportunity for a hearing conducted in accordance with the department's informal hearing procedures in Chapter 1 of this title (relating to the Board of Health).

(j) Training program recordkeeping requirements.

(1) Accredited training program providers shall maintain and make available to the department, if requested, the following records:

(A) all documents specified in subsection (d)(4) of this section that demonstrate the qualifications listed in subsection (d)(1) and (2) of this section of the training manager and principal instructors;

(B) current curriculum/course materials and documents reflecting any changes made to these materials;

(C) the course test blueprint;

(D) information on how the hands-on assessment is conducted including, but not limited to, who conducts the assessment, how the skills are graded, what facilities are used, and the pass/fail rate;

(E) the quality control plan as described in subsection (d)(9) of this section;

(F) results of the students' hands-on skills assessments and course tests, and a record of each student's course completion certificate and test passage date; and

(G) any other material not listed in subparagraphs (A)-(F) of this paragraph that was submitted to the department as part of the program's application for accreditation.

(2) The training program shall retain the records required by paragraph (1) of this subsection at the location (i.e., address) specified on the training program accreditation application (or as modified in accordance with paragraph (3) of this subsection) for a minimum of three years and six months.

(3) The training program shall notify the department in writing within 30 days of relocating its business or transferring the records.

§295.205. Certification: Applications and Renewals.

(a) General requirements. Applications for certification under these sections must be made on forms provided by the Texas Department of Health (department), shall be signed by the applicant, and must be accompanied by a cashier check or money order for the amount of the certification or certification renewal fee. Only applications which are complete shall be considered by the department; the burden of proof for all requirements for certification rests with the applicant. For specific requirements for the various certification disciplines, refer to the sections of this undesignated head relating to certification requirements.

(b) Inquiries. Potential applicants who wish to discuss or obtain information concerning qualification requirements may do so by calling the department's Environmental Lead Program at (512) 834-6600 or (800) 572-5548.

(c) Denials. The department may deny an application for certification (applicants may not reapply for the time periods specified) to those who fail to meet the standards established by these sections, including, but not limited to:

(1) past history of assessed penalties from violations of these sections by the applicant and/or the applicant's employees or agents-three years;

(2) evidence that the applicant cannot be legally employed in the United States-90 days;

(3) fraud, misrepresentation, or deception in obtaining, attempting to obtain, or renewing a certificate-three years;

(4) failure to submit the required information and/or documentation within 90 days of a written request by the department-90 days;

(5) failure to submit the required fee-90 days;

(6) failure to maintain or to permit inspection of the records required of all certified persons-one year;

(7) employing or permitting an unauthorized person or individual to work on any lead project or operation-one year;

(8) engaging in or attempting to engage in an lead-related activity without a valid certification-three years;

(9) failure to comply with any rule adopted by the board or order issued by the department-three years;

(10) failure to provide notice of a lead project or operation as required by these sections-two years;

(11) conviction within the past five years of a felony or a misdemeanor related to conditions for which a person engaged in lead activities-three years;

(12) failure of a certified person to complete their responsibilities during a lead project or operation due to insufficient financial resources-three years;

(13) failure to prevent lead contamination of areas adjacent to the abatement area-three years; or

(14) failure to decontaminate any part of target housing or its environment, or any persons inadvertently contaminated with lead as a result of the persons' actions while exercising their duties under these sections-three years.

(d) Administrative penalty. In accordance with §295.220 of this title (relating to Compliance: Administrative Penalty) an administrative penalty may be assessed, for fraud or misrepresentation in obtaining, attempting to obtain, or renewing a certification.

(e) Processing applications and renewals.

(1) Time periods. Applications for certification shall be processed in accordance with the following time periods: the time from the receipt of a written application to the date of issuance of a written notice outlining the reasons why the application is unacceptable is 60 days; the certification will be issued within 90 days of the applicant meeting all the certification requirements and receipt of all acceptable documents at the department.

(2) Reimbursement of fees. Initial application or renewal fees will be refunded only when the department does not process a completed application in the time period specified. If fee amounts are in excess of the correct fee amount, the excess payment will be reimbursed. Otherwise, fees for applications and renewals are not eligible for refund.

(A) Denial of an application, failure to qualify, or abandonment of the application do not constitute grounds for reimbursement. Abandonment is defined as failure to respond to a written request of the department by the applicant for a period of 90 days.

(B) A denial of an application or a request for renewal may be appealed by the applicant. The details for requesting a hearing are included in each letter of denial.

(3) Appeal. If the request for full reimbursement authorized by this subsection is denied, the applicant may then appeal to the commissioner of health for a resolution of the dispute. The applicant shall give written notice to the commissioner by writing to the administrator, lead certification program, the designated representative of the commissioner, requesting full reimbursement of all filing fees paid because his/her application was not processed within the prescribed time period. The program administrator shall submit a written report of the facts related to the processing of the application and good cause for exceeding the established time periods. The commissioner will determine the final action and provide written notification of his/her decision to the applicant and the program administrator.

(4) Contested case hearing. If at any time during the processing of the application, a contested case proceeding arises, the time periods in the department's formal hearing procedures, §1.34 of 25 TAC (Texas Administrative Code) (relating to Time Periods for Conducting Contested Case Hearings), are applicable.

(f) Renewal notices. At least 30 days before a certificate expires, the department, as a service to the certified person, shall send a renewal notice to the certified person, by first-class mail to the last known address of the certified person. It remains the responsibility of the certified person to keep the department informed of their current address, or change of address for all certification categories, and to take action to renew their certificate whether or not they have received the notification from the department. The renewal notice will state:

(1) the type of certification requiring renewal;

(2) the time period allowed for renewal; and

(3) the amount of the renewal fee.

(g) Renewal requirements. No sooner than 60 days before the certification expires, the certification may be renewed for an additional three-year term providing that the person:

(1) is qualified to be certified;

(2) pays to the department the proper amount of the nonrefundable renewal fee;

(3) submits to the department a renewal application on the prescribed form along with all required documentation;

(4) completes successfully the requirements for renewal and examination, if required;

(5) has complied with all final orders resulting from any violations of these sections; and

(6) submits a copy of the required refresher training course certificates, if required.

(h) Prohibition. To practice with a lapsed certificate is prohibited, regardless of when the renewal application is received. Also, certificates which have lapsed for a period exceeding 180 days cannot otherwise be renewed. A new application subject to current qualifications is required.

(i) Replacements. A certified person may obtain a replacement certificate by submitting such request in writing along with the reissuance fee of $20.

(j) Retention of control. The department may, at any time after the filing of any application and before the expiration of any certification, require:

(1) additional written information and assurances; and

(2) cooperation with any inspections initiated by the department, or the production of any documentary or other evidence that the department considers necessary to determine whether the certification should be granted, delayed, denied, modified, suspended or revoked.

§295.206. Inspector: Certification Requirements.

(a) Certification requirements. A person must be certified as a lead inspector to engage in lead inspection of target housing. Such certification is valid for a period of three years from the date the certificate application is approved by the department.

(b) Application for renewal. To become re-certified, the inspector must complete an inspector refresher training course prior to the inspector's certificate expiration date and follow the procedures contained in §295.205 of this title (relating to Certification: Applications and Renewals).

(c) Specific requirements.

(1) Applicants for certification as lead inspectors are required to successfully complete and receive a course completion certificate from a state-accredited training provider.

(2) No additional educational requirement or experience is required.

(3) Interim certification will be granted upon receipt of a complete application and fee, and shall expire within six months, or upon issuance or denial of department certification.

(4) Certification issued by the state shall be valid for three years.

(5) Any individual can fulfill the requirements of paragraph (1) of this subsection by showing proof of the successful completion, between October 1, 1990, and August 1996, of a lead inspector training course which utilized the Environmental Protection Agency model course curriculum.

(d) Responsibilities. The responsibilities of the certified lead inspector are as follows:

(1) conduct post-abatement soil and dust clearance testing following procedures in §295.212 of this title (relating to Standards for Conducting Lead-Based Paint Activities);

(2) conduct lead-based paint inspections of target housing that measure the concentration of lead in paint on a surface-by-surface basis; and

(3) complete an inspection report.

(e) Fees. An annual fee for lead inspector certification shall be $150. The fee must accompany the certification application. After certification the fee shall be paid in full each year on or before the day of the month of the expiration date given on the certificate.

§295.207. Risk Assessor: Certification Requirements.

(a) Certification requirements. A person must be certified as a lead risk assessor to engage in lead risk assessment of target housing. Such certification is valid for a period of three years from the date the certificate application is approved.

(b) Application for renewal. To become re-certified, the risk assessor must complete a refresher training course prior to the risk assessor's certificate expiration date and follow the procedures contained in §295.205 of this title (relating to Certification: Applications and Renewals).

(c) Specific requirements.

(1) Applicants for certification as lead risk assessors are required to:

(A) successfully complete and receive a course completion certificate from a department-accredited training provider;

(B) meet or exceed the following additional experiences and/or education requirements:

(i) bachelor's degree and one year of experience in a related field (e.g. lead, asbestos, public health, or environmental remediation work); or

(ii) certification as an industrial hygienist, an engineer, a public health nurse, a professional registered sanitarian, a certified safety professional, a registered architect, or an environmental scientist; or

(iii) a high school diploma (or equivalent), plus at least three years of experience in a related field.

(2) Interim certification will be granted upon receipt of a complete application and fee, and shall expire within six months, or upon issuance or denial of department certification.

(3) Certification issued by the department shall be valid for three years.

(4) Any individual can fulfill the requirements of paragraph (1)(A) of this subsection by showing proof of the successful completion, between October 1, 1990, and August 1996, of a lead inspector training course and a lead risk assessor training course which utilized the Environmental Protection Agency model course curriculum.

(d) Responsibilities. The responsibilities of the certified lead risk assessor are as follows:

(1) conducting a risk assessment and other lead hazard assessment activities (such as screening a residence for lead hazard) in target housing;

(2) completing a risk assessment report;

(3) interpreting the results of assessments;

(4) identifying hazard control strategies to reduce or eliminate lead exposures; and

(5) conducting post-abatement soil and dust clearance sampling and evaluating the results.

(e) Fees. An annual fee for lead risk assessor certification shall be $300. The fee must accompany the certification application. After certification the fee shall be paid in full each year on or before the day of the month of the expiration date given on the certificate.

§295.208. Lead Abatement Supervisor: Certification Requirements.

(a) Certification requirements. A person must be certified as a lead abatement supervisor to engage in such activity in target housing. Such certification shall be valid for a period of three years from the date the certificate application is approved by the department.

(b) Application for renewal. To become re-certified, the lead abatement supervisor must complete a supervisor refresher training course prior to the supervisor's certificate expiration date and follow the procedures contained in §295.205 of this title (relating to Certification: Applications and Renewals).

(c) Specific requirements.

(1) Applicants for certification as lead abatement supervisors are required to:

(A) successfully complete a lead supervisor training course and receive a course completion certificate from a department-accredited training provider; and

(B) meet or exceed the following additional experiences and/or education requirements:

(i) one year of experience as a lead abatement worker; or

(ii) at least two years experience in a related field (e.g. asbestos or environmental remediation work), or in the building trades.

(2) Interim certification will be granted upon receipt of a complete application and fee, and shall expire within six months, or upon issuance or denial of department certification.

(3) Certification issued by the department shall be valid for three years.

(4) Any individual can fulfill the requirements of paragraph (1)(A) of this subsection by showing proof of the successful completion, between October 1, 1990, and August 1996, of a lead supervisor training course which utilized the Environmental Protection Agency model course curriculum.

(d) Responsibilities. The responsibilities of the certified lead abatement supervisor are to:

(1) determine the most appropriate course of action to eliminate identified lead hazards;

(2) ensure that all abatement activities in target housing are completed according to the standards outlined in §295.212 of this title (relating to Standards for Conducting Lead-Based Paint Activities);

(3) supply personal protection equipment to employees and to train employees who perform lead-related activities in the use of equipment, and to supervise their compliance;

(4) ensure that abatement activities are conducted in accordance with regulatory requirements;

(5) in projects involving the abatement of less than ten units, develop a written pre-abatement plan and an abatement report for each assigned unit;

(6) maintain accessibility at all times when abatement activities are being conducted;

(7) ensure completion of all abatement activities according to these sections;

(8) assume the duties of lead abatement workers or perform activities affecting lead materials;

(9) cooperate with department personnel in the discharge of their official duties to conduct inspections and investigations, as described in §295.218 of this title (relating to Compliance: Inspection and Investigations); and

(10) maintain standards of operation, including Environmental Protection Agency (EPA) and Occupational Safety and Health Administration of the United States Department of Labor (OSHA) regulations.

(e) Fees. An annual fee for lead supervisor certification shall be $150. The fee must accompany the certification application. After certification the fee shall be paid in full each year on or before the day of the month of the expiration date given on the certificate.

§295.209. Project Designer: Certification Requirements.

(a) Certification requirements. A person must be certified as a lead project designer to engage in such activity in target housing. Such certification shall be valid for a period of three years from the date the certificate application is approved by the department.

(b) Application for renewal. To become re-certified, the project designer must complete a refresher training course prior to the project designer's certificate expiration date and follow the procedures contained in §295.205 of this title (relating to Certification: Applications and Renewals).

(c) Specific requirements.

(1) Applicants for certification as a lead abatement project designer are required to:

(A) successfully complete a lead project designer training course and receive a course completion certificate from a department-accredited training program; and

(B) meet or exceed the following additional experiences and/or education requirements:

(i) a Bachelor's degree in engineering, architecture, or a related profession, and one year of experience in building construction and design or a related field; or

(ii) four years of experience in building construction design or a related field.

(2) Interim certification will be granted upon receipt of a complete application and fee, and shall expire within six months, or upon issuance or denial of department certification.

(3) Certification issued by the department shall be valid for three years.

(4) Any individual can fulfill the requirements of paragraph (1)(A) of this subsection by showing proof of the successful completion, between October 1, 1990, and August 1996, of a lead abatement project designer training course which utilized the Environmental Protection Agency model course curriculum.

(d) Responsibilities. The responsibilities of the certified lead abatement project designer are to:

(1) comply with standards of operation, including EPA and OSHA regulations;

(2) conduct abatement activities in accordance with the procedures and requirements of the pre-abatement plan; and

(3) cooperate with department personnel in the discharge of their official duties to conduct inspections and investigations, as described in §295.218 of this title (relating to Compliance: Inspections and Investigations).

(e) Fees. An annual fee for lead project designer certification shall be $300. The fee must accompany the certification application. After certification the fee shall be paid in full each year on or before the day of the month of the expiration date given on the certificate.

§295.210. Lead Abatement Worker: Certification Requirements.

(a) Certification requirements. A person must be certified as a lead abatement worker to engage in such activity in target housing. Such certification shall be valid for period of three years from the date the certificate application is approved by the department.

(b) Application for renewal. To become re-certified, the lead abatement worker must complete a refresher training course prior to the worker's certificate expiration date and follow the procedures contained in §295.205 of this title (relating to Certification: Applications and Renewals).

(c) Specific requirements.

(1) Applicants for certification as lead abatement workers are required to successfully complete a lead abatement worker training course and receive a course completion certificate from a department-accredited training program.

(2) No additional educational requirement or experience is specified.

(3) Interim certification will be granted upon receipt of a complete application and fee, and shall expire within six months, or upon issuance or denial of department certification.

(4) Certification issued by the department shall be valid for three years.

(5) Any individual can fulfill the requirements of paragraph (1) of this subsection by showing proof of the successful completion, between October 1, 1990, and August 1996, of a lead abatement worker training course which utilized the Environmental Protection Agency model course curriculum.

(d) Fees. An annual fee for lead worker certification shall be $50. The fee must accompany the certification application. After certification the fee shall be paid in full each year on or before the day of the month of the expiration date given on the certificate.

§295.211. Firms: Certification Requirements.

(a) Certification requirements. All firms engaged in or offering to perform lead-based paint activities must be certified by the department.

(b) Application for renewal. To maintain certification, the firm must seek re-certification by submitting an application to the department no later than 30 days before its certification expires. If the certified firm does not submit its application for re-certification by that date, the department cannot guarantee that the application will be reviewed and acted upon before the end of the firm's certification period.

(c) Specific requirements.

(1) A firm seeking certification shall submit to the department a letter signed by the firm's owner or an authorized agent of the firm certifying that the firm will:

(A) only employ certified employees to conduct lead-based paint activities; and

(B) follow the standards for conducting lead-based paint activities set out in §295.212 of this title (relating to Standards for Conducting Lead-Based Paint Activities).

(2) The firm shall maintain all records pursuant to the requirements in §295. 212 of the title.

(3) Interim certification will be granted upon receipt of a complete application and fee, and shall expire within six months, or upon issuance or denial of department certification.

(4) Certification issued by the state shall be valid for three years or upon subsequent recertification.

(d) Responsibilities. The responsibilities of a certified firm are:

(1) to comply with the standards of operation, including EPA and the Occupational Safety and Health Administration of the United States Department of Labor (OSHA) regulations;

(2) to provide required notification to the department about impending abatement projects, changes requiring re-notification, and emergency notifications, as described in §295.214 of this title (relating to Notifications);

(3) to supply and train employees who perform lead-based paint abatement activities in the use of personal protection equipment, and to supervise their compliance;

(4) to maintain the current training status of each employee and the annual physical examination; and

(5) to assist department personnel in the discharge of their official duties to conduct inspections and investigations, as described in §295.218 of this section (relating to Compliance: Inspections and Investigations).

(e) Fees. An annual fee for lead firm certification shall be $500. The fee must accompany the certification application. After certification the fee shall be paid in full each year on or before the day of the month of the expiration date given on the certificate.

§295.212. Standards for Conducting Lead-Based Paint Activities.

(a) Inspection.

(1) Lead-based paint inspections shall be conducted only by persons certified by the department as an inspector or risk assessor and must be conducted according to the procedures in this section.

(2) When conducting an inspection, the following locations shall be tested for the presence of lead-based paint.

(A) For every residential dwelling, each component with a distinct painting history in every room, and each exterior component with a distinct painting history shall be tested for lead-based paint, except those components that the inspector or risk assessor determines to have been replaced after 1978, or to not contain lead-based paint.

(B) If conducting an inspection in a multi-family dwelling, all components with a distinct painting history in every common area, except those components that the inspector or risk assessor determines to have been replaced after 1978, or to not contain lead-based paint.

(3) The collection and analysis of paint samples to determine the presence of lead-based paint shall be conducted using documented methodologies which incorporate adequate quality control procedures.

(4) The certified inspector shall prepare an inspection report which shall include the following information:

(A) date of inspection;

(B) address of buildings and units;

(C) date of construction of buildings and units;

(D) unit numbers (if applicable);

(E) name, address, and telephone number of the owner of buildings and units;

(F) name, signature, and certification number of each certified inspector and/or risk assessor conducting testing;

(G) name, address, and telephone number of the certified firm employing each inspector and/or risk assessor;

(H) name, address, and telephone number of each recognized laboratory conducting an analysis of collected samples;

(I) each testing method and device and/or sampling procedure employed for paint analysis, including quality control data and, if used, the serial number of any XRF device;

(J) specific locations of each painted component tested for the presence of lead-based paint; and

(K) the results of the inspection expressed according to the sampling method used.

(b) Lead hazard screen.

(1) A lead hazard screen shall be conducted only by persons certified by the department as a risk assessor.

(2) If conducted, a lead hazard screen shall be conducted as follows.

(A) A visual inspection of the residential dwelling and common area shall be conducted to:

(i) determine if any deteriorated paint is present; and

(ii) locate at least two dust sampling locations.

(B) If deteriorated paint is present, each representative surface with deteriorated paint shall be tested for the presence of lead-based paint.

(C) In residential dwellings, two composite dust samples shall be collected, one from the floors and the other from the windows, in rooms where one or more children, age six and under, are most likely to come in contact with dust.

(D) In multi-family dwellings, in addition to the floor and window samples required in subparagraph (C) of this paragraph, the risk assessor shall also collect composite dust samples from any common areas where one or more children are likely to come into contact with dust.

(3) Any paint and dust samples shall be taken using documented methodologies that incorporate adequate quality control procedures.

(4) Any collected paint chip or dust samples shall be analyzed according to subsection (e) of this section to determine if they contain detectable levels of lead that can be quantified numerically.

(5) The lead hazard screen is an indicator of the desirability for a risk assessment if:

(A) the lead levels for dust on floors or in windows is greater than one-half the applicable clearance levels for that component; or

(B) the analysis of the deteriorated paint samples establishes the presence of lead-based paint.

(6) The risk assessor shall prepare a risk assessment report, which shall include the following information:

(A) the information required in a risk assessment report as specified in subsection (c) of this section, excluding paragraphs (9)(O)-(R) of subsection (c); and

(B) recommendations concerning the desirability for follow-up risk assessments.

(c) Risk assessment.

(1) A risk assessment shall be conducted only by persons certified by the department as risk assessors and must be conducted according to the procedures in this subsection.

(2) A visual inspection for risk assessment of the residential dwelling shall be undertaken to locate the existence of deteriorated paint and other potential sources of lead-based paint hazards. If deteriorated paint or other potential sources of lead-based paint hazards are present, each surface with deteriorated paint or each painted surface which is a potential lead-based paint hazard shall be tested for the presence of lead.

(3) Background information shall be collected regarding the physical characteristics of the residential dwelling and occupant use patterns that may pose a lead-based paint exposure to one or more children younger than six years of age.

(4) In residential dwellings, dust samples (composite or single-surface samples) shall be collected in living areas where one or more children are most likely to come into contact with dust.

(5) For multi-family dwellings, the samples required in paragraph (4) of this subsection shall be taken. In addition, window and floor dust samples (composite or single-surface samples) shall be collected in the following locations:

(A) common areas adjacent to the sampled unit; and

(B) other common areas in the building that the risk assessor determines may pose a lead-based paint hazard to one or more children age six years and under.

(6) Soil samples shall be collected and analyzed for lead concentrations in the following locations:

(A) exterior play areas where bare soil is present; and

(B) dripline/foundation areas where bare soil is present.

(7) Any paint, dust, or soil samples shall be taken using documented methodologies that incorporate adequate quality control procedures.

(8) Any collected paint chip, dust, or soil samples shall be analyzed according to subsection (e) of this section to determine if they contain detectable levels of lead that can be quantified numerically.

(9) The certified risk assessor shall prepare a risk assessment report which shall include the following information:

(A) date of assessment;

(B) address of residential dwelling, multi-family dwelling, or unit;

(C) date of construction of residential dwelling, multi-family dwelling, or unit;

(D) unit numbers (if applicable);

(E) name, address, and telephone number of the owner of residences and buildings;

(F) name, signature, and certification number of the certified risk assessor conducting the assessment;

(G) name, address, and telephone number of the certified firm employing each risk assessor;

(H) name, address, and telephone number of each recognized laboratory conducting analysis of collected samples;

(I) results of the visual inspection;

(J) testing method and sampling procedure for paint analysis employed;

(K) specific locations of each painted component tested for the presence of lead-based paint;

(L) all data collected from on-site testing;

(M) all results of laboratory analysis on collected paint, soil, and dust samples;

(N) any other sampling results;

(O) any background information collected pursuant to paragraph (3) of this subsection;

(P) to the extent that they are used as part of the lead-based paint hazard determination, an evaluation of the adequacy of any previous inspections or analyses for the presence of lead-based paint, or other assessments of lead-related hazards;

(Q) a description of the location, type, and severity of identified lead-based paint hazards and any other potential lead hazards; and

(R) a description of recommended interim controls and/or abatement options for each identified lead-based paint hazard, and a suggested prioritization for taking each action based on the immediacy and severity of the hazard.

(d) Abatement.

(1) An abatement shall be conducted only by an individual certified by the department as a worker or supervisor, and if conducted, shall be conducted according to the procedures in this subsection.

(2) A certified supervisor is required for each abatement project and shall be onsite during all work site preparation and during the post-abatement cleanup of work areas. At all other times when abatement activities are being conducted, the certified supervisor shall be available either directly or through a pager or answering service, and able to be present at the work site in no more than two hours.

(3) The certified supervisor and the certified firm employing that supervisor shall ensure that all abatement activities are conducted according to the requirements of this subsection and all other Federal, State and local requirements.

(4) Notification of the commencement of lead-based paint abatement activities in multi-family dwellings or as a result of a Federal, State, or local order shall be given to the department, according to the procedures established in §295.214 of this title (relating to Notifications), prior to the commencement of abatement activities.

(5) A written occupant protection plan shall be developed for all abatement projects and shall be prepared according to the following procedures.

(A) The occupant protection plan shall be unique to each residential dwelling and developed prior to the abatement. The occupant protection plan shall describe the measures and management procedures that will be taken during the abatement to protect the building occupants from exposure to any lead-based paint hazards.

(B) A certified project designer shall prepare the occupant protection plan for projects in which ten or more residential dwellings will be abated. A certified supervisor or project designer shall prepare the occupant protection plan for projects in which fewer than ten residential dwellings will be abated.

(6) The following work practices shall be restricted during an abatement as follows.

(A) Open-flame burning or torching of lead-based paint is prohibited.

(B) Machine sanding or grinding or abrasive blasting or sandblasting of lead-based paint is prohibited unless used with High Efficiency Particulate Air (HEPA) exhaust control capable of removing particles of 0.3 microns or larger from the air at 99.97% or greater efficiency.

(C) Dry scraping of lead-based paint is permitted only in conjunction with heat guns or around electrical outlets or when treating defective paint spots totaling no more than three square feet in any one room or totaling no more than 20 square feet on exterior surfaces.

(D) Operating a heat gun on lead-based paint is permitted only at a temperature below 1,100 degrees Fahrenheit.

(7) If conducted, soil abatement shall be conducted in one of the following ways.

(A) If soil is removed, the lead-contaminated soil shall be replaced with non-contaminated soil.

(B) If soil is not removed, the lead-contaminated soil shall be permanently covered.

(8) The following post-abatement clearance procedures shall be performed by a certified inspector or risk assessor.

(A) Following an abatement, a visual inspection shall be performed to determine if deteriorated painted surfaces and/or visible amounts of dust are still present. If deteriorated painted surfaces or visible amounts of dust are present, these conditions must be eliminated prior to the continuation of the clearance procedures.

(B) Following the visual inspection, clearance sampling for dust shall also be conducted. Clearance sampling may be conducted by employing single-surface sampling or composite sampling techniques.

(C) Dust samples for clearance purposes shall be taken using documented methodologies that incorporate adequate quality control procedures.

(D) Dust samples for clearance purposes shall be taken a minimum of one hour after completion of final post-abatement clean-up activities.

(E) The following locations shall be sampled for lead-contaminated dust based upon the extent of abatement activities conducted in or on the target housing.

(i) After conducting an abatement with containment between abated and unabated areas, one sample shall be taken from one window (if available) and the floor of each room within the containment area. In addition, one sample shall be taken from the floor outside the containment area.

(ii) After conducting an abatement with no containment, two dust samples shall be taken from every room in the residential dwelling unit. One sample shall be taken from one window (if available) and the floor of each room.

(iii) Following an exterior paint abatement, at least two dust samples shall be taken from the closest horizontal surface in the outdoor living area, including but not limited to, a patio, deck, porch, sidewalk, or stoop. In addition, a visual inspection shall be conducted to determine the presence of paint chips in bare soil in common areas, on the dripline or next to the foundation below any abated exterior surface. If paint chips are present, they must be removed from the site and properly disposed, according to all applicable Federal, State and local requirements.

(F) The certified inspector or risk assessor shall compare the residual lead dust level (as determined by the laboratory analysis) from each dust sample with applicable clearance levels for lead in dust on floors, windows, and exterior surfaces. If the residual dust levels in a sample exceed the clearance levels, all the components represented by the failed sample shall be recleaned and retested until clearance levels are met.

(9) In a multi-family dwelling with similarly constructed and maintained units, random sampling for the purposes of clearance may be conducted, provided:

(A) the individuals who abate or clean the units do not know which units will be selected in the sample;

(B) a sufficient number of units are selected for sampling to provide a 95% level of confidence that no more than 5.0% or 50 of the units (whichever is smaller) in the sampled population exceed the appropriate clearance levels; and

(C) the selected units are sampled and evaluated for clearance according to the procedures found in paragraph (8) of this subsection.

(10) A certified supervisor or project designer shall prepare abatement reports for projects consisting of less than ten units. A certified project designer shall prepare an abatement report for projects consisting of ten or more units.

(11) An abatement report shall be prepared by a certified supervisor or project designer as required in this section. The abatement report shall include the following information:

(A) start and completion dates of abatement;

(B) the name and address of each certified firm conducting the abatement and the name of each supervisor assigned to the abatement project;

(C) the occupant protection plan prepared pursuant to §295. 212(d)(5);

(D) the name, address, and signature of each certified risk assessor or inspector conducting clearance sampling and the date of clearance testing;

(E) the results of clearance testing and all soil analyses (if applicable) and the name of each recognized laboratory that conducted the analyses; and

(F) a detailed written description of the abatement, including abatement methods used, locations of rooms and/or components where abatement occurred, and reason for selecting particular abatement methods for each component.

(e) Collection and laboratory analysis of samples. Any paint chip, dust, or soil samples collected pursuant to the standards contained in this section shall be:

(1) collected by persons certified by the department as an inspector or risk assessor; and

(2) analyzed by a laboratory recognized by the Environmental Protection Agency pursuant to §405(b) of the Toxic Substances Control Act (TSCA) as being capable of performing analyses for lead in paint chip, dust, and soil samples.

(f) Composite dust sampling. Composite dust sampling may only be conducted in the situations specified in subsections (b) -(d) of this section. If such sampling is conducted, the following conditions shall apply:

(1) composite dust samples shall consist of at least two subsamples;

(2) every component that is being tested shall be included in the sampling; and

(3) composite dust samples shall not consist of subsamples from more than one type of component.

(g) Recordkeeping. All reports required in this section shall be maintained by the certified firm or individual contractor, who prepared the report, for no fewer than three years. The certified firm or individual contractor also shall provide copies of these reports to the building owner who contracted for its services. Building owners are subject to the requirements mandated under §1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992 and 40 Code of Federal Regulations, §745, Subpart F, "Disclosure of Information Concerning Lead-Based Paint Upon Transfer of Residential Property."

§295.213. Lead-Based Paint Activities Requirements. Lead-based paint activities, as defined in §295.202 of this title (relating to Definitions) shall only be conducted according to the procedures and standards contained in §295.212 of this title (relating to Standards for Conducting Lead-Based Paint Activities). No persons may offer to perform or perform any lead-based paint activity unless certified to perform that activity according to the procedures in §295.205 of this title (relating to Certification: Application and Renewals) through §295.211 of this title (relating to Lead Firms: Certification Requirements).

§295.214. Notifications.

(a) General provision. The Texas Department of Health (department) shall be notified by the certified firm's owner or an authorized agent of the firm in writing on a form specified by the department of any lead-based paint abatement activity in target housing. Notification shall be made to the department no less than ten working days (not calendar days) prior to commencement of the activity and shall be submitted on the form specified by the department. Abatement notifications involving one or more units at the same address may be submitted on a single notification form. There must be only one address per each notification form submitted to the department. The department notification form must be filled out completely and properly. Blanks which do not apply shall be marked "N/A". The designation of "N/A" will not be accepted for references requiring identification of the work site, building description, building owner, abatement and transportation companies, and individuals required to be identified on the notification form. An original signature is required of the certified firm's owner or an authorized agent of the firm on each notification form. A copied signature is not acceptable. The notification shall be considered invalid unless it contains an original signature.

(b) Responsibility. It is the responsibility of the certified firm's owner or an authorized agent of the firm to notify the department under this section.

(c) Timeliness of notification. Written notifications of lead abatement activity must be hand delivered, express mailed, or postmarked at least ten working days (not calendar days) before the start of lead-based paint abatement. Notifications must be delivered by United States Postal Service, commercial delivery service, or by hand delivery. Telephone facsimile (FAX) is not permitted. The start date is considered to be the date when lead-based paint abatement begins.

(d) Start-date change to later date. When lead abatement activity will begin later than the date contained in the notice, the certified firm's owner or an authorized agent of the firm shall:

(1) notify the Environmental Lead Program or Regional Office of the changed start date by telephone as soon as possible but prior to the original start date. An amended notification is required in writing immediately following the foregoing notification; and

(2) provide the Environmental Lead Program or Regional Office with a written notice of the new start date as soon as possible before, but no later than the original start date. Delivery of the updated notice by the United States Postal Service, commercial delivery service, or hand delivery is acceptable.

(e) Start-date change to earlier date. When lead abatement will begin on a date earlier than the date contained in the notice, the certified firm's owner or an authorized agent of the firm shall provide the department with a written notice of the new start date at least ten working days before the start of work.

(f) Start-date/stop-date (completion date) requirement. In no event shall lead abatement activity, as covered by this section, begin or be completed on a date other than the date contained in the written notice. Amendments to start date changes are to be submitted as required in subsections (d) and (e) of this section. An amendment is required for any stop dates which change by more than one work day for each week (seven calendar day period) for which the project has been scheduled and notification submitted. The certified firm shall provide schedule changes to the department no less than 24 hours prior to the change or completion of the project. Emergency notification can be confirmed with the department telephonically and followed up in writing.

(g) Provision for emergency. In the event of lead abatement made necessary by an unexpected or unplanned lead incident, notification will be made as soon as practicable, but not later than the following work day after the occurrence of the incident. Initial notification can be made by telephone, followed by formal notification on the department's notification form. Emergencies shall be documented to the extent that the need for the emergency is evident. An emergency lead abatement operation means a lead abatement operation that was not planned, but results from a sudden, unexpected event. This event if not immediately attended to, presents a public health or safety hazard, and is necessary to protect equipment from damage, or is necessary to avoid imposing an unreasonable financial burden. This term includes operations necessitated by non-routine failures of equipment. This term does not include immediate abatement work resulting solely from a lack of adequate planning for foreseeable lead abatement activity.

(h) Lead abatement notification fees.

(1) Applicability. The certified firm's owner or an authorized agent of the firm shall remit to the department a fee that is based on each individual and separate residential dwelling or multi-family dwelling at the same address to be abated.

(2) Payment. An invoice for the required fee will be sent to the person submitting the notice after the notification has been received by the department. Fee amounts, address, and fund numbers are included on the form.

(3) Fees. The notification fee for each project is $50. All dwelling units at the same street address constitute one project for purposes of computing notification fees.

(4) Nonpayment of fees. Failure to pay the required fee after an invoice has been sent shall be considered a violation and may subject the certified firm to administrative penalties as listed in §295.220 of this title (relating to Compliance: Administrative Penalty). The certified firm may also be subject to civil or criminal penalties if applicable. Governmental organizations may submit a copy of the interagency transfer document or a statement that a check has been requested and is in processing. Payment must then be received no later than 60 days following the invoice date.

§295.216. Fee Exemption. Accreditation fees for training programs shall not be imposed on any Federal, State or local government, or nonprofit entities.

§295.218. Compliance: Inspections and Investigations.

(a) The Texas Department of Health (department) shall maintain the right to inspect or investigate the practices of any person involved in lead-based paint activities in target housing as defined in these sections.

(b) Advance notice of inspections or investigations by the department is not required.

(c) Authority and responsibility for the qualifications, health status, and personal protection of department representatives resides with the department. A department representative shall not be impeded or refused entry in the course of his official duties in accordance with these regulations by reason of any regulatory or contractual specification.

(d) All persons engaged in lead-based paint activities must have the department-issued ID card present at the worksite.

§295.219. Compliance: Reprimand, Suspension, Revocation.

(a) After notice to the certified or accredited person of an opportunity for a hearing in accordance with subsection (d) of this section, the Texas Department of Health (department) may reprimand the person or modify, suspend, suspend on an emergency basis, or revoke a certificate or accreditation under the Texas Environmental Lead Reduction Act.

(b) A department representative, upon presenting appropriate credentials, shall have the right to enter at all reasonable times any area or environment, including but not limited to any containment work area, building, construction site, storage, vehicle, training facility, or office area to inspect and investigate for compliance with these sections, to review records, to question any person, or to locate, identify, and assess the condition of lead-based paint-containing material.

(c) The department may reprimand any certified or accredited person, or may suspend or revoke a certification or accreditation for:

(1) failure to comply with any provision of the Act, any rule adopted by the Texas Board of Health, or any order issued by the department or a court;

(2) failure to comply with applicable federal or state standards for lead-based paint activities;

(3) failure to maintain records as required by these sections;

(4) failure to meet the qualifications for which one holds a certification or accreditation; or

(5) fraudulently, by misrepresentation, or deceptively obtaining or attempting to obtain a certification or contract for a lead-based paint activity; or

(6) falsifying records that are required to be maintained by this section.

(d) The contested-case hearing provisions of the Administrative Procedure Act, Texas Government Code, Chapter 2001, shall not apply to any enforcement action proposed to be taken under this section. Rather, the department's informal procedures shall apply. Additionally, in cases where the department proposes to deny the

issuance or renewal of certification or accreditation, the burden of proof shall be on the applicant to show that said applicant has met requirements or criteria for certification or accreditation.

(e) If a certification or accreditation issued under these sections has been suspended, the person(s) named in the suspension are not eligible to reapply for certification or accreditation under these sections for one year.

(f) If a certification issued under these sections has been revoked, the person(s) named in the revocation are not eligible to reapply for certification under these sections for three years.

§295.220. Compliance: Administrative Penalty.

(a) If a person violates the Texas Environmental Lead Reduction Act, or a rule adopted or order issued under the Act, the Texas Department of Health (department) may assess an administrative penalty.

(b) The penalty shall not exceed $5, 000 a day per violation. Each day a violation continues will be considered a separate violation. The total penalty will be the sum of all individual violation penalties.

(c) In assessing administrative penalties, the department shall consider the:

(1) history of previous violation(s);

(2) seriousness of the violation(s);

(3) hazard to the health and safety of the public; and

(4) demonstrated good faith, and any other matter which justice may require.

(d) Individual violations may be reduced or enhanced based on the considerations listed in subsection (c) of this section, or any others 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.

(e) A person is subject to double the initial penalty on second finding of violation of any provision of the Act or rules. Third and subsequent violations of a provision are subject to five times the initial penalty. In any case, the penalty shall not exceed $5,000 a day per violation.

(f) Violations shall be placed in one of the following severity levels.

(1) Critical violation. Severity Level III covers violations that are most significant and have a direct negative impact on public health and safety. The base penalty for a Level III violation, first occurrence will not exceed $5,000 per day, per violation. Examples of Level III violations include, but are not limited to:

(A) failing to establish effective containment during abatement of lead;

(B) permitting disposal of lead-containing material from abatement projects at uncontrolled sites;

(C) working without certification or accreditation from the department or with improper (forged, altered, etc,) certification or accreditation;

(D) failing to adequately prevent public entry to potentially contaminated areas;

(E) submitting a forged or altered training certification in order to obtain a training provider accreditation or other certificate;

(F) training without obtaining accreditation to provide training from the department, or training with an improper accreditation;

(G) providing training certificates to persons who have not attended the required training course as specified by the department; or

(H) failing to submit a notification or to pay the required fee.

(2) Serious violation. Severity Level II covers violations that are significant and which, if not corrected, could threaten public health and safety. The base penalty for Level II violations on a first occurrence will not exceed $2,000 per day, per violation. Examples of Level II violations include, but are not limited to:

(A) using prohibited lead abatement methods such as open-flame burning or torching, machine sanding or grinding without a high-efficiency particulate air (HEPA) vacuum tool, uncontained hydroblasting or high pressure washing, abrasive blasting or sand blasting without HEPA vacuum exhaust tools;

(B) working with a lapsed or suspended certification;

(C) submitting an improper notification;

(D) failing to conduct a training course for the specified time period as required in §295.204 of this title; or

(E) training with a lapsed training provider accreditation.

(3) Significant violation. Severity Level I covers violations that are of more than minor significance and, if left uncorrected, could lead to more serious circumstances. This category shall include fraud and misrepresentation. The base penalty for Level I violations on first occurrence will not exceed $1,000 per day, per violation. Examples of Level I violations include, but are not limited to:

(A) certified supervisor not onsite or available directly through a pager or answering service;

(B) written occupant protection plan not prepared;

(C) worker certificate not on a job site;

(D) training provider fails to submit information to the department regarding training course schedules, or to notify the department of cancellations within the specified time periods; or

(E) proper risk assessment report not prepared.

(g) The person charged with the violation will be given the opportunity for a hearing conducted in accordance with the department's informal hearing procedures in Chapter 1 of this title (relating to the Board of Health).

(h) The hearing regarding a proposed administrative penalty may be consolidated with another hearing on an administrative penalty.

(i) If the person charged with the violation fails to request a hearing within 30 days following receipt of a notice of violation, an administrative penalty may be assessed after the Commissioner of Health has determined that a violation did occur and the amount of the penalty is warranted.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's authority.

Issued in Austin, Texas, on January 29, 1996.

TRD-9601241 Susan K. Steeg
General Counsel
Texas Department of Health

Effective date: February 19, 1996

Proposal publication date: December 12, 1995

For further information, please call: (512) 458-7236

♦ ♦ ♦

TITLE 28. INSURANCE

Part I. Texas Department of Insurance

Chapter 3. Life, Accident and Health Insurance and Annuities

Subchapter JJ. Minimum Registration, Disclosure and Nondiscrimination Requirements for Viatical Settlements

- **28 TAC §§3.10001-3.10018**

The Texas Department of Insurance adopts new Subchapter JJ, §§3.10001-3. 10018, concerning regulation of viatical settlements, with changes to the proposed text as published in the November 24, 1995, issue of the *Texas Register* (20 TexReg 9802).

The sections are necessary to: provide consumer protection in a viatical settlement transaction for the person with a catastrophic or life-threatening illness or condition who sells or otherwise transfers a life insurance policy, or its death benefit, or who attempts to do so; establish requirements for registration, disclosure and form approval for persons engaged in the business of viatical settlements; define prohibited practices for persons engaged in, or involved in transactions relating to, the business of viatical settlements; ensure that a viator's rights under the Insurance Code and this subchapter remain protected if a viatical settlement company sells or otherwise transfers the life insurance policy or death benefits under the policy to another person; protect the confidentiality of the personal, financial and medical information of persons who sell or otherwise transfer their life insurance policies or death benefits under such policies, or who seek to do so; and provide enforcement mechanisms to ensure that persons engaged in, or involved in transactions relating to, the business of viatical settlements comply with the Insurance Code and this subchapter. The sections will implement Insurance Code, Article 3.50-6A as amended by the 74th Legislature, 1995. The sections as adopted differ in some respects from the proposed sections based on further study generated by the comments received. The agency's response to comments, including specific changes to the sections and reasoned justification for the changes, are addressed in the paragraphs that follow.

Section 3.10001 sets forth the scope and purpose of the subchapter and includes a severability provision. Section 3.10002 contains definitions used in the subchapter. Section 3.10003 requires all viatical settlement companies and brokers doing business in Texas to register and pay initial fees. Section 3.10004 requires registered viatical settlement companies and brokers to pay annual fees. Section 3.10005 requires companies to file periodic reports containing specified information on viatical settlement transactions with viators in Texas. The section also requires each viatical settlement broker to file periodic reports regarding its transactions with viatical settlement companies and other brokers. Section 3.10006 requires each viatical settlement company to submit to the department for approval all forms used by the company to effect a viatical settlement with a viator. Section 3.10007 requires companies and brokers to file advertising materials, informational materials and certain viator-requested revisions to contracts with the department for informational purposes. Section 3.10008 requires companies to provide a viator with written informational materials at the time the viator applies for a viatical settlement. Section 3.10009 specifies certain provisions that must be included in applications and contracts used to effect viatical settlements and also delineates prohibited practices related to applications and contracts. Section 3.10010 prohibits companies and brokers from disseminating misleading advertising or other solicitation materials. Section 3.10011 sets forth disclosure requirements and prohibited practices relating to payment of commissions or other compensation. Section 3.10012 places limits on contacting a viator for health status inquiries. Section 3.10013 requires certain disclosures in relation to assignment and resale of policies and prohibits a company from transferring policies to an unregistered person unless that person designates a registered company or broker to make all inquiries to the viator. Section 3.10014 requires companies or others obtaining medical, financial or personal information about viators to maintain such information in strict confidence. Section 3.10015 prohibits operating as an unregistered company or broker. Section 3.10016 delineates enforcement procedures for denying applications for certificates of registration or revoking such certificates, for alternative sanctions against registered companies or brokers, and for stopping and sanctioning companies or brokers who operate in Texas without a certificate of registration. The section also describes the applicability of article 1.10D to the department's regulatory authority over viatical settlement companies and brokers, and sets forth additional investigatory powers of the department. Section 3.10017 establishes the procedures for approval and other determinations by the department and the commissioner. Section 3.10018 contains forms that set out the required format for applications and reporting filings by viatical settlement companies and brokers. Copies of these forms are on file with the office of the Secretary of State, *Texas Register* Section. Copies of these forms may be obtained from the Texas Department of Insurance, Publication Department, MC 108-5A, P.O. Box 149104, Austin, Texas 78714-9104.

Most commenters expressed general support for the rules as proposed. Some commenters supported the sections as proposed without changes. Others offered comments or concerns on specific sections of the rules. Several commenters stated that the sections will protect consumers, including persons with AIDS and older citizens who may be especially physically and financially vulnerable due to having a catastrophic or life-threatening illness or condition, without imposing onerous regulation on the viatical settlement industry. These commenters stated that the sections are needed to regulate a necessary industry that creates an important safety net for persons with terminal illnesses, but in which there is great potential for harm. Some commenters discussed complaints by persons viaticating their policies involving unfair practices by some segments of the viatical settlement industry. These complaints included the release of confidential information such as a viator's medical records by a company without viator consent; misrepresentations about prompt payouts and the failure to inform viators about the consequences of entering into a viatical settlement upon taxation, access to supplemental security income and access to public assistance programs. One commenter stated that the legislative intent of Insurance Code, Article 3.50-6A and rules to be adopted under the statute was to avoid these and other types of unfair practices by providing for confidentiality for viators, requiring companies to submit periodic reports enabling the department to study the viatical settlement market, requiring financial audits, requiring companies to disclose information to viators enabling the viators to protect their rights and providing effective enforcement tools used to protect consumers against unjust settlements or other unfair practices. Other commenters stated that the sections should ensure the accountability of the viatical settlement industry by requiring the registration of companies and brokers, requiring industry advertising that is honest and accurate, requiring disclosures to viators that will help them make informed choices about entering into a viatical settlement, protecting the confidentiality of viators' personal information and ensuring fair rates of return. Another commenter stated that many companies already comply with the escrow, recordkeeping and disclosure requirements embodied in the rules. Agency Response: The agency agrees with the commenter's statement of legislative intent and believes that

the adopted sections meet this intent. With the exception of the requirement for a financial audit, the sections incorporate the items mentioned by the commenter as being within the legislative intent of the statute. The agency has deleted the requirement for a financial audit as explained in the responses to comments concerning §3. 10005. The sections are intended to provide fairness and consumer protection to persons with life-threatening or catastrophic illnesses or conditions who sell or attempt to sell their life insurance policies while providing for the reasonable regulation of the viatical settlement industry. The sections are also intended to assist prospective viators in making informed decisions before selling their life insurance policies. Agency staff is also aware of examples of unfair practices in the nature of those mentioned by the commenters. The sections are intended to prevent these types of unfair practices and to provide enforcement mechanisms to address future occurrences of such practices.

General: A commenter stated that the proposed rules are more expansive than those in other states. This commenter also disagreed with the statement that there will be no fiscal impact on state or local government as a result of enforcement stating that the State of Texas will incur some administrative expense in monitoring compliance and administering the sections. The commenter also stated that the rules create potential for consumers to refrain from purchasing life insurance policies in Texas. The commenter also stated that the rules go beyond the legislature's purpose to register those operating within the viatical settlement industry and to provide consumer protection. Agency Response: The agency disagrees that the sections are onerous or too "expansive," go beyond the legislative purpose, create potential problems for consumers or that the fiscal note was incorrect. The agency has based these sections on the purposes and directives set forth in Insurance Code, Article 3. 50-6A and on information concerning the viatical settlement industry the agency has received from other regulatory bodies, the viatical settlement industry, the insurance industry, consumer groups and individuals. The regulations differ in many respects from those in other states, perhaps most notably in that guaranteed minimum payouts are not included. The department will administer the sections using existing staff and resources, so no additional administrative costs will be incurred. To provide for a more efficient administration of the sections, the agency has revised the registration forms at §3.10018, Figures 1 and 2, by adding a few categories of information to make the processing and tracking of information relating to entities engaged in viatical settlements similar to the processing and tracking of information for other types of persons or entities (insurance companies and agents) the department regulates. These minor changes will reduce costs to the agency by enhancing the agency's efficiency in processing the forms received and tracking information electronically. Additionally, the words "viators in or from Texas" have been changed wherever they occurred in §3.10003 and on the relevant forms and the words "in Texas" or "with viators in Texas" have been substituted. Similar modifications have been made to §3. 10005. This will significantly reduce the amount of statistical information submitted to the department for its review.

General: A number of commenters stated that in developing the sections, the agency's staff engaged in a fair and open process, giving all parties involved ample opportunity to provide input both informally and formally. One of these commenters stated that persons living with HIV and AIDS have been represented in the process and have participated in discussions about the sections. Another commenter, however, expressed a concern that persons with AIDS may have been left out of the rulemaking process. Agency Response: Prior to proposing these sections, department staff conducted an informal meeting with interested parties including representatives of the viatical settlement industry, the insurance industry, consumer groups and AIDS service organizations. The agency based some provisions of the proposed rules upon information it received informally. The agency received written public comments on the proposed rules and held a public hearing to receive additional public comments. The agency reviewed and considered all the comments it received. The adopted sections differ in some respects from the sections as proposed based on further study generated by the public comments received. The department appreciates all of the comments it has received and the information provided at the public hearing.

General: A commenter expressed opposition to onerous and unnecessary regulation of the viatical settlement industry. Of particular concern to the commenter is any regulation that requires a guaranteed minimum payout. Another commenter also stated that the department should not set a minimum payout for viatical settlements. This commenter stated that without further information about trends in the viatical settlement industry, minimum payouts may restrict consumers' ability to sell their life insurance policies. The commenter stated that currently, whether a payout is favorable must be determined on a case-by-case basis considering factors such as life expectancy and current market rates. Another commenter stated that the sections should require viators to notify their spouses that they are entering into a viatical settlement. Agency Response: The sections do not require minimum guaranteed payouts as are required by regulation in other states. The agency agrees that whether the amount of a payout is fair in a particular case must be determined in light of the circumstances of that transaction, viewed within the context of the viatical settlement market. The agency believes that requiring spousal notification of a viatical settlement would exceed the scope of Insurance Code, Article 3.50-6A. As discussed in the following paragraph, the agency will review the appropriateness of rules concerning the relationship between viatical settlement companies and insurance companies that issue the life insurance policies that are the subject of viatical settlements. As part of that review, the agency will consider whether a rule concerning spousal notification may also be appropriate.

General: Several commenters stated that the rules need to regulate the relationship between viatical settlement companies and insurance companies that issue the life insurance policies subject to viatication. One of these commenters stated that the rules need to regulate life insurance companies by requiring them to: timely respond to requests for information; disclose to an employee leaving employment that a new "contestability" period begins if converting from a group to an individual policy; disclose alternatives to payment of accelerated benefits; disclose the effect on tax liability and eligibility for social services if accelerated benefits are received and disclose "lapse rates" on policies. According to this commenter, the rules should also prohibit insurers from denying approval to transfer an insurance policy. Some commenters stated that the rules should help expedite viatical settlements by imposing upon insurers a ten-day response time to requests for information and should prohibit insurers from preventing assignments for value. Insurers should also be prohibited from charging fees for verification of coverage or other administrative fees associated with a viatical settlement to policy owners, viatical settlement companies or brokers. Another commenter stated that although the commenter realized that rules addressed at the relationship between insurance companies and viatical settlement companies are outside the scope of this rulemaking, the department should consider the development of such rules in the future. Agency Response: The agency believes that these commenters have raised important concerns. The recommendations made are beyond the scope of the present rulemaking; however, the agency will fully consider these suggestions and review the relevant statutes to determine if further rulemaking concerning these issues may be appropriate.

General: A commenter stated that the department should provide a telephone number for viators who may wish to file a complaint against a viatical settlement company. Agency Response: Complaints will be received by the department's Consumer Protection Division. Section 3.10009 requires a toll free number, 1-800-252-3439, to be included in all viatical settlement applications. Consumers can use this number to report complaints to the department or receive information about viatical settlements generally.

Section 3.10001, Purpose, scope, severability. A commenter stated that the purpose statement expands the limited purpose defined by Insurance Code, Article 3.50-6A. Agency Response: The agency disagrees with this comment. The section sets forth both the purpose and the scope of the subchapter. All of the items listed in the subsection fall within the intent of Insurance Code, Article 3.50-6A.

Section 3.10002(a)(3), Policy. A commenter stated that the definition of "policy" does not fall within the scope of Insurance Code, Article 3.50-6A. Agency Response: The agency disagrees. The term "policy" is defined to encompass various form of contracts for life insurance as well as death benefits under a contract. Because a viatical settlement can be effected through several means-for example, by transferring ownership of a policy or by irrevocably assigning death benefits under a policy-the broad definition of "policy" is necessary to accomplish the statutory purpose of Insurance Code, Article 3.50-6A to protect all viators, regardless of how they transfer rights under their policies.

Section 3.10002(a)(6), Viatical Settlement Broker. A commenter stated that the definition of "viatical settlement broker" is too broad and could be read to require the following persons or entities to register as brokers: AIDS service organizations who receive funds from viatical settlement companies; purely administrative employees of companies or brokers; and an attorney or accountant who accepts a contingent fee based upon the amount of the negotiated viatical settlement. Another commenter expressed a concern that the advertising provisions in the definition of "referral agent" in subsection (a) (4) of this section, read together with the definition of "viatical settlement broker," may encompass tax advisors and medical case managers who offer their counseling services through advertising. Agency Response: The agency believes that an AIDS service organization would not ordinarily receive compensation based upon an individual settlement transaction and thus would not be likely to fall within the definition of broker unless it did receive such compensation. It is likely that a viator's tax advisor or medical case manager is prohibited under any circumstances from accepting referral fees from a viatical settlement company under §3.10011(b) of these sections. The agency believes that any person or entity that is advertising the availability of viatical settlements should register as a broker. However, if a person or entity receiving referral fees advertises in a manner not directed at potential viators and not promoting the availability of viatical settlements, such advertising will not alone require the person or entity to register as a broker. The definition of "referral agent" in subsection (a)(4) has also been revised to further clarify this advertising issue. Purely administrative employees of companies or brokers would not need to register individually as brokers. The agency agrees that clarification is needed to exclude from the definition of "broker" an attorney or accountant who, in representing a viator, accepts a contingent fee from a viator. Language has been added to this section to exclude an attorney or accountant serving in this capacity from the definition of "viatical settlement broker."

Section 3.10002(a)(7), Viatical settlement company. Some commenters requested that the definition of "viatical settlement company" be revised to exclude passive investors. One of these commenters suggested that a new subparagraph (D) be added to the definition of "viatical settlement company" to exclude from the definition "any person who enters into a viatical settlement and who has appointed a registered viatical settlement company to act as that person's agent in such transaction." The commenter further stated that the definition should exclude trust companies since they are regulated by other state agencies and serve similar functions to the other entities excluded under the definition. According to the commenter, the definition should not exclude insurance companies if the viator is provided an acceleration of benefits option. Under those circumstances the insurer should provide disclosure and other information required by the rules to be provided by viatical settlement companies. Agency Response: The agency agrees with the commenters that passive investors should be excluded from the definition of "viatical settlement company;" however, the agency believes the specific language suggested by one commenter is too broad and would include more than just passive investors. The definition of "viatical settlement company" has been modified to add between "viator" and "or who attempts" the following language: "either on the person's own behalf or as an attorney in fact or other agent for persons referenced in subparagraph (D) of this paragraph... ." New subparagraph (D) has been added to exclude from the definition of "viatical settlement company" a person whose sole activity consists of providing funds to effect the settlement in exchange for future investment proceeds and who has appointed a viatical settlement company to act as the person's agent in the transaction. The agency disagrees that trust companies should be excluded from the definition. If a trust company engages in the activities set forth in the definition of a "viatical settlement company," it is subject to these sections. Insurance companies offering accelerated benefits are governed by other laws in the Insurance Code. The agency will review those laws to determine if additional rules may be appropriate.

Section 3.10003, Registration and initial fees and reports. Some commenters addressed the registration requirements of this section. These commenters stated that the requirement for companies who register prior to March 1, 1997, to report historical data amounts to a retroactive application of law. According to one of these commenters, the proposed registration of viatical settlement companies amounts to a "licensing requirement." This commenter asserted that Insurance Code, Article 3.50-6A does not authorize the department to require financial, associational, reporting, oath or other components as a part of an application for registration. This commenter also asserted that provisions requiring companies to disclose historical data will harm consumers and result in a reduction of the funds available to viators. The commenter also stated that three to four months may not be sufficient time for a broker or company to comply with the requirements of subsection (e). Finally, this commenter expressed a concern that a denial of an application for a certificate of registration by department staff could occur without affording the applicant due process. Agency Response: The section concerning registration of viatical settlement companies requires companies seeking to register to send in a registration form; to pay a registration fee; to submit samples of its viatical settlement forms, advertising and informational materials and, if a company applies for registration prior to March 1, 1997, to report historical data for 1995 and 1996. The historical data mirrors the type of information that viatical settlement companies will be required to report annually under other sections. The compilation of this data is valuable to the department because it allows the department to learn about the condition of the viatical settlement industry in Texas, including developing trends in the industry and the volume of business being conducted in the state. The data will provide the department with needed information without which the department could not fulfill its responsibility to regulate these entities and to protect consumers. Viatical settlement companies already compile this data and report it to other states and, in some instances, may disclose it to potential investors and viators. The agency disagrees that the historical data reporting amounts to retroactive application of Texas law. The section does not change or affect the transactions from which this data is drawn. The agency further disagrees that these minimal registration requirements violate the intent of Insurance Code, Article 3.50-6A. The stated purpose of the statute is to register persons engaged in the business of viatical settlements and to provide consumer protection. The registration requirements, including the requirement to submit historical data, meet both purposes. The agency also disagrees with the commenter that the requirement for companies to report this data would result in a reduction of funds available to viators. Neither this section nor any other requires companies to submit reports containing the names of viators, their policy numbers or other information from which the identity of individual viators or investors could be traced. In fact, the rules prohibit companies from disclosing such identifying information about viators in their periodic reports to the department. The agency has deleted the words "or from Texas" from subsection (b)(5) of the section and substituted "with viators in Texas." This will significantly reduce the amount of information Texas companies doing a high volume of business outside the state will be required to report to the department. This change is intended to narrow only the reporting requirements. The definition of "viatical settlement" remains unchanged and the change to this section does not alter the breadth of the department's enforcement ability. Viatical settlement companies and brokers must comply with the laws in this and other states where they transact business. Insurance Code, Article 3.50-6A, was effective on January 1, 1996. The agency believes that the grace period for registration established in subsection (e) of this section is reasonable. The section clearly provides due process for an applicant whose application has been denied by allowing the applicant to request a hearing on the denial. A final decision would be made by the Commissioner of Insurance after this hearing.

Section 3.10005, Reporting requirements. Several commenters expressed particular support for this section as proposed, because statistical data about viatical settlement transactions can provide the department with the first accurate picture of financial trends in the viatical settlement industry and facilitate the department's regulation of the industry. One of these commenters stated that consumers also need access to this data. A commenter stated that viatical settlement companies should not be required to report the names of those who have sold their policies. A commenter disagreed with the reporting requirements. This commenter stated that Insurance Code, Article 3. 50-6A does not contain authorization to require extensive reporting requirements. Additionally, the commenter suggested that the required information is highly personal and no controls are set forth to protect confidentiality. Another commenter recommended changing the requirement for quarterly reports to annual reports. A commenter stated that the requirement in subsection (b)(1) of this section for an audited financial statement prepared by an independent certified public accountant should be deleted because, according to the commenter, the financial solvency of the viatical settlement company is made irrelevant by other provisions of the rules establishing requirements for methods

of payout. According to the commenter, these provisions are sufficient to protect viators' rights. Agency Response: Insurance Code, Article 3.50-6A gives the Commissioner of Insurance the responsibility to adopt rules to protect persons with terminal or life-threatening illnesses or conditions who sell or attempt to sell their life insurance policies. The reporting requirements, which seek only the most basic information on viatical settlements, are a reasonable means for the department to evaluate and monitor the viatical settlement industry. The agency agrees with the commenters that the department's ability to evaluate and monitor this industry is essential to fulfilling the department's duty to protect consumers. The information will enable the department to evaluate the rate of return in the Texas market and will allow department staff to keep abreast of trends in the industry. The information will also enable the department to gauge the volume of activity in Texas. The agency cannot fulfill its duty to regulate this fledgling industry without sufficient information. The periodic reporting requirements are thus a vital component of these sections. The language of subsections (b), (c) and (d) have been modified to clarify the agency's intent to require statistical data from transactions in Texas. The sections neither require nor allow the disclosure of the names of viators or any other identifying information from which individual viators can be traced; the reporting requirements were specifically designed to protect viators' confidentiality. Viatical settlement companies already compile the information required to be reported and report it to other states and, in some instances, disclose such data to potential investors and viators. The agency believes the quarterly reports are appropriate and should be retained for the limited duration provided in the section. The section only requires quarterly reporting through March 1, 1997. Companies and brokers would then file annual reports. Receiving quarterly reports will enable the agency to quickly obtain information about the viatical industry in Texas and to monitor trends. The quarterly reports seek limited data that companies already collect for themselves and the agency believes this will not place an unfair burden on companies. The agency agrees with the commenter that the financial audit requirement in subsection (b)(1) of this section should be deleted because other sections establish requirements for processing payouts which appear to make the requirement for an annual certified financial audit irrelevant at this time. Moreover, as previously explained in response to comments above, the agency will obtain information crucial for monitoring and evaluating the viatical settlement industry from the required periodic reports. Some of this information could be duplicative of information submitted in annual financial statements. The agency will monitor the operation of these rules to determine whether the agency should reconsider the desirability of the audit requirement. Paragraph (1) of subsection (b) of this section has been deleted.

Section 3.10006, Approval of forms relating to viatical settlements. A commenter stated that the contract forms used to transact a viatical settlement should be designed to enhance consumer protection. This commenter suggested that all new forms should be developed by the department and reviewed by consumer groups. Another commenter suggested eliminating the requirement found in subsection (b) of this section for attorney certification of forms for use prior to department approval. This commenter stated that instead, the section should allow an officer of the viatical settlement company to make the certification. Another commenter stated that the 60-day lead time for approval of forms by the department seems excessive and recommends a five-day lead time. A commenter suggests that subsection (e) of this section as written with reference to "viatical settlement market," is in conflict with the previous section which references "viatical settlement companies." Another commenter pointed out that a typographical error appears in subsection (e)(2) of this section, which is an apostrophe in "disapproval's. " A commenter requested latitude in the placement of the required form number as required by subsection (e)(8) of this section. Agency Response: The section requires the review of forms used to effect viatical settlements by the department. The agency disagrees that all forms used to effect viatical settlements should be developed by the department and believes that companies should be able to vary their forms so long as the forms comply with the law and do not contain misleading information. The agency agrees with the commenter that company officer certification should be allowed but believes this should be allowed as an alternative to attorney certification rather than eliminating attorney certification as the commenter suggests. Retaining the attorney certification as an alternative would provide companies another option. Language has been added to the section to provide for certification by an attorney or any authorized representative of the company. The agency disagrees that only 5 days should be allowed for agency approval of forms. The grace period contained in §3.10003(e) allows companies to continue using forms that they now use during the pendency of their application and the agency's form review, provided they apply for registration before April 1, 1996. After expiration of this grace period, sixty days is a reasonable time for agency staff to review and approve forms before companies use them. Approval of forms before their use is consistent with the intent of Insurance Code, Article 3.50-6A(c)(2). The agency agrees with the commenter that the words "viatical settlement market" should be changed. Those words have been deleted and subsection (e) now references all forms "filed pursuant to this section." The misplaced apostrophe had been deleted from subsection (e)(2) of this section. The agency corrected a typographical error in subsection (e)(3) of this section in that the word "form" has been included as the last word of the sentence. The agency disagrees with the comment concerning placement of the form numbers. This placement is consistent with requirement for other forms required to be filed with the department and will facilitate review of the information submitted.

Section 3.10007, Filings for informational purposes. A commenter suggested deleting subsection (c) of this section which requires that companies file with the department for informational purposes only contracts containing viator-requested changes accompanied by a written statement from the viator's attorney that the viator requested the change after consultation. As an alternative to deleting the provision, the commenter suggested that such contract modifications should only be filed annually with a company's annual report. Agency Response: The agency disagrees with eliminating this provision. The contract changes are filed for information only and are not subject to department approval. Thus, a viatical settlement transaction will not be delayed as a result of viator-requested changes in the contract. One purpose for these information-only filings is to allow the department to evaluate to what extent viatical settlement contracts may be changed from the standard forms approved by the department based upon viator request. Reviewing these changes will help department staff gain knowledge about contract provisions from a viator point of view and will assist staff in fulfilling its duty to approve standard contract forms. The section protects viator confidentiality, requiring any viator-identifying information to be deleted from these filings. The agency disagrees that contract modifications should be filed only on an annual basis with a company's annual report. Because these changes are filed after the transaction has taken place, it should not be burdensome for companies to submit these changes as they are made. To clarify that the modified contracts are to be filed after a transaction has occurred, the agency has deleted the word "proposed" in subsection (c) of this section. The agency has added language to subsection (b) of this section for clarification with respect to the filing of advertising. In subsection (c) of this section, the agency has changed the word "counsel" to "attorney" for consistency within the sections.

Section 3.10008, Required informational materials. A commenter stated that it would be difficult to meet this section's requirement to provide in informational materials broad accurate statements describing the tax consequences or possible consequences of the viatical settlement on a viator's ability to receive public assistance. The commenter suggested that the viator should simply be referred to a certified public accountant and/or attorney to explain the specific consequences of the transaction. Another commenter requested that the department recognize the existence of solicitation brochures used to invite prospective viators to request informational brochures. The commenter requested that the section allow for the distribution of the required information in a "packet" or on videotape rather than requiring a "brochure." Another commenter requested that the section require the informational materials to contain the definitions used in these sections. Agency Response: The agency agrees that promulgating standardized language concerning tax or other financial consequences of entering into a viatical settlement would be beneficial to companies and viators. Such language has been added to the section and the section has been reorganized. The agency recognizes that different companies may wish to use different formats for the information required to be disclosed. The agency has changed the title of this section from "informational brochure" to "informational materials" and has deleted the term "booklet" and substituted "written informational materials." The agency has also deleted the term "brochure" wherever it occurred in other sections and substituted "written informational materials." The agency disagrees that the sections should allow the communication of information in formats other than by written materials, such

as making a videotape available to prospective viators. A videotape may not, in all instances, be given to the viator to keep and even if it were, not all viators may have access to video viewing equipment. The agency disagrees with the commenter that the section should require the informational materials to include all definitions used in these sections. Companies may include these definitions, however. In any case, the sections prohibit companies from making misrepresentations in their informational materials. Thus, any terms or definitions used in these materials must be accurate.

Section 3.10009(a), Settlement application forms. A commenter recommended that the requirement in subsection (a)(1)(B) of this section for information to be provided in Spanish as well as in English be eliminated because viatical settlement companies do not buy policies from insurance companies in Mexico and do not sell policies to non-residents. This commenter also stated that if there are state-to-state variations in the application form requirements, the department should permit viatical companies to enclose a "Texas" notice to avoid companies having to have a separate set of forms or separate application for each state in which they operate. Agency Response: The agency disagrees with the commenter that the Spanish language requirement should be deleted from subsection (a)(1)(B). Some viators in Texas may read and understand Spanish better than English and the disclosure is intended to assist viators in making informed choices. The section contains the Spanish language paragraph for use by companies and it should not be overly burdensome for companies to include this language in their applications. The agency agrees with the commenter that companies should be able to enclose a "Texas" notice with application forms they may use in other states. Language has been added to require that if companies opt to use a "Texas" notice they must place the information required by these sections on a supplement page attached to the front of the application.

Section 3.10009(a)(2), Physician's statement. Several commenters objected to the requirement in subsection (a)(2) for a physician's statement to be included in the application. These commenters stated that this requirement has the potential to prevent a person diagnosed with AIDS from being able to enter into viatical settlements and that existing contract law provides a remedy for individuals who enter into a contractual agreement without the mental competence to do so. Agency Response: The agency has deleted the requirement for a physician's statement as requested by the commenters and agrees that existing contract law already provides a remedy if persons enter into a contract without the mental capacity to do so. Subsection (a)(2) has been deleted.

Section 3.10009(b)(1), Rescission by a viator. A commenter suggested that the date the monies are placed in an escrow account is considered a "non-event" to the viator and that allowing the rescission period to commence on the date an escrow is established does not give the viator a meaningful opportunity to rescind. A company should be required to escrow the funds when the offer is made or accepted. Agency Response: The agency disagrees. The sections allow companies to place funds in escrow during the rescission period so that both parties will be protected should a viator reconsider and rescind the contract.

Section 3.10009(b)(2), Payment of settlement proceeds. A commenter requested clarification of subsection (b)(2) concerning when settlement proceeds that are to be paid in installments should be withdrawn from the escrow account. Another commenter suggested that this subsection should provide that the transfer of the proceeds to the viator should occur no later that 48 hours after receipt by the purchaser of acknowledgment of the transfer of the policy. Agency Response: The agency agrees and subsection (b)(2)(B) has been changed to more accurately reflect when settlement proceeds that are to be paid in installments should be withdrawn from the escrow account. Subsection (c)(5) of §3.10009 has been changed to allow settlement proceeds to be paid in installments only through the purchase of either an annuity from a licensed insurance company or through an escrow or trust account established by a licensed bank. Subsection (b)(2)(B)(ii) has also been changed to provide for proceeds to be transferred to purchase an instrument used to effect installment payments in a manner not prohibited by subsection (c)(5). The agency agrees that there should be no delay in the transfer of funds to the viator. The section as written contemplates immediate transfer of proceeds upon receipt by the purchaser of acknowledgment of the transfer.

Section 3.10009(b)(4), Designation of contact for health status inquiries. A commenter recommended deletion of the paragraph requiring contracts to include a provision for the viator to designate a contact for inquiries about the viator's health status. Agency Response: The agency disagrees. Reasonable limits on direct contacts with the viator for health status purposes are important to protect the privacy of the viator. The section protects the privacy of the viator while also providing a mechanism for investors to monitor their investment.

Section 3.10009(b)(6), Transfer of the policy. A commenter recommended deleting this portion of §3.10009 which requires contracts to contain a provision disclosing to viators whether the company intends to sell or transfer a policy and identifying the buyer or transferee. The commenter stated that if the department needs such information it should ask for it in the annual report. Agency Response: The agency disagrees. The disclosure required by this paragraph is made to the viator rather than to the department. Insurance Code, Article 3.50-6A directs the commissioner to promulgate rules relating to assignment or resale of viaticated policies. The provision is intended to help viators make informed decisions about selling their policies.

Section 3.10009(b)(7), Notarized Statement. A commenter requested modification of the requirement for a contract to include an acknowledgment page containing a notarized statement by a viator. The commenter believed that under some circumstances it may be difficult for a viator to obtain the services of a notary. Agency Response: The agency disagrees and believes that it should not be too burdensome to obtain the notarization. The viatical settlement company is free to provide notary services to viators for such purposes.

Section 3.10009(c), Non-discrimination. Several commenters supported the non-discrimination components of the section as proposed and stated that the language in this section will ensure that discrimination of any type will not be tolerated within the viatical settlement industry. Another commenter suggested that certain factors, such as age and gender, must be considered in determining life expectancy. This commenter suggested that the term "unfairly" be added to modify the word "discriminate" in subsection (c)(2). Another commenter stated, however, that if the word "unfairly" is added to subsection (c)(2), the subsection should also require the viatical company to produce data to support an argument that it is not unfairly discriminating. A commenter who is a representative of a viatical settlement company stated that one of its lending sources will not provide funds for the purchase of life insurance policies from persons with dependents. Therefore a viatical settlement company might appear to discriminate against a person with dependents when, in fact, it cannot obtain funding to purchase the policy. Another commenter requested deletion of many of the categories of persons in subsection (c)(2) because, according to the commenter, including these categories exceeds legislative intent and unduly burdens the right to contract. The commenter also requested deletion of the prohibition against discrimination between viators with dependents and those without in subsection (c)(3). Agency Response: The agency agrees that the non-discrimination provisions are an important component of these sections and will provide protection for viators consistent with the intent of Insurance Code, Article 3. 50-6A(b)(4)(A). The agency believes that these provisions enhance viators' ability to enter into viatical settlements rather than limit or burden their ability to contract. The agency agrees that the life expectancy exception in subsection (c)(2) of §3.10009 should be clarified. The language of this subsection has been revised to prohibit discrimination based on the factors set forth "except when such factors affect the life expectancy of the viator." The subsection as modified eliminates the need to add the term "unfairly." Subsection (c)(2) prohibits discrimination unrelated to life expectancy. The subsection does not suggest, however, that a company would be in violation of the prohibition under circumstances in which a funding source refuses to fund a particular settlement.

Section 3.10009(c)(4), Prohibited practices relating to applications and contracts. Many commenters supported the provision allowing the commissioner to prohibit a payment to a viator that is unjust. A commenter stated, however, that the provision should be deleted because Insurance Code, Article 3.50-6A was only intended to allow the department to collect information on viatical settlement payouts but not to prohibit a payout that is unjust based upon the amount. Another commenter stated that instead of prohibiting unjust settlements, the section should establish minimum payout percentages. Agency Response: The section does not require minimum payout percentages. The agency believes that without more information about the viatical

settlement industry, it would be inappropriate at this time to establish guaranteed minimum payout percentages. Whether the rate of return in a particular transaction is unfair would be determined on a case-by-case basis in light of the circumstances related to that transaction, viewed within the context of the viatical settlement market. The subsection lists criteria that the commissioner would use to evaluate whether the amount of a particular payment is unjust. At times when the market is very competitive and the product is marketed to sophisticated consumers who are able to compare offers, the agency does not expect to receive many complaints concerning unjust payments. The department is concerned, however, that consumers will be vulnerable in the absence of a prohibition against unjust payments, particularly when the market is less competitive or when the product is marketed to the elderly, to less sophisticated consumers or to consumers who are physically or financially unable to make comparisons. The agency believes that to effectively fulfill the responsibility to protect viators, the commissioner should be able to prohibit payments that are unjust. The reporting requirements in §3.10005 will enable the department to compile sufficient non-confidential statistical data to enable viators and companies to compare settlement offers against industry standards. This will enable viatical settlement companies to avoid making unjust payments. The reported data will also give the department an objective means to analyze what is fair or unfair market conduct. To clarify the intent to establish an objective means of comparing a particular payment to known market rates, the agency has deleted the words "nationally or" from the subsection.

Section 3.10009(c)(5), Installment payments. Several commenters stated that subsection (c)(5) of §3.10009 as proposed may restrict the ability of a viator to arrange for installment payments of monies by making this payment option available only if the viatical settlement company is registered as a bank. One of these commenters suggested that an installment payment option should be made available for use with any bank, trust, credit union, savings and loan or other lending institution so long as the entity is an escrow agent with independent ownership from that of the viatical settlement company or broker. This commenter further suggested that there should be a prohibition against shared ownership interests of a viatical settlement company or broker and the escrow or trust agent. Another commenter suggested that the provision should allow installment payments if the viatical settlement company or affiliate has been licensed in this or any other state to act as an insurance company. Alternatively, the commenter suggested adopting provisions requiring the purchase of an annuity, guarantee, letter of credit or similar financial instrument acceptable to the department issued by a licensed insurance company or bank. As another alternative the commenter suggested allowing instruments guaranteed by a bank or insurance company rather than issued by them to avoid transaction costs that may reduce the amount paid to the viator. Additionally, the commenter suggested that the annuity, or comparable instrument, be in the amount equal to the sum of the future payments on the viaticated policy. Agency Response: Installment payments may be advantageous to some viators. The agency has changed subsection (c)(5) of §3.10009 to allow settlement proceeds to be paid in installments only through the purchase of either an annuity from a licensed insurance company or through an escrow or trust account established through a licensed bank. The agency disagrees with other language suggested by the commenters and disagrees with allowing viatical settlement companies to issue instruments guaranteed by an insurance company or bank. These suggestions would increase the risk to the viator and some of the commenters' suggested alternatives may constitute unauthorized insurance under Insurance Code, Article 1.14-1.

Section 3.10010, Advertising and solicitation. A commenter requested deletion of any reference to Insurance Code, Article 21.21 or Texas Administrative Code, Title 28, Chapter 21, Subchapter B because, according to the commenter, incorporating these provisions by reference is not authorized by Insurance Code, Article 3.50-6A. Agency Response: The agency disagrees with this commenter. Including a prohibition against false or misleading advertising is a component of providing consumer protection to viators. The agency is aware of examples of misleading advertising by viatical settlement companies. Article 3.50-6A directs the commissioner to incorporate by reference any provisions of the Insurance Code that the commissioner believes should apply to viatical settlements to ensure consumer protection. Incorporating Article 21.21 and related rules provides guidance for companies and brokers concerning what would be considered to be misleading advertising. Incorporating this article also ensures that the department will evaluate advertising in the viatical industry in a manner that is consistent with its evaluation of other entities regulated by the department.

Section 3.10012, Health status inquiries. A commenter stated that subsection (a) of this section prohibiting persons from contacting a viator or viator's designee concerning the viator's health status unless the person is a registered company or broker should be eliminated because it is not consistent with legislative intent. Another commenter stated that the prohibition on contacting a viator more frequently than every 30 days allows too frequent contacts and should be changed to 60 days. Another commenter stated that the subsection should be clarified to allow a company to contact a viator within 30 days of the application process to determine whether there has been a change in health status. This could be more favorable to the prospective viator because it may result in a higher purchase price. Agency Response: The agency disagrees that restrictions on contacts with the viator to determine health status is outside the intent of Insurance Code, Article 3.50-6A. Normally a licensed company will be the party to the contract with the viator and the rule does not prohibit the company from contacting the viator. The agency believes that this subsection, along with subsection (b) which limits the number of contacts to once every 30 days constitute reasonable limits designed to protect viators from harassment. Language has been added to subsection (b) to clarify that the limits on contacts with viators will apply once a viator has entered into a viatical settlement with a viatical settlement company.

Section 3.10013, Assignment or resale of policies. A commenter recommends deletion of the words "without the consent of the viator" from subsection (a) of this section and the reference in that subsection to §3.10009(b)(6) because, according to the commenter, after the policy is sold, the viator retains no property rights in the policy. The commenter further suggests that the words in subsection (b) "no viatical settlement company shall sell or otherwise transfer" should be replaced with "when a viatical settlement company sells or otherwise transfers ... then ... shall appoint...." Agency Response: The purpose of subsection (a) of this section, along with §3. 10009(b)(6) is to ensure that the viator is informed that the policy may be transferred to other persons, not to prevent the transfer. The agency disagrees that these provisions should be eliminated because they assist viators in making informed decisions before selling their policies and is consistent with the intent of Insurance Code, Article 3.50-6A(c)(5). The agency believes that the subsections should be revised to more clearly reflect this purpose. Subsection (a) as revised provides for enforcement under §3. 10016 for failure to disclose to a viator a sale or transfer of the policy rather than prohibiting the sale or transfer. The language in subsection (b) has been revised similarly.

Section 3.10014, Confidentiality. A number of commenters expressed support for this section. One of these commenters stated that persons living with AIDS can be the subject of discrimination by persons who learn of their illness and that the steps taken in these sections to protect the confidentiality of viators are especially important. Another commenter stated that this section reduces the potential for sensitive information about a viator being released to the public but expressed a concern that mandatory disclosure of sensitive personal information of both consumers and viators to a governmental entity creates a risk that the information may be deemed "public information" and therefore become available to the public. Agency Response: The agency strongly agrees with the need to protect the confidentiality of viators. This section is intended to prevent the disclosure of any identifying or medical information obtained by a viatical settlement company or broker concerning a viator or a viator's family, spouse or significant other. The agency is aware of situations in which a viatical settlement company or its licensee has disclosed the names of viators, their policy numbers and sensitive medical information in marketing materials aimed at investors. This section will prohibit such disclosures. It will allow companies to disclose such sensitive information only to the extent that the viator consents and the disclosure is necessary to effect the viatical settlement between the viator and the company. To further clarify the narrow circumstances under which the identity of the viator can be disclosed by viatical settlement companies, the language of subsection (a)(1) has been changed to: "is necessary to effect the viatical settlement between the viator and the viatical settlement company and the viator provides prior and knowing written consent to the disclosure." The section also prohibits companies from disclosing confidential information about viators when making periodic reports to the department. Information is excepted from the Texas Open Records

Act, and thus is protected from becoming public if it is considered to be confidential by law, either constitutional, statutory or judicial decision. The section also ensures the confidentiality of information obtained by the department under subpoena in an enforcement action by making Insurance Code, Articles 1.10D and 1.19-1 applicable pursuant to Insurance Code, Article 3.50-6A, §3. These statutes create an exception to the Texas Open Records Act when the information is obtained by the department's fraud unit and in cases in which the department obtains information under a subpoena. The Texas Open Records Act also recognizes an exception for information held by a law enforcement agency relating to criminal enforcement matters.

Section 3.10015, Prohibition against unregistered company. Several commenters stated that subsection (c) of this section, combined with §3. 10016(d), would place substantial and unfair responsibilities on a life insurer to verify that a viatical settlement company is registered before effecting the transfer of rights to the company. One commenter suggested remedying this problem by requiring a viatical settlement company or broker to submit proof of registration at the time the company or broker submits a request to the insurance company relating to a transfer of rights under a policy. Other commenters suggested that Insurance Code, Article 3.50-6A did not give the commissioner authority to promulgate rules regulating the activity of insurance companies. The commenters contended that the owner of a policy has the right to designate any beneficiary the owner chooses, and the insurer has no right to interfere with the decision. Placing the burden of investigating registration status of a viatical settlement company on insurers might delay payments to beneficiaries (causing a violation of Unfair Claim Settlement Practices Act). Also, an insurer might make a good faith mistake about a viatical settlement company's status. According to the commenters, responsibility should be solely on a viatical settlement company to meet any statutory and regulatory requirements. Agency Response: The agency believes that these commenters' concerns have merit. It was not the agency's intention to interfere with or restrict the rights of policyholders to designate beneficiaries. Subsection (c) of §3.10015 and subsection (d) of §3.10016 as proposed have been deleted. The agency will consider alternatives for verifying registration of viatical settlement companies, including the suggestion made by the commenter, and will review the relevant statutes to determine if further rulemaking may be appropriate.

Section 3.10016, Enforcement. A commenter suggested that the word "material" be inserted between "any" and "fact" in subsection (a)(1) because denial of an application or revocation of a certificate of registration due to inadvertent or insignificant errors is unnecessary and unduly burdensome. This commenter also stated that subsection (a)(5) should not make violations of federal securities laws a potential subject for denial or revocation of a registration and that the paragraph as worded creates a double jeopardy problem. The commenter also suggests elimination of references to Insurance Code, Articles 1.19-1 and 1.24 in subsection (f) of the section because, according to the commenter, this was not authorized by Insurance Code, Article 3.50-6A. Agency Response: Based upon the recommendation of the commenter, the agency has added the word "material" to subsection (a)(1). The section provides only for civil sanctions rather than criminal sanctions so that no double jeopardy issues are raised. The agency has clarified subsection (a), however, to reflect the intent to focus on violations of securities laws related to the business of viatical settlements: language has been deleted from subsection (a)(5) and a new subsection (a)(6) has been added. The agency disagrees that references to Insurance Code, Articles 1.19-1 and 1.24 should be eliminated. Insurance Code, Article 3.50-6A, §4 expressly contemplates that rules would incorporate more provisions of the Insurance Code than are expressly set forth in the statute. Article 3.50-6A, §3 gives the commissioner the responsibility to enforce this statute and these sections through the application of Insurance Code, Articles 1.10, 1.10D and 1.10E. Insurance Code, Articles 1.19-1 and 1.24 are discovery tools for the department to gather evidence for potential enforcement actions. The agency believes that Article 3.50-6A contemplates incorporating such discovery tools into these sections to enable the department to carry out its enforcement responsibility.

Section 3.10018, Adoption of forms. The agency has deleted the index to forms as unnecessary in light of the specific references to the forms in other sections. The agency believes that clarification is needed in Figure 1 and Figure 2 to distinguish an initial application from an application filed to reflect a change to the information submitted in the initial application. Item 1 has been added to both forms to incorporate an area to designate whether the application is an initial application or an application based on changes. The agency corrected a typographical error it identified in Figure 2 under "Reports of Historical Data" and changed a reference to §3.10017 in this Figure to §3.10018. The agency also corrected a typographical error in Figures 3 and 4, has changed the due date of the April 1996-June 1996 report to August 15, 1996, and has changed the due date for reporting historical data from March 1, 1996 to the date of the initial application.

For: Coalition for Texans with Disabilities, Office of Public Insurance Counsel, individual commenters. For with changes: Affirmative Lifestyles, Inc., American Association of Retired Persons, American Counsel of Life Insurance, Capitol Area Legal Project, Life Benefactors, L.P., Life Partners, National Association of People with Aids (NAPWA), National Viator Representatives, Inc., Texas AIDS Network, Texas Life Insurance Association, Texas Legal Reserve Officials Association (TLROA), USAA Life Investment Trust, Viaticus, Inc., individual commenters.

The new sections are adopted under the Insurance Code, Articles 3.50-6A and 1.03A and Government Code, §§2001.004, et seq. Article 3.50-6A requires the Commissioner to register viatical settlement companies and brokers doing business in Texas and to provide consumer protection to persons with life-threatening illnesses who may sell or otherwise transfer their life insurance policies to viatical settlement companies The article authorizes the commissioner to adopt reasonable rules to implement and enforce the article. Article 1.03A provides that the Commissioner of Insurance may adopt rules and regulations to execute the duties and functions of the Texas Department of Insurance. The Government Code, §§2001.004 et seq authorizes and requires each state agency to adopt rules of practice setting forth the nature and requirement of available procedures and prescribes the procedures for adoption of rules by a state administrative agency.

§3.10001. Purpose, Scope and Severability.

(a) Scope and purpose. This subchapter implements the provisions of the Insurance Code, Article 3.50-6A. The commissioner enacts these rules for the following purposes.

(1) to provide consumer protection in a viatical settlement transaction for the person with a terminal illness who sells or otherwise transfers a life insurance policy or its death benefit, or who attempts to do so;

(2) to establish requirements for registration, disclosure and form approval for persons engaged in the business of viatical settlements;

(3) to define prohibited practices for persons engaged in, or involved in transactions relating to, the business of viatical settlements;

(4) to ensure that a viator's rights under the Insurance Code and this subchapter remain protected if a viatical settlement company sells or otherwise transfers the life insurance policy or death benefits under the policy to another person;

(5) to protect the confidentiality of the personal, financial and medical information of persons who sell or otherwise transfer their life insurance policies or death benefits under such policies, or who seek to do so; and

(6) to provide enforcement mechanisms to ensure that persons engaged in, or involved in transactions relating to, the business of viatical settlements comply with the Insurance Code and this subchapter.

(b) Severability. If a court of competent jurisdiction holds that any provision of this subchapter is inconsistent with any statutes of this state, is unconstitutional or for any other reason is invalid, the remaining provisions shall remain in full effect. If a court of competent jurisdiction holds that the application of any provision of this subchapter to particular persons, or in particular circumstances, is inconsistent with any statutes of this state, is unconstitutional or for any other reason is invalid, the provision shall remain in full effect as to other persons or circumstances.

§3.10002. Definitions.

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

(1) Identity–The complete name, last known business address and last known business telephone number of a person, and, if the person is an entity rather than an individual, the form of the entity.

(2) Person–An individual, corporation, trust, partnership, association, or any other legal entity.

(3) Policy–An individual life insurance policy, a rider to an individual life insurance policy, a certificate or a rider to a certificate evidencing coverage under a group life insurance policy. The term also is used to refer to the death benefit of a policy (that is, a reference to selling or otherwise transferring a policy also encompasses selling, or otherwise transferring the death benefit of a policy or irrevocably designating a beneficiary to receive the death benefit).

(4) Referral agent–A person who, for compensation, refers or introduces a viator to a viatical settlement company or broker, but does not advertise his or her services as a referral agent, the availability of viatical settlements or on behalf of any viatical settlement company or broker, or perform services or take part in negotiations relating to effecting a viatical settlement. A referral agent who makes five or more such referrals in a calendar year must register as a viatical settlement broker.

(5) Viatical settlement–An agreement that is solicited, negotiated, offered, entered into, delivered, or issued for delivery in this state, under which a person acquires, through assignment, transfer, sale, devise, bequest, or otherwise, a policy insuring the life of an individual with a catastrophic or life-threatening illness or condition by paying the owner or holder of the policy compensation, or anything of value, that is less than the expected death benefit of the policy.

(6) Viatical settlement broker–A person, including an insurance agent licensed by the commissioner, who is not a viatical settlement company and who for a commission or other form of compensation, or in the hopes of obtaining such compensation:

(A) offers or advertises the availability of viatical settlements;

(B) offers or attempts to negotiate a viatical settlement between a viator and a viatical settlement company;

(C) in regards to a potential viatical settlement, performs services relating to the gathering, organization or analysis of medical, financial or personal information about a viator; or

(D) acting as a referral agent, refers or introduces a viator to a viatical settlement company or broker five or more times in a calendar year. The term does not include: an attorney, accountant, or person acting under power of attorney from the viator, who is retained to represent the viator and whose compensation is paid entirely by the viator without regard to whether a viatical settlement is effected; an attorney or accountant representing the viator in relation to the viatical settlement, who receives a contingent fee from the viator; a person who solicits only potential investors in viatical settlements, and who does not in any way advertise, solicit or promote viatical settlements in a manner that reasonably could attract viators; or any print, broadcast or other media which prints or broadcasts advertisements of a viatical settlement company or broker.

(7) Viatical settlement company–A person who enters into a viatical settlement with a viator either on the person's own behalf or as an attorney in fact or other agent for persons referenced in subparagraph (D) of this paragraph, or who attempts to do so through negotiations, solicitation, or acquisition of medical, financial or personal information from or about a viator. The term does not include:

(A) a bank, savings bank, savings and loan association, credit union, or other licensed lending institution that takes an assignment of a policy as collateral for a loan;

(B) the issuer of a policy that makes a loan or pays benefits, including accelerated benefits, under the policy or in exchange for surrender of the policy;

(C) any person who, within a three-year period, enters into viatical settlements with no more than one viator, provided that the person enters into no more than three viatical settlements with that viator; or

(D) any person who may be a party to a viatical settlement, but whose sole activity related to the transaction is providing funds to effect the viatical settlement in exchange for future investment proceeds, and who has appointed in writing a registered viatical settlement company to act as the person's agent in such transactions.

(8) Viator–An individual who:

(A) is the owner or holder of a policy insuring the life of an individual who has a catastrophic or life-threatening illness or condition; and

(B) enters into a viatical settlement with a viatical settlement company, or attempts to do so through inquiry to or negotiation with a viatical settlement company or broker, or through providing, or consenting to the provision of, medical, financial or personal information to a viatical settlement company or broker. The term does not include a viatical settlement company that sells, transfers or pledges a policy that it has purchased from a viator.

(b) Article 1.01A, Insurance Code, which includes definitions of "department" and "commissioner" and describes the structure of the Texas Department of Insurance, applies to this subchapter and to Article 3.50-6A, Insurance Code.

§3.10003. Registration and Initial Fees and Reports.

(a) Subject to the grace period allowed by subsection (e) of this section, a person shall not act as a viatical settlement company or broker unless the person holds a certificate of registration issued by the commissioner.

(b) To obtain a certificate of registration as a viatical settlement company, a person must apply to the department in the format prescribed by Figure 1 in §3.10018 of this title (relating to Application and Reporting Forms) (Form VIAT-CO.APP). The application form must be accompanied by:

(1) a registration fee in the amount of $250, in the form of a cashier's check or money order made payable to the Texas Department of Insurance;

(2) samples of all forms that the company uses or plans to use to enter into viatical settlements with viators, and that must be approved by the department pursuant to §3.10006 of this title (relating to Approval of Forms Relating to Viatical Settlements);

(3) the written informational materials that are required by §3.10008 of this title (relating to Required Informational Materials), and must be filed pursuant to §3.10007 of this title (relating to Required Filings for Informational Purposes);

(4) samples of all advertising or other solicitation materials that the company is disseminating or plans to disseminate in Texas, and must be filed pursuant to §3.10007 of this title (relating to Required Filings for Informational Purposes);

(5) (if the viatical settlement company is applying on or before March 1, 1997) historical data regarding the company's conduct of the business of viatical settlements with viators in Texas, in the format prescribed by Figure 3 in §3.10018 of this title (relating to Application and Reporting Forms) (Form VIAT-CO.RPT).

(c) To obtain a certificate of registration as a viatical settlement broker, a person must apply to the department in the format prescribed by Figure 2 in §3.10018 of this title (relating to Application and Reporting Forms) (Form VIAT-BR.APP). The application form must be accompanied by:

(1) a registration fee in the amount of $125, in the form of a cashier's check or money order made payable to the Texas Department of Insurance;

(2) (if the viatical settlement broker is not a referral agent) samples of all advertising or other solicitation materials that the broker is disseminating or plans to disseminate in Texas, as must be filed pursuant to §3.10007 of this title (relating to Required Filings for Informational Purposes);

(3) a list identifying all viatical settlement companies or brokers which have paid or shared commissions with the broker in relation to viatical settlement transactions with viators in Texas, or with which the broker intends to transact business in or from Texas during the first year of registration;

(4) (if the viatical settlement broker is applying on or before March 1, 1997) historical data regarding the broker's conduct of the business of viatical settlements in relation to viatical settlement transactions with viators in Texas, in the format prescribed by Figure 4 in §3.10018 of this title (relating to Application and Reporting Forms) (Form VIAT-BR.RPT).

(d) If a viatical settlement company or broker has complied with all application procedures in subsections (b) and (c) of this section, the commissioner shall issue the viatical settlement company or broker a certificate of registration unless the department determines that the application should be denied based on any one or more of the factors set forth in subsection (a) of §3.10016 of this title (relating to Enforcement). The department shall provide written notice to an applicant of the denial of the application and the applicant may make a written request for a hearing to the Chief Clerk, Texas Department of Insurance, P.O. Box 149104, Mail Code 113-1C, Austin, Texas 78714-9104, within 30 days after denial of the application by the department. The department may use the investigatory or subpoena powers referenced in §3.10016 of this title (relating to Enforcement) to perform any investigation of an applicant that the department deems necessary.

(e) Each viatical settlement company or broker which has filed an application for a certificate of registration and has submitted the accompanying materials required in this section on or before April 1, 1996, or the 90th day after the commissioner promulgates the sections of this subchapter, whichever date is earlier:

(1) may do the business of viatical settlements until the commissioner approves the application, or the department issues a notice of denial regarding the application;

(2) may continue to use the forms submitted pursuant to this section and §3. 10006 of this title (relating to Approval of Forms Relating to Viatical Settlements), until the commissioner has completed the review of the forms and either has approved or disapproved them.

(f) In complying with the reporting requirements of this section, viatical settlement companies or brokers shall not include the name of the viator, or in any other way compromise the anonymity of the viator, or the viator's family, spouse or significant other.

(g) The registration of any viatical settlement company or broker with a principal place of business outside of Texas shall not be approved unless the application is accompanied by:

(1) a written designation of an agent for service of process in Texas; and

(2) a written irrevocable consent to the jurisdiction of the commissioner and Texas courts.

(h) If there is a material change to any information provided in an application by a viatical settlement company or broker, the company or broker shall submit a new application containing the changed information.

§3.10004. Annual Fees.

(a) On or before March 1 of each year, beginning on March 1, 1997, viatical settlement companies shall submit to the department an annual renewal fee in the amount of $250, or, if the company has been registered less then 12 months in the previous calendar year, a prorated amount of $0.68 multiplied by the number of days registered in the previous calendar year, in the form of a cashier's check or money order made payable to the Texas Department of Insurance.

(b) On or before March 1 of each year, beginning on March 1, 1997, viatical settlement brokers must submit to the department an annual renewal fee in the amount of $125, or, if the broker has been registered for less than 12 months in the previous calendar year, a prorated amount of $0.34 multiplied by the number of days registered in the previous calendar year, in the form of a cashier's check or money order made payable to the Texas Department of Insurance.

§3.10005. Reporting Requirements.

(a) If a viatical settlement company has applied for a certificate of registration on or before March 1, 1997, it shall submit to the department quarterly reports, in the format prescribed by the form included as Figure 3 in §3.10018 of this title (relating to Application and Reporting Forms) (Form VIAT-CO.RPT), as such reports become due pursuant to the timetable specified on the first page of Figure 3. The report will consist of data relating to events or transactions that occurred during the three-month period preceding the report. Beginning March 1, 1997, viatical settlement companies shall submit reports to the department annually, as set forth in subsection (b) of this section.

(b) On or before March 1 of each year, beginning on March 1, 1997, viatical settlement companies shall submit to the department an annual report, consisting of data relating to viatical settlement transactions with viators in Texas during the previous calendar year, as specified in Figure 3 in §3. 10018 of this title (relating to Application and Reporting Forms) (Form VIAT-CO.RPT).

(c) If a viatical settlement broker has applied for a certificate of registration on or before March 1, 1997, it shall submit to the department quarterly reports relating to viatical settlement transactions with viators in Texas, in the format prescribed by Figure 4 in §3.10018 of this title (relating to Application and Reporting Forms) (Form VIAT-BR.RPT), as such reports become due pursuant to the timetable specified on the first page of Figure 4. The report will

consist of data relating to events or transactions that occurred during the three-month period preceding the report. Beginning March 1, 1997, viatical settlement brokers shall submit reports to the department annually, as set forth in subsection (d) of this section.

(d) On or before March 1 of each year, beginning on March 1, 1997, viatical settlement brokers registered in this state must submit to the department data relating to viatical settlement transactions with viators in Texas that occurred during the previous calendar year, as specified in Figure 4 in §3.10018 of this title (relating to Application and Reporting Forms) (Form VIAT-BR.RPT).

(e) In complying with the reporting requirements of this section, viatical settlement companies or brokers shall not include the name of the viator, or in any other way compromise the anonymity of the viator, or the viator's family, spouse or significant other.

§3.10006. Approval of Forms Relating to Viatical Settlements.

(a) A viatical settlement company shall not enter into a viatical settlement with a viator in this state unless all forms used in effecting the settlement with the viator, including the application, have been filed with and approved by the department. Such forms submitted for approval must include any forms prepared and processed by a viatical settlement broker, but relied upon by the viatical settlement company in effecting the settlement.

(b) Except as allowed under the initial grace period set forth in subsection (e) of §3.10003 of this title (relating to Registration and Initial Fees), all forms that a viatical settlement company proposes to use in effecting viatical settlements with viators in this state must be filed with the department at least sixty days prior to use of the forms. If the forms have not been disapproved, and if corrections have not been requested, the company may use the forms at the end of sixty days from the date the form is received by the department, or the date the department issues a certificate of registration to the company, whichever date is later, provided that an attorney licensed to practice law in this state, or any authorized representative of the company, files a certification on behalf of the company, stating that:

(1) the certification is filed on behalf of the viatical settlement company, which agrees to be bound by it;

(2) the attorney or representative has reviewed and is familiar with all applicable statutes and rules relating to viatical settlements;

(3) the attorney or representative has analyzed the forms filed with the department, and, based on the attorney or representative's best knowledge and belief, the forms comply with all applicable statutes and rules of this state relating to viatical settlements.

(c) If the department disapproves any such form, the viatical settlement company, upon written notice of such disapproval, shall stop using the form immediately. The department may require a viatical settlement company to replace disapproved forms used to effect viatical settlements during the pendency of the department's review with amended or reissued forms that meet the department's approval.

(d) The department may disapprove any form filed pursuant to this section, or, withdraw a previous approval of any form, if:

(1) the form fails to comply with any applicable provision of the Insurance Code or the sections promulgated under this subchapter; or

(2) the content of the form is unjust, encourages misrepresentation or is in any way deceptive.

(e) All forms filed pursuant to this section shall be submitted in duplicate in accordance with the following procedures:

(1) The transmittal letter shall be submitted in duplicate and shall specify that the form is for use in the viatical settlement market. The transmittal letter must identify the type of form and explain the purpose and use of the form.

(2) Form filings shall be submitted to the Life/Health Group, Filings Intake, Mail Code 106-1E, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104 or 333 Guadalupe, Austin, Texas 78701. To expedite the return of notices of proposed disapprovals or approvals, a company may enclose an overnight mail envelope together with either a completed form for transmittal or the company's billing number.

(3) The form filing must identify the type of filing as a viatical settlement form and explain the purpose and use of the form.

(4) All correspondence and forms, including resubmissions and corrections for pending forms, shall be submitted in duplicate.

(5) All forms must be filled in with specimen language and specimen fill-in material.

(6) Forms shall be submitted on paper that will accept a rubber stamp and that is suitable for permanent filing and microfilming. Glossy stock paper is not acceptable.

(7) All filings must be legible.

(A) Forms and corrections shall be submitted for review on 8 1/2 by 11 paper.

(B) Forms and corrections should not be submitted for review in any print format which consists of materials bound or printed on paper other than 8 1/2 by 11.

(C) Forms and corrections may be submitted in typewritten, computer generated, or printer's proof format.

(D) Handwritten forms or handwritten corrections will not be accepted.

(8) Each form shall be designated by a form number sufficient to distinguish it from all other forms used by the viatical settlement company. The form number shall be located in the lower left-hand corner of the cover page or on the first page of the form if the form number would be visible with the cover closed.

(9) One person shall be designated as the contact person for each filing submitted. Said submission should provide the name, address and phone number of the contact person for that filing. If the forms are submitted by anyone other than the company itself, the forms shall be accompanied by a dated letter executed by an officer of the company designating as contact person for that filing the consulting firm, actuary, legal counsel, or other contact person.

§3.10007. Required Filings for Informational Purposes.

(a) Each viatical company shall file with the department a copy of the written informational material required by §3.10008 of this title (relating to the Required Informational Materials), on or before the date the brochure is disseminated to viators.

(b) Each viatical settlement company or broker shall file with the department all advertising or other solicitation materials used to market viatical settlements or the company or broker's services to viators or prospective viators in this state, on or before the date such materials are published or disseminated. Advertising submitted with the application for registration should be submitted to the address specified in §3.10006(e)(2) of this title *(relating to Approval of Forms Relating to Viatical Settlements). Subsequent*

filings of advertising should be sent directly to the Advertising Unit of the Consumer Protection Division, Texas Department of Insurance, Mail Code 111-2A, P.O. Box 149104, Austin, Texas 78714-9104 or 333 Guadalupe, Austin, Texas 78701.

(c) If a viator represented by an attorney requests any substantive revision in a contract effecting a viatical settlement, the viatical settlement company must file the contract, as revised, with the department, redacting all information made confidential by §3.10014 of this title (relating to Confidentiality). Provided that this submission is accompanied by a written certification from the viator's stating that the viator has requested the substantive revision after consultation with the viator's attorney, the submission of the revised contract will be for informational purposes, rather than for prior approval.

(d) The filings required by this section are for informational purposes only. Viatical settlement companies or brokers may use or disseminate the materials referenced in subsections (a)-(c)of this section without the prior approval of the department.

§3.10008. Required Informational Materials.

(a) With each application for a viatical settlement, the viatical settlement company shall deliver to the applicant written informational materials setting forth the company's full name and home office address.

(b) The written informational materials must include the following statements:

(1) "Persons with catastrophic or life-threatening illnesses or conditions may have alternatives to viatical settlements, including accelerated benefits offered by the issuer of the policy, loans secured by the policy and surrender of the policy for cash value."

(2) "A viator may incur tax consequences from entering into a viatical settlement. Persons interested in entering into a viatical settlement should consult their tax advisor."

(3) "A viatical settlement may affect a viator's ability to receive supplemental social security income, public assistance and public medical services. Persons interested in entering into a viatical settlement should consult an attorney, financial advisor or social services agency regarding these potential consequences."

(4) "The proceeds of a viatical settlement payable to the viator may not be exempt from the viator's creditors, personal representatives, trustees in bankruptcy and receivers in state or federal court. Persons interested in entering into a viatical settlement should consult an attorney or financial advisor regarding these potential consequences."

(c) The written informational materials must explain:

(1) How viatical settlements operate;

(2) The viator's right to rescind a viatical settlement not later than the 15th day after the date either that the viator receives the viatical settlement proceeds, or the proceeds are placed in escrow, as allowed by §3.10009 of this title (relating to Application and Contract Forms: Required Provisions and Prohibited Practices).

(3) The viator's right to know, upon request, the identity of any person who will receive a commission or other form of compensation from the viatical settlement company or broker with respect to the viatical settlement and the amount and terms of such compensation.

(4) The limits and options regarding contacts for determination of health status set forth in subsection (b)(4) of §3.10009 of this title (relating to Application and Contract Forms: Required Provisions and Prohibited Practices) and §3.10012 of this title (relating to Contacting the Viator for Health Status Inquiries: Limits and Prohibited Practices);

(5) Every viator's right to confidentiality under §3.10014 of this title (relating to Confidentiality);

(6) That if the policy that is the subject of a viatical settlement contains a provision for double or additional indemnity for accidental death, or contains riders or other provisions insuring the lives of spouses, family members or anyone else other than the person with the catastrophic or life-threatening illness, the viatical settlement contract will affect those provisions or riders and may cause spouses, family members or others to lose the additional benefits afforded by those provisions or riders.

§3.10009. Application and Contract Forms: Required Provisions and Prohibited Practices.

(a) All application forms used to effect viatical settlements shall contain the following information in English and in Spanish, which either must be displayed prominently and in bold print on the front page of the application, or on a supplement attached to the front of the application:

(1) In English: "Receipt of a viatical settlement may affect your eligibility for public assistance programs such as medical assistance (Medicaid), Aid to Families with Dependent Children (AFDC), supplementary social security income (SSI), and drug assistance programs. The money you receive for your life insurance policy also may be taxable. Before completing a viatical settlement contract, you are urged to consult with a qualified tax advisor and with social service agencies concerning how receipt of such a payment will affect you, your family, and your spouse's eligibility for public assistance. For more information about viatical settlements generally, contact the Texas Department of Insurance, at 1-800-252-3439."
FIGURE 1: 28 TAC §3.10009(a)(2)

(b) All forms of contract used to effect viatical settlements shall contain:

(1) a provision that the viator may rescind the viatical settlement not later than the 15th day after either the date that the viator receives the proceeds of the viatical settlement, or, at the option of the viatical settlement company, the date the proceeds are placed in escrow as provided by subsection (b)(2)B) of this section;

(2) a provision that upon receipt from the viator of documents to effect the transfer of the policy, the viatical settlement company may at its option either:

(A) make unconditional payment to the viator immediately, either in a lump sum or in installment payments in a manner not prohibited by subsection (c)(5) of this section; or

(B) pay the proceeds of the settlement to an escrow or trust account managed by a trustee or escrow agent in a national or state bank that is a member of the Federal Deposit Insurance Corporation, where such proceeds shall remain until:

(i) the proceeds are disbursed to the viator upon acknowledgment of the transfer of the policy by the issuer of the policy, or the expiration of the rescission period without rescission by the viator, whichever occurs later;

(ii) the proceeds are transferred to purchase an instrument used to effect installment payments in a manner not prohibited by subsection (c)(5) of this section; or

(iii) the proceeds are returned to the viatical settlement company upon notice of the viator's rescission within the rescission period;

(3) a provision that the forms used to effect the viatical settlement, together with the application, constitute the entire contract between the viatical settlement company and the viator;

(4) a provision that the viator may designate any adult individual in regular contact with the viator as the contact for all inquiries about the viator's health status, and, if such designation is made, a viatical settlement company cannot make such an inquiry to the viator, unless the company is unable, after diligent effort, to contact the designee for more than 30 days. The viator may change this designation at any time, upon written notice to the viatical settlement company;

(5) a provision disclosing that the viatical settlement company could sell or otherwise transfer the policy that is the subject of the viatical settlement to a person unknown to the viator, without the viator's consent;

(6) if the viatical settlement company intends to sell or otherwise transfer the policy that is the subject of the viatical settlement to a particular person or persons, a provision disclosing the company's intent to sell or otherwise transfer the policy, and the identity of the person or persons to whom the initial company proposes to sell or otherwise transfer the policy;

(7) an acknowledgment page, which a prospective viator must sign before a notary, stating that the prospective viator acknowledges that he or she:

(A) has a life-threatening illness;

(B) has received and read the written informational materials required by §3.10008 of this subchapter (relating to Required Informational Materials);

(C) has received and read all of the documents used to effect the viatical settlement;

(D) is entering into the viatical settlement knowingly and voluntarily;

(8) a full disclosure regarding what effect the viatical settlement will have on payment of premiums and disposition of proceeds, cash values and dividends, if the policy that is the subject of the viatical settlement contains a provision for double or additional indemnity for accidental death, or contains riders or other provisions insuring the lives of spouses, family members or anyone else other than the person with the life-threatening illness.

(c) Prohibited practices relating to applications and contracts. A viatical settlement company or broker shall not:

(1) condition the consideration of an application on exclusive dealing between the viator and the viatical settlement company or broker;

(2) discriminate in the availability or terms of viatical settlements on the basis of race, color, national origin, creed, religion, occupation, geographic location, marital or family status, sexual orientation, age, gender, disability or partial disability (except when any such factor affects the life expectancy of the viator);

(3) discriminate between viators with dependents and those without dependents;

(4) enter into any viatical settlement that provides a payment to the viator that is unjust (In determining whether a payment is unjust, the commissioner may consider, among other factors, the life expectancy of the viator, the applicable rating of the insurance company that issued the subject policy by a rating service generally recognized by the insurance industry, regulators and consumer groups, and the prevailing discount rates in the viatical settlement market in Texas, or if insufficient data is available for Texas, the prevailing rates nationally or in other states that maintain such data.) or;

(5) enter into a viatical settlement in which payments of proceeds are made in installments, unless the settlement is effected through an annuity purchased from an insurance company licensed by this state or any other state in the United States, or through an escrow or trust account which provides for installment refunds and which is established by a bank licensed by this state or any other state in the United States.

§3.10010. Advertising and Other Solicitation. Prohibited Practices. No viatical settlement company or broker shall advertise or in other way solicit business in a manner that is untruthful or misleading by fact or implication. In considering whether or not the advertising or other solicitation is untruthful or misleading, the commissioner may use the standards set forth in this subchapter, Article 21.21, Insurance Code, and Subchapter B of Chapter 21, of this title (relating to Insurance Advertising, Certain Trade Practices, and Solicitation).

§3.10011. Payment of Commissions or other Forms of Compensation: Disclosure and Prohibited Practices.

(a) Upon request of the viator at or before the time a viatical settlement is executed, the viatical settlement company, viatical settlement broker, or both, shall disclose in writing to the viator:

(1) the identity of any person who will receive a commission or other form of compensation from the viatical settlement company or broker with respect to the viatical settlement; and

(2) the amount and terms of the compensation.

(b) A viatical settlement company or broker shall not pay or offer to pay any referral or finder's fee, commission, or other compensation to a viator's physician, attorney, accountant, social worker, case manager or other person providing medical, social, legal or financial planning or other counseling services to the viator.

§3.10012. Contacting the Viator for Health Status Inquiries: Limits and Prohibited Practices.

(a) No person shall contact a viator or the viator's designee (as provided for in subsection (b)(4) of §3.10009 of this title (relating to Application and Contract Forms: Required Provisions and Prohibited Practices)), for determining the viator's health status, unless that person is registered as a viatical settlement company or broker in this state.

(b) Once a viator has entered into a viatical settlement with a viatical settlement company, no viatical settlement company or broker shall contact the viator, or the viator's designee, to determine the viator's health status more frequently than once every 30 days.

§3.10013. Assignment or resale of policies: Disclosure and Prohibited Practices.

(a) As to viatical settlements executed after the effective date of this subchapter, any viatical settlement company that sells or otherwise transfers any policy that is the subject of a viatical settlement without making the disclosures to the viator required by subsections (b)(5) and (b)(6) of §3.10009 of this title (relating to Application and Contract Forms; Required Provisions and Prohibited Practices) is subject to discipline by the commissioner under §3.10016 of this title (relating to Enforcement).

(b) At the time a viatical settlement company sells or otherwise transfers its interest in any policy that is the subject of a viatical settlement to any person not registered pursuant to this subchapter, the purchaser or transferee must appoint, in writing, either the viatical settlement company that entered into the viatical settlement or a broker who received commissions from the viatical settlement to make all inquiries to the viator, or the viator's designee, regarding health status of the viator or any other matters. A

viatical settlement company that sells or otherwise transfers such a policy to a purchaser or transferee who does not make such an appointment commits a violation of this section, and is subject to discipline by the commissioner under §3.10016 of this title (relating to Enforcement).

§3.10014. Confidentiality.

(a) All medical, financial or personal information solicited or obtained by a viatical settlement company or broker about a viator, including the viator's identity or the identity of family members, a spouse or a significant other, is confidential and shall not be disclosed in any form to any person, unless disclosure:

(1) is necessary to effect the viatical settlement between the viator and the viatical settlement company and the viator provides prior and knowing written consent to the disclosure; or

(2) is provided to the department in the form of statistical data from which the identity of the viator cannot be traced, in response to the reporting requirements set forth in §3.10005 of this title (relating to Annual Reporting Requirements) and in Figures 3 and 4 contained in §3.10018 of this title (relating to Application and Reporting Forms); or

(3) is provided to the department in response to a subpoena from the commissioner, pursuant to the enforcement powers set forth in §3.10016 of this title (relating to Enforcement).

(b) All persons to whom the confidential information referenced in subsection (a) of this section is disclosed pursuant to the viator's consent shall maintain the confidentiality of such information, and not disclose it to any other person in any form, without prior and knowing written consent of the viator.

(c) The confidentiality of information obtained by the department or the commissioner pursuant to the subpoena powers set forth in §3.10016 of this title (relating to Enforcement), is protected by the confidentiality provisions of either Article 1.10D or Article 1.19-1, Insurance Code, depending on which article is used to subpoena the information.

(d) All medical information solicited or obtained by a viatical settlement company or broker about a viator further shall be subject to applicable provisions of the laws of this state, and of the United States, relating to the confidentiality of medical information.

§3.10015. Prohibition Against Operating As, or Doing Business with, an Unregistered Company or Broker.

(a) No person shall act as a viatical settlement company or broker without first obtaining a certificate of registration from the Texas Department of Insurance, except as allowed under the grace period set forth in subsection (e) of §3.10003 of this title (relating to Registration and Initial Fees).

(b) After expiration of the grace period set forth in subsection (e) of §3.10003 of this title (relating to Registration and Initial Fees), no viatical settlement company or broker registered pursuant to this subchapter shall participate in a viatical settlement, or pay or share commissions, with a company or broker not registered pursuant to this subchapter.

§3.10016. Enforcement.

(a) If a viatical settlement company or broker files a request for hearing on the department's denial of the company or broker's application for a certificate of registration, or if the department seeks revocation of the certificate of registration issued to any company or broker, the commissioner may deny the application or revoke the certificate if the commissioner determines, after notice and opportunity for hearing, that the company or broker, or any officers, directors, controlling shareholders of the company or broker, or any employees or affiliates of a company or broker who themselves are acting as a broker:

(1) misrepresented any material fact in its application for the certificate of registration;

(2) has been convicted, within the ten years prior to the date of the application, of a felony or other crime involving fraud in any jurisdiction;

(3) is conducting its financial affairs in such a manner as to jeopardize any viator's rights, under this subchapter or the terms of a viatical settlement, to prompt or full payment of proceeds from a viatical settlement;

(4) is engaging in the business of viatical settlements unlawfully in any other state;

(5) has violated any provision of Article 3.50-6A, Insurance Code, or this subchapter, or any other insurance law of this state made applicable to viatical settlement companies or brokers by Article 3.50-6A or this subchapter; or

(6) while engaging in the business of viatical settlements, has violated any state or federal securities laws.

(b) After notice and the opportunity for a hearing, if the commissioner finds that a viatical settlement company or broker has committed conduct specified in subsection (a) of this section, the commissioner may, in lieu of revocation, order one or more of the sanctions set forth in subsections (a)(1)-(a)(4) of the Insurance Code, Article 1.10, §7.

(c) If the commissioner determines, after notice and opportunity for a hearing, that any person is acting unlawfully as a viatical settlement company or broker in this state without a certificate of registration, or that such person is violating any other provision of Article 3.50-6A, Insurance Code, or this subchapter, or any other insurance law of this state made applicable to viatical settlement companies or brokers by Article 3.50-6A or this subchapter, the commissioner:

(1) shall order such person to immediately cease and desist from doing the business of viatical settlements until the person fully complies with all registration requirements of the Insurance Code and this subchapter;

(2) shall order such person to cease and desist from violating any other applicable provisions of the Insurance Code or this subchapter;

(3) may order such person to pay an administrative penalty in accordance with Article 1.10E, Insurance Code; and

(4) may order such person to make complete restitution to all persons in Texas harmed by the person's illegal conduct, in a form and amount, and within a time period, determined by the commissioner.

(d) If a person violates any penal law while engaging in the business of viatical settlements, or while attempting to defraud a viatical settlement company or broker, the commissioner and the insurance fraud unit of the department shall have all powers against such person under Article 1.10D, Insurance Code, that the commissioner and the fraud unit have against a person who commits a fraudulent insurance act, as defined in Article 1.10D.

(e) In order to facilitate enforcement of Article 3.50-6A, Insurance Code, other applicable insurance laws and this subchapter, the department may utilize the provisions of Articles 1.19-1 and 1.24, Insurance Code, which hereby are made expressly applicable to investigations of viatical settlement companies or brokers (whether registered by the commissioner, applying for a certificate of registration or unlawfully doing business without a certificate of registration), or anyone else engaged in, or conducting transactions relating to, the business of viatical settlements.

(f) The department shall seek information made confidential by §3.10014 of this title (relating to Confidentiality) only through use of subpoenas issued pursuant to either Article 1.10D or 1.19-1, Insurance Code. Confidential information obtained by the department pursuant to such subpoenas shall remain confidential pursuant to the terms of either §5 of Article 1.10D, or subsection (1)(d) of Article 1.19-1.

(g) Articles 1.33A and 1.33B, Insurance Code, apply to enforcement actions brought pursuant to this section.

(h) Pursuant to Article 1.09-1, Insurance Code, the Attorney General shall represent the department and the commissioner in matters appealed to, or brought in, any state or federal court.

§3.10017. Procedure for Approval or Other Determination by the Department and Commissioner. Whenever an approval or other determination by the department is required by this subchapter, the approval or other determination shall be made by the deputy commissioner of the Life/Health Group, or the deputy commissioner's designee. Whenever an approval or other determination by the commissioner is required by this subchapter, the initial approval or other determination shall be made by the deputy commissioner of the Life/Health Group, or the deputy commissioner's designee.

§3.10018. Adoption by Department of Forms for Application and Reporting. Form VIAT-CO.APP (Figure 1, containing the format for Application for Registration as a Viatical Settlement Company including the application, Service of Process, and Irrevocable Consent to Jurisdiction); Form VIAT-BR.APP (Figure 2, containing the format for Application for Registration as a Viatical Settlement Broker, including the application, Service of Process, and Irrevocable Consent to Jurisdiction); Form VIAT-CO.RPT (Figure 3, containing the format for Viatical Settlement Company Report); and Form VIAT-BR.RPT (Figure 4, containing the format for Viatical Settlement Broker Report) shall be utilized when applying for registration and filing reports adopted in this subchapter. Each is reproduced in detail in this section. Persons may obtain the forms by making a request to: Texas Department of Insurance, Publication Department, MC 108-5A, P.O. Box 149104, Austin, Texas 78714-9104.

FIGURE 1: 28 TAC §3.10018
FIGURE 2: 28 TAC §3.10018
FIGURE 3: 28 TAC §3.10018
FIGURE 4: 28 TAC §3.10018

The department may provide diskettes containing the application or reporting forms upon which an applicant or registrant would enter the data required by these sections or may otherwise facilitate the receipt of information by the department in a computer compatible manner.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on February 5, 1996.

TRD-9601517 Alicia M. Fechtel
General Counsel and Chief Clerk
Texas Department of Insurance

Effective date: February 26, 1996

Proposal publication date: November 24, 1995

For further information, please call: (512) 463-6327

◆ ◆ ◆

TITLE 30. ENVIRONMENTAL QUALITY

Part I. Texas Natural Resource Conservation Commission

Chapter 305. Consolidated Permits

The Texas Natural Resource Conservation Commission (commission or TNRCC) adopts amendments to §§305.51, 305.69, and 305.122, concerning consolidated permits. Section 305.69 is adopted with changes to the proposed text as published in the October 31, 1995, issue of the *Texas Register* (20 TexReg 8968), as corrected in the December 1, 1995, issue of the *Texas Register* (20 TexReg 10226). Sections 305.51 and 305.122 are adopted without changes to the proposed text as published in the October 31, 1995, issue of the *Texas Register* (20 TexReg 8968), and will not be republished.

The amendments address changes to the federal hazardous waste regulations made effective between July 1, 1991, and June 30, 1993, and include a change to the federal regulations promulgated on January 31, 1991. The amendments are adopted strictly for the purpose of ensuring that state rules are equivalent to the federal regulations after which they are patterned. By establishing equivalency with certain federal hazardous waste regulations, the State of Texas will be able to retain authorization to operate aspects of the federal hazardous waste program in lieu of the United States Environmental Protection Agency (EPA). The resultant benefit will be a reduced cost to participants in the hazardous waste regulatory program because state hazardous waste program procedures will not need to be duplicated with the federal agency.

The rule amendments substantially advance the stated purpose by adopting the aforementioned federal regulations by reference or by introducing language intended to ensure that state rules are equivalent to the corresponding federal regulations.

This rule does not constitute a taking under the Private Real Property Rights Preservation Act because it falls within the mandatory federal law exception.

Comment was received from the Texas Chemical Council, generally supporting the proposal with a suggestion concerning §305.69(i), concerning solid waste permit modification at the request of the permittee. The commenter noted that the federal regulation under 40 Code of Federal Regulations, §270.42, Appendix I, Section B.1.b., contains an entry that should have been included in the corresponding state rule. It is the permit modification to incorporate changes associated with F039 (multisource leachate) sampling or analysis methods, as a Class 11 modification, and was promulgated by the EPA on January 31, 1991, at 56 FedReg 3864. The commission agrees that it is appropriate to adopt this regulation, and it is shown under §305.69(i), Appendix I, B.1.b. Consequently, proposed §305.69(i), Appendix I, B.1.b. and c. have been renumbered as B.1.c. and d., respectively.

Subchapter C. Application for Permit

• 30 TAC §305.51

The amendment is adopted pursuant to the Texas Water Code, §5.103 and §5.105 (Vernon 1988), which authorizes the TNRCC to promulgate rules necessary to carry out the powers and duties under the provisions of the Texas Water Code and other laws of this state.

The amendment is also adopted pursuant to the Texas Health and Safety Code, §361.017 and §361.024 (Vernon 1992), which further authorizes the TNRCC to promulgate rules necessary to manage industrial solid and municipal hazardous wastes.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's authority.

Issued in Austin, Texas, on February 5, 1996.

TRD-9601509 Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission

Effective date: February 26, 1996

Proposal publication date: October 31, 1995

For further information, please call: (512) 239-4640

♦ ♦ ♦

Subchapter D. Amendments, Modifications, Renewals, Transfers, Corrections, Revocation, and Suspension of Permits

• 30 TAC §305.69

The amendment is adopted pursuant to the Texas Water Code, §5.103 and §5.105 (Vernon 1988), which authorizes the Texas Natural Resource Conservation Commission (TNRCC) to promulgate rules necessary to carry out the powers and duties under the provisions of the Texas Water Code and other laws of this state.

The amendment is also adopted pursuant to Texas Health and Safety Code §361.017 and §361.024 (Vernon 1992), which further authorizes the TNRCC to promulgate rules necessary to manage industrial solid and municipal hazardous wastes.

§305.69. Solid Waste Permit Modification at the Request of the Permittee.

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

(d) Class 3 modifications of solid waste permits.

(1) for Class 3 modifications listed in Appendix I of this subchapter, the permittee must submit a modification request to the executive director that:

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

(D) provides the applicable information in the form and manner specified in §§305.41-305.53 of this title (relating to Application for Permit), §§305.171-305.174 of this title (relating to Hazardous Waste Incinerator Permits), and §§305.181-305.184 of this title (relating to Permits for Land Treatment Demonstrations Using Field Tests or Laboratory Analyses), and §§305.571-305.573 (relating to Permits for Boilers and Industrial Furnaces Burning Hazardous Waste).

(2)-(6) (No change.)

(e) (No change.)

(f) Temporary authorizations.

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

(5) The commission shall approve or deny the temporary authorization as quickly as practicable. To issue a temporary authorization, the commission must find:

(A) (No change.)

(B) the temporary authorization is necessary to achieve one of the following objectives before action is likely to be taken on a modification request:

(i) (No change.)

(ii) to allow treatment or storage in tanks, containers, or containment buildings, of restricted wastes in accordance with 40 CFR, Part 268 or RCRA §3004;

(iii)-(v) (No change.)

(6) (No change.)

(g) (No change.)

(h) Newly regulated wastes and units.

(1) The permittee is authorized to continue to manage wastes listed or identified as hazardous under 40 CFR, Part 261, or to continue to manage hazardous waste in units newly regulated as hazardous waste management units if:

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

(D) the permittee also submits a complete Class 2 or 3 modification request within 180 days after the effective date of the final rule listing or identifying the waste or subjecting the unit to RCRA Subtitle C management standards; and

(E) (No change.)

(2) (No change.)

(i) Appendix I. The following appendix will be used for the purposes of Subchapter D which relate to solid waste permit modification at the request of the permittee.
Figure 1: 30 TAC §305.69(i)

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's authority.

Issued in Austin, Texas, on February 5, 1996.

TRD-9601508 Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission

Effective date: February 26, 1996

Proposal publication date: October 31, 1995

For further information, please call: (512) 239-4640

♦ ♦ ♦

Subchapter F. Permit Characteristics and Conditions

• 30 TAC §305.122

The amendment is adopted under the Texas Water Code, §5.103 and §5. 105 (Vernon 1988), which provides the Texas Natural Resource Conservation Commission (TNRCC) the authority to promulgate rules necessary to carry out the powers and duties under the provisions of the Texas Water Code and other laws of this state, and under the Texas Health and Safety Code, §361.017 and §361.024 (Vernon 1992), which further provides the TNRCC authority to promulgate rules necessary to manage industrial solid and municipal hazardous wastes.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's authority.

Issued in Austin, Texas, on February 5, 1996.

TRD-9601507 Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission

Effective date: February 26, 1996

Proposal publication date: October 31, 1995

For further information, please call: (512) 239-4640

♦ ♦ ♦

Chapter 330. Municipal Solid Waste

The Texas Natural Resource Conservation Commission (commission or TNRCC) adopts the repeal of §330.568, amendments to §§330.561-330.567, and new §330.568 and §330.569, concerning the development of regional and local solid waste management plans, and financial assistance to regional planning commissions and local governments. The amendments to §§330.562, 330.565, 330.566 and 330.567 and new §330.568 and 330.569 are adopted with changes to the proposed text as published in the October 10, 1995, issue of the

Texas Register (20 TexReg 8310). The repeal and the amendments to §§330.561, 330.563 and 330.564 are adopted without changes and will not be republished.

The adopted revisions update the regional and local planning requirements in the existing rules to include a requirement established by House Bill (HB) 2537, Regular Session, 73rd Legislature (1993) that regional and local solid waste management plans include an inventory of existing and closed landfills. The revisions also provide for a new grants program made possible by HB 3072, Regular Session, 74th Legislature (1995), which directs that half of the revenue collected from the state's municipal solid waste disposal fees be dedicated to local and regional solid waste projects consistent with regional plans approved by the commission and that those plans be updated and maintained. Additionally, the revisions update the rule language as a result of the transfer of the municipal solid waste program from the Texas Department of Health to the TNRCC, and as a result of changes in agency responsibilities and plan approval policies.

The adopted revisions specify requirements for the preparation, coordination and approval of regional and local solid waste management plans and the provisions of a planning fund for providing financial assistance to prepare those plans. The new regional solid waste grants program includes provisions for allocating the dedicated funds to the state's 24 municipal solid waste planning regions through a formula developed by the TNRCC, with cooperation of various interested parties, in accordance with the direction set forth in the legislation.

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code Annotated Section 2007.043. The following is a summary of that Assessment. The specific purpose of the rule is to implement the provision in House Bill (HB) 3072, 74th Legislature, that dedicates half of the municipal solid waste disposal fee revenue to local and regional projects which are consistent with approved regional plans, and also to incorporate the requirement of HB 2537, 73rd Legislature, that all regional and local solid waste management plans include an inventory of existing and closed landfills. The rules will substantially advance this specific purpose by incorporating all of the applicable provisions of the legislation. Additionally, other amendments were made to update the rule language as a result of the transfer of the municipal solid waste program from the Texas Department of Health to the TNRCC, and as a result of changes in agency responsibilities and plan approval policies. Promulgation and enforcement of these rules will not affect private real property because the actions that are required by the rules are directed at regional and local planning agencies and not toward private real property owners.

The TNRCC received written comments from the National Solid Wastes Management Association-Sunbelt Region, and the City of Plainview. No persons provided verbal comments at the public hearing.

The TNRCC received one comment concerning the new §330.563(a)(3)(O) and §330.563(b)(3)(L). These new sections add the requirement from HB 2537 (73rd Texas Legislature) that regional and local solid waste management plans include an inventory of municipal solid waste landfill units, including landfill units no longer in operation. The comment indicated that the responsibility for executing the landfill inventory should be outlined in the regulations. The TNRCC does not agree that additional explanation concerning responsibility for executing the inventories is needed in the regulation. The additional provisions add to an existing list of items that must be addressed in the regional and local plans, and the current language of the regulation outlines the responsibilities for preparing and adopting those plans. In addition, the new §330.563(a)(3)(O) includes a statement that the executive director of the TNRCC may conduct statewide inventories and provide those to the councils of governments to include in their regional plans to help satisfy this requirement. Further, §330.563(b)(3)(L) allows for the inventories prepared for the regional plans to be used to satisfy the requirement for an inventory to be included in a local plan.

The TNRCC received one comment concerning changes to §330.566(b) and §330.567(b)(3)(D)(6). The change to the first section removes the time limitation of 90 days after submittal of a plan for the executive director to tentatively determine if the plan conforms to the rules and the time frame of 30 days within which a notice of deficiencies will be provided to the planning agency after tentative disapproval of a plan by the executive director. The change to the second section removes the requirement that the TNRCC shall approve or disapprove an application for financial assistance from the municipal solid waste management planning fund within 90 days of its receipt. The comment received expressed concern that the changes would eliminate the time limits placed on the TNRCC for review and response, while the rules retain response time limits for entities that must prepare the plans, such as in §330.566(e). The changes to §330.566(b) were proposed based on the experience gained in working with councils of governments over the last several years in developing regional plans. During that time frame, it was found that the review time periods did not really apply, since in many cases the review and communication of agency comments was an ongoing function with close communication between TNRCC staff and the regional planning agency. The time limits, which were not legislatively mandated, set a more rigid, regulatory approach to the process, which has been more interactive than was originally envisioned by the regulations. The TNRCC agrees, however, that some entities may have concerns with removing the time limits placed on the TNRCC in its review of the plans. Therefore, the TNRCC will retain the time limits in this section and in §330.567 for similar reasons.

The TNRCC received one comment questioning the deletion of the sentence under §330.567(b)(2) that stated that the scope of work for the development of plans funded from the planning fund shall be mutually agreed upon by the TNRCC and the funding applicant. The TNRCC proposed deleting this sentence to avoid any confusion concerning the grant approval and award process. This provision is not required by statute, and it is inherent in the funding process that negotiation will take place on proposals submitted by an applicant for planning funds from the TNRCC. From experience with recent planning efforts, the TNRCC has found it advantageous to encourage more consistent, standardized approaches to developing these plans, while allowing for consideration of individual regional or local needs. Since, ultimately, the TNRCC must adopt these plans before they become effective, the TNRCC has final responsibility to ensure that the scope of work being funded will result in an acceptable plan. Therefore, the language is being deleted to avoid any confusion over the TNRCC's authority to finally approve or disapprove the specific planning activities to be funded.

The TNRCC received one comment requesting that the funding allocation formula for the regional solid waste grant program referenced in the new §330.569(c) should be better defined, and that the formula should be published for public comment. The time frame available for establishing the formula, so that the grants program could go forward, did not allow for more extensive public review. However, the allocation formula was developed by the TNRCC with input from a number of representative groups, including the Texas Association of Regional Councils, the Texas Municipal League, the Texas Association of Counties, and the TNRCC's Municipal Solid Waste Management and Resource Recovery Advisory Council. The same time constraints precluded the TNRCC from considering including more specific detail on the formula in the rule changes. The TNRCC will further consider the need for more specific information to be included in future rule changes, but such consideration will need to take into account a need for flexibility in the formula to address changing conditions and needs.

The TNRCC received one comment concerning the private industry considerations set forth in the new §330.569(d). The comment indicated that new §330.569(h) should state that the statutory prohibition against using these grant funds to compete with private industry applies to all grant recipients and pass-through grant recipients. The comment further requested that the rules state that failure to comply with this requirement is grounds for termination of the contract and/or the revocation of any unexpended or inappropriately expended funds. The TNRCC agrees with the intent of the comment, but has determined that the provisions of §330.569(d) adequately address those concerns. The current language applies to "all" projects or services funded under the grants program, so additional language in §330. 569(h) is not needed. Similarly, language concerning termination of the contract for failure to comply with the requirements is also not needed, since the provisions of the contracts between TNRCC and the councils of governments require compliance with these statutory requirements.

For the purposes of clarification of the application of terms used in these rules relating to the agency, the definitions for "commission" and "commissioners" have been added and the definition for "executive director" has been revised to be consistent with the agency's procedural rules. Some minor changes in the rules have resulted from the application of those terms.

Subchapter O. Regional and Local Solid Waste Management Planning and Financial Assistance General Provisions

- **30 TAC §§330.561-330.569**

The amendments and new sections are adopted under the Texas Water Code, §5.103, which provides the TNRCC with the authority to adopt any rules necessary to carry out its powers and duties under the code and other laws of the State of Texas, and to establish and approve all general policy of the commission; and under the Comprehensive Municipal Solid Waste Management, Resource Recovery, and Conservation Act (the Conservation Act), Texas Health and Safety Code, §363.021, which gives the TNRCC the authority to adopt and promulgate rules to implement the Conservation Act.

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

CMSWLF–Closed municipal solid waste landfill.

Commission–The Texas Natural Resource Conservation Commission (TNRCC).

Commissioners–The three-member governing body of the Texas Natural Resource Conservation Commission.

Executive director–The executive director of the commission, or any authorized individual designated by the executive director to act in his or her place.

Planning fund–The municipal solid waste management planning fund created in the state treasury by the Comprehensive Municipal Solid Waste Management, Resource Recovery, and Conservation Act (V.T.C.A., Health and Safety Code, Chapter 363).

Public agency–A city, county, district, or authority created and operating under the Texas Constitution, Article III, §52(b)(1) or (2), or Article XVI, §59, or a combination of two or more of these governmental entities acting under an interlocal agreement and having the authority under state laws to own and operate a solid waste management system.

Regional or local solid waste management plan–A plan adopted by a planning region or local government under authority of the Municipal Solid Waste Management, Resource Recovery, and Conservation Act (V.T. C.A., Health and Safety Code, Chapter 363).

Regional Planning Commission–A regional planning commission created under Chapter 391, Local Government Code.

Regional solid waste grants program–The program established to utilize funds dedicated under the Health and Safety Code, Chapter 361, §361.014 for local and regional solid waste projects and to update and maintain regional solid waste management plans.

State solid waste management plan–The municipal solid waste management plan for Texas.

Variance–The granting of relief from the terms or conditions of a plan by the executive director.

§330.565. Public Participation Requirements for Solid Waste Plans.

(a) Advisory committee. An advisory committee shall be convened to provide input, review, and comment during development of regional and local plans. Committee members shall be appointed who represent a broad range of interests, including a representative of the TNRCC, public officials, private operators, citizen groups, and interested individuals.

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

(e) Plan approval. Local and regional solid waste management plans shall be approved by the governing body of the responsible entity before being submitted to the TNRCC for approval.

§330.566. Procedures for Regional and Local Plan Submission and Approval.

(a) Prior to the submission of a plan, the plan shall be adopted by the regional planning commission or local government(s) pursuant to applicable administrative procedures. Local governments shall coordinate with the appropriate regional planning commission and ensure that a local plan is consistent with any regional solid waste management plan in effect for the region encompassing the jurisdiction of the local government, if a regional plan has been approved by the commissioners of the TNRCC .

(b) Within 90 days after a regional or local plan has been submitted, the executive director will tentatively determine if the plan conforms to this subchapter and the state solid waste management plan. The executive director will communicate this determination to the agency which submitted the plan. If the plan is not in conformance, a notice of deficiencies will be provided to the planning agency within 30 days of the tentative disapproval. The executive director has authority to disapprove any plan which has deficiencies. Disapproved plans will not be considered by the commissioners until the executive director determines that deficiencies have been corrected, unless the applicant submits a request for appeal to the commissioners. In order for a plan to be considered under such circumstances, the appeal must be in writing and must be submitted to the commissioners within 30 days following the day the applicant receives notification of tentative plan disapproval by the executive director.

(c) If the executive director tentatively determines a regional or local plan meets the requirements of this subchapter, is in conformance with the state solid waste management plan, and should be approved, the executive director will submit the plan to the commissioners, which, if they concur with the executive director's approval, shall approve a plan by adopting a rule in accordance with the Administrative Procedure Act, Texas Government Code, Chapter 2001. Commissioners' action on the plan will normally occur within 60 days of the tentative decision by the executive director to approve the plan, but the approval will not be effective until the plan has completed the rulemaking process specified by the Administrative Procedure Act, i.e., publication of the proposed action in the *Texas Register*, a 30-day public comment period, and publication of the final rule action in the *Texas Register*. If approved, the executive director will notify the planning agency of the commissioners' approval. In the event the plan is not approved, the commissioners will state the plan's deficiencies and the executive director will immediately notify the planning agency of the commissioners' decision and the plan's deficiencies. The plan may be resubmitted for approval if the executive director determines that deficiencies have been corrected.

(d) If a regional or local solid waste management plan is adopted by rule of the commissioners , public and private solid waste management activities and state regulatory activities shall conform to the adopted regional or local solid waste management plan. The plan shall only remain in effect during the planning period defined in the plan. Under procedures and criteria of subsections (g) and (h) of this section, the executive director may grant a variance from an adopted regional or local solid waste management plan.

(e) If a portion of a regional or local plan is determined by the executive director to no longer be in compliance with the state solid waste management plan or these sections, the executive director may request that the regional body or local government revise the plan. If such a revision is not submitted to the TNRCC within 180 days, the executive director may ask the commissioners to withdraw their approval of that portion of the plan.

(f) A planning commission or local government may submit revisions or updates to an approved plan that reflect new information or changed conditions. Updates to an approved plan to provide for

changes to data and information contained in the plan, which do not substantially change the scope or content of the goals and recommendations of the plan, may be incorporated into an approved plan upon approval by the executive director without further adoption procedures being required. Major revisions and amendments to an approved plan that substantially change the scope or content of the goals and recommendations of the plan shall be considered by the same procedures as original plan submission and approval.

(g) Upon application, the executive director may grant a variance from an adopted regional or local solid waste management plan when:

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

(h) If the executive director intends to grant a variance from the requirements of a plan, the executive director will offer the opportunity for a public hearing on the matter prior to the final decision. The hearing, if requested, will be advertised and conducted within the area affected by the plan.

§330.567. Financial Assistance for Regional and Local Plans.

(a) Authority. The municipal solid waste management planning fund is established by the Comprehensive Municipal Solid Waste Management, Resource Recovery, and Conservation Act (V.T.C.A., Health and Safety Code, Chapter 363) as a special fund in the state treasury.

(b) Administration of the planning fund.

(1) The executive director shall administer the financial assistance program and the planning fund under the direction of the commissioners.

(2) An applicant for financial assistance from the planning fund shall agree to comply with the state solid waste management plan, the TNRCC's rules, and any other requirements adopted by the commissioners.

(3) The executive director shall not authorize release of funds under an application for financial assistance until the applicant has furnished the executive director with a resolution adopted by the governing body of each public agency or planning region which is a party to the application certifying that:

(A) the applicant will comply with the provisions of the financial assistance program and the requirements of the TNRCC;

(B) the grant will only be used for the purposes for which it was provided;

(C) regional or local solid waste management plans developed with state financial assistance will be adopted by the governing body as its policy; and

(D) future municipal solid waste management activities will, to the extent reasonably feasible, conform to the regional or local solid waste management plan.

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

(6) The executive director may approve an application consistent with the provisions of this section when the executive director finds state financial participation is in the public interest and when it is determined that both state and regional or local funding is sufficient to complete the agreed scope of services. The executive director shall approve or disapprove an application for financial assistance within 90 days of its receipt.

(c) Applications.

(1) Requests for state financial assistance shall be made on forms furnished by the TNRCC and shall include a work program and budget for a defined period in which the tasks described in the work program are to be completed.

(2) The only applicant eligible to apply for regional planning financial assistance shall be the regional planning commission designated as responsible for the planning region for which a plan is considered.

(3) The only applicants authorized to apply for local planning financial assistance are local governments or public agencies and designated regional planning commissions. Where the local plan is to cover a geographical area larger than the area of one city, then the application and any resulting contract shall be made by one of the cities, counties, or public agencies which has all or part of its jurisdiction within the area to be considered in the plan, and which is authorized by all public agencies with jurisdictions included in the area considered to act as their agent; or the designated regional planning commission which has jurisdiction over the geographical area to be considered in the plan.

§330.568. Approved State, Regional, and Local Solid Waste Management Plans.

(a) Purpose. This section identifies state, regional, and local solid waste management plans which have been approved by the commissioners.

(b) State plan. The state solid waste management plan may be amended and updated from time to time as conditions warrant and as may be directed by state law. For the purposes of this subchapter, the current state plan is the latest plan, including any plan updates and amending materials, which has been issued by the TNRCC.

(c) Plans approved. The current effective regional solid waste management plan for each region or local solid waste management plan for a local government is the latest plan, including plan amendments, which has been adopted by the commissioners. Copies of approved plans shall be kept on file and available for public review at the TNRCC library. Those plans, and any adopted amendments thereto, are hereby incorporated by reference into this subchapter. Updates to an approved regional or local plan which do not require official adoption by the commissioners, as specified under §330.566(f) of this title (relating to Procedures for Regional and Local Plan Submission and Approval), may be incorporated into an approved plan for informational purposes, as each update is approved by the executive director. Each plan's effectiveness applies only for the geographical area described in the plan and for the period designated in the plan.

(d) Conflicting provisions. By adopting a regional or local plan, the commission has determined that the plan has been developed according to TNRCC rules and does not conflict with the state plan. If it should later be determined that provisions of an adopted plan do conflict with provisions of the state plan, then provisions of the state plan shall prevail.

(e) Agency responsibilities. It shall be the responsibility of the regional planning commission to coordinate the implementation of regional policies and recommended actions in an approved regional plan and coordinate local planning efforts. It shall be the responsibility of affected local governments to implement the policies and recommended actions of adopted regional and local plans and to maintain policies and activities that do not conflict with provisions in current state, regional, and local solid waste management plans.

§330.569. Regional Solid Waste Grants Program.

(a) Authority. Funds are dedicated under the Health and Safety Code, §361.014, for the development and updating of regional and local solid waste management plans, and for implementing regional and local projects consistent with approved regional

solid waste management plans and the state solid waste management plan. This regional solid waste grants program is separate from the financial assistance program outlined under §330.567 of this title (relating to Financial Assistance for Regional and Local Plans).

(b) Administration of regional solid waste grants program. The executive director shall administer the regional solid waste grants program under the direction of the commissioners.

(c) Funding allocation. Funds for local and regional projects under the regional solid waste grants program shall be allocated to municipal solid waste geographic planning regions according to a formula established by the TNRCC that takes into account population, area, solid waste fee generation, and public health needs.

(d) Public/private cooperation. A project or service funded under the regional solid waste grant program must promote cooperation between public and private entities and may not be otherwise readily available or create a competitive advantage over a private industry that provides recycling or solid waste services.

(e) Pass-through grants. The executive director may establish procedures to make grant funds available to authorized local entities through pass-through grants administered by each regional planning commission.

(f) Applications.

(1) Requests for state financial assistance provided directly by the TNRCC shall be made on forms furnished by the TNRCC.

(2) Requests for financial assistance made available through pass-through grants administered by a regional planning commission shall be made on forms developed jointly by the TNRCC and the regional planning commission, and furnished by the regional planning commission.

(g) Application procedures. Applicants for financial assistance from the TNRCC shall follow the procedures set forth in the application instructions and guidelines issued by the executive director. Applicants for pass-through grant assistance from a regional planning commission shall follow the procedures set forth in the pass-through grant application instructions issued by the regional planning commission.

(h) Grant contracts. Grants shall be provided through contractual agreement between the TNRCC and the grant recipient. If a regional planning commission provides financial assistance to local entities through a pass-through grant arrangement, the regional planning commission shall enter into an appropriate contractual agreement with the local grant recipient. The contractual agreement between the regional planning commission and the local grant recipient shall adhere to all applicable provisions of the main grant contract between the regional planning commission and the TNRCC.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's authority.

Issued in Austin, Texas, on February 5, 1996.

TRD-9601515 Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission

Effective date: February 26, 1996

Proposal publication date: October 10, 1995

For further information, please call: (512) 239-4640

♦ ♦ ♦

• 30 TAC §330.568

The repeal is adopted under the Texas Water Code, §5.103, which provides the Texas Natural Resource Conservation Commission (TNRCC) with the authority to adopt any rules necessary to carry out its powers and duties under the code and other laws of the State of Texas, and to establish and approve all general policy of the commission; and under the Comprehensive Municipal Solid Waste Management, Resource Recovery, and Conservation Act (the Conservation Act), Texas Health and Safety Code, §363.021, which gives the TNRCC the authority to adopt and promulgate rules to implement the Conservation Act.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's authority.

Issued in Austin, Texas, on February 5, 1996.

TRD-9601516 Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission

Effective date: February 26, 1996

Proposal publication date: October 10, 1995

For further information, please call: (512) 239-4640

♦ ♦ ♦

Chapter 335. Industrial Solid Waste and Municipal Hazardous Waste

The Texas Natural Resource Conservation Commission (commission or TNRCC) adopts amendments to §§335.1, 335.29, 335.69, 335.112, 335.118, 335.124, 335.125, 335.152, 335.168-335.170, 335.173-335.175, 335.222, and 335.224, concerning industrial solid waste and municipal hazardous waste. Sections 335. 69, 335.112, and 335.118 are adopted with changes to the proposed text as published in the November 3, 1995, issue of the *Texas Register* (20 TexReg 9136). Sections 335.1, 335.29, 335.124, 335.125, 335.152, 335.168, 335. 169, 335.170, 335.173, 335.174, 335.175, 335.222, and 335.224 are adopted without changes and will not be republished.

The purpose of the amendments is to address changes to the federal hazardous waste regulations made effective between July 1, 1991, and June 30, 1993. The amendments include provisions for storage and treatment containment buildings, including a hazardous waste permit exemption for these units. The amendments also include numerous corrections and technical amendments to existing program elements, such as the burning of hazardous waste in boilers and industrial furnaces, the disposal of hazardous waste in surface impoundment and landfill units, and certain restrictions on the disposal of hazardous waste. By establishing equivalency with certain federal hazardous waste regulations, the State of Texas will be able to retain authorization to operate aspects of the federal hazardous waste program in lieu of the United States Environmental Protection Agency (EPA). The resultant benefit will be a reduced cost to participants in the hazardous waste regulatory program because state hazardous waste program procedures will not need to be duplicated with the federal agency.

The rule amendments substantially advance the stated purpose by adopting the aforementioned federal regulations by reference or by introducing language intended to ensure that state rules are equivalent to the corresponding federal regulations.

This rule does not constitute a taking under the Private Real Property Rights Preservation Act because it falls within the mandatory federal law exception.

Comments were received from the Texas Chemical Council, generally supporting the proposals with several suggestions concerning the adoption of state rules reflecting additional, more recent federal regulations, along with typographical corrections. The commenter suggested that the state adopt certain of the federal regulations promulgated on August 31, 1993, at 58 *Federal Register* 46040. While the commission appreciates the commenter's sentiment concerning updating the state rules to reflect more recent changes, the above-referenced federal regulations were not proposed to be adopted in this current package. Consequently, these federal regulations are not reflected in the current adoption, but it should be noted that the commission plans to include them in an upcoming proposal.

The commenter also suggested that the state adopt certain of the federal interim status regulations relating to landfills promulgated on

November 18, 1992, at 57 *Federal Register* 54452. The standards in question are under 40 Code of Federal Regulations (CFR) §265.314(c) and §265.314(f), and concern sorbents used to treat free liquids to be disposed of in landfills. The commission respectfully declines to implement the commenter's suggestion in this area. As noted in the proposal preamble, the state rules have, since 1985, been more stringent than federal regulations regarding the use of sorbents to treat free liquids destined for placement in hazardous waste landfills. See 30 TAC §335.125. These stringencies are due to a concern for desorption of the free liquids in the landfill environment and the potential adverse impact of those free liquids on ground water. These stringencies are not changed by these adopted amendments.

Finally, the commenter offered suggestions for two typographical corrections. First, under §335.69(a)(1)(D), the citation to 40 CFR §261. 1101 should be corrected to §265.1101. The commission agrees. Second, under §335.118(b), there appears to be an error in the sentence where the following proposed wording appears: "...contained in 40 Code of Federal Regulations, §264.1102." The commission agrees. The rule is adopted as follows: "The executive director's decision must assure that the approved closure plan is consistent with 40 Code of Federal Regulations §§265.111 through 265.115, and the applicable closure requirements contained in this chapter for specific waste management methods, and contained in 40 CFR §264. 1102. A copy of this modified plan with a detailed statement of reasons for the modifications must be mailed to the owner or operator."

Another typographical correction has been made under §335.112(a) by the deletion of the redundant reference to 55 FedReg 22685.

Subchapter A. Industrial Solid Waste and Municipal Hazardous Waste Management in General

• 30 TAC §335.1, §335.29

The amendments are adopted pursuant to the Texas Water Code, §5.103 and §5.105 (Vernon 1988), which authorizes the TNRCC to promulgate rules necessary to carry out the powers and duties under the provisions of the Texas Water Code and other laws of this state. These amendments are also adopted pursuant to the Texas Health and Safety Code, §361.017 and §361.024 (Vernon 1992), which further authorizes the TNRCC to promulgate rules necessary to manage industrial solid and municipal hazardous wastes.

The amended sections are adopted under the Texas Water Code, §§5.103, 5. 105, and 26.011, which provides the commission with authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state. The sections are also adopted under the Texas Health and Safety Code, Texas Solid Waste Disposal Act, §361.017 and §361. 024, which provides the commission the authority to regulate industrial solid wastes and hazardous municipal wastes and to adopt and promulgate rules consistent with the general intent and purposes of the Act.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's authority.

Issued in Austin, Texas, on February 5, 1996.

TRD-9601514 Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission

Effective date: February 26, 1996

Proposal publication date: November 3, 1995

For further information, please call: (512) 239-4640

◆ ◆ ◆

Subchapter C. Standards Applicable to Generators of Hazardous Waste

• 30 TAC §335.69

The amendment is adopted under the Texas Water Code, §5.103 and §26. 011, which provides the commission with authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state. The sections are also adopted under the Texas Solid Waste Disposal Act, §361.017, which provides the commission the authority to regulate industrial solid wastes and hazardous municipal wastes and all other powers necessary or convenient to carry out its responsibilities.

§335.69. Accumulation Time.

(a) Generators that comply with the requirements of §335.69(a)(1) are exempt from all requirements adopted by reference in §335.112(a)(6) and (7) of this title (relating to Standards), except 40 Code of Federal Regulations (CFR) §265.111 and §265.114. Except as provided in subsections (f)-(h) of this section, a generator may accumulate hazardous waste on-site for 90 days without a permit or interim status provided that:

(1) the waste is placed:

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

(C) on drip pads and the generator complies with §335.112(a)(18) of this title (relating to drip pads) and maintains the following records at the facility: a description of procedures that will be followed to ensure that all wastes are removed from the drip pad and associated collection system at least once every 90 days; and documentation of each waste removal, including the quantity of waste removed from the drip pad and the sump or collection system and the date and time of removal, or

(D) the waste is placed in containment buildings and the generator complies with subpart DD of 40 CFR, Part 265, has placed its professional engineer certification that the building complies with the design standards specified in 40 CFR §265.1101 in the facility's operating record prior to operation of the unit. The owner or operator shall maintain the following records at the facility:

(i) a written description of procedures to ensure that each waste volume remains in the unit for no more than 90 days, a written description of the waste generation and management practices for the facility showing that they are consistent with respecting the 90-day limit, and documentation that the procedures are complied with; or

(ii) documentation that the unit is emptied at least once every 90 days.

(2)-(4) (No change.)

(b)-(i) (No change.)

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's authority.

Issued in Austin, Texas, on February 5, 1996.

TRD-9601513 Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission

Effective date: February 26, 1996

Proposal publication date: November 3, 1995

For further information, please call: (512) 239-4640

◆ ◆ ◆

Subchapter E. Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities

• 30 TAC §§335.112, 335.118, 335.124, 335.125

The amendments are adopted pursuant to §5.103 and §5.105 of the Texas Water Code (Vernon Supplement 1991), which authorizes the

Texas Natural Resource Conservation Commission (TNRCC) to adopt any rules necessary to carry out the powers and duties under the provisions of the Texas Water Code and other laws of this state. These amended sections are also proposed pursuant to the Texas Solid Waste Disposal Act, (the Act), Texas Health and Safety Code Annotated., Chapter 361 (Vernon Supplement 1992), §361.017 and §361.024, which further authorizes the TNRCC to promulgate rules necessary for accomplishing the purposes of the Act, including the control of all aspects of the management of industrial solid and municipal hazardous wastes.

§335.112. Standards.

(a) The following regulations contained in 40 Code of Federal Regulations (CFR), Part 265 (including all appendices to Part 265) (except as otherwise specified herein), are adopted by reference as amended and adopted in the CFR through June 1, 1990, at 55 FedReg 22685 and as further amended as indicated in each paragraph of this section:

(1) Subpart B-General Facility Standards (as amended through November 18, 1992, at 57 FedReg 54452);

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

(4) Subpart E-Manifest System, Recordkeeping and Reporting (as amended through January 29, 1992, at 57 FedReg 3492), except 40 CFR §§265.71, 265. 72, 265.75, 265.76, and 265.77;

(5) Subpart F-Groundwater Monitoring (as amended through December 23, 1991, at 56 FedReg 66369), except 40 CFR §265.90 and §265.94;

(6) Subpart G-Closure and Post-Closure (as amended through August 18, 1992, at 57 FedReg 37194); except 40 CFR §265.112 (d)(3) and (4) and §265. 118(e) and (f);

(7) Subpart H-Financial Requirements (as amended through September 16, 1992, at 57 FedReg 42832); except 40 CFR §265.142(a)(2); provided that the corporate guarantee for closure or for post-closure care, described in 40 CFR §265.143(e)(10) or §265.145(e)(11), respectively, may be provided only by a direct or higher-tier parent corporation of the owner or operator;

(8)-(9) (No change.)

(10) Subpart K-Surface Impoundments (as amended through August 18, 1992, at 57 FedReg 37194-37282);

(11) Subpart L-Waste Piles (as amended through January 29, 1992, at 57 FedReg 3493), except 40 CFR §265.253;

(12) (No change.)

(13) Subpart N-Landfills (as amended through July 10, 1992, at 57 FedReg 30658), except 40 CFR §265.302, §265.314, and §265.315;

(14)-(18) (No change.)

(19) Subpart AA-Air Emission Standards for Process Vents (as amended through April 26, 1991, at 56 FedReg 19290);

(20) Subpart BB-Air Emission Standards for Equipment Leaks (as amended through April 26, 1991, at 56 FedReg 19290); and

(21) Subpart DD-Containment Buildings (as amended through August 18, 1992, at 57 FedReg 37194).

(b) The regulations of the United States Environmental Protection Agency (EPA) that are adopted by reference in this section are adopted subject to the following changes:

(1) The term "regional administrator" is changed to the "executive director" of the Texas Natural Resource Conservation Commission or to the commission, consistent with the organization of the commission as set out in the Texas Water Code, Chapter 5, Subchapter B;

(2) The term "treatment" is changed to "processing;"

(3) References the Resource Conservation and Recovery Act, to §3008(h) are changed to the Texas Solid Waste Disposal Act, Texas Health & Safety Code Annotated (Vernon Pamphlet 1993), §361.303 (relating to Corrective Action);

(4) References to 40 CFR §§260.10, 264.90, 264.101, 270.41, or 270. 42, are changed to §335.1 of this title (relating to Definitions), §335. 156 of this title (relating to Applicability of Groundwater Monitoring and Response), §335.167 of this title (relating to Corrective Action for Solid Waste Management Units), §305.62 of this title (relating to Amendment), or §305.69 of this title (relating to Solid Waste Permit Modification at the Request of the Permittee), respectively;

(5) References to 40 CFR, Part 264, Subpart F, are changed to §335. 156 of this title (relating to Applicability of Groundwater Monitoring and Response), §335.157 of this title (relating to Required Programs), §335. 158 of this title (relating to Groundwater Protection Standard), §335.159 of this title (relating to Hazardous Constituents), §335.160 of this title (relating to Concentration Limits), §335.161 of this title (relating to Point of Compliance), §335.162 of this title (relating to Compliance Period), §335.163 of this title (relating to General Groundwater Monitoring Requirements), §335.164 of this title (relating to Detection Monitoring Program), §335.165 of this title (relating to Compliance Monitoring Program), §335.166 of this title (relating to Corrective Action Program), and §335. 167 of this title (relating to Corrective Action for Solid Waste Management Units);

(6) References to 40 CFR, Part 265, Subpart F, are changed to include §335.116 of this title (relating Applicability of Groundwater Monitoring Requirements) and §335.117 of this title (relating to Recordkeeping and Reporting), in addition to the reference to 40 CFR, Part 265, Subpart F, except §265.90 and §265.94; and

(7) References to the EPA are changed to the Texas Natural Resource Conservation Commission.

(c) A copy of 40 CFR, Part 265 is available for inspection at the library of the Texas Natural Resource Conservation Commission, located on the first floor of Building A at 12100 Park 35 Circle, Austin, Texas.

§335.118. Closure Plan; Submission and Approval of Plan.

(a) Except as provided in this section, the owner or operator must submit his closure plan to the executive director in accordance with the procedures outlined in 40 Code of Federal Regulations (CFR) §265.112. The owner or operator must submit his closure plan to the executive director no later than 15 days after:

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

(b) The executive director will provide the owner or operator and the public, through newspaper notice, the opportunity to submit written comments on the plan and request modifications of the plan within 30 days of the date of the notice. The owner or operator is responsible for the cost of publication. The executive director may, in response to a request or at his own discretion, hold a public hearing whenever such a hearing might clarify one or more issues concerning a closure plan. The executive director will give public notice of the hearing at least 30 days before it occurs. (Public notice of the hearing may be given at the same time as notice of the opportunity for the public to submit written comments, and the two notices may be combined.) The executive director will approve, modify, or disapprove the plan within 90 days of receipt. If the executive director does not approve the plan, he shall provide the owner or operator with a detailed written statement of reasons for the refusal and the owner or operator must modify the plan or

submit a new plan within 30 days after receiving such written statement. The executive director will approve or modify this plan in writing within 60 days. If the executive director modifies the plan, this modified plan becomes the approved closure plan. The executive director's decision must assure that the approved closure plan is consistent with 40 CFR §§265.111 through 265.115, and the applicable closure requirements contained in this chapter for specific waste management methods, and contained in 40 CFR §264.1102. A copy of this modified plan with a detailed statement of reasons for the modifications must be mailed to the owner or operator.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's authority.

Issued in Austin, Texas, on February 5, 1996.

TRD-9601512 Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission

Effective date: February 26, 1996

Proposal publication date: November 3, 1995

For further information, please call: (512) 239-4640

♦ ♦ ♦

Subchapter F. Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities

• 30 TAC §§335.152, 335.168-335.170, 335.173-335.175

The amendments are adopted pursuant to §5.103 and §5.105 of the Texas Water Code (Vernon Supplement 1991), which authorizes the Texas Natural Resource Conservation Commission (TNRCC) to adopt any rules necessary to carry out the powers and duties under the provisions of the Texas Water Code and other laws of this state. These amended sections are also adopted pursuant to the Texas Solid Waste Disposal Act (the Act), Texas Health and Safety Code Annotated, Chapter 361 (Vernon Supplement 1992), §361.017 and §361.024, which further authorizes the TNRCC to promulgate rules necessary for accomplishing the purposes of the Act, including the control of all aspects of the management of industrial solid and municipal hazardous wastes.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's authority.

Issued in Austin, Texas, on February 5, 1996.

TRD-9601511 Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission

Effective date: February 26, 1996

Proposal publication date: November 3, 1995

For further information, please call: (512) 239-4640

♦ ♦ ♦

Subchapter H. Standards for the Management of Specific Wastes and Specific Types of Facilities

Hazardous Waste Burned for Energy Recovery

• 30 TAC §335.222, §335.224

The amendments are adopted pursuant to §5.103 and §5.105 of the Texas Water Code (Vernon Supplement 1991), which authorizes the Texas Natural Resource Conservation Commission (TNRCC) to adopt any rules necessary to carry out the powers and duties under the provisions of the Texas Water Code and other laws of this state. These amended sections are also adopted pursuant to the Texas Solid Waste Disposal Act (the Act), Texas Health and Safety Code Annotated, Chapter 361 (Vernon Supplement 1992), §361.017 and §361.024, which further authorizes the TNRCC to promulgate rules necessary for accomplishing the purposes of the Act, including the control of all aspects of the management of industrial solid and municipal hazardous wastes.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's authority.

Issued in Austin, Texas, on February 5, 1996.

TRD-9601510 Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission

Effective date: February 26, 1996

Proposal publication date: November 3, 1995

For further information, please call: (512) 239-4640

♦ ♦ ♦

February - December 1996 Publication Schedule

The following is the February-December 1996 Publication Schedule for the *Texas Register*. Listed below are the deadline dates for these issues of the *Texas Register*. Because of printing schedules, material received after the deadline for an issue cannot be published until the next issue. Generally, deadlines for a Tuesday edition of the *Texas Register* are Monday and Wednesday of the previous week, and deadlines for a Friday edition are Wednesday of the previous week and Monday of the week of publication. No issues will be published on February 23, March 15, November 8, December 3, and December 31. An asterisk beside a publication date indicates that the deadlines have been moved because of state holidays.

FOR ISSUE PUBLISHED ON:	DEADLINES FOR RULES BY 10 A.M.	DEADLINES FOR MISCELLANEOUS DOCUMENTS BY 10 A.M.	DEADLINES FOR OPEN MEETINGS BY 10 A.M.
9 Friday, February 2	Wednesday, January 24	Monday, January 29	Monday, January 29
10 Tuesday, February 6	Monday, January 29	Wednesday, January 31	Wednesday, January 31
11 Friday, February 9	Wednesday, January 31	Monday, February 5	Monday, February 5
12 Tuesday, February 13	Monday, February 5	Wednesday, February 7	Wednesday, February 7
13 Friday, February 16	Wednesday, February 7	Monday, February 12	Monday, February 12
14 Tuesday, February 20	Monday, February 12	Wednesday, February 14	Wednesday, February 14
Friday, February 23	*No Issue Published*		
15 Tuesday, February 27	*Tuesday, February 20	Wednesday, February 21	Wednesday, February 21
16 Friday, March 1	Wednesday, February 21	Monday, February 26	Monday, February 26
17 Tuesday, March 5	Monday, February 26	Wednesday, February 28	Wednesday, February 28
18 Friday, March 8	Wednesday, February 28	Monday, March 4	Monday, March 4
19 Tuesday, March 12	Monday, March 4	Wednesday, March 6	Wednesday, March 6
Friday, March 15	*No Issue Published*		
20 Tuesday, March 19	Monday, March 11	Wednesday, March 13	Wednesday, March 13
21 Friday, March 22	Wednesday, March 13	Monday, March 18	Monday, March 18

22 Tuesday, March 26	Monday, March 18	Wednesday, March 20	Wednesday, March 20
23 Friday, March 29	Wednesday, March 20	Monday, March 25	Monday, March 25
24 Tuesday, April 2	Monday, March 25	Wednesday, March 27	Wednesday, March 27
25 Friday, April 5	Wednesday, March 27	Monday, April 1	Monday, April 1
Tuesday, April 9	*First Quarterly Index*		
26 Friday, April 12	Wednesday, April 3	Monday, April 8	Monday, April 8
27 Tuesday, April 16	Monday, April 8	Wednesday, April 10	Wednesday, April 10
28 Friday, April 19	Wednesday, April 10	Monday, April 15	Monday, April 15
29 Tuesday, April 23	Monday, April 15	Wednesday, April 17	Wednesday, April 17
30 Friday, April 26	Wednesday, April 17	Monday, April 22	Monday, April 22
31 Tuesday, April 30	Monday, April 22	Wednesday, April 24	Wednesday, April 24
32 Friday, May 3	Wednesday, April 24	Monday, April 29	Monday, April 29
33 Tuesday, May 7	Monday, April 29	Wednesday, May 1	Wednesday, May 1
34 Friday, May 10	Wednesday, May 1	Monday, May 6	Monday, May 6
35 Tuesday, May 14	Monday, May 6	Wednesday, May 8	Wednesday, May 8
36 Friday, May 17	Wednesday, May 8	Monday, May 13	Monday, May 13
37 Tuesday, May 21	Monday, May 13	Wednesday, May 15	Wednesday, May 15
38 Friday, May 24	Wednesday, May 15	Monday, May 20	Monday, May 20
39 Tuesday, May 28	Monday, May 20	Wednesday, May 22	Wednesday, May 22
40 Friday, May 31	Wednesday, May 22	*Friday, May 24	*Friday, May 24
41 Tuesday, June 4	*Tuesday, May 28	Wednesday, May 29	Wednesday, May 29
42 Friday, June 7	Wednesday, May 29	Monday, June 3	Monday, June 3
43 Tuesday, June 11	Monday, June 3	Wednesday, June 5	Wednesday, June 5
44 Friday, June 14	Wednesday, June 5	Monday, June 10	Monday, June 10
45 Tuesday, June 18	Monday, June 10	Wednesday, June 12	Wednesday, June 12
46 Friday, June 21	Wednesday, June 12	Monday, June 17	Monday, June 17

47 Tuesday, June 25	Monday, June 17	Wednesday, June 19	Wednesday, June 19
48 Friday, June 28	Monday, June 19	Wednesday, June 24	Wednesday, June 24
49 Tuesday, July 2	Wednesday, June 24	Wednesday, June 26	Wednesday, June 26
50 Friday, July 5	Wednesday, June 26	Monday, July 1	Monday, July 1
51 Tuesday, July 9	Monday, July 1	Wednesday, July 3	Wednesday, July 3
Friday, July 12	*2nd Quarterly Index*		
52 Tuesday, July 16	Monday, July 8	Wednesday, July 10	Wednesday, July 10
53 Friday, July 19	Wednesday, July 10	Monday, July 15	Monday, July 15
54 Tuesday, July 23	Monday, July 15	Wednesday, July 17	Wednesday, July 17
55 Friday, July 26	Wednesday, July 17	Monday, July 22	Monday, July 22
56 Tuesday, July 30	Monday, July 22	Wednesday, July 24	Wednesday, July 24
57 Friday, August 2	Wednesday, July 24	Monday, July 29	Monday, July 29
58 Tuesday, August 6	Monday, July 29	Wednesday, July 31	Wednesday, July 31
59 Friday, August 9	Wednesday, July 31	Monday, August 5	Monday, August 5
60 Tuesday, August 13	Monday, August 5	Wednesday, August 7	Wednesday, August 7
61 Friday, August 16	Wednesday, August 7	Monday, August 12	Monday, August 12
62 Tuesday, August 20	Monday, August 12	Wednesday, August 14	Wednesday, August 14
63 Friday, August 23	Wednesday, August 14	Monday, August 19	Monday, August 19
64 Tuesday, August 27	Monday, August 19	Wednesday, August 21	Wednesday, August 21
65 Friday, August 30	Wednesday, August 21	Monday, August 26	Monday, August 26
66 Tuesday, September 3	Monday, August 26	Wednesday, August 28	Wednesday, August 28
67 Friday, September 6	Wednesday, August 28	*Friday, August 30	*Friday, August 30
68 Tuesday, September 10	*Tuesday, September 3	Wednesday, September 4	Wednesday, September 4
69 Friday, September 13	Wednesday, September 4	Monday, September 9	Monday, September 9
70 Tuesday, September 17	Monday, September 9	Wednesday, September 11	Wednesday, September 11
71 Friday, September 20	Wednesday, September 11	Monday, September 16	Monday, September 16

72 Tuesday, September 24	Monday, September 16	Wednesday, September 18	Wednesday, September 18
73 Friday, September 27	Wednesday, September 18	Monday, September 23	Monday, September 23
74 Tuesday, October 1	Monday, September 23	Wednesday, September 25	Wednesday, September 25
75 Friday, October 4	Wednesday, September 25	Monday, September 30	Monday, September 30
Tuesday, October 8	*Third Quarterly Index*		
76 Friday, October 11	Wednesday, October 2	Monday, October 7	Monday, October 7
77 Tuesday, October 15	Monday, October 7	Wednesday, October 9	Wednesday, October 9
78 Friday, October 18	Wednesday, October 9	Monday, October 14	Monday, October 14
79 Tuesday, October 22	Monday, October 14	Wednesday, October 16	Wednesday, October 16
80 Friday, October 25	Wednesday, October 16	Monday, October 21	Monday, October 21
81 Tuesday, October 29	Monday, October 21	Wednesday, October 23	Wednesday, October 23
82 Friday, November 1	Wednesday, October 23	Monday, October 28	Monday, October 28
83 Tuesday, November 5	Monday, October 28	Wednesday, October 30	Wednesday, October 30
Friday, November 8	*No Issue Published*		
84 Tuesday, November 12	Monday, November 4	Wednesday, November 6	Wednesday, November 6
85 Friday, November 15	Wednesday, November 6	*Friday, November 8	*Friday, November 8
86 Tuesday, November 19	*Tuesday, November 12	Wednesday, November 13	Wednesday, November 13
87 Friday, November 22	Wednesday, November 13	Monday, November 18	Monday, November 18
88 Tuesday, November 26	Monday, November 18	Wednesday, November 20	Wednesday, November 20
89 Friday, November 29	Wednesday, November 20	Monday, November 25	Monday, November 25
Tuesday, December 3	*No Issue Published*		
90 Friday, December 6	Wednesday, November 27	Monday, December 2	Monday, December 2
91 Tuesday, December 10	Monday, December 2	Wednesday, December 4	Wednesday, December 4
92 Friday, December 13	Wednesday, December 4	Monday, December 9	Monday, December 9
93 Tuesday, December 17	Monday, December 9	Wednesday, December 11	Wednesday, December 11
94 Friday, December 20	Wednesday, December 11	Monday, December 16	Monday, December 16

95 Tuesday, December 24	Monday, December 16	Wednesday, December 18	Wednesday, December 18
96 Friday, December 27	Wednesday, December 18	Monday, December 23	Monday, December 23
Tuesday, December 31	*No Issue Published*		

Texas Register
Services

The *Texas Register* offers the following services. Please check the appropriate box (or boxes).

Texas Natural Resource Conservation Commission, Title 30

- ❑ **Chapter 285** $20 ❑ update service $15/year *(On-Site Wastewater Treatment)*
- ❑ **Chapter 290** $20 ❑ update service $15/year *(Water Hygiene)*
- ❑ **Chapter 330** $45 ❑ update service $15/year *(Municipal Solid Waste)*
- ❑ **Chapter 334** $35 ❑ update service $15/year *(Underground/Aboveground Storage Tanks)*
- ❑ **Chapter 335** $25 ❑ update service $15/year *(Industrial Solid Waste/Municipal Hazardous Waste)*

Update service should be in ❑ printed format ❑ 3 1/2" diskette ❑ 5 1/4" diskette

Texas Workers Compensation Commission, Title 28

❑ Update service $25/year

Texas Register Phone Numbers

Documents	(512) 463-5561
Circulation	(512) 463-5575
Marketing	(512) 463-5564
Texas Administrative Code	(512) 463-5565

Information For Other Divisions of the Secretary of State's Office

Executive Offices	(512) 463-5701
Corporations/	
Copies and Certifications	(512) 463-5578
Direct Access	(512) 463-2755
Information	(512) 463-5555
Legal Staff	(512) 463-5586
Name Availability	(512) 463-5555
Trademarks	(512) 463-5576
Elections	
Information	(512) 463-5650
Statutory Documents	
Legislation	(512) 463-0872
Notary Public	(512) 463-5705
Public Officials	(512) 463-5552
Uniform Commercial Code	
Information	(512) 475-2700
Financing Statements	(512) 475-2703
Financing Statement Changes	(512) 475-2704
UCC Lien Searches/Certificates	(512) 475-2705

Please use this form to order a subscription to the *Texas Register*, to order a back issue, or to indicate a change of address. Please specify the exact dates amd quantities of the back issues required. You may use your VISA or Mastercard. All purchases made by credit card will be subject to an additional 2.1% service charge. Return this form to the Texas Register, P.O. Box 13824, Austin, Texas 78711-3824. For more information, please call (800) 226-7199.

❒ **Change of Address**

❒ **Back Issue**

_____ Quantity

Volume _____,

Issue # _____

(Prepayment required for back issues)

❒ **New Subscription (Yearly)**

Printed ❒ $95

Diskette
- ❒ 1 to 10 users $200
- ❒ 11 to 50 users $500
- ❒ 51 to 100 users $750
- ❒ 100 to 150 users $1000
- ❒ 151 to 200 users $1250

More than 200 users--please call

Online BBS
- ❒ 1 user $35
- ❒ 2 to 10 users $50
- ❒ 11 to 50 users $90
- ❒ 51 to 150 users $150
- ❒ 151 to 300 $200

More than 300 users--please call

NAME _____

ORGANIZATION _____

ADDRESS _____

CITY, STATE, ZIP _____

Customer ID Number/Subscription Number _____
(Number for change of address only)

❒ **Bill Me** ❒ **Payment Enclosed**

Mastercard/VISA Number _____

Expiration Date _____ Signature _____

Please make checks payable to the Secretary of State. Subscription fees are not refundable. Do not use this form to renew subscriptions.

_____

_____

Second Class Postage

PAID

Austin, Texas
and additonal entry offices

_____

_____