TEXAS REGISTER

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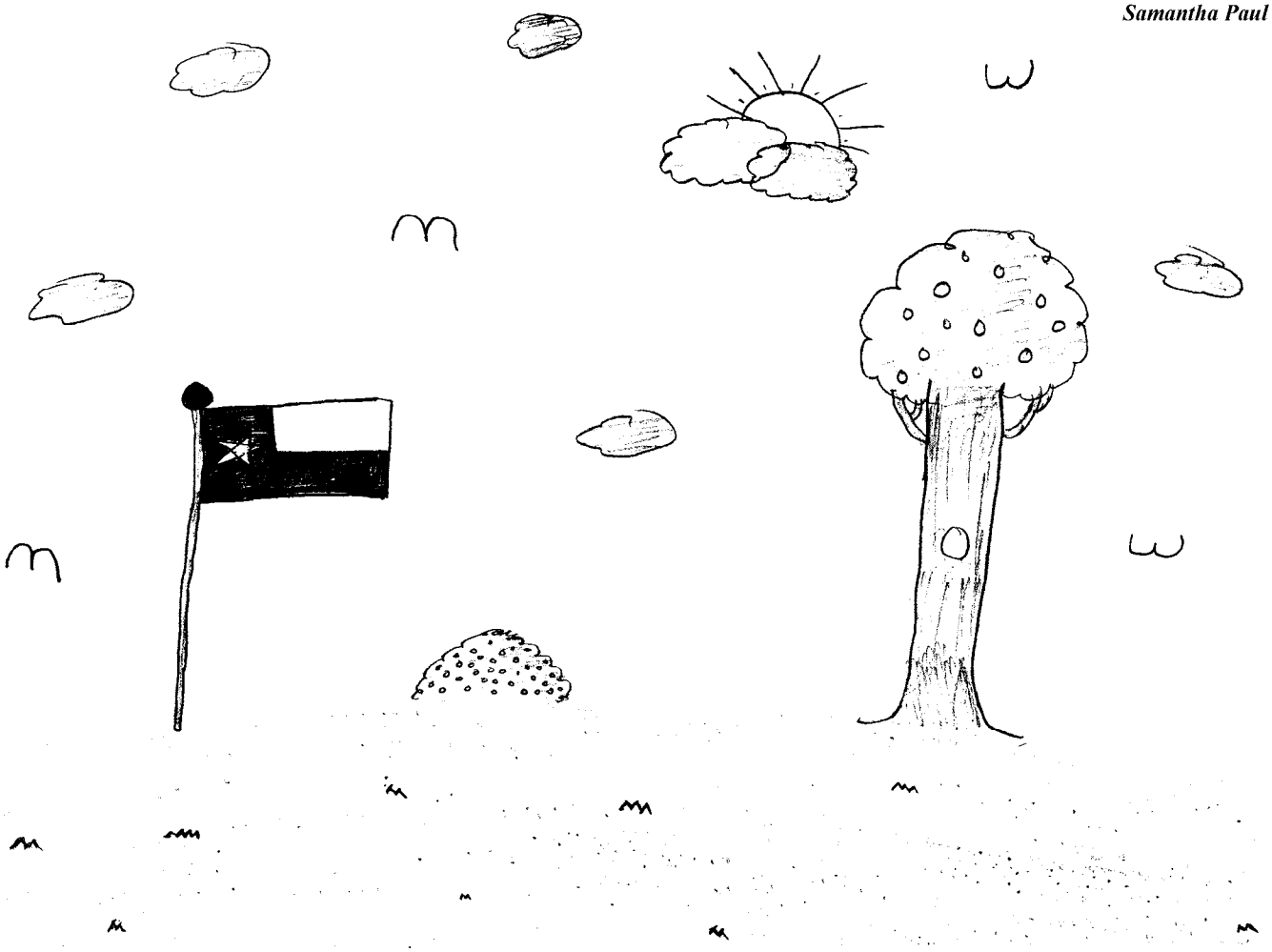
Samantha Paul



School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

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IN THIS ISSUE

ADOPTED RULES

Open Meetings

Statewide agencies and regional agencies that extend into four or more counties post meeting notices with the Secretary of State.

Meeting agendas are available on the *Texas Register*'s Internet site:
http://www.sos.state.tx.us/open/index.shtml

Members of the public also may view these notices during regular office hours from a computer terminal in the lobby of the James Earl Rudder Building, 1019 Brazos (corner of 11th Street and Brazos) Austin, Texas. To request a copy by telephone, please call 512-463-5561. Or request a copy by email: register@sos.state.tx.us

For items ***not*** available here, contact the agency directly. Items not found here:

- minutes of meetings
- agendas for local government bodies and regional agencies that extend into fewer than four counties
- legislative meetings not subject to the open meetings law

The Office of the Attorney General offers information about the open meetings law, including Frequently Asked Questions, the *Open Meetings Act Handbook*, and Open Meetings Opinions.
http://www.oag.state.tx.us/open/index.shtml

The Attorney General's Open Government Hotline is 512-478-OPEN (478-6736) or toll-free at (877) OPEN TEX (673-6839).

Additional information about state government may be found here:
http://www.texas.gov

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Meeting Accessibility. Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas. TTY: 7-1-1.

THE GOVERNOR

As required by Government Code, §2002.011(4), the *Texas Register* publishes executive orders issued by the Governor of Texas. Appointments and proclamations are also published. Appointments are published in chronological order. Additional information on documents submitted for publication by the Governor's Office can be obtained by calling (512) 463-1828.

Appointments

Appointments for September 17, 2011

Appointed to the Public Utility Commission of Texas for a term to expire September 1, 2013, Rolando B. Pablos of Olmos Park (replacing Barry Smitherman of Austin who resigned).

Appointed to the Public Utility Commission of Texas for a term to expire September 1, 2017, Kenneth W. Anderson, Jr. of Dallas (Commissioner Anderson is being reappointed).

Appointments for September 26, 2011

Appointing Kathy Walt as designee to serve as an Ex-Officio/Non-Voting member of the Texas Economic Development Corporation for a term at the pleasure of the Governor. Ms. Walt replaces Ray Sullivan.

Appointed to the One Call Board for a term to expire August 31, 2014, Rodney J. Unruh of Spring Branch (reappointed).

Appointed to the One Call Board for a term to expire August 31, 2014, James Wynn of Midland (reappointed).

Appointed to the One Call Board for a term to expire August 31, 2014, Jay S. Zeidman of Houston (reappointed).

Appointed to the Texas Lottery Commission for a term to expire February 1, 2017, Cynthia Tauss Delgado of League City (filing position vacated in August 2010 by Winston Krause who was appointed to replace David Schenck.

Appointed to the Texas State University System Board of Regents for a term to expire February 1, 2013, William F. Scott of Nederland (replacing Michael Truncale of Beaumont who resigned).

Appointed to the Commission on Law Enforcement Officer Standards and Education for a term to expire August 30, 2017, Patricia Scheckel Hollingsworth of Arlington (Ms. Hollingsworth is being reappointed).

Appointed to the Commission on Law Enforcement Officer Standards and Education for a term to expire August 30, 2017, Ronald E. Hood of Dripping Springs (replacing Charles Hall of Midland whose term expired).

Appointed to the Commission on Law Enforcement Officer Standards and Education for a term to expire August 30, 2017, James Oakley of Spicewood (Mr. Oakley is being reappointed).

Designating Joel W. Richardson as presiding officer of the Commission on Law Enforcement Officer Standards and Education for a term at the pleasure of the Governor. Sheriff Richardson is replacing Charles Hall of Midland as presiding officer.

Appointed to the School Land Board for a term to expire August 29, 2013, Thomas Orr, Jr. of Houston (Mr. Orr is being reappointed).

Appointed to the State Commission on Judicial Conduct, effective November 19, 2011, for a term to expire November 19, 2017, Valerie E. Ertz of Dallas (replacing Janelle Shepard of Weatherford whose term expired).

Appointed to the State Commission on Judicial Conduct, effective November 19, 2011, for a term to expire November 19, 2017, Patti H. Johnson of Canyon Lake (Ms. Johnson is being reappointed).

Appointed to the Rehabilitation Council of Texas for a term to expire October 29, 2013, Roger Cortez of Cedar Park (pursuant to the U.S. Rehabilitation Act).

Appointed to the Rehabilitation Council of Texas for a term to expire October 29, 2013, Elizabeth A. Gentry of Schertz (pursuant to the U.S. Rehabilitation Act).

Appointed to the Rehabilitation Council of Texas, effective October 29, 2011, for a term to expire October 29, 2014, Brent L. Pitt of Austin (replacing Carolyn Todd of Georgetown whose term expired).

Appointed to the Education Commission of the States for a term to expire at the pleasure of the Governor, Michael Berry of Austin (replacing Kara Belew of Austin).

Appointed to the Education Commission of the States for a term to expire at the pleasure of the Governor, Daniel Branch of Dallas (replacing Geanie Morrison of Victoria).

Appointed to the Board for Lease of Texas Department of Criminal Justice Lands for a term to expire September 1, 2013, Wesley Lloyd of Waco (Mr. Lloyd is being reappointed).

Appointed to the Board for Lease of Texas Parks and Wildlife Lands for a term to expire September 1, 2013, Wesley Lloyd of Waco (Mr. Lloyd is being reappointed).

Appointed to the Early Childhood Intervention Advisory Committee for a term to expire February 1, 2013, Barbara R. Knighton of Spring (replacing Michelle Smith of Justin who resigned).

Appointed to the Early Childhood Intervention Advisory Committee for a term to expire February 1, 2013, Rumisha J. Rice of Spring (replacing Peter Ellis of San Antonio who resigned).

Appointed to the Early Childhood Intervention Advisory Committee for a term to expire February 1, 2013, Patricia Rosenlund of Mission (replacing Katherine De la Pena of Edinburg who resigned).

Appointed to the Early Childhood Intervention Advisory Committee for a term to expire February 1, 2017, Richard C. Adams of Plano (Dr. Adams is being reappointed).

Appointed to the Early Childhood Intervention Advisory Committee for a term to expire February 1, 2017, Jonel Huggins of Kyle (replacing Dottie Goodman of Austin whose term expired).

Appointed to the Early Childhood Intervention Advisory Committee for a term to expire February 1, 2017, Karen Meyer of San Antonio (replacing Yvonne Caldera of Lubbock whose term expired).

Appointed to the Early Childhood Intervention Advisory Committee for a term to expire February 1, 2017, Holly Sanchez of McKinney (replacing Benna Timperlake of Corpus Christi who resigned).

Appointed to the Southern States Energy Board for a term to expire at the pleasure of the Governor, Barry Smitherman of Austin (replacing Michael Williams of Arlington). Commissioner Smitherman will serve in the capacity of alternate for Governor Rick Perry.

Pursuant to SB 249, 82nd Legislature, Regular Session, appointed to the Finance Commission of Texas for a term to expire February 1, 2014, Larry L. Patton of El Paso.

Pursuant to SB 249, 82nd Legislature, Regular Session, appointed to the Finance Commission of Texas for a term to expire February 1, 2016, Susan H. Burton of Addison.

Appointed to the Texas Health Services Authority Corporation for a term to expire June 15, 2013, Frederick J. Buckwold of Houston (reappointed).

Appointed to the Texas Health Services Authority Corporation for a term to expire June 15, 2013, David C. Fleeger of Austin (reappointed).

Appointed to the Texas Health Services Authority Corporation for a term to expire June 15, 2013, Matthew J. Hamlin of Argyle (reappointed).

Appointed to the Texas Health Services Authority Corporation for a term to expire June 15, 2013, James L. Martin of Austin (reappointed).

Appointed to the Texas Health Services Authority Corporation for a term to expire June 15, 2013, Edward W. Marx of Colleyville (reappointed).

Appointed to the Texas Health Services Authority Corporation for a term to expire June 15, 2013, Kathleen K. Mechler of Fredericksburg (reappointed).

Appointed to the Texas Health Services Authority Corporation for a term to expire June 15, 2013, William A. Phillips, Jr. of San Antonio (reappointed).

Appointed to the Texas Health Services Authority Corporation for a term to expire June 15, 2013, Judith D. Powell of The Woodlands (reappointed).

Appointed to the Texas Health Services Authority Corporation for a term to expire June 15, 2013, Jennifer L. Rangel of Austin (reappointed).

Appointed to the Texas Health Services Authority Corporation for a term to expire June 15, 2013, J. Darren Rodgers of Dallas (reappointed).

Appointed to the Texas Health Services Authority Corporation for a term to expire June 15, 2013, Stephen Yurco of Austin (reappointed).

Appointed to the Texas Health Services Authority Corporation for a term to expire June 15, 2013, Thomas P. "Tate" Erlinger of Austin (replacing Adolfo Valadez of Austin whose term expired and also serving as a nonvoting ex-officio member).

Appointed to the Governor's Committee on People with Disabilities for a term to expire February 1, 2013, Joseph Bontke of Houston (Mr. Bontke is being reappointed).

Appointed to the Governor's Committee on People with Disabilities for a term to expire February 1, 2013, Daphne Brookins of Fort Worth (Ms. Brookins is being reappointed).

Appointed to the Governor's Committee on People with Disabilities for a term to expire February 1, 2013, David A. Fowler of Katy (Mr. Fowler is being reappointed).

Appointed to the Governor's Committee on People with Disabilities for a term to expire February 1, 2013, Connie Sue Kelley of Humble (replacing Bobby Holcomb, Jr. of Mount Pleasant whose term expired).

Appointed to the Governor's Committee on People with Disabilities for a term to expire February 1, 2013, Shawn P. Saladin of Edinburg (replacing Brian Shannon of Lubbock whose term expired).

Appointed to the Southern Regional Education Board for a term to expire June 30, 2015, Daniel Branch of Dallas (replacing Geanie Morrison of Victoria whose term expired).

Rick Perry, Governor

TRD-201104030

THE ATTORNEY GENERAL

The *Texas Register* publishes summaries of the following: Requests for Opinions, Opinions, Open Records Decisions.

An index to the full text of these documents is available from the Attorney General's Internet site http://www.oag.state.tx.us. Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: http://www.oag.state.tx.us/opinopen/opinhome.shtml.)

Requests for Opinions

RQ-0994-GA

Requestor:

The Honorable Richard Pena Raymond

Chair, Human Services Committee

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768-2910

Re: Whether a justice of the peace may adjudicate truancy cases where there exists an interlocal agreement between a justice court and an independent school district regarding juvenile court coordinators (RQ-0994-GA)

Briefs requested by October 24, 2011

RQ-0995-GA

Requestor:

The Honorable Lisa Pence

Erath County Attorney

100 West Washington

Stephenville, Texas 76401

Re: Whether an eight-liner machine that dispenses tickets for prizes redeemable only at the bingo hall in which the machine is located is a "gambling device" within the meaning of section 47.01(4) of the Penal Code (RQ-0995-GA)

Briefs requested by October 25, 2011

RQ-0996-GA

Requestor:

Mr. John P. Maline, Executive Director

Texas Board of Physical Therapy Examiners

333 Guadalupe, Suite 2-510

Austin, Texas 78701-3942

Re: Whether the Board of Physical Therapy Examiners may provide the social security numbers of its licensees to a non-profit organization composed of physical therapy licensing authorities in the United States (RQ-0996-GA)

Briefs requested by October 26, 2011

RQ-0997-GA

Requestor:

Ms. Katherine A. Thomas, MN, RN

Executive Director

Texas Board of Nursing

333 Guadalupe, Suite 3-460

Austin, Texas 78701

Re: Whether the receipt of an non-disclosure order requires the Board of Nursing to redact information relating to a licensee's criminal history record (RQ-0997-GA)

Briefs requested by October 27, 2011

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-201104032
Jay Dyer
Deputy Attorney General
Office of the Attorney General
Filed: September 27, 2011

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EMERGENCY RULES

Emergency Rules include new rules, amendments to existing rules, and the repeals of existing rules. A state agency may adopt an emergency rule without prior notice or hearing if the agency finds that an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires adoption of a rule on fewer than 30 days' notice. An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days (Government Code, §2001.034).

TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 371. DRINKING WATER STATE REVOLVING FUND

Pursuant to Government Code §2001.034, the Texas Water Development Board (Board) finds that an imminent peril to the public health, safety and welfare requires immediate adoption of amendments to 31 Texas Administrative Code (TAC) Chapter 371, Drinking Water State Revolving Fund, Subchapter C, Intended Use Plan, §371.21 regarding Rating Process, Subchapter E, Environmental Reviews and Determinations, §371.40 regarding Definitions, §371.41 regarding Environmental Review Process, §371.42 regarding Types of Environmental Determinations: Categorical Exclusions, and new §371.51 regarding Emergency Relief Project Procedures. The Board is adopting the amendments and new rule to allow expedited consideration of funding projects to address emergency conditions affecting public water systems.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE AMENDMENTS AND NEW RULE

The Drinking Water State Revolving Fund (DWSRF) is used by the TWDB to offer loans and loan forgiveness to political subdivisions for improvements to water systems. Loans from the DWSRF are provided through annual federal capitalization grants, in coordination with the U.S. Environmental Protection Agency (EPA) Region 6 and the Texas Commission on Environmental Quality (TCEQ). Implementation of the financing program is through the Intended Use Plan (IUP). While the TWDB has utilized the IUP to manage the DWSRF program, staff has determined that amendments to certain sections of 31 TAC Chapter 371 are needed to authorize expedited environmental review procedures required for entities seeking DWSRF funding in emergency situations.

Record high temperatures, preceded by significantly low rainfall, have resulted in declining reservoir and aquifer levels, threatening water supplies and delivery systems throughout the State of Texas. These exceptional drought conditions have reached historic levels and pose an imminent threat to public health, property and the environment as memorialized in the Emergency Disaster Proclamation re-issued by the Governor of the State of Texas on September 1, 2011. Entities impacted have been forced to implement extraordinary measures to restrict water consumption and quickly find alternatives to meet customer demands and avoid service disruptions. In addition, related factors such as wildfires and shifting soil are causing significant damage to public water systems, requiring immediate repairs. Staff recommends adopting amendments to 31 TAC Chapter 371 on an emergency basis to provide for the application of a streamlined environmental review process for those entities seeking DWSRF funding for an approved emergency relief project. This expedited process will assist entities that are coping with serious damage to their drinking water systems or experiencing a critical decline in water supplies.

As authorized by Texas Government Code §2001.034, the Board may adopt an emergency rule without prior notice or hearing, or with an abbreviated notice and hearing, if the Board finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule on fewer than 30 days notice. Emergency rules adopted under Government Code §2001.034 may be effective for not longer than 120 days and may be renewed for not longer than 60 days. The Board intends to proceed with formal rulemaking under Government Code, Chapter 2001, Subchapter B, prior to the expiration of the 120 days.

SECTION BY SECTION DISCUSSION OF AMENDMENTS AND NEW RULE

Section 371.21

The amendment to §371.21 describes the rating process for those entities seeking DWSRF funding for an approved emergency relief project.

Section 371.40

The amendment to §371.40 adds paragraph (7) and defines an "emergency relief project" in order to determine those entities experiencing an emergency condition or incident that causes an imminent peril to public health, safety, environment, or welfare.

Section 371.41(a)

The amendment to §371.41(a) clarifies that the environmental review process, in compliance with the National Environmental Policy Act (NEPA), will be applied to projects funded in whole or in part by the DWSRF to the maximum extent legally and practicably feasible. The amendment allows the environmental review process to be modified if an emergency condition as described in §371.40(7) exists.

Section 371.42(g)

The amendment to §371.42(g) describes the public notice criteria for a Categorical Exclusion (CE) environmental determination made by the executive administrator. The amendment allows the required public notice to be published either in a newspaper of general circulation in the county or counties of the affected community or on the agency's website and referenced in a public notice that is published in a newspaper of general circulation in the county or counties of the affected community.

Section 371.51

New §371.51 provides that if an applicant requests funding for an emergency relief project, the executive administrator shall review all relevant information needed by the Board to find that an emergency condition as described under amended §371.40(7) is present. If the Board determines that an emergency condition is present, the Board may authorize funding for the designated emergency relief project, subject to the availability of funds. If the Board finds that full compliance with NEPA will unreasonably delay the resolution of the emergency condition, the NEPA notification requirements will be modified to the extent necessary to proceed with the project provided the Board also finds that the modified notification will not adversely impact any natural resources falling within NEPA protections. The notification will be documented by the executive administrator.

SUBCHAPTER C. INTENDED USE PLAN

31 TAC §371.21

STATUTORY AUTHORITY.

This rulemaking is adopted on an emergency basis under Government Code §2001.034, relating to emergency rulemaking, under the authority of Water Code §6.101, which authorizes the Board to adopt rules necessary to carry out the powers and duties of the Board, and Water Code, Chapter 15, Subchapter J, §15.605 relating to rules necessary to carry out Subchapter J.

This rulemaking affects Water Code, Chapter 15, Subchapter J.

§371.21. Rating Process.

(a) (No change.)

(b) Projects will be rated based on the following factors:

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

(3) Emergency relief. Projects which are affected by events of natural disaster.

(A) The Applicant must demonstrate that a need for emergency relief from an imminent threat to public health, safety, environment, or welfare exists. The applicant must describe the nature of the threat and provide a complete description of the proposed emergency relief project as defined in §371.40 of this title (relating to Definitions).

(B) The Board may authorize funding for the emergency relief project as detailed in §371.51 of this title (relating to Emergency Relief Project Procedures) or as described in the IUP.

(4) (No change.)

(c) - (f) (No change.)

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

Filed with the Office of the Secretary of State on September 22, 2011.

TRD-201103932
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Effective date: September 22, 2011
Expiration date: January 19, 2012
For further information, please call: (512) 463-8061

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SUBCHAPTER E. ENVIRONMENTAL REVIEWS AND DETERMINATIONS

31 TAC §§371.40 - 371.42, 371.51

STATUTORY AUTHORITY.

This rulemaking is adopted on an emergency basis under Government Code §2001.034, relating to emergency rulemaking, under the authority of Water Code §6.101, which authorizes the Board to adopt rules necessary to carry out the powers and duties of the Board, and Water Code, Chapter 15, Subchapter J, §15.605 relating to rules necessary to carry out Subchapter J.

This rulemaking affects Water Code, Chapter 15, Subchapter J.

§371.40. Definitions.

Unless specifically defined differently within this subchapter, the following terms and acronyms, used in this subchapter, mean:

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

(7) Emergency Relief Project--Infrastructure construction project which provides relief to an entity experiencing an emergency condition or incident that causes an imminent peril to public health, safety, environment, or welfare, such as:

(A) the failure or destruction of public water supply pipelines, transmission or distribution systems;

(B) the threat of or actual contamination of a public water supply;

(C) sustained or permanent service disruption of a source water or water treatment system;

(D) the reduction of public water supplies to critical levels by drought or other natural cause(s); or

(E) any other emergency condition as described in the IUP.

§371.41. Environmental Review Process.

(a) Policy and purpose. This subchapter governs the environmental review of projects funded in whole or in part by the DWSRF. Environmental review of all proposed infrastructure projects is a condition of the use of federal DWSRF funds. This subchapter follows the procedures established by EPA for implementing the NEPA set forth at 40 CFR Part 6. The environmental review process described in this subchapter applies to the maximum extent legally and practicably feasible. However, the environmental review process may be modified due to an emergency condition as described in §371.40(7) of this title (relating to Definitions). The environmental review must be completed prior to the release of federal funds for design and construction and the review is subject to public comment. The Applicant, at all times throughout the design, construction, and operation of the project, shall comply with the determinations resulting from the environmental review.

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

§371.42. Types of Environmental Determinations: Categorical Exclusions.

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

(g) Public notice. The executive administrator's determination relating to a CE shall be subject to public notice which shall be published either in a newspaper of general [~~wide~~] circulation in the county or counties of the affected community or on the agency's website and referenced in a public notice in a newspaper of general circulation in the county or counties of the affected community.

§371.51. Emergency Relief Project Procedures.

(a) If an applicant requests funding for an emergency relief project, the executive administrator shall review all information relevant to the emergency, proposed project, status of environmental review of the proposed project, known issues with the natural or cultural environment of the project area, and availability of funding. The executive administrator shall forward this information and the executive administrator's recommendation to the Board for the Board's determination whether an emergency condition is present.

(b) If an emergency condition described in §371.40(7) of this title (relating to Definitions) is present, the Board may authorize funding for the emergency relief project, subject to availability of funds, without full preparation or public review of NEPA review documentation (including a categorical exclusion determination, EA, or EIS) if the Board determines that:

(1) delaying commencement of project construction during the period it would take to prepare, review, and circulate NEPA documentation, would increase the imminent peril to public health, safety, environment, or welfare; and

(2) consultations required by the Endangered Species Act and National Historic Preservation Act have been completed.

(c) The Board may require any special conditions appropriate to minimize any potential for adverse impact due to abbreviated or expedited review.

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

Filed with the Office of the Secretary of State on September 22, 2011.

TRD-201103933
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Effective date: September 22, 2011
Expiration date: January 19, 2012
For further information, please call: (512) 463-8061

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PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES

SUBCHAPTER J. PURCHASED HEALTH SERVICES

DIVISION 33. INDIAN HEALTH SERVICES

1 TAC §355.8620

The Texas Health and Human Services Commission (HHSC) proposes an amendment to §355.8620, concerning the Reimbursement Methodology for Outpatient Services Provided in Indian Health Services Facilities Operating Under the Authority of P.L. 93-638. The proposed amendment adds inpatient services to the types of services provided to Native Americans by a qualified facility operated by the Indian Health Service (IHS) or a tribe that will be reimbursed at the applicable rate published and specified by the IHS in the *Federal Register.*

Background and Justification

IHS policy indicates state Medicaid programs are to reimburse IHS facilities and tribal facilities an all-inclusive rate for hospital services that is negotiated with the Centers for Medicare and Medicaid Services (CMS) and published annually in the *Federal Register.* CMS issued guidance to HHSC in a letter dated March 1, 2011, that the all-inclusive rate should be applied for all hospital services provided to qualified individuals in IHS facilities and tribal facilities, including those facilities that are outside of Texas. The proposed amendment to §355.8620 will enable HHSC to reimburse those qualified facilities for hospital services at the rates published by the IHS in the *Federal Register* on June 16, 2010 (75 FedReg 34147), and future published rates.

Section-by-Section Summary

Proposed §355.8620 amends the section title to remove the specific reference to outpatient services so that all inpatient and outpatient services provided at IHS facilities or tribal facilities are included in this rule.

Proposed §355.8620 adds inpatient services to the services provided to Native Americans by a qualified facility operated by the IHS or a tribe that will be reimbursed at the applicable rate published and specified by the IHS in the *Federal Register.*

Fiscal Note

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that the proposal has no foreseeable fiscal impact to the state government or to local governments for the first five years the proposed amendment is in effect. The number of IHS facilities that provide services to Medicaid clients is limited, and no IHS facilities have recently provided inpatient services to Medicaid clients. The facilities that qualify as IHS providers and that are able to bill Texas Medicaid are all out-of-state providers. Expenditures for these services are covered with 100 percent federal matching dollars to the state.

Small and Micro-business Impact Analysis

Ms. Rymal has also determined that there is no adverse economic effect on small businesses or micro-businesses as a result of enforcing or administering the amendment. Texas Government Code §2006.001 defines both a "small business" and "micro-business" as a for-profit corporation. There are no for-profit entities that would be affected by this rule amendment.

There are no anticipated economic costs to persons who are required to comply with the proposed rule. The proposal will not affect a local economy.

Public Benefit

Carolyn Pratt, Director of Rate Analysis, has determined that for each year of the first five years the proposed rule is in effect, the public will benefit from adoption of the amendment. The anticipated public benefit, as a result of the amendment, is that HHSC will reimburse IHS facilities based on the federal per diem rates consistent with and in compliance with IHS policy.

Regulatory Analysis

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. A "major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Takings Impact Assessment

HHSC has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under §2007.043 of the Government Code.

Public Comment

Written comments on the proposal may be submitted to Chris Dockal, Senior Rate Analyst, Rate Analysis Department, Texas Health and Human Services Commission, P.O. Box 85200, MC-H400, Austin, Texas 78708-5200; by fax at (512) 491-1983; or by

e-mail at Chris.Dockal@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register.*

Statutory Authority

The amendment is proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

The amendment affects the Human Resources Code, Chapter 32, and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§355.8620. Reimbursement Methodology for [~~Outpatient~~] Services Provided in Indian Health Service and Tribal [~~Services~~] Facilities [~~Operating Under the Authority of P.L. 93-638~~].

For inpatient and outpatient services provided to Native Americans by a qualified facility operated by the Indian Health Service (IHS) or a tribe, the applicable rate will be paid as published and specified by the IHS [~~Office of Management and Budget (OMB)~~] in the *Federal Register.*

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

Filed with the Office of the Secretary of State on September 21, 2011.

TRD-201103923
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: November 6, 2011
For further information, please call: (512) 424-6900

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TITLE 4. AGRICULTURE

PART 2. TEXAS ANIMAL HEALTH COMMISSION

CHAPTER 33. FEES

4 TAC §33.4

The Texas Animal Health Commission (Commission) proposes new §33.4, Laboratory Fees, in Chapter 33, which is entitled "Fees". The proposed new section is for the purpose of assessing fees related to testing performed by the State-Federal Laboratory System in Texas, which is operated by the Commission.

The Commission operates a regional veterinary diagnostic reference laboratory for Brucellosis testing and various other regulatory diseases. There were four laboratories which operated in Lubbock, Palestine, Fort Worth and Austin. The Commission recently announced that effective August 1, 2011, government subsidized Brucellosis testing at all Texas livestock markets will be discontinued due to a lack of funding available to pay for future testing. The Commission will no longer enforce the requirement that all test eligible (adult) cattle be Brucellosis tested for a change of ownership within Texas. Based on the cessation of the test requirement, the Commission has closed the laboratories in Lubbock and Palestine because of the anticipated reduction in the volume of testing. Approximately half of the livestock markets in Texas, however, have indicated that they intend to continue testing all or some of the adult cattle sold through their markets. Commission officials strongly encourage voluntary testing of Texas cattle to remain vigilant in keeping Texas Brucellosis free. It is imperative to remember that Brucellosis was found in two cattle herds in Texas earlier this year. Further, approximately 25 card positive (usually false positive) animals per month are detected throughout Texas markets.

There were several legislative bills introduced during the 82nd Texas Legislative Session which all contained specific fee authorization language for the Commission. House Bill 1992 was passed and enacted into law which provides the Commission with the full and necessary authority to assess any appropriate and equitable fee for the different types of services or actions provided to the various agricultural animal industries. This legislation was necessary as a result of the current Legislative Budget Board recommendation to fundamentally change the agency funding structure from primarily General Revenue sourced funding to a partial fee-for-services funding model. The change will require the Commission to generate new revenue streams through fees for up to approximately 50% of future budgets to maintain all essential services. The Commission will now assess a fee for the services being provided by the Laboratories in order cover the costs associated with the testing. Testing will be performed at one of the two Commission State-Federal Laboratories located in Fort Worth and Austin.

The Commission labs seek to provide economical, convenient and timely laboratory services. The stated laboratory fees are inclusive of lab analysis, interpretation, consultation if needed, specimen maintenance, and record retention maintenance. Each diagnostic procedure provided by the Commission labs has been cost-accounted based on the total expense of labor required to perform the test and the cost of reagents, consumables, and overhead. Testing for APHIS slaughter surveillance regulatory program diseases and foreign animal disease investigations is not subject to charge.

Specimens are processed upon receipt and results reported to the client as soon as possible. The turnaround time for a test depends upon which test(s) were requested, and which day of the week the test samples are received. The availability of test results will be impacted by marked increases in requests for an individual test, arrival time of the specimen, incompatibility of the sample with the testing protocol, and some tests may require a minimum number of samples to be run concurrently to complete a batch.

Submitting veterinarians must have a valid account established. Submissions must be accompanied by properly completed test documents. The Commission may withhold future results if an account is not paid in full in a timely manner. Expedited processing may be provided upon approval of the Director of Labs or State Epidemiologist for additional fee. Tests will be billed monthly to the veterinarian's clinic or office whose account number appears on the test request form accompanying the specimen(s) and full payment is due no later than 30 days from date of invoice for all lab services.

FISCAL NOTE

The Laboratory Fee stands to generate an estimated $200,000 per year based on historical annual volumes of market-based brucellosis testing. Fluctuations in volume are anticipated due to the recent suspension of enforcement of change of owner-

ship test requirements for cattle, and the monthly throughput going forward reflects what currently appears to be a conservative estimate.

Dr. Matt Cochran, Assistant Executive Director of Administration, Texas Animal Health Commission, has determined for the first five-year period the section is in effect, there will be no significant additional fiscal implications for local government as a result of enforcing or administering the section.

The Commission has evaluated the requirements and determined that there is not an adverse economic impact associated with levying these fees, relative to the disease mitigation and risk management provided by consistent inspection and monitoring of the livestock populations in question. The change from mandatory testing of test-eligible animals to voluntary testing was a paradigm shift, and these laboratory fees are being proposed as a means to cover the cost associated with what is now voluntary surveillance. The Commission has made an effort to provide this laboratory service to Texas cattle ranchers/buyers in a cost-effective manner because maintenance of brucellosis surveillance is scientifically indicated.

PUBLIC BENEFIT NOTE

Dr. Cochran has also 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 sustained disease surveillance, control, enhanced marketability, quality assurance, and the related relative freedoms of commerce both intra and interstate. By standards put forth by the Code of Federal Regulations, based on a long history of brucellosis eradication across the U.S., Texas is still classified as a high-risk state for cattle brucellosis. Any voluntary testing will serve to bolster the market confidence in and out of Texas, and it will increase the Commission's chances of detecting and stopping a potential brucellosis problem before it becomes increasingly damaging.

LOCAL EMPLOYMENT IMPACT STATEMENT

In accordance with Texas Government Code §2001.022, this agency has determined that the proposed section will not have a deleterious impact on local economies.

TAKINGS ASSESSMENT

The agency has determined that the proposed governmental action will not affect private real property. This proposed section is an activity related to the handling of animals, including requirements for testing, movement, inspection, identification, reporting of disease, and treatment, in accordance with 4 TAC §59.7, and is, therefore, compliant with the Private Real Property Preservation Act in Government Code, Chapter 2007.

REQUEST FOR COMMENT

Comments regarding the proposed new section may be submitted to Carol Pivonka, Texas Animal Health Commission, 2105 Kramer Lane, Austin, Texas 78758, by fax at (512) 719-0721 or by e-mail at "comments@tahc.state.tx.us."

STATUTORY AUTHORITY

The new section is proposed under the following statutory authority as found in Chapter 161 of the Texas Agriculture Code. Under §161.060, "[t]he commission may charge a fee, as provided by commission rule, for an inspection made by the commission". During the 82nd Texas Legislative Session, House Bill 1992 was passed which provides the Commission with broader based fee assessment authority. HB 1992 amends §161.060 which will allow the Commission to set and collect a fee for most services provided, including: 1) inspecting animals or facilities; 2) obtaining samples from animals for disease diagnostic test; 3) testing animals for disease; 4) disease prevention, control/eradication and treatment efforts; 5) services related to the transport of livestock; 6) control and eradication of ticks and other pests; and 7) any other service for which the Commission may incur a cost.

The Commission is also vested by statute, §161.041(a), with the requirement to protect all livestock, domestic animals, and domestic fowl from disease. The Commission is authorized, by §161.041(b), to act to eradicate or control any disease or agent of transmission for any disease that affects livestock. If the Commission determines that a disease listed in §161.041 of this code or an agent of transmission of one of those diseases exists in a place in this state among livestock, or that livestock are exposed to one of those diseases or an agent of transmission of one of those diseases, the Commission shall establish a quarantine on the affected animals or on the affected place. That is found in §161.061.

As a control measure, the Commission by rule may regulate the movement of animals. The Commission may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international commerce. The Commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved. That is found in §161.054. That authority is found in §161.048. A person is presumed to control the animal if the person is the owner or lessee of the pen, pasture, or other place in which the animal is located and has control of that place; or exercises care or control over the animal. That is under §161.002.

No other statutes, articles or codes are affected by the proposal.

§33.4. Laboratory Fees.

(a) Any test request must be submitted to the Commission on a form approved by the Commission with all the required fields completed. In order to run any test you must have a valid account.

(b) When faxed reporting of test results is requested, an additional $1.00 charge shall be added to the invoice.

(c) An accession (processing) fee of $5.00 for tests will be charged for each accession number assigned. This fee is for each accession/case number assigned, not each specimen submitted.

(d) Expedited processing may be provided for an additional fee of $25.00 upon approval of the Director of Labs or State Epidemiologist.

(e) Full payment is due 30 days from the date of invoice for all lab services. Test results may be withheld if an account is not paid in full in a timely manner.

(f) The Fee Schedule is as follows for Test Services:

(1) Brucellosis Testing:

(A) RAP Test - $1.50

(B) CARD - $2.00

(C) Rivanol - $4.00

(D) BAPA - $2.00

(E) Plate SPT - $2.00

(F) Tube STT - $3.00

(G) CF - $4.00

(H) FPA - $3.00

(I) FPA - $3.00

(J) Ring BRT - $2.00

(K) HRIT - $4.00

(L) Culture - $15.00

(2) Pseudorabies Testing:

(A) ALX - $3.00

(B) G1 - $3.00

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

Filed with the Office of the Secretary of State on September 26, 2011.

TRD-201104007
Gene Snelson
General Counsel
Texas Animal Health Commission
Earliest possible date of adoption: November 6, 2011
For further information, please call: (512) 719-0724

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4 TAC §33.5

he Texas Animal Health Commission (Commission) proposes new §33.5, Herd Disease Free Status Fees, in Chapter 33, which is entitled "Fees". The new section is for the purpose of assessing and collecting fees for services related to the Commission creating, maintaining, and/or validating disease free certification or status programs.

The Commission provides the following herd free status programs: 1) Requirements for Certified Brucellosis Free Herd of Cattle (see §35.3 of this title (relating to Brucellosis in Cattle)); 2) Initial Validation and Revalidation of Individual Swine Herd (see §35.48 of this title (relating to Brucellosis in Swine)); 3) Requirements for Certified Brucellosis Free Cervidae Herd (see §35.82 of this title (relating to Brucellosis in Cervidae)); 4) Requirements for Certified Brucellosis Free Herd of Goats (see §35.62 of this title (relating to Brucellosis in Goats)); 5) Herd Status Plans for Cervidae (see §40.3 of this title (relating to Chronic Wasting Disease)); 6) Accredited Herd Plan for Cattle (see §43.2 of this title (relating to Tuberculosis in Cattle and Bison)); 7) Accredited Herd Plan for Goats (see §43.11 of this title (relating to Tuberculosis in Goats)); 8) Herd Status Plans for Cervidae (see §43.22 of this title (relating to Tuberculosis in Cervidae)) 9) Trichomoniasis Herd Certification Program--Breeding Bulls (see §38.8 of this title (relating to Trichomoniasis)); and 10) Pseudorabies (see §55.5 of this title (relating to Pseudorabies in Swine)).

The basic premise of any disease free status or certification program is based on following similar principles: testing on a regular basis, maintaining a closed herd, testing new arrivals as required, and following all other rules and regulations of the program. For new arrivals, status is maintained by only purchasing animals from an accredited/certified free herd or testing the new animals prior to introduction into the herd. The animals must all be officially identified and an inventory maintained for all animals in the herd as directed by the program rules.

The regulations for these programs can describe general requirements for the collection and submission of samples to approved laboratories for testing, recognition of official tests, and the interpretation standards for official tests which are necessary to achieve or maintain "Free Herd" status. Herds which have achieved this status may have distinct advantages in the marketability and the ease or cost of interstate/international movement of animals.

The proposed fee will be $100.00 for each certificate or status approved or renewed and issued by the Commission. The fee is due in full in order to issue a certificate to provide a herd status. These certification programs generally provide that all animals be tested annually for two to three years and then they are allowed to follow longer timeframes for recertification. The fee will only be assessed with the issuance of each initial certificate or when recertification is sought. There is one program that is handled somewhat differently and that is a program for Cervids (certain Deer and Elk) and is called "Chronic Wasting Disease".

The Commission has legislative authority to make and enforce regulations and assess fees to prevent, control, and eradicate specific infectious animal diseases or pests which endanger livestock, exotic livestock, and poultry. The Commission is also the lead agency in Texas for animal disaster issues, including disease, natural, or manmade situations.

There were several legislative bills introduced during the 82nd Texas Legislative Session which all contained specific fee authorization language for the Commission. House Bill 1992 was passed which provides the Commission with broader based fee assessment authority. This legislation was necessary as a result of the current Legislative Budget Board recommendation to fundamentally change the agency funding structure from primarily General Revenue sourced funding to a partial fee-for-services funding model. The change will require the Commission to generate new revenue streams through fees for up to approximately 50% of future budgets to maintain all essential services.

The Commission's activities are focused not only on protecting the animal industries of Texas from disease threats, but also supporting consumer confidence that Texas' animals and products are safe, wholesome, and disease free. A disease free Texas livestock population also allows for enhanced marketability and less restrictive movement requirements, from both an interstate and international perspective.

FISCAL NOTE

The Herd Free Status Fee stands to generate an estimated $40,000 per year at $100.00 per herd status. This revenue projection is based on a review of historical participation in herd certification programs. Revenue in the first fiscal year is an expected $25,000 due to a mid-year implementation.

Dr. Matt Cochran, Assistant Executive Director of Administration, Texas Animal Health Commission, has determined for the first five-year period the rule is in effect, there will be no significant additional fiscal implications for local government as a result of enforcing or administering the rule.

The Commission has evaluated the requirements and determined that there is not an adverse economic impact associated with levying these fees, relative to the disease mitigation and risk management provided by consistent inspection and monitoring of the livestock populations in question. Livestock producers can benefit from the increased biosecurity and marketability that

herd status conveys by implementing what amounts to verifiable "best practices".

PUBLIC BENEFIT NOTE

Dr. Cochran has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be disease surveillance, control, enhanced marketability, quality assurance, and the related freedoms of commerce both intra and interstate. Herd disease-free certification is voluntary implementation of verifiable biosecurity best practices and contributes to a healthier state herd. Disease free herds also mean smoother commerce and related cost efficiencies that should translate to the public.

LOCAL EMPLOYMENT IMPACT STATEMENT

In accordance with Texas Government Code §2001.022, this agency has determined that the proposed rule will not have a deleterious impact on local economies.

TAKINGS ASSESSMENT

The agency has determined that the proposed governmental action will not affect private real property. This proposed rule is an activity related to the handling of animals, including requirements for testing, movement, inspection, identification, reporting of disease, and treatment, in accordance with 4 TAC §59.7, and is, therefore, compliant with the Private Real Property Preservation Act in Texas Government Code, Chapter 2007.

REQUEST FOR COMMENT

Comments regarding the proposed new section may be submitted to Carol Pivonka, Texas Animal Health Commission, 2105 Kramer Lane, Austin, Texas 78758, by fax at (512) 719-0721 or by e-mail at "comments@tahc.state.tx.us."

STATUTORY AUTHORITY

The new section is proposed under the following statutory authority as found in Chapter 161 of the Texas Agriculture Code. Under §161.060, "[t]he commission may charge a fee, as provided by commission rule, for an inspection made by the commission". During the 82nd Texas Legislative Session, House Bill 1992 was passed which provides the Commission with broader based fee assessment authority. HB 1992 amends §161.060 which will allow the Commission to set and collect a fee for most services provided, including: 1) inspecting animals or facilities; 2) obtaining samples from animals for disease diagnostic test; 3) testing animals for disease; 4) disease prevention, control/eradication and treatment efforts; 5) services related to the transport of livestock; 6) control and eradication of ticks and other pests; and 7) any other service for which the Commission may incur a cost.

The Commission is also vested by statute, §161.041(a), with the requirement to protect all livestock, domestic animals, and domestic fowl from disease. The Commission is authorized, by §161.041(b), to act to eradicate or control any disease or agent of transmission for any disease that affects livestock. If the Commission determines that a disease listed in §161.041 of this code or an agent of transmission of one of those diseases exists in a place in this state among livestock, or that livestock are exposed to one of those diseases or an agent of transmission of one of those diseases, the Commission shall establish a quarantine on the affected animals or on the affected place. That is found in §161.061. Section 161.112 provides that the Commission may establish rules regarding the tests, immunization, and dipping of animals at livestock markets.

As a control measure, the Commission by rule may regulate the movement of animals. The Commission may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international commerce. The Commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved. That is found in §161.054. That authority is found in §161.048. A person is presumed to control the animal if the person is the owner or lessee of the pen, pasture, or other place in which the animal is located and has control of that place; or exercises care or control over the animal. That is under §161.002.

No other statutes, articles or codes are affected by the proposal.

§33.5. Herd Disease Free Status Fees.

(a) The Commission is assessing a fee for the following programs.

(1) Requirements for Certified Brucellosis Free Herd for Cattle (See §35.3 of this title (relating to Brucellosis in Cattle)).

(2) Initial Validation and Revalidation of Individual Swine Herd (See §35.48 of this title (relating to Brucellosis in Swine)).

(3) Requirements for Certified Brucellosis Free Cervidae Herd (See §35.82 of this title (relating to Brucellosis in Cervidae)).

(4) Requirements for Certified Brucellosis Free Herd of Goats (See §35.62 of this title (relating to Brucellosis in Goats)).

(5) CWD Herd Status Plans for Cervidae (See §40.3 of this title (relating to Chronic Wasting Disease)).

(6) Accredited Herd Plan for Cattle (See §43.2 of this title (relating to Tuberculosis in Cattle and Bison)). A herd must meet the standards of the Uniform Methods and Rules (UM&R) as provided in Part IV.

(7) Accredited Herd Plan for Goats (See §43.11 of this title (relating to Tuberculosis in Goats)).

(8) Herd Status Plans for Cervidae (See §43.22 of this title (relating to Tuberculosis in Cervidae)).

(9) Trichomoniasis Herd Certification Program--Breeding Bulls (See §38.8 of this title (relating to Trichomoniasis)).

(10) Pseudorabies Qualified and Monitored Herd Plans for Swine (See §55.5 of this title (relating to Pseudorabies in Swine)).

(b) The fee is $100.00 and is due upon submitting an application or application for renewal for a Herd Disease Free program.

(c) The fee is due in full in order to issue a certificate and provide a herd a disease free status.

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

Filed with the Office of the Secretary of State on September 27, 2011.

TRD-201104013
Gene Snelson
General Counsel
Texas Animal Health Commission
Earliest possible date of adoption: November 6, 2011
For further information, please call: (512) 719-0724

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CHAPTER 53. MARKET REGULATION

4 TAC §53.4

The Texas Animal Health Commission (Commission) proposes amendments to §53.4, Market Identification, in Chapter 53, which is entitled "Market Regulations". The proposed amendments are for the purpose of requiring that livestock markets tag specific species of cattle with permanent identification as well as ensure that the information is recorded.

The Commission recently announced that effective August 1, 2011, government subsidized Brucellosis testing at all Texas livestock markets will be discontinued, due to a lack of funding available to pay for future testing. The Commission will no longer enforce the requirement that all test eligible (adult) cattle be Brucellosis tested for a change of ownership within Texas. Although the Commission will no longer enforce the requirement for Brucellosis testing of adult cattle, cattle producers were encouraged to still identify animals that were age eligible for testing.

Historically, all Texas cattle leaving a market have had a USDA official eartag in place because they were brucellosis tested there or elsewhere. The official identification of cattle (usually with a metal eartag) is not completely linked to brucellosis testing; however, Commission and USDA rules require official identification on all cattle tested, but they also require the market to record existing official IDs on any adult cattle presented for sale, all dairy cattle prior to movement, any bulls involved with the Trichomoniasis program (including virgins) and Mexican origin event cattle. Also, the Commission has a requirement that all dairy cattle moving intrastate are required to be officially identified. This was put in place to help Texas dairies from being unknowingly exposed to out of state dairy cattle that would prevent the Commission from tracing exposed or suspect cattle back to herds of origin. This is particularly important for out of state dairy cattle that end up in Texas. The cessation of the Brucellosis testing of cattle and the associated lack of identification is causing the Commission to propose an identification requirement at livestock markets.

USDA's Animal and Plant Health Inspection Service (APHIS) is proposing regulations to establish minimum national official identification and documentation requirements for the traceability of livestock moving interstate. They currently have their rule proposal out for comments. Comments must be received on or before November 9, 2011. Under this proposed rule, unless specifically exempted, livestock belonging to species covered by this rulemaking that are moved interstate would have to be officially identified and accompanied by an interstate certificate of veterinary inspection or other documentation. The proposed regulations specify approved forms of official identification for each species, but would allow the livestock covered under this rulemaking to be moved interstate with another form of identification, as agreed upon by animal health officials in the shipping and receiving States or Tribes.

Also, USDA recently released a 130-page report entitled *"Assessment of Pathways for the Introduction and Spread of Mycobacterium bovis in the United States".* This is an assessment on the pathways for the introduction and spread of bovine tuberculosis (TB) in the United States. The report indicates that a lack of a national animal identification program leaves the U.S. vulnerable to containing disease outbreaks and puts the U.S. at risk of shutting down commerce if there is a significant disease outbreak.

With the federal regulation proposal for identification of specific species moving interstate and the issuance of a national report indicating that lack of identification could negatively impact commerce in the event of a significant disease outbreak, both support the fact that the Commission is proposing a requirement to help support and protect our state's cattle industry. This amendment will require that all livestock markets identify each head of sexually intact cattle that are parturient or postparturient, or 18 months of age or older; all dairy cattle (all cattle breeds typically used to produce milk or other dairy products for human consumption); and all cattle and bison used for rodeos, recreational events, shows or exhibitions, with an official approved eartag. Also, the amendment will require that the market record the identification in a manner prescribed by the Commission.

FISCAL NOTE

Dr. Matt Cochran, Assistant Executive Director of Administration, Texas Animal Health Commission, has determined for the first five-year period the rule is in effect, there will be no significant additional fiscal implications for local government as a result of enforcing or administering the rule. The supplies required for tagging cattle as proposed are readily available at livestock markets, and new tags are available from the USDA at no extra charge. There will be some cost associated with the labor required for actually tagging, as well as recording the documentation that correlates the applied backtag with the eartag of a tag-eligible animal. The actual cost of this process will vary some from market to market, but the described documentation is similar to that which was required with mandatory brucellosis testing. Having a reasonable level of traceability will result in cost savings in the long run, as disease exposures and sources will be more readily identified; saving unrelated animals, facilities, ranchers, and brokers the time and cost of having to review their records and have their animals tested.

PUBLIC BENEFIT NOTE

Dr. Cochran has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be sustained disease surveillance, control, enhanced marketability, quality assurance, and the related relative freedoms of commerce both intra and interstate.

LOCAL EMPLOYMENT IMPACT STATEMENT

In accordance with Texas Government Code §2001.022, this agency has determined that the proposed rule will not have a deleterious impact on local economies.

TAKINGS ASSESSMENT

The agency has determined that the proposed governmental action will not affect private real property. This proposed rule is an activity related to the handling of animals, including requirements for testing, movement, inspection, identification, reporting of disease, and treatment, in accordance with 4 TAC §59.7, and is, therefore, compliant with the Private Real Property Preservation Act in Government Code, Chapter 2007.

REQUEST FOR COMMENT

Comments regarding the proposed amendments may be submitted to Carol Pivonka, Texas Animal Health Commission, 2105 Kramer Lane, Austin, Texas 78758, by fax at (512) 719-0721 or by e-mail at "comments@tahc.state.tx.us."

STATUTORY AUTHORITY

The amendments are proposed under the following statutory authority as found in Chapter 161 of the Texas Agriculture Code. Specifically, §161.112 provides the Commission with the authority to adopt rules relating to the movement of livestock, exotic livestock, and exotic fowl from livestock markets. The Commission is also vested by statute, §161.041(a), with the requirement to protect all livestock, domestic animals, and domestic fowl from disease. The Commission is authorized, by §161.041(b), to act to eradicate or control any disease or agent of transmission for any disease that affects livestock. If the Commission determines that a disease listed in §161.041 of this code or an agent of transmission of one of those diseases exists in a place in this state among livestock, or that livestock are exposed to one of those diseases or an agent of transmission of one of those diseases, the Commission shall establish a quarantine on the affected animals or on the affected place. That is found in §161.061.

Section 161.112 provides that the Commission may establish rules regarding the tests, immunization, and dipping of animals at livestock markets. As a control measure, the Commission by rule may regulate the movement of animals. The Commission may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international commerce. The Commission may require, by §161.054, testing, vaccination, or another epidemiologically sound procedure before or after animals are moved. That authority is found in §161.048. A person is presumed to control the animal if the person is the owner or lessee of the pen, pasture, or other place in which the animal is located and has control of that place; or exercises care or control over the animal. That is under §161.002.

No other statutes, articles or codes are affected by the proposal.

§53.4. Market Identification.

(a) The market shall identify each head of sexually intact cattle that are parturient or postparturient or 18 months of age or older, all dairy cattle (all cattle breeds typically used to produce milk or other dairy products for human consumption), and all cattle and bison used for rodeos, recreational events, shows or exhibitions [~~tested~~] at the market with an official United States Department of Agriculture, Animal and Plant Health Inspection Service, Veterinary Services approved eartag and backtag. The market shall record the identification along with all the information required in §53.5(a) [~~supply this information to the accredited veterinarian prior to testing as provided in §35.2(e)(3)~~] of this chapter [~~title~~] (relating to Market Recordkeeping [~~General Requirements~~]) and in a manner prescribed by the Commission.

(b) The market shall identify each sow and boar over six months of age consigned to the market with an official United States Department of Agriculture, Animal and Plant Health Inspection Service, Veterinary Services approved identification backtag. The market shall record the backtag numbers for each consignment.

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

Filed with the Office of the Secretary of State on September 26, 2011.

TRD-201104008
Gene Snelson
General Counsel
Texas Animal Health Commission
Proposed date of adoption: December 6, 2011
For further information, please call: (512) 719-0724

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TITLE 16. ECONOMIC REGULATION

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 73. ELECTRICIANS

16 TAC §§73.10, 73.20, 73.25, 73.26, 73.51 - 73.54, 73.60, 73.65, 73.70, 73.80

The Texas Department of Licensing and Regulation (Department) proposes amendments to existing rules at 16 Texas Administrative Code (TAC) Chapter 73, §§73.10, 73.20, 73.25, 73.26, 73.51, 73.52, 73.53, 73.54, 73.60, 73.65, 73.70, and 73.80 regarding the electricians program.

The proposed amendments implement changes suggested by the Electrical Safety and Licensing Advisory Board (Advisory Board) to simplify and clarify the rules, and changes continuing education for electrical sign apprentices as required by statutory changes to Chapter 1305 of the Texas Occupations Code. The rule amendments are proposed under the authority of the Texas Occupations Code §1305.102(a) that mandates the Executive Director adopt rules for the licensing of electricians, sign electricians, electrical sign contractors, electrical contractors, residential appliance installers, and residential appliance installation contractors.

Section 73.10 establishes definitions, in addition to those found in Texas Occupations Code, Chapter 1305, for terms that are used in statute, rules, and industry. Proposed amendments to §73.10(1) delete an outdated reference to the Business and Commerce Code. The Department is proposing to delete §73.10(21) for it is unnecessary. The proposed amendments to §73.10(23) and §73.10(24) delete "residential" to comply with the statutory provisions in Senate Bill 1630, 82nd Legislature, Regular Session (2011). The proposed amendments to §73.10(26) simply add residential appliance installation contractor into the offer to perform definition to mirror the existing definition for electrical, and electrical sign contractors. The Advisory Board recommended adding this definition to clarify this type of work.

The proposed amendments to §73.20(a)(3) add a requirement to document proof of ownership of a business to clarify who owns the business and the proposed amendments to §73.20 further delete a portion of this rule requiring that on the job training must be established by letters setting out dates of employment. The Advisory Board felt this was not necessary to require in rule. In an effort to simplify the rules by eliminating unnecessary language, the advisory board recommended this requirement be deleted.

The proposed amendments to §73.25 address the statutory changes to Texas Occupations Code, Chapter 1305 implemented by House Bill 1625, 82nd Legislature, Regular Session (2011). These changes require electrical sign apprentices take continuing education or in the alternative be enrolled in an approved apprentice training program.

The proposed amendments in §73.26 simplify the current standards by requiring that a master electrician or master sign electrician provide verifiable documentation of the on-the-job training hours of an applicant. Additionally, in an effort to simplify the rules, rules allowing unlicensed individuals to verify experience

gained before September 1, 2004 have been stricken. The Advisory Board recommended that this requirement was no longer necessary.

The proposed amendments to §73.53 simply add residential appliance installation work to mirror the existing language for electrical and electrical sign work. The proposed amendments to §§73.51(e), 73.52(e), and 73.54(d) repeal the date of July 1, 2010, for that reference in date is no longer necessary. In an effort for rule simplification, this unnecessary language is deleted.

The proposed amendments to §73.60 add electrical sign contracting and residential appliance installation contracting to mirror the standards for electrical contractors. Also for rule simplification, the Department proposes amendments to §73.65(b) and (c) for these provisions are provided for in statute.

The proposed amendments to §73.70(f) delete the duty of a licensee to inform a client of the facts that give rise of the duty to withdraw. For the purposes of rule simplification, the advisory board felt this was unnecessary.

The proposed amendments to §73.80(12) reduce the residential appliance installation contractor fee from $125 to $115.

The substance of these rule changes was recommended by the Electrical Safety and Licensing Advisory Board at its meeting on June 30, 2011, to simplify and clarify the rules.

William H. Kuntz, Jr., Executive Director, has determined that for the first five-year period the proposed rules are in effect there will be no direct cost to state or local government as a result of enforcing or administering the proposed rules.

Mr. Kuntz also has determined that for each year of the first five-year period the proposed amendments are in effect, the public benefit will be added protection for public health and safety.

There is no anticipated adverse economic effect on small or micro-business or to persons who are required to comply with the rules as proposed.

There is no anticipated potential economic impact of the proposed rules on small or micro-businesses for the rules clarify and simplify existing rules and duties under those rules or implements provisions required by statute. Since the agency has determined that the proposed rules will have no adverse economic effect on small or micro-businesses, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, is not required.

Comments on the proposal may be submitted by mail to Melissa Rinard, Legal Assistant, General Counsel's Office, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or by facsimile to (512) 475-3032, or electronically to erule.comments@license.state.tx.us. The deadline for comments is 30 days after publication in the *Texas Register.*

The amendments are proposed under Texas Occupations Code, Chapters 51 and 1305, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapters 51 and 1305. No other statutes, articles, or codes are affected by the proposal.

§73.10. Definitions.

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

(1) Assumed name--A name used by a business as defined in the Business and Commerce Code[~~, Title 4, Chapter 36, Subchapter A, §36.02~~].

(2) Business affiliation--The business organization to which a master licensee may assign his or her license.

(3) Employee--An individual who performs tasks assigned to him by his employer. The employee is subject to the deduction of social security and federal income taxes from his pay. An employee may be full time, part time, or seasonal.

(4) Employer--One who employs the services of employees, pays their wages, deducts the required social security and federal income taxes from the employee's pay, and directs and controls the employee's performance.

(5) Filed--A document is deemed to have been filed with the department on the date that the document has been received by the department or, if the document has been mailed to the department, the date a postmark is applied to the document by the U.S. Postal Service.

(6) General Supervision--Exercise of oversight by a master electrician on behalf of an electrical contractor, or electrical sign contractor, or by a master sign electrician on behalf of an electrical sign contractor of performance by all classes of electrical licensees of electrical work bearing responsibility for the work's compliance with applicable codes under Texas Occupations Code, Chapter 1305.

(7) On-Site Supervision--Exercise of supervision of electrical work or electrical sign work by a licensed individual other than an electrical apprentice. Continuous supervision of an electrical apprentice is not required, though the on-site supervising licensee is responsible for review and inspection of the electrical apprentice's work to ensure compliance with any applicable codes or standards.

(8) Electrical Contractor--A person, or entity, licensed as an electrical contractor, that is in the business of performing "Electrical Contracting" as defined by Texas Occupations Code, §1305.002(5).

(9) Master Electrician--An individual, licensed as a master electrician, who on behalf of an electrical contractor, electrical sign contractor, or employing governmental entity, performs "Electrical Work" as defined by Texas Occupations Code, §1305.002(11).

(10) Journeyman Electrician--An individual, licensed as a journeyman electrician, who works under the general supervision of a master electrician, on behalf of an electrical contractor, or employing governmental entity, while performing "Electrical Work" as defined by Texas Occupations Code, §1305.002(11).

(11) Electrical Apprentice--An individual, licensed as an apprentice who works under the on-site supervision of a master electrician, journeyman electrician, or residential wireman, on behalf of an electrical contractor or employing governmental entity performing "Electrical Work" as defined by Texas Occupations Code, §1305.002(11).

(12) Electrical Sign Contractor--A person, or entity, licensed as an electrical sign contractor, that is in the business of performing "Electrical Sign Contracting" as defined by Texas Occupations Code, §1305.002(9).

(13) Master Sign Electrician--An individual, licensed as a master sign electrician, who, on behalf of an electrical sign contractor, performs "Electrical Sign Work" as defined in paragraph (18).

(14) Journeyman Sign Electrician--An individual, licensed as a journeyman sign electrician, who works under the general supervision of a master electrician or a master sign electrician, on behalf of

an electrical sign contractor, while performing "Electrical Sign Work" as defined in paragraph (18).

(15) Residential Wireman--An individual, licensed as a residential wireman, who works under the general supervision of a master electrician, on behalf of an electrical contractor, or employing governmental entity, while performing electrical work that is limited to electrical installations in single family and multifamily dwellings not exceeding four stories, as defined by Texas Occupations Code, §1305.002(13).

(16) Maintenance Electrician--An individual, licensed as a maintenance electrician, who works under the general supervision of a master electrician, on behalf of an electrical contractor, or employing governmental entity while performing "Electrical Maintenance Work" as defined in paragraph (17).

(17) Electrical Maintenance Work--The replacement, or repair of existing electrical appurtenances, apparatus, equipment, machinery, or controls used in connection with the use of electrical energy in, on, outside, or attached to a building, residence, structure, property, or premises. All replacements or repairs must be of the same rating and type as the existing installation. No improvements may be made that are necessary to comply with applicable codes under Texas Occupations Code, Chapter 1305. Electrical maintenance work does not include the installation of any new electrical appurtenances, apparatus, equipment, machinery, or controls beyond the scope of any existing electrical installation.

(18) Electrical Sign Work--Any labor or material used in manufacturing, installing, maintaining, extending, connecting or reconnecting an electrical wiring system and its appurtenances, apparatus or equipment used in connection with signs, outline lighting, awnings, signals, light emitting diodes, and the repair of existing outdoor electric discharge lighting, including parking lot pole lighting. This also includes the installation of an electrical service integral to an isolated sign and/or outline lighting installation.

(19) Work Involved in the Manufacture of Electrical Equipment--Work involved in the manufacture of electrical equipment includes on and off-site manufacture, commissioning, testing, calibration, coordination, troubleshooting, evaluation, repair or retrofits with components of the same ampacity, maintenance and servicing of electrical equipment within their enclosures performed by authorized employees, or authorized representatives of electrical equipment manufacturers and limited to the type of products they manufacture.

(20) Electrical Sign Apprentice--An individual, licensed as an electrical sign apprentice who works under the on-site supervision of a master electrician, a master sign electrician, or a journeyman sign electrician, on behalf of an electrical sign contractor performing "Electrical Sign Work" as defined by this chapter.

[~~(21) A Principal Place of Business--For purposes of this chapter, a contractor has a principal place of business in another state or territory or foreign country if the contractor is doing business in Texas without complying with all applicable Texas statutes and the contractor conducts substantial business in another state, territory or country while business conducted by the contractor in Texas is minimal.~~]

(21) [~~(22)~~] On-the-job Training--Training or experience gained under the supervision of an appropriate licensee, as prescribed by Texas Occupations Code Chapter 1305, while performing electrical work as defined by Texas Occupations Code, §1305.002(11).

(22) [~~(23)~~] Residential Appliance Installer--An individual, licensed as a residential appliance installer, who on behalf of a residential appliance installation contractor, performs electrical work that is limited to residential appliance installation including pool-related electrical installation and maintenance as defined by Texas Occupations Code, §1305.002(12-b).

(23) [~~(24)~~] Residential Appliance Installation Contractor--A person or entity licensed as a residential appliance installation contractor, that is in the business of residential appliance installation including pool-related electrical installation and maintenance as defined by Texas Occupations Code §1305.002(12-d).

(24) [~~(25)~~] Residential Appliance--Electrical equipment that performs a specific function, and is installed as a unit in a dwelling by direct connection to an existing electrical circuit, such as water heaters, kitchen appliances, or pool-related electrical device. The term does not include general use equipment such as service equipment, other electrical power production sources, or branch circuit overcurrent protection devices not installed in the listed appliance or listed pool-related electrical device.

(25) [~~(26)~~] Offer to perform--To make a written or oral proposal, to contract in writing or orally to perform electrical work or electrical sign work, [~~or~~] to advertise in any form through any medium that a person or business entity is an electrical contractor, [~~or~~] electrical sign contractor, or residential appliance installation contractor or that implies in any way that a person or business entity is available to contract for or perform electrical work, [~~or~~] electrical sign work, or residential appliance installation work.

(26) [~~(27)~~] Electro Mechanical Integrity--The condition of an electrical product, electrical system, or electrical equipment installed in accordance with its intended purpose and according to standards at least as strict as the standards provided by the National Electrical Code, the manufacturer's specifications, any listing or labeling on the product, and all other applicable codes or ordinances.

§73.20. Licensing Requirements--Applicant and Experience Requirements.

(a) An applicant for a license must submit the required fees with a completed application and the appropriate attachments:

(1) Applicants for Master Electrician, Master Sign Electrician, Journeyman Electrician, Journeyman Sign Electrician, Residential Wireman, and Maintenance Electrician licenses must submit documentation proving the required amount of on-the-job-training.

(2) Applicants for contractor's licenses must submit proof of general liability insurance and either workers' compensation insurance or a certificate of authority to self insure, or a statement that the applicant has elected not to obtain workers' compensation insurance pursuant to Subchapter A, Chapter 406, Labor Code, with the initial and renewal applications.

(3) Applicants for contractor's licenses must submit proof of ownership of the business entity and provide documentation of the sponsoring master licensee in a manner prescribed by the department.

(b) An applicant must complete all requirements within one year of the date the application is filed.

(c) For purposes of this chapter, 2,000 hours of on the job training shall be the maximum that may be earned within one year. [~~On the job training must be established by letter(s) setting out dates of employment from persons who either employed or supervised the applicant or as required by the application. Letters must include the name and license type of the supervising person.~~]

(d) Each applicant must meet the applicable eligibility requirements as set forth in Texas Occupations Code, §§1305.153 - 1305.1618.

§73.25. Continuing Education.

(a) Terms used in this section have the meanings assigned by Chapter 59 of this title, unless the context indicates otherwise.

(b) For each renewal, an electrical apprentice, electrical sign apprentice, journeyman electrician, master electrician, journeyman sign electrician, master sign electrician, residential wireman, or maintenance electrician must complete four hours of continuing education in:

(1) the National Electrical Code, as adopted under Title 8, Occupations Code §1305.101, or the current version of the National Electrical Code, as approved by the National Fire Protection Association (NFPA);

(2) state law and rules that regulate the conduct of licensees; and

(3) safety as defined in the National Fire Protection Association (NFPA) 70E.

(c) In lieu of taking four hours of continuing education as required in subsection (b), an electrical apprentice or electrical sign apprentice may enroll in a department-registered apprenticeship training program.

(d) In the case of timely renewal, the continuing education hours must have been completed, or enrollment must have occurred in a department-registered apprenticeship training program, within the term of the current license. For a late renewal, the continuing education hours must have been completed, or enrollment must have occurred in a department-registered apprenticeship training program, within one year prior to the date of renewal.

(e) A licensee may not receive continuing education credit for attending the same course more than once.

(f) A licensee shall retain a copy of the certificate of completion for a course for one year after the date of completion. In conducting any inspection or investigation of the licensee, the department may examine the licensee's records to determine compliance with this subsection.

(g) To be approved under Chapter 59 of this title, a provider's course must be dedicated to instruction in:

(1) the National Electrical Code, as adopted under Title 8, Occupations Code §1305.101, or the current version of the National Electrical Code, as approved by the National Fire Protection Association (NFPA);

(2) state law and rules that regulate the conduct of licensees; and

(3) safety as defined in the National Fire Protection Association (NFPA) 70E.

(h) To register an apprenticeship training program with the department, a program must:

(1) file a completed application in a form approved by the department;

(2) provide proof to the department that the program is:

(A) recognized by the Texas Workforce Commission or the Texas Higher Education Coordinating Board;

(B) registered with the United States Department of Labor; or

(C) a competency-based standardized craft-training program that meets the training program standards of the United States Department of Labor Office of Apprenticeship; and

(3) pay the required application fee shown in §73.80.

(i) A department-registered apprentice training program must maintain the following documents for 24 months after a participant is no longer enrolled in the program:

(1) participant's program application;

(2) proof of participant's program completion;

(3) participant's leave of absence, resignation or termination; and

(4) other documentation effecting participant's enrollment.

(j) A department-registered apprentice training program must submit to the department proof of a participant's change in enrollment status within two days of the change. The proof must be in a form approved by the department.

(k) A department-registered apprentice training program must comply with the requirements of the Act and this chapter and must maintain the requirement of subsection (h)(2).

(l) A department-registered apprentice training program must annually notify the department, in a form approved by the department, of its intention to continue as a registered program.

(m) A department-registered apprentice training program must immediately notify the department if it ceases to be registered. The notice must be in a form approved by the department.

(n) The provisions listed in subsections (b) [~~(b)(3)~~], (c), and (d) are effective for electrical sign apprentice licenses that expire on or after September 1, 2012, and all other licenses, that expire on or after September 1, 2010.

§73.26. Documentation of Required On-The-Job Training.

(a) Individual applicants may meet requirements for on-the-job training by providing verified proof, in a form acceptable to the department, showing that the applicant has been supervised for the requisite period by one or more persons licensed by any jurisdiction as a master electrician or master sign electrician as appropriate for the license.

(b) A master electrician or master sign electrician shall provide verifiable documentation of the on-the-job training hours of an applicant they have supervised up on the request of the department. [~~Individual applicants may meet requirements for on-the-job training by providing proof of experience gained prior to September 1, 2004 under the supervision of an unlicensed supervisor. That supervisor must have had overall responsibility for electrical work or electrical sign work as was acceptable in the trade for a business in an area where no municipal or regional electrical license or electrical sign license was required.~~] This proof must be submitted in a form acceptable to the department. [~~and include:~~]

[~~(1) a verified statement from the owner or manager of the business stating that the applicant's unlicensed supervisor had overall responsibility for electrical work, or electrical sign work, as appropriate, performed by the business during the period of employment reported; or,~~]

[~~(2) a verified statement by the unlicensed supervisor that he or she was the owner of a business with overall responsibility for work performed by the business, and that he or she supervised the applicant in the performance of electrical work or electrical sign work, as appropriate, during the period of employment reported; or,~~]

[~~(3) when statements described in paragraph (1) and (2) are not available;~~]

[~~(A) the applicant's verified statement setting out the period of employment, the nature of relevant work provided by the business, the nature of work performed by the applicant, the name and title of supervising persons, that the supervising persons had overall responsibility for electrical work, or electric sign work, as appropriate, and an explanation why a statement under either paragraph (1) or (2) is not available; and,~~]

[~~(B) documentation showing applicant's relationship to the business for the relevant period, such as:~~]

[~~(i)~~ ~~payroll records;~~]

[~~(ii)~~ ~~applicant's personal tax records; or,~~]

[~~(iii)~~ ~~other records acceptable to the department that provide proof of applicant's relationship to the business for the relevant period.~~]

[~~(c) When the applicant has been supervised by an unlicensed person, the existence of the business described in subsection (b) must be established by providing documentation for the relevant period, such as:~~]

[~~(1) invoices showing work performed;~~]

[~~(2) tax records of the business;~~]

[~~(3) approval of electrical work, or electrical sign work, as appropriate, by officials from jurisdictions having authority over the work, but where no license was required;~~]

[~~(4) yellow page and newspaper advertisements (must include date); or~~]

[~~(5) other records acceptable to the department that provide proof of the business existence.~~]

[~~(d) A master electrician and master sign electrician shall provide verified documentation of the on-the-job training hours of a person they have supervised upon request of the department.~~]

§73.51. Electrical Contractors' Responsibilities.

(a) An electrical contractor shall:

(1) notify the department when a new master electrician of record is assigned to the contractor and notify the department within thirty business days from the date that the master electrician's employment with the contractor ended;

(2) maintain employee records and records of all work performed on its behalf for a period of four years after completion of the work, and shall make those records available to the department at the contractor's place of business during normal business hours for inspection and copying. If the contractor's principal place of business is located out of the state of Texas, the department may require the contractor to make records available to the department at its offices in Austin, Texas or another location agreed upon by the department and the contractor.

(b) A person or contractor that performs or offers to perform electrical work shall:

(1) provide safe and proper installation and service, and assure the electro-mechanical integrity of all work and installations are to applicable code;

(2) not misrepresent the need for services, services to be provided, or services that have been provided;

(3) not make a fraudulent promise or false statement to influence, persuade, or induce an individual or an entity to contract for services; and

(4) ensure that all of an electrical contractor's electrical work shall be performed by licensed individuals.

(c) The design of an electrical system shall only be done by a licensed master electrician or design professional as authorized by statute. The design shall not be subcontracted to an unlicensed person, firm or corporation.

(d) A licensed electrical contractor shall display its name and license number on both sides of each vehicle owned or operated by the business and used in the conduct of electrical work. Lettering shall be of a contrasting color and at least two inches in height. The license number shall be preceded by the letters "TECL".

(e) All advertising by electrical contracting companies designed to solicit electrical business shall include the electrical contractor's name and license number. This includes business cards [~~on or after July 1, 2010~~]. The following advertising does not require the license number:

(1) nationally placed television advertising, in which a statement indicating that license numbers are available upon request is used in lieu of the electrical contractor license number;

(2) telephone book listings that contain only the name, address, and telephone number;

(3) manufacturers' and distributor's telephone book trade ads identifying an electrical contractor;

(4) telephone solicitations, provided the solicitor states that the contractor complies with licensing requirements of the state. The electrical contractor's number must be provided upon request;

(5) promotional items of nominal value such as ball caps, tee shirts, and other gifts; or

(6) signs located on the contractor's permanent business location.

(f) The electrical contractor's name, address, phone number, and license number shall appear on all proposals, invoices, and written contracts from the contractor. The following information: "Regulated by The Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, 1-800-803-9202, 512-463-6599; website: www.license.state.tx.us/complaints" shall be listed on all proposals, invoices, and written contracts.

(g) A licensed electrical contractor and its designated master electrician of record is responsible for supervision of all licensees performing work on behalf of the contractor to assure compliance with applicable statutes and rules and in particular, standards of conduct set out in this chapter.

(h) An electrical contractor shall not use a license that is not assigned to that contractor.

§73.52. Electrical Sign Contractors' Responsibilities.

(a) An Electrical Sign Contractor shall:

(1) notify the department when a new master electrician or master sign electrician of record is assigned to the contractor and notify the department within thirty business days from the date that the master electrician's employment with the contractor ended;

(2) maintain employee records and records of all work performed on its behalf for a period of four years after completion of the work, and shall make those records available to the department at the contractor's place of business during normal business hours for inspection and copying. If the contractor's principal place of business is located out of the state of Texas, the department may require the contractor to make records available to the department at its offices in Austin,

Texas or another location agreed upon by the department and the contractor.

(b) A person or contractor that performs or offers to perform electrical sign contracting shall:

(1) provide safe and proper installation and service, and assure the electro-mechanical integrity of all work and installations are to code;

(2) not misrepresent the need for services, services to be provided, or services that have been provided;

(3) not make a fraudulent promise or false statement to influence, persuade, or induce an individual or an entity to contract for services; and

(4) ensure that all of an electrical sign contractor's non-exempt electrical work shall be performed by licensed individuals.

(c) The design of an electrical sign shall only be done by a licensed master electrician, master sign electrician, or design professional as authorized by statute. The design shall not be subcontracted to an unlicensed person, firm or corporation.

(d) A licensed electrical sign contractor shall display its name and license number on both sides of each vehicle owned or operated by the business and used in the conduct of electrical work. Lettering shall be of a contrasting color and at least two inches in height. The license number shall be preceded by the letters "TSCL".

(e) All advertising by electrical sign contracting companies designed to solicit electrical business shall include the electrical sign contractor's name and license number. This includes business cards [~~on or after July 1, 2010~~]. The following advertising does not require the license number:

(1) nationally placed television advertising, in which a statement indicating that license numbers are available upon request is used in lieu of the electrical sign contractor license number;

(2) telephone book listings that contain only the name, address, and telephone number;

(3) manufacturers' and distributor's telephone book trade ads identifying an electrical contractor;

(4) telephone solicitations, provided the solicitor states that the contractor complies with licensing requirements of the state. The electrical sign contractor's number must be provided upon request;

(5) promotional items of nominal value such as ball caps, tee shirts, and other gifts; and

(6) signs located on the contractor's permanent business location.

(f) The electrical sign contractor's name, address, phone number, and license number shall appear on all proposals, invoices, and written contracts from the contractor. The following information: "Regulated by The Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, 1-800-803-9202, 512-463-6599; website: www.license.state.tx.us/complaints" shall be listed on all proposals, invoices, and written contracts.

(g) A licensed electrical sign contractor and its designated master electrician or master sign electrician of record is responsible for supervision of all licensees performing work on behalf of the contractor to assure compliance with applicable statutes and rules and in particular, standards of conduct set out in this chapter.

(h) An electrical sign contractor shall not use a license that is not assigned to that contractor.

§73.53. Responsibilities of All Persons Performing Electrical Work.

All persons must perform non-exempt electrical work, [~~or~~] non-exempt electrical sign work, or non-exempt residential appliance installation work in compliance with applicable codes and ordinances. The department will interpret applicable codes and ordinances for purposes of enforcement of the Act.

§73.54. Residential Appliance Installation Contractors' Responsibilities.

(a) A residential appliance installation contractor shall:

(1) notify the department when a new residential appliance installer of record is assigned to the contractor and notify the department within thirty business days from the date that the residential appliance installer's employment with the contractor ended;

(2) maintain employee records of all work performed on its behalf for a period of four years after completion of the work, and shall make those records available to the department at the contractor's place of business during normal business hours for inspection and copying. If the contractor's principal place of business is located out of the state of Texas, the department may require the contractor to make records available to the department at its offices in Austin, Texas or another location agreed upon by the department and the contractor.

(b) A person or contractor that performs or offers to perform residential appliance installation work shall:

(1) provide safe and proper installation and service, and assure the electro-mechanical integrity of all work and installations are to code;

(2) not misrepresent the need for services, services to be provided, or services that have been provided;

(3) not make a fraudulent promise or false statement to influence, persuade, or induce an individual or an entity to contract for services; and

(4) ensure that all of a residential appliance installation contractor's non-exempt residential appliance installation [~~electrical~~] work shall be performed by licensed individuals.

(c) A licensed residential appliance installation contractor shall display its name and license number on both sides of each vehicle owned or operated by the business and used in the conduct of residential appliance installation [~~electrical~~] work. Lettering shall be of a contrasting color and at least two inches in height. The license number shall be preceded by the letters "TICL".

(d) All advertising by residential appliance installation contracting companies designed to solicit residential appliance installation business shall include the residential appliance installation contractor's name and license number. This includes business cards [~~on or after July 1, 2010~~]. The following advertising does not require the license number:

(1) nationally placed television advertising, in which a statement indicating that license numbers are available upon request is used in lieu of the residential appliance installation contractor license number;

(2) telephone book listings that contain only the name, address, and telephone number;

(3) manufacturers' and distributor's telephone book trade ads identifying a residential appliance installation contractor;

(4) telephone solicitations, provided the solicitor states that the contractor complies with licensing requirements of the state. The

residential appliance installation contractor's number must be provided upon request;

(5) promotional items of nominal value such as ball caps, tee shirts, and other gifts; and

(6) signs located on the contractor's permanent business location.

(e) The residential appliance installation contractor's name, address, phone number, and license number shall appear on all proposals, invoices, and written contracts from the contractor. The following information: "Regulated by The Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, 1-800-803-9202, 512-463-6599; website: www.license.state.tx.us/complaints" or "Regulated by The Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, 1-800-803-9202, 512-463-6599; website: www.license.state.tx.us/complaints. TDLR regulation limited to electrical work only." shall be listed on all proposals, invoices, and written contracts.

(f) A licensed residential appliance installation contractor and its designated residential appliance installer of record is responsible for supervision of all licensees performing work on behalf of the contractor to assure compliance with applicable statutes and rules and in particular, standards of conduct set out in this chapter.

(g) A residential appliance installation contractor shall not use a license that is not assigned to that contractor.

§73.60. Standards of Conduct for Engaging in Electrical Work.

(a) Competency. The licensee shall be knowledgeable of and adhere to the Act, the rules, applicable codes, and all procedures established by the department for licensees. It is the obligation of the licensee to exercise reasonable judgment and skill in the performance of all duties and work performed as a licensee.

(b) Integrity. A licensee shall be honest and trustworthy in the performance of all duties and work performed as a licensee, and shall avoid misrepresentation and deceit in any fashion, whether by acts of commission or omission. Acts or practices that constitute threats, coercion, or extortion are prohibited.

(c) Interest. The primary interest of the licensee is to ensure compliance with the Act, the rules, and all applicable codes. The licensee's position, in this respect, should be clear to all parties concerned while in the performance of all duties and work performed as a licensee.

(d) Specific Rules of Conduct. A licensee shall not:

(1) participate, whether alone or in concert with others, in any plan, scheme, or arrangement attempting or having as its purpose the evasion of any provision of the Act, the rules, or the standards adopted by the commission;

(2) furnish inaccurate, deceitful, or misleading information to the department, a consumer, or other person while engaged in the business of electrical contracting, electrical sign contracting, or residential appliance installation contracting, or performing, or offering to perform non-exempt electrical work; or

(3) engage in any activity that constitutes dishonesty, misrepresentation, or fraud while performing as a licensee.

§73.65. Advisory Board.

[~~(a)~~] Board meetings are called by the presiding officer. Meetings in excess of those mandated by the Act may be authorized by the executive director.

[~~(b) Expenses reimbursed to board members shall be limited to authorized expenses incurred while on board business and traveling to and from board meetings. The least expensive method of travel should be used. Expenses can be reimbursed to board members only when the legislature has authorized reimbursement for travel.~~]

[~~(c) Expenses paid to board members shall be limited to those allowed by the State of Texas Travel Allowance Guide and the Texas Department of Licensing and Regulation policies governing travel allowances for eligible advisory boards.~~]

§73.70. Responsibility of Licensee--Standards of Conduct.

(a) An individual licensee must provide all electrical work requiring a license through a licensed contractor, or employing governmental entity.

(b) The licensee shall accurately and truthfully represent to any prospective client or employer, the licensee's capabilities and qualifications to perform the services to be rendered.

(c) The licensee shall not offer to perform, nor perform, technical services for which the licensee is not qualified by education or experience, without securing the services of another who is qualified.

(d) The licensee shall not evade responsibility to a client or employer.

(e) The licensee shall not agree to perform services if any significant financial or other interest exists that may be in conflict with:

(1) the obligation to render a faithful discharge of such services; or

(2) the service would impair independent judgment in rendering such services.

(f) The licensee should withdraw from employment when it becomes apparent that it is not possible to faithfully discharge the duty and performance of services owed the client or employer, but then only upon reasonable notice to the client or employer. [~~A licensee who does not withdraw must inform the consumer of the facts that give rise to the duty to withdraw.~~]

(g) The licensed contractor shall not engage in advertising that is false, misleading, deceptive, or which does not clearly display the licensee's state license number.

(h) The licensee shall not misrepresent the amount or extent of prior education or experience to any employer or client, or to the department.

(i) The licensee shall not hold out as being engaged in partnership or association with any person unless a partnership or association exists in fact.

(j) Licensees must abide by all laws and rules regulating electricians, including the Standards of Conduct set forth in this section, within any geographic location in this state when performing or offering to perform electrical work.

§73.80. Fees.

(a) Application fees:

(1) Master Electrician--$50

(2) Master Sign Electrician--$50

(3) Journeyman Electrician--$35

(4) Journeyman Sign Electrician--$35

(5) Residential Wireman--$25

(6) Maintenance Electrician--$25

(7) Electrical Contractor--$115

(8) Electrical Sign Contractor--$115

(9) Electrical Apprentice--$20

(10) Electrical Sign Apprentice--$20

(11) Residential Appliance Installer--$35

(12) Residential Appliance Installation Contractor--$115

(13) Apprentice Training Program Registration--$100

(b) Renewal fees:

(1) Master Electrician--$50

(2) Master Sign Electrician--$50

(3) Journeyman Electrician--$35

(4) Journeyman Sign Electrician--$35

(5) Residential Wireman--$25

(6) Maintenance Electrician--$25

(7) Electrical Contractor--$115

(8) Electrical Sign Contractor--$115

(9) Electrical Apprentice--$20

(10) Electrical Sign Apprentice--$20

(11) Residential Appliance Installer--$40

(12) Residential Appliance Installation Contractor--$115 [~~$125~~]

(c) Late Renewal Fees. Late renewal fees for licenses issued under this chapter are provided under §60.83 of this title (relating to Late Renewal Fees).

(d) Revised or duplicate license fees:

(1) All licenses except as set out below--$25

(2) Electrical Apprentice--$20

(3) Electrical Sign Apprentice--$20

(e) All fees are non-refundable.

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

Filed with the Office of the Secretary of State on September 26, 2011.

TRD-201104011
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: November 6, 2011
For further information, please call: (512) 463-5386

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CHAPTER 82. BARBERS

The Texas Department of Licensing and Regulation (Department) proposes amendments to existing rules at 16 Texas Administrative Code (TAC) Chapter 82, §§82.10, 82.20 - 82.23, 82.31, 82.40, 82.70 - 82.72, 82.80, 82.100, 82.104, 82.106, and 82.112; the repeal of §§82.75 - 82.77 and §82.120; and new §82.120, regarding the barbering program.

These proposed rule changes are necessary to implement Senate Bill 1170 (SB 1170), 82nd Legislature, Regular Session (2011), which amended Texas Occupations Code, Chapters 1601, 1602 and 1603. The proposed rule changes are also in response to the Texas Commission of Licensing and Regulation's (Commission) rule simplification initiatives. The proposed rule changes allow for the creation of barber schools in public education institutions, amend the eligibility and curriculum requirements for barber instructors, and create a shampoo/apprentice permit, barber technician/manicurist license, barber technician/hair weaving license and specialty instructor license.

In addition the proposed rule changes reduce barber school square footage requirements, amend the instructor-to-student ratio and refund policy calculation, allow for the use of sanitizers, in addition to autoclaves or sterilizers, and allow for early examination for the written portion of the barbering exam. The proposed rule changes were recommended by the Barber Advisory Board at its meeting on September 19, 2011.

§82.10. Definitions.

Proposed §82.10 establishes definitions, in addition to those found in Texas Occupations Code Chapters 1601 and 1603, for the terms that are used in the statutes and rules.

Proposed §82.10(3) which defines barber refresher course is deleted in accordance with SB 1170 which eliminated this course requirement. Proposed §82.10(19) which defines registered examination proctor is also deleted as an unnecessary definition because proctors are not used for grading examinations.

§82.20. License Requirements--Individuals.

Proposed §82.20 sets outs the licensing requirements for individuals and is amended to include the licensing requirements for barber instructor, barber technician/manicurist, barber technician/hair weaving, shampoo apprentice, and the following specialty instructor licenses: manicurist, barber technician, barber technician/manicurist, barber technician/hair weaving, hair weaving and hair braiding.

§82.21. License Requirements--Examinations.

Proposed §82.21 amends the examination eligibility requirements. Students may now take the written exam early after completing 1,000 hours of the 1,500 hour curriculum or 900 hours of the 1,000 hour curriculum.

§82.22. Permit Requirements--Barbershops, Specialty Shops, Dual Shops, Mobile Shops and Booth Rental.

Proposed §82.22(f) adds the following license types as licenses eligible for a booth rental permit: barber technician, barber technician/manicurist, barber technician/hair weaving, barber instructor and specialty instructor.

§82.23. Permit Requirements--Barber Schools.

Proposed §82.23 amends square footage requirements for barber schools based upon the population of the municipality or unincorporated county in which the school is located. The rule also simplifies the building requirements for a barber school and amends minimum equipment requirements.

§82.31. Licenses--License Terms.

Proposed §82.31(a) adds the following license types to the list of licenses issued with a term of two years: barber instruc-

tor, specialty instructors, barber technician/manicurist, barber technician/hair weaving and shampoo apprentice. Proposed §82.31(c) is added to clarify that a student permit does not expire.

§82.40. Barber School Tuition Protection Account.

Proposed §82.40 is amended to specify that the tuition protection account applies to private barber schools.

§82.70. Responsibilities of Individuals.

Proposed §82.70(b) adds the following license types to the list of licensees who are responsible for compliance with the health and safety standards of Chapter 82; barber instructors, barber technician/manicurists, barber technician/hair weaving, specialty instructors and shampoo apprentices.

Proposed §82.70(f) adds the following license types to the list of licensees who must obtain a booth rental permit to engage in the practice of barbering as an independent contractor: barber instructors, specialty instructors, barber technicians, barber technician/manicurists and barber technician/hair weaving.

§82.71. Responsibilities of Barbershops, Specialty Shops, and Dual Shops.

Proposed §82.71(q) sets out the equipment requirements for manicure specialty shops. Proposed §82.71(r) adds the requirement that dual shops not currently employing or contracting with at least one licensed barber or cosmetologist must immediately display a sign indicating so. A shop without a barber or cosmetologist for 45 days or more must remove or obscure signage that indicates otherwise.

§82.72. Responsibilities of Barber Schools.

Proposed §82.72(a) is amended to require a barber school to apply for a new permit and pay the permit fee ten days prior to a change in ownership. The requirement that a barber school be inspected when there is a change in ownership is repealed. Proposed §82.72(y) is added to require at least one instructor for every 25 students on the school's premises.

Proposed §82.72(z) is added to require at least one instructor for every three student instructors on the school's premises. Proposed §82.72(aa) is added to allow private and post-secondary public barber schools to provide barber instruction to public high school students by contracting with the school district.

§82.75. Responsibilities of Registered Examination Proctor.

Existing §82.75 is proposed for repeal. The Department does not use registered examination proctors to grade exams and instead, contracts with a testing company to develop, administer and grade examinations.

§82.76. Responsibilities of Barber Technician.

Existing §82.76 is proposed for repeal. The barber technician responsibilities are set out in statute and are unnecessary in rule.

§82.77. Barber Refresher Course.

Existing §82.77 is repealed as authorized by SB 1170.

§82.80. Fees

The proposed amendments to §82.80 are a result of the Department's fee review, pursuant to Texas Occupations Code, §51.202, to ensure that fees charged in a particular program are set at the appropriate amount to cover the Department's costs in operating the program.

The amendments eliminate the $10 fee for the barber newsletter and reduce the various license and renewal fees accordingly and in addition reduce the renewal fee for a school. The fee review determined that the reduced fees should generate sufficient revenue to operate the program. These changes could also lead to reduced costs to the Department in preparing, printing, and mailing the newsletter. The information currently provided in the printed newsletter can be provided to licensees through other media, such as the Department's website, listserv emails, and the Department's Facebook page.

§82.100. Health and Safety Definitions.

Proposed §82.100(9) amends the definition of sterilize or sterilization to mean the elimination of all forms of bacteria by use of an autoclave or dry heat sterilizer. Proposed §82.100(10) adds the definition of sanitize or sanitization to mean the reduction in the number of microorganisms to a safe level by use of an ultraviolet sanitizer.

§82.104. Health and Safety Standards--Facial Services.

Proposed §82.104 amends the requirement to clean and disinfect tweezers and comedone extractors to include all types of multiple use implements.

§82.106. Health and Safety Standards--Manicure and Pedicure Services.

Proposed §82.106 amends the methods of cleaning, disinfecting and sterilizing to include sanitizing when providing manicure and pedicure services.

§82.112. Health and Safety Standards--Prohibited Products or Practices.

Proposed §82.112(a)(5) which requires certified training in a department-approved program prior to using a drill or similar tool, is repealed. Proposed §82.112(c) is added to prohibit using products or procedures which come into contact with the dermis layer of the skin.

§82.120. Technical Requirements--Curricula.

Existing §82.120 is repealed and proposed new §82.120 is added to include the curriculum requirements for the following licenses: barber instructor - 750 hour, barber instructor - 500 hour with one year experience, cosmetology operator to class A barber, class A barber in public high school, barber technician/manicurist and barber technician/hair weaving.

William H. Kuntz, Jr., Executive Director, has determined that for the first five-year period the proposed rules are in effect there will be no direct costs to state or local government as a result of enforcing or administering the proposed rules; however, the reduction in revenue to the state for the first five-year period is as follows: fiscal year 2012--$72,336; fiscal year 2013--$73,371; fiscal year 2014--$74,405; fiscal year 2015--$75,439; and fiscal year 2016--$76,474. There are no foreseeable implications to costs or revenues of local government as a result of enforcing or administering the proposed rules.

Mr. Kuntz has also determined that for the first five-year period the rules are in effect, the public benefit anticipated as a result of the proposed rules will be reduced costs for applicants and licensees to obtain and renew licenses.

The anticipated economic effect on small or micro-businesses or to persons who are required to comply with the rules as proposed will be lower fees for original and renewal licenses for applicants and licensees. In addition, reduction of the square

footage requirements for barber schools will result in lower overhead costs for barber school owners who may not be utilizing all of the square footage they currently lease or own and as a result, may choose to occupy smaller spaces.

Expansion of the definition of barber school to include the term "publicly funded" will allow the creation of barber school programs in public high schools and provide an opportunity for individuals to begin work immediately after high school graduation.

There will be no adverse economic impact on small or micro-business or to persons who are required to comply with the rules as proposed.

Since the agency has determined that the rule will have no adverse economic effect on small businesses preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, is not required.

Comments on the proposal may be submitted by mail to Caroline Jackson, Legal Assistant Team Lead, General Counsel's Office, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or by facsimile to (512) 475-3032, or electronically to erule.comments@license.state.tx.us. The deadline for comments is 30 days after publication in the *Texas Register.*

16 TAC §§82.10, 82.20 - 82.23, 82.31, 82.40, 82.70 - 82.72, 82.80, 82.100, 82.104, 82.106, 82.112, 82.120

The amendments and new section are proposed under Texas Occupations Code, Chapters 51, 1601, and 1603 which authorize the Texas Commission of Licensing and Regulation (Commission), the Department's governing body, to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department. In particular, Texas Occupations Code, §51.202(a) directs the Commission to set fees in amounts reasonable and necessary to cover the costs of administering programs or activities.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapters 51, 1601, and 1603. No other statutes, articles, or codes are affected by the proposal.

§82.10. Definitions.

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

(1) Act--Texas Occupations Code[,] Chapters 1601 and 1603.

(2) Barber Establishment--A barbershop, specialty shop, dual shop, mobile shop, or school[,] that is subject to regulation under the Act.

(3) Barber Instructor--A person authorized by the department to perform or offer instruction in any act or practice of barbering under Texas Occupations Code §1601.002.

(4) Barber School--An entity that holds a permit issued under this chapter to teach the practice of barbering and that may be privately or publicly funded. The term includes a barber college.

(5) Barber Technician--A person who holds a specialty license and who is authorized to practice the services defined in Texas Occupations Code §1601.002(1)(C), (D), (F), (G) and (I).

(6) Barber Technician/Manicurist--A person who holds a specialty license and who is authorized to practice the services defined in Texas Occupations Code §1601.002(1)(C) - (G).

(7) Barber Technician/Hair Weaver--A person who holds a specialty license and who is authorized to practice the services defined in Texas Occupations Code §1601.002(1)(C), (D), (G) and (H).

~~[(3) Barber Refresher Course--A department-approved course to renew or update the skills of a currently licensed barber, or a barber who has not practiced for a period of time, or to prepare a formerly licensed barber for the examination.]~~

~~[(4) Barber School--When used in this chapter includes both barber schools and barber colleges.]~~

(8) [~~(5)~~] Beard--The beard extends from below the line of demarcation and includes all facial hair regardless of texture.

(9) [~~(6)~~] Board--The Advisory Board on Barbering.

(10) [~~(7)~~] Booth Rental Permit--A permit that allows a barber, barber instructor, specialty instructor, barber technician, manicurist, barber technician/manicurist, barber technician/hair weaver, hair weaver, or hair braider to lease space on the premises of a barbershop, specialty shop, or dual shop to engage in the practice of barbering as an independent contractor.

(11) Class A Barber--A person authorized by the department to perform any act or practice of barbering under Texas Occupations Code §1601.002.

(12) [~~(8)~~] Commission--The Texas Commission of Licensing and Regulation.

(13) [~~(9)~~] Department--The Texas Department of Licensing and Regulation.

(14) [~~(10)~~] Dual shop--A dual barber and beauty shop licensed under Texas Occupations Code[,] §1603.205.

(15) [~~(11)~~] Hair braider--A person who holds a Hair Braiding Specialty Certificate of Registration from the department to braid hair. Such practice shall not include shampooing, conditioning, drying, styling, or applying any chemicals, including color chemicals, relaxers, perm solutions, or other preparations to alter the color or to straighten, curl or alter the structure of hair. A hair braider may trim hair extensions only as applicable to the braiding process. Commercial hair may be attached only by braiding and without the use of chemicals or adhesives.

(16) [~~(12)~~] Hair Relating to Haircutting--The hair extending from the scalp of the head is recognized as the hair trimmed, shaped or cut in the process of hair cutting.

(17) [~~(13)~~] Hair weaver--A person who holds a Hair Weaving Specialty Certificate of Registration from the department to perform the services of a hair braider as defined in this section and, additionally, attach hair by any weaving method. Such practice may include shampooing, conditioning, and drying performed in connection with a hair weaving service. Such practice may not include styling, cutting, or trimming hair except to the extent such activity is incidental to a hair weaving service. Such practice shall not include the application of color chemicals, relaxers, perm solutions, or other preparations to alter the color or to straighten, curl, or alter the structure of hair.

(18) [~~(14)~~] License--A license, permit, certificate, or registration issued under the authority of the Act.

(19) [~~(15)~~] License by reciprocity--A process that permits a barber license holder from another jurisdiction or foreign country to obtain a Texas barber license without repeating barber education or examination license requirements.

(20) [~~(16)~~] Line of Demarcation between "the hair" and "the beard"--The demarcation boundary between scalp hair ("the hair")

and facial hair ("the beard") is a horizontal line drawn from the bottom of the ear.

(21) Manicurist--A person who holds a specialty license and who is authorized to practice the services defined in Texas Occupations Code §1601.002(1)(E) and (F).

(22) [~~(17)~~] Mobile Shop--A barbershop, specialty shop, or dual shop that is operated in a self-contained, self-supporting, enclosed mobile unit.

(23) [~~(18)~~] Provisional license--A license that allows a person to practice barbering in Texas pending the department's approval or denial of that person's application for licensure by reciprocity.

~~[(19) Registered Examination Proctor--An individual authorized by the Department to evaluate or grade a practical examination for the department for a certificate or license issued under Texas Occupations Code, Chapter 1601.]~~

(24) [~~(20)~~] Self-Contained--Containing within itself all that is necessary to be able to operate without connecting to outside utilities such as water and electricity.

(25) Shampoo Apprentice Permit--A non-renewable permit that allows a person to perform the practice of barbering defined in Texas Occupations Code §1601.002(1)(I).

(26) [~~(21)~~] Sideburn--Part of a haircut [~~hair cut~~] or style that is a continuation of the natural scalp hair growth, does not extend below the line of demarcation, and is not connected to any other bearded area on the face.

(27) Specialty Instructor--A person authorized by the department to perform or offer instruction in an act or practice of barbering limited to Texas Occupations Code §1601.002(1)(C) - (H) and (K).

(28) Specialty Shop--A barber establishment in which only the practice of barbering as defined in Texas Occupations Code §1601.002(1)(E), (F), (H) or (K) is performed.

(29) [~~(22)~~] Weaving--The process of attaching, by any method, commercial hair (hair pieces, hair extensions) to a client's hair and/or scalp. Weaving is also known as hair integration or hair intensification.

§82.20. License Requirements--Individuals.

(a) To be eligible for a Class A Barber Certificate, Barber Instructor License, [~~a Teacher's Certificate,~~] Barber Technician License, Manicurist License, Barber Technician/Manicurist License, Barber Technician/Hair Weaving License or Hair Weaving Specialty Certificate of Registration, an applicant must:

(1) submit the completed application on a department-approved [~~Department approved~~] form;

(2) pass the applicable examinations [~~examination~~];

(3) pay the fee required under §82.80; and

(4) meet other applicable requirements of the Act, [~~and~~] this section, and the applicable curriculum set forth in §82.120.

(b) To be eligible for a Hair Braiding Specialty Certificate of Registration or Student Permit, an applicant must:

(1) submit the completed application on a department-approved [~~Department approved~~] form;

(2) pay the fee required under §82.80; and

(3) meet other applicable requirements of the Act, [~~and~~] this section, and the applicable curriculum set forth in §82.120.

(c) Class A Barber Certificate--To be eligible for a Class A barber certificate, an applicant must meet the eligibility requirements set forth in Texas Occupations Code §1601.253.

(d) Barber Instructor License [~~Teacher's Certificate~~]--To be eligible for a Barber Instructor License [~~teacher's certificate~~], an applicant must meet the eligibility requirements set forth in Texas Occupations Code §1601.254.

(e) Barber Technician License--To be eligible for a Barber Technician License, an applicant must meet the eligibility requirements set forth in Texas Occupations Code §1601.256.

(f) Manicurist License--To be eligible for a Manicurist license, an applicant must meet the eligibility requirements set forth in Texas Occupations Code §1601.257.

(g) Hair Weaving Specialty Certificate of Registration--To be eligible for a Hair Weaving Specialty Certificate of Registration, an applicant must meet the eligibility requirements set forth in Texas Occupations Code §1601.258. [~~Additionally, an applicant must complete 300 hours of instruction in a barber school and pass a written and practical examination.~~]

(h) Hair Braiding Specialty Certificate of Registration--To be eligible for a Hair Braiding Specialty Certificate of Registration, an applicant must meet the eligibility requirements set forth in Texas Occupations Code §1601.259. [~~Additionally, an applicant must complete 35 hours of instruction in a barber school.~~] No examination is required.

(i) Student Permit--To be eligible for a Student permit, an applicant must meet the eligibility requirements set forth in Texas Occupations Code §1601.260.

(j) Shampoo Apprentice Permit--To be eligible for a Shampoo Apprentice Permit, an applicant must submit a completed application on a department-approved form and meet the eligibility requirements set forth in Texas Occupations Code §1601.261. A Shampoo Apprentice Permit may not be renewed and no examination is required.

(k) Barber Technician/Manicurist License--To be eligible for a Barber Technician/Manicurist License, an applicant must meet the eligibility requirements set forth in Texas Occupations Code §1601.262.

(l) Barber Technician/Hair Weaving License--To be eligible for a Barber Technician/Hair Weaving License, an applicant must meet the eligibility requirements set forth in Texas Occupations Code §1601.263.

(m) To be eligible for a Specialty Instructor License as a Manicurist Instructor, Barber Technician Instructor, Barber Technician/Manicurist Instructor, Barber Technician/Hair Weaving Instructor, Hair Weaving Instructor or Hair Braiding Instructor, an applicant must:

(1) submit the completed application on a department-approved form;

(2) pay the fee required under §82.80;

(3) be at least 18 years of age;

(4) have a high school diploma or high school equivalency certificate;

(5) hold a current specialty license in the specialty or specialties in which the applicant is seeking licensure; and

(A) have completed a course consisting of 750 hours of instruction in barber courses and methods of teaching in a barber school; or

(B) have at least one year of licensed work experience in each of the specialties in which the applicant is seeking licensure; and

(i) have completed 500 hours of instruction in barber courses and methods of teaching in a barber school; or

(ii) have completed 15 semester hours in education courses from an accredited college or university within the 10 years preceding the date of the application; or

(iii) have obtained a degree in education from an accredited college or university; and

(6) pass a written and practical exam required under §82.21.

[(j) Registered Examination Proctor--To be eligible for an Examination Proctor registration, an applicant must:]

[(1) have held an active teacher's certificate for at least two of the five years preceding the application;]

[(2) hold an active teacher's certificate;]

[(3) obtain a certificate of completion from a department approved training course;]

[(4) submit a completed application for initial registration on a form approved by the department; and]

[(5) pay the applicable fee under §82.80.]

[(k) A license application is valid for one year from the date it is filed with the department.]

§82.21. License Requirements--Examinations.

(a) To be eligible for a department examination, an applicant must:

(1) submit a completed license application on a department-approved form;

(2) pay the applicable license application fee under §82.80; and

(3) have completed the number of curriculum hours required by this chapter and the Act.

(b) For a Class A barber certificate, a student enrolled in a 1,500 hour program is eligible to take the written examination when the department receives proof of completion of 1,000 curriculum hours . A student enrolled in a 1,000 hour program is eligible to take the written examination when the department receives proof of completion of 900 curriculum hours. [, as specified by Texas Occupations Code, §1603.255, relating to early examination.]

(c) All department examinations consist of a written and practical part. A passing grade of 70 on each part is needed to satisfy the examination requirement.

(d) Examinees must pass the written examination before being eligible to take the practical examination.

(e) When appearing for an examination [for a Class A barber certificate or a teacher's certificate], the examinee shall bring the instruments necessary to give a practical demonstration of the barbering services applicable to the license for which the examinee is applying.

[(f) An examinee for a manicurist, hair weaving, or barber technician license or certificate shall bring to the examination any instruments necessary for a practical demonstration of the services distinctive to his or her specialty.]

(f) [(g)] The examinee shall provide a model, of 16 years of age or older, on whom to demonstrate the practical work. The department may require parental approval for models under 18 years of age.

(g) [(h)] To be admitted to an examination, the examinee must present a current, valid government-issued photo identification, which includes the applicant's full name and date of birth.

(h) [(i)] Examinees are required to wear a smock or professional attire for the practical examination.

(i) [(j)] The department will notify an examinee if the examinee fails either the written or practical examination.

(j) [(k)] Any student or applicant having had a name change during his or her enrollment at any department licensed barber school must notify the department in writing prior to the date on which the student or applicant is scheduled to take any examination, written or practical.

§82.22. Permit Requirements--Barbershops, Specialty Shops, Dual Shops, Mobile Shops, and Booth Rental.

(a) To be eligible for a Barbershop, Specialty Shop Permit, a Dual Shop or Mobile Shop License, or a Booth Rental Permit, an applicant must:

(1) submit the completed application on a department approved form;

(2) pay the fee required under §82.80; and

(3) meet other applicable requirements of the Act and this chapter.

(b) Barbershop Permit--To be eligible for a barbershop permit, an applicant must meet the eligibility requirements set forth in Texas Occupations Code §1601.303.

(c) Specialty Shop Permit--To be eligible for a Specialty Shop Permit, an applicant must meet the eligibility requirements set forth in Texas Occupations Code §1601.305. The categories of Specialty Shop Permits issued by the department are: manicurist, hair weaving, and hair braiding.

(d) Dual Shop License--To be eligible for a Dual Shop License, an applicant must comply with the requirements of the Act, this chapter, Texas Occupations Code[,] Chapter 1602, and 16 TAC Chapter 83 for obtaining a beauty salon license and a barbershop permit.

(e) Mobile Shop License--To be eligible for a Mobile Shop License, an applicant must:

(1) provide a permanent physical address from which the mobile unit is dispatched and to which the mobile unit is returned when not in use;

(2) provide a permanent mailing address where correspondence from the department may be received; and

(3) verify that the mobile shop complies with the requirements of the Act and this chapter.

(f) Booth Rental Permit--To be eligible for a booth rental permit, an applicant must hold a valid department-issued [Department-issued] Class A barber certificate, barber technician license, barber technician/manicurist license, barber technician/hair weaving license, barber instructor license, specialty instructor license, manicurist license, hair weaving specialty certificate of registration, or hair braiding specialty certificate of registration and meet the requirements of this section.

§82.23. Permit Requirements--Barber Schools.

(a) To be eligible for a Barber School Permit, an applicant must:

(1) submit the completed application on a department-approved [~~department approved~~] form;

(2) pay the fee required under §82.80; [~~and any required fee under §82.40; and~~]

(3) satisfy the facility and equipment requirements of Texas Occupations Code §1601.353; and

(4) [~~(3)~~] meet other applicable requirements of the Act and this chapter.

(b) In addition to the eligibility requirements of subsection (a), a private barber school must also pay any required fee under §82.40 and provide adequate proof of financial responsibility.

~~[(b) An applicant must provide a current financial statement prepared by a certified public accountant. If the financial statement is more than 180 days old, an applicant must also provide a supplemental financial statement dated to within 180 days of the application.]~~

(c) A school must be inspected and approved by the department [~~Department~~] prior to the operation of the school. [~~To ensure timely inspection, an applicant should submit a completed application at least 45 days in advance of the anticipated opening date.~~]

(d) Barber schools must have and maintain the following:

(1) a building of permanent construction that must include classroom and practical areas covered in a hard-surface floor covering of tile or other suitable material and that must also include access to permanent restrooms, adequate drinking fountain and adequate lighting for each room;

(2) in municipalities with populations of more than 50,000 the building must have a minimum of 2,000 square feet of floor space. In municipalities with populations of 50,000 or less or in an unincorporated area of a county, the building must have a minimum of 1,000 square feet of floor space. Population shall be determined according to the most current decennial census compiled by the United States Census Bureau;

(3) at least 10 student work stations that include a chair that reclines, a back bar, and a wall mirror;

(4) a sink behind every two workstations;

(5) a liquid sterilizer for each workstations; and

(6) at least 10 classroom chairs and other materials necessary to teach the required subjects.

§82.31. Licenses--License Terms.

(a) The following licenses issued under this chapter shall have a term of two years from the date of issuance:

(1) Class A Barber Certificate;

(2) Barber Instructor License [~~Teacher's Certificate~~];

(3) Specialty License--Barber Technician, Manicurist, Barber Technician/Manicurist, Barber Technician/Hair Weaving;

~~[(3) Barber Technician License;]~~

~~[(4) Manicurist License;]~~

(4) [~~(5)~~] [~~Hair Weaving~~] Specialty Certificate of Registration--Hair Weaving, Hair Braiding;

(5) Specialty Instructor License--Barber Technician, Manicurist, Barber Technician/Manicurist, Barber Technician/Hair Weaving, Hair Weaving, Hair Braiding;

(6) Shampoo Apprentice Permit;

~~[(6) Hair Braiding Specialty Certificate of Registration;]~~

(7) Barbershop Permit;

(8) [~~Manicurist~~] Specialty Shop Permit;

~~[(9) Hair Weaving Specialty Shop Permit;]~~

~~[(10) Hair Braiding Specialty Shop Permit;]~~

(9) [~~(11)~~] Dual Shop License;

(10) [~~(12)~~] Mobile Shop License; and

(11) [~~(13)~~] Booth Rental Permit. [~~; and~~]

~~[(14) Student Permit.]~~

(b) A Barber School Permit [~~The following licenses~~] issued under this chapter shall have a term of one year from the date of issuance.[~~:~~]

~~[(1) Barber School Permit; and]~~

~~[(2) Examination Proctor Registration.]~~

(c) A Student Permit issued under this chapter does not expire.

§82.40. Private Barber School Tuition Protection Account.

(a) Pursuant to §1601.3571 of the Act, the Private Barber School Tuition Protection Account is created to refund unused tuition if a barber school ceases operation before its course of instruction is complete.

(b) In each year in which the balance of the account [~~Barber School Tuition Protection Account~~] is less than $25,000 the department [~~Department~~] will determine a fee that shall be paid by all permitted barber schools to the account.

(c) The necessity for assessing the fee will be determined by the department [~~Department~~] when it conducts its annual account balance review prior to December 31st. The fee that is assessed by the department [~~Department~~] shall be in effect for a period of 12 months.

(d) The fee shall be paid by each permitted barber school, upon annual renewal of the license during the 12-month period and shall be paid in addition to the renewal fee. The renewal notice sent by the department [~~Department~~] will reflect the fee due to the account.

(e) In addition to any other fees, all new schools applying for a barber school permit shall pay the prescribed fee to the account before a permit will be issued.

(f) The total payment of a claim from the account [~~Barber School Tuition Protection Account~~] may not exceed $1,000. The total amount of claims paid against a single closed school may not exceed $2,500.

(g) The executive director may authorize payment to a student from the account [~~Barber School Tuition Protection Account~~], if:

(1) the student makes a claim for payment on a form approved by the executive director;

(2) a closed barber school has failed to refund unused tuition to the student within 30 days after the date the student became eligible for the refund;

(3) the executive director determines after investigation that the student is owed the refund; and

(4) the student assigns to the department all rights of the student against the barber school to the extent of the amount paid to the student from the account.

(h) The department shall pay claims on a pro rata basis from appropriated money available in the account if:

(1) the account contains insufficient assets to pay all claims;

(2) insufficient money has been appropriated to the department from the account to pay all claims; or

(3) the total amount of claims against a single closed school exceeds the amount specified in subsection [~~Subsection~~] (f).

(i) The department shall notify a closed barber school of any claim made against the closed school under this section. Before the executive director may authorize any payment from the account, the school shall have 20 days from the date of notice of the claim to dispute the claim and present evidence to the executive director in opposition to the claim.

(j) If payment is made from the account [~~Barber School Tuition Protection Account~~] on a claim against a closed barber school:

(1) the school shall reimburse the account immediately or agree in writing to reimburse the account, on a schedule to be determined by the executive director;

(2) the school shall immediately pay the student any additional amount due to the student under the Act or agree in writing to pay the student on a schedule to be determined by the executive director;

(3) payments made by a school to the account or to a student under this subsection include interest accruing at the rate of eight percent a year beginning on the date the executive director pays the claim;

(4) the department shall be subrogated to all rights of the student against the barber school to the extent of the amount paid to the student; and

(5) the department may assess administrative penalties or sanctions against the school and may deny an application for a license, certificate, or permit or an application for renewal of a license, certificate, or permit filed by the holder of the barber school permit.

§82.70. Responsibilities of Individuals.

(a) Only a permitted barber school, barbershop, specialty shop, dual shop, mobile shop, or a licensed barber may advertise in the yellow pages of the telephone directory under "Barber."

(b) License holders, including Class A barbers, barber instructors, [~~teachers,~~] barber technicians, barber technician/manicurists, barber technician/hair weavers, hair weavers, hair braiders, [~~and~~] manicurists, specialty instructors and shampoo apprentices are responsible for compliance with the health and safety standards of this chapter.

(c) Licensees shall wear clean top and bottom outer garments and footwear while performing services authorized under the Act. Outer garments include tee shirts, blouses, sweaters, dresses, smocks, pants, jeans, shorts, and other similar clothing and does not include lingerie or see-through fabric.

(d) Licensees shall notify the department in writing of any name change within thirty days of the change.

(e) Licensees shall maintain a current mailing address on file with the department and must notify the department not later than thirty days following any change of mailing address.

(f) Barbers, manicurists, barber instructors, specialty instructors, barber technicians, barber technician/manicurists, barber technician/hair weavers, hair weavers or hair braiders who lease space on the premises of a barbershop or specialty shop to engage in the practice of barbering as an independent contractor must obtain a booth rental permit.

§82.71. Responsibilities of Barbershops, Specialty Shops, and Dual Shops.

(a) - (p) (No change.)

(q) Manicure specialty shops shall provide the following equipment for each licensee present and providing services;

(1) one manicure table with light;

(2) one manicure stool; and

(3) one professional client chair for each manicure station.

(r) [~~(q)~~] Dual shops shall:

(1) comply with all requirements of the Act and this chapter applicable to barbershops;

(2) comply with all requirements of Texas Occupations Code[~~,~~] Chapter 1602 and 16 TAC Chapter 83 applicable to beauty salons; and

(3) if the shop does not currently have employed or have a contract with [~~is without the services of~~] at least one licensed barber (or cosmetologist) the owner must immediately display a prominent sign at the entrance and exit of the shop indicating that no barber (or cosmetologist) is available; and [~~for a period of 90 days or more:~~]

(4) if the shop has neither employed nor contracted with at least one licensed barber (or cosmetologist) for a period of 45 days or more the owner shall:

(A) not place any new advertisement or display any sign or symbol indicating that the shop offers barbering (or cosmetology) services; and

(B) remove or obscure any existing sign or symbol indicating that the shop offers barbering (or cosmetology) services.

§82.72. Responsibilities of Barber Schools.

(a) If a barber school changes ownership, the new owner must apply for a new school permit, including the new permit fee, ten days prior to the change of ownership [~~shall notify the department of the change and apply for a new permit from the department within thirty days of the change of ownership~~].

[~~(b) The department shall inspect a barber school that has changed ownership to determine that it fulfills all requirements of the department and of the Act.~~]

(b) [~~(c)~~] A new permit fee shall be required from a barber school that has changed ownership.

(c) [~~(d)~~] A barber school must have one barber chair available for each student in attendance on the practical floor. Additional students in attendance must be assigned to the beginner's department or theory classroom.

(d) [~~(e)~~] A barber school shall furnish each student within seven days of the student's enrollment his or her own copy of the law and rules book published by the department. Each student shall retain permanent ownership of the books so that he or she will have ready access to and be knowledgeable of the laws and rules that regulate barbering.

(e) [~~(f)~~] The barber school must issue within seven days of enrollment each student his or her own textbook or books which shall contain all subjects referred to in Texas Occupations Code §1601.558. The department must approve each textbook or books before it may be used in the barber school curriculum.

(f) [~~(g)~~] Within 30 days of enrollment, a barber school shall furnish to or ensure that each student is equipped with his or her own personal tools which must include the following:

(1) one professional electric clipper of modern design;

(2) one neck duster;

(3) one barber shears;

(4) one thinning shears;

(5) one razor equipped with disposable blades;

(6) three barber combs;

(7) one styptic powder or liquid styptic;

(8) one tool kit (carrying kit);

(9) one hair styling brush;

(10) one neck clip;

(11) one can clipper oil;

[~~(12) two washable uniforms;~~]

(12) [~~(13)~~] one hand held hair dryer; and

(13) [~~(14)~~] one T-edger or outliner.

(g) [~~(h)~~] No student may take instruction or accrue hours for practical work unless he or she is equipped with the tools required above.

(h) [~~(i)~~] Each barber school shall have:

(1) for each student in attendance on the practical floor, enrolled in a manicurist course outlined in §82.120, one complete manicure table, one complete set of manicuring implements for plain and sculptured nails, and one textbook with complete instructions;

(2) an adequate supply of permanent wave rods , and optional hair styling rollers;

(3) a minimum of two canvas-type wig blocks;

(4) two mannequins, one long-haired and one short-haired;

(5) a minimum of one wig, one hairpiece, and hair extensions for weaving [~~one hairwoven piece~~];

(6) clock;

(7) bulletin board;

(8) chalk board or dry erase board;

(9) one hooded hair dryer;

(10) [~~(8)~~] fire extinguisher with current inspection report;

(11) [~~(9)~~] instructor's [~~teacher's~~] desk in classroom; and

(12) [~~(10)~~] if providing manicure or pedicure nail services, an autoclave, dry heat sterilizer or ultraviolet sanitizer [~~a department-approved sterilizer~~].

[~~(j) Each classroom consultant to theory instruction in a barber school shall have a valid Texas barber teacher's certificate, an academic degree or specialized training or expertise in the subject being taught if the subject pertains to material relating to barbering.~~]

(i) [~~(k)~~] A student instructor [~~teacher~~] may instruct theory only if assisted by a person holding a barber instructor's license [~~a teaching certificate~~].

[~~(l) Whenever an approved barber school is without the services of at least one teacher who has a valid Texas barber teacher's certificate for all or any portion of three consecutive business days, no instruction may be provided, and no student shall accrue hours for either practical work or theory for the duration of such absence.~~]

(j) [~~(m)~~] A barber school shall submit each application for student permit in a manner prescribed by the department. [~~which shall include the following items:~~]

[~~(1) the original of the application for student permit form; and~~]

[~~(2) proof of a seventh-grade education or its equivalency. This shall be in the form of a transcript or copy of the diploma, equivalency certificate, or record.~~]

(k) Students must have a permit to attend barber school and are authorized to only practice barbering in that school. The school must attach a current student photograph to the school's portion of the permit and to the student's portion of the permit. No student permit is valid unless these photographs are attached.

[~~(n) Application for a student permit must be sent to the department in complete form within ten days of actual date of enrollment. After the department receives the completed student permit application, the department will issue a student permit which gives the student the right to do barber service only in the school. The school shall affix to the student permit two current photographs furnished by the student, one photograph affixed to the school's portion of the permit and one photograph affixed to the student's portion of the permit. No student permit is valid unless these photographs are attached thereto.~~]

(l) [~~(o)~~] A barber school shall maintain one album displaying the school's portion of student permits, including affixed picture, of all enrolled students. The permits shall be in alphabetical order. No student may accrue hours for practical work or theory unless the student's permit is displayed in accordance with this subsection.

(m) [~~(p)~~] Each barber school approved by the department shall include in its instruction the curricula approved by the department.

(n) [~~(q)~~] No business other than the teaching and practicing of barbering can be operated on the premises of a barber school, with the exception of vending machines or retail products directly relating to hair care.

(o) [~~(r)~~] Only a permitted barber school, barbershop, or manicurist specialty shop or a licensed barber may advertise in the yellow pages of the telephone directory under "Barber."

(p) [~~(s)~~] Schools may establish rules of operation and conduct, which may include rules relating to student clothing, that do not conflict with this chapter.

(q) [~~(t)~~] A student enrolled in a barber school must wear a clean uniform or smock during school hours.

(r) [~~(u)~~] Barber schools are responsible for compliance with the health and safety standards of this chapter.

(s) [~~(v)~~] Alterations to the school's floor plan must be in compliance with the requirements of the Act and this chapter.

(t) [~~(w)~~] Barber schools shall notify the department in writing of any name change of the school within thirty days of the change.

(u) [~~(x)~~] Barber schools shall maintain a current mailing address on file with the department and must notify the department not later than thirty days following any change of mailing address.

(v) [~~(y)~~] At least one time per month, barber schools shall submit to the department an electronic record of each student's accrued hours, in a manner and format prescribed by the department. [~~The initial submission of student hours shall include all student hours accrued at the school.~~] Delayed data submission(s) are permitted only upon department approval, and the department shall determine the period of time for which a school may delay the electronic submission of data on a case by case basis. Upon department approval, a school may submit data required under this subsection in an alternate manner and format as determined by the department, if the school demonstrates that the requirements of this subsection would cause a substantial hardship to the school.

(w) [~~(z)~~] A school shall maintain and have available for department and/or student inspection the monthly progress report required by Texas Occupations Code[~~,~~] §1601.561(a), documenting the daily attendance record of each student and number of credit hours earned. The school shall maintain the monthly progress report throughout the period of the student's enrollment and for 48 months after the student completes the curriculum, withdraws, or is terminated.

(x) [~~(aa)~~] A barber establishment shall display in the establishment, in a conspicuous place clearly visible to the public, a copy of the establishment's most recent inspection report issued by the department.

(y) A barber school must have at least one instructor for every 25 students on the school's premises.

(z) A barber school must have at least one instructor for every three student instructors on the school's premises. A student instructor shall concentrate on developing teaching skills and may not be booked with customers.

(aa) A private barber school or post secondary barber school may provide barber instruction to public high school students by contracting with the school district and complying with Texas Education Agency law and rules. A public high school student receiving instruction under such contract is considered to be a public high school student enrolled in a public school barber program for purposes of the Act and department rules.

§82.80. Fees.

(a) Application Fees:

(1) Class A [~~Registered~~] Barber Certificate--$60 [~~License--$70 (includes $10 newsletter fee) for applications filed prior to March 15, 2008; $70 (includes $10 newsletter fee) for applications filed on or after March 15, 2008.~~]

(2) Barber Instructor License [~~Teacher Certificate~~]--$70

(3) Specialty License--Barber Technician, Manicurist, Barber Technician/Manicurist, Barber Technician/Hair Weaving--$30 [~~License--$40 (includes $10 newsletter fee)~~]

[~~(4) Manicurist License--$40 (includes $10 newsletter fee)~~]

(4) [~~(5)~~] Student Permit--$35 (includes $10 law and rules book fee)

(5) Shampoo Apprentice Permit--No charge

(6) [~~Hair Weaving~~] Specialty Certificate of Registration--Hair Weaving, Hair Braiding--$43 [~~$53 (includes $10 newsletter fee)~~]

(7) Specialty Instructor License--Barber Technician, Manicurist, Barber Technician/Manicurist, Barber Technician/Hair Weaving, Hair Weaving, Hair Braiding--$70

[~~(7) Hair Braiding Specialty Certificate of Registration--$53 (includes $10 newsletter fee)~~]

[~~(8) Registered Examination Proctor--$25~~]

(8) [~~(9)~~] Barbershop Permit--$60

(9) [~~(10)~~] Specialty Shop Permit--$50

(10) [~~(11)~~] Booth Rental Permit--$50

(11) [~~(12)~~] School Original Permit--$500

(12) [~~(13)~~] Dual Shop--$130

(13) [~~(14)~~] Mobile Shop--$60

(b) Renewal Fees:

(1) Class A [~~Registered~~] Barber Certificate--$60 [~~License--$70 (includes $10 newsletter fee) for licenses expiring prior to March 15, 2008; $70 (includes $10 newsletter fee) for licenses expiring on or after March 15, 2008.~~]

(2) Barber Instructor License [~~Teacher Certificate~~]--$70

(3) Specialty License--Barber Technician, Manicurist, Barber Technician/Manicurist, Barber Technician/Hair Weaving--$30

[~~(3) Barber Technician License--$90 for licenses expiring on or before May 31, 2006; $40 for licenses expiring on or after June 1, 2006 (includes $10 newsletter fee)~~]

[~~(4) Manicurist License--$40 (includes $10 newsletter fee)~~]

(4) [~~(5)~~] Student Permit--No charge

(5) [~~(6)~~] [~~Hair Weaving~~] Specialty Certificate of Registration--Hair Weaving, Hair Braiding--$43 [~~$53 (includes $10 newsletter fee)~~]

(6) Specialty Instructor License--Barber Technician, Manicurist, Barber Technician/Manicurist, Barber Technician/Hair Weaving, Hair Weaving, Hair Braiding--$70

[~~(7) Hair Braiding Specialty Certificate of Registration--$53 (includes $10 newsletter fee)~~]

[~~(8) Registered Examination Proctor--$25~~]

(7) [~~(9)~~] Barbershop Permit--$60

(8) [~~(10)~~] Specialty Shop Permit--$50

(9) [~~(11)~~] Booth Rental Permit--$50

(10) [~~(12)~~] School Permit--$200 [~~$300~~]

(11) [~~(13)~~] Dual Shop--$100

(12) [~~(14)~~] Mobile Shop--$60

(c) License by Reciprocity or Endorsement--$100

(d) Issuance of a revised or duplicate license, certificate or permit--$25

(e) Verification of license, permit or certificate to other states--$25

(f) Law and Rules Book Fee--$10

[~~(g) Registered Examination Proctor Department Training Course--$50~~]

(g) [~~(h)~~] Late renewals fees for licenses, certificates and permits issued under this chapter are provided under §60.83 of this title (relating to Late Renewal Fees).

(h) [~~(i)~~] Inspection Fees (for each occurrence):

(1) Initial Inspection or Reinspection of school--$200 [~~$500~~]

(2) Risk-based Inspection Fees for schools and shops--$150

(i) [~~(j)~~] All fees are nonrefundable, except as otherwise provided by law or commission rule.

§82.100. Health and Safety Definitions.

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

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

(9) Sterilize or sterilization--To eliminate all forms of [~~make free from live~~] bacteria or other microorganisms by use of an autoclave or [~~,~~] dry heat [~~or ultraviolet light~~] sterilizer [~~that is listed with the United States Food and Drug Administration~~].

(10) Sanitize or sanitization--To reduce the number of microorganisms to a safe level by use of an ultraviolet sanitizer.

§82.104. Health and Safety Standards--Facial Services.

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

(d) After each client, multiple use implements such as metal tweezers and comedone extractors [~~the following implements~~] shall be cleaned and disinfected[~~: tweezers and comedone extractors~~].

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

§82.106. Health and Safety Standards--Manicure and Pedicure Services.

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

(c) All metal manicure and pedicure tools shall be properly cleaned, disinfected and sterilized or sanitized after [~~prior to~~] each service, in accordance with this chapter, regardless of the tool's multiuse for only a single client or for multiple clients.

(d) After each client, the following implements shall be cleaned, disinfected, and sterilized or sanitized in accordance with the rule: metal pusher and files, cuticle nipper and scissors, metal tweezers, finger and toe nail clippers and electric drill bits.

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

§82.112. Health and Safety Standards--Prohibited Products or Practices.

(a) Licensees may not use any of the following substances or products in performing barbering services:

(1) Methyl Methacrylate Liquid Monomers, a.k.a., MMA.

(2) Razor-type callus shavers designed and intended to cut growths of skin such as corns and calluses, e.g., credo blades.

(3) Alum or other astringents in stick or lump form. (Alum or other astringents in powder or liquid form are acceptable.)

(4) Fumigants such as formalin (formaldehyde) tablets or liquids.

~~[(5) A drill or similar tool designed for use by a manicurist or pedicurist, without proof of certification of training of that manicurist or pedicurist through a program approved by the department.]~~

(b) Possession on licensed premises of any item listed in this section is a violation under this chapter.

(c) The use of any product, preparation or procedure that comes into contact with or penetrates the dermis layer of the skin is prohibited.

§82.120. Technical Requirements--Curricula.

(a) Requirement for enrollment. No person may enroll in an instructor's course in an approved barber school before receiving the appropriate license.

(b) The curriculum for the 750 hour barber instructor license must be completed in a course of not less than 20 weeks as follows:
Figure: 16 TAC §82.120(b)

(c) The curriculum for the barber instructor license with one year experience consists of 500 hours to be completed in a course of not less than 13 weeks as follows:
Figure: 16 TAC §82.120(c)

(d) The curriculum for the class A barber certificate in a private or public post-secondary barber school consists of 1,500 hours, to be completed in a course of not less than nine months, as follows:
Figure: 16 TAC §82.120(d)

(e) The curriculum for the class A barber certificate while holding a cosmetology operator license consists of 300 hours, to be completed in a course of not less than 9 weeks, as follows:
Figure: 16 TAC §82.120(e)

(f) The curriculum for the class A barber certificate in a public secondary program for high school students consists of 1,000 hours of instruction in barber courses and 500 hours of related high school courses prescribed by the commission in a vocational barber program in a public school to be completed in a course of not less than six months, with the 1,000 hours as follows:
Figure: 16 TAC §82.120(f)

(g) The curriculum for the manicurist license consists of 600 hours, to be completed in a course of not less than 16 weeks, as follows:
Figure: 16 TAC §82.120 (g)

(h) The curriculum for the barber technician/manicurist license consists of 900 hours; to be completed in a course of not less than 24 weeks, as follows:
Figure: 16 TAC §82.120(h)

(i) The curriculum for the barber technician/hair weaving license consists of 600 hours to be completed in a course of not less than 16 weeks, as follows:
Figure: 16 TAC §82.120(i)

(j) The curriculum for the barber technician license consists of 300 hours, to be completed in a course of not less than 8 weeks, as follows:
Figure: 16 TAC §82.120(j)

(k) The curriculum for the hair braiding specialty certificate of registration consists of 35 hours as follows:
Figure: 16 TAC §82.120(k)

(l) The curriculum for the hair weaving specialty certificate of registration consists of 300 hours as follows:
Figure: 16 TAC §82.120(l)

(m) Field Trips.

(1) Barber related field trips are permitted under the following conditions for students enrolled in the following courses and the guidelines under this subsection must be strictly followed.

(2) A student may obtain the following field trip curriculum hours:

(A) a maximum of 75 hours out of the 1,500 hour Class A Barber course;

(B) a maximum of 50 hours out of the 1,000 hour Class A Barber course;

(C) a maximum of 30 hours for the Manicure course;

(D) a maximum of 20 hours for the Barber Technician course;

(E) a maximum of 45 hours for the Barber Technician/Manicurist course;

(F) a maximum of 30 hours for the Barber Technician/Hair Weaving course;

(G) a maximum of 20 hours for the Hair Weaving course;

(H) a maximum of 35 hours for the 750 hour Instructor course;

(I) a maximum of 25 hours for the 500 hour Instructor course; and

(J) a maximum of 15 hours for the Cosmetology Operator to Class A Barber course.

(3) Students must be under the supervision of a licensed instructor from the school where the student is enrolled at all times during the field trip. The instructor-student ratio required in a school is required on a field trip.

(4) Complete documentation is required, including student names, instructor names, activity, location, date, and duration of the activity.

(5) No credit may be earned for travel.

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

Filed with the Office of the Secretary of State on September 26, 2011.

TRD-201104010
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: November 6, 2011
For further information, please call: (512) 463-7348

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16 TAC §§82.75 - 82.77, 82.120

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

The repeal is proposed under Texas Occupations Code, Chapters 51, 1601, and 1603 which authorize the Texas Commission of Licensing and Regulation (Commission), the Department's governing body, to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department.

The statutory provisions affected by the repeal proposal are those set forth in Texas Occupations Code, Chapters 51, 1601, and 1603. No other statutes, articles, or codes are affected by the proposal.

§82.75. Responsibilities of Registered Examination Proctor.

§82.76. Responsibilities of Barber Technician.

§82.77. Barber Refresher Course.

§82.120. Technical Requirements--Curricula.

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

Filed with the Office of the Secretary of State on September 26, 2011.

TRD-201104009
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: November 6, 2011
For further information, please call: (512) 463-7348

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TITLE 22. EXAMINING BOARDS

PART 3. TEXAS BOARD OF CHIROPRACTIC EXAMINERS

CHAPTER 80. PROFESSIONAL CONDUCT

22 TAC §80.1

The Texas Board of Chiropractic Examiners (Board) proposes an amendment to §80.1, relating to Delegation of Authority, to make clear the rules on delegation of authority by a licensee to a student that has completed an out-patient clinic. Currently the rule states that a chiropractic adjustment or manipulation done by a student who has completed an out-patient clinic must be performed under the supervision of a licensee who does not need to physically be present in the treating room at the time of the adjustment. The Board has received several questions from licensees regarding whether the licensee must be on-site at the time of the adjustment, and thus believe this amendment is necessary to clarify that the licensee must in fact be on-site at the time of the adjustment performed by the student.

Yvette Yarbrough, Executive Director, has determined that, for each year of the first five years that this amendment will be in effect, there will be no additional cost to state or local governments.

Ms. Yarbrough has also determined that, for each year of the first five years that this amendment will be in effect, the public benefit of this amendment will be better supervision of students performing chiropractic adjustments or manipulation by licensees. Ms. Yarbrough has also determined that there will be no adverse economic effect to individuals and small or micro businesses during the first five years that this amendment will be in effect.

Comments on the proposed amendment and/or a request for a public hearing on the proposed amendment may be submitted to Yvette Yarbrough, Executive Director, Texas Board of Chiropractic Examiners, 333 Guadalupe St., Tower III, Suite 825, Austin,

Texas 78701; fax: (512) 305-6705, no later than 30 days from the date that this proposed amendment is published in the *Texas Register.*

This amendment is proposed under Texas Occupations Code §201.152, relating to rules. Section 201.152 authorizes the Board to adopt rules necessary to regulate the practice of chiropractic.

No other statutes, articles, or codes are affected by the proposed amendment.

§80.1. Delegation of Authority

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

(c) A licensee may allow or direct a student enrolled in an accredited chiropractic college to perform chiropractic adjustments or manipulations.

(1) (No change.)

(2) For students that have completed an out-patient clinic at a chiropractic college, the chiropractic adjustment or manipulation must be performed under the supervision of a licensee who need not be physically present in the treating room at the time of the adjustment or manipulation, but must be on-site at the time of the adjustment or manipulation.

(3) (No change.)

(d) - (j) (No change.)

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

Filed with the Office of the Secretary of State on September 23, 2011.

TRD-201103965
Yvette Yarbrough
Executive Director
Texas Board of Chiropractic Examiners
Earliest possible date of adoption: November 6, 2011
For further information, please call: (512) 305-6716

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CHAPTER 81. RULEMAKING

22 TAC §81.1

The Texas Board of Chiropractic Examiners (Board) proposes new §81.1, relating to Definitions, to define terms used in Chapter 81 of Title 22, Part 3 of the Texas Administrative Code.

Yvette Yarbrough, Executive Director, has determined that, for each year of the first five years this new rule will be in effect, there will be no additional cost to state or local governments.

Ms. Yarbrough has also determined that, for each year of the first five years this new rule will be in effect, the public benefit of this new rule will be clear definitions for terms used in Chapter 81. Ms. Yarbrough has also determined that there will be no adverse economic effect to individuals and small or micro business during the first five years this new rule will be in effect.

Comments on the proposed new rule and/or a request for a public hearing on the proposed new rule may be submitted to Yvette Yarbrough, Executive Director, Texas Board of Chiropractic Examiners, 333 Guadalupe St., Tower III, Suite 825, Austin, Texas 78701; fax: (512) 305-6705, no later than 30 days from the date that this proposed new rule is published in the *Texas Register.*

This new rule is proposed under Texas Occupations Code §201.152, relating to rules. Section 201.152 authorizes the Board to adopt rules necessary to regulate the practice of chiropractic.

No other statutes, articles, or codes are affected by the proposed new rule.

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

(1) APA--Administrative Procedure Act, Government Code, Chapter 2001;

(2) Board--Texas Board of Chiropractic Examiners;

(3) Person--An individual, partnership, corporation, association, governmental subdivision, or public or private organization that is not a state agency;

(4) Rule--A statement by the Texas Board of Chiropractic Examiners of general applicability that:

(A) implements, interprets or prescribes law or policy; or describes the procedure or practice requirements of the Board;

(B) includes the amendment or repeal of a prior rule; and

(C) does not include a statement regarding only the internal management or organization of the Board and not affecting private rights or procedures.

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

Filed with the Office of the Secretary of State on September 23, 2011.

TRD-201103966
Yvette Yarbrough
Executive Director
Texas Board of Chiropractic Examiners
Earliest possible date of adoption: November 6, 2011
For further information, please call: (512) 305-6716

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22 TAC §81.3

The Texas Board of Chiropractic Examiners (Board) proposes new §81.3, relating to Petition for Adoption of Rules, to prescribe the form for a petition for adoption of rules made by an interested person pursuant to §2001.021 of the Administrative Procedure Act (APA) and to prescribe the procedure for such a petition's submission, consideration and disposition. Section 2001.021(b) of the APA directs state agencies to adopt rules

Currently the Board does not have any rules in compliance with §2001.021(b). As such, the Board proposes this new rule to detail the form required for submission and the procedures for the submission, consideration and disposition of a petition for adoption of rules.

Yvette Yarbrough, Executive Director, has determined that, for each year of the first five years this new rule will be in effect, there will be no additional cost to state or local governments.

Ms. Yarbrough has also determined that, for each year of the first five years this new rule will be in effect, the public benefit of this new rule will be a clear method for the public to petition the Board for rulemaking, as outlined in §2001.021 of the APA. Ms. Yarbrough has also determined that there will be no adverse economic effect to individuals and small or micro business during the first five years this new rule will be in effect.

Comments on the proposed new rule and/or a request for a public hearing on the proposed new rule may be submitted to Yvette Yarbrough, Executive Director, Texas Board of Chiropractic Examiners, 333 Guadalupe St., Tower III, Suite 825, Austin, Texas 78701; fax: (512) 305-6705, no later than 30 days from the date that this proposed new rule is published in the *Texas Register.*

This new rule is proposed under Texas Occupations Code §201.152, relating to rules, and under the APA, §2001.021, relating to petitions for adoption of rules. Section 201.152 authorizes the Board to adopt rules necessary to regulate the practice of chiropractic. Section 2001.021 directs the Board to adopt rules relating to the form for a petition for adoption of rules and relating to the procedure for such a petition's submission, consideration and disposition.

No other statutes, articles, or codes are affected by the proposed new rule.

§81.3. Petition for Adoption of Rules.

(a) As authorized by the APA, §2001.021(a), an interested person by petition to the Board may request the adoption of a rule.

(b) Form for submission. A person must submit a petition for adoption of rules in writing via mail, fax, e-mail, or hand-delivery to the Executive Director or General Counsel of the Board. The petition shall contain the following information as applicable and except as may be waived by the Board:

(1) the name and contact information of the petitioning party and his or her interest in the adoption of the rule;

(2) a statement of the legal authority and jurisdiction under which the petition is filed;

(3) the exact language of the proposed rule requested to be adopted;

(4) a statement and legal references regarding whether, to the petitioner's knowledge, the requested rule is in conflict with any existing rule, ruling, order or opinion of the Board or any other rules or statutes; and

(5) a statement of the purpose of the requested rule.

(c) Consideration and Disposition. During the sixty (60) day period following receipt of the petition by the Board, the Rules Committee shall meet to consider the petition. Not less than ten (10) days prior to such meeting, the Board shall notify the petitioning party in writing of the date, time and place the petition shall be considered.

(1) At this meeting, the petitioning party may be given an opportunity to present matters to the Rules Committee, at the Committee's discretion.

(2) The Committee, at the conclusion of the meeting, shall decide whether to deny the petition or to recommend to the Board at the next board meeting to publish the requested rule in the *Texas Register* for comment. If the Committee decides to deny the petition, the Committee shall state its reasons for denial in writing to the petitioning party. A recommendation by the Rules Committee to publish the requested rule for comment shall constitute initiation of rulemaking for purposes of §2001.021(c)(2) of the APA.

(3) At the next board meeting following the Rules Committee meeting, the Board shall consider the Rules Committee's recommendation. The Board shall then decide whether to deny the petition or to publish the requested rule in the *Texas Register* for comment. If the Board decides to deny the petition, the Board shall state its reasons for denial in writing to the petitioning party.

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

Filed with the Office of the Secretary of State on September 23, 2011.

TRD-201103968
Yvette Yarbrough
Executive Director
Texas Board of Chiropractic Examiners
Earliest possible date of adoption: November 6, 2011
For further information, please call: (512) 305-6716

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PART 9. TEXAS MEDICAL BOARD

CHAPTER 173. PHYSICIAN PROFILES

22 TAC §173.1, §173.3

The Texas Medical Board (Board) proposes amendments to §173.1, concerning Profile Contents; and §173.3, concerning Physician-Initiated Updates.

The amendment to §173.1 clarifies what utilization review services are subject to reporting on a physician's profile and specifically excludes the reporting of utilization review provided in relation to worker's compensation claims.

The amendment to §173.3 clarifies that changes in address to be reported to the Board by physicians within 30 days of their occurrence, applies to both mailing and practice address changes.

Elsewhere in this issue of the *Texas Register,* the Board contemporaneously proposes the rule review for Chapter 173.

Nancy Leshikar, General Counsel for the Board, has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing this proposal will be to exclude unnecessary reporting to the Board of utilization review services provided in worker's compensation claims, as such information is already provided in utilization review forms for these types of claims as required by the Division of Workers' Compensation under the Texas Department of Insurance and to ensure that the Board has accurate contact information for licensed physicians.

Mrs. Leshikar has also determined that for the first five-year period the sections are in effect there will be no fiscal implication to state or local government as a result of enforcing the sections as proposed. There will be no effect to individuals required to comply with the rules as proposed. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Jennifer Kaufman, P.O. Box 2018, Austin, Texas 78768-2018, or e-mail comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

The amendments are proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

The amendments are also authorized by §153.001 and §154.006, Texas Occupations Code.

§173.1. Profile Contents.

(a) (No change.)

(b) The profile of each licensed physician shall contain the following information listed in paragraphs (1) - (28) of this subsection:

(1) - (27) (No change.)

(28) whether the physician provides utilization review services for an insurance company in connection with health care services rendered by a group health plan and the name of the insurance company or companies. This does not include providing utilization review in relation to worker's compensation claims.

§173.3. Physician-Initiated Updates.

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

(d) A physician shall report the following to the Board within 30 days after the event:

(1) Any change of mailing or practice address;

(2) - (4) (No change.)

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

Filed with the Office of the Secretary of State on September 26, 2011.

TRD-201103998
Mari Robinson, J.D.
Executive Director
Texas Medical Board
Earliest possible date of adoption: November 6, 2011
For further information, please call: (512) 305-7016

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CHAPTER 175. FEES AND PENALTIES

22 TAC §§175.1, 175.2, 175.5

The Texas Medical Board (Board) proposes amendments to §175.1, concerning Application and Administrative Fees; §175.2, concerning Registration and Renewal Fees; and §175.5, concerning Payment of Fees or Penalties.

The amendment to §175.1 removes all language relating to surcharges as this term is used only for internal agency purposes and its removal eliminates confusion; increases the application fee for physician-in-training permits used to complete rotations in Texas by $1 due to fee increases set by the Department of Information Resources; and sets the fee at $18 for the processing of Physician/Physician Assistant Jointly-Owned Entity Annual Reports.

The amendment to §175.2 removes all language relating to surcharges as this term is used only for internal agency purposes and its removal eliminates confusion.

The amendment to §175.5 provides that additional fees shall be incurred by individuals who renew their applications online or through hard-copy, depending on the format.

Elsewhere in this issue of the *Texas Register,* the Board contemporaneously proposes the rule review for Chapter 175.

Nancy Leshikar, General Counsel for the Board, has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing this proposal will be to remove confusing language and raise fees to appropriately cover the agency's expenses in relation to certain applications and fees; to remove confusing language in the rules and to put applicants on notice of additional fees that are incurred due to fees set by the Department of Information Resources, and to encourage individuals to use the Board's online system when available to avoid additional fees for hard copy applications.

Mrs. Leshikar has also determined that for the first five-year period the sections are in effect there will be no fiscal implication to state or local government as a result of enforcing the sections as proposed. The effect to individuals required to comply with the rules as proposed will be the fee increases or new fees as established. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Jennifer Kaufman, P.O. Box 2018, Austin, Texas 78768-2018, or e-mail comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

The amendments are proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

The amendments are also authorized by §153.001 and §153.051, Texas Occupations Code.

§175.1. Application and Administrative Fees.

The board shall charge the following fees for processing an application for a license or permit:

(1) Physician Licenses:

(A) Full physician license--$1,002 [~~(includes surcharge of $215)--$1002~~].

(B) Telemedicine license--$1,002 [~~(includes surcharge of $215)--$1002~~].

(C) Administrative medicine license--$1,002 [~~(includes surcharge of $215)--$1002~~].

(D) Reissuance of license following revocation [~~(includes surcharge of $205)~~]--$885.

(E) Temporary license:

(i) State health agency--$50.

(ii) Visiting physician--$-0-.

(iii) Visiting professor--$167.

(iv) National Health Service Corps--$-0-.

(v) Faculty temporary license [~~(includes surcharges of $280)~~]--$737.

(vi) Postgraduate Research Temporary License--$-0-.

(vii) Provisional license--$107.

(F) Licenses and Permits relating to Graduate Medical Education:

(i) Initial physician in training permit--$212.

(ii) Physician in training permit for program transfer--$141.

(iii) Evaluation or re-evaluation of postgraduate training program--$250.

(iv) Physician in training permit for applicants performing rotations in Texas--$131 [~~$130~~].

(2) Physician Assistants:

(A) Physician assistant license [~~(includes surcharge of $5)~~]--$205.

(B) Reissuance of license following revocation [~~(includes surcharge of $5)~~]--$205.

(C) Temporary license--$107.

(3) Acupuncturists/AcudetoxSpecialists/Continuing Education Providers:

(A) Acupuncture licensure [~~(includes surcharge of $5)~~]--$305.

(B) Temporary license for an acupuncturist--$107.

(C) Acupuncturist distinguished professor temporary license--$50.

(D) Acudetox specialist certification [~~(includes surcharge of $2)~~]--$52.

(E) Continuing acupuncture education provider--$50.

(F) Review of a continuing acupuncture education course--$25.

(G) Review of continuing acudetox acupuncture education courses--$50.

(4) Non-Certified Radiologic Technician permit [~~(includes surcharge of $3)~~]--$115.50.

(5) Non-Profit Health Organization initial certification--$2,500.

(6) Surgical Assistants:

(A) Surgical assistant licensure--$300.

(B) Temporary license--$50.

(7) Criminal History Evaluation Letter--$100.

(8) Certifying board evaluation--$200.

(9) Physician/Physician Assistant Jointly-Owned Entity Annual Report--$18.

§175.2. Registration and Renewal Fees.

The board shall charge the following fees to continue licenses and permits in effect:

(1) Physician Registration Permits:

(A) Initial biennial permit--$826.

(B) Subsequent biennial permit--$822.

(C) Additional biennial registration fee for office-based anesthesia--$210 [~~(includes surcharge of $10)~~].

(2) Physician Assistant Registration Permits:

(A) Initial annual permit [~~(includes surcharges of $10)~~]--$257.50.

(B) Subsequent annual permit [~~(includes surcharges of $6)~~]--$253.50.

(3) Acupuncturists/Acudetox Specialists Registration Permits:

(A) Initial annual permit for acupuncturist [~~(includes surcharges of $10)~~]--$322.50.

(B) Subsequent annual permit for acupuncturist [~~(includes surcharges of $6)~~]--$318.50.

(C) Annual renewal for acudetox specialist certification--$87.50.

(4) Non-Certified Radiologic Technician permit annual renewal [~~(includes surcharge of $3)~~]--$115.50.

(5) Non-Profit Health Organization biennial recertification--$1,125.

(6) Surgical Assistants registration permits:

(A) Initial biennial permit [~~(includes surcharges of $6)~~]--$531.

(B) Subsequent biennial permit [~~(includes surcharges of $2)~~]--$527.

(7) Certifying board evaluation renewal--$200.

§175.5. Payment of Fees or Penalties.

(a) Method of Payment. Fees paid online must be submitted by credit card, electronic check, or debit card, as required by the online application. All other licensure fees or penalties must be submitted in the form of a money order, personal check, or cashier's check payable on or through a United States bank. Fees and penalties cannot be refunded except as provided in subsection (c) [~~(b)~~] of this section. If a single payment is made for more than one individual permit, it must be made for the same class of permit and a detailed listing, on a form prescribed by the board, must be included with each payment.

(b) Additional Fees Based on Method of Payment.

(1) Online payments. Applicants and licensees who submit payments online may be subject to convenience fees set by the Department of Information Resources, that are in addition to the fees listed in §§175.1 - 175.3 of this title (relating to Application and Administrative Fees, Registration and Renewal Fees and Penalties).

(2) Payments submitted for hard-copy applications. Applicants and licensees who choose to apply or register on paper if online processing is available will be subject to an additional fee of $50 collected by the board, in addition to the fees listed in §§175.1 - 175.3 of this title.

(c) [~~(b)~~] Refunds. Refunds of fees may be granted under the following circumstances:

(1) Administrative error by the Board;

(2) Licensure applicants who do not appear before the Licensure Committee and who withdraw their applications and request a refund within 30 days of being notified by board staff that they are ineligible for licensure;

(3) Applicants who withdraw a licensure application after applying for multiple types of licensure at the same time but then either

elect to pursue only one type of license or the Board approves one type of license before completing the review of the other applications;

(4) Applicants who apply for temporary licenses but do not receive a temporary license due to the issuance of full licensure;

(5) Licensees who retire or request cancellation of their licenses within 90 days of paying the registration fee;

(6) Applicants or licensees who die within 90 days of having paid a fee; or

(7) Applicants who withdraw their applications within 45 days of initial application.

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

Filed with the Office of the Secretary of State on September 26, 2011.

TRD-201103999
Mari Robinson, J.D.
Executive Director
Texas Medical Board
Earliest possible date of adoption: November 6, 2011
For further information, please call: (512) 305-7016

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PART 22. TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY

CHAPTER 501. RULES OF PROFESSIONAL CONDUCT

SUBCHAPTER A. GENERAL PROVISIONS

22 TAC §501.51

The Texas State Board of Public Accountancy (Board) proposes an amendment to §501.51, concerning Preamble and General Principles.

The amendment to §501.51 makes it clear that CPAs not only have an obligation of professional responsibility to their client when in private practice but to their employer when in industry practice. The amendment also deletes the interpretive comment in subsection (h) and relocates it to another rule and replaces accounting terms with acronyms that have been defined in §501.55.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendment will be none.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendment will be none.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be none.

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be clarification of the CPAs' responsibility to their employers and to streamline the rule.

The probable economic cost to persons required to comply with the amendment will be none.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses because the amendment does not impose any duties or obligations upon small businesses.

Mr. Treacy has determined that an Economic Impact Statement and a Regulatory Flexibility Analysis are not required because the proposed amendment will not adversely affect small or micro businesses.

The Board requests comments on the substance and effect of the proposed rule from any interested person. Comments must be received at the Board no later than noon on November 7, 2011. Comments should be addressed to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted, finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§501.51. Preamble and General Principles.

(a) These rules of professional conduct were promulgated under the Public Accountancy Act, which directs the Texas State Board of Public Accountancy to promulgate rules of professional conduct "in order to establish and maintain high standards of competence and integrity in the practice of public accountancy and to insure that the conduct and competitive practices of licensees serve the purposes of the Act and the best interest of the public."

(b) The services usually and customarily performed by those in the public, industry, or government practice of accountancy involve a high degree of skill, education, trust, and experience which are professional in scope and nature. The use of professional designations carries an implication of possession of the competence associated with a profession. The public, in general, and the business community, in particular, rely on this professional competence by placing confidence in reports and other services of accountants. The public's reliance,

in turn, imposes obligations on persons utilizing professional designations[~~, both~~] to their clients, employers and to the public in general. These obligations include maintaining independence in fact and in appearance, while in the client practice of public accountancy, continuously improving professional skills, observing GAAP [~~generally accepted accounting principles~~] and GAAS, when required [~~generally accepted auditing standards~~], promoting sound and informative financial reporting, holding the affairs of clients and employers in confidence, upholding the standards of the public accountancy profession, and maintaining high standards of personal and professional conduct in all matters.

(c) The board has an underlying duty to the public to insure that these obligations are met in order to achieve and maintain a vigorous profession capable of attracting the bright minds essential to serving adequately the public interest.

(d) These rules recognize the First Amendment rights of the general public as well as licensees and do not restrict the availability of accounting services. However, public accountancy, like other professional services, cannot be commercially exploited without the public being harmed. While information as to the availability of accounting services and qualifications of licensees is desirable, such information should not be transmitted to the public in a misleading fashion.

(e) The rules are intended to have application to all kinds of professional services performed in the practice of public accountancy, including services relating to:

(1) accounting, auditing and other assurance services,

(2) taxation,

(3) financial advisory services,

(4) litigation support,

(5) internal auditing,

(6) forensic accounting, and

(7) management advice and consultation.

(f) Finally, these rules also recognize the duty of certified public accountants to refrain from committing acts discreditable to the profession. These acts, whether or not related to the accountant's practice, impact negatively upon the public's trust in the profession.

(g) In the interpretation and enforcement of these rules, the board may consider relevant interpretations, rulings, and opinions issued by the boards of other jurisdictions and appropriate committees of professional organizations, but will not be bound thereby.

[~~(h) Interpretive Comment: Outsourced internal audit services are considered engagements in the client practice of public accountancy as defined in §501.52(8) of this title (relating to Definitions).~~]

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

Filed with the Office of the Secretary of State on September 22, 2011.

TRD-201103938
J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: November 6, 2011
For further information, please call: (512) 305-7842

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22 TAC §501.53

The Texas State Board of Public Accountancy (Board) proposes an amendment to §501.53, concerning Applicability of Rules of Professional Conduct.

The amendment to §501.53 will correct rule references and titles that have changed.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendment will be none.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendment will be none.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be none.

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be to correct references to the Board's rules.

The probable economic cost to persons required to comply with the amendment will be none.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses because the amendment does not impose any duties or obligations upon small businesses.

Mr. Treacy has determined that an Economic Impact Statement and a Regulatory Flexibility Analysis are not required because the proposed amendment will not adversely affect small or micro businesses.

The Board requests comments on the substance and effect of the proposed rule from any interested person. Comments must be received at the Board no later than noon on November 7, 2011. Comments should be addressed to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted, finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the

Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§501.53. Applicability of Rules of Professional Conduct.

(a) All of the rules of professional conduct shall apply to and must be observed by a certificate or registration holder engaged in the client practice of public accountancy.

(b) No certificate or registration holder shall issue, or otherwise be associated with, financial statements that do not conform to the accounting principles described in [~~Section~~] §501.61 of this chapter [~~title~~] (relating to Accounting Principles).

(c) The following rules of professional conduct shall apply to and be required to be observed by certificate or registration holders when not employed in the client practice of public accountancy:

(1) [~~Section~~] §501.73 of this chapter [~~title~~] (relating to Integrity and Objectivity);

(2) [~~Section~~] §501.74 of this chapter [~~title~~] (relating to Competence);

(3) [~~Section~~] §501.77 of this chapter [~~title~~] (relating to Acting through Others);

(4) [~~Section~~] §501.78 of this chapter [~~title~~] (relating to Withdrawal or Resignation);

(5) [~~Section~~] §501.90 of this chapter [~~title~~] (relating to Discreditable Acts);

(6) [~~Section~~] §501.91 of this chapter [~~title~~] (relating to Reportable Events);

(7) [~~Section~~] §501.92 of this chapter [~~title~~] (relating to Frivolous Complaints);

(8) [~~Section~~] §501.93 of this chapter [~~title~~] (relating to Responses); and

(9) [~~Section~~] §501.94 of this chapter [~~title~~] (relating to Mandatory Continuing Professional Education [~~Reporting~~]).

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

Filed with the Office of the Secretary of State on September 22, 2011.

TRD-201103939
J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: November 6, 2011
For further information, please call: (512) 305-7842

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22 TAC §501.54

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

The Texas State Board of Public Accountancy (Board) proposes to repeal §501.54, concerning Savings and Provisions and Disposition Table.

The repeal of §501.54 will remove a rule that is no longer needed for purposes of reference.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed repeal will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the repeal will be none.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the repeal will be none.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the repeal will be none.

Mr. Treacy has determined that for the first five-year period the repeal is in effect the public benefits expected as a result of adoption of the proposed repeal will be to eliminate unnecessary language.

The probable economic cost to persons required to comply with the repeal will be none.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed repeal will not affect a local economy.

Mr. Treacy has determined that the proposed repeal will not have an adverse economic effect on small businesses because the repeal does not impose any duties or obligations upon small businesses.

Mr. Treacy has determined that an Economic Impact Statement and a Regulatory Flexibility Analysis are not required because the proposed repeal will not adversely affect small or micro businesses.

The Board requests comments on the substance and effect of the proposed repeal from any interested person. Comments must be received at the Board no later than noon on November 7, 2011. Comments should be addressed to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854.

The Board specifically invites comments from the public on the issues of whether or not the proposed repeal will have an adverse economic effect on small businesses; if the proposed repeal is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the repeal, describe and estimate the economic impact of the repeal on small businesses, offer alternative methods of achieving the purpose of the repeal; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed repeal is to be adopted, finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

The repeal is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to repeal rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed repeal.

§501.54. Savings and Provisions and Disposition Table.

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

Filed with the Office of the Secretary of State on September 22, 2011.

TRD-201103940
J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: November 6, 2011
For further information, please call: (512) 305-7842

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22 TAC §501.55

The Texas State Board of Public Accountancy (Board) proposes an amendment to §501.55, concerning Definitions of Acronyms.

The amendment to §501.55 will add and define acronyms related to the accounting profession.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendment will be none.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendment will be none.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be none.

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be to streamline and make the rule easier to understand.

The probable economic cost to persons required to comply with the amendment will be none.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses because the amendment does not impose any duties or obligations upon small businesses.

Mr. Treacy has determined that an Economic Impact Statement and a Regulatory Flexibility Analysis are not required because the proposed amendment will not adversely affect small or micro businesses.

The Board requests comments on the substance and effect of the proposed rule from any interested person. Comments must be received at the Board no later than noon on November 7, 2011. Comments should be addressed to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted, finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§501.55. Definitions of Acronyms.

The following acronyms, when used in Title 22, Part 22 of the Texas Administrative Code relating to the Texas State Board of Public Accountancy, shall have the following meanings:

(1) "AICPA" means the American Institute of Certified Public Accountants;

(2) "CPA" means Certified Public Accountant;

(3) "CPE" means continuing professional education;

(4) "FASB" means the Financial Accounting Standards Board;

(5) "GAAP" means Generally Accepted Accounting Principles;

(6) "GAAS" means Generally Accepted Auditing Standards;

(7) "GAGAS" means Government Auditing Standards;

(8) "GASB" means the Governmental Accounting Standards Board;

(9) "IASB" means the International Accounting Standards Board;

(10) "IESB" means the International Ethics Standards Board;

(11) "IFRB" means International Financial Reporting Bulletins;

(12) "IFRS" means International Financial Reporting Standards;

(13) "IRS" means the Internal Revenue Service;

(14) [~~(4)~~] "NASBA" means the National Association of State Boards of Accountancy;

(15) "NPRC" means the National Peer Review Committee;

(16) [~~(5)~~] "PCAOB" means the Public Company Accounting Oversight Board;

(17) "SAS" means Statements on Auditing Standards;

(18) [~~(6)~~] "SEC" means the United States Securities and Exchange Commission;

(19) "SOAH" means the State Office of Administrative Hearings;

(20) "SSAE" means Statements on Standards for Attestation Engagements;

(21) "SSARS" means Statements on Standards for Accounting and Review Services;

(22) "SSCS" means Statements on Standards for Consulting Services;

(23) "SSTS" means Statements on Standards for Tax Services;

(24) [~~(7)~~] "TSCPA" means the Texas Society of Certified Public Accountants;

(25) "UAA" means the Uniform Accountancy Act;

(26) "UCPAE" means the Uniform Certified Public Accountant Examination;

(27) "U.S. GAO" means the United States Government Accountability Office; and

(28) "U.S. IQAB" means the United States International Qualifications Appraisal Board.

[~~(8) "NPRC" means the National Peer Review Committee;~~]

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

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J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: November 6, 2011
For further information, please call: (512) 305-7842

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SUBCHAPTER B. PROFESSIONAL STANDARDS

22 TAC §501.60

The Texas State Board of Public Accountancy (Board) proposes an amendment to §501.60, concerning Auditing Standards.

The amendment to §501.60 will replace accounting terms with acronyms that have been defined in §501.55 and add language to clarify standards issued by the PCAOB.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendment will be none.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendment will be none.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be none.

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be to streamline the rule.

The probable economic cost to persons required to comply with the amendment will be none.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses because the amendment does not impose any duties or obligations upon small businesses.

Mr. Treacy has determined that an Economic Impact Statement and a Regulatory Flexibility Analysis are not required because the proposed amendment will not adversely affect small or micro businesses.

The Board requests comments on the substance and effect of the proposed rule from any interested person. Comments must be received at the Board no later than noon on November 7, 2011. Comments should be addressed to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted, finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§501.60. Auditing Standards.

A person shall not permit his name to be associated with financial statements in such a manner as to imply that he is acting as an auditor with respect to such financial statements, unless he has complied with GAAS [~~applicable generally accepted auditing standards~~]. SAS [~~Statements on auditing standards~~] issued by the AICPA [~~American Institute of Certified Public Accountants~~], auditing standards included in Standards for Audit of Government Organizations, Programs, Activities and Functions issued by the U.S. GAO, auditing and related professional practice standards to be used by registered public accounting firms issued by the PCAOB [~~United States General Accounting Office, Public Company Accounting Oversight Board~~], and other pronouncements having similar generally recognized authority, are considered to be interpretations of GAAS [~~generally accepted auditing standards, and departures from such pronouncements must be justified~~].

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

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J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
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For further information, please call: (512) 305-7842

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22 TAC §501.61

The Texas State Board of Public Accountancy (Board) proposes an amendment to §501.61, concerning Accounting Principles.

The amendment to §501.61 will delete repeated words, add a reference to the Act and replace accounting terms with acronyms that have been defined in §501.55.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendment will be none.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendment will be none.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be none.

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be to streamline the rule and make the rule easier to understand.

The probable economic cost to persons required to comply with the amendment will be none.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses because the amendment does not impose any duties or obligations upon small businesses.

Mr. Treacy has determined that an Economic Impact Statement and a Regulatory Flexibility Analysis are not required because the proposed amendment will not adversely affect small or micro businesses.

The Board requests comments on the substance and effect of the proposed rule from any interested person. Comments must be received at the Board no later than noon on November 7, 2011. Comments should be addressed to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted, finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§501.61. Accounting Principles.

A person [~~or person~~] practicing under a practice privilege as provided for in §901.462 of the Act (relating to Practice by Out-of-State Practitioner With Substantially Equivalent Qualifications), shall not issue a report asserting that financial statements are presented in conformity with GAAP [~~generally accepted accounting principles~~] if such financial statements contain any departure from such accounting principles which has a material effect on the financial statements taken as a whole, unless the person [~~or person~~] practicing under a practice privilege as provided for in §901.462 of the Act can demonstrate that by reason of unusual circumstances the financial statement(s) would otherwise be [~~have been~~] misleading. The report must describe the departure, the approximate effects thereof, if practicable, and the reasons why compliance with GAAP [~~the generally accepted accounting principles~~] would result in a misleading statement. For purposes of this section, GAAP is [~~generally accepted accounting principles are~~] considered to be defined by pronouncements issued by FASB [~~the Financial Accounting Standards Board~~] and its predecessor entities and similar pronouncements issued by other entities having similar generally recognized authority.

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

Filed with the Office of the Secretary of State on September 22, 2011.

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J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
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For further information, please call: (512) 305-7842

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22 TAC §501.62

The Texas State Board of Public Accountancy (Board) proposes an amendment to §501.62, concerning Other Professional Standards.

The amendment to §501.62 will replace accounting terms with acronyms that have been defined in §501.55 and add clarity to the entities the board refers to.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendment will be none.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendment will be none.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be none.

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be to streamline the rule and make the rule easier to understand.

The probable economic cost to persons required to comply with the amendment will be none.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses because the amendment does not impose any duties or obligations upon small businesses.

Mr. Treacy has determined that an Economic Impact Statement and a Regulatory Flexibility Analysis are not required because the proposed amendment will not adversely affect small or micro businesses.

The Board requests comments on the substance and effect of the proposed rule from any interested person. Comments must be received at the Board no later than noon on November 7, 2011. Comments should be addressed to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted, finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§501.62. Other Professional Standards.

A person in the performance of consulting services, accounting and review services, any other attest service, or tax services shall conform to the professional standards applicable to such services. For purposes of this section, such professional standards are considered to be interpreted by:

(1) AICPA issued standards, including but not limited to:

(A) Statements on Standards on Consulting Services (SSCS);

(B) Statements on Standards for Accounting and Review Services (SSARS);

(C) Statements on Standards for Attestation Engagements (SSAE);

(D) Statements on Standards for Tax Services (SSTS); or

~~[(1) Statements on Standards on Consulting Services (SSCS) issued by the American Institute of Certified Public Accountants;]~~

~~[(2) Statements on Standards for Accounting and Review Services (SSARS) issued by the American Institute of Certified Public Accountants;]~~

~~[(3) Statements on Standards for Attestation Engagements (SSAE) issued by the American Institute of Certified Public Accountants;]~~

~~[(4) Statements on Standards for Tax Services issued by the American Institute of Certified Public Accountants; or]~~

(2) [~~(5)~~] [~~similar~~] pronouncements by other professional entities having similar national or international authority recognized by the board.

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

Filed with the Office of the Secretary of State on September 22, 2011.

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J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
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For further information, please call: (512) 305-7842

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SUBCHAPTER C. RESPONSIBILITIES TO CLIENTS

22 TAC §501.70

The Texas State Board of Public Accountancy (Board) proposes an amendment to §501.70, concerning Independence.

The amendment to §501.70 will replace an accounting term with the acronym that has been defined in §501.55 and correct the name of the United States Government Accountability Office.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendment will be none.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendment will be none.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be none.

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be to streamline the rule and make the rule easier to understand.

The probable economic cost to persons required to comply with the amendment will be none.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses because the amendment does not impose any duties or obligations upon small businesses.

Mr. Treacy has determined that an Economic Impact Statement and a Regulatory Flexibility Analysis are not required because the proposed amendment will not adversely affect small or micro businesses.

The Board requests comments on the substance and effect of the proposed rule from any interested person. Comments must be received at the Board no later than noon on November 7, 2011. Comments should be addressed to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted, finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§501.70. Independence.

A person in the performance of professional accounting services or professional accounting work, including those who are not members of the AICPA, shall conform in fact and in appearance to the independence standards established by the AICPA and the board, and, where applicable, the SEC [~~U.S. Securities and Exchange Commission~~], the U.S. GAO [~~General Accounting Office~~], the PCAOB and other national or international regulatory or professional standard setting bodies.

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

Filed with the Office of the Secretary of State on September 22, 2011.

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J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
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For further information, please call: (512) 305-7842

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22 TAC §501.71

The Texas State Board of Public Accountancy (Board) proposes an amendment to §501.71, concerning Receipt of Commissions and Other Compensation.

The amendment to §501.71 will clarify that the disclosure, which includes other benefits, must be made to the client when he receives or expects to receive it.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendment will be none.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendment will be none.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be none.

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be to make the rule easier to understand.

The probable economic cost to persons required to comply with the amendment will be none.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses because the amendment does not impose any duties or obligations upon small businesses.

Mr. Treacy has determined that an Economic Impact Statement and a Regulatory Flexibility Analysis are not required because the proposed amendment will not adversely affect small or micro businesses.

The Board requests comments on the substance and effect of the proposed rule from any interested person. Comments must be received at the Board no later than noon on November 7, 2011. Comments should be addressed to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted, finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§501.71. Receipt of Commission, Compensation or Other Benefit [~~Commissions and Other Compensation~~].

(a) A person shall not for a commission, compensation or other benefit recommend or refer to a client any product or service or refer any product or service to be supplied to a client, or receive a commission, compensation or other benefit when the person also performs services for that client requiring independence under §501.70 of this chapter (relating to Independence).

(b) This prohibition applies during the period in which the person is engaged to perform any of the services requiring independence and during the period covered by any of the historical financial statements involved in such services requiring independence.

(c) A person who receives, expects or agrees to receive, pays, expects or agrees to pay, other compensation in exchange for [~~with respect to~~] services or products recommended, referred, or sold by him shall, no later than the making of such recommendation, referral, or sale, disclose to the client in writing the nature, source, and amount, or an estimate of the amount when the amount is not known, of all such other compensation.

~~[(d) The disclosure shall be made regardless of the amount of other compensation involved.]~~

(d) [~~(e)~~] This section does not apply to payments received from the sale of all, or a material part, of an accounting practice, or to retirement payments.

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

Filed with the Office of the Secretary of State on September 22, 2011.

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J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: November 6, 2011
For further information, please call: (512) 305-7842

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22 TAC §501.73

The Texas State Board of Public Accountancy (Board) proposes an amendment to §501.73, concerning Integrity and Objectivity.

The amendment to §501.73 will add a reference to the rule and replace an accounting term with the acronym that has been defined in §501.55.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendment will be none.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendment will be none.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be none.

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be to streamline the rule and make the rule easier to understand.

The probable economic cost to persons required to comply with the amendment will be none.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses because the amendment does not impose any duties or obligations upon small businesses.

Mr. Treacy has determined that an Economic Impact Statement and a Regulatory Flexibility Analysis are not required because the proposed amendment will not adversely affect small or micro businesses.

The Board requests comments on the substance and effect of the proposed rule from any interested person. Comments must be received at the Board no later than noon on November 7, 2011. Comments should be addressed to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted, finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§501.73. Integrity and Objectivity.

(a) A person in the performance of professional accounting services or professional accounting work shall maintain integrity and objectivity, shall be free of conflicts of interest and shall not knowingly misrepresent facts nor subordinate his or her judgment to others. In tax practice, however, a person may resolve doubt in favor of his client as long as any tax position taken complies with applicable standards such as those set forth in Circular 230 issued by the IRS [~~Internal Revenue Service~~] and the AICPA's SSTSs [~~AICPA Statements on Standards for Tax Services~~].

(b) A conflict of interest may occur if a person performs a professional accounting service or professional accounting work for a client or employer and the person has a relationship with another person, entity, product, or service that could, in the person's professional judgment, be viewed by the client, employer, or other appropriate parties as impairing the person's objectivity. If the person believes that the professional accounting service or professional accounting work can be performed with objectivity, and the relationship is disclosed to and consent is obtained from such client, employer, or other appropriate parties, then this rule shall not operate to prohibit the performance of the professional accounting service or professional accounting work because of a conflict of interest.

(c) Certain professional engagements, such as audits, reviews, and other services, require independence. Independence impairments under §501.70 of this chapter (relating to Independence), its interpretations and rulings cannot be eliminated by disclosure and consent.

(d) A person shall not concurrently engage in the practice of public accountancy and in any other business or occupation which impairs independence or objectivity in rendering professional accounting services or professional accounting work, or which is conducted so as to augment or benefit the accounting practice unless these rules are observed in the conduct thereof.

~~[(e) Interpretive Comment: Reference should be made to §501.62(4) and (5) of this title (relating to Other Professional Standards) where applicable.]~~

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

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J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
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For further information, please call: (512) 305-7842

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22 TAC §501.74

The Texas State Board of Public Accountancy (Board) proposes an amendment to §501.74, concerning Competence.

The amendment to §501.74 will correct references in the rule.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendment will be none.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendment will be none.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be none.

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be to make the rule easier to understand.

The probable economic cost to persons required to comply with the amendment will be none.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses because the amendment does not impose any duties or obligations upon small businesses.

Mr. Treacy has determined that an Economic Impact Statement and a Regulatory Flexibility Analysis are not required because the proposed amendment will not adversely affect small or micro businesses.

The Board requests comments on the substance and effect of the proposed rule from any interested person. Comments must be received at the Board no later than noon on November 7, 2011. Comments should be addressed to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted, finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§501.74. Competence.

(a) A person shall not undertake any engagement for the performance of professional accounting services or professional accounting work which he cannot reasonably expect to complete with due professional competence, including compliance, where applicable, with §501.60 of this chapter [~~title~~] (relating to Auditing Standards), §501.61

of this chapter [~~title~~] (relating to Accounting Principles), and §501.62 of this chapter [~~title~~] (relating to Other Professional Standards).

(1) Competence to perform professional accounting services or professional accounting work involves both the technical qualifications of the person and the person's staff and the ability to supervise and evaluate the quality of the work being performed.

(2) If a person is unable to gain sufficient competence to perform professional accounting services or professional accounting work, the person shall suggest to the client the engagement of someone competent to perform the needed professional accounting or professional accounting work service, either independently or as an associate.

(b) A person shall exercise due professional care in the performance of professional services.

(c) A person shall adequately plan and supervise the performance of professional services.

(d) A person shall obtain and maintain appropriate documentation to afford a reasonable basis for conclusions and recommendations in relation to any professional services performed.

(e) Interpretive comment: The person may have the knowledge required to complete the professional services with competence prior to performance. In some cases, however, additional research or consultation with others may be necessary during the performance of the professional services.

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

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J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: November 6, 2011
For further information, please call: (512) 305-7842

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22 TAC §501.76

The Texas State Board of Public Accountancy (Board) proposes an amendment to §501.76, concerning Records and Work Papers.

The amendment to §501.76 will better clarify the definition of records and work papers and the standards by which CPAs should maintain them.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendment will be none.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendment will be none.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be none.

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be CPAs who will better maintain their clients' records and work papers.

The probable economic cost to persons required to comply with the amendment will be none.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses because the amendment does not impose any duties or obligations upon small businesses.

Mr. Treacy has determined that an Economic Impact Statement and a Regulatory Flexibility Analysis are not required because the proposed amendment will not adversely affect small or micro businesses.

The Board requests comments on the substance and effect of the proposed rule from any interested person. Comments must be received at the Board no later than noon on November 7, 2011. Comments should be addressed to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted, finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§501.76. Records and Work Papers.

(a) Records.

(1) A person shall return original client records to a client or former client within a reasonable time (promptly, not to exceed 10 business days) after the client or former client has made a request for those records. Client records are those records provided to the person by the client or former client in order for the person to provide professional accounting services to the client or former client. Client records also include those documents obtained by the person on behalf of the client or former client in order for the person to provide professional accounting services to the client or former client. The person shall provide these records to the client or former client, regardless of the status of the client's or former client's account and cannot charge a fee to provide such records. Such records shall be returned to the client or former client in the same format, to the extent possible, that they were

provided to the person by the client or former client. The person may make copies of such records and retain those copies.

(2) A person's work papers, to the to the extent that such work papers include records which would ordinarily constitute part of the client's or former client's books and records and are not otherwise available to the client or former client, shall also be furnished to the client within a reasonable time (promptly, not to exceed 10 business days) after the client has made a request for those records. The person can charge a reasonable fee for providing such work papers. Such work papers shall be in a format that the client or former client can use for the purpose of reading and using such work papers. Work papers which constitute client records include, but are not limited to:

(A) documents in lieu of books of original entry such as listings and distributions of cash receipts or cash disbursements;

(B) documents in lieu of general ledger or subsidiary ledgers, such as accounts receivable, job cost and equipment ledgers, or similar depreciation records;

(C) all adjusting and closing journal entries and supporting details when the supporting details are not fully set forth in the explanation of the journal entry; and

(D) consolidating or combining journal entries and documents and supporting detail in arriving at final figures incorporated in an end product such as financial statements or tax returns.

(b) Work papers. Work papers, regardless of format, are those documents developed by the person incident to the performance of his engagement which do not constitute records that must be returned to the client in accordance with subsection (a) of this section. Work papers developed by a person during the course of a professional engagement as a basis for, and in support of, an accounting, audit, consulting, tax, or other professional report prepared by the person for a client, shall be and remain the property of the person who developed the work papers.

(c) For a reasonable charge, a person shall furnish to his client or former client, upon request from his client made within a reasonable time after original issuance of the document in question:

(1) a copy of the client's tax return; or

(2) a copy of any report or other document previously issued by the person to or for such client or former client provided that furnishing such reports to or for a client or former client would not cause the person to be in violation of the portions of §501.60 of this chapter (relating to Auditing Standards) concerning subsequent events.

(d) This rule imposes no obligation on the person who provides services to a business entity to provide documents to anyone involved with the entity except the authorized representative of the entity.

[(a) Upon request, a person shall provide to the client or former client any accounting or other records, belonging to, or obtained from or on behalf of, the client that the person removed from the client's premises or received on behalf of the client. The records and work papers may be provided to the client in either hard copy or other useable form. A person may make and retain copies of such records when they form the basis of work done by him. For a reasonable charge, a person shall furnish to his client or former client, upon request made within a reasonable time after original issuance of the document in question:]

[(1) a copy of the client's tax return;]

[(2) a copy of any report or other document previously issued by the person to or for such client provided that furnishing such reports to or for a client or former client would not cause the person to be in violation of the portions of §501.60 of this title (relating to Auditing Standards) concerning subsequent events;]

[(3) a copy of the person's work papers, to the extent that such work papers include records which would ordinarily constitute part of the client's books and records and are not otherwise available to the client.]

[(b) A person, when performing an engagement that is terminated prior to the completion of the engagement, is required to return or furnish the originals of only those records originally obtained by the person from the client.]

[(c) Work papers developed by a person during the course of a professional engagement as a basis for, and in support of, an accounting, audit, consulting, tax, or other professional report prepared by the person for a client, shall be and remain the property of the person who developed the work papers.]

[(1) Work papers, whether in the form of hard copy or computer readable format, are those documents developed by the person incident to the performance of his engagement which do not result in changes to the client's records or are in part of the records ordinarily maintained by the client.]

[(2) Analyses of inventory or other accounts as part of the person's selective audit procedures, even when prepared by client personnel at the request of the person, are the person's work papers.]

[(3) If the analyses described in paragraph (2) of this subsection result in changes to the client's records, the person is required to furnish the details from his work papers in support of the journal entries recording such changes unless the journal entries themselves contain all necessary details.]

[(d) Work papers include, but are not limited to:]

[(1) letters of confirmation and representation;]

[(2) excerpts of company documents;]

[(3) audit programs;]

[(4) internal memoranda;]

[(5) schedules;]

[(6) flowcharts; and]

[(7) narratives.]

[(e) Work papers which constitute client records include, but are not limited to:]

[(1) documents in lieu of books of original entry such as listings and distributions of cash receipts or cash disbursements;]

[(2) documents in lieu of general ledger or subsidiary ledgers, such as accounts receivable, job cost and equipment ledgers, or similar depreciation records;]

[(3) all adjusting and closing journal entries and supporting details when the supporting details are not fully set forth in the explanation of the journal entry; and]

[(4) consolidating or combining journal entries and documents and supporting detail in arriving at final figures incorporated in an end product such as financial statements or tax returns.]

(e) [(f)] Documentation or work documents required by professional standards for attest services shall be maintained in paper or electronic format by a person for a period of not less than five years from the date of any report issued in connection with the attest service, unless otherwise required by another regulatory body. Failure to maintain such documentation or work papers constitutes a violation of this section and may be deemed an admission that they do not comply with professional standards.

(f) [~~(g)~~] Interpretive Comment: It is recommended that a person obtain a receipt or other written documentation of the delivery of records to a client.

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

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J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: November 6, 2011
For further information, please call: (512) 305-7842

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22 TAC §501.78

The Texas State Board of Public Accountancy (Board) proposes an amendment to §501.78, concerning Withdrawal or Resignation.

The amendment to §501.78 will correct references to the Rules and add language that is more consistent with the Act.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendment will be none.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendment will be none.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be none.

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be to make the rule easier to understand.

The probable economic cost to persons required to comply with the amendment will be none.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses because the amendment does not impose any duties or obligations upon small businesses.

Mr. Treacy has determined that an Economic Impact Statement and a Regulatory Flexibility Analysis are not required because the proposed amendment will not adversely affect small or micro businesses.

The Board requests comments on the substance and effect of the proposed rule from any interested person. Comments must be received at the Board no later than noon on November 7, 2011. Comments should be addressed to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted, finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§501.78. Withdrawal or Resignation.

(a) If a person cannot complete an engagement to provide professional [~~public~~] accounting services and professional [~~public~~] accounting work or employment assignment in a manner that complies with the requirements of this chapter, the person shall withdraw from the engagement or resign from the employment assignment.

(b) If a person withdraws from an engagement or resigns from an employment assignment pursuant to this section, the person shall inform the client or employer of the withdrawal or resignation.

(c) Interpretive Comment: Any withdrawal or resignation shall preferably be in writing. A person shall comply with the requirements of §501.75 of this chapter [~~title~~] (relating to Confidential Client Communications) and §501.90(16) of this chapter [~~title~~] (relating to Discreditable Acts) regarding confidential information of clients and employers during and after a withdrawal or resignation executed pursuant to this section. For purposes of this section, an engagement commences once an engagement letter is signed by the client, time is charged to the engagement, or compensation is received by a person in connection with an engagement or employment assignment.

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

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J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
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For further information, please call: (512) 305-7842

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SUBCHAPTER D. RESPONSIBILITIES TO THE PUBLIC

22 TAC §501.80

The Texas State Board of Public Accountancy (Board) proposes an amendment to §501.80, concerning Practice of Public Accountancy.

The amendment to §501.80 will replace accounting terms with the acronyms that have been defined in §501.55 and correct references to the rules.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendment will be none.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendment will be none.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be none.

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be to make the rule easier to understand.

The probable economic cost to persons required to comply with the amendment will be none.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses because the amendment does not impose any duties or obligations upon small businesses.

Mr. Treacy has determined that an Economic Impact Statement and a Regulatory Flexibility Analysis are not required because the proposed amendment will not adversely affect small or micro businesses.

The Board requests comments on the substance and effect of the proposed rule from any interested person. Comments must be received at the Board no later than noon on November 7, 2011. Comments should be addressed to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted, finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§501.80. Practice of Public Accountancy.

(a) A person may not engage in the practice of public accountancy unless he holds a valid license or qualifies under a practice privilege. A person may not use the title or designation "certified public accountant," the abbreviation "CPA," or any other title, designation, word, letter, abbreviation, sign, card, or device tending to indicate that the person is a CPA [~~certified public accountant~~] unless he holds a valid license issued by the board or qualifies under a practice privilege. A license is not valid for any date or for any period prior to the date it is issued by the board and it automatically expires and is no longer valid after the end of the period for which it is issued.

(b) Any licensee of this board in good standing as a CPA [~~certified public accountant~~] or public accountant may use such designation whether or not the licensee is in the client, industry, or government practice of public accountancy. However, a licensee who is not in the client practice of public accountancy may not in any manner, through use of the CPA designation or otherwise, claim or imply independence from his employer or that the licensee is in the client practice of public accountancy.

(c) Interpretive Comment: This section incorporates the definitions of the practice of public accountancy and professional services and accounting work found in §501.52(8) and [~~§501.52~~](21) of this chapter [~~title~~] (relating to Definitions) as well as §901.003 of the Act (relating to Practice of Public Accountancy).

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

Filed with the Office of the Secretary of State on September 22, 2011.

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J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: November 6, 2011
For further information, please call: (512) 305-7842

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22 TAC §501.81

The Texas State Board of Public Accountancy (Board) proposes an amendment to §501.81, concerning Firm License Requirements.

The amendment to §501.81 will correct terms that should be lower-case, replace accounting terms with the acronyms that have been defined in §501.55 and correct a reference to a Rule.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendment will be none.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendment will be none.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be none.

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be to make the rule easier to understand.

The probable economic cost to persons required to comply with the amendment will be none.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses because the amendment does not impose any duties or obligations upon small businesses.

Mr. Treacy has determined that an Economic Impact Statement and a Regulatory Flexibility Analysis are not required because the proposed amendment will not adversely affect small or micro businesses.

The Board requests comments on the substance and effect of the proposed rule from any interested person. Comments must be received at the Board no later than noon on November 7, 2011. Comments should be addressed to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted, finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§501.81. Firm License Requirements.

(a) A firm [~~Firm~~], may not provide or offer to provide attest services or use the title "CPA," "CPAs," "CPA Firm," "Certified Public Accountants," "Certified Public Accounting Firm," or "Auditing Firm" or any variation of those titles unless the firm holds a firm license issued by the board or qualifies under a practice privilege. A firm license is not valid for any date or for any period prior to the date it is issued by the board and it automatically expires and is no longer valid after the end of the period for which it is issued. A firm license does not expire when the application for license renewal [~~licensure~~] is received by the board [~~Board~~] prior to its expiration date. An expiration date for a firm license may be extended by the board [~~Board~~], in its sole discretion, upon a demonstration of extenuating circumstances that prevented the firm from timely applying for or renewing a firm license.

(b) A firm is required to hold a license issued by the board if the firm establishes or maintains an office in this state.

(c) A firm is required to hold a license issued by the board and an individual must practice through a firm that holds such a license, if for a client that has its principal office in this state, the individual performs:

(1) a financial statement audit or other engagement that is to be performed in accordance with SAS [~~the Statements on Auditing Standards~~];

(2) an examination of prospective financial information that is to be performed in accordance with SSAE [~~the Statement on Standards of Attestation Engagements~~]; or

(3) an engagement that is to be performed in accordance with auditing standards of the PCAOB or its successor.

(d) Each advertisement or written promotional statement that refers to a CPA's designation and his or her association with an unlicensed entity in the client practice of public accountancy must include the disclaimer: "This firm is not a CPA firm." The disclaimer must be included in conspicuous proximity to the name of the unlicensed entity and be printed in type not less bold than that contained in the body of the advertisement or written statement. If the advertisement is in audio format only, the disclaimer shall be clearly declared at the conclusion of each such presentation.

(e) The requirements of subsection (d) of this section do not apply with regard to a person performing services:

(1) as a licensed attorney at law of this state while in the practice of law or as an employee of a licensed attorney when acting within the scope of the attorney's practice of law;

(2) as an employee, officer, or director of a federally-insured depository institution, when lawfully acting within the scope of the legally permitted activities of the institution's trust department; or

(3) pursuant to a practice privilege.

(f) On the determination by the board that a person has practiced without a license or through an unlicensed firm in violation of subsection (d) of this section, the person's certificate shall be subject to revocation and may not be reinstated for at least 12 months from the date of the revocation.

(g) Interpretive Comment: A person who is employed by an unlicensed firm that offers services that fall within the definitions of the client practice of public accountancy as defined in §501.52(8) and (21) of this chapter [~~title~~] (relating to Definitions) and §901.003 of the Act (relating to Practice of Public Accountancy) must comply with the disclaimer requirement found in subsection (d) of this section.

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

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J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
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For further information, please call: (512) 305-7842

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22 TAC §501.82

The Texas State Board of Public Accountancy (Board) proposes an amendment to §501.82, concerning Advertising.

The amendment to §501.82 will delete unneeded language and add language that is more consistent with the Act for a more streamlined rule.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendment will be none.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendment will be none.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be none.

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be to make the rule easier to understand.

The probable economic cost to persons required to comply with the amendment will be none.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses because the amendment does not impose any duties or obligations upon small businesses.

Mr. Treacy has determined that an Economic Impact Statement and a Regulatory Flexibility Analysis are not required because the proposed amendment will not adversely affect small or micro businesses.

The Board requests comments on the substance and effect of the proposed rule from any interested person. Comments must be received at the Board no later than noon on November 7, 2011. Comments should be addressed to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted, finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§501.82. Advertising.

(a) A person shall not use or participate in the use of:

(1) any [~~written, oral, or electronic~~] communication having reference to the person's professional services that contains a false, fraudulent, misleading or deceptive statement or claim; nor

(2) any [~~written, oral or electronic~~] communication that refers to the person's professional services that is accomplished or accompanied by coercion, duress, compulsion, intimidation, threats, overreaching, or vexatious or harassing conduct.

(b) Definitions:

(1) A "false, fraudulent, misleading[~~,~~] or deceptive statement or claim" includes, but is not limited to, a statement or claim which:

(A) contain a misrepresentation of fact;

(B) is likely to mislead or deceive because it fails to make full disclosure of relevant facts;

(C) is intended or likely to create false or unjustified expectations of favorable results;

(D) implies educational or professional attainments or licensing recognition not supported in fact;

(E) represents that professional accounting services can or will be completely performed for a stated fee when this is not the case, or makes representations with respect to fees for professional accounting services that do not disclose all variables that may reasonably be expected to affect the fees that will in fact be charged;

(F) contains other representations or implications that in reasonable probability will cause a reasonably prudent person to misunderstand or be deceived;

(G) implies the ability to improperly influence any court, tribunal, regulatory agency or similar body or official due to some special relations;

(H) consists of self-laudatory statements that are not based on verifiable facts;

(I) makes untrue comparisons with other accountants; or

(J) contains testimonials or endorsements that are not based upon verifiable facts.

(2) Broadcast--Any transmission over the airwaves or over a cable, wireline, Internet, cellular, e-mail system or any other electronic means.

(3) Coercion--Compelling by force so that one is constrained to do what his free will would otherwise refuse.

(4) Compulsion--Driving or urging by force or by physical or mental constraint to perform or forbear from performing an act.

(5) Direct personal communication--Either a face-to-face meeting or a conversation by telephone.

(6) Duress--Any conduct which overpowers the will of another.

(7) Harassing--Any word, gesture, or action which tends to alarm and verbally abuse another person.

(8) Intimidation--Willfully to take, or attempt to take, by putting in fear of bodily harm.

(9) Overreaching--Tricking, outwitting, or cheating anyone into doing an act which he would not otherwise do.

(10) Threats--Any menace of such a nature and extent as to unsettle the mind of anyone on whom it operates, and to take away from his acts that free and voluntary action which alone constitutes consent.

(11) Vexatious--Irritating or annoying.

(c) It is a violation of these rules for a person to persist in contacting a prospective client when the prospective client has made known to the person, or the person should have known the prospective client's desire not to be contacted by the person.

(d) In the case of an electronic or direct mail communication, the person shall retain a copy of the actual communication along with a list or other description of parties to whom the communication was distributed. Such copy shall be retained by the person for a period of at least 36 months from the date of its last distribution.

(e) Subsection (d) of this section does not apply to anyone when:

(1) the communication is made to anyone who is at that time a client of the person;

(2) the communication is invited by anyone to whom it was made; or

(3) the communication is made to anyone seeking to secure the performance of professional accounting services.

(f) In the case of broadcasting, the broadcast shall be recorded and the person shall retain a recording of the actual transmission for at least 36 months.

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

Filed with the Office of the Secretary of State on September 22, 2011.

TRD-201103953
J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: November 6, 2011
For further information, please call: (512) 305-7842

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22 TAC §501.83

The Texas State Board of Public Accountancy (Board) proposes an amendment to §501.83, concerning Firm Names.

The amendment to §501.83 will correct terms that should be lower-case.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendment will be none.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendment will be none.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be none.

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be to make the rule easier to understand.

The probable economic cost to persons required to comply with the amendment will be none.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses because the amendment does not impose any duties or obligations upon small businesses.

Mr. Treacy has determined that an Economic Impact Statement and a Regulatory Flexibility Analysis are not required because the proposed amendment will not adversely affect small or micro businesses.

The Board requests comments on the substance and effect of the proposed rule from any interested person. Comments must be received at the Board no later than noon on November 7, 2011. Comments should be addressed to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted, finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§501.83. Firm Names.

(a) General rules applicable [~~Rules Applicable~~] to all firms [~~Firms~~]:

(1) A firm name may not contain words, abbreviations or other language that are misleading to the public, or that may cause confusion to the public as to the legal form or ownership of the firm.

(2) A firm licensed by the board may not conduct business, perform or offer to perform services for or provide products to a client under a name other than the name in which the firm is licensed.

(3) A word, abbreviation or other language is presumed to be misleading if it:

(A) is a trade name or assumed name that does not comply with paragraph (4)(A) or (B) of this subsection;

(B) states or implies the quality of services offered, special expertise, expectation as to outcomes or favorable results, or geographic area of service;

(C) includes the name of a non-owner of the firm;

(D) includes the name of a non-CPA, except as provided in paragraph (4)(B) of this subsection;

(E) states or implies educational or professional attainment not supported in fact;

(F) states or implies licensing recognition for the firm or any of its owners not supported in fact; or

(G) includes a designation such as "and company," "company," "associates," "and associates," "group" or abbreviations thereof or similar designations implying that the firm has more than one employed licensee unless there are at least two employed licensees involved in the practice. Independent contractors are not considered employees under this subsection.

(4) A word, abbreviation or other language is presumed not misleading if it:

(A) is the name, surname, or initials of one or more current or former CPA owners of the firm, its predecessor firm or successor firm;

(B) is the name, surname, or initials of one or more current or former foreign practitioner owners of the firm, its predecessor firm or successor firm who are or would have been eligible to practice public accountancy in this state under §513.2 of this title (relating to Application for Registration of Foreign Practitioners);

(C) indicates the legal organization of the firm;[,] or[;]

(D) states or implies a limitation on the type of service offered by the firm, such as "tax," "audit" or "investment advisory services," provided the firm in fact principally limits its practice to the type of service indicated in the name.

(5) The board may place conditions on the licensing of a firm in order to ensure compliance with the provisions of this section.

(b) Additional Requirements Based on Legal Form or Ownership.

(1) The names of a corporation, professional corporation, limited liability partnership, professional limited liability company or other similar legal forms of ownership must contain the form of ownership or an abbreviation thereof, such as "Inc.," "P.C.," "L.L.P." or "P.L.L.C."; except that a limited liability partnership organized before September 1, 1993 is not required to utilize the words "limited liability partnership" or any abbreviation thereof.

(2) Sole Proprietorships:

(A) The name of a firm that is a sole proprietor must contain the surname of the sole proprietor as it appears on the individual license issued to the sole proprietor by the board.

(B) A partner surviving the death of all other partners may continue to practice under the partnership name for up to two years after becoming a sole proprietor, notwithstanding subsection (d) of this section.

(c) The name of any current or former owner may not be used in a firm name during any period when such owner is prohibited from practicing public accountancy and prohibited from using the title "certified public accountant," "public accountant" or any abbreviation thereof, unless specifically permitted by the board.

(d) A firm licensed by the board is required to report to the board any change in the legal organization of the firm and amend the firm name to comply with this section regarding firm names for the new organization within thirty days of the effective date of such change.

(e) This section regarding firm names does not affect firms licensed by the board prior to the effective date of this section, but does apply to any change in legal organization or name that occurs after the effective date of this section. Nothing in this subsection prohibits the board from placing conditions on the licensing of a firm pursuant to subsection (a)(5) of this section at the time of renewal of the firm license.

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

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J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: November 6, 2011
For further information, please call: (512) 305-7842

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22 TAC §501.85

The Texas State Board of Public Accountancy (Board) proposes an amendment to §501.85, concerning Complaint Notice.

The amendment to §501.85 replaces the listed telephone number with the telephone number to the Enforcement Division and deletes the word "firm" and replaces it with "person" to clarify that a complaint is not limited to a firm but can be made against a firm and an individual.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendment will be none.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendment will be none.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be none.

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be to make contacting the Enforcement Division easier and faster and make the rule easier to understand.

The probable economic cost to persons required to comply with the amendment will be none.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses because the amendment does not impose any duties or obligations upon small businesses.

Mr. Treacy has determined that an Economic Impact Statement and a Regulatory Flexibility Analysis are not required because the proposed amendment will not adversely affect small or micro businesses.

The Board requests comments on the substance and effect of the proposed rule from any interested person. Comments must be received at the Board no later than noon on November 7, 2011. Comments should be addressed to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted, finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§501.85. Complaint Notice.

When a person [~~firm~~] receives a complaint that an alleged violation of the Act or Rules of Professional Conduct has occurred, a person shall provide to the complainant a statement that: Complaints concerning Certified Public Accountants may be addressed in writing to the Texas State Board of Public Accountancy at 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701-3900, telephone (512) 305-7866 [~~305-7800~~], e-mail to enforcement@tsbpa.state.tx.us, or fax (512) 305-7854.

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

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J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: November 6, 2011
For further information, please call: (512) 305-7842

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22 TAC §501.86

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

The Texas State Board of Public Accountancy (Board) proposes the repeal of §501.86, concerning Disclosure of Subsequently Discovered Facts.

The repeal of §501.86 will remove a rule that is no longer needed.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed repeal will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the repeal will be none.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the repeal will be none.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the repeal will be none.

Mr. Treacy has determined that for the first five-year period the repeal is in effect the public benefits expected as a result of adoption of the proposed repeal will be to eliminate unnecessary rules.

The probable economic cost to persons required to comply with the repeal will be none.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed repeal will not affect a local economy.

Mr. Treacy has determined that the proposed repeal will not have an adverse economic effect on small businesses because the repeal does not impose any duties or obligations upon small businesses.

Mr. Treacy has determined that an Economic Impact Statement and a Regulatory Flexibility Analysis are not required because the proposed repeal will not adversely affect small or micro businesses.

The Board requests comments on the substance and effect of the proposed repeal from any interested person. Comments must be received at the Board no later than noon on November 7, 2011. Comments should be addressed to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854.

The Board specifically invites comments from the public on the issues of whether or not the proposed repeal will have an adverse economic effect on small businesses; if the proposed repeal is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the repeal, describe and estimate the economic impact of the repeal on small businesses, offer alternative methods of achieving the purpose of the repeal; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed repeal is to be adopted, finally describe how the health, safety, environmental and economic welfare of the

state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

The repeal is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to repeal rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed repeal.

§501.86. Disclosure of Subsequently Discovered Facts.

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

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J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: November 6, 2011
For further information, please call: (512) 305-7842

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SUBCHAPTER E. RESPONSIBILITIES TO THE BOARD/PROFESSION

22 TAC §501.90

The Texas State Board of Public Accountancy (Board) proposes an amendment to §501.90, concerning Discreditable Acts.

The amendment to §501.90 will replace accounting terms with the acronyms that have been defined in §501.55 and correct references to the Rules and Act.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendment will be none.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendment will be none.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be none.

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be to make the rule easier to understand.

The probable economic cost to persons required to comply with the amendment will be none.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses because the amendment does not impose any duties or obligations upon small businesses.

Mr. Treacy has determined that an Economic Impact Statement and a Regulatory Flexibility Analysis are not required because the proposed amendment will not adversely affect small or micro businesses.

The Board requests comments on the substance and effect of the proposed rule from any interested person. Comments must be received at the Board no later than noon on November 7, 2011. Comments should be addressed to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted, finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§501.90. Discreditable Acts.

A person shall not commit any act that reflects adversely on that person's fitness to engage in the practice of public accountancy. A discreditable act includes but is not limited to:

(1) fraud or deceit in obtaining a certificate as a CPA [~~certified public accountant~~] or in obtaining registration under the Act or in obtaining a license to practice public accounting;

(2) dishonesty, fraud or gross negligence in the practice of public accountancy;

(3) violation of any of the provisions of Subchapter J or §901.458 of the Act (relating to Loss of Independence) applicable to a person certified or registered by the board;

(4) final conviction of a felony or imposition of deferred adjudication or community supervision in connection with a criminal prosecution of a felony under the laws of any state or the United States;

(5) final conviction of any crime or imposition of deferred adjudication or community supervision in connection with a criminal prosecution, an element of which is dishonesty or fraud under the laws of any state or the United States, a criminal prosecution for a crime of moral turpitude, a criminal prosecution involving alcohol abuse or controlled substances, or a criminal prosecution for a crime involving physical harm or the threat of physical harm;

(6) cancellation, revocation, suspension or refusal to renew authority to practice as a CPA [~~certified public accountant~~] or a public accountant by any other state for any cause other than failure to pay the appropriate registration fee in such other state;

(7) suspension or revocation of or any consent decree concerning the right to practice before any state or federal regulatory or licensing body for a cause which in the opinion of the board warrants its action;

(8) knowingly participating in the preparation of a false or misleading financial statement or tax return;

(9) fiscal dishonesty or breach of fiduciary responsibility of any type;

(10) failure to comply with a final order of any state or federal court;

(11) repeated failure to respond to a client's inquiry within a reasonable time without good cause;

(12) intentionally misrepresenting facts or making a misleading or deceitful statement to a client, the board, board staff or any person acting on behalf of the board;

(13) giving intentional false sworn testimony or perjury in court or in connection with discovery in a court proceeding or in any communication to the board or any other federal or state regulatory or licensing body;

(14) threats of bodily harm or retribution to a client;

(15) public allegations of a lack of mental capacity of a client which cannot be supported in fact;

(16) voluntarily disclosing information communicated to the person by an employer, past or present, or through the person'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) pursuant to:

(i) a court order signed by a judge; or

(ii) a summons:

(I) under the provisions of the Internal Revenue Code of 1986 and its subsequent amendments,

(II) the Securities Act of 1933 (15 U.S.C. §77a et seq.) and its subsequent amendments, or

(III) the Securities Exchange Act of 1934 (15 U.S.C. §78a et seq.) and its subsequent amendments;

(D) in an investigation or proceeding by the board;

(E) in an ethical investigation conducted by a professional organization of CPAs [~~certified public accountants~~]; [~~or~~]

(F) in the course of a peer review under [~~Section~~] §901.159 of the [~~Public Accountancy~~] Act (relating to Peer Review); or

(G) any information that is required to be disclosed by the professional standards for reporting on the examination of a financial statement.

(17) breaching the terms of an agreed consent order entered by the board or violating any Board Order.

(18) Interpretive Comment: The board has found in §519.7 of this title (relating to Misdemeanors that Subject a Certificate or Registration Holder [~~Person~~] to Discipline by the Board) and §525.1 of this title (relating to Applications for the Uniform CPA Examination, Issuance of the CPA Certificate, or a License[~~, or Renewal of a License for Persons with Criminal Backgrounds~~]) that any crime of moral turpitude directly relates to the practice of public accountancy. A crime of moral turpitude is defined in this chapter as a crime involving grave infringement of the moral sentiment of the community. The board has found in §519.7 of this title that any crime involving alcohol abuse or controlled substances directly relates to the practice of public accountancy.

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

Filed with the Office of the Secretary of State on September 22, 2011.

TRD-201103957
J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
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For further information, please call: (512) 305-7842

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22 TAC §501.91

The Texas State Board of Public Accountancy (Board) proposes an amendment to §501.91, concerning Reportable Events.

The amendment to §501.91 will delete the word "licensee" and replace it with "person" to clarify that reporting is not limited to a licensee and should include firms and individuals, replace accounting terms with the acronyms that have been defined in §501.55 and correct a reference to a Rule.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendment will be none.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendment will be none.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be none.

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be to make the rule easier to understand.

The probable economic cost to persons required to comply with the amendment will be none.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses because the amendment does not impose any duties or obligations upon small businesses.

Mr. Treacy has determined that an Economic Impact Statement and a Regulatory Flexibility Analysis are not required because the proposed amendment will not adversely affect small or micro businesses.

The Board requests comments on the substance and effect of the proposed rule from any interested person. Comments must be received at the Board no later than noon on November 7, 2011. Comments should be addressed to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted, finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§501.91. Reportable Events.

(a) A person [~~licensee~~] shall report in writing to the board the occurrence of any of the following events within 30 days of the date the person [~~licensee~~] has knowledge of these events:

(1) the conviction or imposition of deferred adjudication of the person [~~licensee~~] of any of the following:

(A) a felony;

(B) a crime of moral turpitude;

(C) any crime of which fraud or dishonesty is an element or that involves alcohol abuse or controlled substances; and

(D) any crime related to the qualifications, functions, or duties of a public accountant or CPA [~~certified public accountant~~], or to acts or activities in the course and scope of the practice of public accountancy or as a fiduciary.

(2) the cancellation, revocation, or suspension of a certificate, other authority to practice, or refusal to renew a certificate or other authority to practice as a CPA [~~certified public accountant~~] or a public accountant, by any state, foreign country or other jurisdiction;

(3) the cancellation, revocation, or suspension of the right to practice as a CPA [~~certified public accountant~~] or a public accountant before any governmental body or agency or other licensing agency;

(4) an unappealable adverse finding in any state or federal court or an agreed settlement in a civil action against the person [~~licensee~~] concerning professional accounting services or professional accounting work or a finding of a breach of fiduciary duty, fraud or misappropriation; or

(5) the loss of a professional license from another state or federal regulatory agency such as an insurance license or a securities license, resulting from an unappealable adverse finding.

(b) The report required by subsection (a) of this section shall be signed by the person [~~licensee~~] and shall set forth the facts which constitute the reportable event. If the reportable event involves the action of an administrative agency or court, then the report shall set forth the title of the matter, court or agency name, docket number, and dates of occurrence of the reportable event.

(c) Nothing in this section imposes a duty upon any person [~~licensee~~] to report to the board the occurrence of any of the events set forth in subsection (a) of this section either by or against any other person [~~licensee~~].

(d) As used in this section, a conviction includes the initial plea, verdict, or finding of guilt, plea of no contest, or pronouncement of sentence by a trial court even though that conviction may not be final or sentence may not be actually imposed until all appeals are exhausted.

(e) Interpretive Comment: A crime of moral turpitude is defined in this chapter as a crime involving grave infringement of the moral sentiment of the community and further defined in §501.90(18) and §519.7 of this title (relating to Discreditable Acts and Misdemeanors that Subject a Certificate or Registration Holder to Discipline by the Board [~~and Misdemeanors that Subject a Certificate or Registration Holder to Discipline by the Board~~]).

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

Filed with the Office of the Secretary of State on September 22, 2011.

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J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: November 6, 2011
For further information, please call: (512) 305-7842

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22 TAC §501.93

The Texas State Board of Public Accountancy (Board) proposes an amendment to §501.93, concerning Responses.

The amendment to §501.93 will add clarity to the requirement that a response must be provided to the board within 30 days of the request.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendment will be none.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendment will be none.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be none.

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be to make the rule easier to understand.

The probable economic cost to persons required to comply with the amendment will be none.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses because the amendment does not impose any duties or obligations upon small businesses.

Mr. Treacy has determined that an Economic Impact Statement and a Regulatory Flexibility Analysis are not required because the proposed amendment will not adversely affect small or micro businesses.

The Board requests comments on the substance and effect of the proposed rule from any interested person. Comments must be received at the Board no later than noon on November 7, 2011. Comments should be addressed to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted, finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§501.93. Responses.

(a) A person shall substantively respond in writing, within 30 days, to any communication from the board requesting a response[, ~~within 30 days~~]. The board may specify a shorter time for response in the communication when circumstances so require. The time to respond shall commence on the date the communication was mailed, delivered to a courier or delivery service, faxed or e-mailed to the last address, facsimile number, or e-mail address furnished to the board by the applicant or person.

(b) A person shall provide copies of documentation and/or work papers, within 30 days, in response to the board's request at no expense to the board [~~within 30 days~~]. The board may specify a shorter time for response in the communication when circumstances so require. The time to respond shall commence on the date the request was mailed, delivered to a courier or delivery service, faxed or e-mailed to the last address, facsimile number or e-mail address furnished to the board by a person. A person may comply with this subsection by providing the board with original records for the board to duplicate. In such a circumstance, upon request the board will provide an affidavit from the custodian of records documenting custody and control of the records.

(c) Failure to timely respond substantively to written communications, or failure to furnish requested documentation and/or work papers, constitutes conduct indicating lack of fitness to serve the public as a professional accountant.

(d) Each applicant and each person required to be registered with the board under the Act shall notify the board, either in writing or through the board's website, of any and all changes in either such person's mailing address or telephone number and the effective date thereof within 30 days before or after such effective date.

(e) Interpretive Comment. This section should be read in conjunction with §519.6 of this title (relating to Subpoenas).

(f) Interpretive Comment. In this section, the term board includes board staff.

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

Filed with the Office of the Secretary of State on September 22, 2011.

TRD-201103959
J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: November 6, 2011
For further information, please call: (512) 305-7842

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CHAPTER 519. PRACTICE AND PROCEDURE
SUBCHAPTER A. GENERAL PROVISIONS

22 TAC §519.8

The Texas State Board of Public Accountancy (Board) proposes an amendment to §519.8, concerning Administrative Penalties.

The amendment to §519.8 will implement the transfer of administrative penalties collected in the Board's disciplinary actions, excluding penalties for failing to maintain CPE, to the Scholarship Trust Fund for Fifth-Year Accounting Students.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendment will be none.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendment will be none.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be none.

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be the application of additional funding for the fifth-year accounting students scholarship program.

The probable economic cost to persons required to comply with the amendment will be none.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses because the amendment does not impose any duties or obligations upon small businesses.

Mr. Treacy has determined that an Economic Impact Statement and a Regulatory Flexibility Analysis are not required because the proposed amendment will not adversely affect small or micro businesses.

The Board requests comments on the substance and effect of the proposed rule from any interested person. Comments must be received at the Board no later than noon on November 7, 2011. Comments should be addressed to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted, finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§519.8. Administrative Penalties.

(a) The board may impose an administrative penalty alone or in addition to other sanctions permitted under the Act. Board committees and the executive director are delegated the authority to determine that any alleged violation warrants an administrative penalty under Subchapter L of the Public Accountancy Act.

(b) The report of any such determination may be included in a notice of hearing.

(c) A request for a hearing under §901.554 of the Public Accountancy Act shall clearly notify the staff that the hearing must address issues relevant to the assessment of an administrative penalty by including the language "RESPONDENT SPECIFICALLY REQUESTS A HEARING ON ADMINISTRATIVE PENALTIES" in capital letters. Failure to include such language shall be a waiver of the right to a hearing within the meaning of §901.554 of the Public Accountancy Act.

(d) Pursuant to §901.551 of the Public Accountancy Act:

(1) the board imposes an administrative penalty on licensees who, in violation of §901.411 of the Public Accountancy Act:

(A) do not complete at least 120 hours of continuing professional education in each three-year license period;

(B) do not complete at least 20 hours in each one-year license period;

(C) do not comply with board rules for the reporting of continuing professional education; or

(D) fail to complete or report sufficient ethics hours as required by board §523.63 of this title (relating to Mandatory Continuing Professional Education Attendance).

(2) considering the seriousness of violation of §901.411 of the Public Accountancy Act, the hazard and potential hazard to the public from CPAs who are not trained in current accounting standards and practices, the amount necessary to deter future violations, and such other matters as the board considers justice may require, the board sets the administrative penalty for the violations described in §519.7(d)(1) of this title (relating to Administrative Penalties) at a minimum of $100 per licensee per license period

(3) the penalty may be assessed only on licensees against whom a final board order is issued.

(e) Administrative penalties collected by the board for disciplinary actions taken against licensees for any violation of the board's Rules of Professional Conduct, excluding §501.94 of this title (relating to Mandatory Continuing Professional Education), shall be transferred to the Scholarship Trust Fund for Fifth-Year Accounting Students to provide financial assistance to students intending to take the CPA exam.

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

Filed with the Office of the Secretary of State on September 22, 2011.

TRD-201103960
J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: November 6, 2011
For further information, please call: (512) 305-7842

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 354. MEMORANDA OF UNDERSTANDING

31 TAC §354.4

The Texas Water Development Board (Board) proposes amendments to §354.4, a memorandum of understanding (MOU) between the Board and the Texas Department of Rural Affairs (TDRA). The existing MOU expired on August 31, 2011 and these amendments describe the new working MOU entered into between TWDB and TDRA for the period from September 11, 2011 to August 31, 2013.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED AMENDMENT.

General Appropriations Act (GAA), HB 1, 82nd R.S., page VI-54, Rider 8 requires the Board to enter into an MOU with TDRA regarding coordination of funding decisions in the economically distressed areas program (EDAP) to ensure that appropriated funds are not expended in a manner that aids the proliferation of colonias and to minimize administrative delay in the expenditure of such funds. The TDRA is also required to enter into this MOU pursuant to the GAA, HB 1, 82nd R.S., page VII-15, Rider 5 for the same purpose.

Texas Water Code §6.104 requires the Board to adopt by rule any MOU entered into between the Board and any other state agency.

DISCUSSION OF THE AMENDMENTS.

Section 354.4 contains the MOU describing the working relationship between the TDRA and the Board for the period from September 1, 2011 through August 31, 2013. The gist of the MOU is contained in section V relating to Performance. The Board is required to provide TDRA with schedules for and descriptions of EDAP funded projects that require funds from the TDRA's Colonia Fund to provide connections and plumbing improvements. Additionally, the Board will assist eligible loan applicants with applications to TDRA's Colonia Fund for such projects. Finally, the Board is required to work with TDRA to select eligible projects for funding and to provide technical assistance at the request of contractors or the TDRA during the implementation of the project.

Both the Board and the TDRA are required to submit a report of activities and expenditures to the Legislative Budget Board annually pursuant to section VII of the MOU.

The Board and the TDRA are required by law, the GAA, to enter into the MOU.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS.

Ms. Melanie Callahan, Chief Financial Officer, has determined that there will be no fiscal implications for state or local governments as a result of the proposed rulemaking. For the first five years these rules are in effect, there is no expected additional cost to state or local governments resulting from their administration. This rule directly affects only the Board and TDRA and will have no additional cost for either agency since the coordination addressed by this rule has been in place for years and no extra costs will be incurred due to continuing the agreement to coordinate.

These rules are not expected to result in reductions in costs to either state or local governments. The rulemaking will not result in any reductions in costs; the state agencies involved already have and have had personnel assigned to implementation of the rule and the rule does not require any local government resources. These rules are not expected to have any impact on state or local revenues. The rules do not require any increase in expenditures for state or local governments as a result of administering these rules. Additionally, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from these rules.

PUBLIC BENEFITS AND COSTS.

Ms. Callahan also has determined that for each year of the first five years the proposed rulemaking is in effect, the public will benefit from the rulemaking due to coordination between the Board and TDRA that will result in increased efficiencies in financing projects because the agencies will avoid duplication and maximize the use of appropriated funds for water and sewer projects. There will be no economic cost to persons required to comply with these rules because the rules do not place any requirements on private individuals or on local governments.

LOCAL EMPLOYMENT IMPACT STATEMENT.

The Board has determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect because it will impose no new requirements on local economies. The Board also has determined that there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this rulemaking because the rules are not regulatory and are not directed at private small or micro-businesses. The Board also has determined that there is no anticipated economic cost to persons who are required to comply with the rulemaking as proposed. Therefore, no regulatory flexibility analysis is necessary.

REGULATORY ANALYSIS.

The Board has determined that the proposed rulemaking is not subject to Government Code §2001.0225 because it is not a major environmental rule under that section.

TAKINGS IMPACT ASSESSMENT.

The Board has determined that the promulgation and enforcement of this proposed rule will constitute neither a statutory nor a constitutional taking of private real property. The proposed rule does not adversely affect a landowner's rights in private real property, in whole or in part, temporarily or permanently, because the proposed rule does not burden or restrict or limit the owner's right to or use of property. Therefore, the proposed rule does not constitute a taking under Texas Government Code, Chapter 2007 or the Texas Constitution.

SUBMITTAL OF COMMENTS.

Comments on the proposed rulemaking will be accepted for 30 days following publication in the *Texas Register* and may be submitted to Legal Services, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, rulescomments@twdb.state.tx.us, or by fax at (512) 475-2053.

STATUTORY AUTHORITY.

This rulemaking is proposed under the authority of Texas Water Code §6.104, which requires the TWDB to adopt by rule any memorandum of understanding between the TWDB and any other state agency. The TWDB is required to enter into the MOU that is the subject of this rule by the General Appropriations Act, HB 1, 82nd R.S., Rider 8, page VI-54.

§354.4. Memorandum of Understanding Between the Texas Department of Rural Affairs and the Texas Water Development Board.

(a) SECTION I. RECITALS. [~~Recitals. Pursuant to Rider 8, Texas Water Development Board (TWDB) and Rider 6, Texas Department of Rural Affairs (TDRA) of the 2010 - 2011 Appropriations Act of the Texas Legislature, the TWDB and the TDRA are required to continue to coordinate funds as outlined in a Memorandum of Understanding to assure that none of the funds appropriated therein are expended in a manner that aids the proliferation of colonias or are otherwise used in a manner inconsistent with the intent of the Economically Distressed Areas Program (EDAP), administered by the TWDB and maximize de-~~

~~livery of the funds and minimize administrative delay in their expenditure.~~]

(1) WHEREAS, pursuant to General Appropriations Act, HB 1, 82 L.S., Rider 8, page VI-54, the Texas Water Development Board (TWDB) is required to enter into this Memorandum of Understanding (MOU) with the Texas Department of Rural Affairs (TDRA);

(2) WHEREAS, the TDRA administers the Colonia Set-Aside Program described in General Appropriations Act, HB 1, 82 L.S., Rider 6, page VII-18 of the TDRA budget;

(3) WHEREAS, the TDRA and TWDB are required to continue to coordinate funds as outlined in this MOU to ensure that none of the funds appropriated therein are expended in a manner that aids the proliferation of colonias or are otherwise used in a manner inconsistent with the intent of the Economically Distressed Areas Program (EDAP) administered by the TWDB, and maximize delivery of the funds and minimize administrative delay in their expenditure.

(4) NOW THEREFORE, the TDRA and the TWDB hereby enter into this MOU for the purposes set forth herein.

(b) SECTION II. PARTIES. [~~Parties.~~] This Memorandum is made and entered into between the TDRA, an agency of the State of Texas, and the TWDB also[~~,~~] an agency of the State of Texas.

(c) SECTION III. PURPOSE. [~~Purpose.~~] The purpose of this Memorandum is to ensure [~~assure~~] that none of the funds appropriated under the Colonia Fund are expended in a manner that aids the proliferation of colonias or are otherwise used in a manner inconsistent with the intent of the EDAP operated by the TWDB and to use the Colonia Set Aside program for residential service lines, hookups and plumbing improvements, so as to maximize delivery of the funds and minimize administrative delay in their expenditure.

(d) SECTION IV. PERIOD OF PERFORMANCE. The obligations under this MOU shall be in force beginning on September 1, 2011, and terminating on August 31, 2011. [~~Period of performance. This Memorandum shall begin on September 1, 2009, and shall terminate on August 31, 2011.~~]

(e) SECTION V. PERFORMANCE. [~~Performance.~~] Each party to this MOU [~~Memorandum~~] shall coordinate with the other in delivering water and sewer service lines, hook-ups, and plumbing improvements to residents of selected colonias in order to connect those residents' housing units to EDAP-funded water and sewer systems.

(1) TDRA responsibilities. The TDRA shall be responsible for the following functions:

(A) develop an application process for projects submitted by eligible units of local government;

(B) assist units of general local government in preparing an application to the Colonia Fund;

(C) determine whether projects meet federal requirements;

(D) select projects to receive funding in conjunction with the TWDB;

(E) make Colonia Fund grant awards for selected projects on an as-needed basis;

(F) prepare and execute contracts with units of general local government (Contractor localities);

(G) provide oversight and guidance to Contractor localities regarding applicable federal and state laws and program regulations (environmental, labor, acquisition of real property, relocation, procurement, financial management, fair housing, equal employment opportunity, etc.);

(H) provide on-site technical assistance if necessary to ensure that funds are efficiently and effectively used to accomplish the activities for which they were intended;

(I) review, approve, process, and honor valid reimbursement requests from Contractor localities;

(J) monitor each project prior to contract completion to ensure compliance with applicable federal and state laws and program regulations;

(K) consult with the TWDB regarding specific projects on an as-needed basis; and

(L) notify communities on list provided by the TWDB of the availability of funds.

(2) TWDB responsibilities. The TWDB shall be responsible for the following functions:

(A) provide the TDRA with descriptions of and schedules for EDAP-funded projects that need Colonia Fund assistance to provide connections and plumbing improvements at least six (6) weeks before such assistance would be required;

(B) provide a list of projects for the TDRA's eligibility review for joint funding; and

[~~(B) assist eligible units of general local government in preparing an application for assistance through the TDRA Colonia Fund;~~]

[~~(C) select projects to receive funding in conjunction with the TDRA; and~~]

(C) ~~(D)~~ provide assistance with technical project-related concerns brought forward by Contractor localities or the TDRA during the course of the project.

(f) SECTION VI. LIMITATIONS. [~~Limitations.~~] Eligible applicants shall be those counties eligible under both the TDRA's Colonia Fund and TWDB's EDAP. Non-entitlement cities located within eligible counties are also eligible applicants. Eligible projects shall be located in unincorporated colonias identified by the TWDB and in eligible cities that annexed the colonia where improvements are to be made within five years after the effective date of the annexation, or are in the process of annexing the colonia where improvements are to be made. Eligibility shall be denied to any project in a county that has not adopted or is not enforcing the Model Subdivision Rules established pursuant to §16.343 of the Texas Water Code. If there are [~~is~~] an insufficient number of TWDB EDAP projects ready for Colonia Economically Distressed Areas Program (CEDAP) funding, the CEDAP funds may be transferred at the TDRA's discretion as stated within the current Community Development Block Grant action.

(g) SECTION VIII. REPORTING REQUIREMENTS. [~~Reporting Requirements.~~] Each party to this Memorandum shall submit, on or before the fifteenth day of the month following the end of the calendar quarter, to the other party a report of its activities and expenditures during the previous calendar quarter. No later than September 15, 2012, [~~2010,~~] the TDRA and the TWDB shall submit a joint report to the Legislative Budget Board that describes and analyzes the effectiveness of projects funded as a result of coordinated Colonia Fund/EDAP efforts.

(h) SECTION VIII. TERMINATION. [~~Termination.~~] This Memorandum shall terminate upon ten (10) days written notice by either party to the other party in this contract.

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

Filed with the Office of the Secretary of State on September 26, 2011.

TRD-201104006
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Earliest possible date of adoption: November 6, 2011
For further information, please call: (512) 463-8061

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CHAPTER 384. RURAL WATER ASSISTANCE FUND

The Texas Water Development Board ("TWDB" or "Board") proposes amendments to §384.2, regarding Definitions of Terms; §384.3, regarding Use of Funds; §384.7, regarding Investment of Funds; §384.22, regarding Application for Assistance; §384.24, regarding Board Consideration of Application; §384.42, regarding Deed of Trust and Other Required Documentation; and §384.44, regarding Loan Agreements for Nonprofit Water Supply Corporations.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED AMENDMENTS.

The Rural Water Assistance Fund ("RWAF" or "Fund") is used by TWDB primarily to make loans to nonprofit water supply corporations and other rural political subdivisions for improvements to water or wastewater systems. The loans from RWAF have been historically financed through the TWDB's issuance of Water Financial Assistance Bonds through the Financial Assistance Account of the Texas Water Development Fund II, under Texas Water Code, Chapter 17, Subchapter L.

The 82nd Texas Legislature passed Senate Bill 360, relating to the composition and use of money in the RWAF, effective September 1, 2011. Generally, Senate Bill 360 adds other sources of funds for the RWAF and adds to the range of projects that can be financed through the Fund. In addition, the bill allows for zero interest loans, negative interest loans, loan forgiveness, or grants for projects financed through the Fund. The bill also codifies what has been the TWDB's practice reflected in the TWDB's rules but not in statute, namely, that if an applicant is a nonprofit water supply corporation ("WSC"), the TWDB may make a loan that is securitized by a loan agreement and promissory note instead of bonds, and the WSC is not required to retain a bond counsel or financial advisor.

SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS.

The proposed amendment of §384.2 adds a definition of "nonprofit water supply or sewer service corporation," because that definition was added in Texas Water Code §15.993 by Senate Bill 360.

The proposed amendment of §384.3 adds new uses of the Fund, as added by Senate Bill 360.

The paragraphs within §384.3(a) are also reorganized to better match the provisions of Texas Water Code §15.994(a), as amended by Senate Bill 360.

Proposed §384.3(b) provides that the fund may be used to provide zero interest loans, negative interest loans, loan forgiveness, or grants for projects financed through the Fund under criteria developed by the Board, as required by Texas Water Code §15.994(b).

Proposed §384.3(c) - (f) contain provisions that correspond to Texas Water Code §15.994(c), (d), (e), and (g), as amended by Senate Bill 360.

The proposed amendment of §384.7 deletes the reference to 31 TAC Chapter 365, since that chapter has been deleted and replaced with the TWDB's investment policy.

The proposed amendment of §384.22 adds subsection (c) to provide that a rural political subdivision may enter into an agreement with a federal agency, a state agency, or another rural political subdivision to submit a joint application for financial assistance, in order to be consistent with Texas Water Code §15.994(h), as amended by Senate Bill 360.

The proposed amendment of §384.24(a) divides this subsection into two paragraphs, and adds the provision that the TWDB's staff may coordinate its review of an application with a federal agency to avoid duplication of efforts and costs, consistent with Texas Water Code §15.994(h), as added by Senate Bill 360.

The proposed amendment of §384.42 changes "nonprofit water supply corporation" to "nonprofit water supply or sewer service corporation" to conform to the definition added to §384.2 in this rulemaking and added in Texas Water Code §15.993 by Senate Bill 360.

The proposed amendment of §384.44 changes "nonprofit water supply corporation" to "nonprofit water supply or sewer service corporation" in both the title and body of the rule, to conform to the definition added to §384.2 in this rulemaking and added in Texas Water Code §15.993 by Senate Bill 360.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS.

Ms. Melanie Callahan, Chief Financial Officer, has determined that there will be no fiscal implications for state or local governments as a result of the proposed rulemaking. For the first five years these rules are in effect, there is no expected additional cost to state or local governments resulting from their administration. These rules affect only those entities that voluntarily apply for financial assistance.

These rules are not expected to result in reductions in costs to either state or local governments. The rulemaking will clarify the uses of the Fund and the criteria under which the TWDB may offer zero interest loans, negative interest loans, loan forgiveness, or grants for projects financed through the Fund. These rules are not expected to have any impact on state or local revenues. The rules do not require any increase in expenditures for state or local governments as a result of administering these rules. Additionally, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from these rules.

PUBLIC BENEFITS AND COSTS.

Ms. Callahan also has determined that for each year of the first five years the proposed rulemaking is in effect, the public will benefit from the rulemaking as it allows financing for water and wastewater projects at a cost generally below the market rate at which the entity would be able to finance the project. There will be no economic cost to persons required to comply with these

rules because the requirements of these rules apply only to those persons who voluntarily seek assistance from the Fund.

LOCAL EMPLOYMENT IMPACT STATEMENT.

The Board has determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect because it will impose no new requirements on local economies. The Board also has determined that there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this rulemaking because the rules are not regulatory and are not directed at private small or micro-businesses. The Board also has determined that there is no anticipated economic cost to persons who are required to comply with the rulemaking as proposed. Therefore, no regulatory flexibility analysis is necessary.

REGULATORY ANALYSIS.

The Board has determined that the proposed rulemaking is not subject to Government Code §2001.0225 because it is not a major environmental rule under that section.

TAKINGS IMPACT ASSESSMENT.

The Board has determined that the promulgation and enforcement of the proposed rules will constitute neither a statutory nor a constitutional taking of private real property. The proposed rules do not adversely affect a landowner's rights in private real property, in whole or in part, temporarily or permanently, because the proposed rules do not burden or restrict or limit the owner's right to or use of property. Therefore, the proposed rules do not constitute a taking under Texas Government Code, Chapter 2007 or the Texas Constitution.

SUBMITTAL OF COMMENTS.

Comments on the proposed amendments will be accepted for 30 days following publication in the *Texas Register* and may be submitted to Legal Services, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, rulescomments@twdb.state.tx.us, or by fax at (512) 475-2053.

SUBCHAPTER A. INTRODUCTORY PROVISIONS

31 TAC §§384.2, 384.3, 384.7

STATUTORY AUTHORITY.

The amendments are proposed under the authority of Texas Water Code §6.101, which authorizes the Board to adopt rules necessary to carry out the powers and duties of the Board, and Texas Water Code §15.995, which authorizes the Board to adopt rules necessary to administer Texas Water Code, Chapter 15, Subchapter R, including rules establishing procedures for the application for and award of financing, the distribution of funds, the investment of funds, and the administration of financial assistance from the RWAF.

The amendments affect Texas Water Code, Chapter 15, Subchapter R.

§384.2. Definitions of Terms.

Words and terms used in this chapter shall have the following meanings, unless the context clearly indicates otherwise. Words defined in Texas Water Code Chapter [~~Chapters~~] 15 or 17 and not defined here shall have the meanings provided by the appropriate Texas Water Code chapter.

(1) Applicant--A rural political subdivision, including a rural political subdivision which has entered into an agreement with a Federal Agency or State Agency for the purpose of submitting a joint application.

(2) District--A conservation or reclamation district created under Texas Constitution, Section 52, Article III, or Section 59, Article XVI.

(3) Federal agency--An agency or other entity of the United States, including the United States Department of Agriculture or an agency or entity that is acting through or on behalf of that department.

(4) Fund--The Rural Water Assistance Fund.

(5) Nonprofit water supply or sewer service corporation--A water or sewer service corporation operating under Texas Water Code, Chapter 67.

(6) [~~(5)~~] Rural political subdivision--A nonprofit water supply or sewer service corporation, district, or municipality with a service area of 10,000 or less in population or that otherwise qualifies for financing from a federal agency or a county in which no urban area exceeds 50,000 in population.

(7) [~~(6)~~] State agency--An agency or other entity of the state, including the Texas Department of Agriculture and the Texas Department of Housing and Community Affairs and any agency or authority that is acting through or on behalf of the Texas Department of Agriculture or the Texas Department of Housing and Community Affairs.

§384.3. Use of Funds.

(a) The fund may be used to provide low-interest loans to rural political subdivisions for:

(1) [~~to provide low-interest loans to rural political subdivisions for~~] water or water-related projects and for water quality enhancement projects, including but not limited to: [~~the purchase of well fields, the purchase or lease of rights to produce groundwater, on-site or wetland wastewater treatment facilities, and interim financing of construction projects;~~]

(A) the construction of infrastructure facilities for wholesale or retail water or sewer service;

(B) desalination projects;

(C) the purchase or lease of water well fields;

(D) property necessary for water well fields;

(E) the purchase or lease of rights to produce groundwater;

(F) onsite or wetland wastewater treatment facilities; and

(G) the interim financing of construction projects;

(2) water projects included in the state water plan or a regional water plan;

(3) development of groundwater sources and acquisition of water rights, including groundwater and surface water rights;

(4) the acquisition of retail public utilities as defined by §13.002 of the Texas Water Code;

(5) the acquisition of water supply or sewer services facilities or systems owned by municipalities or other political subdivisions;

(6) construction, acquisition, or improvement of water and wastewater projects to provide services to an economically distressed area;

(7) planning and design costs, permitting costs, and other costs associated with state or federal regulatory activities with respect to a project; and

(8) obtaining water or wastewater service supplied by other political subdivisions or financing the consolidation or regionalizing of neighboring political subdivisions, or both.

~~[(2) to enable a rural political subdivision to obtain water or wastewater service supplied by a larger political subdivision or to finance the consolidation or regionalization of neighboring political subdivisions, or both; or]~~

~~[(3) as a source of revenue for the repayment of principal and interest on water financial assistance bonds issued by the board if the proceeds of the sale of these bonds will be deposited into the fund.]~~

(b) The fund may be used to provide zero interest loans, negative interest loans, loan forgiveness, or grants for any purpose described in subsection (a) of this section under criteria developed by the Board.

(c) The board may use money in the fund to contract for outreach, financial, and technical assistance to assist rural political subdivisions in obtaining and using financing from the fund.

(d) The fund may be used to buy down interest rates on loans.

(e) The fund may be used to finance a joint application submitted by a rural political subdivision and a federal agency, a state agency, or another rural political subdivision where the parties have entered into an agreement to submit a joint application for financial assistance.

(f) The fund may be used as a source of revenue for the repayment of principal and interest on water financial assistance bonds issued by the board if the proceeds of the sale of these bonds will be deposited into the fund.

§384.7. Investment of Funds.

Money in the fund [~~Funds~~] will be invested in accordance with the board's investment policy [~~Chapter 365 of this title (relating to Investment Rules)~~].

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

Filed with the Office of the Secretary of State on September 22, 2011.

TRD-201103934
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Earliest possible date of adoption: November 6, 2011
For further information, please call: (512) 463-8061

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SUBCHAPTER B. APPLICATION PROCEDURES

31 TAC §384.22, §384.24

STATUTORY AUTHORITY.

The amendments are proposed under the authority of Texas Water Code §6.101, which authorizes the Board to adopt rules necessary to carry out the powers and duties of the Board, and Texas Water Code §15.995, which authorizes the Board to adopt rules necessary to administer Texas Water Code, Chapter 15, Subchapter R, including rules establishing procedures for the application for and award of financing, the distribution of funds, the investment of funds, and the administration of financial assistance from the Rural Water Assistance Fund.

The amendments affect Texas Water Code, Chapter 15, Subchapter R.

§384.22. Application for Assistance.

(a) A rural political subdivision shall submit an application for financial assistance in writing.

(b) The following information is required on all applications to the board for financial assistance.

(1) General, fiscal and legal information required includes:

(A) the name and address of the rural political subdivision;

(B) a citation of the law under which the rural political subdivision operates and was created;

(C) the total cost of the project;

(D) the amount of financial assistance being requested;

(E) a description of the project;

(F) the name, address and telephone number of the authorized representative, engineer and any other consultant(s);

(G) the source of repayment and the status of legal authority to pledge selected revenues;

(H) the financing plan for repaying the total cost of the project;

(I) the rural political subdivision's default history;

(J) the most recent annual financial statements and latest monthly and year-to-date financial reports for the General Fund and Utility Fund of the political subdivision;

(K) a certified copy of a resolution of the rural political subdivision's governing body requesting financial assistance from the board, authorizing the submission of the application, and designating the authorized representative for executing the application, and for appearing before the board;

(L) a notarized affidavit from the authorized representative stating that:

(i) for a rural political subdivision, the decision to request financial assistance from the board was made in a public meeting held in accordance with the Open Meetings Act (Government Code, Chapter 551);

(ii) the information submitted in the application is true and correct according to the best knowledge and belief of the representative;

(iii) the applicant has no litigation or other proceedings pending or threatened against the applicant that would materially adversely affect the financial condition of the applicant or the ability of the applicant to issue debt;

(iv) the applicant has no pending, threatened, or outstanding judgments, orders, fines, penalties, taxes, assessment or other enforcement or compliance issue of any kind or nature by EPA, the Texas Commission on Environmental Quality, Texas Comptroller,

Texas Secretary of State, or any other federal, state or local government, except for such actions identified in the affidavit; and

(v) the applicant will comply with all applicable federal laws, rules, and regulations as well as the laws of this state and the rules and regulations of the board;[.]

(M) any special request for repayment structure that reflects the particular needs of the rural political subdivision.

(2) Engineering feasibility report. An applicant shall submit an engineering feasibility report in accordance with §363.13 of this title (relating to Preliminary Engineering Feasibility Data).

(3) Environmental assessment. An applicant shall submit an environmental assessment in accordance with §363.14 of this title (relating to Environmental Assessment).

(4) Required water conservation plan. An applicant shall submit a water conservation plan prepared in accordance with §363.15 of this title (relating to Required Water Conservation Plan).

(5) Funding from other sources. If additional funds are necessary to complete the project, or if the applicant has applied for and/or received a commitment from any other funding agency for the project or any aspect of the project, an applicant shall submit a listing of those sources, including total project costs, financing terms, and current status of the funding requests.

(6) Additional application information. An applicant shall submit any additional information requested by the executive administrator as necessary to complete the financial, legal, engineering, and environmental reviews.

(c) A rural political subdivision may enter into an agreement with a federal agency, a state agency, or another rural political subdivision to submit a joint application for financial assistance under this subchapter.

§384.24. Board Consideration of Application.

(a) The executive administrator shall submit the application to the board with comments concerning financial assistance. The application will be scheduled on the agenda for board consideration at the earliest practical date. The applicant and other interested parties known to the board shall be notified of the time and place of such meeting.

(1) If the applicant has received an obligation of federal funds by the United States Department of Agriculture-Rural Development that would duplicate funding from the board for the same project, as evidenced in writing from the United States Department of Agriculture-Rural Development, or if the applicant has canceled such an obligation, the executive administrator shall not submit the application to the board and shall notify the applicant that its application will no longer be considered for this reason, unless good cause is shown that the application should be submitted to the board.

(2) Board staff may coordinate its review of an application submitted under this subchapter with a federal agency to avoid duplication of efforts and costs.

(b) In passing on an application for financial assistance, the board shall consider:

(1) the needs of the area to be served by the project, the benefit of the project to the area, the relationship of the project to the overall state water needs, and the relationship of the project to the state water plan; and

(2) the availability of revenue to the rural political subdivision from all sources for the ultimate repayment of the cost of the water supply project, including all loan interest.

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

Filed with the Office of the Secretary of State on September 22, 2011.

TRD-201103935
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Earliest possible date of adoption: November 6, 2011
For further information, please call: (512) 463-8061

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SUBCHAPTER C. CLOSING AND RELEASE OF FUNDS

31 TAC §384.42, §384.44

STATUTORY AUTHORITY.

The amendments are proposed under the authority of Texas Water Code §6.101, which authorizes the Board to adopt rules necessary to carry out the powers and duties of the Board, and Texas Water Code §15.995, which authorizes the Board to adopt rules necessary to administer Texas Water Code, Chapter 15, Subchapter R, including rules establishing procedures for the application for and award of financing, the distribution of funds, the investment of funds, and the administration of financial assistance from the Rural Water Assistance Fund.

The amendments affect Texas Water Code, Chapter 15, Subchapter R.

§384.42. Deed of Trust and Other Required Documentation.

Prior to release of funds, a nonprofit water supply or sewer service corporation must submit an executed Deed of Trust in the form provided by the executive administrator and must submit a policy of title insurance, written to the benefit of the board, which is acceptable in form and substance to the executive administrator.

§384.44. Loan Agreements for Nonprofit Water Supply or Sewer Service Corporations.

(a) The board may provide financial assistance to an applicant that is a nonprofit water supply or sewer service corporation by entering into a loan agreement with the nonprofit water supply or sewer service corporation.

(b) In addition to executing a loan agreement, the applicant must execute a promissory note in the full amount of the loan.

(c) An applicant which utilizes the loan agreement option is not required to engage the services of a bond counsel or a financial advisor.

(d) The applicant must provide the board with an attorney's opinion as to the authority of the rural political subdivision to incur the debt.

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

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Kenneth L. Petersen
General Counsel
Texas Water Development Board
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For further information, please call: (512) 463-8061

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 9. PROPERTY TAX ADMINISTRATION

SUBCHAPTER A. PRACTICE AND PROCEDURE

34 TAC §9.101

The Comptroller of Public Accounts proposes an amendment to §9.101, concerning the conduct of the property value study. This section is being amended to provide for certification of separate taxable values for value subject to maintenance and operations tax rates and value subject to interest and sinking fund tax rates in school districts in which Government Code, §403.302(d)(9)(B) is applicable. The section is also being amended to update the reference to the rules applicable to protests of comptroller findings.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be by improving the administration of local property valuation and taxation. The proposed amendment would have no fiscal impact on small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the amendment may be submitted to Deborah Cartwright, Director, Property Tax Assistance Division, P.O. Box 13528, Austin, Texas 78711-3528. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

The amendment is proposed under Government Code, §403.302(o) which requires the comptroller to adopt rules governing the conduct of the study after consulting with the Comptroller's Property Value Study Committee.

The amendment implements Government Code, §403.302(o).

§9.101. Conduct of the Property Value Study.

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

(1) Appraisal--A statement that estimates the market value or other legally required value of property.

(2) Appraisal ratio--The ratio of a property's appraised value as determined by the appraisal office or appraisal review board (the County Appraisal District (CAD)) value, as applicable to:

(A) the sale price of the property; or

(B) an independent appraisal of the property, as applicable.

(3) Appraiser--A comptroller employee or contractor who conducts appraisals for the property value study.

(4) Assigned value--The value of property determined in the property value study.

(5) Coefficient of dispersion--The absolute average deviation of appraisal ratios in a sample from the median appraisal ratio for the sample, expressed as a percentage of the median.

(6) Comptroller--The Comptroller of Public Accounts or the Comptroller of Public Accounts' designee.

(7) Confirm--A sale is confirmed when the comptroller has documented that the sale price for a property is correct.

(8) Documentary evidence--Writings such as letters, memoranda, appraisal records, or deeds.

(9) Local property--Property other than utility, industrial, mineral, or 1-d or 1-d-1 qualified agricultural property.

(10) Median appraisal ratio--The median level of appraisal is the median appraisal ratio of a sample of properties collected as part of the school district taxable value study in an appraisal district. The median appraisal ratio for a sample of properties is, in a numerically ordered list of the appraisal ratios for the properties:

(A) if the sample contains an odd number of properties, the appraisal ratio above and below which there is an equal number of appraisal ratios in the list; or

(B) if the sample contains an even number of properties, the average of the two consecutive appraisal ratios above and below which there is an equal number of appraisal ratios in the list.

(11) Price related differential--The price related differential is the mean of a property sample divided by the weighted mean of that sample.

(12) Property value study--The studies conducted by the comptroller in alternating or consecutive years pursuant to Government Code, §403.302 and Tax Code, §5.10, according to a coordinated schedule that ensures that CAD reviews required by Tax Code, §5.102 are conducted in years in which the studies of school districts within the CAD are not performed, except when consecutive year studies are mandated. The schedule of alternating studies and CAD reviews shall be determined by the comptroller.

(13) Random sample--A sample in which each item of the population has an equal chance of being included.

(14) Representative sample--Representative means composed of individual properties that collectively reflect the individual characteristics of the population from which they were drawn. A representative sample meets the requirements for operational representativeness set forth in the International Association of Assessing Officers' Standard on Ratio Studies.

(15) Sale--A transfer of property for consideration.

(16) Sale date--The date on which a deed or other document transferring title to real property by sale is executed.

(17) Sample--A group of properties analyzed to determine characteristics of property in a school or appraisal district.

(18) School district split--Each portion of a school district located in different counties where properties are appraised by different appraisal districts.

(19) Stratification--Stratification divides the range of information for property in a district or property category into intervals and lists the number and CAD value of properties falling into each interval.

(20) Stratified weighted mean appraisal ratio--A stratified weighted mean appraisal ratio is calculated by separating the properties in a category sample into subcategories by value range or other property characteristics (strata) and determining the weighted mean appraisal ratio for each of the strata. The value of property in each of the strata is calculated by dividing the total CAD value by the weighted mean appraisal ratio. These individual market value estimates are then added to produce a market value estimate for the total category sample. The total CAD value of property in the category is then divided by the total category market value estimate to produce the stratified weighted mean ratio.

(21) Verify--A sale is verified when the comptroller has documented that a sale is a market value transaction as defined by Tax Code, §1.04(7).

(22) Weighted mean appraisal ratio--The weighted mean appraisal ratio is a number calculated by dividing the total CAD value of property in a sample by the total of corresponding sale prices or appraised values of property in that sample.

(b) General statement of policy. The study constitutes a limited audit of the taxable value of property in the districts. The purpose of this section is to ensure that sufficient competent and relevant evidence affords a reasonable basis for the comptroller's judgments and conclusions regarding the taxable value of property in a school district and the appropriate measures of appraisal level and uniformity in an appraisal district.

(c) General standard. Except where inconsistent with these sections, the Standard on Ratio Studies, International Association of Assessing Officers, is adopted by reference as a standard for the conduct of the property value study. For the purposes of ratio study design, including but not limited to stratification and sampling design, the requirements to apply appropriate standard statistical analysis techniques set out in Tax Code, §5.10(a) and to use generally accepted auditing and sampling techniques set out in Government Code, §403.302(a) and (b) are met by complying with the Standard on Ratio Studies.

(d) Changing appraisal methods. The comptroller will consult regularly with representatives of property owners, industries, appraisal firms, and other interested parties to keep abreast of changing appraisal methods.

(e) Selection of property studied. The accuracy of the estimate of taxable property value for each school district in this state shall be the primary consideration in determining the amount and category of property included in the study sample.

(1) The comptroller may determine whether a category or class of property in a school district is a major category or class of property to be included in the study on a case-by-case basis. To maximize accuracy or efficient use of resources, the comptroller may decline to sample or estimate category values or measures. If a category or class of property except land qualified for appraisal based on its productive capacity has an appraised value as determined by the CAD of 5.0% or less of the total appraised value of property in categories sampled in the study, the comptroller may decline to sample or estimate the value of that category or class of property.

(2) The comptroller may determine that a school district split does not have enough value to necessitate that a study be conducted in that portion of the school district. Except in cases where the school district has values split among multiple counties, the comptroller will study at least 85% of the total value for the school district in categories deemed to have enough value to sample.

(3) If the comptroller does not sample a school district split, a category of property in a school district, or a subcategory of property in a school district, the comptroller may calculate the district's taxable value by using the district's locally reported value to represent the value of the school district split, category, or subcategory not included in the sample.

(f) Taxpayer data. Owners of large unique or complex properties should be advised if these properties are included in the property value study. Taxpayers shall have the option of presenting data to the comptroller to verify the CAD value as representative of market value for inclusion in the study. The comptroller shall have the option of accepting the indicated market value for inclusion in the property value study.

(g) Determining taxable value. The taxable value of certain classes of property shall be determined according to the following appraisal methods:

(1) Agricultural land qualified for productivity appraisal. The comptroller may determine the productivity value of land qualified for productivity appraisal in a school district through direct appraisal. The staff shall estimate an average value per acre for each land class in each school district using information provided by published sources and by individuals knowledgeable concerning local agricultural conditions. The estimated average productivity value per acre shall be developed using the same methods applicable to appraisal districts under §9.4001 of this title (relating to Valuation of Open-Space and Agricultural Lands). The estimated value per acre shall be applied to the total number of acres in each land class reported in the school district report of property value to determine the total value of property in each class. The sum of the values of each class is the total value of agricultural property receiving productivity appraisal in the school district.

(2) Timber land qualified for productivity appraisal. The comptroller may determine the productivity value of land qualified for timber appraisal in a school district through direct appraisal. The staff shall estimate an average value per acre for each soil class and type of timber in each school district using information provided by published sources and by individuals knowledgeable concerning local timber production. The estimated average productivity value per acre shall be developed using the same methods applicable to appraisal districts under §9.4011 of this title (relating to Appraisal of Timberlands). The estimated value per acre shall be applied to the total number of acres in each soil class for each type of timber reported in the school district report of property value to determine the total value of property in each class. The sum of the values of each class is the total value of timber property receiving productivity appraisal in the school district.

(3) Utility property. Utility samples in a school district are chosen using a method that ensures sampling dominant properties and other properties as appropriate. Utilities shall be valued using recognized unitary valuation methods, that may include one or more of the cost, income, and market (sales comparison or stock and debt) approaches. Utility unit values will be allocated using generally accepted allocation methods based on the best information available. Appraisers shall consider the effects of regulation, if applicable.

(4) Industrial property. If the comptroller appraises an industrial property, the property shall be valued using generally accepted appraisal methods. If staff selects an industrial property sample, the

property sample shall be selected without regard to whether the appraisal district performs its own industrial property appraisals.

(5) Mineral property. Mineral samples in a school district shall be chosen using a method that ensures sampling dominant leases and a sample of other leases as appropriate. Minerals shall be appraised using generally accepted appraisal methods, emphasizing the income approach to value.

(6) Local property. The comptroller shall make its determination of local property values on the basis of representative samples of property selected within school districts. Except as provided in this section, the comptroller shall select samples of properties based on the comptroller's judgment of the number and kind of properties required to be sampled to reasonably reflect the taxable value of property in each school district. The comptroller staff is not required to but may employ random sampling or other sampling procedures where feasible and appropriate.

(A) Estimated sample sizes shall initially be assigned by supervisory staff. The overall goal in setting the sample size is to obtain school district taxable values that are acceptably accurate and reliable. The sample size assigned for a particular category of property in a particular school district is based on the available comptroller time, the availability of current sales, variability of ratios, and the relative value of the category. A sample may be larger or smaller than the assigned sample if the school district's resulting taxable value is determined by supervisory staff to be acceptably accurate and reliable.

(B) Samples may include a combination of sales and appraisals that satisfies both size and representativeness requirements. However, a sample may consist of sales only or appraisals only. All meaningful property characteristics shall be considered in selecting non-random samples. The following guidelines should be followed in non-random selection:

(i) the sample should not be weighted in favor of sold properties that are appraised at a different level from unsold properties;

(ii) a sample should include properties from each primary geographic area, if the geographic area contains a significant number of the kind of property being tested and the property has significant value;

(iii) a sample should include improvements of varying ages;

(iv) sample selection should consider other property characteristics such as construction type, size, use, and business type, as required;

(v) stratification information should be used to ensure that samples are representative. If stratification data are unavailable, an appraiser should use informed judgment and knowledge of the area in a reasonable effort to ensure that samples are representative.

(C) Appraisers shall categorize sample properties as they are categorized by appraisal districts (Category A, B, C, etc.), unless the comptroller determines that a property or portion of property is categorized incorrectly, in which case the comptroller may move the value of the property into the correct category. The comptroller's decision to re-categorize property may be the subject of a protest provided by Government Code, §403.303.

(D) Appraisers should develop a sales population to maintain a thorough knowledge of local markets and appraisal practices; and to provide a population of sales from which to select property samples. Appraisers should gather sales that occurred over as broad a time period as practicable and should gather sales from a variety of sources, such as appraisal districts, real estate professionals, title companies, financial institutions, courthouse records, and other reliable sources.

(i) As a general rule, if an appraiser's sample size is less than all the sales within a relevant time period, the sales sample will be selected randomly. However, other sample selection methods may be used.

(ii) The appraiser must document the source of each sale included in the property value study. The appraiser must use codes to identify the source of each sale entered into the comptroller sale/appraisal system. The appraiser must maintain sufficient written documentation to permit source verification upon request.

(iii) The appraiser must confirm and verify at least 20% of the sales included in each category sample for each school district or school district split from sources other than the appraisal district.

(iv) Sales included in a sample must be market transactions. Market transactions are consistent with the definition of market value found in Tax Code, §1.04(7). For the purposes of that section, the term "price" means the most probable price. As provided in the Standard on Ratio Studies, International Association of Assessing Officers, transactions that may be non-arm's-length sales should be clearly identified and used only if it can be established that they are consistent with the definition of market value.

(v) If an appraiser questions whether a transaction selected for use in the study is a market sale, the appraiser should obtain sales agreements, closing statements, statements from parties to the transaction, deed records that disclose full consideration, or other evidence sufficient to determine whether or not the transaction is a market transaction.

(vi) The appraiser must exclude sales of properties that change category or significant physical characteristics after the sale but before the assessment date.

(vii) The appraiser may not exclude a sale solely because it appears to be inconsistent with other sales in the sample. Such sales should be verified. The inconsistencies may indicate that a sale is not a market transaction, but they also may indicate that information regarding the sale was recorded incorrectly. If further investigation reveals that the sale was indeed a legitimate market transaction, the appraiser may include it in the sample, despite its apparent inconsistency. If the investigation, however, reveals that the sale was not a legitimate market transaction, the sale should be excluded.

(viii) Generally, when financing reflects prevailing market practices and interest rates, sales prices require no adjustment. Adjustments should be considered if:

(I) the seller and lender are the same party and financing is not at prevailing market rates;

(II) the buyer assumes an existing mortgage at a non-market rate of interest; or

(III) lenders charge the seller "points" (a percentage of the loan amount) for making money available to the purchaser/borrower.

(ix) Some forms of mortgage terms also may require adjustment. If these adjustments alter the sales price significantly, the use of the sale as a good indicator of market value may be questionable.

(x) The appraiser shall adjust sales samples for the effect of time if there is evidence of a significant value increase or decrease during the period from which sales are drawn. The appraiser must document how the time adjustments were determined. As an al-

ternative to time adjustment, the appraiser may randomly select samples so that the value of properties sold during a specified period before the assessment date roughly approximates the value of properties sold during a similar period after the assessment date. A sample balanced in this manner will negate the effect of changes in the level of market values if those changes occurred uniformly over the study time frame.

(xi) The comptroller may use a method of adjusting for financing, time, personal property, or other matters affecting the sales price, that includes an overall adjustment affecting all or any relevant portion of the sales in the sample.

(xii) If the comptroller determines that recently sold properties are appraised by the appraisal district at a different level of value than unsold properties, the comptroller may take actions to ensure that the unsold properties are fairly represented in the sample. These actions may include using appraisals in the sample, using sales that occurred after the appraisal district certified the school district tax rolls in the sample, deleting sales from the sample, or other adjustments the comptroller deems necessary to maintain the integrity of the property value study.

(E) Appraisals of local property are performed if the comptroller determines they are necessary to ensure the study develops competent evidence of the value of all property in the school district. Appraisals are used to ensure a representative sample of sufficient size and to test whether sold and unsold properties are assessed at the same level. The following guidelines govern the use of appraisals:

(i) appraisal samples shall be selected randomly if practicable;

(ii) appraisals shall be conducted using generally accepted appraisal practices. The comptroller shall prepare written procedures as needed to conduct appraisals. The written procedures are open records. Supervisory staff shall selectively test appraisals to ensure the consistency and accuracy of data throughout the state;

(iii) appraisers should physically inspect each property appraised. If acreage or lots cannot be physically inspected, the appraiser may use appraisal cards, aerial photographs, soil maps, and other relevant information in performing appraisals;

(iv) in appraising a particular property, the appraiser may not consider the value placed on that property by the appraisal district. However, the appraiser may consult with appraisal district staff and review appraisal district records to gather information relevant to the appraisal;

(v) the market value estimate for a particular property account must include the value of all property associated with that account, e.g., multiple improvements, paving, outbuildings, signs, business vehicles, additional lots, etc. The appraiser may use the appraisal district's value for any item(s) that the appraiser is unable to appraise if the item(s) in question represent an insignificant portion of the appraisal district's total appraised value for the account.

(h) Local reports of taxable value. Local reports of taxable value are essential parts of the property value study. Appraisal districts shall submit their annual appraisal roll using the comptroller's Electronic Appraisal Roll Submission record layout according to §9.3059 of this title (relating to Certification of Appraisal Roll). This submission results in a local report of taxable value which the comptroller shall thoroughly review as needed to ensure reliability. The comptroller must document the date of and reasons for each revision.

(i) Protest or request for audit. A protest or request for an audit of the Property Value Study findings shall be submitted in accordance with Subchapter L of this chapter (relating to Procedures for Protesting Comptroller Property Value Study and Audit Findings) [~~§§9.4301 - 9.4313 of this title (relating to Procedures for Protesting Preliminary Findings of Total Taxable Value)~~] or §9.103 of this title (relating to Audits of School District Taxable Property Values), as applicable.

(j) Determination of school district value. School district taxable values shall be determined in a manner that maximizes the accuracy and reliability of the taxable value in each school district.

(1) The taxable value of a category of property in a school district shall be determined by dividing the total locally appraised value of property in that category by the weighted mean or stratified weighted mean ratio for the sample of property selected from that category. However, the taxable value of property in a category may be determined by other methods if it is determined that sufficient competent evidence requires their use.

(2) The taxable value of property in a school district shall be determined by adding together the taxable value of property in each category of property in the school district and subtracting from the total the items listed in Government Code, §403.302(d). However, the taxable value of property in a school district may be determined by other methods if it is determined that sufficient competent evidence requires their use.

(k) Determination of appraisal district measures. Appraisal district measures shall be determined from the sales and appraisals gathered as a part of the school district taxable value study.

(1) The median level of appraisal for each category of property in the appraisal district and for the appraisal district as a whole is determined as provided by Tax Code, §5.10.

(2) The coefficient of dispersion for each category of property in the appraisal district and for the appraisal district as a whole is determined as provided by Tax Code, §5.10.

(3) The comptroller may determine and report other measures of appraisal accuracy and uniformity it deems useful and informative.

(l) Certification of taxable values in school districts in which Government Code, §403.302(d)(9)(B) is applicable. The comptroller will determine separate taxable values to reflect value subject to maintenance and operations tax rates and value subject to interest and sinking fund tax rates in school districts in which Government Code, §403.302(d)(9)(B) is applicable. Such values will be certified to the commissioner of education, published, and delivered as required under Government Code, §403.302.

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

Filed with the Office of the Secretary of State on September 22, 2011.

TRD-201103931
Ashley Harden
General Counsel
Comptroller of Public Accounts
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For further information, please call: (512) 475-0387

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PART 4. EMPLOYEES RETIREMENT SYSTEM OF TEXAS

CHAPTER 87. DEFERRED COMPENSATION

34 TAC §87.35

The Employees Retirement System of Texas (ERS) proposes new §87.35, concerning Roth 457 Contributions.

As a result of legislation in the 81st Legislative Session, House Bill 2283 added §609.5021 to the Texas Government Code regarding the ability of the Board of Trustees to add a qualified Roth investment option to the Texa$aver 457 Plan. Therefore, ERS is proposing to add new §87.35 to establish a qualified Roth contribution program in accordance with Section 402A of the Internal Revenue Code of 1986, wherein an employee may designate all or a portion of the employee's contributions under a 457 Plan as a Roth contribution at the time the contribution is made. This section is added to update the ERS rules governing the Texa$aver 457 Plan for the various changes related to that legislation.

Section 87.35, concerning Roth 457 Contributions, is being proposed to reflect the standards, procedures and requirements that the plan administrator will use to implement designated Roth contributions in the Texa$aver 457 Plan.

Paula A. Jones, General Counsel and Chief Compliance Officer, has determined that for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Ms. Jones also determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing the rules will be to permit plan participants to receive the benefits allowed by Section 402A of the Internal Revenue Code of 1986 and other relevant federal laws and regulations by providing them the additional option of a Roth contribution in the 457 Plan, and to make the rules conform to Texas legislation. There are no known anticipated costs to persons who are required to comply with the rules as proposed and, to her knowledge, small businesses should not be affected.

Comments on the proposed new rule may be submitted to Paula A. Jones, General Counsel and Chief Compliance Officer, Employees Retirement System of Texas, P.O. Box 13207, Austin, Texas 78711-3207, or you may email Ms. Jones at *paula.jones@ers.state.tx.us.* The deadline for receiving comments is Monday, November 7, 2011, at 10:00 a.m.

The new section is proposed under Texas Government Code §609.006 and §609.508 which provide authorization for the ERS Board of Trustees to adopt rules for the deferred compensation plan and to conform the deferred compensation plan to federal law.

No other statutes are affected by the proposal.

§87.35. Roth 457 Contributions.

(a) General application. This section will apply to a Designated Roth Contribution permitted by the plan administrator on or after January 1, 2012. As of this effective date, the plan may accept an elective deferral designated as a Roth contribution made on behalf of a participant. A participant's Designated Roth Contribution shall be allocated to a separate account maintained for those deferrals as described in subsection (e) of this section. Unless specifically stated otherwise, a Designated Roth Contribution shall be treated as an elective deferral for all purposes under the plan.

(b) "Designated Roth Contribution" defined. A Designated Roth Contribution is an elective deferral that is:

(1) designated irrevocably by the participant at the time of the deferral election as a Designated Roth Contribution that is being made in lieu of all or a portion of the pre-tax deferrals that the participant is otherwise eligible to make under the plan as a Regular 457 Plan Contribution; and

(2) treated by the employer as included in the participant's income at the time the participant would have received that amount in cash if the participant had not made a deferral election.

(c) "Regular 457 Plan Contribution" defined. A Regular 457 Plan Contribution is any deferral to the participant's Texa$aver 457 Plan account that is not a Designated Roth Contribution.

(d) Limitation of plan contributions. Each participant may designate any portion of his/her 457 Plan contributions as a Designated Roth Contribution; provided, however, that a participant's Designated Roth Contribution and Regular 457 Plan Contribution, either considered together or separately for any plan year, shall never be permitted to exceed the contribution limitations of the Internal Revenue Code.

(e) Separate accounting. Contributions and withdrawals of a Designated Roth Contribution will be credited and debited to the Roth contribution account maintained for each participant. The plan will maintain a record of the amount of each participant's Designated Roth Contribution in his/her Roth contribution account. Gains, losses and other credits or charges must be separately allocated on a reasonable and consistent basis to each participant's Roth contribution account and to the participant's other accounts under the plan as applicable. No contributions, other than a Designated Roth Contribution, any properly attributable earnings and eligible rollover contributions, will be credited to the participant's Roth contribution account.

(f) Eligible rollover contributions. Eligible rollover contributions of a Designated Roth Contribution made from an applicable retirement plan described in Internal Revenue Code Section 402A(e(1) are allowed and shall be credited to the participant's Roth contribution account. Participants shall not be permitted to convert any Regular 457 Plan Contributions or any funds within the participant's 457 or 401(k) accounts into Designated Roth Contributions.

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

Filed with the Office of the Secretary of State on September 23, 2011.

TRD-201103967
Paula A. Jones
General Counsel and Chief Compliance Officer
Employees Retirement System of Texas
Earliest possible date of adoption: November 6, 2011
For further information, please call: (512) 867-7711

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PART 11. OFFICE OF THE FIRE FIGHTERS' PENSION COMMISSIONER

CHAPTER 306. CREDITABLE SERVICE FOR MEMBERS OF THE TEXAS EMERGENCY SERVICES RETIREMENT SYSTEM

34 TAC §306.2

The State Board of Trustees of the Texas Emergency Services Retirement System (System) proposes new §306.2 determining general conditions that would apply if a volunteer fire fighter pension plan chooses to merge a preexisting plan into the System when making an election to join the statewide system. Existing Texas Government Code §862.004 specifically authorizes the board to adopt rules for the merger of existing pension plans into the System, and this would be the board's first exercise of that authority.

The board proposes new §306.2, concerning Merger of Existing Pension Plan into Pension System, on the ground that mergers of preexisting plans are increasingly likely within the system, and a fairly uniform design for incorporation of such plans is in the interest of the System and its constituent parts.

Sherri Walker, Commissioner, has determined that the public benefit for the first five years that the rule is in effect will be to ensure that the System has a consistent policy for incorporating individual retirement plans into a statewide plan that is actuarially sound and meets the needs of its very deserving public servants.

There would be no cost to local governments, except as they choose, as a result of adoption of the rule. The System would gain added actuarial soundness as a result of adoption of the rule. There would be no cost to the state as a result of the proposed new rule.

Small businesses or individuals would not be affected by the adoption of the rule.

Comments on the proposed rule may be submitted in writing to Sherri Walker, Commissioner, Office of the Fire Fighters' Pension Commissioner, P.O. Box 12577, Austin, Texas 78711-2577, not later than November 15, 2011. Comments may also be submitted electronically to rules@ffpc.state.tx.us or faxed to (512) 936-3480.

The new rule is proposed under the statutory authority of Texas Government Code, Title 8, Subtitle H, Texas Emergency Services Retirement System, §862.004.

No other statutes, articles, or codes are affected by the proposed new rule.

§306.2. Merger of Existing Pension Plan into Pension System.

(a) Subject to approval by the state board, the governing body of a department that elects to participate in the pension system shall merge into the pension system any existing defined-benefit pension plan it operates for emergency services personnel.

(b) The pension system actuary shall determine the prior service costs of the merging plan according to generally accepted actuarial standards. The participating department shall pay the determined prior service costs not later than the 10th anniversary of the effective date of merger. Interest on the prior service costs accrues at the assumed rate of investment return at the time determination of the prior service costs is made, except that interest is waived if the department completes payment not later than the first anniversary of the effective date of merger.

(c) On the effective date of merger, the participating department shall transfer all assets and liabilities of the former pension plan to the pension system. The pension system shall commingle the transferred assets with other assets of the system for investment purposes, but the costs of granting prior service credit must be determined on an actuarially sound basis for the cost-sharing pension system.

(d) The pension system shall begin paying benefits being paid to annuitants by the merging plan on the effective date of merger. Prior service credit granted as a result of a merger is creditable as if it were performed as a member of the pension system, subject to the requirements of Section 66, Article XVI, Texas Constitution.

(e) A department may not purchase prior service credit under §306.1 of this title (relating to Prior Service Credit for Members of Participating Departments) for any service that is credited under the terms of a merger agreement.

(f) The details of how the assets of the merging plan will be divided among the liability for the benefits being paid to annuitants on the effective date of the merger, the prior service costs, and future monthly contributions must be described in the merger agreement between the participating department and the pension system.

(g) This section applies only to a merger that takes effect on or after the effective date of this section.

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

Filed with the Office of the Secretary of State on September 20, 2011.

TRD-201103882
Sherri Walker
Commissioner
Office of the Fire Fighters' Pension Commissioner
Earliest possible date of adoption: November 6, 2011
For further information, please call: (512) 936-3372

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CHAPTER 310. ADMINISTRATION OF THE TEXAS EMERGENCY SERVICES RETIREMENT SYSTEM

34 TAC §310.3

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

The State Board of Trustees of the Texas Emergency Services Retirement System (System) proposes the repeal of §310.3, requiring the board to issue a request for proposal for actuarial services at least once every four years. Texas Government Code §865.006(a) requires the board to employ an actuary, and general law--Texas Government Code §802.101--requires an actuarial valuation at least once every three years. Should the book value of System assets reach $100 million, general law (Texas Government Code §802.1012) will require an audit of actuarial services at least once every five years (current value is just under $60 million).

The board proposes to repeal §310.3 on the ground that the period for review and renewal of actuarial services is best left up to negotiated contracts, rather than an arbitrary period. The board would retain its flexibility to evaluate the quality of actuarial services at any time.

Sherri Walker, Commissioner, has determined that the public benefit for the first five years that the rule is repealed will be to ensure that the System has greater flexibility to meet economic and investment market demands as conditions warrant.

There would be no cost to local governments as a result of repeal of the rule. The state would gain added flexibility in eliminating a costly procedure not timed to economic or actuarial realities.

Small businesses or individuals would not be affected by the repeal of the rule.

Comments on the proposed repeal of the rule may be submitted in writing to Sherri Walker, Commissioner, Office of the Fire Fighters' Pension Commissioner, P.O. Box 12577, Austin, Texas 78711-2577, not later than November 15, 2011. Comments may also be submitted electronically to rules@ffpc.state.tx.us or faxed to (512) 936-3480.

The rule is proposed to be repealed under the statutory authority of Texas Government Code, Title 8, Subtitle H, Texas Emergency Services Retirement System, §865.006(b).

No other statutes, articles, or codes are affected by the proposed repealed rule.

§310.3. Review of Actuarial Services.

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

Filed with the Office of the Secretary of State on September 20, 2011.

TRD-201103881
Sherri Walker
Commissioner
Office of the Fire Fighters' Pension Commissioner
Earliest possible date of adoption: November 6, 2011
For further information, please call: (512) 936-3372

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 9. MENTAL RETARDATION SERVICES--MEDICAID STATE OPERATING AGENCY RESPONSIBILITIES

SUBCHAPTER D. HOME AND COMMUNITY-BASED SERVICES (HCS) PROGRAM

40 TAC §§9.158, 9.159, 9.166, 9.192, 9.193

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §9.158, concerning process for enrollment of applicants; §9.159, concerning IPC; and §9.166, concerning renewal and revision of an IPC; new §9.192, concerning service limits; and new §9.193, concerning exception to service limits, in Chapter 9, Mental Retardation Services--Medicaid State Operating Agency Responsibilities.

BACKGROUND AND PURPOSE

The purpose of the amendments and new sections is to implement the 2012-2013 General Appropriations Act (Article II, Special Provisions, Section 17, House Bill 1, 82nd Legislature, Regular Session, 2011) which requires DADS to adjust the amount of all community services, including Home and Community-Based Services (HCS) Program services. The rules in Chapter 9, Subchapter D, describe the requirements for operation of the HCS Program. Regarding the requirement to adjust community services, the amendments and new rules establish service limits, effective through August 31, 2013, for the following HCS Program services: adaptive aids, audiology, behavioral support, dietary services, occupational therapy services, physical therapy, social work, speech and language pathology, supported employment, and supported home living. For each service, the service limit is based on the 90th percentile of paid units for individuals who received the service during fiscal year 2010. These service limits describe the maximum amount of services an individual in the HCS Program may receive without being granted an exception. In addition, the amendments and new rules describe the exception process by which a service coordinator or program provider (based on information from an individual, legally authorized representative, service coordinator, or program provider) may request that DADS allow an individual to receive services in excess of these service limits. Further, the new rules provide that an exception may not be requested to the existing service limit for dental treatment, minor home modifications, and respite. The new rules also provide that the current limits for adaptive aids and supported employment remain in place even if DADS grants an exception to the new, lower service limits.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §9.158(n)(2) requires that a service coordinator, when submitting an initial individual plan of care (IPC) that includes a service component for which a service limit is described in new §9.192(b) is exceeded, submit a completed Request for Exception to Service Limit form to DADS and keep a copy of the completed form in the individual's record.

The proposed amendment to §9.159(c) adds new paragraph (2) requiring a service coordinator or program provider to, when an IPC includes a service component for which a service limit described in new §9.192(b) is exceeded, request an exception to the service limit in accordance with proposed new §9.193.

The proposed amendment to §9.166(a)(3) requires that an individual's service planning team and the program provider develop a proposed renewal IPC in accordance with §9.159(c). The proposed amendment also restructures §9.166(e)(2) and adds a new subparagraph (D) requiring a program provider to, if a proposed renewal or revised IPC includes a service component for which a service limit described in new §9.192(b) is exceeded, submit a completed Request for Exception to Service Limit to DADS and keep a copy of the completed form in the individual's record.

Proposed new §9.192 establishes service limits (the maximum amount of services an individual in the HCS Program may receive without being granted an exception), effective through August 31, 2013, for the following HCS Program services: adaptive aids, audiology, behavioral support, dietary services, occupational therapy services, physical therapy, social work, speech and language pathology, supported employment, and supported home living. The proposed new section also states the current service limit for dental treatment, minor home modifications, and respite and that these services are not subject to an exception granted by DADS. Further the proposed new section lists the service limits that are effective September 1, 2013, for adaptive aids, dental treatment, minor home modifications, respite, and supported employment.

Proposed new §9.193, describes the exception process by which a service coordinator or program provider requests that DADS allow an individual to receive services in excess of the service limits described in new §9.192(b). The proposed new section also provides that the current limits for adaptive aids and supported employment remain in place even if DADS grants an exception to the new, lower service limits.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments and new sections are in effect, there are foreseeable implications relating to costs or revenues of state government. There are no foreseeable implications relating to costs or revenues of local governments.

The effect on state government for the first five years the proposed amendments and new sections are in effect is an estimated reduction in costs of $1,349,913 in fiscal year (FY) 2012; $1,878,632 in FY 2013; $0.00 in FY 2014; $0.00 in FY 2015; and $0.00 in FY 2016.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendments and new sections will not have an adverse economic effect on small businesses or micro-businesses, because any new requirements imposed by these rules do not require program providers to incur a cost.

PUBLIC BENEFIT AND COSTS

Jon Weizenbaum, DADS Deputy Commissioner, has determined that, for each year of the first five years the amendments and new sections are in effect, the public benefit expected as a result of enforcing the amendments and new sections is a cost savings for the state, while ensuring that an individual enrolled in the HCS Program continues to receive needed program services.

Mr. Weizenbaum anticipates that there will not be an economic cost to persons who are required to comply with the amendments and new sections. The amendments and new sections will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Dana Williamson at (512) 438-3385 in DADS Waiver and State Plan Division, Center for Policy and Innovation. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-11R01, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, TX 78751; faxed to (512) 438-5759; or e-mailed to *rulescomments@dads.state.tx.us.* To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register.* The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 11R01" in the subject line.

A hearing to accept public comment regarding the proposal will be held at 8:30 a.m., Tuesday, October 18, 2011, in the Public Hearing Room of the John H. Winters Building, 701 W. 51st Street, Austin, Texas. The hearing is being held to comply with the requirements of Texas Government Code, §2001.029(b), in the event a request is made in accordance with that subsection. Persons with disabilities who will need auxiliary aids or services at the hearing are asked to call the Center for Consumer and External Affairs at (512) 438-4563, at least three days before the date of the hearing so appropriate arrangements can be made.

STATUTORY AUTHORITY

The amendments and new sections are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The amendments and new sections affect Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§9.158. Process for Enrollment of Applicants.

(a) DADS notifies an MRA, in writing, of an HCS Program vacancy in the MRA's local service area and directs the MRA to offer the program vacancy to an applicant:

(1) whose registration date, assigned in accordance with §9.157(a)(1) of this subchapter (relating to Maintenance of HCS Program Interest list), is earliest on the statewide interest list for the HCS Program as maintained by DADS;

(2) whose registration date, assigned in accordance with §9.157(a)(1) of this subchapter is earliest on the local service area interest list for the HCS Program as maintained by the MRA, in accordance with §9.157 of this subchapter;

(3) for whom DADS has proposed to terminate or has terminated TxHmL Program services because the applicant no longer meets the eligibility criteria described in §9.556(a)(5) and (8) of this chapter (relating to Eligibility Criteria); or

(4) who is a member of a target group identified in the approved HCS waiver application.

(b) Except as provided in subsection (c) of this section, the MRA must make the offer of program vacancy in writing and deliver it to the applicant or LAR by regular United States mail or by hand delivery.

(c) The MRA must make the offer of program vacancy to an applicant described in subsection (a)(4) of this section who is currently receiving services in a state supported living center or a state mental health facility as defined by §2.253 of this title (relating to Definitions) in accordance with DADS procedures.

(d) The MRA must include in a written offer that is made in accordance with subsection (a)(1), (2), or (3) of this section:

(1) a statement that:

(A) if the applicant or LAR does not respond to the offer of the program vacancy within 30 calendar days after the MRA's written offer, the MRA withdraws the offer of the program vacancy, and:

(i) for an applicant who is under 22 years of age and residing in an institution listed in §9.157(a)(1)(B)(i) - (v) of this subchapter, the MRA removes the applicant's name from the HCS Program interest list in accordance with §9.157(a)(3)(F) of this subchapter and places the applicant's name on the HCS Program interest list with a new registration date that is the date of the MRA's notification; or

(ii) for an applicant other than one described in clause (i) of this subparagraph, the MRA removes the applicant's name from the HCS Program interest list in accordance with §9.157(a)(3)(F) of this subchapter; and

(B) if the applicant is currently receiving services from the MRA that are funded by general revenue and the applicant or LAR declines the offer of the program vacancy, the MRA terminates those services that are similar to services provided under the HCS Program; and

(2) information relating to the time frame requirements described in subsection (f) of this section using the Deadline Notification form, which is found at www.dads.state.tx.us.

(e) If an applicant or LAR responds to an offer of program vacancy, the MRA must:

(1) provide the applicant, LAR, and, if the LAR is a not family member, at least one family member (if possible) both an oral and written explanation of the services and supports for which the applicant may be eligible, including the ICF/MR Program (both state supported living centers and community-based facilities), waiver programs under §1915(c) of the Social Security Act, and other community-based services and supports. The MRA must use the Explanation of Services and Supports document, which is found at www.dads.state.tx.us; and

(2) give the applicant or LAR the Verification of Freedom of Choice Form, Waiver Program which is found at www.dads.state.tx.us, to document the applicant's choice regarding the HCS Program and ICF/MR Program.

(f) The MRA must withdraw an offer of a program vacancy made to an applicant or LAR and remove the applicant's name from the HCS Program interest list if:

(1) within 30 calendar days after the MRA's offer made to the applicant or LAR in accordance with subsection (a)(1), (2), or (3) of this section, the applicant or LAR does not respond to the offer of the program vacancy;

(2) within seven calendar days after the applicant or LAR receives the Verification of Freedom of Choice, Waiver Program form from the MRA in accordance with subsection (e)(2) of this section, the applicant or LAR does not document the choice of HCS Program services over the ICF/MR Program using the Verification of Freedom of Choice, Waiver Program form; or

(3) within 30 calendar days after the applicant or LAR has received the contact information regarding all program providers in the MRA's local service area in accordance with subsection (l)(1) of this section, the applicant or LAR does not document the choice of a program provider using the Documentation of Provider Choice form.

(g) If the MRA withdraws an offer of a program vacancy made to an applicant and removes the applicant's name from the HCS Program interest list, the MRA must notify the applicant or LAR of such actions, in writing, by certified United States mail and:

(1) for an applicant who is under 22 years of age and residing in an institution listed in §9.157(a)(1)(B)(i) - (v) of this subchapter, include a statement that the applicant's name will be placed on the HCS Program interest list with a new registration date that is the date of the MRA's notification; or

(2) for an applicant other than one described in paragraph (1) of this subsection, include a statement that the applicant or the applicant's primary correspondent may request, orally or in writing, to have the applicant's name placed on the HCS Program interest list with a new registration date that is the date the applicant or LAR makes the request.

(h) If the applicant is currently receiving services from the MRA that are funded by general revenue and the applicant declines the offer of the program vacancy, the MRA must terminate those services that are similar to services provided under the HCS Program.

(i) If the MRA terminates an applicant's services in accordance with subsection (h) of this section, the MRA must notify the applicant or LAR of the termination, in writing, by certified United States mail and provide an opportunity for a review in accordance with §2.46 of this title (relating to Notification and Appeals Process).

(j) If the MRA notifies an applicant under 22 years of age or the applicant's LAR in accordance with subsection (g)(1) of this section, the MRA must coordinate with DADS to ensure the applicant's name is placed on the HCS Program interest list with a new registration date that is the date of the MRA's notification.

(k) If the applicant or LAR, on the applicant's behalf, chooses to enroll in the HCS Program the MRA must compile and maintain information necessary to process the request for enrollment in the HCS Program.

(1) If the applicant's financial eligibility for the HCS Program must be established, the MRA must initiate, monitor, and support the processes necessary to obtain a financial eligibility determination.

(2) The MRA must complete an MR/RC Assessment if an LOC determination is necessary in accordance with §9.161 and §9.163 of this subchapter (relating to LOC Determination and LON Assignment, respectively).

(A) The MRA must:

(i) perform or endorse a determination that the applicant has mental retardation in accordance with Chapter 5, Subchapter D of this title (relating to Diagnostic Eligibility for Services and Supports--Mental Retardation Priority Population and Related Conditions); or

(ii) verify that the applicant has been diagnosed by a licensed physician as having a related condition as defined in §9.203 of this chapter (relating to Definitions).

(B) The MRA must administer the ICAP and recommend an LON assignment to DADS in accordance with §9.163 and §9.164 of this subchapter (relating to DADS' Review of LON).

(C) The MRA must electronically transmit the completed MR/RC Assessment to DADS for approval in accordance with §9.161(a) and §9.163(a) of this subchapter and, if applicable, submit supporting documentation as required by §9.164(c) of this subchapter;

(3) The MRA must assign a service coordinator who, together with the applicant and LAR, must develop a PDP.

(4) The MRA must develop a proposed initial IPC with the applicant or LAR in accordance with §9.159(c) of this subchapter (relating to IPC).

(l) The service coordinator must:

(1) provide names and contact information to the applicant or LAR regarding available program providers in the MRA's local service area (i.e., program providers operating below their service capacity as identified in CARE);

(2) arrange for meetings and visits with potential program providers as requested by the applicant or LAR;

(3) review the proposed initial IPC with potential program providers as requested by the applicant or LAR;

(4) ensure that the applicant's or LAR's choice of a program provider is documented on the Documentation of Provider Choice Form and signed by the applicant or LAR;

(5) negotiate and finalize the proposed initial IPC and the date services will begin with the selected program provider, consulting with DADS if necessary to reach agreement with the selected program provider on the content of the proposed initial IPC and the date services will begin;

(6) ensure the individual or LAR signs and dates the proposed initial IPC;

(7) ensure the selected program provider signs and dates the proposed IPC, demonstrating agreement that the service components will be provided to the individual;

(8) sign and date the proposed initial IPC, which indicates that the service coordinator agrees that the requirements described in §9.159(c) of this subchapter have been met; and

(9) inform the applicant or LAR, orally and in writing, of the following reasons HCS Program services may be terminated:

(A) the individual no longer meets the eligibility criteria described in §9.155 of this subchapter (relating to Eligibility Criteria and Suspension of HCS Program Services); or

(B) the individual or LAR requests termination of HCS Program services.

(m) The MRA must:

(1) conduct permanency planning in accordance with §9.167(a) of this subchapter (relating to Permanency Planning); and

(2) discuss CDS with the applicant or LAR in accordance with §9.168(a) and (b) of this subchapter (relating to CDS).

(n) After the proposed initial IPC is finalized and signed in accordance with subsection (l)(5) - (8) of this section, the MRA must:

(1) electronically transmit the proposed initial IPC to DADS and:

(A) keep the original proposed initial IPC in the individual's record; and

(B) ensure the electronically transmitted proposed initial IPC contains information identical to that on the original proposed initial IPC; [~~and~~]

(2) if the IPC includes a service component that has a service limit described in §9.192(b) of this subchapter (relating to Service Limits) and the service limit is exceeded:

(A) submit to DADS a completed Request for an Exception to Service Limit form as required by §9.193(c) of this subchapter (relating to Exception to Service Limits); and

(B) keep a copy of the completed form in the individual's record; and

(3) [~~(2)~~] submit other required enrollment information to DADS.

(o) DADS notifies the applicant or LAR, the selected program provider, the CDSA, if applicable, and the MRA of its approval or denial of the applicant's enrollment. When the enrollment is approved, DADS authorizes the applicant's enrollment in the HCS Program through the automated enrollment and billing system and issues an enrollment letter that includes the effective date of the applicant's enrollment in the HCS Program.

(p) Prior to the individual's service begin date, the MRA must provide to the selected program provider and CDSA, if applicable, copies of all enrollment documentation and associated supporting documentation, including relevant assessment results and recommendations, the completed MR/RC Assessment, the proposed initial IPC, and the applicant's PDP.

(q) The selected program provider must not initiate services until notified of DADS' approval of the applicant's enrollment.

(r) The selected program provider must develop an implementation plan for HCS Program services that is based on the individual's PDP and authorized IPC.

(s) The MRA must retain in the applicant's record:

(1) the Verification of Freedom of Choice, Waiver Program form documenting the applicant's or LAR's choice of services;

(2) the Documentation of Provider Choice form documenting the applicant's or LAR's choice of a program provider, if applicable;

(3) the Deadline Notification form; and

(4) any other correspondence related to the offer of a program vacancy.

(t) Copies of the following forms and letters referenced in this section are available by contacting the Department of Aging and Disability Services, Provider Services Division, P.O. Box 149030, Mail Code W-521, Austin, Texas 78714-9030:

(1) Verification of Freedom of Choice, Waiver Program;

(2) Documentation of Provider Choice form; and

(3) Deadline Notification form.

§9.159. IPC.

(a) An MRA must initiate development of a proposed initial IPC for an applicant as required by §9.158(k)(4) of this subchapter (relating to Process for Enrollment of Applicants).

(b) A program provider must initiate development of a proposed renewal and proposed revised IPC for an individual as required by §9.166 of this subchapter (relating to Renewal and Revision of an IPC).

(c) An IPC must be based on the PDP and specify the type and amount of each service component to be provided to an individual, as well as services and supports to be provided by other sources during the IPC year.

(1) The type and amount of each service component in the IPC must be supported by:

(A) [~~(1)~~] documentation that other sources for the service component are unavailable and the service component does not replace existing supports, including natural supports or other sources for the service;

(B) [~~(2)~~] assessments of the individual that identify specific service components necessary for the individual to live in the community, to ensure the individual's health, safety, and welfare in the community, and to prevent the need for institutional services; and

(C) [~~(3)~~] documentation of deliberations and conclusions of the service planning team that the service components are based on the desired outcomes in the PDP and are necessary for the individual to live in the community, to ensure the individual's health, safety, and welfare in the community, and to prevent the need for institutional services.

(2) If the IPC includes a service component that has a service limit described in §9.192(b) of this subchapter (relating to Service Limits) and the service limit is exceeded, the MRA or program provider, as appropriate, must request an exception to the service limit in accordance with §9.193(c) of this subchapter (relating to Exception to Service Limits).

(d) A program provider must provide HCS Program services in accordance with an individual's authorized IPC.

(e) A program provider must retain in an individual's record results and recommendations of individualized assessments that support the individual's current need for each service component included in the IPC.

§9.166. Renewal and Revision of an IPC.

(a) Renewal of the IPC. At least annually and before the expiration of an individual's IPC, the individual's IPC must be renewed in accordance with this subsection and with DADS' instructions.

(1) At least 60 but no more than 90 calendar days before the expiration of an individual's IPC, a program provider must notify the service coordinator that the individual's IPC must be renewed.

(2) Upon notification in accordance with paragraph (1) of this subsection, the service planning team must review the individual's PDP and update it, if necessary. If the PDP is updated, the service coordinator must send a copy of the updated PDP to the program provider within 10 calendar days after the PDP is updated.

(3) At least 30 but no more than 60 calendar days before the expiration of the individual's IPC, the service planning team and the program provider must review the PDP and develop the proposed renewal IPC in accordance with §9.159(c) of this subchapter (relating to IPC), including completion of the CDS portion of the proposed renewal IPC, if applicable, and the non-HCS Program services.

(4) The program provider must, before the effective date of the proposed renewal IPC, develop an implementation plan for HCS Program services that is based on the individual's PDP and proposed renewal IPC.

(5) Within seven calendar days after development of the proposed renewal IPC as required by paragraph (3) of this subsection, the program provider must comply with the requirements in subsection (e)(1) and (2) of this section.

(6) Within seven calendar days after the program provider electronically transmits the proposed renewal IPC to DADS as required by subsection (e)(2) of this section, the service coordinator must comply with the requirements in subsection (e)(3) of this section.

(7) The program provider must provide HCS Program services in accordance with an implementation plan that is based on the individual's PDP and authorized renewal IPC.

(b) Revisions to the IPC. The service coordinator or the program provider may determine whether an individual's IPC needs to be revised to add a new HCS Program service or change the amount of an existing service.

(1) The service coordinator must notify the program provider if the service coordinator determines that the IPC needs to be revised.

(2) The program provider must notify the service coordinator if the program provider determines that the IPC needs to be revised.

(3) Within 14 calendar days after the notification required by paragraph (1) or (2) of this subsection:

(A) the service planning team and the program provider must develop a proposed revised IPC;

(B) the service planning team must revise the PDP, if appropriate, and if the PDP is not revised, the service coordinator must document the reasons for the proposed IPC revision;

(C) the program provider must revise the implementation plan for HCS Program services that is based on the individual's PDP and proposed revised IPC; and

(D) the program provider must comply with the requirements in subsection (e)(1) and (2) of this section.

(4) Within seven calendar days after the program provider electronically transmits the proposed revised IPC to DADS as required by subsection (e)(2) of this section, the service coordinator must comply with the requirements in subsection (e)(3) of this section.

(5) The program provider must provide HCS Program services in accordance with an implementation plan that is based on the individual's PDP and the authorized revised IPC.

(c) Revision of IPC before delivery of services. Except as provided by subsection (d) of this section, if an individual's service planning team and program provider determine that the IPC must be revised to add a new HCS Program service or change the amount of an existing service, the program provider must revise the IPC in accordance with subsection (b) of this section before the delivery of a new or increased service.

(d) Emergency provision of services and revision of the IPC.

(1) If an emergency necessitates the provision of an HCS Program service to ensure the individual's health and safety and the service is not on the IPC or exceeds the amount on the IPC, the program provider may provide the service before revising the IPC. The program provider must, within one business day after providing the service:

(A) document:

(i) the circumstances that necessitated providing the new HCS Program service or the increase in the amount of the existing HCS Program service; and

(ii) the type and amount of the service provided;

(B) notify the service coordinator of the emergency provision of the service and that the IPC must be revised; and

(C) upon request, provide a copy of the documentation required by subparagraph (A) of this paragraph to the service coordinator.

(2) Within seven calendar days after providing the service:

(A) the service planning team and the program provider must develop a proposed revised IPC;

(B) the service planning team must revise the PDP, if appropriate;

(C) the program provider must revise the implementation plan for HCS Program services that is based on the individual's PDP and proposed revised IPC; and

(D) the program provider must comply with the requirements in subsection (e)(1) and (2) of this section.

(3) Within seven calendar days after the program provider electronically transmits the proposed revised IPC to DADS as required by subsection (e)(2) of this section, the service coordinator must comply with the requirements in subsection (e)(3) of this section.

(4) The program provider must provide HCS Program services in accordance with an implementation plan that is based on the individual's PDP and the authorized revised IPC.

(e) Submitting a proposed renewal and revised IPC to DADS. A proposed renewal or revised IPC must be submitted to DADS for authorization in accordance with this subsection.

(1) The program provider must:

(A) sign and date the proposed renewal or revised IPC demonstrating agreement that the service components will be provided to the individual; and

(B) ensure that a proposed renewal or revised IPC is signed and dated by the individual or LAR.

(2) The program provider must:

(A) electronically transmit a proposed renewal or revised IPC to DADS;[. ~~The program provider must~~]

(B) keep the original proposed renewal or revised IPC in the individual's record and, within three calendar days after electronic transmission, ensure the service coordinator receives a paper copy of the signed proposed renewal or revised IPC;[. ~~The program provider must~~]

(C) ensure the electronically transmitted proposed renewal or revised IPC contains information identical to that on the original proposed renewal or revised IPC; and[.]

(D) if the IPC includes a service component that has a service limit described in §9.192(b) of this subchapter (relating to Service Limits) and the service limit is exceeded:

(i) submit to DADS a completed Request for an Exception to Service Limit as required by §9.193(c) of this subchapter (relating to Exception to Service Limits); and

(ii) keep a copy of the completed form in the individual's record.

(3) The service coordinator must review the electronically transmitted proposed renewal or revised IPC and:

(A) enter the service coordinator's name and date in CARE;

(B) enter in CARE whether the service coordinator agrees or disagrees that the requirements described in §9.159(c) of this subchapter (relating to IPC) have been met; and

(C) if the service coordinator disagrees that the requirements described in §9.159(c) of this subchapter have been met, notify the individual or LAR, the program provider, and DADS of the service coordinator's disagreement in accordance with DADS [~~DADS'~~] instructions.

§9.192. Service Limits.

(a) The service limits listed in subsection (b) of this section are in effect through August 31, 2013.

(b) Subject to an exception granted by DADS in accordance with §9.193 of this subchapter (relating to Exception to Service Limits), the following limits apply to an individual's services:

(1) An individual may receive, during an IPC year, adaptive aids having a maximum cost of $1,057. The program provider may request, in accordance with the *HCS Program Billing Guidelines*, authorization of a requisition fee that is in addition to the $1,057 service limit.

(2) The maximum number of hours of a specialized therapy that an individual may receive during an IPC year is as follows:

(A) for audiology, three hours;

(B) for behavioral support, ten hours;

(C) for dietary services, three hours;

(D) for occupational therapy services, eight hours;

(E) for physical therapy, 30 hours;

(F) for social work, ten hours; and

(G) for speech and language pathology, 49 hours.

(3) An individual may receive a maximum of 126 hours of supported employment during an IPC year.

(4) The maximum number of hours of supported home living that an individual may receive during an IPC year is as follows:

(A) for an individual with an LON 1: 923 hours;

(B) for an individual with an LON 5: 1,337 hours;

(C) for an individual with an LON 8: 1,868 hours;

(D) for an individual with an LON 6: 2,098 hours; and

(E) for an individual with an LON 9: 3,546 hours.

(c) The following limits apply to an individual's services and are not subject to an exception granted by DADS in accordance with §9.193 of this subchapter.

(1) An individual may receive dental treatment having a maximum cost of $1,000 during an IPC year. The program provider may request, in accordance with the *HCS Program Billing Guidelines*, authorization of a requisition fee that is in addition to the $1,000 service limit.

(2) During the time an individual is enrolled in the HCS Program, an individual may receive minor home modifications that have a maximum cost of $7,500, which may be paid in one or more IPC years.

(A) The program provider may request, in accordance with the *HCS Program Billing Guidelines*, authorization of a requisition fee that is in addition to the service limit.

(B) After reaching the maximum cost of $7,500, an individual may receive, during an IPC year, a maximum of $300 for repair and maintenance.

(3) An individual may receive a maximum of 300 hours of respite during an IPC year.

(d) Effective September 1, 2013, the following service limits apply to the individual:

(1) for adaptive aids, $10,000 during an IPC year;

(2) for dental treatment, $1,000 during an IPC year;

(3) for minor home modifications, $7,500 during the time period the individual is enrolled in the HCS Program, which may be paid in one or more IPC years;

(4) for respite, 300 hours during an IPC year; and

(5) for supported employment, 150 hours during an IPC year.

§9.193. Exception to Service Limits.

(a) Proposed initial IPC If an individual, LAR, or service coordinator has information demonstrating that exceeding a service limit described in §9.192(b) of this subchapter (relating to Service Limits) is necessary to meet the criteria described in §9.159(c) of this subchapter (relating to IPC), the service coordinator must request an exception to the service limit in accordance with subsection (c) of this section.

(b) Proposed renewal or proposed revised IPC If an individual, LAR, or program provider has information demonstrating that exceeding a service limit described in §9.192(b) of this subchapter is necessary to meet the criteria described in §9.159(c) of this subchapter, the program provider must request an exception to the service limit in accordance with subsection (c) of this section.

(c) Requesting an exception.

(1) To request an exception to a service limit described in §9.192(b) of this subchapter, a service coordinator or program provider, as appropriate, must:

(A) complete the Request for an Exception of Service Limit form, found at www.dads.state.tx.us, in accordance with form instructions;

(B) include on the form a detailed explanation of why providing the service in excess of the service limit is necessary to meet the criteria described in §9.159(c) of this subchapter; and

(C) submit to DADS any additional information or documentation requested by DADS.

(2) The service coordinator or program provider, as appropriate, must submit the completed Request for an Exception of Service Limit form to DADS.

(A) For a proposed initial IPC, the service coordinator must submit the completed form in accordance with §9.158(n)(2) of this subchapter (relating to Process for Enrollment of Applicants); or

(B) For a proposed renewal or revised IPC, the program provider must submit the completed form in accordance with §9.166(e)(2)(D) of this subchapter (relating to Renewal and Revision of an IPC).

(d) DADS review of request for an exception. DADS grants an exception to a service limit if, after a review of the request submitted in accordance with subsection (c) of this section, DADS determines that providing the service component in excess of the service limit is necessary to meet the criteria described in §9.159(c) of this subchapter.

(e) Limit to Exception. An exception granted under subsection (d) of this section is subject to:

(1) for adaptive aids, a maximum of $10,000 during an IPC year;

(2) for supported employment, a maximum of 150 hours during an IPC year; and

(3) the IPC cost limit as described in §9.155(a)(3) of this subchapter (relating to Eligibility Criteria and Suspension of HCS Program Services).

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

Filed with the Office of the Secretary of State on September 26, 2011.

TRD-201103981
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Proposed date of adoption: December 1, 2011
For further information, please call: (512) 438-3734

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CHAPTER 18. NURSING FACILITY ADMINISTRATORS

SUBCHAPTER B. REQUIREMENTS FOR LICENSURE

40 TAC §18.16

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), an amendment to §18.16, concerning examinations, in Chapter 18, Nursing Facility Administrators.

BACKGROUND AND PURPOSE

The purpose of the amendment is to implement Senate Bill (SB) 867, 82nd Legislature, Regular Session, 2011. SB 867 amended Texas Occupations Code, Chapter 54, to require reasonable examination accommodation for a licensing examinee diagnosed as having dyslexia. The proposal allows an applicant with a disability, including dyslexia as defined in the Texas Education Code §51.970 (relating to Instructional Material for Blind and Visually Impaired Students and Students with Dyslexia), to request reasonable accommodation for examination in accordance with and the Americans with Disabilities Act.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §18.16 adds new subsection (e) and reformats the remaining subsections. New subsection (e) contains requirements for providing for a reasonable accommodation for a licensing examinee with dyslexia or any other disability under the Americans with Disabilities Act.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendment is in effect, enforcing or administering the amendment does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendment will not have an adverse economic effect on small businesses or micro-

businesses, because DADS contracts with vendors to administer the examinations for nursing facility administrator licenses. The vendors currently comply with the Americans with Disabilities Act to provide for reasonable accommodation for a licensing examinee. The proposed rule adds the requirements for reasonable accommodation to Chapter 18 to correspond to current practice.

PUBLIC BENEFIT AND COSTS

Veronda Durden, DADS Assistant Commissioner for Regulatory Services, has determined that, for each year of the first five years the amendment is in effect, the public benefit expected as a result of enforcing the amendment is that licensing examinees with dyslexia or another disability under the Americans with Disabilities Act will be able to receive reasonable accommodation to take the examination for a nursing facility administrator license.

Ms. Durden anticipates that there will not be an economic cost to persons who are required to comply with the amendment. The amendment will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Jennifer Morrison at (512) 438-4624 in DADS Regulatory Services. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-11R13, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, TX 78751; faxed to (512) 438-5759; or e-mailed to *rulescomments@dads.state.tx.us.* To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register.* The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 11R13" in the subject line.

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Health and Safety Code, Subchapter I, which provides for nursing facility administrator licensing and a licensing examination approved by DADS; and Occupations Code, §54.003, which requires a state agency to provide reasonable accommodation for a licensing examinee.

The amendment implements Texas Government Code, §531.0055; Texas Human Resources Code, §161.021; Texas Health and Safety Code, Subchapter I; and Texas Occupations Code, §54.003.

§18.16. Examinations.

(a) Applicants seeking licensure as nursing facility administrators from DADS must pass the following examinations:

(1) state examination on the nursing facility requirements found in Chapter 19 of this title (relating to Nursing Facility Requirements for Licensure and Medicaid Certification); and

(2) NAB examination.

(b) Applicants register for examination at a designated NAB website by:

(1) submitting an application for approval to test; and

(2) paying the $155 state examination and $285 NAB examination fees on-line.

(c) DADS sends e-mails notifying applicants of their eligibility to take the test.

(d) Applicants must not take any examination without DADS approval.

(e) An applicant with a disability, including an applicant with dyslexia as defined in Texas Education Code §51.970 (relating to Instructional Material for Blind and Visually Impaired Students and Students with Dyslexia), may request a reasonable accommodation for the examination under the Americans with Disabilities Act.

(f) [~~(e)~~] Applicants complete the on-line state and NAB examinations at PES.

(g) [~~(f)~~] DADS notifies applicants of test scores within two weeks after receiving examination results from the testing agency.

(h) [~~(g)~~] An applicant who fails an examination and wants to retest must pay the appropriate state or NAB examination fee stated in subsection (b)(2) of this section.

(i) [~~(h)~~] Applicants failing the state or NAB examination three consecutive times must complete another minimum 1,000-hour AIT internship before retesting.

(j) [~~(i)~~] Applicants previously licensed as nursing facility administrators by passing the comprehensive examination and who have an expired licensed for 12 months or longer or voluntarily surrendered their license must pass the NAB and state examinations to obtain a new license.

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

Filed with the Office of the Secretary of State on September 26, 2011.

TRD-201103994
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Proposed date of adoption: December 1, 2011
For further information, please call: (512) 438-3734

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CHAPTER 45. COMMUNITY LIVING ASSISTANCE AND SUPPORT SERVICES

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §§45.103, 45.104, 45.212, 45.214, 45.216, 45.223, 45.225, 45.403, 45.405, 45.602, 45.604 - 45.606, 45.609, 45.612 - 45.617, 45.704, 45.804, 45.806, 45.901, and 45.902, concerning definitions, description of the CLASS program, process for enrollment of an individual, development of enrollment IPC, DADS review of an enrollment IPC, renewal and revision of an IPC, utilization review of an IPC by DADS, denial of a CLASS program service, reduction of a CLASS program service, authorization limit for adaptive aids and amount for repair and maintenance, requirements for authorization to purchase an adaptive aid costing $500 or more, requirements for specifications for an adaptive aid, requirements for bids of an adaptive aid, requirements of DSA following provision of adaptive aid, authorization limit for minor home modifications and amount for repair and maintenance, requirements for authorization to purchase a minor home modification, requirements for specifications for a minor home modification, bid requirements for a minor home modification, inspection of a minor home modification, time frames for completion of minor home modification, training of CMA staff persons, training of DSA staff persons, respite and dental treatment, administrative errors, and financial errors; new §45.218, concerning service limits, and new §45.219, concerning exception to service limits, in Chapter 45, Community Living Assistance and Support Services.

BACKGROUND AND PURPOSE

The purpose of the amendments and new sections is to implement the 2012-2013 General Appropriations Act (Article II, Special Provisions, Section 17, House Bill 1, 82nd Legislature, Regular Session, 2011), which requires DADS to adjust the amount of all community services, including Community Living and Assistance and Support Services (CLASS) Program services, and make reductions related to provider requisition fees as cost-saving measures for the state budget. The rules in Chapter 45 describe the requirements for operation of the CLASS Program. Regarding the requirement to adjust community services, the amendments and new rules establish service limits, effective through August 31, 2013, for the following CLASS Program services: adaptive aids, dental treatment, behavioral support, minor home modifications, occupational therapy, physical therapy, prevocational services, respite, speech therapy, and specialized therapies. For each service, other than for specialized therapies, the service limit is based on the 90th percentile of paid units for individuals who received the service during fiscal year 2010. For specialized therapies, the service limit is based on the 75th percentile of paid units for specialized therapy services, combined, for each individual who received the services during fiscal year 2010. These service limits describe the maximum amount of services an individual in the CLASS Program may receive without being granted an exception. In addition, the amendments and new rules describe the exception process by which a case management agency (CMA) (based on information from an individual, legally authorized representative (LAR), the CMA, or a direct services agency (DSA)) requests that DADS allow an individual to receive services in excess of these service limits and provide that if DADS denies an exception, the requested services will be denied or reduced. The new rules also provide that the current limits for adaptive aids, dental treatment, minor home modifications, and respite remain in place even if DADS grants an exception to the new, lower service limits. Regarding the requirement to reduce requisition fees, the amendments eliminate the process by which a CMA obtains authorization for payment to a DSA of specifications for adaptive aids and minor home modifications and also deletes references to a requisition fee for adaptive aids and minor home modifications.

The purpose of the proposed rules is to include the current service limit for transition assistance services and to reflect DADS current practice that any services requested above that limit will be denied. The proposed rules also clarify DADS current practice of reviewing an individual plan of care (IPC) to determine if an adaptive aid or minor home modification is requested in accordance with the requirements in Subchapter F of this chapter, regarding the processes to obtain an adaptive aid and minor home modification. Because the proposed rules eliminate payment for specifications, the proposed rules restructure the process to obtain an adaptive aid or minor home modification so that a CMA is no longer required to obtain authorization for payment to the DSA for specifications.

In addition, the proposed rules enact current policy regarding the provision of respite to an individual who has a service provider of habilitation, support family services, or continued family services or has an employee in the consumer directed services (CDS) option of habilitation. The current policy is set forth, in part, in Information Letter No. 11-17, dated June 8, 2011.

The proposed rules remove nutritional services as a specialized therapy and make it a separate service because nutritional services now has a billing service code that is separate from the billing service code for the other services that comprise specialized therapies and because it is not subject to a service limit like the other specialized therapy services.

The proposed rules eliminate the requirement that CMA and DSA staff persons complete DADS computer-based training, available on DADS website, and instead require that staff complete training currently described in the *CLASS Provider Manual.* This change is made because DADS does not have computer-based training for this purpose.

Further, the proposed rules remove duplicative language, clarify language, and update cross-references to rule citations.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §45.103 revises the definition of "respite," removes "nutritional services" from the definition of "specialized therapies" and updates a rule citation.

The proposed amendment to §45.104 removes "nutritional services" from the list of services that comprise specialized therapies and lists it as a separate service.

The proposed amendment to §45.212 clarifies that DADS reviews an IPC to determine if an adaptive aid or minor home modification is requested in accordance with the requirements in Subchapter F. The proposed amendment also states that DADS reviews an IPC to determine if the requirements in new §45.218, regarding service limits, are met.

The proposed amendment to §45.214 clarifies that if transition assistance services are on an IPC, the amount must be within the current service limit. In addition, the proposed amendment reorganizes subsection (d) to describe the process a CMA must follow if a requested CLASS Program service does not meet the criteria in subsection (b), the requirements in subsection (f), or exceeds the service limit for transition assistance services. The proposed amendment to subsection (d) includes the process a CMA must follow if a service on a proposed IPC exceeds a ser-

vice limit in proposed new §45.218(b). Further, the amendment to §45.214 deletes information regarding denial of an individual's request for enrollment or CLASS Program service, because that information is duplicated in §45.216, and adds a new subsection referencing §45.216.

The proposed amendment to §45.216 provides that DADS, as part of its review of a proposed enrollment IPC, reviews a completed Request for an Exception to Service Limit form if the IPC includes a service described in new §45.218(b) in an amount that exceeds the service limit. The proposed amendment reverses the order of subsections (c) and (d) to create a more logical sequence. Further, the proposed amendment reorganizes the language in subsection (e) that describes the process DADS follows in denying a requested CLASS Program service and modifying an individual's IPC and adds that the basis for such denial or modification includes exceeding the service limit for transition assistance services or DADS denial of a request for an exception to a service limit described in new §45.218(b).

Proposed new §45.218 establishes service limits (the maximum amount of services an individual in the CLASS Program may receive without being granted an exception), effective through August 31, 2013, for the following CLASS Program services: adaptive aids, dental treatment, behavioral support, minor home modifications, occupational therapy, physical therapy, prevocational services, respite, speech therapy, and specialized therapies. The proposed new section states the current service limit for transition assistance services and that this service is not subject to an exception granted by DADS. Further, the proposed new section lists the service limits that are effective September 1, 2013, for adaptive aids, dental treatment, minor home modifications, respite, and transition assistance services.

Proposed new §45.219 describes the exception process by which a CMA (based on information from an individual, LAR, the CMA, or DSA) requests that DADS allow an individual to receive services in excess of the service limits described in new §45.218(b). The proposed new section also provides that the current limits for adaptive aids, dental treatment, minor home modifications, and respite remain in place even if DADS grants an exception to the new, lower service limits.

The proposed amendment to §45.223 includes the process a CMA must follow if a service on a proposed IPC exceeds a service limit described in proposed new §45.218(b). The proposed amendment reorganizes subsection (e) that describes the process a CMA must follow if a requested CLASS Program service does not meet the criteria in subsection (b), the requirements in subsection (f), or exceeds the service limit for transition assistance services. Further, the proposed amendment to §45.223 removes language regarding termination, denial, or proposed reduction of CLASS Program services, because that language is duplicated in §45.225, and adds a new subsection referencing §45.225.

The proposed amendment to §45.225 clarifies that DADS reviews an IPC to determine if an adaptive aid or minor home modification is requested in accordance with the requirements in Subchapter F. The proposed amendment states that DADS reviews an IPC to determine if the requirements in proposed new §45.218 regarding service limits are met. Further, the proposed amendment reorganizes subsection (d) to describe the process DADS follows in denying or proposing reduction of a requested CLASS Program service and modifying an individual's IPC and adds language stating that the basis for such denial, reduction, and modification includes exceeding the service limit for transition assistance services or DADS denial of a request for an exception to a service limit described in proposed new §45.218(b).

The proposed amendment to §45.403 states that an individual's service may be denied if the service limit for transition assistance services is exceeded or DADS denies a request for an exception to a service limit described in proposed new §45.218(b).

The proposed amendment to §45.405 states that an individual's service may be proposed for reduction if the service limit for transition assistance services is exceeded or DADS denies a request for an exception to a service limit described in proposed new §45.218(b).

The proposed amendment to §45.602 changes the maximum amount of $10,000 that DADS may authorize as payment for adaptive aids and dental treatment to the new service limit of $6,935 listed in proposed new §45.218(b). The proposed amendment states that the new authorization limit is subject to an exception granted by DADS under proposed new §45.219 and, if an exception is granted, the maximum amount that may be authorized is $10,000.

The proposed amendment to §45.604 deletes the requirement for a CMA to obtain authorization for payment to the DSA for a specifications for adaptive aids, restructures the process for a DSA and CMA to obtain DADS authorization for an adaptive aid, and updates rule citations.

The proposed amendment to §45.605 deletes language regarding DADS authorization of payment for specifications of an adaptive aid and the requirement that a DSA obtain an invoice for the cost of specifications.

The proposed amendment to §45.606 and §45.609 updates rule citations.

The proposed amendment to §45.612 changes the maximum amount of $10,000 that DADS may authorize as payment for minor home modifications to the new service limit of $7,515 listed in proposed new §45.218(b). The proposed amendment states that the new authorization limit is subject to an exception granted by DADS under proposed new §45.219 and, if an exception is granted, the maximum amount that may be authorized is $10,000.

The proposed amendment to §45.613 deletes the requirement of a CMA to obtain authorization for payment to the DSA for a specifications for minor home modifications, restructures the process for a DSA and CMA to obtain DADS authorization for a minor home modification, and updates rule citations.

The proposed amendment to §45.614 deletes language regarding DADS authorization of payment for specifications of a minor home modification and the requirement that a DSA obtain an invoice for the cost of the specifications.

The proposed amendment to §§45.615 - 45.617 updates rule citations.

The proposed amendment to §45.704 deletes the requirement that a CMA staff person complete DADS computer-based training available on DADS website and require instead that a staff person complete training described in the *CLASS Provider Manual.*

The proposed amendment to §45.804 deletes the requirement that a DSA staff person complete DADS computer-based training available on DADS website and require instead require that a

staff person complete training described in the CLASS Provider Manual.

The proposed amendment to §45.806 changes the maximum amount of 30 calendar days of respite that an individual may receive to the new service limit of 29 calendar days listed in proposed new §45.218(b). The proposed amendment states that the new limit is subject to an exception granted by DADS under proposed new §45.219 and, if an exception is granted, the maximum amount of respite an individual may receive is 30 calendar days. The proposed amendment changes the maximum amount of $10,000 that DADS may authorize as payment for adaptive aids and dental treatment to the new service limit of $6,935 listed in proposed new §45.218(b). The proposed amendment states that the new authorization limit is subject to an exception granted by DADS under proposed new §45.219 and, if an exception is granted, the maximum amount that may be authorized is $10,000.

The proposed amendment to §45.901 deletes language regarding recoupment of a requisition fee.

The proposed amendment to §45.902 deletes references to a requisition fee.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments and new sections are in effect, there are foreseeable implications relating to costs or revenues of state government. There are no foreseeable implications relating to costs or revenues of local governments.

The effect on state government for the first five years the proposed amendments and new sections are in effect is an estimated reduction in cost of $3,627,082 in fiscal year (FY) 2012; $4,958,234 in FY 2013; $0.00 in FY 2014; $0.00 in FY 2015; and $0.00 in FY 2016.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendments and new sections may have an adverse economic effect on small businesses and micro-businesses, because DADS projects some CLASS providers will be adversely impacted by a loss of revenue when they are not permitted to submit claims for the costs of obtaining specifications for adaptive aids and minor home modifications, or the administrative effort in requisitioning adaptive aids, dental treatment, medical supplies, and minor home modifications. In 2008, 12 entities provided CLASS services to individuals. Based on 2008 Texas Medicaid cost reports for the CLASS Program (the most recent data available), of these entities, seven were small businesses, of which one was a micro-business.

The projected economic impact for a small business and micro-business is $6.17 per month, per individual.

In preparing the proposed rules, the agency considered several alternatives to minimize the adverse economic impact on small and micro-businesses. Specifically, the agency considered continuing to reimburse all CLASS providers for the cost of obtaining specifications and requisitioning items, but determined that the savings required by the General Appropriations Act (Article II, Special Provisions, Section 17(a)(5), H.B. 1, 82nd Legislature, Regular Session, 2011) would not be achieved using that alternative. Similarly, the agency considered continuing to reimburse CLASS providers that are small and micro-businesses for the cost of obtaining specifications and requisitioning items, but determined that the required savings would not be achieved using that alternative either, especially given the high percentage of CLASS providers that are small and micro-businesses. Finally, the agency considered reducing reimbursement for the cost of obtaining specifications and requisitioning items to Home and Community Based Services (HCS) Program providers, in addition to CBA and CLASS providers to save costs and lessen the effect on CLASS providers. However, the agency determined that HCS providers would be subjected a disproportionately large reduction in revenue, as compared to CLASS providers, because other reductions in revenue have been imposed on HCS providers recently. Thus, the agency determined that small and micro-businesses will incur the cost of complying with the proposed rules in an effort to achieve the cost savings required by the General Appropriations Act.

PUBLIC BENEFIT AND COSTS

Jon Weizenbaum, DADS Deputy Commissioner, has determined that, for each year of the first five years the amendments and new sections are in effect, the public benefit expected as a result of enforcing the amendments and new sections is a cost savings for the state, while ensuring that an individual enrolled in the CLASS Program continues to receive needed program services.

Mr. Weizenbaum anticipates that there will be an economic cost to persons who are required to comply with the amendments and new sections. The probable economic cost to persons required to comply with the amendments and new sections for each year of the first five years the amendments and new sections are in effect will be $6.17 per month, per individual. The amendments and new sections will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Dana Williamson at (512) 438-3385 in DADS Waiver and State Plan Division, Center for Policy and Innovation. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-11R01, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, TX 78751; faxed to (512) 438-5759; or e-mailed to *rulescomments@dads.state.tx.us.* To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register.* The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 11R01" in the subject line.

A hearing to accept public comment regarding the proposal will be held at 8:30 a.m., Tuesday, October 18, 2011, in the Public Hearing Room of the John H. Winters Building, 701 W. 51st Street, Austin, Texas. The hearing is being held to comply with

the requirements of Texas Government Code, §2001.029(b), in the event a request is made in accordance with that subsection. Persons with disabilities who will need auxiliary aids or services at the hearing are asked to call the Center for Consumer and External Affairs at (512) 438-4563, at least three days before the date of the hearing so appropriate arrangements can be made.

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §45.103, §45.104

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The amendments affect Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§45.103. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

(1) Actively involved--Significant, ongoing, and supportive involvement with an individual by a person, as determined by the individual, based on the person's:

(A) interactions with the individual;

(B) availability to the individual for assistance or support when needed; and

(C) knowledge of, sensitivity to, and advocacy for the individual's needs, preferences, values, and beliefs.

(2) Adaptive aid--An item or service that enables an individual to retain or increase the ability to perform ADLs or perceive, control, or communicate with the environment in which the individual lives, and:

(A) is included in the list of adaptive aids in the *CLASS Provider Manual;* or

(B) is the repair and maintenance of an adaptive aid on such list that is not covered by a warranty.

(3) ADL--Activity of daily living.

(4) Aquatic therapy--A service that involves a low-risk exercise method done in water to improve an individual's range of motion, flexibility, muscular strengthening and toning, cardiovascular endurance, fitness, and mobility.

(5) Auditory integration training/auditory enhancement training--Specialized training that assists an individual to cope with hearing dysfunction or over-sensitivity to certain frequency ranges of sound by facilitating auditory processing skills and exercising the middle ear and auditory nervous system.

(6) Behavior support plan--An individualized written plan prescribing the systematic application of behavioral techniques and containing specific objectives to decrease or eliminate targeted behavior.

(7) Behavioral Support--Specialized interventions that assist an individual in increasing adaptive behaviors and replacing or modifying maladaptive or socially unacceptable behaviors that prevent or interfere with the individual's inclusion in the community and which consist of the following activities:

(A) assessment of the targeted behavior so that a behavior support plan may be developed;

(B) development of an individualized behavior support plan;

(C) training of and consultation with an individual, family member, or other persons involved in the individual's care regarding the implementation of the behavior support plan;

(D) monitoring and evaluation of the effectiveness of the behavior support plan;

(E) modification, as necessary, of the behavior support plan based on monitoring and evaluation of the plan's effectiveness; and

(F) counseling with and educating an individual, family members, or other persons involved in the individual's care about the techniques to use in assisting the individual to control maladaptive or socially unacceptable behaviors.

(8) Business day--A day when DADS state office is open.

(9) Case management--A service that assists an individual in the following:

(A) assessing the individual's needs;

(B) enrolling into the CLASS Program;

(C) developing the individual's IPC;

(D) coordinating the provision of CLASS Program services;

(E) monitoring the effectiveness of the CLASS Program services and the individual's progress toward achieving the outcomes identified for the individual;

(F) revising the individual's IPC, as appropriate;

(G) accessing non-CLASS Program services;

(H) resolving a crisis that occurs regarding the individual; and

(I) advocating for the individual's needs.

(10) Catchment area--As determined by DADS, a geographic area composed of multiple Texas counties.

(11) CDS option--Consumer directed services option. A service delivery option as defined in §41.103 of this title (relating to Definitions) in which an individual or LAR employs and retains service providers and directs the delivery of program services.

(12) CDSA--Consumer directed service agency. An entity, as defined in §41.103 of this title that provides financial management services.

(13) CMA--Case management agency. A program provider that contracts with DADS to provide case management.

(14) CLASS Program--The Community Living Assistance and Support Services Program.

(15) CMS--The Centers for Medicare and Medicaid Services. CMS is the agency within the United States Department of Health and Human Services that administers Medicare and Medicaid programs.

(16) Competitive employment--Employment that pays an individual at or above the greater of:

(A) the applicable minimum wage; or

(B) the prevailing wage paid to individuals without disabilities for performing the same or similar work.

(17) Continued family services--Services provided to an individual 18 years of age or older who resides with a support family, as described in §45.531 of this chapter (relating to Support Family Requirements), that allow the individual to reside successfully in a community setting by training the individual to acquire, retain, and improve self-help, socialization, and daily living skills or assisting the individual with ADLs. The individual must be receiving support family services immediately before receiving continued family services. Continued family services consist of services described in §45.533 of this chapter (relating to Support Family Duties).

(18) DADS--The Texas Department of Aging and Disability Services.

(19) Denial--An action taken by DADS that:

(A) rejects an individual's request for enrollment into the CLASS Program;

(B) disallows a CLASS Program service requested on an IPC that was not authorized on the prior IPC; or

(C) disallows a portion of the amount or level of a CLASS Program service requested on an IPC that was not authorized on the prior IPC.

(20) Dental treatment--A service that:

(A) consists of the following:

(i) emergency dental treatment, which is procedures necessary to control bleeding, relieve pain, and eliminate acute infection; operative procedures that are required to prevent the imminent loss of teeth; and treatment of injuries to the teeth or supporting structures;

(ii) routine preventative dental treatment, which is examinations, x-rays, cleanings, sealants, oral prophylaxes, and topical fluoride applications;

(iii) therapeutic dental treatment, which includes fillings, scaling, extractions, crowns, pulp therapy for permanent and primary teeth; restoration of carious permanent and primary teeth; maintenance of space; and limited provision of removable prostheses when masticatory function is impaired, when an existing prosthesis is unserviceable, or when aesthetic considerations interfere with employment or social development;

(iv) orthodontic dental treatment, which is procedures that include treatment of retained deciduous teeth; cross-bite therapy; facial accidents involving severe traumatic deviations; cleft palates with gross malocclusion that will benefit from early treatment; and severe, handicapping malocclusions affecting permanent dentition with a minimum score of 26 as measured on the Handicapping Labio-lingual Deviation Index; and

(v) dental sedation, which is sedation necessary to perform dental treatment including non-routine anesthesia, (for example, intravenous sedation, general anesthesia, or sedative therapy prior to routine procedures) but not including administration of routine local anesthesia only; and

(B) does not include cosmetic orthodontia.

(21) Direct services--CLASS Program services other than case management, financial management services, support consultation, support family services, continued family services, or transition assistance services.

(22) DSA--Direct services agency. A program provider that is a HCSSA that contracts with DADS to provide direct services.

(23) DFPS--The Texas Department of Family and Protective Services.

(24) Enrollment IPC--The first IPC developed for an individual upon enrollment into the CLASS Program.

(25) Financial management services--A service, as defined in §41.103 of this title, that is provided to an individual who chooses to participate in CDS.

(26) Habilitation--A service that allows an individual to reside successfully in a community setting by training the individual to acquire, retain, and improve self-help, socialization, and daily living skills or assisting the individual with ADLs. Habilitation services consist of the following:

(A) habilitation training, which is interacting face-to-face with an individual who is awake to train the individual in the following activities:

(i) self-care;

(ii) personal hygiene;

(iii) household tasks;

(iv) mobility;

(v) money management;

(vi) community integration;

(vii) use of adaptive equipment;

(viii) management of caregivers;

(ix) personal decision making;

(x) interpersonal communication;

(xi) reduction of maladaptive behaviors;

(xii) socialization and the development of relationships;

(xiii) participating in leisure and recreational activities;

(xiv) use of natural supports and typical community services available to the public;

(xv) self-administration of medication; and

(xvi) strategies to restore or compensate for reduced cognitive skills;

(B) habilitation ADLs, which are:

(i) interacting face-to-face with an individual who is awake to assist the individual in the following activities:

(I) self-care;

(II) personal hygiene;

(III) ambulation and mobility;

(IV) money management;

(V) community integration;

(VI) use of adaptive equipment;

(VII) self-administration of medication;

(VIII) reinforce any therapeutic goal of the individual;

(IX) provide transportation to the individual; and

(X) protect the individual's health, safety and security;

(ii) interacting face-to-face or by telephone with an individual or an involved person regarding an incident that directly affects the individual's health or safety; and

(iii) performing one of the following activities that does not involve interacting face-to-face with an individual:

(I) shopping for the individual;

(II) planning or preparing meals for the individual;

(III) housekeeping for the individual;

(IV) procuring or preparing the individual's medication; or

(V) arranging transportation for the individual; and

(C) habilitation delegated, which is tasks delegated by a registered nurse to a service provider of habilitation in accordance with 22 TAC Chapter 224 (relating to Delegation of Nursing Tasks By Registered Professional Nurses to Unlicensed Personnel For Clients With Acute Conditions Or In Acute Care Environments) or Chapter 225 (relating to RN Delegation to Unlicensed Personnel and Tasks Not Requiring Delegations In Independent Living Environments For Clients With Stable and Predictable Conditions).

(27) HCSSA--A home and community support services agency licensed by DADS in accordance with Texas Health and Safety Code Chapter 142.

(28) HHSC--The Texas Health and Human Services Commission.

(29) Hippotherapy--The provision of therapy that:

(A) involves an individual interacting with and riding on horses;

(B) is designed to improve the balance, coordination, focus, independence, confidence, and motor and social skills of the individual; and

(C) is provided by two service providers at the same time, as described in §45.803(d)(11) of this chapter (relating to Qualifications of DSA Staff Persons).

(30) ICF/MR--Intermediate care facility for persons with mental retardation or related conditions.

(31) Individual--A person seeking to enroll or who is enrolled in the CLASS Program.

(32) Institutional services--Medicaid-funded services provided in a nursing facility licensed in accordance with Texas Health and Safety Code, Chapter 242, or in an ICF/MR certified by DADS for a capacity of more than six persons.

(33) Integrated employment--Employment at a work site that provides an individual with an opportunity for routine interaction with people without disabilities other than the individual's work site supervisor or service providers.

(34) IPC--Individual plan of care. A written plan developed by an individual's service planning team that:

(A) describes:

(i) the type and amount of each CLASS Program service to be provided to the individual; and

(ii) services and supports to be provided to the individual through non-CLASS Program resources including natural supports, medical services, and educational services; and

(B) is authorized by DADS in accordance with Subchapter B of this chapter.

(35) IPC cost--The estimated annual cost of CLASS Program services on an IPC.

(36) IPC period--The effective period of an enrollment IPC and a renewal IPC as follows:

(A) for an enrollment IPC, the period of time from the effective date of an enrollment IPC, as described in §45.214(h) [~~§45.214(j)~~] of this chapter (relating to Development of Enrollment IPC), until the first calendar day of the same month of the effective date in the following year; and

(B) for a renewal IPC, a 12-month period of time starting on the effective date of a renewal IPC as described in §45.222(b) of this chapter (relating to Renewal IPC and Requirement for Authorization to Continue Services).

(37) IPP--Individual program plan. A written plan that describes the goals and objectives to be met by the provision of each CLASS Program service on an individual's IPC that:

(A) are supported by justifications;

(B) are measurable; and

(C) have timelines.

(38) LAR--Legally authorized representative. A person authorized by law to act on behalf of an individual with regard to a matter described in this chapter, and may include a parent, guardian, or managing conservator of a minor, or the guardian of an adult.

(39) Licensed vocational nursing--The provision of vocational nursing, as defined in Texas Occupations Code, Chapter 301.

(40) Massage therapy--The provision of massage therapy as defined in Texas Occupations Code, Chapter 455.

(41) Medicaid--A program administered by CMS and funded jointly by the states and the federal government that pays for health care to eligible groups of low-income people.

(42) Medicaid waiver program--A service delivery model authorized under §1915(c) of the Social Security Act in which certain Medicaid statutory provisions are waived by CMS.

(43) Mental retardation--Consistent with Texas Health and Safety Code, §591.003, significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and originating during the developmental period (0-18 years of age).

(44) Minor home modification--A physical adaptation to an individual's residence that is necessary to address the individual's specific needs and that enables the individual to function with greater

independence in the individual's residence or to control his or her environment and:

(A) is included on the list of minor home modifications in the *CLASS Provider Manual;* or

(B) except as provided by §45.618(c) of this chapter (relating to Repair or Replacement of Minor Home Modification), is the repair and maintenance of a minor home modification purchased through the CLASS Program that is needed after one year has elapsed from the date the minor home modification is complete and that is not covered by a warranty.

(45) Music therapy--The use of musical or rhythmic interventions to restore, maintain, or improve an individual's social or emotional functioning, mental processing, or physical health.

(46) Natural supports--Assistance from persons, including family members and friends, that helps an individual live in a community and that occurs naturally within the individual's environment.

(47) Nutritional services--The provision of nutrition services as defined in Texas Occupations Code, Chapter 701.

(48) Occupational therapy--The practice of occupational therapy as described in Texas Occupations Code, Chapter 454.

(49) Own home or family home--A residence that is not:

(A) an ICF/MR licensed or subject to being licensed in accordance with Texas Health and Safety Code, Chapter 252, or certified by DADS;

(B) a nursing facility licensed or subject to being licensed in accordance with Texas Health and Safety Code, Chapter 242;

(C) an assisted living facility licensed or subject to being licensed in accordance with Texas Health and Safety Code, Chapter 247;

(D) a residential child-care operation licensed or subject to being licensed by DFPS unless it is a foster family home or a foster group home;

(E) a facility licensed or subject to being licensed by the Department of State Health Services;

(F) a facility operated by the Department of Assistive and Rehabilitative Services;

(G) a residential facility operated by the Texas Youth Commission, a jail, or prison; or

(H) a setting in which two or more dwellings, including units in a duplex or apartment complex, single family homes, or facilities listed in subparagraphs (A) - (G) of this paragraph, but excluding supportive housing under Section 811 of the National Affordable Housing Act of 1990, meet all of the following criteria:

(i) the dwellings create a residential area distinguishable from other areas primarily occupied by persons who do not require routine support services because of a disability;

(ii) most of the residents of the dwellings are persons with mental retardation, a related condition, or a physical disability; and

(iii) the residents of the dwellings are provided routine support services through personnel, equipment, or service facilities shared with the residents of the other dwellings.

(50) Physical therapy--The provision of physical therapy as defined in Texas Occupations Code, Chapter 453.

(51) Physician--A person who is licensed as a physician by the Texas Medical Board [~~Texas State Board of Medical Examiners~~] in accordance with Chapter 155 of the Texas Occupations Code or is licensed as physician or osteopath in accordance with the laws of Oklahoma, New Mexico, Arkansas, or Louisiana.

(52) Prevocational services--Services that are not job-task oriented and are provided to an individual who the service planning team does not expect to be employed (without receiving supported employment) within one year after prevocational services are to begin, to prepare the individual for employment. Prevocational services consist of:

(A) assessment of vocational skills an individual needs to develop or improve upon;

(B) individual and group instruction regarding barriers to employment;

(C) training in skills:

(i) that are not job-task oriented;

(ii) that are related to goals identified in the individual's habilitation plan;

(iii) that are essential to obtaining and retaining employment, such as the effective use of community resources, transportation, and mobility training; and

(iv) for which an individual is not compensated more than 50 percent of the federal minimum wage or industry standard, whichever is greater;

(D) training in the use of adaptive equipment necessary to obtain and retain employment; and

(E) transportation between the individual's place of residence and prevocational services work site when other forms of transportation are unavailable or inaccessible.

(53) Program provider--An entity that delivers CLASS Program case management or direct services under a provider agreement.

(54) Provider agreement--A written agreement between DADS and a program provider that obligates the program provider to provide CLASS Program services.

(55) Recreational therapy--Recreational or leisure activities that assist an individual to restore, remediate or habilitate the individual's level of functioning and independence in life activities, promote health and wellness, and reduce or eliminate the activity limitations caused by an illness or disabling condition.

(56) Reduction--An action taken by DADS as a result of a review of a revised IPC or renewal IPC that decreases the amount or level of a service authorized by DADS on the prior IPC.

(57) Registered nurse--A person licensed to provide professional nursing in accordance with Texas Occupations Code, Chapter 301.

(58) Registered nursing--The provision of professional nursing, as defined in Texas Occupations Code, Chapter 301.

(59) Related condition--As defined in the Code of Federal Regulations (CFR), Title 42, §435.1010, a severe and chronic disability that:

(A) is attributed to:

(i) cerebral palsy or epilepsy; or

(ii) any other condition, other than mental illness, found to be closely related to mental retardation because the condition results in impairment of general intellectual functioning or adaptive behavior similar to that of individuals with mental retardation and requires treatment or services similar to those required for individuals with mental retardation;

(B) is manifested before the individual reaches 22 years of age;

(C) is likely to continue indefinitely; and

(D) results in substantial functional limitation in at least three of the following areas of major life activity:

(i) self-care;

(ii) understanding and use of language;

(iii) learning;

(iv) mobility;

(v) self-direction; and

(vi) capacity for independent living.

(60) Relative--A person related to another person within the fourth degree of consanguinity or within the second degree of affinity. A more detailed explanation of this term is included in the *CLASS Provider Manual.*

(61) Renewal IPC--An IPC developed for an individual in accordance with §45.223 of this chapter (relating to Renewal and Revision of an IPC) because the IPC will expire within 90 calendar days.

(62) Respite--The temporary assistance with an individual's ADLs if the individual has the same residence as a person who routinely provides such assistance and support to the individual, and the person is temporarily unavailable to provide such assistance and support [~~and is not a service provider of habilitation, support family services, or continued family services or an employee in the CDS option of habilitation~~].

(A) If the person who routinely provides assistance and support, resides with the individual, and is temporarily unavailable to provide assistance and support, is a service provider of habilitation or an employee in the CDS option of habilitation, DADS does not authorize respite unless:

(i) the service provider or employee routinely provides unpaid assistance and support with activities of daily living to the individual;

(ii) the amount of respite does not exceed the amount of unpaid assistance and support routinely provided; and

(iii) the service provider of respite or employee in the CDS option of respite does not have the same residence as the individual.

(B) If the person who routinely provides assistance and support, resides with the individual, and is temporarily unavailable to provide assistance and support, is a service provider of support family services or continued family services, DADS does not authorize respite unless:

(i) for an individual receiving support family services, the individual does not receive respite on the same day the individual receives support family services;

(ii) for an individual receiving continued family services, the individual does not receive respite on the same day the individual receives continued family services; and

(iii) the service provider of respite or employee in the CDS option of respite does not have the same residence as the individual.

(C) Respite services consist of the following:

(i) [~~(A)~~] interacting face-to-face with an individual who is awake to assist the individual in the following activities:

(I) [~~(i)~~] self-care;

(II) [~~(ii)~~] personal hygiene;

(III) [~~(iii)~~] ambulation and mobility;

(IV) [~~(iv)~~] money management;

(V) [~~(v)~~] community integration;

(VI) [~~(vi)~~] use of adaptive equipment;

(VII) [~~(vii)~~] self-administration of medication;

(VIII) [~~(viii)~~] reinforce any therapeutic goal of the individual;

(IX) [~~(ix)~~] provide transportation to the individual; and

(X) [~~(x)~~] protect the individual's health, safety, and security;

(ii) [~~(B)~~] interacting face-to-face or by telephone with an individual or an involved person regarding an incident that directly affects the individual's health or safety; and

(iii) [~~(C)~~] performing one of the following activities that does not involve interacting face-to-face with an individual:

(I) [~~(i)~~] shopping for the individual;

(II) [~~(ii)~~] planning or preparing meals for the individual;

(III) [~~(iii)~~] housekeeping for the individual;

(IV) [~~(iv)~~] procuring or preparing the individual's medication;

(V) [~~(v)~~] arranging transportation for the individual; or

(VI) [~~(vi)~~] protecting the individual's health, safety, and security while the individual is asleep.

(63) Revised IPC--An enrollment IPC or a renewal IPC that is revised during an IPC period in accordance with §45.223 of this chapter to add a new CLASS Program service or change the amount of an existing service.

(64) Service planning team--A planning team convened and facilitated by a CLASS Program case manager consisting of the following persons:

(A) the individual;

(B) if applicable, the individual's LAR;

(C) the case manager;

(D) a representative of the DSA;

(E) other persons whose inclusion is requested by the individual or LAR and who agree to participate; and

(F) a person selected by the DSA, with the approval of the individual or LAR, who is:

(i) professionally qualified by certification or licensure and has special training and experience in the diagnosis and habilitation of persons with the individual's related condition; or

(ii) directly involved in the delivery of services and supports to the individual.

(65) Service provider--A person who is an employee or contractor of the DSA who provides a direct service.

(66) Specialized licensed vocational nursing--The provision of licensed vocational nursing to an individual who has a tracheostomy or is dependent on a ventilator.

(67) Specialized registered nursing--The provision of registered nursing to an individual who has a tracheostomy or is dependent on a ventilator.

(68) Speech therapy--The provision of speech-language pathology as defined in Texas Occupations Code, Chapter 401.

(69) Specialized therapies--Services to promote skills development, maintain skills, decrease inappropriate behaviors, facilitate emotional well-being, create opportunities for socialization, or improve physical and medical status that consist of the following:

(A) aquatic therapy;

(B) hippotherapy;

(C) massage therapy;

(D) music therapy;

~~[(E) nutritional services;]~~

(E) [~~(F)~~] recreational therapy; and

(F) [~~(G)~~] therapeutic horseback riding.

(70) Staff person--A full-time or part-time employee of the program provider.

(71) Support consultation--A service, as defined in §41.103 of this title, that may be provided to an individual who chooses to participate in CDS.

(72) Supported employment--A service that assists an individual to sustain competitive, integrated employment.

(73) Support family services--Services provided to an individual under 18 years of age who resides with a support family, as described in §45.531 of this chapter, that allow the individual to reside successfully in a community setting by supporting the individual to acquire, maintain, and improve self-help, socialization, and daily living skills or assisting the individual with ADLs. Support family services consist of the services described in §45.533 of this chapter.

(74) Therapeutic horseback riding--The provision of therapy that:

(A) involves an individual interacting with and riding on horses;

(B) is designed to improve the balance, coordination, focus, independence, confidence, and motor and social skills of the individual; and

(C) is provided by only one service provider as described in §45.803(d)(10) of this chapter.

(75) Temporary admission--Being admitted for 180 consecutive calendar days or less.

(76) Transition assistance services--Services provided to a person who is receiving institutional services and is eligible for and enrolling into the CLASS Program. A more detailed description of this CLASS Program service is contained in Chapter 62 of this title (relating to Contracting to Provide Transition Assistance Services).

§45.104. Description of the CLASS Program.

(a) The CLASS Program is a Medicaid waiver program approved by CMS under §1915(c) of the Social Security Act. It provides community-based services and supports to an eligible individual as an alternative to the ICF/MR Program. CLASS Program services are intended to, as a whole, enhance the individual's integration into the community, maintain or improve the individual's independent functioning, and prevent the individual's admission to an institution.

(b) DADS operates the CLASS Program under the authority of HHSC.

(c) DADS limits the enrollment in the CLASS Program to the number of individuals approved by CMS or by available funding from the state.

(d) The CLASS program offers the following services:

(1) adaptive aids;

(2) auditory integration training/auditory enhancement training;

(3) behavioral support;

(4) case management;

(5) dental treatment;

(6) financial management services (only in CDS option);

(7) habilitation;

(8) licensed vocational nursing;

(9) minor home modifications;

(10) nutritional services;

(11) [~~(10)~~] occupational therapy;

(12) [~~(11)~~] physical therapy;

(13) [~~(12)~~] prevocational services;

(14) [~~(13)~~] registered nursing;

(15) [~~(14)~~] respite, which consists of:

(A) in-home respite; and

(B) out-of-home respite;

(16) [~~(15)~~] speech therapy;

(17) [~~(16)~~] specialized licensed vocational nursing;

(18) [~~(17)~~] specialized registered nursing;

(19) [~~(18)~~] specialized therapies, which consist of:

(A) aquatic therapy;

(B) hippotherapy;

(C) massage therapy;

(D) music therapy;

~~[(E) nutritional services;]~~

(E) [~~(F)~~] recreational therapy; and

(F) [~~(G)~~] therapeutic horseback riding;

(20) [~~(19)~~] support consultation (only in CDS option);

(21) [~~(20)~~] support family services;

(22) [~~(21)~~] continued family services;

(23) [~~(22)~~] supported employment; and

(24) [~~(23)~~] transition assistance services.

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

Filed with the Office of the Secretary of State on September 26, 2011.

TRD-201103982
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Proposed date of adoption: December 1, 2011
For further information, please call: (512) 438-3734

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SUBCHAPTER B. ELIGIBILITY, ENROLLMENT, AND REVIEW
DIVISION 2. ENROLLMENT PROCESS

40 TAC §§45.212, 45.214, 45.216, 45.218, 45.219

STATUTORY AUTHORITY

The amendments and new sections are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The amendments and new sections affect Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§45.212. Process for Enrollment of an Individual.

(a) Upon notification by DADS that an individual selected the CMA as a program provider, a CMA must assign a case manager to perform the following functions within 14 calendar days of DADS notification to the CMA:

(1) verify that the individual resides in the catchment area for which the individual's selected CMA and DSA have a CLASS Program provider agreement;

(2) conduct an initial face-to-face, in-home visit with the individual and LAR or person actively involved with the individual and during the visit provide an oral and written explanation of the following to the individual and LAR or person actively involved with the individual:

(A) CLASS Program services;

(B) the mandatory participation requirements of an individual as described in §45.302 of this chapter (relating to Mandatory Participation Requirements of an Individual);

(C) the CDS option as described in §45.217 of this division (relating to CDS Option);

(D) the right to request a fair hearing in accordance with §45.301 of this chapter (relating to Individual's Right to a Fair Hearing);

(E) that the individual and LAR or person actively involved with the individual may report an allegation of abuse, neglect, or exploitation or make a complaint by calling DADS toll-free telephone number (1-800-458-9858);

(F) the process by which the individual and LAR or person actively involved with the individual may file a complaint regarding case management as required by §45.707(c)(1) of this chapter (relating to CMA: Quality Management and Complaint Process);

(G) voter registration, if the individual is 18 years of age or older; and

(H) transition assistance services, if the individual is receiving institutional services; and

(3) obtain the signature of the individual or LAR on a Verification of Freedom of Choice form designating the choice for the individual of CLASS Program services over enrollment in the ICF/MR Program.

(b) The CMA must:

(1) within two business days of the case manager's face-to-face, in-home visit required by subsection (a)(2) of this section:

(A) collect and maintain the information necessary for the CMA and DSA to process the individual's request for enrollment into the CLASS Program in accordance with the *CLASS Provider Manual;* and

(B) provide the individual's selected DSA with the collected information required by subparagraph (A) of this paragraph;

(2) assist the individual or LAR in completing and submitting an application for Medicaid financial eligibility as required by §45.302(1) of this chapter (relating to Mandatory Participation Requirements of an Individual); and

(3) ensure that the case manager documents in the individual's record the progress toward completing a Medicaid application and enrollment into CLASS Program services.

(c) If an individual or LAR does not submit a Medicaid application to HHSC within 30 calendar days of the case manager's initial face-to-face, in-home visit as required by §45.302(1) of this chapter, but is making good faith efforts to complete the application, the CMA may extend, in 30-calendar day increments, the time frame in which the application must be submitted to HHSC, except as provided in paragraph (1) of this subsection.

(1) The CMA may not grant an extension that results in a time period of more than 365 calendar days from the date of the case manager's initial face-to-face, in-home visit.

(2) The CMA must ensure that the case manager documents each extension in the individual's record.

(d) If an individual or LAR does not submit a Medicaid application to HHSC as required by §45.302(1) of this chapter and is not making good faith efforts to complete the application, the CMA must request, in writing, that DADS withdraw the offer of a program va-

cancy made to the individual in accordance with §45.211(d)(3) of this subchapter (relating to Written Offer of a CLASS Program Vacancy).

(e) If DSAs serving the catchment area in which the individual resides are not willing to provide CLASS Program services to an individual because they have determined that they cannot ensure the individual's health and safety, the CMA must provide to DADS, in writing, the specific reasons the DSAs have determined that they cannot ensure the individual's health and safety.

(f) If the individual is receiving institutional services and anticipates needing transition assistance services, the case manager must, before the effective date of the enrollment IPC:

(1) provide the individual or LAR with a list of provider agencies of transition assistance services; and

(2) using the Transition Assistance Services Assessment and Authorization form as described in the *CLASS Provider Manual*, assist the individual or LAR to:

(A) identify the individual's essential needs for transition assistance services; and

(B) provide estimated amount of transition assistance services needed by the individual.

(g) A DSA must, after receiving notice from DADS that an individual selected the DSA as a program provider:

(1) assign a registered nurse to perform the following functions within 14 calendar days after information is provided to the DSA by the CMA as required by subsection (b)(1)(B) of this section:

(A) conduct an initial face-to-face, in-home visit with the individual and LAR or person actively involved with the individual;

(B) perform nursing and adaptive behavior assessments of the individual; and

(C) complete the Mental Retardation/Related Conditions (MR/RC) Assessment in accordance with the *CLASS Provider Manual;* and

(2) within 14 calendar days after information is provided to the DSA by the CMA as required by subsection (b)(1)(B) of this section, inform the individual and LAR or person actively involved with the individual, orally and in writing, of the process by which they may file a complaint regarding CLASS Program services provided by the DSA as required by §45.808(1) of this chapter (relating to DSA: Complaint Process).

(h) A DSA must ensure that:

(1) the diagnosis of the individual's condition documented on the MR/RC Assessment is authorized by a physician; and

(2) the completed MR/RC assessment is submitted to DADS for a decision regarding the individual's diagnostic eligibility.

(i) DADS reviews the completed MR/RC Assessment in accordance with §45.213 of this division (relating to Determination of Diagnostic Eligibility by DADS).

(j) If a DSA receives written notice from DADS that diagnostic eligibility is approved for an individual, as described in §45.213(d), the DSA must notify the individual's CMA of DADS decision within one business day after receiving the notice from DADS.

(k) If DADS denies diagnostic eligibility, DADS sends written notice to the individual or LAR of the denial of the individual's request for enrollment into the CLASS Program in accordance with §45.402(b) of this chapter (relating to Denial of a Request for Enrollment into the CLASS Program).

(l) If the CMA receives notice from the DSA that DADS approves diagnostic eligibility, the CMA must ensure that a proposed enrollment IPC, habilitation plan, and IPPs for the individual are developed and submitted to DADS for review in accordance with §45.214 of this division (relating to Development of Enrollment IPC).

(m) DADS reviews a proposed enrollment IPC in accordance with §45.216 of this division (relating to DADS review of an Enrollment IPC) to determine if:

(1) the IPC meets the eligibility criterion described in §45.201(a)(5) of this subchapter (relating to Eligibility Criteria) and the requirements in §45.214(a)(1)(B) of this division; and

(2) the CLASS Program services specified in the IPC meet the requirements described in §45.214(b) of this division, Subchapter F of this chapter (relating to Adaptive Aids and Minor Home Modifications), and §45.218 of this division (relating to Service Limits).

(n) If DADS notifies the individual's CMA, in accordance with §45.216(d) of this division, that the individual's request for enrollment is approved:

(1) the CMA must, within one business day after DADS notification, notify the individual or LAR and the individual's DSA of DADS decision; and

(2) the CMA and DSA must initiate CLASS Program services for the individual in accordance with the individual's IPC within seven calendar days after DADS notification.

(o) If DADS notifies the CMA that the individual's request for enrollment is approved but action is being taken as described in §45.216(e) of this division, including modifying the individual's proposed enrollment IPC, the CMA must:

(1) implement the modified enrollment IPC; and

(2) send the individual or LAR written notice of the denial of the CLASS Program service in accordance with §45.403(c) of this chapter (relating to Denial of a CLASS Program Service).

(p) The CMA and DSA must not provide CLASS Program services to an individual until notified by DADS that the individual's request for enrollment into the CLASS Program has been approved.

§45.214. Development of Enrollment IPC.

(a) A CMA must, within 30 calendar days after notification by the DSA of DADS approval of diagnostic eligibility for an individual as required by §45.212(j) of this division (relating to Process for Enrollment of an Individual), ensure that an individual's case manager:

(1) convenes a service planning team meeting in which the service planning team develops:

(A) a habilitation plan, as described in the *CLASS Provider Manual*, based on information obtained from assessments conducted and observations made by the DSA as required by §45.212(g) of this division [~~chapter (relating to Process for Enrollment of an Individual)~~]; and

(B) a proposed enrollment IPC that [~~specifies~~]:

(i) identifies the type of CLASS Program service to be provided to an individual;

(ii) specifies the number of units of each CLASS Program service to be provided to the individual and for transition assistance services, is within the service limit described in §45.218(c) of this division (relating to Service Limits); and

(iii) describes any other service or support to be provided to the individual through sources other than the CLASS Program; and

(2) develops an IPP for each CLASS Program service listed on the proposed enrollment IPC.

(b) The case manager must ensure that each CLASS Program service on the proposed enrollment IPC:

(1) is necessary to protect the individual's health and welfare in the community;

(2) addresses the individual's related condition;

(3) is not available to the individual through any other source, including the Medicaid State Plan, other governmental programs, private insurance, or the individual's natural supports;

(4) is the most appropriate type and amount of CLASS Program service to meet the individual's needs; and

(5) is cost effective.

(c) If the individual or LAR, case manager, and DSA agree on the type and amount of services to be included in a proposed enrollment IPC, the case manager must:

(1) ensure that during the service planning team meeting required by subsection (a) of this section the proposed enrollment IPC is reviewed, signed as evidence of agreement, and dated by:

(A) the individual or LAR;

(B) the case manager; and

(C) the DSA; and

(2) no later than 30 calendar days before the effective date of the proposed enrollment IPC as determined by the service planning team:

(A) submit the following to DADS for its review:

(i) the proposed enrollment IPC;

(ii) the IPPs; [~~and~~]

(iii) the habilitation plan; and

(iv) if the IPC includes a service described in §45.218(b) of this division in an amount that exceeds the service limit for that service, a completed Request for an Exception to Service Limit form as required by §45.219(b) of this division (relating to Exception to Service Limits); and

(B) send a copy of the proposed enrollment IPC to the CDSA, if applicable.

(d) If the individual or LAR requests a CLASS Program service that the case manager or DSA has determined does not meet the criteria described in subsection (b) of this section, [~~or~~] the requirements described in Subchapter F of this chapter (relating to Adaptive Aids and Minor Home Modifications), or, for transition assistance services, exceeds the service limit described in §45.218(c) of this division, the CMA must comply with this subsection.[~~:~~]

(1) The CMA must, in accordance with *CLASS Provider Manual*, send the individual or LAR written notice of the denial of the requested CLASS Program service, copying the DSA and CDSA, if the individual or LAR requests a CLASS Program service that the CMA or DSA has determined: [~~:~~]

(A) does not met the criteria described in subsection (b) of this section;

(B) does not meet the requirements described in Subchapter F of this chapter (relating to Adaptive Aids and Minor Home Modifications); or

(C) if the service is transition assistance services, exceeds the service limit described in §45.218(c) of this division.

(2) If the CMA is required to send written notice of denial of a CLASS Program service as described in paragraph (1) of this subsection, the CMA must also:

(A) [~~(2)~~] no later than 30 calendar days before the effective date of the proposed IPC as determined by the service planning team, submit to DADS for its review:

(i) [~~(A)~~] the proposed enrollment IPC that includes the type and amount of CLASS Program services in dispute and not in dispute and is signed and dated by:

(I) [~~(i)~~] the individual or LAR;

(II) [~~(ii)~~] the case manager; and

(III) [~~(iii)~~] the DSA;

(ii) [~~(B)~~] the IPPs; and

(iii) [~~(C)~~] the habilitation plan; and

(B) [~~(3)~~] send a copy of the proposed enrollment IPC to the CDSA, if applicable.

(3) If the individual or LAR requests a service described in §45.218(b) of this division in an amount that exceeds the service limit for that service, the CMA must:

(A) no later than 30 calendar days before the effective date of the proposed IPC as determined by the service planning team, submit to DADS for its review:

(i) the proposed enrollment IPC that includes the type and amount of CLASS Program services in dispute and not in dispute and is signed and dated by:

(I) the individual or LAR;

(II) the case manager; and

(III) the DSA;

(ii) the IPPs;

(iii) the habilitation plan; and

(iv) a completed Request for an Exception to Service Limit form as required by §45.219(b) of this division; and

(B) send a copy of the proposed enrollment IPC to the CDSA, if applicable.

(e) DADS reviews a proposed enrollment IPC in accordance with §45.216 of this division (relating to DADS Review of an Enrollment IPC). At DADS request, the CMA must submit additional documentation supporting the proposed enrollment IPC to DADS within 10 calendar days after DADS request.

[~~(f) If DADS determines that the proposed enrollment IPC does not meet the eligibility criterion described in §45.201(a)(5) of this subchapter (relating to Eligibility Criteria), DADS notifies the CMA and DSA of such determination and sends written notice to the individual or LAR that the individual's request for enrollment is denied and includes in the notice the individual's right to request a fair hearing in accordance with §45.301 of this chapter (relating to Individual's Right to a Fair Hearing).~~]

(f) [~~(g)~~] If DADS determines that the proposed enrollment IPC meets the eligibility criterion described in §45.201(a)(5) of this subchapter and the CLASS Program services specified in the IPC meet the requirements described in subsection (b) of this section, DADS notifies the individual's CMA, in writing, that the IPC is authorized.

(g) The process by which an individual's request for enrollment is denied of a CLASS Program service is denied, based on DADS review of a proposed enrollment IPC, is described in §45.216(d) - (f) of this division.

[~~(h) If DADS determines that the proposed enrollment IPC meets the eligibility criterion described in §45.201(a)(5) of this subchapter but that one or more of the CLASS Program services specified in the IPC do not meet the requirements described in subsection (b) of this section, DADS:~~]

[~~(1) denies the service(s);~~]

[~~(2) modifies the IPC; and~~]

[~~(3) notifies the individual's CMA, in writing, of the action taken.~~]

[~~(i) If DADS notifies the CMA that the individual's CLASS Program services have been denied and the proposed enrollment IPC modified in accordance with subsection (h) of this section, the CMA must:~~]

[~~(1) implement the modified IPC; and~~]

[~~(2) send written notice to the individual or LAR of the denial of CLASS Program Services, in accordance with §45.403(c) of this chapter (relating to Denial of a CLASS Program Service).~~]

(h) [~~(j)~~] The effective date of an enrollment IPC is one of the following, whichever is later:

(1) the effective date as determined by the service planning team; or

(2) the date DADS notifies the CMA that the individual's request for enrollment is approved and the IPC is authorized in accordance with §45.216(c) [~~§45.216(d)~~] or (e) of this division.

(i) [~~(k)~~] An enrollment IPC is effective for an IPC period.

(j) [~~(l)~~] An individual's enrollment IPC must be reviewed and updated in accordance with §45.223 of this subchapter (relating to Renewal and Revision of an IPC).

§45.216. DADS Review of an Enrollment IPC.

(a) DADS reviews a proposed enrollment IPC, habilitation plan, [~~and~~] IPPs, and if the individual or LAR requests a service described in §45.218(b) of this division (relating to Service Limits) in an amount that exceeds the service limit for that service, a completed Request for an Exception to Service Limit form submitted by a CMA in accordance with §45.214(d) of this division (relating to Development of Enrollment IPC) to determine if:

(1) the IPC meets the eligibility criterion described in §45.201(a)(5) of this subchapter (relating to Eligibility Criteria) and the requirements in §45.214(a)(1)(B) of this division; [~~and~~]

(2) the CLASS Program services specified in the IPC meet the requirements described in §45.214(b) of this division; and[~~.~~]

(3) for a completed Request for an Exception to Service Limit form, whether providing the service in excess of the service limit is necessary to meet the criteria described in §45.214(b) of this division.

(b) At DADS request, the CMA must submit additional documentation supporting the proposed enrollment IPC to DADS within 10 calendar days after DADS request.

[~~(c) If DADS determines that the proposed enrollment IPC does not meet the eligibility criterion described in §45.201(a)(5) of this subchapter, DADS notifies the individual's CMA and DSA of such determination and sends written notice to the individual or LAR that the individual's request for enrollment is denied and includes in the notice the individual's right to request a fair hearing in accordance with §45.301 of this chapter (relating to Individual's Right to a Fair Hearing).~~]

(c) [~~(d)~~] If DADS determines that the proposed enrollment IPC meets the eligibility criterion described in §45.201(a)(5) of this subchapter and the requirements in §45.214(a)(1)(B) of this division and the CLASS Program services specified in the IPC meet the requirements described in §45.214(b) of this division, Subchapter F of this chapter (relating to Adaptive Aids and Minor Home Modifications), and §45.218 of this division DADS notifies the individual's CMA, in writing, that the IPC is authorized and the individual's request for enrollment is approved.

(d) If DADS determines that the proposed enrollment IPC does not meet the eligibility criterion described in §45.201(a)(5) of this subchapter, DADS notifies the individual's CMA and DSA of such determination and sends written notice to the individual or LAR that the individual's request for enrollment is denied and includes in the notice the individual's right to request a fair hearing in accordance with §45.301 of this subchapter (relating to Individual's Right to a Fair Hearing).

(e) DADS denies a CLASS Program service and modifies an IPC in accordance with this subsection.

(1) DADS denies a CLASS Program service if DADS determines that the proposed enrollment IPC meets the eligibility criterion described in §45.201(a)(5) of this subchapter but:

(A) one or more of the CLASS Program services specified in the IPC:

(i) does not meet the requirements described in §45.214(b) of this division;

(ii) does not meet the requirements described in Subchapter F of this chapter; or

(iii) if the service is transition assistance services, exceeds the service limit described in §45.218(c) of this division; or

(B) DADS denies a request for an exception to the service limit of a service described in §45.218(b) of this division.

(2) If DADS denies a service as described in paragraph (1) of this subsection, DADS:

(A) modifies and authorizes the IPC;

(B) approves the individual's request for enrollment with the modified IPC; and

(C) notifies the individual's CMA, in writing, of the action taken.

[~~(e) If DADS determines that the proposed enrollment IPC meets the eligibility criterion described in §45.201(a)(5) of this subchapter but that one or more of the CLASS Program services specified in the IPC do not meet the requirements described in §45.214(b) of this division or the requirements described in Subchapter F of this chapter (relating to Adaptive Aids and Minor Home Modifications), DADS:~~]

~~[(1) denies the service(s);]~~

~~[(2) modifies and authorizes the IPC;]~~

~~[(3) approves the individual's request for enrollment with the modified IPC; and]~~

~~[(4) notifies the individual's CMA, in writing, of the action taken.]~~

(f) If DADS notifies the CMA of the denial of the CLASS Program service and of the enrollment IPC modified in accordance with subsection (e) of this section, the CMA must:

(1) implement the modified enrollment IPC; and

(2) send the individual or LAR written notice of the denial of the CLASS Program service in accordance with §45.403(c) of this chapter (relating to Denial of a CLASS Program Service).

§45.218. Service Limits.

(a) The service limits listed in subsection (b) of this section are in effect through August 31, 2013.

(b) Subject to an exception granted by DADS in accordance with §45.219 of this division (relating to Exception to Service Limits), the following limits apply to an individual's services:

(1) An individual may receive, during an IPC period, adaptive aids and dental treatment having a maximum combined cost of $6,935.

(2) An individual may receive a maximum of 192 hours of behavioral support during an IPC period.

(3) An individual may receive a maximum of 3,312 hours of habilitation during an IPC period.

(4) During the time period an individual is enrolled in the CLASS Program, an individual may receive minor home modifications that have a maximum cost of $7,515, which may be paid in one or more IPC periods. After reaching the maximum cost of $7,515, an individual may receive, during an IPC period, a maximum of $300 for repair and maintenance of a minor home modification purchased through the CLASS Program needed after one year has elapsed from the date the minor home modification is complete.

(5) An individual may receive a maximum of 83 hours of occupational therapy during an IPC period.

(6) An individual may receive a maximum of 91 hours of physical therapy during an IPC period.

(7) An individual may receive prevocational services having a maximum cost of $13,965 during an IPC period.

(8) An individual may receive a maximum of 29 days of in-home respite and out-of-home respite, combined, during an IPC period.

(9) An individual may receive a maximum of 56 hours of speech therapy during an IPC period.

(10) An individual may receive, during an IPC period, aquatic therapy, hippotherapy, massage therapy, music therapy, recreational therapy, and therapeutic horseback riding having a maximum combined cost of $10,118.

(c) In accordance with §62.5(c) and (d) of this title (relating to Service Description), an individual may receive transition assistance services having a maximum cost of $2,500. This service limit is not subject to an exception granted by DADS in accordance with §45.219 of this division.

(d) Effective September 1, 2013, the following limits apply to an individual's services:

(1) for adaptive aids and dental treatment, a maximum combined cost of $10,000 during an IPC period;

(2) for minor home modifications, $10,000 during the time period an individual is enrolled in the CLASS Program, which may be paid in one or more IPC periods;

(3) for respite, 30 days of in-home respite and out-of-home respite, combined, during an IPC period; and

(4) the service limit for transition assistance services described in subsection (c) of this section.

§45.219. Exception to Service Limits.

(a) Proposed enrollment, renewal, or revised IPC. If an individual, LAR, CMA, or DSA has information demonstrating that exceeding a service limit described in §45.218(b) of this division (relating to Service Limits) is necessary to meet the criteria described in §45.214(b) of this division (relating to Development of Enrollment IPC), the CMA must request an exception to the service limit in accordance with subsection (b) of this section.

(b) Requesting an exception.

(1) To request an exception to a service limit described in §45.218(b) of this division, a CMA must:

(A) complete the Request for an Exception of Service Limit form, found at *www.dads.state.tx.us*, in accordance with form instructions;

(B) include on the form a detailed explanation of why providing the service in excess of the service limit is necessary to meet the criteria described in §45.214(b) of this division; and

(C) submit to DADS any additional information or documentation requested by DADS.

(2) The CMA must submit the completed Request for an Exception of Service Limit form to DADS:

(A) for a proposed enrollment IPC, in accordance with §45.214(c)(2)(A)(iv) or (d)(3)(A)(iv) of this division; or

(B) for a proposed renewal or revised IPC, in accordance with §45.223(e) of this subchapter (relating to Renewal and Revision of an IPC).

(c) DADS review of request for an exception. DADS grants an exception to a service limit, if, after review of the request submitted in accordance with subsection (b) of this section, it determines that providing the service in excess of the service limit is necessary to meet the criteria described in §45.214(b) of this division.

(d) Limits to exception granted by DADS. An exception granted under subsection (c) of this section is subject to:

(1) the following service limits:

(A) for adaptive aids and dental treatment, a maximum combined cost of $10,000 during an IPC period;

(B) for minor home modifications, $10,000 during the time period an individual is enrolled in the CLASS Program, which may be paid in one or more IPC periods; and

(C) for respite, 30 days of in-home respite and out-of-home respite, combined, during an IPC period; and

(2) the IPC cost limit as described in §45.201(a)(5) of this chapter (relating to Eligibility Criteria).

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

Filed with the Office of the Secretary of State on September 26, 2011.

TRD-201103983
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Proposed date of adoption: December 1, 2011
For further information, please call: (512) 438-3734

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DIVISION 3. REVIEWS

40 TAC §45.223, §45.225

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The amendments affect Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§45.223. Renewal and Revision of an IPC.

(a) Beginning the effective date of an individual's IPC, as determined by §45.214(h) [~~§45.214(j)~~] of this subchapter (relating to Development of Enrollment IPC) or §45.222(b) of this division (relating to Renewal IPC and Requirement for Authorization to Continue Services), a case manager must, at least every 90 calendar days, meet with the individual or LAR in the individual's home to review the individual's progress toward achieving the goals and objectives as described on the IPP for each CLASS Program service listed on the individual's IPC. The case manager must document the results of the review in the individual's record.

(b) An individual's case manager must:

(1) convene a service planning team that develops a proposed renewal IPC, new IPPs and a new habilitation plan at least annually, but no more than 90 calendar days before the end of the IPC period of the IPC being renewed; and

(2) if the case manager becomes aware that the individual's need for a CLASS Program service changes, develop, within five business days after becoming aware, a proposed revised IPC and revised IPP(s) and, if necessary, a revised habilitation plan.

(c) The case manager must ensure that:

(1) a proposed renewal IPC and proposed revised IPC, developed in accordance with subsection (b)(1) or (2) of this section, meet the criteria described in §45.214(a)(1)(B) and (b) of this subchapter; and

(2) new or revised IPPs developed in accordance with subsection (b)(1) or (2) of this section are reviewed, signed, and dated as evidence of agreement by:

(A) the individual or LAR;

(B) the case manager; and

(C) the DSA.

(d) If the individual or LAR, case manager, and DSA agree on the type and amount of services to be included in a proposed renewal IPC or a proposed revised IPC developed in accordance with subsection (b) of this section, the case manager must:

(1) ensure that the proposed renewal IPC or proposed revised IPC is reviewed, signed, and dated as evidence of agreement by:

(A) the individual or LAR;

(B) the case manager; and

(C) the DSA; and

(2) submit to DADS for its review the proposed IPC, IPPs, [~~and~~] habilitation plan, and if the individual or LAR requests a service described in §45.218(b) of this subchapter (relating to Service Limits) in an amount that exceeds the service limit for that service, a completed Request for an Exception to Service Limit form as required by §45.219(b) of this subchapter (relating to Exception to Service Limits) [~~to DADS for its review~~] in accordance with the following:

(A) for a proposed renewal IPC developed in accordance with subsection (b)(1) of this section, the proposed renewal IPC, new IPPs, [~~and~~] new habilitation plan, and any completed Request for an Exception to Service Limit Form must be submitted to DADS at least 30 calendar days before the end of the IPC period; and

(B) for a proposed revised IPC developed in accordance with subsection (b)(2) of this section, the proposed revised IPC, any revised IPPs, [~~and~~] any revised habilitation plan, and any completed Request for an Exception to Service Limit form must be submitted to DADS at least 30 calendar days before the effective date proposed by the service planning team; and

(3) send a copy of the proposed renewal or proposed revised IPC to the CDSA, if applicable.

(e) If the individual or LAR requests a CLASS Program service that the case manager or DSA has determined does not meet the criteria described in §45.214(b) of this subchapter or the requirements described in Subchapter F of this chapter (relating to Adaptive Aids and Minor Home Modifications), that exceeds a service limit described in §45.218 of this subchapter the CMA [~~case manager~~] must comply with this subsection.[~~:~~]

(1) The CMA must, in accordance with the *CLASS Provider Manual*, send the individual or LAR written notice of the denial of or proposal to reduce, as appropriate, the requested CLASS Program service, copying the DSA and CDSA, if the individual or LAR requests a CLASS Program service that the CMA or DSA has determined:[~~; and~~]

(A) does not meet the criteria described in §45.214(b) of this subchapter;

(B) does not meet the requirements described in Subchapter F of this chapter; or

(C) if the service is transition assistance services, exceeds the service limit described in §45.218(c) of this subchapter.

(2) If the CMA is required to send a written notice of denial of a CLASS Program service as described in paragraph (1) of this subsection, the CMA must:

(A) [~~(2)~~] in accordance with the time frames described in subsection (d)(2) of this section, submit to DADS for its review:

(i) [~~(A)~~] the proposed renewal IPC or proposed revised IPC, which includes the type and amount of CLASS Program services in dispute and not in dispute, and is signed and dated by:

(I) [~~(i)~~] the individual or LAR;

(II) [~~(ii)~~] the case manager; and

(III) [~~(iii)~~] the DSA;

(ii) [~~(B)~~] the IPPs; and

(iii) [~~(C)~~] the new habilitation plan or any revised habilitation plan; and

(B) [~~(3)~~] send a copy of the proposed renewal or proposed revised IPC to the CDSA, if applicable.

(3) If the individual or LAR requests a service described in §45.218(b) of this subchapter in an amount that exceeds the service limit for that service, the CMA must:

(A) in accordance with the time frames described in subsection (d)(2) of this section, submit to DADS for its review:

(i) the proposed renewal IPC or proposed revised IPC that includes the type and amount of CLASS Program services in dispute and not in dispute and is signed and dated by:

(I) the individual or LAR;

(II) the case manager; and

(III) the DSA;

(ii) the IPPs; and

(iii) the new habilitation plan or any revised habilitation plan; and

(iv) a completed Request for an Exception to Service Limit form as required by §45.219(b) of this subchapter; and

(B) send a copy of the proposed enrollment IPC to the CDSA, if applicable.

(f) At DADS request, the CMA must submit additional documentation supporting the proposed IPC to DADS within 10 calendar days after DADS request.

[~~(g) If DADS determines that the proposed renewal IPC or the proposed revised IPC does not meet the eligibility criterion described in §45.201(a)(5) of this subchapter (relating to Eligibility Criteria), DADS notifies the individual's CMA and DSA of such determination and sends written notice to the individual or LAR that the individual's CLASS Program services are proposed for termination and includes in the notice the individual's right to request a fair hearing in accordance with §45.301 of this chapter (relating to Individual's Right to a Fair Hearing).~~]

(g) [~~(h)~~] If DADS determines that the proposed renewal IPC or the proposed revised IPC meets the eligibility criterion described in §45.201(a)(5) of this subchapter and the CLASS Program services specified in the IPC meet the requirements described in §45.214(b) of this subchapter, DADS notifies the individual's CMA, in writing, that the IPC is authorized.

(h) The process by which an individual's CLASS program services are terminated or a CLASS Program service is denied, based on DADS review of a proposed renewal IPC or proposed revised IPC, is described in §45.225(c) - (e) of this division (relating to Utilization Review of an IPC by DADS).

[~~(i) If DADS determines that the proposed renewal IPC or the proposed revised IPC meets the eligibility criterion described in §45.201(a)(5) of this subchapter but that one or more of the CLASS Program services specified in the IPC does not meet the requirements described in §45.214(b) of this subchapter or the requirements described in Subchapter F (relating to Adaptive Aids and Minor Home Modifications), DADS:~~]

[~~(1) denies or proposes reduction of the service(s), as appropriate;~~]

[~~(2) modifies and authorizes the IPC; and~~]

[~~(3) notifies the individual's CMA, in writing, of the action taken.~~]

[~~(j) If DADS notifies the CMA of the denial or proposed reduction of a CLASS Program service and of the IPC modified in accordance with subsection (i) of this section:~~]

[~~(1) for a denial of a CLASS Program service, the CMA must:~~]

[~~(A) send the individual or LAR written notice of the denial of the CLASS Program service in accordance with §45.403(c) of this chapter (relating to Denial of a CLASS Program Service); and~~]

[~~(B) coordinate the implementation of the modified IPC; or~~]

[~~(2) for a proposed reduction of a CLASS Program service:~~]

[~~(A) the CMA must send the individual or LAR written notice of the proposal to reduce the CLASS Program service in accordance with §45.405(c) of this chapter (relating to Reduction of a CLASS Program Service); and~~]

[~~(B) the modified IPC is handled as follows:~~]

[~~(i)~~ ~~in accordance with §45.405(d) of this chapter, if the individual or LAR requests a fair hearing before the effective date of the reduction of a CLASS Program service, as specified in the written notice, the modified IPC may not be implemented; or~~]

[~~(ii)~~ ~~if the individual or LAR does not request a fair hearing before the effective date of the reduction of a CLASS Program service, as specified in the written notice, the CMA must coordinate the implementation of the modified IPC.~~]

(i) [~~(k)~~] The IPC period of a revised IPC is the same IPC period as the enrollment IPC or renewal IPC being revised.

§45.225. Utilization Review of an IPC by DADS.

(a) At DADS discretion, DADS conducts a utilization review of an IPC to determine if:

(1) the IPC meets the eligibility criterion described in §45.201(a)(5) of this subchapter (relating to Eligibility Criteria); and

(2) the CLASS Program services specified in the IPC meet the requirements described in §45.214(b)of this subchapter (relating to Development of Enrollment IPC), Subchapter F of this chapter (relating to Adaptive Aids and Minor Home Modifications), and §45.218 of this subchapter (relating to Service Limits).

(b) If requested by DADS, a CLASS Program provider must submit documentation supporting the IPC to DADS within 10 calendar days after DADS request.

(c) If DADS determines that the IPC does not meet the eligibility criterion described in §45.201(a)(5) of this subchapter, DADS notifies the individual's CMA and DSA of such determination and sends written notice to the individual or LAR that the individual's CLASS Program services are proposed for termination and includes in the notice the individual's right to request a fair hearing in accordance with §45.301 of this chapter (relating to Individual's Right to a Fair Hearing).

(d) DADS denies or proposes reduction of a CLASS Program service and modifies an IPC in accordance with this subsection.

(1) DADS denies or proposes reduction of a CLASS Program service if DADS determines that the IPC meets the eligibility criterion described in §45.201(a)(5) of this subchapter but:

(A) one or more of the CLASS Program services specified in the IPC:

(i) does not meet the requirements described in §45.214(b) of this subchapter;

(ii) does not meet the requirements described in Subchapter F of this chapter; or

(iii) if the service is transition assistance services, exceeds the service limit described in §45.218(c) of this subchapter; or

(B) DADS denies a request for an exception to the service limit of a service described in §45.218(b) of this subchapter.

(2) If DADS denies or proposes reduction of a CLASS Program service as described in paragraph (1) of this subsection, DADS:

(A) modifies and authorizes the IPC; and

(B) notifies the individual's CMA, in writing, of the action taken.

~~[(d) If DADS determines that one or more of the CLASS Program services specified in the IPC do not meet the requirements described in §45.214(b) of this subchapter or the requirements described in Subchapter F of this chapter (relating to Adaptive Aids and Minor Home Modifications), DADS:]~~

~~[(1) denies or proposes reduction of the service(s), as appropriate;]~~

~~[(2) modifies and authorizes the IPC; and]~~

~~[(3) notifies the individual's CMA, in writing, of the action taken.]~~

(e) If DADS notifies the CMA of the denial or proposed reduction of the individual's CLASS Program services and of the IPC modified in accordance with subsection (d) of this section:

(1) for a denial of a CLASS Program service, the CMA must:

(A) send the individual or LAR written notice of the denial of the CLASS Program service in accordance with §45.403(c) of this chapter (relating to Denial of a CLASS Program Service); and

(B) coordinate the implementation of the modified IPC; or

(2) for a proposed reduction of a CLASS Program service:

(A) the CMA must send the individual or LAR written notice of the proposal to reduce the CLASS Program service in accordance with §45.405(c) of this chapter (relating to Reduction of a CLASS Program Service); and

(B) the modified IPC is handled as follows:

(i) in accordance with §45.405(d) of this chapter, if the individual or LAR requests a fair hearing before the effective date of the reduction of a CLASS Program service, as specified in the written notice, the modified IPC may not be implemented; or

(ii) if the individual or LAR does not request a fair hearing before the effective date of the reduction of a CLASS Program service, as specified in the written notice, the CMA must coordinate the implementation of the modified IPC.

(f) The IPC period of an enrollment IPC or a renewal IPC modified by DADS in accordance with subsection (d) of this section does not change as a result of DADS modification.

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

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Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
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For further information, please call: (512) 438-3734

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SUBCHAPTER D. TRANSFER, DENIAL, SUSPENSION, REDUCTION, AND TERMINATION OF SERVICES

40 TAC §45.403, §45.405

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The amendments affect Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§45.403. Denial of a CLASS Program Service.

(a) DADS denies a CLASS Program service on an individual's IPC, based on a review described in §45.216 of this chapter (relating to DADS Review of an Enrollment IPC), §45.223 of this chapter (relating to Renewal and Revision of an IPC), or §45.225 of this chapter (relating to Utilization Review of an IPC by DADS), if:

(1) DADS determines that the IPC does not meet:

(A) the requirements described in §45.214(b) of this chapter (relating to Development of Enrollment IPC); or

(B) the requirements described in Subchapter F of this chapter (relating to Adaptive Aids and Minor Home Modifications);[.]

(2) the service is transition assistance services and the service limit described in §45.218(c) of this chapter (relating to Service Limits) is exceeded; or

(3) DADS denies a request for an exception to the service limit of a service described in §45.218(b) of this chapter submitted in accordance with §45.219(c) of this chapter (relating to Exception to Service Limits).

(b) DADS notifies the CMA selected by the individual, in writing, if DADS denies a CLASS Program service on the individual's IPC. DADS sends a copy of the modified IPC to the CMA.

(c) Upon receipt of DADS written notice of denial of a CLASS Program service, the CMA must:

(1) in accordance with the *CLASS Provider Manual*, send written notice to the individual or LAR of the denial of the service, copying the individual's DSA and, if selected, CDSA;

(2) include in the notice the individual's right to request a fair hearing in accordance with §45.301 of this chapter (relating to Individual's Right to a Fair Hearing); and

(3) coordinate the implementation of the modified IPC described in subsection (b) of this section.

§45.405. Reduction of a CLASS Program Service.

(a) DADS reduces a CLASS Program service on an individual's IPC, based on a review described in §45.223 of this chapter (relating to Renewal and Revision of an IPC) or §45.225 of this chapter (relating to Utilization Review of an IPC by DADS), if:

(1) DADS determines that the IPC does not meet:

(A) the requirements described in §45.214(b) of this chapter (relating to Development of Enrollment IPC); or

(B) the requirements described in Subchapter F of this chapter (relating to Adaptive Aids and Minor Home Modifications);[.]

(2) the service is transition assistance services and the service limit described in §45.218(c) of this chapter (relating to Service Limits) is exceeded; or

(3) DADS denies a request for an exception to the service limit of a service described in §45.218(b) of this chapter submitted in accordance with §45.219(c) of this chapter (relating to Exception of Service Limits).

(b) DADS notifies the individual's CMA, in writing, if it proposes to reduce a CLASS Program service. DADS sends a copy of the modified IPC to the CMA.

(c) Upon receipt of a written notice from DADS proposing to reduce a CLASS Program service, the CMA must, in accordance with the *CLASS Provider Manual*, send written notice to the individual or LAR of the proposal to reduce the service, copying the individual's DSA and, if selected, CDSA. The CMA must include in the notice the individual's right to request a fair hearing in accordance with §45.301 of this chapter (relating to Individual's Right to a Fair Hearing).

(d) If the individual or LAR requests a fair hearing before the effective date of the reduction of a CLASS Program Service, as specified in the written notice, the modified IPC described in subsection (b) of this section may not be implemented and the DSA must provide the service to the individual in the amount authorized in the prior IPC while the appeal is pending.

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

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Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
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SUBCHAPTER F. ADAPTIVE AIDS AND MINOR HOME MODIFICATIONS
DIVISION 1. ADAPTIVE AIDS

40 TAC §§45.602, 45.604 - 45.606, 45.609

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The amendments affect Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§45.602. Authorization Limit for Adaptive Aids and Amount for Repair and Maintenance.

(a) Except as provided in subsection (b) of this section, the [The] maximum amount DADS authorizes as payment to a DSA for all adaptive aids and dental treatment combined for an individual is $6,935 per IPC period, unless an exception is granted by DADS in accordance with §45.219(c) of this chapter (relating to Exception to Service Limits), in which case the maximum amount is $10,000 per IPC period in accordance with §45.219(d)(1)(A) of this chapter [for an individual, except as provided in subsection (b) of this section].

(b) To request authorization for repair and maintenance of an adaptive aid up to $300 per IPC period, a DSA is not required to follow the process described in §45.603 of this division (relating to Requirements For Authorization to Purchase an Adaptive Aid Costing Less Than $500) but must include the amount requested on an individual's IPC as described in §45.214 of this chapter (relating to Development of Enrollment IPC) or §45.223 of this chapter (relating to Renewal and Revision of an IPC).

(c) A DSA must follow the process for requesting authorization to purchase an adaptive aid as described in §45.603 of this division if:

(1) requesting authorization for repair and maintenance of an adaptive aid in an amount that exceeds the $300 limit described in subsection (b) of this section; or

(2) requesting authorization for repair and maintenance of an adaptive aid that is not purchased through the CLASS Program but is identical to an item or service that a DSA may purchase as an adaptive aid listed in the *CLASS Provider Manual.*

§45.604. Requirements for Authorization to Purchase an Adaptive Aid Costing $500 or More.

(a) To purchase an adaptive aid costing $500 or more for an individual, a CMA must:

(1) ensure that the individual's service planning team initiates a request [~~includes the cost of the specifications~~] for the adaptive aid by completing Part A of the Adaptive Aids, Medical Supplies and Minor Home Modifications form [~~,~~] as described in the *CLASS Provider Manual;* and [~~§45.605 of this division (relating to Requirements for Specifications for an Adaptive Aid), in:~~]

[~~(A) the individual's proposed enrollment IPC, proposed renewal IPC, or proposed revised IPC, as applicable; and~~]

[~~(B) the individual's IPP; and~~]

(2) send the partially completed form to the DSA. [~~within 14 calendar days after completing the requirement described in paragraph (1) of this subsection, submit to DADS:~~]

[~~(A) the proposed enrollment IPC, proposed renewal IPC, or proposed revised IPC as described in paragraph (1)(A) of this subsection, as applicable; and~~]

[~~(B) the individual's IPP as described in paragraph (1)(B) of this subsection.~~]

(b) The DSA must: [~~The cost of the specifications included on an IPC and IPP as required by subsection (a)(1) of this section may not exceed an amount equal to three units of service of behavioral support, occupational therapy, physical therapy, or speech therapy, as applicable.~~]

(1) within 30 calendar days after receipt of the partially completed form, obtain the specifications regarding the adaptive aid in accordance with §45.605 of this division (relating to Requirements for Specifications for an Adaptive Aid) and ensure that Part B of the Adaptive Aids, Medical Supplies and Minor Home Modifications form is completed; and

(2) within 60 calendar days after obtaining the specifications:

(A) obtain bids from vendors in accordance with §45.606 of this division (relating to Requirements for Bids of an Adaptive Aid);

(B) select a vendor from which to purchase the adaptive aid; and

(C) complete Part C of the Adaptive Aids, Medical Supplies and Minor Home Modifications form and send the form to the CMA.

(c) A CMA must, within 14 calendar days after receipt of the form described in subsection (b)(2)(C) of this section: [~~DADS reviews the documentation described in subsection (a)(2) of this section and determines whether the proposed IPC is authorized in accordance with §45.216 of this chapter (relating to DADS Review of an Enrollment IPC) or §45.223 of this chapter (relating to Renewal and Revision of an IPC).~~]

(1) complete Part D of the Adaptive Aids, Medical Supplies and Minor Home Modifications form, evidencing that the criteria described in §45.214(b) of this chapter (relating to Development of Enrollment IPC) are met;

[~~(d) DADS notifies a DSA, in the electronic billing system, of whether the proposed IPC is authorized. DADS notifies a CMA, in writing, of whether the proposed IPC is authorized.~~]

[~~(e) If DADS authorizes the proposed IPC for payment of the specifications, the DSA must:~~]

[~~(1) within 30 calendar days after the date DADS authorizes the IPC, obtain the specifications regarding the adaptive aid in accordance with §45.605 of this division; and~~]

[~~(2) within 60 calendar days after obtaining the specifications:~~]

[~~(A) obtain bids from vendors in accordance with §45.606 of this division (related to Requirements for Bids of an Adaptive Aid); and~~]

[~~(B) select a vendor from which to purchase the adaptive aid.~~]

[~~(f) A CMA must, within 14 calendar days after completing the requirements in subsection (e)(2) of this section, ensure that the individual's service planning team completes the Adaptive Aids, Medical Supplies and Minor Home Modifications form as described in the CLASS Provider Manual, evidencing its agreement that the adaptive aid recommended by the appropriate licensed professional is necessary.~~]

[~~(g) A CMA must:~~]

(2) [~~(1)~~] [~~within 14 calendar days after completing the requirement in subsection (f) of this section,~~] ensure that, in accordance with Subchapter B of this chapter (relating to Eligibility, Enrollment, and Review), the individual's service planning team includes the cost of the adaptive aid in:

(A) the individual's proposed enrollment IPC, proposed renewal IPC, or proposed revised IPC, as applicable; and

(B) the individual's IPP; and

(3) [~~(2)~~] within 14 calendar days after completing the requirement described in paragraph (2) [~~(1)~~] of this subsection, submit to DADS:

(A) the completed Request for Adaptive Aids, Medical Supplies, and Minor Home Modifications form [~~as required by subsection (f) of this section~~];

(B) the proposed enrollment IPC, proposed renewal IPC, or proposed revised IPC as described in paragraph (2)[~~(1)~~](A) of this subsection, as applicable;

(C) the individual's IPP as described in paragraph (2)[~~(1)~~](B) of this subsection; and

(D) documentation regarding bids as required by §45.606 of this division.

(d) [~~(h)~~] DADS reviews the documentation described in subsection (c)(3) [~~(g)(2)~~] of this section and determines whether the proposed IPC is authorized in accordance with §45.216 of this chapter

(relating to DADS Review of an Enrollment IPC) or §45.223 of this chapter (relating to Renewal and Revision of an IPC).

(e) [~~(i)~~] DADS notifies a DSA, in the electronic billing system, of whether the proposed IPC is authorized. DADS notifies a CMA, in writing, of whether the proposed IPC is authorized.

§45.605. Requirements for Specifications for an Adaptive Aid.

(a) For [~~If DADS authorizes payment for specifications for~~] an adaptive aid costing $500 or more [~~in accordance with §45.604(c) of this division (relating to Requirements For Authorization to Purchase an Adaptive Aid Costing $500 or More)~~], a DSA must:

(1) obtain [~~the~~] specifications from a licensed professional required by DADS for that adaptive aid as described in the *CLASS Provider Manual;* and

(2) ensure that the specifications:

(A) include a complete description of the adaptive aid; and

(B) are approved, in writing, by the individual or LAR and the DSA by completing the Specifications for Adaptive Aids or Minor Home Modifications form as described in the *CLASS Provider Manual.*

[~~(b) The DSA must obtain an invoice from the person who develops the specifications, substantiating the cost of the specifications.~~]

(b) [~~(c)~~] The DSA must provide a copy of the specifications to the CMA.

§45.606. Requirements for Bids of an Adaptive Aid.

(a) As required by §45.604(b) [~~§45.604(e) (2)(A)~~] of this division (relating to Requirements For Authorization to Purchase an Adaptive Aid Costing $500 or More), for a recommended adaptive aid costing $500 or more, a DSA must obtain comparable bids for the requested adaptive aid from three vendors. Comparable bids describe the adaptive aid and any associated items or modifications identified in the completed Request for Adaptive Aids, Medical Supplies and Minor Home Modifications form required by §45.604 [~~§45.604(f)~~] of this division.

(b) A bid obtained in accordance with subsection (a) of this section must include:

(1) the total cost of the requested adaptive aid, which may be from a catalog, website, or brochure price list;

(2) the amount of any additional expenses related to the delivery of the adaptive aid, including shipping and handling, taxes, installation, and other labor charges;

(3) the date of the bid;

(4) the name, address, and telephone number of the vendor, who may not be a relative of the individual;

(5) for an adaptive aid other than interpreter service and specialized training for augmentative communication programs, a complete description of the adaptive aid and any associated items or modifications as identified in the completed Request for Adaptive Aids, Medical Supplies and Minor Home Modifications form, which may include pictures or other descriptive information from a catalog, website, or brochure; and

(6) for interpreter service and specialized training for augmentative communication programs, the number of hours of the service or training to be provided in-person and the hourly rate of the service.

(c) A DSA may obtain only one bid or two comparable bids for an adaptive aid if the DSA has written justification for obtaining less than three bids because the adaptive aid is available from a limited number of vendors.

(d) If a DSA requests to purchase an adaptive aid that is not based on the lowest bid, the DSA must have written justification for payment of a higher bid. The following are examples of justifications that support payment of a higher bid:

(1) the higher bid is based on the inclusion of a longer warranty for the adaptive aid; and

(2) the higher bid is from a vendor that is more accessible to the individual than another vendor.

(e) If the requested adaptive aid is a vehicle modification, a DSA must obtain proof that the individual or individual's family member owns the vehicle for which the vehicle modification is requested.

(f) A DSA may not disclose information regarding a submitted bid to any other vendor who has submitted a bid or to a vendor who may submit a bid.

§45.609. Requirements of DSA Following Provision of Adaptive Aid.

(a) Within 10 business days after an individual has received an adaptive aid, a DSA must ensure that:

(1) the adaptive aid meets the specifications required by §45.604(b)(1) [~~§45.604(e) (1)~~] of this division (relating to Requirements For Authorization to Purchase an Adaptive Aid Costing $500 or More); and

(2) a staff person involved in purchasing the adaptive aid for the individual:

(A) contacts the individual to determine whether the adaptive aid meets the needs of the individual; and

(B) documents the results of that visit on the Documentation of Completion of Purchase form as described in the *CLASS Provider Manual.*

(b) If the DSA determines that the adaptive aid does not meet the specifications required by §45.604(b)(1) [~~§45.604(e) (1)~~] of this division, the DSA must work with the vendor to ensure that the adaptive aid meets the specifications within 30 calendar days after the DSA's determination.

(c) If the staff person or individual or LAR determines that the adaptive aid does not adequately meet the individual's needs because the individual needs training or other assistance, or the adaptive aid requires repair or adjustment, the DSA must ensure that, within 14 business days after the determination, a person who is qualified to perform such training, assistance, repair, or adjustment visits the individual in person and performs the necessary functions.

(d) If the individual or LAR has concerns about the adaptive aid that are not addressed by the DSA's compliance with subsections (b) and (c) of this section, the DSA must process the individual's or LAR's concerns as a complaint in accordance with §45.808 of this chapter (relating to DSA: Complaint Process).

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

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Kenneth L. Owens
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Department of Aging and Disability Services
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DIVISION 2. MINOR HOME MODIFICATIONS

40 TAC §§45.612 - 45.617

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The amendments affect Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§45.612. Authorization Limit for Minor Home Modifications and Amount for Repair and Maintenance.

(a) Except as provided in subsection (b) of this section, the maximum amount DADS authorizes as payment to a DSA for all minor home modifications provided to an individual is $7,515 during the time period the individual is enrolled in the CLASS Program, unless an exception is granted by DADS in accordance with §45.219(c) of this chapter (relating to Exception to Service Limits), in which case the maximum amount is $10,000 for the same time period in accordance with §45.219(d)(1)(A) of this chapter [~~$10,000 for the lifetime of the individual~~].

(b) In addition to the $7,515 [~~$10,000~~] authorization limit described in subsection (a) of this section, DADS may authorize up to $300 per IPC period for repair and maintenance of minor home modifications purchased through the CLASS Program needed after one year has elapsed from the date the minor home modification is complete.

(c) To request authorization for repair and maintenance of a minor home modification as described in subsection (b) of this section, a DSA is not required to follow the process set forth in §45.613 of this division (relating to Requirements for Authorization to Purchase a Minor Home Modification) but must include the amount requested on an individual's IPC as described in §45.214 of this chapter (relating to Development of Enrollment IPC) or §45.223 of this chapter (relating to Renewal and Revision of an IPC).

(d) A DSA must follow the process for requesting authorization to purchase a minor home modification as described in §45.613 of this division if:

(1) requesting authorization for repair and maintenance of a minor home modification in an amount that exceeds the $300 limit described in subsection (b) of this section; or

(2) requesting authorization for repair and maintenance of a minor home modification that is not purchased through the CLASS Program but is identical to an item or service that a DSA may purchase as a minor home modification listed in the *CLASS Provider Manual.*

(e) A request described under subsection (d) of this section and authorized by DADS is counted toward the authorization limit described in subsection (a) of this section.

§45.613. Requirements for Authorization to Purchase a Minor Home Modification.

(a) To purchase a minor home modification for an individual a CMA must:

(1) ensure that the individual's service planning team initiates a request [~~includes the cost of the specifications~~] for the [~~requested~~] minor home modification by completing Part A of the Adaptive Aids, Medical Supplies and Minor Home Modifications form[~~,~~] as described in the *CLASS Provider Manual;* and [~~§45.614 of this division (relating to Requirements for Specifications for a Minor Home Modification), not to exceed $200, in:~~]

[~~(A) the individual's proposed enrollment IPC, proposed renewal IPC, or proposed revised IPC, as applicable; and~~]

[~~(B) the individual's IPP; and~~]

(2) send the partially completed form to the DSA. [~~within 14 calendar days after completing the requirement described in paragraph (1) of this subsection, submit to DADS:~~]

[~~(A) the proposed enrollment IPC, proposed renewal IPC, or proposed revised IPC, as described in paragraph (1)(A) of this subsection, as applicable; and~~]

[~~(B) the individual's IPP as described in paragraph (1)(B) of this subsection.~~]

(b) The DSA must: [~~DADS reviews the documentation described in subsection (a)(2) of this section and determines whether the proposed IPC is authorized in accordance with §45.216 of this chapter (relating to DADS' Review of an Enrollment IPC) or §45.223 of this chapter (relating to Renewal and Revision of an IPC).~~]

(1) within 30 calendar days after receipt of the partially completed form, obtain the specifications regarding the minor home modification in accordance with §45.614 of this division (relating to Requirements for Specifications for a Minor Home Modification) and ensure that Part D of the Adaptive Aids, Medical Supplies and Minor Home Modifications form is completed; and

(2) within 60 calendar days after obtaining the specifications:

(A) if the minor home modification costs more than $1,000, obtain bids from vendors in accordance with §45.615 of this division (relating to Bid Requirements for a Minor Home Modification);

(B) select a vendor to complete construction of the minor home modification; and

(C) complete Part C of the Adaptive Aids, Medical Supplies and Minor Home Modifications form and send the form to the CMA; and

(3) before construction of the minor home modification:

(A) obtain written approval for construction of the modification from the owner of the property in question, unless such approval is granted in an applicable lease agreement; and

(B) ensure that the selected vendor obtains any required building permits.

(c) A CMA must, within 14 calendar days after receipt of the form described in subsection (b)(2)(C) of this section: [~~DADS notifies a DSA, in the electronic billing system, of whether the proposed IPC is authorized. DADS notifies a CMA, in writing, of whether the proposed IPC is authorized.~~]

(1) complete Part D of the Adaptive Aids, Medical Supplies and Minor Home Modifications form, evidencing that the criteria described in §45.214(b) of this chapter (relating to Development of Enrollment IPC) are met;

[~~(d) If DADS authorizes the proposed IPC for payment of the specifications, the DSA must:~~]

[~~(1) within 30 calendar days after the date DADS authorizes the IPC, obtain the specifications regarding the requested minor home modification in accordance with §45.614 of this division;~~]

[~~(2) within 60 calendar days after obtaining the specifications:~~]

[~~(A) if the minor home modification costs more than $1000, obtain bids from vendors in accordance with §45.615 of this division (related to Bid Requirements for a Minor Home Modification); and~~]

[~~(B) select a vendor to complete construction of the minor home modification; and~~]

[~~(3) before construction of the minor home modification:~~]

[~~(A) obtain written approval for construction of the modification from the owner of the property in question, unless such approval is granted in an applicable lease agreement; and~~]

[~~(B) ensure that the selected vendor obtains any required building permits.~~]

[~~(e) A CMA must, within 14 calendar days after completing the requirements in subsection (d)(2) of this section, ensure that the individual's service planning team completes the Adaptive Aids, Medical Supplies and Minor Home Modifications form as described in the CLASS Provider Manual, evidencing its agreement that the minor home modification recommended by the licensed professional is necessary.~~]

[~~(f) A CMA must:~~]

(2) [~~(1)~~] [~~within 14 calendar days after completing the requirement in subsection (e) of this section,~~] ensure that the individual's service planning team includes the cost of the minor home modification and the cost of the inspection of the minor home modification, not to exceed $150, in:

(A) the individual's proposed enrollment IPC, proposed renewal IPC, or proposed revised IPC, as applicable; and

(B) the individual's IPP; and

(3) [~~(2)~~] within 14 calendar days after completing the requirement described in paragraph (2) [~~(1)~~] of this subsection, submit to DADS:

(A) the completed Request for Adaptive Aids, Medical Supplies, and Minor Home Modifications form [~~required by subsection (e) of this section~~];

(B) the proposed enrollment IPC, proposed renewal IPC, or proposed revised IPC as described in paragraph (2)[~~(1)~~](A) of this subsection, as applicable;

(C) the individual's IPP as described in paragraph (2)[~~(1)~~](B) of this subsection; and

(D) documentation regarding bids as required by §45.615 of this division.

(d) [~~(g)~~] DADS reviews the documentation described in subsection (c)(3) [~~(f)(2)~~] of this section and determines whether the proposed IPC is authorized in accordance with §45.216 of this chapter (relating to DADS Review of an Enrollment IPC) or §45.223 of this chapter (relating to Renewal and Revision of an IPC).

(e) [~~(h)~~] DADS notifies a DSA, in the electronic billing system, of whether the proposed IPC is authorized. DADS notifies a CMA, in writing, of whether the proposed IPC is authorized.

(f) [~~(i)~~] The DSA must direct the vendor to begin construction of the minor home modification within seven calendar days after one of the following, whichever is later:

(1) the date DADS authorizes the proposed IPC; or

(2) the effective date of the IPC as determined by the service planning team.

(g) [~~(j)~~] A DSA must, within seven business days after it receives information that the minor home modification is completed, conduct an in-person inspection of the minor home modification in accordance with §45.616 of this division (relating to Inspection of a Minor Home Modification).

§45.614. Requirements for Specifications for a Minor Home Modification.

[~~(a)~~] For [~~If DADS authorizes payment for specifications for~~] a minor home modification [~~in accordance with §45.613(c) of this division (relating to Requirements for Authorization to Purchase a Minor Home Modification)~~], a DSA must:

(1) obtain [~~the~~] specifications from a person who has experience in constructing home modifications; and

(2) ensure that the specifications:

(A) include a complete description of the minor home modification and any associated installations identified in the specifications;

(B) include a drawing or picture of both the existing room, structure, or other area and the proposed modification made to scale;

(C) comply with the Texas Accessibility Standards promulgated by the Texas Department of Licensing and Regulation unless:

(i) the DSA determines that it is not structurally feasible to do so and the DSA documents, in writing, the basis for its determination; or

(ii) the individual or LAR requests, in writing, that the specifications not be in compliance with the Texas Accessibility Standards; and

(D) are approved, in writing, by each member of the service planning team by completing the Specifications for Adaptive Aids or Minor Home Modifications form as described in the *CLASS Provider Manual.*

[~~(b) The DSA must obtain an invoice from the person who develops the specifications, substantiating the cost of the specifications.~~]

§45.615. Bid Requirements for a Minor Home Modification.

(a) As required by §45.613(b)(2)(A) [~~§45.613(d)(2)(A)~~] of this division (relating to Requirements For Authorization to Purchase a Minor Home Modification), for a minor home modification costing more than $1,000, a DSA must obtain comparable bids for the minor

home modification from three vendors. Comparable bids describe the minor home modification and any associated installations identified in the specifications required by §45.613(b)(1) [~~§45.613(d)(1)~~] of this division.

(b) A bid obtained in accordance with subsection (a) of this section must be based on the specifications and include:

(1) an itemized list of materials and labor necessary to construct the modification;

(2) the cost of each material and labor listed;

(3) the date of the bid;

(4) the name, address, and telephone number of the vendor;

(5) a detailed explanation of the vendor's warranty for the modification, if any; and

(6) a statement that the minor home modification will be made in accordance with all applicable state and local building codes.

(c) A DSA may obtain only one bid or two comparable bids for a minor home modification if the DSA has written justification for obtaining less than three bids because the minor home modification is available from a limited number of vendors.

(d) If a DSA requests to purchase a minor home modification that is not based on the lowest bid, the DSA must have written justification for payment of a higher bid. An example of a justification that supports payment of a higher bid is that the higher bid is based on the inclusion of a longer warranty for the minor home modification.

(e) The person who developed the specifications required by §45.613(b)(1) [~~§45.613(d)(1)~~] of this division may be one of the bidders required by this section.

(f) A DSA may not disclose information regarding a submitted bid to any other vendor who has submitted a bid or to a vendor who may submit a bid.

§45.616. Inspection of a Minor Home Modification.

(a) A DSA must conduct an in-person inspection of the minor home modification to determine if:

(1) the minor home modification has been completed;

(2) the minor home modification has been made in accordance with the specifications required by §45.613(b)(1) [~~§45.613(d)(1)~~] of this division [~~chapter~~] (relating to Requirements For Authorization to Purchase a Minor Home Modification); and

(3) the quality of workmanship of the minor home modification is adequate.

(b) The inspection required by subsection (a) of this section may be performed by the person who developed the specifications unless that person is affiliated with the vendor who completed the minor home modification.

(c) The DSA must obtain an invoice from the person who conducted the inspection, substantiating the cost of the inspection.

(d) If, based on the inspection, the DSA determines that the minor home modification meets the conditions listed in subsection (a) of this section, the DSA must send a completed Documentation of Completion of Purchase form as described in the *CLASS Provider Manual* to the individual's CMA within seven business days after completion of the inspection.

(e) If, based on the inspection, the DSA determines that the minor home modification does not meet the conditions listed in subsection (a) of this section, the DSA must ensure that the vendor meets the conditions within 30 calendar days after the DSA's determination.

(f) A DSA may not submit a claim for payment of the minor home modification until the DSA determines that the minor home modification meets the conditions listed in subsection (a) of this section.

§45.617. Time Frames for Completion of Minor Home Modification.

(a) A DSA must ensure that a minor home modification is completed within 60 calendar days after one of the following dates, whichever is later:

(1) the date DADS authorizes the proposed IPC that includes the cost of the minor home modification and inspection as described in §45.613(c)(2) [~~§45.613(f)~~] of this division (relating to Requirements For Authorization to Purchase a Minor Home Modification); or

(2) the effective date of the IPC as determined by the service planning team.

(b) If the DSA determines that the minor home modification will not be completed within the time frame required by subsection (a) of this section, the DSA must notify the individual or LAR, and the case manager, in writing, of a new proposed date of completion. The proposed date may not exceed 30 calendar days after the date required by subsection (a) of this section.

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

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Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
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For further information, please call: (512) 438-3734

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SUBCHAPTER G. ADDITIONAL CMA REQUIREMENTS

40 TAC §45.704

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The amendment affects Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§45.704. Training of CMA Staff Persons.

A CMA must ensure that a CMA staff person[:]

[(1)] completes training as described in the *CLASS Provider Manual.* [DADS computer-based CLASS Program Basic Training available at DADS website within 60 calendar days after job duties are assumed; and]

[(2) completes, annually thereafter, the CLASS Individual Rights and Safeguards portion of such training.]

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

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SUBCHAPTER H. ADDITIONAL DSA REQUIREMENTS

40 TAC §45.804, §45.806

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The amendments affect Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§45.804. Training of DSA Staff Persons.

(a) A DSA must ensure that a DSA staff person who has direct contact with an individual completes training as described in the *CLASS Provider Manual.* [:]

[(1) completes DADS computer-based CLASS Program Basic Training available at DADS website within 60 calendar days after job duties are assumed; and]

[(2) completes, annually thereafter, the CLASS Individual Rights and Safeguards portion of such training.]

(b) A DSA must ensure that, before providing services to an individual, a service provider of habilitation completes:

(1) two hours of orientation covering the following:

(A) an overview of related conditions; and

(B) an explanation of commonly performed tasks regarding habilitation;

(2) training in cardiopulmonary resuscitation and choking prevention that includes an in-person evaluation by a qualified instructor of the service provider's ability to perform these actions; and

(3) training in the habilitation activities necessary to meet the needs and characteristics of the individual to whom the service provider is assigned, in accordance with the *CLASS Provider Manual,* with training to occur in the individual's home with full participation from the individual, if possible.

(c) The supervisor of a service provider of habilitation must, in accordance with the *CLASS Provider Manual,* evaluate the performance of the service provider, in person, to ensure the needs of the individual are being met. The evaluation must occur annually.

§45.806. Respite and Dental Treatment.

(a) An individual may receive a maximum of 29 days [no more than a total of 30 calendar days] of in-home and out-of-home respite combined, during an [per] IPC period, unless an exception is granted by DADS in accordance with §45.219(c) of this chapter (relating to Exception to Service Limits), in which case the individual may receive no more than 30 days of in-home and out-of-home respite, combined, during an IPC period in accordance with §45.219(d)(1)(C) of this chapter.

(b) A DSA must ensure that:

(1) in-home respite is provided in the individual's residence or the residence of a relative or friend that is not one of the settings listed in paragraph (2) of this subsection;

(2) out-of-home respite is provided in one of the following:

(A) an adult foster care home licensed by DADS in accordance with Chapter 48, Subchapter K of this title (relating to Minimum Standards for Adult Foster Care);

(B) a nursing facility licensed in accordance with Texas Health and Safety Code, Chapter 242;

(C) an ICF/MR licensed in accordance with Texas Health and Safety Code, Chapter 252, or certified by DADS;

(D) an approved outdoor camp accredited by the American Camping Association; or

(E) the residence of another person receiving a Medicaid waiver service; and

(3) the setting in which out-of-home respite is provided is:

(A) acceptable to the individual or LAR; and

(B) an accessible, safe, and comfortable environment for the individual and promotes the individual's health and welfare.

(c) If a DSA provides out-of-home respite in a residence described in subsection (b)(2)(E) of this section, the DSA must:

(1) obtain written approval from each person residing in the residence who is receiving a Medicaid waiver service, or LAR, for the provision of respite in the residence; and

(2) ensure that no more than four persons receiving a Medicaid waiver service are residing in the residence.

(d) The maximum amount DADS authorizes as payment to a DSA for all dental treatment and adaptive aids combined for an individual is $6,935 [$10,000] per IPC period, unless an exception is granted by DADS in accordance with §45.219(c) of this chapter, in which case the maximum amount is $10,000 per IPC period in accordance with §45.219(d)(1)(A) of this chapter [for an individual].

(e) A DSA must follow the process for requesting authorization to purchase dental treatment as described in the *CLASS Provider Manual.*

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

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SUBCHAPTER I. FISCAL MONITORING

40 TAC §45.901, §45.902

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The amendments affect Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§45.901. Administrative Errors.

A recoupment of 12 percent of the paid unit rate is the administrative error exception for services billed. It represents the administrative portion of the rate. Administrative errors are applied to the documentation reviewed and are not extrapolated. Administrative errors include, but are not limited to, the items in paragraph (1) - (2) of this section:

(1) Administrative errors on documentation of services delivered form or the facsimile:

(A) The program provider leaves the month and year of service blank. DADS applies the error to the total number of units documented on the time sheet.

(B) The timekeeper fails to enter a date of signature to certify the total number of hours the habilitation service provider, nurse, or therapist worked. DADS applies the error to the total number of units documented on the time sheet.

(C) The timekeeper corrects the date of signature but fails to initial the correction. DADS applies the error to the number of units reimbursed after the earliest signature date.

(D) The timekeeper enters an illegible date of signature or makes an illegible correction to the date. DADS applies the error to the total number of units documented on the time sheet.

(E) The timekeeper enters a date of signature that is before the date of the last day services are delivered. DADS applies the error to the total number of units reimbursed after the signature date.

(F) The timekeeper fails to sign the time sheet. DADS applies the error to the total number of units documented on the time sheet.

(G) The timekeeper uses a signature stamp, but fails to initial the stamped signature. DADS applies the error to the total number of units documented on the time sheet.

(H) The habilitation service provider, nurse, therapist, other professional, or timekeeper uses liquid paper/correction fluid to correct an entry in the record of time, signature, or date portion of the time sheet. DADS applies the error to the total number of units documented on the time sheet. If the liquid paper/correction fluid is used only on a daily entry in the record of time, DADS applies the error only to the total number of units reimbursed for that day.

(I) The habilitation service provider, nurse, therapist, other professional, or timekeeper makes an illegible entry in or an illegible correction to any portion of the record of time column. DADS applies the error to the total number of units reimbursed for the days in which entries are illegible.

(J) The habilitation service provider fails to initial an increase in the daily time or the monthly total of hours for the pay period. DADS applies the error to the number of units reimbursed in excess of the original entry.

(K) The habilitation service provider, nurse, therapist, other professional, or other agency representative fails to sign the documentation of services delivered form or facsimile unless the service delivered is documented through an electronic visit verification system. DADS applies the error to the total number of units documented on the time sheet.

(L) DADS reimburses the program provider for nursing, therapies, psychological, habilitation, out-of-home respite, in-home respite, adaptive aids/vehicle modifications or home modifications but a valid authorization IPC form, pages 1-2 and all pertinent attachments signed by the case manager, are missing for the period reimbursed to the agency. DADS applies the error to the total number of units of nursing, psychological therapies, habilitation, out-of-home respite, in-home respite, and adaptive aids/vehicular modifications claimed and not covered by a valid IPC.

(M) DADS reimburses the program provider for nursing services, and there is no other documentation available that the nurse provided billable nursing services during the visit.

(2) The following items are administrative errors [~~resulting in recoupment of the entire requisition fee~~].

(A) There is no CLASS Program documentation of completion of services delivered, but there is a receipt for the purchase of adaptive aids/vehicle modifications or the completion of the minor home modification.

(B) Bids were required for the purchase of an adaptive aid/vehicle modification or the completion of a minor home modification and bids were not solicited.

(C) DADS reimburses the program provider for the purchase of medical supplies, but there is no documentation available that price list/price quotes were obtained from three suppliers for the items for which the provider has been reimbursed or the price list/price quotes were obtained more than 12 months before the purchase.

(D) DADS reimburses the program provider for the purchase of adaptive aids, but there is no documentation available that price list/price quotes were obtained from three suppliers for the items for which the program provider has been reimbursed or there is no documentation available that the supplier selected on an annual basis to deliver the adaptive aids had the lowest prices for the main type of adaptive aids the agency has purchased.

(3) Administrative errors for the CMA include, but are not limited to, the following:

(A) The CMA does not provide a completed IPC and an updated IPP within seven days from an interdisciplinary team meeting which results in the DSA providing services that at a later date are rejected because the CMA failed to submit the IPC for DADS authorization.

(B) The DSA has the case information form on record which indicates that the DSA had requested corrected service updates be made to the individual's IPC prior to providing the service and the CMA provided authorization for that service on the case information form but failed to submit a corrected IPC for DADS authorization.

§45.902. Financial Errors.

A reduction of 100 percent of the paid unit rate is the financial error exception. This exception is applied to the unit(s) of service on the documentation reviewed in the CLASS Program. This exception is not extrapolated. Financial errors include, but are not limited to, the following:

(1) DADS reimburses the program provider for services, but the CLASS Program documentation of services delivered form, or facsimile, is missing for the period for which services are reimbursed. DADS applies the error to the total number of units documented on the time sheet.

(2) The habilitation service provider, nurse, therapist, or other professional leaves the entire record of time section blank. DADS applies the error to the total number of units documented on the time sheet.

(3) DADS reimburses the program provider for hours that exceed the authorization given by DADS. DADS applies the error to the total number of units reimbursed in excess of the units authorized by DADS, unless purchased following emergency procedures.

(A) For nursing services, the maximum that may be reimbursed is the number of hours listed under "Nursing Services" in the IPC form.

(B) For habilitation services, the maximum that may be reimbursed for a month is the monthly amount authorized on the CLASS IPC/IPP plus any hours not used due to individual stay while in a hospital or in a rehabilitation hospital.

(4) DADS reimburses the program provider for any waiver service that is not identified on the individual's IPC form and attachments, unless the service was provided as a result of an emergency and is supported by back-up documentation within seven business days from the date the emergency was determined.

(5) DADS reimburses the program provider for hours that exceed the total number of hours recorded on the documentation of services delivered form or facsimile or generated by an electronic visit verification system. DADS applies the error to the total number of units reimbursed in excess of the units recorded on the time sheet. If the sum of the daily total of hours does not equal what is written in the monthly total blank, the lesser of the two totals is used to calculate the total number of hours subject to the error.

(6) DADS reimburses the program provider for nursing, physical therapy, occupational therapy, or speech pathology services, but a valid order by a licensed health care professional legally authorized to issue such an order is missing. DADS applies the error to the total number of units claimed and not covered by a valid order.

(7) DADS reimburses the program provider for a claim for service, other than the initial administrative fee, delivered prior to the eligibility effective date on the IPC form. DADS applies the error to the total number of units reimbursed for such services that were delivered before the effective date on the form.

(8) DADS reimburses the program provider for any hours that consisted of non-billable time and activities as identified in the *CLASS Provider Manual.*

(9) DADS reimburses the program provider for more than four hours of nursing used to decide whether to delegate to the habilitation service provider. DADS applies the error to the total number of units reimbursed for such services.

(10) DADS reimburses the program provider for more than 10 hours during the individual's IPC year for nursing services being performed by a nurse to prevent service breaks caused by the habilitation service provider not being available to provide delegated nursing tasks. DADS applies the error to the total number of units reimbursed in excess of the 10 hour maximum for such services.

(11) DADS reimburses the program provider for an amount in excess of the amount documented on the invoice/receipt for adaptive aids/vehicle modifications or minor home modifications. DADS applies the error to the total number of dollars reimbursed in excess of the amount on the invoice/receipt[~~, plus the appropriate dollar amount of the requisition fee, if applicable~~].

(12) If there is no invoice/receipt for the purchase of adaptive aids/vehicle modifications or for the completion of minor home modifications for which the provider has been reimbursed, DADS applies the error to the total dollar amount reimbursed for adaptive aids/vehicle modifications or minor home modifications in question[~~, including the requisition fee~~].

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

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CHAPTER 48. COMMUNITY CARE FOR AGED AND DISABLED

SUBCHAPTER J. COMMUNITY BASED ALTERNATIVES (CBA) PROGRAM

40 TAC §§48.6002, 48.6003, 48.6006, 48.6010, 48.6026, 48.6052, 48.6068, 48.6078, 48.6084, 48.6085, 48.6090,

48.6092, 48.6098, 48.6100, 48.6102, 48.6104, 48.6109, 48.6110

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §§48.6002, 48.6003, 48.6006, 48.6010, 48.6026, 48.6052, 48.6068, 48.6078, 48.6084, 48.6090, 48.6092, 48.6098, 48.6100, 48.6102, and 48.6104, concerning community based alternatives (CBA) definitions, eligibility criteria, individual plan of care, client's right to appeal, home and community support services agency (HCSSA) qualifications, cost-effective purchases of adaptive aids, cost-effective purchases of minor home modifications, billable units, service claim limits, fiscal monitoring and recoupment, initiation of community based alternatives (CBA) home and community support services (HCSS), circumstances requiring denial of services with advance notice, circumstances requiring denial of services and Medicaid eligibility without advance notice, circumstances which may result in denial of services and require advance notice, and crisis intervention requiring immediate suspension or reduction of services without advance notice; and new §§48.6085, 48.6109, and 48.6110, concerning exception to service limit, denial of a CBA program service, and reduction of a CBA program service, in Chapter 48, Community Care for Aged and Disabled.

BACKGROUND AND PURPOSE

The purpose of the amendments and new sections is to implement the 2012-2013 General Appropriations Act (Article II, Special Provisions, Section 17, House Bill 1, 82nd Legislature, Regular Session, 2011), which requires DADS to adjust the amount of all community services, including Community Based Alternatives (CBA) Program services, and make reductions related to provider requisition and specification fees as cost saving measures for the state budget. The rules in Chapter 48, Subchapter J describe the requirements for operation of the CBA Program. Regarding the requirement to adjust community services, the amendments and new rules establish service limits, effective through August 31, 2013, for the following CBA Program services: adaptive aids, medical supplies, dental services, minor home modifications, respite, occupational therapy, personal assistance services, physical therapy, speech, hearing and language therapy. For each service, the service limit is based on the 90th percentile of paid units for individuals who received the service during fiscal year 2010. These service limits describe the maximum amount of services an individual in the CBA Program may receive without being granted an exception. In addition, the amendments and new rules describe the exception process by which DADS may allow an individual to receive services in excess of these service limits. The new rules also provide that the current limits for adaptive aids and medical supplies, minor home modifications, and respite remain in place even if DADS grants an exception to the new, lower service limits. The new rules add limits for dental services that an exception granted by DADS may not exceed. The amendments further provide that the current limits for adaptive aids, medical supplies, and minor home modifications and new limits for dental services that were in effect before December 1, 2011 will continue to be in effect as of September 1, 2013. Regarding the requirement to reduce requisition fees, the amendments eliminate the process by which a CBA provider requests and DADS authorizes payment for a specification fee for adaptive aids and minor home modifications and also deletes references to a requisition fee for adaptive aids, medical supplies, and minor home modifications. The amendments also clarify HCSSA qualifications associated with providing CBA services under the personal assistance services category of licensure. The proposed amendments also revise initial training requirements for an attendant.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §48.6002 adds definitions of denial, ISP, HCSSA, LVN, reduction, RN, and workday. The definitions will improve the clarity of the subchapter.

The proposed amendment to §48.6003 provides that to be eligible for the CBA Program, an individual must have an ISP with a cost for CBA Program services at or below the reimbursement rate that would have been paid for that same individual to receive nursing facility services as of August 31, 2010. The amendment also provide that an individual's ISP may include a maximum of $300 per ISP year for repair and maintenance of a minor home modification and substitute "Nursing Facility Risk Criteria Scoring Form" as the name of the form used to assess whether an individual is at risk of nursing facility placement. The amendments clarify the eligibility criteria for the CBA Program.

The proposed amendment to §48.6006 provides that if an ISP includes a service that exceeds a limit described in §48.6084, the home and community support services agency must provide information to DADS supporting the need for the service to exceed the limit.

The proposed amendment to §48.6010 describes the circumstances permitting an individual to request a fair hearing and references HHSC's uniform fair hearing rules.

The proposed amendment to §48.6026 clarifies HCSSA qualifications associated with providing CBA services under the personal assistance services category of licensure.

The proposed amendment to §48.6052 restructures the section to clarify the procedures a HCSSA must follow to request an adaptive aid for an individual, updates terminology to be consistent with current DADS usage, and removes references to reimbursement for developing specifications for an adaptive aid.

The proposed amendment to §48.6068 restructures the section to clarify the procedures a HCSSA must follow to request a minor home modification for an individual, updates terminology to be consistent with current DADS usage, and removes references to reimbursement for developing specifications for a minor home modification.

The proposed amendment to §48.6078 removes references to a specifications fee as a billable activity.

The proposed amendment to §48.6084 establishes service limits, effective through August 31, 2013, for certain CBA Program services, and establishes that service limits for certain CBA Program services that were in effect before December 2, 2011, will continue to be in effect as of September 1, 2013. The proposed amendment also adds the service limit on dental services that will be in effect as of September 1, 2013.

Proposed new §48.6085, concerning exception to service limits, describes the exception process by which DADS may allow an individual to receive services in excess of the service limits described in §48.6084(a). The amendment also describes the limits that an exception may not exceed.

The proposed amendment to §48.6090 updates terminology to be consistent with current DADS usage, removes a discussion of administrative errors that result in DADS recouping a requisition

fee, and removes other references to documentation supporting a requisition fee.

The proposed amendment to §48.6092 specifies that a registered nurse (RN) or licensed vocational nurse (LVN) must provide training on personal assistance services to an attendant under the home health licensure category and that an RN or LVN is not required to provide training on personal assistance services to an attendant under the personal assistance services licensure category. The proposed amendment also sets forth the type of training required by licensure type.

The proposed amendment to §48.6098 updates terminology to be consistent with current DADS usage, including substituting "termination" for "denial" to clarify the action taken by DADS in response to the circumstances described in the section. The amendment also clarifies that if an individual submits a timely request for a fair hearing to appeal the termination of CBA services, the CBA provider must continue to provide CBA services at the current authorized level while the appeal is pending.

The proposed amendment to §48.6100 updates terminology to be consistent with current DADS usage, including substituting "termination" for "denial" to clarify the action taken by DADS in response to the circumstances described in the section. The amendment also clarifies that a CBA provider is not required to continue to provide CBA services to the individual after the effective date of DADS notice of termination.

The proposed amendment to §48.6102 updates terminology to be consistent with current DADS usage, including substituting "termination" for "denial" to clarify the action taken by DADS in response to the circumstances described in the section. The amendment also clarifies that if an individual submits a timely request for a fair hearing to contest the termination of CBA services, the CBA provider must continue to provide CBA services at the current authorized level while the appeal is pending.

The proposed amendment to §48.6104 updates terminology to be consistent with current DADS usage and to clarify the action taken by DADS in response to the circumstances described in the section. The amendment also clarifies that a CBA provider is not required to continue to provide CBA services to the individual after the effective date of DADS notice of termination that may result if the issues are not resolved.

Proposed new §48.6109 describes the circumstances permitting DADS to deny an individual's request for a CBA service, provides that an individual may request a fair hearing to contest the denial of the CBA service, and provides that a CBA provider is not required to provide the service while the appeal is pending.

Proposed new §48.6110 describes the circumstances permitting DADS to reduce the amount of a CBA service, provides that an individual may request a fair hearing to contest the reduction of the CBA service, and provides that a CBA provider must continue to provide the service at the currently authorized level while the appeal is pending.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments and new sections are in effect, there are foreseeable implications relating to costs or revenues of state government. There are no foreseeable implications relating to costs or local governments.

The effect on state government for the first five years the proposed amendments and new sections are in effect is an estimated reduction in cost of $3,892,942 in fiscal year (FY) 2012; $3,715,678 in FY 2013; $0.00 in FY 2014; $0.00 in FY 2015; and $0.00 in FY 2016.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendments and new sections may have an adverse economic effect on small businesses and micro-businesses, because DADS projects some CBA providers will be adversely impacted by the loss of revenue when they are not permitted to submit a claims for the costs of obtaining specifications for adaptive aids and minor home modifications, or the administrative effort in requisitioning adaptive aids, dental treatment, medical supplies, and minor home modifications. In 2008, approximately 239 entities provided CBA services to DADS consumers. Based on 2008 Texas Medicaid cost reports for the CBA program (the most recent data available), of these entities, approximately 213 were small businesses, of which approximately 95 were micro-businesses.

The projected economic impact for a small business and micro-business is $9.68 per month, per individual.

In preparing the proposed rules, the agency considered several alternatives to minimize the adverse economic impact on small and micro-businesses. Specifically, the agency considered continuing to reimburse all CBA providers for the cost of obtaining specifications and requisitioning items, but determined that the savings required by the General Appropriations Act (Article II, Special Provisions, Section 17(a)(5), H.B. 1, 82nd Legislature, Regular Session, 2011) would not be achieved using that alternative. Similarly, the agency considered continuing to reimburse CBA providers that are small and micro-businesses for the cost of obtaining specifications and requisitioning items, but determined that the required savings would not be achieved using that alternative either, especially given the high percentage of CBA providers that are small and micro-businesses. Finally, the agency considered reducing reimbursement for the cost of obtaining specifications and requisitioning items to Home and Community Based Services (HCS) Program providers, in addition to CBA and CLASS providers to save costs and, lessen the effect on CBA providers. However, the agency determined that HCS providers would be subjected to a disproportionately large reduction in revenue, as compared to CBA providers, because other reductions in revenue have been imposed on HCS providers recently. Thus, the agency determined that small and micro-businesses will incur the cost of complying with the proposed rules in an effort to achieve the cost savings required by the General Appropriations Act.

PUBLIC BENEFIT AND COSTS

Jon Weizenbaum, DADS Deputy Commissioner, has determined that, for each year of the first five years the amendments and new sections are in effect, the public benefit expected as a result of enforcing the amendments and new sections is a cost savings for the state, while ensuring that an individual enrolled in the CBA Program continues to receive needed program services.

Mr. Weizenbaum anticipates that there will be an economic cost to persons who are required to comply with the amendments and new sections. The probable economic cost to persons required to comply with the amendments and new sections for each year of the first five years the amendments and new sections are in effect will be $9.68 per month, per individual. The amendments and new sections will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Dana Williamson at (512) 438-3385 in DADS Waiver and State Plan Division, Center for Policy and Innovation. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-11R01, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, TX 78751; faxed to (512) 438-5759; or e-mailed to *rulescomments@dads.state.tx.us.* To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register.* The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 11R01" in the subject line.

A hearing to accept public comment regarding the proposal will be held at 8:30 a.m., Tuesday, October 18, 2011, in the Public Hearing Room of the John H. Winters Building, 701 W. 51st Street, Austin, Texas. The hearing is being held to comply with the requirements of Texas Government Code, §2001.029(b), in the event a request is made in accordance with that subsection. Persons with disabilities who will need auxiliary aids or services at the hearing are asked to call the Center for Consumer and External Affairs at (512) 438-4563, at least three days before the date of the hearing so appropriate arrangements can be made.

STATUTORY AUTHORITY

The amendments and new sections are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The amendments and new sections affect Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§48.6002. Community Based Alternatives (CBA) Definitions.

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

(1) Advance notice--A statement of the action the state intends to take provided in writing to the individual or the individual's authorized representative; and advises them of the right to a hearing, the method by which a hearing may be obtained, and that the individual may represent himself, or use legal counsel, a relative, a friend, or other spokesperson. The Texas Department of Aging and Disability Services (DADS) [~~Texas Department of Human Services (DHS)~~] must provide a notice to the individual at least 10 days before the date of action.

(2) Denial--An action taken by DADS that:

(A) rejects an applicant's request for enrollment into the CBA Program;

(B) rejects a CBA Program service requested on an ISP that was not previously authorized on the current ISP;

(C) rejects a request for an increase of a CBA program service above the amount that was authorized on the current ISP; or

(D) rejects, in part, the amount of a request for a CBA Program service that was not authorized on the current ISP.

(3) HCSSA--A home and community support services agency licensed by DADS in accordance with Texas Health and Safety Code, Chapter 142.

(4) ISP--An individual service plan is a written plan developed using person-directed planning to describe, for each CBA Program service to be provided to an individual, the type and amount of service, the type of provider, and the estimated cost.

(5) LVN--Licensed vocational nurse. A person licensed to provide vocational nursing in accordance with Texas Occupations Code, Chapter 301.

(6) Reduction--An action taken by DADS that decreases the requested amount of a CBA Program service below the amount on the current ISP.

(7) RN--Registered nurse. A person licensed to provide professional nursing in accordance with Texas Occupations Code, Chapter 301.

(8) [~~(2)~~] Suspension of services--A temporary reduction of waiver services without loss of program or Medicaid eligibility.

(9) [~~(3)~~] Waiver Program--A Medicaid program that provides home and community-based services to a limited number of eligible adults who are aged and/or disabled as an alternative to institutional care in a nursing facility in accordance with the waiver provisions of the Social Security Act, §1915(c).

(10) [~~(4)~~] Waiver Program Services--Medicaid home and community-based services provided under waiver provisions of the Social Security Act, §1915(c).

(11) Workday--Any day except Saturday, Sunday, a state holiday, or a federal holiday.

§48.6003. Eligibility Criteria.

(a) In this section, the term "individual" means a person applying for or enrolled in the Community Based Alternatives (CBA) Program, unless the context clearly indicates otherwise.

(b) To be determined eligible by the Department of Aging and Disability Services (DADS) for the CBA Program, an individual must:

(1) be 21 years of age or older;

(2) meet the level-of-care criteria for medical necessity for nursing facility care in accordance with §19.2401 of this title (relating to General Qualifications for Medical Necessity Determinations);

(3) choose the CBA Program as an alternative to nursing facility services, as described in the Code of Federal Regulations, Title 42, §441.302(d);

(4) not be enrolled in another Medicaid waiver program approved by the Centers for Medicare and Medicaid Services (CMS) pursuant to §1915(c) of the Social Security Act and operated by DADS;

(5) live in a county not included in a Medicaid managed care area;

(6) have an individual service plan (ISP) [~~of care (IPC)~~] with a cost for CBA Program services at or below 200 percent of the reimbursement rate that would have been paid for that same individual to receive nursing facility services, as of August 31, 2010, considering all other resources, including resources described in §40.1 of this title (relating to Use of General Revenue for Services Exceeding the Individual Cost Limit of a Waiver Program);

(7) have been determined by the Texas Health and Human Services Commission to be financially eligible for Medicaid;

(8) have ongoing needs for CBA Program services with projected costs, as indicated on the ISP [~~IPC~~], that do not exceed the following maximum service ceilings:

(A) adaptive aids and medical supplies service category must not exceed $10,000 per individual per ISP [~~IPC~~] year without approval by DADS;

(B) minor home modifications service category must not exceed a lifetime maximum of $7,500 per individual without approval by DADS, and a maximum of [~~after which minor home modifications must not exceed~~] $300 per ISP [~~IPC~~] year for repair and maintenance of a minor home modification [~~or additional modifications~~]; and

(C) respite care must not exceed 30 days per individual per ISP [~~IPC~~] year without approval by DADS;

(9) receive CBA Program services within 30 days after eligibility is established;

(10) reside in:

(A) the individual's own home;

(B) a licensed assisted living facility contracted with DADS to provide CBA Program services; or

(C) an adult foster care home contracted with DADS to provide CBA Program services;

(11) not reside in an institutional setting, including a hospital, a nursing facility, an intermediate care facility for persons with mental retardation, or a facility required to be licensed as an assisted living facility but is not licensed; and

(12) meet two or more of the criteria specified in the Nursing Facility Risk Criteria Scoring Form [~~Resident Assessment Instrument-Home Care Assessment for Nursing Home Risk and summarized~~] as follows:

(A) needs assistance with one or more of the activities of dressing, personal hygiene, eating, toilet use, or bathing;

(B) has a functional decline in the past 90 days;

(C) has a history of a fall two or more times in past 180 days;

(D) has a neurological diagnosis of Alzheimer's disease, head trauma, multiple sclerosis, parkinsonism, or dementia;

(E) has a history of nursing facility placement within the last five years;

(F) has multiple episodes of urine incontinence daily; or

(G) goes out of one's residence one or fewer days a week.

(c) Enrollment in the CBA Program is limited to the number of individuals approved by CMS or the availability of state funding.

(1) An individual is enrolled from the CBA Program interest list on a "first-come, first-served" basis, except for the following:

(A) an individual who is 21 years of age and:

(i) has been receiving Medically Dependent Children Program (MDCP) services and is no longer eligible for MDCP; or

(ii) has been receiving nursing services through the Texas Health Steps Program and is no longer eligible for Texas Health Steps Program services; or

(B) an individual described in paragraph (3) of this subsection.

(2) Except for an individual described in paragraph (1)(A) and (B) of this subsection, DADS suspends enrollment of individuals whose names are on the CBA Program interest list into the CBA Program while the census of enrolled individuals exceeds funded limits.

(3) An individual receiving services reimbursed through the Texas Medicaid Nursing Facility Program will be approved for the CBA Program if the individual requests services while residing in the nursing facility and meets all eligibility criteria for the CBA Program. If the individual is discharged from the nursing facility for a community setting before being determined eligible for Medicaid nursing facility services and the CBA Program, the individual will be denied immediate enrollment in the CBA Program.

(d) An individual transferring from a nursing facility or from MDCP is exempt from subsection (b)(12) of this section.

§48.6006. Individual Service Plan [~~of Care~~].

(a) In this section, the term "individual" means a person applying for or enrolled in the Community Based Alternatives (CBA) Program, unless the context clearly indicates otherwise.

(b) A CBA [~~Program~~] provider must coordinate with an interdisciplinary team to develop an ISP [~~individual plan of care (IPC)~~] that is based on assessments conducted in accordance with §48.6020 and §48.6022 of this subchapter (relating to Pre-Enrollment Health Assessment; and Community Based Alternatives Annual Reassessment) and that meets the criteria in subsection (d) of this section.

(c) Before providing CBA Program services in accordance with the (ISP) [~~IPC~~], the CBA [~~Program~~] provider must obtain approval from the Department of Aging and Disability Services (DADS).

(d) To be approved by DADS, CBA Program services in the ISP [~~IPC~~] must:

(1) be necessary to protect the individual's health and welfare in the community;

(2) supplement rather than replace the individual's natural supports and other non-CBA Program services and supports for which the individual may be eligible;

(3) prevent the individual's admission to an institution;

(4) be the most appropriate type and amount of services to meet the individual's needs; and

(5) be cost effective.

(e) If the ISP includes a service that has a limit described in §48.6084(a)(2)(A) - (G) of this subchapter (relating to Service Limits

and Claim Limits), the HCSSA must provide information to the DADS case manager, in accordance with §48.6085(a) of this subchapter (relating to Exception to Service Limit), that exceeding the limit is necessary to meet the individual's needs.

(f) [~~(e)~~] To demonstrate that the CBA Program services on [~~in~~] the ISP [~~IPC~~] meet the requirements described in subsection (d) of this section, the CBA [~~Program~~] provider must submit to DADS the following:

(1) an assessment of the individual supporting the CBA Program services recommended by the CBA [~~Program~~] provider; and

(2) documentation that other sources for adaptive aids and medical supplies are unavailable.

(g) [~~(f)~~] DADS conducts utilization review of an ISP [~~IPC~~] and supporting documentation at any time to determine if the CBA Program services specified in the ISP [~~IPC~~] meet the requirements described in subsection (d) of this section.

(1) The CBA [~~Program~~] provider must submit documentation supporting the ISP [~~IPC~~] to DADS as requested by DADS.

(2) If DADS determines that one or more of the CBA Program services specified in the ISP [~~IPC~~] do not meet the requirements described in subsection (d) of this section, DADS denies or reduces the service, modifies the ISP [~~IPC~~], and sends written notification to the individual and CBA Program provider.

(h) [~~(g)~~] In addition to the utilization review conducted in accordance with subsection (g) [~~(f)~~] of this section, DADS may conduct utilization reviews of CBA [~~Program~~] providers and CBA Program services based on utilization patterns and trends.

§48.6010. Individual's [~~Client's~~] Right to Appeal.

An applicant whose request for enrollment into the CBA Program is denied or is not acted upon with reasonable promptness, or an individual whose CBA Program services have been denied, suspended, reduced, or terminated by DADS, is entitled to a fair hearing in accordance with Texas Administrative Code, Title 1, Chapter 357, Subchapter A (relating to Uniform Fair Hearing Rules). [~~Any applicant or client who is denied waiver program services is entitled to a fair hearing conducted by the Texas Department of Human Services (DHS) according to DHS's fair hearing rules in Chapter 79 of this title (relating to Legal Services).~~]

§48.6026. Home and Community Support Services Agency (HCSSA) Qualifications.

(a) A HCSSA that contracts to provide CBA services must:

(1) maintain a license under Chapter 97 of this title (relating to Licensing Standards for Home and Community Support Services Agencies) in the licensed home health services category;

(2) have a separate contract to provide CBA services in each DADS region in which services are to be delivered;

(3) be in compliance with Chapter 49 of this title (relating to Contracting for Community Care Services);

(4) have the counties in the DADS contract for CBA services included in the identified licensed service area on file at DADS; and

(5) be authorized by the secretary of state to do business in the State of Texas (if an out-of-state corporation).

(b) A HCSSA that contracts to provide CBA services may maintain a license in the personal assistance services category in addition to the licensed home health services category for the purpose of providing personal assistance services [~~care tasks~~] that do not require nurse delegation [~~or supervision, including health maintenance activities~~].

§48.6052. Cost-Effective Purchases of Adaptive Aids.

(a) Adaptive aid costing less than $500.

(1) [~~(a)~~] For any single adaptive aid expenditure costing less than $500, the HCSSA [~~Home and Community Support Services (HCSS) agency~~] must:

(A) [~~(1)~~] determine and document the needs and preferences of the participant for the adaptive aid;

(B) [~~(2)~~] document the necessity for the adaptive aid;

(C) [~~(3)~~] consider renting the adaptive aid on a short-term basis if the participant's needs or desires cannot be accurately determined at the time of the assessment;

(D) [~~(4)~~] obtain comparative price quotes or use a price list to document prices of the adaptive aid from a minimum of three suppliers or annually select a supplier based on the lowest prices from the quotes or price [~~quotes/price~~] list for the main types of adaptive aids purchased by the HCSSA; [~~that the agency has been purchasing.~~]

(E) document [~~Document~~] in the vendor records:

(i) the names of the suppliers from whom all quotes or price [~~quotes/price~~] lists were obtained;[~~,~~]

(ii) the amount of the quotes or price [~~quotes/price~~] lists;[~~,~~]

(iii) the items for which the quotes or price [~~quotes/price~~] lists were requested;[~~,~~] and

(iv) the dates the quotes or price [~~quotes/price~~] lists were obtained;

(F) [~~(5)~~] document in the individual's record;

(i) the reason each selection is made[~~,~~] (examples are cost, delivery time of item, record of quality services, access to loaners during repairs, repair history, and warranty; the individual's personal preference alone is not sufficient justification for purchasing a more expensive item); or [~~document~~]

(ii) the selection of an annual supplier[~~. Participant preference alone is not sufficient justification for purchasing a more expensive item~~]; and

(G) [~~(6)~~] have an LVN, RN [~~a nurse~~], occupational therapist, physical therapist, speech, hearing, and language therapist, or other appropriate HCSSA employee or contractor who has [~~agency staff that have~~] been involved in the procurement contact the individual [~~participant~~] within ten DADS workdays after [~~10 Texas Department of Human Services (DHS) work days of~~] delivery of the adaptive aid to the individual to:

(i) verify that the adaptive aid meets the needs of the individual; [~~participant,~~]

(ii) verify that orientation was provided to the individual [~~participant~~] in the use of the adaptive aid;[~~,~~] and

(iii) [~~to~~] document completion of the purchase and satisfaction of the individual [~~participant~~] on the CBA Documentation of Completion of Purchase [~~documentation of completion of purchase~~] form.

(2) If the HCSSA becomes aware that additional orientation, training, or adjustments [~~orientation/training or adjustments~~] to the adaptive aid are needed, the HCSSA:

(A) must ensure an LVN, RN, occupational therapist, physical therapist, speech, hearing, and language therapist, or durable medical equipment vendor conducts a home visit to provide the needed orientation, training or adjustments [~~will be conducted by a therapist, nurse, or durable medical equipment vendor. The follow-up home visit must be conducted~~] within 14 DADS workdays after the HCSSA becomes aware [~~DHS work days of awareness~~] of the need; and [~~for additional training/orientation or adjustments. If the home visit is conducted by a therapist or nurse,~~]

(B) may request reimbursement for the home visit [~~is reimbursed~~] at the hourly rate for nursing or therapy services, depending on which professional provided the service.

(b) Adaptive aid costing $500 or more.

(1) [~~(b)~~] For any single adaptive aid expenditure costing $500 or more, in addition to complying with the requirements listed in subsection (a) of this section, the HCSSA [~~HCSS agency~~] must:

(A) [~~(1)~~] obtain written specifications for the adaptive aid from: [~~an appropriate professional including~~]

(i) a licensed physician;[~~,~~]

(ii) an RN; [~~nurse,~~]

(iii) an occupational therapist;[~~,~~]

(iv) a physical therapist;[~~, or~~]

(v) a speech, hearing, and language therapist; or

(vi) for computer assistive technology, augmentative communication devices, or environmental controls, another appropriate professional, including a rehabilitation engineer; and [~~pathologist. Other appropriate professionals, including rehabilitation engineers, may provide assessments and specifications for computer assistive technology, augmentative communication devices, or environmental controls. Providing assessments and obtaining written specifications is reimbursable as a nursing service if performed by a nurse and as a therapy service if performed by an occupational therapist, physical therapist, or speech pathologist and authorized on the individual service plan. If another appropriate professional is required to provide the assessment and develop the specifications for computer assistive technology, environmental controls, or augmentative communication devices, the actual cost of writing the specifications and the follow-up orientation/training visit is reimbursed as part of the invoice cost up to a maximum of $500. The provider must maintain documentation to support the cost of developing the specifications;~~]

(B) obtain comparative price quotes or use a price list to document prices of the adaptive aid from a minimum of three suppliers or annually select a supplier based on the lowest prices from the quotes or price list for the main types of adaptive aids purchased by the HCSSA; and

(C) document in the vendor records:

(i) the names of the suppliers from whom all quotes or price lists were obtained;

(ii) the amount of the quotes or price lists;

(iii) the items for which the quotes or price lists were requested; and

(iv) the dates the quotes or price lists were obtained.

(2) A HCSSA may claim reimbursement for an assessment for an adaptive aid:

(A) conducted by an RN as a nursing service; and

(B) conducted by an occupational therapist, physical therapist, or speech, hearing, and language therapist as a therapy service.

(3) If an appropriate professional other than those listed in paragraph (2) of this subsection is required to provide an assessment for computer assistive technology, environmental controls, or augmentative communication devices, the actual cost of an assessment or a follow-up orientation or training visit is reimbursed, up to a maximum of $500. The CBA provider must maintain documentation to support the cost of providing an assessment and conducting a follow-up orientation or training visit.

[~~(2) obtain a minimum of three written bids if not using price lists or price quotes as identified under subsection (a)(4) of this section, and document the reason for the selection including cost, delivery time of item, record of quality services, access to loaners during repairs, repair history, and warranties.~~]

§48.6068. Cost-Effective Purchases of Minor Home Modifications.

(a) The HCSSA [~~Home and Community Support Services (HCSS) agency~~] must:

(1) determine and document the needs and preferences of the individual [~~participant~~] for the minor home modification;

(2) document the necessity for the minor home modification;

(3) obtain written specifications for any minor home modification project expenditure costing $1,000 or more which will be used to procure bids and inspect the completed job;[~~. Written specifications must be obtained from an individual with experience in home modifications. These specifications are reimbursable as part of the invoice cost of a minor home modification up to a maximum of $200. The provider must maintain documentation to support the cost for developing the specifications. The individual who developed the specifications may bid on the completion of the minor home modification;~~]

(4) obtain a minimum of three written bids based on the written specifications for any project expenditure costing $1,000 or more;

(5) select a bidder to provide the modification and document the reason for selecting the bid including cost, completion time of modification, record of quality service, timely response to repair requests, and warranties; and

(6) inspect the minor home modification for completion, compliance with the written specifications, if applicable, [~~and~~] quality of workmanship, and compliance with Texas Accessibility Standards within seven DADS workdays after [~~Texas Department of Human Services (DHS) work days of~~] the work is [~~being~~] completed.

(b) The HCSSA must ensure that written specifications obtained in accordance with subsection (a)(3) of this section are obtained from a person with experience in home modifications.

(1) The HCSSA must maintain documentation that supports the written specifications.

(2) The person who develops the written specifications may bid on the completion of the minor home modification.

(c) The inspection requirements are as follows:

(1) [~~(A)~~] The HCSSA [~~HCSS provider~~] must ensure that a qualified person conducts an inspection of the completed minor home modification in accordance with subsection (a)(6) of this section [~~inspects completed work to ensure all work was done according to written specifications, if applicable, and the Texas Accessibility Standards~~].

(2) [~~(B)~~] The HCSSA must ensure that the inspection is not [~~may be~~] performed by the person who prepared [~~individual preparing~~] the specifications obtained in accordance with subsection (a)(3) of this section, [~~but not by~~] the contractor who completed the minor home modification, or [~~nor by~~] the attendant.

(A) The invoice cost of the inspection is reimbursable as a minor home modification up to a maximum of $150.

(B) The HCSSA [~~provider~~] must maintain documentation to support the cost for performing the inspection [~~inspections~~].

(3) [~~(C)~~] Once the inspection is concluded and the minor home modification is completed, the HCSSA [~~HCSS provider~~] must send a copy of the CBA [~~Community Based Alternatives~~] documentation of completion of purchase form to the DADS case manager within seven DADS workdays [~~DHS work days~~] after the completion of the inspection.

(A) The HCSSA may submit a claim to DADS for the cost of building materials before the minor home modification is completed.

(B) The minor home modification must pass inspection before the HCSSA submits a claim to DADS [~~provider bills DHS~~] for the costs of labor and completion. [~~The cost of building materials may be billed separately before completion.~~]

§48.6078. Billable Units.

The following activities may be billed as Community Based Alternatives (CBA) services by a HCSSA [~~home and community support services agency~~]:

(1) Nursing services:

(A) direct [~~participant~~] contact with an individual;

(B) participation on the interdisciplinary team (IDT);

(C) time spent in delegating, training, and supervising a personal assistance services attendant, care attendants, an adult foster care provider, [~~Adult Foster Care providers,~~] and an adult foster care provider substitute [~~substitutes~~] in the delivery of delegated [~~nursing~~] tasks [~~that have been delegated~~];

(D) to prevent a service break, time spent in providing nursing tasks that had been delegated to an attendant who is not available in order to prevent a service break[~~, if no attendant can be found~~];

(E) time spent in training family members, neighbors, and other informal support providers to provide needed nursing or personal assistance services [~~care~~] tasks;

(F) time spent performing an [~~the~~] annual reassessment or level of care reassessment that includes direct [~~resets which include actual participant~~] contact with an individual and documentation of assessment forms and ISP [~~care plan~~];

(G) time spent performing assessments and developing written specifications for adaptive aids; and

(H) a follow-up orientation or training visit following delivery of adaptive aids.

(2) Specialized therapy services (occupational therapy, physical therapy, and speech, hearing, and language therapy [~~pathology~~]):

(A) direct [~~participant~~] contact with an individual;

[~~(B) development of written bid specifications;~~]

(B) [~~(C)~~] a follow-up orientation or training [~~follow-up/orientation~~] visit following delivery of adaptive aid; and

(C) [~~(D)~~] participation on the IDT.

(3) Personal assistance services:

(A) direct [~~participant~~] contact with an individual to provide [~~personal care and nursing~~] tasks [~~that have been delegated~~]; and

(B) participation on the IDT.

(4) Billable items for medical supplies are limited to [~~include~~] the invoice cost, [~~including~~] freight charges, and sales tax[~~,~~] of the medical supply [~~and the requisition fee~~].

(5) Billable items for minor home modifications are limited to [~~include~~] the invoice cost of labor, materials, sales tax, and [~~actual cost of specification development up to $200,~~] actual cost of inspection up to $150[~~, and the requisition fee~~].

(6) Billable items for adaptive aids are limited to [~~include~~] the invoice cost of the item, [~~including~~] freight charges, [~~and~~] sales tax, [~~actual cost of development of written bid specifications for computer assistive technology, environmental controls and augmentative communication devices,~~] and up to $500 for a follow-up orientation or training [~~the follow-up/orientation~~] visit by the professional knowledgeable of the adaptive aid [~~these items, up to $500 of the cost of the item, and the requisition fee~~].

(7) In-Home Respite Care--relief of the unpaid primary caregiver.

§48.6084. Service Limits and Claim Limits.

(a) Service limits.

(1) The limits to an individual's services listed in paragraph (2) of this subsection are in effect through August 31, 2013.

(2) Subject to an exception granted by DADS in accordance with §48.6085 of this subchapter (relating to Exception to Service Limit), the following limits apply to an individual's services:

(A) An individual may receive, during an ISP year, adaptive aids having a maximum cost of $2,050.

(B) An individual may receive, during an ISP year, general dentistry services and the services of an oral and maxillofacial surgeon having a maximum combined cost of $4,675.

(C) An individual may receive, during an ISP year, medical supplies having a maximum cost of $1,736.

(D) During the time period an individual is enrolled in the CBA Program, an individual may receive minor home modifications that have a maximum cost of $6,550, which may be paid in one or more ISP years.

(E) An individual may receive a maximum of 24 days of respite during an ISP year.

(F) The maximum number of hours of a specialized therapy that an individual may receive during an ISP year is as follows:

(i) for occupational therapy, 61 hours;

(ii) for physical therapy, 86 hours; and

(iii) for speech, hearing, and language therapy, 69 hours.

(G) An individual may receive a maximum of 2,135 hours of PAS during an ISP year.

(3) Not subject to an exception granted by DADS, an individual may receive, during an ISP year, a maximum of $300 for repair and maintenance of a minor home modification.

(4) In accordance with §62.5(c) and (d) of this title (relating to Service Description), an individual may receive a maximum of $2,500 of transition assistance services.

(5) Effective September 1, 2013, the following limits apply to an individual:

(A) For adaptive aids and medical supplies, minor home modifications, and respite during an ISP year, the maximum service ceilings described in §48.6003(b)(8)(A) - (C) of this subchapter (relating to Eligibility Criteria);

(B) For dental services during an ISP year, a maximum combined cost of $5,000 for general dentistry and the services of an oral and maxillofacial surgeon and an additional maximum cost of $5,000 for the services of an oral and maxillofacial surgeon.

(b) Claim Limits.

(1) [~~(a)~~] A HCSSA may bill for a maximum of four hours of [~~may be billed under~~] nursing services by an RN [~~the registered nurse~~] to decide whether or not to delegate a nursing task to an adult foster care provider.

(2) [~~(b)~~] A HCSSA may bill for a maximum of ten hours [~~In order to avoid service breaks, the Home and Community Support Services agency may bill~~] for authorized PAS [~~personal assistance services~~] hours performed by an LVN or RN for an individual [~~a licensed nurse, for a maximum period of 10 hours~~] during the ISP year [~~participant's individual service plan effective period~~].

(A) [~~(1)~~] The PAS hours performed by the LVN or RN [~~nurse~~] may be billed at the nursing rate, only if there are no attendants available to perform the needed delegated nursing tasks and only an LVN or RN [~~licensed nurses~~] can be recruited to perform the authorized PAS hours.

(B) [~~(2)~~] The documentation must include all efforts the HCSSA [~~provider agency~~] made in order to find an attendant to deliver delegated [~~nursing~~] tasks in order to prevent a break in service.

(3) [~~(c)~~] Components of minor home modifications cannot be billed without an invoice or in more than two billings.

§48.6085. Exception to Service Limit.

(a) If a DADS case manager receives information demonstrating that exceeding a limit to an individual's service described in §48.6084(a)(2)(A) - (G) of this subchapter (relating to Service Limits and Claim Limits) is necessary to meet an individual's needs, the DADS case manager determines whether providing the service in excess of the limit is necessary for the ISP to meet the criteria described in §48.6006(d)(1) - (5) of this subchapter (relating to Individual Service Plan).

(b) The DADS case manager grants an exception to a limit if, after a review of the information received as described in subsection (a) of this section, the DADS case manager determines that providing the service in excess of the limit is necessary for the ISP to meet the criteria described in §48.6006(d)(1) - (5) of this subchapter.

(c) An exception granted under subsection (b) of this section is subject to:

(1) for adaptive aids and medical supplies, minor home modifications, and respite during an ISP year, the maximum service ceilings described in §48.6003(b)(8)(A) - (C) of this subchapter (relating to Eligibility Criteria);

(2) for dental services during and ISP year, a maximum combined cost of $5,000 for general dentistry and the services of an oral and maxillofacial surgeon and an additional maximum cost of $5,000 for the services of an oral and maxillofacial surgeon; and

(3) the ISP cost as described in §48.6003(b)(6) of this subchapter.

§48.6090. Fiscal Monitoring and Recoupment.

(a) Administrative errors. A recoupment of 12% of the paid unit rate is the administrative error exception for services billed on an hourly basis. It represents the administrative portion of the rate. Administrative errors are applied to the documentation reviewed and are not extrapolated. Administrative errors include, but are not limited to [~~the items in paragraphs (1)-(2) of this subsection~~]:

[~~(1) administrative errors on the documentation of services delivered form or the facsimile:~~]

(1) [~~(A)~~] The CBA provider [~~agency~~] leaves the month and year of service blank. DADS [~~The Texas Department of Human Services (DHS)~~] applies the error to the total number of units documented on the time sheet.

(2) [~~(B)~~] The timekeeper fails to enter a date of signature to certify the total number of hours the attendant, LVN, RN [~~nurse~~], or therapist worked. DADS [~~DHS~~] applies the error to the total number of units documented on the time sheet.

(3) [~~(C)~~] The timekeeper corrects the date of signature, but fails to initial the correction. DHS applies the error to the number of units reimbursed after the earliest signature date.

(4) [~~(D)~~] The timekeeper enters an illegible date of signature or makes an illegible correction to the date. DADS [~~DHS~~] applies the error to the total number of units documented on the time sheet.

(5) [~~(E)~~] The timekeeper enters a date of signature that is before the date of the last day services are delivered. DADS [~~DHS~~] applies the error to the total number of units reimbursed after the signature date.

(6) [~~(F)~~] The timekeeper fails to sign the time sheet. DADS [~~DHS~~] applies the error to the total number of units documented on the time sheet.

(7) [~~(G)~~] The timekeeper uses a signature stamp, but fails to initial the stamped signature. DADS [~~DHS~~] applies the error to the total number of units documented on the time sheet.

(8) [~~(H)~~] The attendant, LVN, RN [~~nurse~~], therapist, or [~~and/or~~] timekeeper uses correction fluid or tape [~~liquid paper/correction fluid~~] to correct an entry in the record of time, signature, or date portion of the time sheet. DADS [~~DHS~~] applies the error to the total number of units documented on the time sheet. If the correction fluid or tape [~~liquid paper/correction fluid~~] is used only on a daily entry in the record of time, DADS [~~DHS~~] applies the error only to the total number of units reimbursed for that day.

(9) [~~(I)~~] The attendant, LVN, RN [~~nurse~~], therapist, or [~~and/or~~] timekeeper makes an illegible entry in or an illegible correction to any portion of the record of time column. DADS [~~DHS~~] applies the error to the total number of units reimbursed for the days in which entries are illegible.

(10) [~~(J)~~] The attendant fails to initial an increase in the daily time or the monthly total of hours for the pay period. DADS [~~DHS~~] applies the error to the number of units reimbursed in excess of the original entry.

(11) [~~(K)~~] The attendant, LVN, RN [~~nurse~~], therapist, or other agency representative fails to sign the documentation of services

delivered form or facsimile. DADS [~~DHS~~] applies the error to the total number of units documented on the time sheet.

(12) [~~(L)~~] DADS [~~DHS~~] reimburses the HCSSA [~~provider agency~~] for nursing, occupational therapy [~~therapies~~], personal assistance services, physical therapy, and speech, hearing, and language therapy, or in-home respite, but a valid ISP [~~individual service plan, pages 1-3~~] and all pertinent attachments, signed by the case manager, is missing for the period reimbursed by DADS [~~the agency~~]. DADS [~~DHS~~] applies the error to the total number of units of nursing, occupational therapy [~~therapies~~], personal assistance services, physical therapy, and speech, hearing, and language therapy, or in-home respite, claimed and not covered by a valid ISP [~~individual service plan~~].

(13) [~~(M)~~] DADS [~~DHS~~] reimburses the HCSSA [~~provider agency~~] for nursing services and there is no other documentation available to determine whether the nurse provided billable nursing services during the visit.

~~[(2) The following items are administrative errors resulting in recoupment of the entire requisition fee:]~~

~~[(A) There is no Community Based Alternatives documentation of completion of purchase form, but there is a receipt for the purchase of adaptive aids, medical supplies, or for the completion of the minor home modification.]~~

~~[(B) Bids were required for the purchase of an adaptive aid or the completion of a minor home modifications and bids were not solicited.]~~

~~[(C) DHS reimburses the provider agency for the purchase of medical supplies, but there is no documentation available that price list/price quotes were obtained from three suppliers for the items for which the provider has been reimbursed or the price list/price quotes were obtained more than 12 months before the purchase.]~~

~~[(D) DHS reimburses the provider agency for the purchase of adaptive aids, but there is no documentation available that price list/price quotes were obtained from three suppliers for the items for which the provider has been reimbursed or there is no documentation available that the supplier selected on an annual basis to deliver the adaptive aids had the lowest prices for the main type of adaptive aids the agency has purchased.]~~

(b) Financial errors. A reduction of 100% of the paid unit rate is the financial error exception. This exception is applied to the units of service on the documentation reviewed. This exception is not extrapolated. Financial errors include, but are not limited to, the following:

(1) DADS [~~DHS~~] reimburses the HCSSA [~~provider agency~~] for services, but the documentation of services delivered form, or facsimile, is missing for the period for which services are reimbursed. DADS [~~DHS~~] applies the error to the total number of units documented on the time sheet.

(2) The attendant, LVN, RN, occupational therapist, physical therapist, or speech, hearing, and language [~~nurse, or~~] therapist leaves the entire record of time section blank. DADS [~~DHS~~] applies the error to the total number of units documented on the time sheet.

(3) DADS [~~DHS~~] reimburses the CBA provider [~~agency~~] for hours that exceed the authorization given by DADS [~~DHS~~]. DADS [~~DHS~~] applies the error to the total number of hours [~~units~~] reimbursed in excess of the number of hours [~~units~~] authorized by DADS [~~DHS~~], unless purchased following emergency procedures. For nursing tasks, the maximum monthly hours that may be reimbursed is the number of hours listed under "NURSING TASKS, Direct Nursing Performed by HCSSA [~~HCSS Provider~~]" on the nursing service plan [~~individual service plan/nursing service plan~~].

(4) DADS [~~DHS~~] reimburses the CBA provider [~~agency~~] for any waiver service that is not identified on the ISP [~~individual service plan~~] and attachments, unless the service was provided as a result of an emergency and is supported by backup documentation supplied by the CBA provider within seven DADS workdays after [~~DHS work days from~~] the date the emergency was determined. DADS [~~DHS~~] applies the error to the entire amount reimbursed for such services.

(5) DADS [~~DHS~~] reimburses the CBA provider [~~agency~~] for hours that exceed the total number of hours recorded on the documentation of services delivered form or facsimile. DADS [~~DHS~~] applies the error to the total number of hours [~~units~~] reimbursed in excess of the hours [~~units~~] recorded on the time sheet. If the sum of the daily total of hours does not equal what is written in the monthly total blank, the lesser of the two totals is used to calculate the total number of hours subject to the error.

(6) DADS [~~DHS~~] reimburses the HCSSA [~~provider agency~~] for nursing, physical therapy, occupational therapy, or speech, hearing, and language therapy [~~pathology~~] services, but a valid physician's order is missing. DADS [~~DHS~~] applies the error to the total number of units claimed and not covered by a valid physician's order.

(7) DADS [~~DHS~~] reimburses the HCSSA [~~provider agency~~] for a claim for service, other than a pre-enrollment home health assessment, delivered prior to the eligibility effective date on the notification of Community Based Alternatives services form. DADS [~~DHS~~] applies the error to the entire amount reimbursed for such services that were delivered before the effective date on the form.

(8) DADS [~~DHS~~] reimburses the HCSSA [~~provider agency~~] for any hours or items that consisted of non-billable time and activities as identified in [~~the rule~~] §48.6080 of this subchapter [~~title~~] (relating to Non-Billable Time and Activities). DADS [~~DHS~~] applies the error to the entire amount reimbursed for such services.

(9) DADS [~~DHS~~] reimburses the HCSSA [~~provider agency~~] for more than four hours of nursing used to decide whether to delegate to an adult foster care [~~Adult Foster Care~~] provider. DADS [~~DHS~~] applies the error to the total number of units reimbursed for such services.

(10) DADS [~~DHS~~] reimburses the HCSSA [~~provider agency~~] for more than 10 hours during the ISP [~~participant's individual service plan~~] year for nursing services being performed by an LVN or RN [~~a nurse~~] to prevent service breaks caused by the attendant not being available to provide delegated nursing tasks. DADS [~~DHS~~] applies the error to the total number of units reimbursed in excess of the 10 hour maximum for such services.

(11) DADS [~~DHS~~] reimburses the CBA provider [~~agency~~] for an amount in excess of the amount documented on the invoice or receipt [~~invoice/receipt~~] for an adaptive aid, dental services, medical supply [~~adaptive aids, medical supplies~~], or minor home modification [~~modifications~~]. DADS [~~DHS~~] applies the error to the total number of dollars reimbursed in excess of the amount on the invoice or receipt [~~invoice/receipt, plus the appropriate dollar amount of the requisition fee, if applicable~~].

(12) If there [~~There~~] is no invoice, receipt, or ISP [~~invoice/receipt~~] for the purchase of an adaptive aid, dental services, or medical supply [~~adaptive aids or medical supplies~~], or for the completion of a minor home modification [~~modifications~~] for which the HCSSA [~~provider~~] has been reimbursed,[~~.~~] DADS [~~DHS~~] applies the error to the total dollar amount reimbursed for the [~~medical supplies,~~] adaptive aid or medical supply, dental services [~~aids~~], or minor home modification [~~modifications in question, including the requisition fee~~].

§48.6092. Initiation of Community Based Alternatives (CBA) Home and Community Support Services Agency [(HCSS)].

In order to initiate CBA HCSSA [~~HCSS~~] services, the HCSSA [~~provider agency~~] must:

(1) negotiate a start date with the Department of Aging and Disability (DADS) case manager for:

(A) priority status applicants; or

(B) routine status applicants needing a specific start date as determined by the (DADS) case manager;

(2) initiate waiver services:

(A) on or before any negotiated start date;

(B) within seven calendar days from the effective date on the DADS [~~Texas Department of Human Services' (DHS's)~~] Notification of CBA Services form for routine status applicants, if no earlier start date has been negotiated;

(C) within seven DADS [~~DHS~~] workdays of the initiation of personal assistance services (PAS) and send a Case Information form to the DADS case manager with the:

(i) service initiation date; and

(ii) name of the attendant performing PAS [~~personal assistance services~~]; and

(3) for non-delegated PAS provided under the PAS licensure category and in accordance with §97.404 of this title (relating to Standards Specific to Agencies Licensed to Provide Personal Assistance Services), ensure that the HCSSA [~~HCSS registered nurse (RN)~~] provides the training specified in subparagraphs (A) - (C) of this paragraph to the attendant in the participant's home, on or before the date of initiation of PAS [~~service~~]:

(A) tasks to be performed [~~information about the participant's health condition and how it may affect the performance of tasks~~];

(B) [~~tasks to be performed,~~] work schedule[~~, and safety and emergency procedures~~]; and

(C) emergency procedures [~~symptoms or changes in the participant's health status about which the unlicensed person should notify either the RN or the attending physician~~].

(4) for PAS provided under the home health licensure category and in accordance with §97.401 of this title (relating to Standards Specific to Licensed Home Health Services), ensure that the HCSSA licensed vocational nurse or registered nurse (RN) provides the training specified in subparagraphs (A) - (C) of this paragraph to the attendant in the participant's home, on or before the date of initiation of PAS:

(A) information about the participant's health condition and how it may affect the performance of tasks;

(B) tasks to be performed, and safety emergency procedures; and

(C) symptoms or changes in the participant's health status about which the unlicensed person should notify either the RN or the attending physician.

§48.6098. Circumstances Requiring Termination [~~Denial~~] of CBA Services with Advance Notice.

(a) If one or more of the circumstances specified in paragraphs (1) - (10) [~~(1) through (10)~~] of this subsection occur, the CBA [~~Community Based Alternatives (CBA)~~] provider [~~agency~~] must provide written documentation to the DADS [~~Texas Department of Human Services (DHS)~~] case manager within two DADS [~~DHS~~] workdays after [~~of~~] the occurrence to support a recommendation for termination [~~denial~~] of CBA services. [~~Advance notice is defined in §48.6002 of this title (relating to Community Based Alternatives (CBA) Definitions).~~]

(1) The individual [~~participant~~] leaves the state for more than 90 days. DADS retains [~~DHS will retain~~] authority to extend this time in extraordinary circumstances.

(2) The individual [~~participant~~] has been legally confined or has resided in an institutional setting for longer than 120 days. An institution includes legal confinement, an acute care hospital, state hospital, rehabilitation hospital, state school, nursing home, or intermediate care facility for persons with mental retardation/related conditions (ICF-MR/RC). DADS retains [~~DHS will retain~~] authority to extend this time in extraordinary circumstances.

(3) The individual [~~participant~~] is not financially eligible for Medicaid benefits.

(4) The individual [~~participant~~] does not meet the medical necessity criteria (MN) for nursing facility care.

(5) HCSSAs [~~Home and community support services providers~~] have refused to serve the individual [~~participant~~] on the basis of a reasonable expectation that the individual's [~~participant's~~] medical and nursing needs cannot be met adequately in the individual's home [~~participant's residence~~].

(6) The individual [~~participant~~] or someone in the individual's [~~participant's~~] home refuses to comply with mandatory program requirements, including the determination of eligibility or [~~and/or~~] the monitoring of service delivery.

(7) The individual [~~participant~~] fails to pay [~~his~~] room and board expenses or copayment in the adult foster care (AFC) or assisted living/residential care (AL/RC) setting.

(8) The individual [~~participant~~] fails to pay the required [~~his~~] qualified income trust copayment.

(9) The situation, individual [~~participant~~], or someone in the individual's [~~participant's~~] home is hazardous to the health and safety of the service provider, but there is no immediate threat to the health or safety of the service provider.

(10) The individual [~~participant~~] or someone in the individual's [~~participant's~~] home openly uses illegal drugs or has illegal drugs readily available within sight of the service provider.

(b) The supporting documentation submitted by the CBA provider must include a detailed description of the interventions attempted by the CBA provider [~~that have occurred~~] prior to deciding [~~the decision~~] to recommend the termination [~~denial~~] of CBA services. The documentation must justify the reasons for termination [~~denial~~] and describe the strategies, outcomes, and negotiations with the individual [~~participant~~] in accordance with CBA [~~the~~] program policies, rules, and [~~in~~] the provider manual.

(c) If the DADS [~~DHS~~] case manager determines the documentation supports the termination of CBA services [~~initiation of denial~~], the DADS case manager provides written notice of the termination of CBA services [~~notification of denial~~] to the individual with a copy to the [~~participant and~~] CBA provider [~~agency~~] within two DADS [~~DHS~~] workdays after receiving the documentation described in subsection (b) of this section. The written notice [~~notification~~] must specify:

(1) the reason for termination; [~~denial,~~]

(2) the effective date of termination; [~~denial,~~]

(3) the regulatory reference; [~~,~~] and [~~provide written notice of the right to appeal.~~]

(4) information regarding the individual's right to request a fair hearing in accordance with §48.6010 of this subchapter (relating to Individual's Right to Appeal).

(d) If the individual submits a request for a fair hearing before the effective date of the termination specified in the written notice [~~participant appeals the notification of denial within 10 days of written notification~~], the CBA provider [~~agency~~] continues CBA services at the current authorized level while the appeal is pending [~~until notification of the decision by the DHS hearing officer. The CBA provider agency must not reduce waiver services until the outcome of the appeal is known~~].

§48.6100. Circumstances Requiring Termination [~~Denial~~] of Services and Medicaid Eligibility Without Advance Notice.

(a) If one or more circumstances specified in paragraphs (1) - (6) [~~(1) through (6)~~] of this subsection occur, the DADS [~~Texas Department of Human Services (DHS)~~] case manager terminates CBA [~~is required to deny Community Based Alternatives (CBA)~~] services without advance notice.

(1) DADS [~~the operating agency~~] or its designee has factual information confirming the death of the individual;

(2) DADS [~~the operating agency~~] or its designee receives a clear written statement signed by the individual that:

(A) the individual [~~he or she~~] no longer wishes services; or

(B) gives information that requires termination [~~or reduction in services~~] and indicates that the individual [~~he or she~~] understands that this must be the result of supplying that information;

(3) The [~~the~~] individual's whereabouts are unknown and the post office returns agency or designee mail directed to the individual [~~him or her~~] indicating no forwarding address;

(4) The CBA provider [~~the operating agency~~] or its designee establishes the fact that the individual has been accepted for Medicaid services by another state;

(5) A [~~a~~] change in the level of medical care is prescribed by the individual's physician; or

(6) The [~~the~~] notice involves an adverse determination made with regard to the preadmission screening requirements.

(b) Within one DADS workday after becoming aware that a situation described in subsection (a) of this section exists, the [~~The~~] CBA provider [~~agency~~] must [~~verbally~~] notify the DADS [~~DHS~~] case manager by phone [~~the next DHS workday~~] of the reason for termination [~~denial~~] and follow up with written documentation on the case information form within two DADS [~~DHS~~] workdays of the phone [~~verbal~~] notification.

(c) The CBA provider is not required to continue to provide CBA services to the individual.

§48.6102. Circumstances Which May Result in Termination [~~Denial~~] of Services and Require Advance Notice.

(a) If one or both circumstances specified in paragraphs (1) and (2) of this subsection occur, the DADS [~~Texas Department of Human Services (DHS)~~] case manager may terminate CBA [~~deny Community Based Alternatives (CBA)~~] services. The CBA provider [~~agency~~] must provide written documentation to DADS [~~DHS~~] to support the reason for the termination [~~denial~~] of services.

(1) The individual [~~participant~~] or someone in the individual's [~~participant's~~] home has a substantial and demonstrated pattern of verbal abuse and harassment of service providers, not related to the individual's [~~participant's~~] disability that [~~, which~~] results in the CBA provider being unable [~~an inability~~] to provide service(s) to the individual [~~participant~~].

(2) The individual [~~participant~~] or someone in the individual's [~~participant's~~] home has a substantial and demonstrated pattern of discrimination against the service providers on the basis of race, color, national origin, age, sex, or disability that has not improved with appropriate intervention and which results in the CBA provider being unable [~~an inability~~] to provide service(s) to the individual [~~participant~~].

(b) The DADS case manager must provide written notice to the individual with an copy to the CBA provider no later than 12 DADS workdays before the effective date of termination identified in the written notice [~~advanced written notification of denial of services to the participant with written notice of the right to appeal~~]. The notification must specify:

(1) the reason for the termination of services; [~~denial,~~]

(2) the effective date of termination; [~~denial, and~~]

(3) the regulatory reference; and[~~.~~]

(4) information regarding the individual's right to request a fair hearing in accordance with §48.6010 of this subchapter (relating to Individual's Right to Appeal).

(c) If the individual submits a request for a fair hearing before the effective date of the termination specified in the written notice [~~participant appeals the denial of services within 10 days of written notification~~], the CBA provider [~~agency~~] must continue to provide CBA services at the current authorized level while the appeal is pending [~~until notification of the decision by the DHS hearing officer. The CBA provider agency must not reduce or suspend services until the outcome of the appeal is known~~].

§48.6104. Crisis Intervention Requiring Immediate Suspension or Reduction of Services Without Advance Notice.

(a) If the individual [~~participant~~] or someone in the individual's home [~~participant's place of residence~~] exhibits reckless behavior that [~~which~~] may result in imminent danger to the health and safety of service providers, the DADS [~~Texas Department of Human Services (DHS)~~] case manager and the CBA [~~Community Based Alternatives (CBA)~~] provider must: [~~agency are required to make an immediate referral for appropriate crisis intervention services to the Texas Department of Protective and Regulatory Services and/or the police and suspend CBA services. Suspension of services is defined in §48.6002 of this title (relating to Community Based Alternatives (CBA) Definitions).~~]

(1) immediately file a report with the appropriate law enforcement agency and, if appropriate, make an immediate referral to the Department of Family and Protective Services for appropriate crisis intervention services; and

(2) immediately suspend the individual's CBA services.

(b) The DADS [~~DHS~~] case manager must immediately provide written notice to the individual with a copy to the CBA provider of the [~~temporary~~] suspension of CBA services [~~to the participant and the right of appeal to a fair hearing must be explained to the participant~~]. The written notice [~~notification~~] must specify:

(1) the reason for suspension of services; [~~denial/suspension,~~]

(2) the effective date of the suspension;[~~,~~]

(3) the regulatory reference;[,] and [~~the right of appeal.~~]

(4) information regarding the individual's right to request a fair hearing in accordance with §48.6010 of this subchapter (relating to Individual's Right to Appeal).

(c) The CBA provider [~~agency~~] must [~~verbally~~] inform the DADS [~~DHS~~] case manager by phone by the following DADS [~~DHS~~] workday of the reason for the immediate suspension and follow up with written notification to DADS [~~DHS~~] within two DADS [~~DHS~~] workdays of the phone [~~verbal~~] notification.

(d) The DADS [~~DHS~~] case manager must make a face-to-face visit to the individual to initiate efforts to resolve the situation. If the temporary suspension of services constitutes a threat to the health and safety of the individual, then community alternatives or placement in an institutional setting must be offered and facilitated by the DADS case manager.

(e) With prior authorization by DADS [~~DHS~~], the CBA provider [~~agency~~] may continue providing services to assist in the resolution of the crisis. This service will be reimbursed as an administrative expense.

(f) If the crisis is not satisfactorily resolved, the DADS [~~DHS~~] case manager provides written notice to the individual with a copy to the CBA provider [~~notification~~] of the termination [~~denial~~] of services [~~and offers the right of appeal. Services do not continue during the appeal process~~]. The written notice must specify:

(1) the reason for termination;

(2) the effective date of termination;

(3) the regulatory reference; and

(4) information regarding the individual's right to request a fair hearing in accordance with §48.6010 of this subchapter.

(g) If the individual submits a request for a fair hearing, the CBA provider is not required to continue to provide CBA services to the individual.

§48.6109. Denial of a CBA Program Service.

(a) The DADS case manager denies a request for a CBA service if the DADS case manager determines, as a result of utilization review, that the service does not meet the requirements described in §48.6006(d)(1) - (5) of this subchapter (relating to Individual Service Plan).

(b) The DADS case manager provides written notice of the denial to the individual and the CBA provider agency within two DADS workdays of making the determination. The written notice must specify:

(1) the reason for denial;

(2) the regulatory reference, if applicable; and

(3) the individual's right to request a fair hearing in accordance with §48.6010 of this subchapter (relating to Individual's Right to Appeal).

(c) If the individual submits a request for a fair hearing, the CBA provider is not required to provide the denied CBA services to the individual while the appeal is pending.

§48.6110. Reduction of a CBA Program Service.

(a) The DADS case manager reduces the amount of a CBA Program service if the DADS case manager determines:

(1) as a result of utilization review, that the amount of the service does not meet the requirements described in §48.6006(d)(1) - (5) of this subchapter (relating to Individual Service Plan); or

(2) that providing the service in excess of a service limit described in §48.6084(a)(2)(A) - (G) of this subchapter (relating to Service Limits and Claim Limits) is not necessary to meet the requirements described in §48.6006(d)(1) - (5) of this subchapter.

(b) If the DADS case manager reduces the services, the DADS case manager provides written notice to the individual and CBA provider not later than 12 DADS workdays before the effective date of the reduction identified in the written notice. The written notice must specify:

(1) the reason for reduction;

(2) the effective date of reduction;

(3) the regulatory reference; and

(4) the individual's right to request a fair hearing in accordance with §48.6010 of this subchapter (relating to Individual's Right to Appeal).

(c) If the individual submits a request for a fair hearing, the CBA provider agency must continue to provide the service at the current authorized level while the appeal is pending.

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

Filed with the Office of the Secretary of State on September 26, 2011.

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Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Proposed date of adoption: December 1, 2011
For further information, please call: (512) 438-3734

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CHAPTER 51. MEDICALLY DEPENDENT CHILDREN PROGRAM
SUBCHAPTER B. ELIGIBILITY, ENROLLMENT, AND SERVICES

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §51.215, concerning home visit, §51.231, concerning service limitations, and new §51.232, concerning exception to service limit, in Chapter 51, Medically Dependent Children Program.

BACKGROUND AND PURPOSE

The purpose of the amendments and new section is to implement the 2012-2013 General Appropriations Act (Article II, Special Provisions, Section 17, House Bill 1, 82nd Legislature, Regular Session, 2011), which requires DADS to adjust the amount of all community services, which includes MDCP services. The amendments and new rule in Chapter 51 are proposed to implement these requirements. The rules in Chapter 51 describe the requirements for operation of MDCP. Regarding the requirement to adjust community services, the amendments and new

rules establish service limits, effective through August 31, 2013, for respite and adjunct support services. For each service, the service limit is based on the 90th percentile of paid units for individuals who received the service during fiscal year 2010. These service limits describe the maximum amount of services an individual enrolled in MDCP may receive without being granted an exception. In addition, the amendments and new rule describe the exception process by which an individual may request that DADS allow the individual to receive respite and adjunct support services in excess of these service limits. Further, the amendments provide an individual may not request an exception to existing service limits for adaptive aids and minor home modifications. The new rule also provides that the current limit for facility-based respite remains in place even if DADS grants an exception to the new, lower service limits. The amendments further provide that the service limit for facility-based respite that was in effect before the adoption of these amendments and new section will again be in effect as of September 1, 2013.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §51.215, concerning Home Visit, requires a case manager and DADS RN must develop an IPC in accordance with §51.231, concerning Service Limitations.

The proposed amendment to §51.231, concerning Service Limitations, restructures the section to establish service limits, effective through August 31, 2012, for certain MDCP services, and establish that service limits for certain MDCP services that were in effect before the adoption of the amendments and new section will again be in effect as of September 1, 2013.

Proposed new §51.232, concerning Exception to Service Limits, describes the exception process by which DADS may allow an individual to receive services in excess of the service limits described in revised §51.231.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments and new section are in effect, there are foreseeable implications relating to costs or revenues of state government. There are no foreseeable implications relating to costs or revenues of local governments.

The effect on state government for the first five years the proposed amendments and new section are in effect is an estimated reduction in cost of $1,042,659 in fiscal year (FY) 2012; $1,613,474 in FY 2013; $0.00 in FY 2014; $0.00 in FY 2015; and $0.00 in FY 2016.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendments and new section will not have an adverse economic effect on small businesses or micro-businesses, because any new requirements imposed by these rules do not require program providers to incur a cost.

PUBLIC BENEFIT AND COSTS

Jon Weizenbaum, DADS Deputy Commissioner, has determined that, for each year of the first five years the amendments and new section are in effect, the public benefit expected as a result of enforcing the amendments and new section is a cost savings for the state, while ensuring that an individual enrolled in the MDCP continues to receive needed program services.

Mr. Weizenbaum anticipates that there will not be an economic cost to persons who are required to comply with the amendments and new section. The amendments and new section will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Dana Williamson at (512) 438-3385 in DADS Waiver and State Plan Division, Center for Policy and Innovation. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-11R01, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, TX 78751; faxed to (512) 438-5759; or e-mailed to *rulescomments@dads.state.tx.us.* To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register.* The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 11R01" in the subject line.

A hearing to accept public comment regarding the proposal will be held at 8:30 a.m., Tuesday, October 18, 2011, in the Public Hearing Room of the John H. Winters Building, 701 W. 51st Street, Austin, Texas. The hearing is being held to comply with the requirements of Texas Government Code, §2001.029(b), in the event a request is made in accordance with that subsection. Persons with disabilities who will need auxiliary aids or services at the hearing are asked to call the Center for Consumer and External Affairs at (512) 438-4563, at least three days before the date of the hearing so appropriate arrangements can be made.

DIVISION 2. ENROLLMENT

40 TAC §51.215

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The amendment affects Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§51.215. Home Visit.

After DADS mails the enrollment materials as described in §51.211 of this chapter (relating to Enrollment), the case manager and a DADS RN conduct a home visit to:

(1) complete the medical assessment;

(2) complete the social assessment;

(3) develop the IPC in accordance with: [~~as described in~~]

(A) §51.217 of this chapter (relating to Individual Plan of Care); and

(B) §51.231 of this chapter (relating to Service Limitations); and

(4) assist the family in completing the application for Medicaid, if necessary.

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

Filed with the Office of the Secretary of State on September 26, 2011.

TRD-201103992
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Proposed date of adoption: December 1, 2011
For further information, please call: (512) 438-3734

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DIVISION 3. SERVICES

40 TAC §51.231, §51.232

STATUTORY AUTHORITY

The amendments and new section are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The amendments and new section affect Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§51.231. Service Limitations.

(a) General. The individual or the individual's parent or guardian may not ask the provider to provide MDCP services to any other household member while serving the individual in the individual's residence.

(b) Respite [~~and adjunct support services~~].

(1) Respite services may not be provided in a setting in which identical services are already being provided.

(2) Subject to an exception granted by DADS in accordance with §51.232 of this division (relating to Exception to Service Limit), an individual may receive a maximum of 2,096 hours of respite during an IPC year, of which 144 hours (six days) may be used for facility based respite.

(3) The service limit described in paragraph (2) of this subsection is in effect through August 31, 2013.

(4) Effective September 1, 2013, an individual may be admitted to facility-based respite for a maximum of 29 days during an IPC year with the amount of respite other than facility-based respite subject to the IPC cost limit as described in §51.203(7) of this subchapter (relating to Eligibility Requirements). If the DADS case manager receives information demonstrating the need of the parent or guardian to admit the individual to facility-based respite in excess of 29 days during an IPC year, the DADS case manager determines whether providing facility-based respite in excess of the limit is necessary for the IPC to meet the criteria described in §51.217(b) of this subchapter (relating to Individual Plan of Care).

[~~(2) Facility-based respite is limited to 29 days per IPC year. If an individual or the individual's parent or guardian requests an extension of the 29-day limit, the case manager must inform DADS' Access and Intake Division of the number of days requested beyond the 29-day limit and the reason for the request. DADS' Access and Intake Division approves or denies the request.~~]

[~~(3) Adjunct support services may be used only when the primary caregiver is working, attending job training, or attending school.~~]

(c) Adjunct support services.

(1) Subject to an exception granted by DADS in accordance with §51.232 of this division, an individual may receive a maximum of 1,875 hours of adjunct support services during an IPC year.

(2) The service limit described in paragraph (1) of this subsection is in effect through August 31, 2013.

(3) Adjunct support services may be used only when the primary caregiver is working, attending job training, or attending school.

(d) [~~(c)~~] Adaptive aids.

(1) An individual may receive adaptive aids having a maximum cost of [~~The cost ceiling for adaptive aids is~~] $4,000 during an [~~per~~] IPC year.

(2) The service limit described in paragraph (1) of this subsection is not subject to an exception.

(3) [~~(2)~~] DADS does not reimburse for an adaptive aid [~~Adaptive aids~~] costing less than $100 [~~are not reimbursable~~].

(e) [~~(d)~~] Minor home modifications. [~~The cost ceilings for minor home modifications are:~~]

(1) An individual may receive minor home modifications during the individual's lifetime having a maximum cost of $7,500, which may be paid in one or more IPC years. [~~in an individual's lifetime; and~~]

(2) An individual may receive, during an IPC year, a maximum of $300 for repair [~~repairs~~] and maintenance of a minor home modification [~~per IPC year~~].

(f) [~~(e)~~] Transition assistance services.

(1) An individual may access transition assistance services only once in the individual's lifetime.

(2) The cost ceiling for transition assistance services is $2,500.

§51.232. Exception to Service Limit.

(a) If the DADS case manager receives information demonstrating the need of the parent or guardian to exceed a service limit described in §51.231(b)(2) or (c)(1) of this division (relating to Service Limitations), the DADS case manager determines whether providing the service in excess of the service limit is necessary to support the individual's primary caregiver and enable the individual to remain safely in the home.

(b) The DADS case manager grants an exception to a service limit if, after a review of the information received as described in subsection (a) of this section, the DADS case manager determines that providing the service in excess of the service limit is necessary to support the individual's primary caregiver and enable the individual to remain safely in the home.

(c) An exception granted under subsection (b) of this section is subject to:

(1) for facility-based respite, a maximum of 29 days during an IPC year; and

(2) the individual cost limit as described in §51.203(7) of this subchapter (relating to Eligibility Requirements).

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

Filed with the Office of the Secretary of State on September 26, 2011.

TRD-201103993
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Proposed date of adoption: December 1, 2011
For further information, please call: (512) 438-3734

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CHAPTER 92. LICENSING STANDARDS FOR ASSISTED LIVING FACILITIES

SUBCHAPTER A. INTRODUCTION

40 TAC §92.2

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), an amendment to §92.2, concerning definitions, in Chapter 92, Licensing Standards for Assisted Living Facilities.

BACKGROUND AND PURPOSE

The purpose of the amendment is to implement portions of House Bill (HB) 2972 of the 81st Legislature, Regular Session, 2010. HB 2972 amended Texas Health and Safety Code, §247.005, by revising the definition of a "controlling person." The definition clarifies that neither a shareholder nor lender of a publicly traded corporation is a "controlling person" of an assisted living facility.

A similar amendment, along with other changes to Chapter 92, was adopted with an effective date of June 1, 2010 in the May 28, 2010, issue of the *Texas Register* (35 TexReg 4472). However, that amendment was inadvertently omitted when a subsequent amendment to §92.2 was published for adoption in the August 27, 2010, issue of the *Texas Register* (35 TexReg 7878), effectively repealing the amendment on September 1, 2010. Thus, the amendment is being proposed again.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §92.2 revises the definition of a "controlling person" to be consistent with Texas Health and Safety Code §247.005. The revised definition clarifies that if an assisted living facility or a business entity that operates or contracts with others to operate an assisted living facility is a publicly traded corporation, an officer or director of that corporation is a controlling person, but a shareholder or lender of the corporation is not.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendment is in effect, enforcing or administering the amendment does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS DADS has determined that the proposed amendment will not have an adverse economic effect on small businesses or micro-businesses, because there is no cost associated with the proposed rule.

PUBLIC BENEFIT AND COSTS

Veronda Durden, DADS Assistant Commissioner for Regulatory Services, has determined that, for each year of the first five years the amendment is in effect, the public benefit expected as a result of enforcing the amendment is the definition in the rule will be consistent with the Texas Health and Safety Code.

Ms. Durden anticipates there will not be an economic cost to persons who are required to comply with the amendment. The amendment will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Jennifer Morrison at (512) 438-4624 in DADS Regulatory Services. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-11R20, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, TX 78751; faxed to (512) 438-5759; or e-mailed to *rulescomments@dads.state.tx.us.* To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register.* The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 11R20" in the subject line.

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 247, which authorizes DADS to license and regulate assisted living facilities.

The amendment implements Texas Government Code, §531.0055; Texas Human Resources Code, §161.021; and Texas Health and Safety Code, §§247.001 - 247.069.

§92.2. Definitions.

The following words and terms, when used in this chapter, have the following meaning, unless the context clearly indicates otherwise.

(1) Accreditation commission--Has the meaning given in Texas Health and Safety Code, §247.032.

(2) Advance directive--Has the meaning given in Texas Health and Safety Code, §166.002.

(3) Affiliate--With respect to:

(A) a partnership, each partner thereof;

(B) a corporation, each officer, director, principal stockholder, subsidiary, and each person with a disclosable interest, as the term is defined in this section; and

(C) a natural person:

(i) said person's spouse;

(ii) each partnership and each partner thereof of which said person or any affiliate of said person is a partner; and

(iii) each corporation in which said person is an officer, director, principal stockholder, or person with a disclosable interest.

(4) Alzheimer's facility--A type B assisted living facility that is certified to provide specialized services to residents with Alzheimer's or a related condition.

(5) Applicant--A person applying for a license to operate an assisted living facility under Texas Health and Safety Code, Chapter 247.

(6) Attendant--A facility employee who provides direct care to residents. This employee may serve other functions, including cook, janitor, porter, maid, laundry worker, security personnel, bookkeeper, activity director, and manager.

(7) Authorized electronic monitoring (AEM)--The placement of an electronic monitoring device in a resident's room and using the device to make tapes or recordings after making a request to the facility to allow electronic monitoring.

(8) Behavioral emergency--Has the meaning given in §92.41(p)(2) of this chapter (relating to Standards for Type A, Type B, and Type E Assisted Living Facilities).

(9) Change of ownership--A change of ownership is:

(A) a change of sole proprietorship that is licensed to operate a facility;

(B) a change of 50 percent or more in the ownership of the business organization that is licensed to operate the facility;

(C) a change in the federal taxpayer identification number; or

(D) relinquishment by the license holder of the operation of the facility.

(10) Commingles--The laundering of apparel or linens of two or more individuals together.

(11) Controlling person--A person with the ability, acting alone or with others, to directly or indirectly influence, direct, or cause the direction of the management, expenditure of money, or policies of an assisted living facility or other person. A controlling person includes:

(A) a management company, landlord, or other business entity that operates or contracts with others for the operation of an assisted living facility;

(B) any person who is a controlling person of a management company or other business entity that operates an assisted living facility or that contracts with another person for the operation of an assisted living facility; [~~and~~]

(C) an officer or director of a publicly traded corporation that is, or that controls, a facility, management company, or other business entity described in subparagraph (A) of this paragraph but does not include a shareholder or lender of the publicly traded corporation; and

(D) [~~(C)~~] any other individual who, because of a personal, familial, or other relationship with the owner, manager, landlord, tenant, or provider of an assisted living facility, is in a position of actual control or authority with respect to the facility, without regard to whether the individual is formally named as an owner, manager, director, officer, provider, consultant, contractor, or employee of the facility, except an employee, lender, secured creditor, landlord, or other person who does not exercise formal or actual influence or control over the operation of an assisted living facility.

(12) Covert electronic monitoring--The placement and use of an electronic monitoring device that is not open and obvious, and the facility and DADS have not been informed about the device by the resident, by a person who placed the device in the room, or by a person who uses the device.

(13) DADS--The Department of Aging and Disability Services.

(14) DHS--Formerly, this term referred to the Texas Department of Human Services; it now refers to DADS.

(15) Dietitian--A person who currently holds a license or provisional license issued by the Texas State Board of Examiners of Dietitians.

(16) Disclosure statement--A DADS form for prospective residents or their legally authorized representatives that a facility must complete. The form contains information regarding the preadmission, admission, and discharge process; resident assessment and service plans; staffing patterns; the physical environment of the facility; resident activities; and facility services.

(17) Electronic monitoring device--Video surveillance cameras and audio devices installed in a resident's room, designed to acquire communications or other sounds that occur in the room. An electronic, mechanical, or other device used specifically for the

nonconsensual interception of wire or electronic communication is excluded from this definition.

(18) Facility--An entity required to be licensed under the Assisted Living Facility Licensing Act, Texas Health and Safety Code, Chapter 247.

(19) Fire suppression authority--The paid or volunteer fire-fighting organization or tactical unit that is responsible for fire suppression operations and related duties once a fire incident occurs within its jurisdiction.

(20) Governmental unit--The state or any county, municipality, or other political subdivision, or any department, division, board, or other agency of any of the foregoing.

(21) Health care professional--An individual licensed, certified, or otherwise authorized to administer health care, for profit or otherwise, in the ordinary course of business or professional practice. The term includes a physician, registered nurse, licensed vocational nurse, licensed dietitian, physical therapist, and occupational therapist.

(22) Immediate threat--There is considered to be an immediate threat to the health or safety of a resident, or a situation is considered to put the health or safety of a resident in immediate jeopardy, if there is a situation in which an assisted living facility's noncompliance with one or more requirements of licensure has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident.

(23) Immediately available--The capacity of facility staff to immediately respond to an emergency after being notified through a communication or alarm system. The staff are to be no more than 600 feet from the farthest resident and in the facility while on duty.

(24) Large facility--A facility licensed for 17 or more residents.

(25) Legally authorized representative--A person authorized by law to act on behalf of a person with regard to a matter described in this chapter, and may include a parent, guardian, or managing conservator of a minor, or the guardian of an adult.

(26) Management services--Services provided under contract between the owner of a facility and a person to provide for the operation of a facility, including administration, staffing, maintenance, or delivery of resident services. Management services do not include contracts solely for maintenance, laundry, transportation, or food services.

(27) Manager--The individual in charge of the day-to-day operation of the facility.

(28) Medication--

(A) Medication is any substance:

(i) recognized as a drug in the official United States Pharmacopoeia, Official Homeopathic Pharmacopoeia of the United States, Texas Drug Code Index or official National Formulary, or any supplement to any of these official documents;

(ii) intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease;

(iii) other than food intended to affect the structure or any function of the body; and

(iv) intended for use as a component of any substance specified in this definition.

(B) Medication includes both prescription and over-the-counter medication, unless otherwise specified.

(C) Medication does not include devices or their components, parts, or accessories.

(29) Medication administration--The direct application of a medication or drug to the body of a resident by an individual legally allowed to administer medication in the state of Texas.

(30) Medication assistance or supervision--The assistance or supervision of the medication regimen by facility staff. Refer to §92.41(j) of this chapter.

(31) Medication (self-administration)--The capability of a resident to administer the resident's own medication or treatments without assistance from the facility staff.

(32) NFPA 101--The 1988 publication titled "NFPA 101 Life Safety Code" published by the National Fire Protection Association, Inc., 1 Batterymarch Park, Quincy, Massachusetts 02169.

(33) Ombudsman--has the meaning given in §85.2 of this title (relating to Definitions).

(34) Person--Any individual, firm, partnership, corporation, association, or joint stock association, and the legal successor thereof.

(35) Person with a disclosable interest--Any person who owns 5.0 percent interest in any corporation, partnership, or other business entity that is required to be licensed under Texas Health and Safety Code, Chapter 247. A person with a disclosable interest does not include a bank, savings and loan, savings bank, trust company, building and loan association, credit union, individual loan and thrift company, investment banking firm, or insurance company unless such entity participates in the management of the facility.

(36) Personal care services--Assistance with meals, dressing, movement, bathing, or other personal needs or maintenance; the administration of medication by a person licensed to administer medications or the assistance with or supervision of medication; or general supervision or oversight of the physical and mental well-being of a person who needs assistance to maintain a private and independent residence in the facility or who needs assistance to manage his or her personal life, regardless of whether a guardian has been appointed for the person.

(37) Physician--A practitioner licensed by the Texas Medical Board.

(38) Practitioner--An individual who is currently licensed in a state in which the individual practices as a physician, dentist, podiatrist, or a physician assistant; or a registered nurse approved by the Texas Board of Nursing to practice as an advanced practice nurse.

(39) Qualified medical personnel--An individual who is licensed, certified, or otherwise authorized to administer health care. The term includes a physician, registered nurse, and licensed vocational nurse.

(40) Resident--An individual accepted for care in a facility.

(41) Respite--The provision by a facility of room, board, and care at the level ordinarily provided for permanent residents of the facility to a person for not more than 60 days for each stay in the facility.

(42) Restraint hold--

(A) A manual method, except for physical guidance or prompting of brief duration, used to restrict:

(i) free movement or normal functioning of all or a portion of a resident's body; or

(ii) normal access by a resident to a portion of the resident's body.

(B) Physical guidance or prompting of brief duration becomes a restraint if the resident resists the guidance or prompting.

(43) Restraints--Chemical restraints are psychoactive drugs administered for the purposes of discipline or convenience and are not required to treat the resident's medical symptoms. Physical restraints are any manual method, or physical or mechanical device, material, or equipment attached or adjacent to the resident that restricts freedom of movement. Physical restraints include restraint holds.

(44) Safety--Protection from injury or loss of life due to such conditions as fire, electrical hazard, unsafe building or site conditions, and the hazardous presence of toxic fumes and materials.

(45) Seclusion--The involuntary separation of a resident from other residents and the placement of the resident alone in an area from which the resident is prevented from leaving.

(46) Service plan--A written description of the medical care, supervision, or nonmedical care needed by a resident.

(47) Short-term acute episode--An illness of less than 30 days duration.

(48) Small facility--A facility licensed for 16 or fewer residents.

(49) Staff--Employees of an assisted living facility.

(50) Standards--The minimum conditions, requirements, and criteria established in this chapter with which a facility must comply to be licensed under this chapter.

(51) Terminal condition--A medical diagnosis, certified by a physician, of an illness that will result in death in six months or less.

(52) Universal precautions--An approach to infection control in which blood, any body fluids visibly contaminated with blood, and all body fluids in situations where it is difficult or impossible to differentiate between body fluids are treated as if known to be infectious for HIV, hepatitis B, and other blood-borne pathogens.

(53) Working day--Any 24-hour period, Monday through Friday, excluding state and federal holidays.

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

Filed with the Office of the Secretary of State on September 26, 2011.

TRD-201103997
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: November 6, 2011
For further information, please call: (512) 438-3734

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CHAPTER 94. NURSE AIDES

40 TAC §94.4

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), an amendment to §94.4, concerning competency evaluation program (CEP) requirements, in Chapter 94, Nurse Aides.

BACKGROUND AND PURPOSE

The purpose of the amendment is to implement Senate Bill (SB) 867, 82nd Legislature, Regular Session, 2011. SB 867 amended Texas Occupations Code, Chapter 54, to require reasonable examination accommodations for a licensing examinee diagnosed as having dyslexia. The proposal allows an applicant with a disability, including dyslexia as defined in the Texas Education Code §51.970 (relating to Instructional Material for Blind and Visually Impaired Students and Students with Dyslexia), to request reasonable accommodation for examination in accordance with and the Americans with Disabilities Act.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §94.4 revises subsection (g) to specifically include dyslexia, along with any other disability under the Americans with Disabilities Act, as one of the disabilities for which a licensing examinee may request reasonable accommodation for examination. The amendment to (b)(2) replaces "nurse aide" with "eligible trainee" to clarify that an eligible trainee who is not yet a nurse aide may take the examination. Additional changes update agency references from DHS to DADS.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendment is in effect, enforcing or administering the amendment does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendment will not have an adverse economic effect on small businesses or micro-businesses, because DADS contracts with vendors to administer the examinations for nurse aide permits. The vendors currently comply with the Americans with Disabilities Act to provide for reasonable accommodation for a licensing examinee. The proposed rule adds the requirements for reasonable accommodation to Chapter 94 to correspond to current practice.

PUBLIC BENEFIT AND COSTS

Veronda Durden, DADS Assistant Commissioner for Regulatory Services, has determined that, for each year of the first five years the amendment is in effect, the public benefit expected as a result of enforcing the amendment is that licensing examinees with dyslexia or another disability under the Americans with Disabilities Act will be able to receive reasonable accommodation to take the examination for a nurse aide certification.

Ms. Durden anticipates that there will not be an economic cost to persons who are required to comply with the amendment. The amendment will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Jennifer Morrison at (512) 438-4624 in DADS Regulatory Ser-

vices. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-11R13, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, TX 78751; faxed to (512) 438-5759; or e-mailed to *rulescomments@dads.state.tx.us.* To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register.* The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 11R13" in the subject line.

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Occupations Code, §54.003, which requires a state agency provide reasonable accommodation for a licensing examinee.

The amendment implements Texas Government Code, §531.0055; Texas Human Resources Code, §161.021; and Texas Occupations Code, §54.003.

§94.4. Competency Evaluation Program (CEP) Requirements.

(a) All examinations will be administered by a DADS [~~DHS~~]-designated examiner to individuals who have successfully completed the training portion of a NATCEP or are eligible to take a CEP under §94.9 of this title (relating to Waiver, Reciprocity, and Exemption Requirements).

(b) Requirements for the competency evaluation portion of a NATCEP are:

(1) A trainee is eligible to take the competency evaluation portion of a NATCEP if he or she has successfully completed the training portion of a NATCEP as determined by the program director.

(2) An eligible trainee will take the examination as part of the same NATCEP. If it is not possible to test with the same NATCEP, an eligible trainee [~~a nurse aide~~] may take the examination at another approved facility or at a NATCEP that has volunteered to serve as an examination site.

(3) An eligible trainee who does not test with the same NATCEP must obtain from the program director of the NATCEP a signed CEP application or a certificate or letter to present to the skills examiner before taking the examination, as described in §94.5(a)(4)(E) - (F) of this title (relating to Program Director, Program Instructor, Supplemental Trainers, and Skills Examiner Requirements).

(c) An approved facility or NATCEP serving as an examination site is responsible for:

(1) providing the facility where the skills examination will be given and the location where the written or oral examination will be given;

(2) offering the examination to its own trainees promptly after successful completion of the training portion of a NATCEP;

(3) offering the examination to an eligible examinee employed by or who has received an offer of employment from the facility, if the individual desires to be examined at the facility;

(4) offering the examination to other eligible examinees the facility or NATCEP has voluntarily accepted for the examination;

(5) scheduling examinations and retests with DADS [~~DHS's~~] designated examiner; and

(6) ensuring applications for examination are completed accurately.

(d) The examinee is responsible for:

(1) taking the examination within 24 months of completion of the training portion of the NATCEP:

(A) with the NATCEP where the examinee was trained;

(B) at an approved facility from which the individual has received an offer of employment or is employed; or

(C) at an approved facility or NATCEP that has volunteered to accept the examinee for examination;

(2) verifying the arrangements for examination with the examination site;

(3) presenting the completed application for examination and documentation to the skills examiner before the examination, as required under subsection (b)(3) of this section or §94.9(c) of this title;

(4) requesting a retest if the examinee fails the examination; and

(5) meeting any other procedural requirements specified by DADS [~~DHS~~] or its designated examiner.

(e) DADS [~~DHS~~] or designated examiner is responsible for:

(1) providing instructions and eligibility forms to applicants for a CEP and provide a letter of approval as specified in §94.9(c) of this title;

(2) assisting an eligible examinee find an approved facility or NATCEP to serve as an examination site;

(3) scheduling examinations and retests for the requesting approved facility or NATCEP; and

(4) administering examinations and report results of examinations as required by DADS [~~DHS~~].

(f) The examination must consist of:

(1) the skills examination, which includes the trainee demonstrating five randomly selected skills drawn from a pool of skills that are generally performed by nurse aides, including all personal care skills listed in the curriculum; and

(2) the written or oral examination, which includes 60 scored multiple choice questions selected from a pool of test items that address each course requirement in the curriculum. The written examination questions are printed in a test booklet with a separate answer sheet. The oral examination is a tape-recorded presentation read from a prepared text in a neutral manner that includes additional questions to test reading comprehension.

(g) An applicant with a disability, including an applicant with dyslexia as defined in Texas Education Code §51.970 (relating to Instructional Material for Blind and Visually Impaired Students and Stu-

dents with Dyslexia), may request a reasonable accommodation for the examination under the Americans with Disabilities Act. [~~A nurse aide with a disability may take the examination to establish competency under this section by requesting a reasonable accommodation pursuant to the Americans with Disabilities Act.~~]

(h) Successful completion of the examination consists of a passing grade on the:

(1) skills examination as determined by DADS [~~DHS~~]; and

(2) written or oral examination as determined by DADS [~~DHS~~].

(i) A person who fails the skills examination or the written or oral examination may retest twice on the failed examination.

(1) The person will be advised of the areas he or she did not pass.

(2) The person must request re-examination through the approved facility, NATCEP, or DADS [~~DHS's~~] designated examiner.

(3) DADS [~~DHS~~] is not required to set special re-examination schedules.

(4) After failing the examination three times, the individual must complete the training portion of a NATCEP before retesting.

(j) The state must advise in advance any individual who takes the examination that a record of the successful completion of the examination will be included on the Nurse Aide Registry.

(k) A record of successful completion of the examination must be included on the Nurse Aide Registry within 30 days of the date the examination was passed.

(l) An examination will not be offered by or in a facility if the facility falls within any of the provisions of §94.3(g) of this title (relating to Nurse Aide Training and Competency Evaluation Program (NATCEP) Requirements).

(m) A nurse aide who is employed by, or who has received an offer of employment from, a facility on the date on which the nurse aide begins a CEP may not be charged for any portion of the CEP.

(n) If an individual does not fall under this subsection, but becomes employed as a nurse aide by, or receives an offer of employment as a nurse aide from, a facility not later than 12 months after completing a CEP, the state must provide for the reimbursement of costs incurred in completing the CEP on a pro rata basis during the period in which the individual is employed as a nurse aide.

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

Filed with the Office of the Secretary of State on September 26, 2011.

TRD-201103995
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Proposed date of adoption: December 1, 2011
For further information, please call: (512) 438-3734

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CHAPTER 95. MEDICATION AIDES--PROGRAM REQUIREMENTS

40 TAC §95.111, §95.128

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §95.111, concerning examination, and §95.128, concerning home health medication aides, in Chapter 95, Medication Aides--Program Requirements.

BACKGROUND AND PURPOSE

The purpose of the amendments is to implement Senate Bill (SB) 867, 82nd Legislature, Regular Session, 2011. SB 867 amended Texas Occupations Code, Chapter 54, to require reasonable examination accommodation for a licensing examinee diagnosed as having dyslexia. The proposal allows an applicant with a disability, including dyslexia as defined in the Texas Education Code §51.970 (relating to Instructional Material for Blind and Visually Impaired Students and Students with Dyslexia), to request reasonable accommodation for examination in accordance with and the Americans with Disabilities Act.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §95.111 adds new (a)(4) to specifically include dyslexia, along with any other disability under the Americans with Disabilities Act, as one of the disabilities for which a licensing examinee for a medication aide permit may request reasonable accommodation for examination.

The proposed amendment to §95.128 adds new (j)(2) to specifically include dyslexia, along with any other disability under the Americans with Disabilities Act, as one of the disabilities for which a licensing examinee for a home health medication aide permit may request reasonable accommodation for examination. The amendment also updates section titles, program contact information, and references to the Texas Board of Nursing.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments are in effect, enforcing or administering the amendments does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendments will not have an adverse economic effect on small businesses or micro-businesses, because DADS currently incurs any costs to allow for reasonable accommodations for medication aide permitting. The proposed rule adds the requirements for reasonable accommodation to Chapter 95 to correspond to current practice.

PUBLIC BENEFIT AND COSTS

Veronda Durden, DADS Assistant Commissioner for Regulatory Services, has determined that, for each year of the first five years the amendments are in effect, the public benefit expected as a result of enforcing the amendments is that licensing examinees with dyslexia or another disability under the Americans with Disabilities Act will be able to receive reasonable accommodation to take the examination for a medication aide permit.

Ms. Durden anticipates that there will not be an economic cost to persons who are required to comply with the amendment. The amendment will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Jennifer Morrison at (512) 438-4624 in DADS Regulatory Services. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-11R13, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, TX 78751; faxed to (512) 438-5759; or e-mailed to *rulescomments@dads.state.tx.us.* To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register.* The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 11R13" in the subject line.

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Health and Safety Code, §§142.021 - 142.030, which govern administration of medication by a home and community support services agency, and §§242.601 - 242.614, which provide for a medication aide permit program; and Texas Occupations Code, §54.003, which requires a state agency to provide reasonable accommodation for a licensing examinee.

The amendments implement Texas Government Code, §531.0055; Texas Human Resources Code, §161.021; Texas Health and Safety Code, §§142.021 - 142.030 and §§242.601 - 242.614; and Texas Occupations Code, §54.003.

§95.111. Examination.

(a) DADS gives a written examination to each applicant at a site determined by DADS.

(1) The applicant must meet the requirements of §95.107 of this title (relating to Training Requirements; Nursing Graduates; Reciprocity) and §95.109 of this title (relating to Application Procedures) before taking the written examination.

(2) The applicant is tested on the subjects taught in the training program curricula and clinical experience. The examination covers an applicant's knowledge of accurate and safe drug therapy that will be administered to a facility's residents.

(3) The examination must be given after the applicant has successfully completed the training program or met the requirements of §95.107(c) - (e) of this title (relating to Training Requirements; Nursing Graduates; Reciprocity).

(4) An applicant with a disability, including an applicant with dyslexia as defined in Texas Education Code §51.970 (relating to Instructional Material for Blind and Visually Impaired Students and Students with Dyslexia), may request a reasonable accommodation for the examination under the Americans with Disabilities Act.

(5) [~~(4)~~] Staff of a training program must notify DADS at least four weeks prior to its requested examination date.

(6) [~~(5)~~] DADS determines the passing grade on the examination.

(7) [~~(6)~~] If DADS grades or reviews the examination, DADS notifies the applicant of the results of the examination not later than the 30th day after the date the applicant took the examination.

(8) [~~(7)~~] If a testing service grades or reviews the examination:

(A) DADS notifies the applicant of the results of the examination not later than the 14th day after the date DADS receives the results from the testing service; and

(B) if notice of the examination results will be delayed for longer than 90 days after the examination date, DADS notifies the applicant of the reasons for the delay before the 90th day.

(9) [~~(8)~~] DADS may require a testing service to notify an applicant of the results of the applicant's examination.

(10) [~~(9)~~] DADS notifies in writing an applicant who fails the examination.

(A) DADS may give an applicant under §95.107(a) of this title one subsequent examination, without additional payment of a fee, upon the applicant's written request to DADS.

(B) A subsequent examination must be completed by the date given in the failure notification. The site of the examination is determined by DADS.

(C) DADS gives no further examinations if the student fails the subsequent examination, unless the student enrolls in and successfully completes another training program.

(D) If requested in writing by an applicant who fails the examination, DADS furnishes the applicant with an analysis of the applicant's performance on the examination.

(b) An applicant who is unable to attend the applicant's scheduled examination due to unforeseen circumstances may be given an examination at another time without payment of an additional fee upon the applicant's written request to DADS. The examination must be completed within 45 days from the date of the originally scheduled examination. The rescheduled examination must be at a site determined by DADS.

(c) An applicant whose application for a permit must be denied under §95.113 of this title (relating to Determination of Eligibility) is ineligible to take the examination.

§95.128. Home Health Medication Aides.

(a) General.

(1) A person may not administer medication to a client unless the person:

(A) holds a current license under state law which authorizes the licensee to administer medication;

(B) holds a current permit issued under this section and acts under the delegated authority of a registered nurse (RN) licensed

by the Texas Board of Nursing [~~Board of Nurse Examiners~~] which authorizes the licensee to administer medication;

(C) administers a medication to a client of an agency in accordance with rules of the Texas Board of Nursing [~~Board of Nurse Examiners~~] that permit delegation of the administration of medication to a person not holding a permit under this section; or

(D) administers noninjectable medication under circumstances authorized by the memorandum of understanding between the Texas Board of Nursing [~~Board of Nurse Examiners~~] and DADS.

(2) An agency providing licensed and certified home health services, licensed home health services, hospice services, or personal assistance services may use a home health medication aide. If there is a direct conflict between the requirements of this chapter and federal regulations, the requirements that are more stringent apply to the licensed and certified home health services agency.

(3) Exemptions are as follows.

(A) A person may administer medication to a client of an agency without the license or permit as required in paragraph (1) of this subsection if the person is:

(i) a graduate nurse holding a temporary permit issued by the Texas Board of Nursing [~~Board of Nurse Examiners~~];

(ii) a student enrolled in an accredited school of nursing or program for the education of RNs who is administering medications as part of the student's clinical experience;

(iii) a graduate vocational nurse holding a temporary permit issued by the Texas Board of Nursing [~~BNE~~];

(iv) a student enrolled in an accredited school of vocational nursing or program for the education of vocational nurses who is administering medications as part of the student's clinical experience; or

(v) a trainee in a medication aide training program approved by DADS under this chapter who is administering medications as part of the trainee's clinical experience.

(B) Supervision of an exempt person described in subparagraph (A) of this paragraph is as follows.

(i) A person described in:

(I) subparagraph (A)(i) of this paragraph shall be supervised by an RN;

(II) subparagraph (A)(ii) or (iv) of this paragraph shall be supervised by the student's instructor; or

(III) subparagraph (A)(iii) of this paragraph shall be supervised by an RN or licensed vocational nurse.

(ii) Supervision must be on-site.

(C) An exempt person described in this subsection may not be used in a supervisory or charge position.

(b) Required actions.

(1) If home health medication aide services are provided, an agency employs a home health medication aide to provide home health medication aide services, and an RN shall be employed by or under contract with the agency to perform the initial assessment; prepare the client care plan; establish the medication list, medication administration record, and medication aide assignment sheet; and supervise the home health medication aide. The RN must be available to supervise the home health medication aide when services are provided.

(2) The clinical records of a patient using a home health medication aide must include a statement signed by the client or family acknowledging receipt of the list of permitted and prohibited acts of a home health medication aide.

(3) The RN must be knowledgeable of the rules of DADS governing home health medication aides and must assure that the home health medication aide is in compliance with the Health and Safety Code, Chapter 142, Subchapter B.

(4) A permit holder must:

(A) function under the supervision of an RN;

(B) function in accordance with applicable law and this chapter relating to administration of medication and operation of the agency;

(C) comply with DADS rules applicable to personnel used in an agency; and

(D) comply with this section and §97.701 of this title (relating to Home Health Aides) if the person will be used as a home health aide and a home health medication aide.

(5) The RN must make a supervisory visit while the medication aide is in the client's residence in accordance with §97.298 of this title (relating to Delegation of Nursing Tasks by Registered Professional Nurses to Unlicensed Personnel and Tasks Not Requiring Delegation) [~~§97.21(b)(6) of this title (relating to (relating to Licensure Requirements and Standards for Agencies Providing Licensed Home Health, Licensed and Certified Home Health or Hospice Services)~~].

(c) Permitted actions. A permit holder is permitted to:

(1) observe and report to the agency's RN and document in the clinical note reactions and side effects to medication shown by a client;

(2) take and record vital signs prior to the administration of medication which could affect or change the vital signs;

(3) administer regularly prescribed medication which the permit holder has been trained to administer only after personally preparing (setting up) the medication to be administered. The medication aide must document the administered medication in the client's clinical note;

(4) administer oxygen per nasal cannula or a non-sealing face mask only in emergency. Immediately after the emergency, the permit holder must verbally notify the supervising RN and appropriately document the action and notification;

(5) apply specifically ordered ophthalmic, otic, nasal, vaginal, topical, and rectal medication unless prohibited by subsection (d)(10) of this section; and

(6) administer medications only from the manufacturer's original container or the original container in which the medication had been dispensed and labeled by the pharmacy with all information mandated by the Texas State Board of Pharmacy.

(d) Prohibited actions. Permit holders must not:

(1) administer a medication by any injectable route;

(2) administer medication used for intermittent positive pressure breathing (IPPB) treatment or any form of medication inhalation treatments;

(3) administer previously ordered pro re nata (PRN) medication unless authorization is obtained from the agency's RN. If authorization is obtained, the permit holder must:

(A) document in the client's clinical notes symptoms indicating the need for medication and the time the symptoms occurred;

(B) document in the client's clinical notes that the agency's RN was contacted, symptoms were described, and permission was granted to administer the medication and the time of contact;

(C) obtain permission to administer the medication each time the symptoms occur in the client; and

(D) insure that the client's clinical record is co-signed by the RN who gave permission within seven calendar days of incorporation of the notes into the clinical record;

(4) administer the initial dose of a medication that has not been previously administered to a client. Whether a medication has been previously administered must be determined by the client's current clinical records;

(5) calculate a client's medication doses for administration except that the permit holder may measure a prescribed amount of a liquid medication to be administered or break a scored tablet for administration to a client provided the RN has calculated the dosage. The client's medication administration record must accurately document how the tablet must be altered prior to administration;

(6) crush medication unless authorization has been given in the original physician's order or obtained from the agency's RN. The authorization to crush the specific medication must be documented on the client's medication administration record;

(7) administer medications or feedings by way of a tube inserted in a cavity of the body except as specified §97.298 [~~§97.21(b)(6)~~] of this title;

(8) receive or assume responsibility for reducing to writing a verbal or telephone order from a physician, dentist, or podiatrist;

(9) order a client's medication from a pharmacy;

(10) apply topical medications that involve the treatment of skin that is broken or blistered when a specified aseptic technique is ordered by the attending physician;

(11) administer medications from any container other than the manufacturer's original container or the original container in which the medication had been dispensed and labeled by the pharmacy with all information mandated by the Texas State Board of Pharmacy;

(12) steal, divert, or otherwise misuse medications;

(13) violate any provision of the statute or of this chapter;

(14) fraudulently procure or attempt to procure a permit;

(15) neglect to administer appropriate medications, as prescribed, in a responsible manner; or

(16) administer medications if the person is unable to do so with reasonable skill and safety to clients by reasons of drunkenness, excessive use of drugs, narcotics, chemicals, or any other type of material.

(e) Applicant qualifications. Each applicant for a permit issued under Health and Safety Code, Chapter 142, Subchapter B must complete a training program. Prior to enrollment in a training program and prior to application for a permit under this section, all persons:

(1) must be able to read, write, speak, and understand English;

(2) must be at least 18 years of age;

(3) must be free of communicable diseases and in suitable physical and emotional health to safely administer medications;

(4) must be a graduate of a high school or have an equivalent diploma or higher degree; and

(5) must have satisfactorily completed a home health aide training and competency evaluation program or a competency evaluation program under §97.701 of this title.

(f) Nursing graduates. A person who is a graduate of an accredited school of nursing and who does not hold a license to practice professional or vocational nursing meets the training requirements for issuance of a permit under this section if the date of graduation from the nursing school was no earlier than January 1 of the year immediately preceding the year of application for a permit under this section.

(1) The applicant must submit a DADS application form to DADS. The applicant must meet the requirements of subsection (e)(1)-(4) of this section.

(2) The application must be accompanied by the permit application fee.

(3) The applicant must include an official transcript documenting graduation from an accredited school of nursing.

(4) DADS acknowledges receipt of the application by sending the applicant a copy of this chapter and DADS [~~DADS'~~] open book examination.

(5) The applicant must complete the open book examination and return it to DADS by the date given in the examination notice.

(6) The applicant must complete DADS [~~DADS'~~] written examination. DADS determines the site of the examination. DADS denies the application of an applicant failing to schedule and take the examination by the date given in the examination notice.

(7) An open book or written examination may not be retaken if the applicant fails.

(8) Upon successful completion of the two examinations, DADS evaluates all application documents submitted by the applicant.

(9) DADS notifies the applicant in writing of the examination results.

(g) Nursing students. A person who is attending or has attended an accredited school of nursing and who does not hold a license to practice professional or vocational nursing meets the training requirements for issuance of a permit under this section if the person:

(1) attended the nursing school no earlier than January 1 of the year immediately preceding the year of application for a permit under this section;

(2) successfully completed courses at the nursing school that cover DADS [~~DADS'~~] curriculum for a home health medication aide training program;

(3) submits a statement that is signed by the nursing school's administrator or other authorized individual and certifies that the person completed the courses specified under paragraph (2) of this subsection. The administrator is responsible for determining that the courses that he or she certifies cover DADS [~~DADS'~~] curriculum. The statement must be submitted with the person's application for a permit under this section; and

(4) complies with subsection (f)(1)-(2) and (4)-(9) of this section.

(h) Reciprocity. A person who holds a valid license, registration, certificate, or permit as a home health medication aide issued by another state whose minimum standards or requirements are substantially equivalent to or exceed the requirements of this section in effect at the time of application may request a waiver of the training program requirement as follows:

(1) The applicant must submit a DADS application form to DADS. The applicant must meet the requirements of subsection (e)(1)-(4) of this section.

(2) The application must be accompanied by the permit application fee.

(3) The application must include a current copy of the rules of the other state governing its licensing and regulation of home health medication aides, a copy of the legal authority (law, act, code, section, or otherwise) for the state's licensing program, and a certified copy of the license or certificate by which the reciprocal permit is requested.

(4) DADS acknowledges receipt of the application by sending the applicant a copy of this chapter and of DADS [~~DADS'~~] open book examination.

(5) DADS may contact the issuing agency to verify the applicant's status with the agency.

(6) The applicant must complete DADS [~~DADS'~~] open book examination and return it to DADS by the date given in the examination notice.

(7) The applicant must complete DADS [~~DADS'~~] written examination. The site of the examination is determined by DADS. DADS denies the application of an applicant failing to schedule and take the examination by the date given in the examination notice.

(8) An open book or written examination may not be retaken if the applicant fails.

(9) Upon successful completion of the two examinations, DADS evaluates all application documents submitted by the applicant.

(10) DADS notifies the applicant in writing of the examination results.

(i) Application by trainees. An applicant under subsection (e) of this section must submit to DADS, no later than 30 calendar days after enrollment in a training program, an application, including all required information and documentation on DADS forms.

(1) DADS considers an application as officially submitted when DADS receives the nonrefundable combined permit application and examination fee payable to the Department of Aging and Disability Services. The fee required by subsection (n) of this section must accompany the application form.

(2) The general statement enrollment form must contain the following application material that is required of all applicants:

(A) specific information regarding personal data, certain misdemeanor and felony convictions, work experience, education, and training;

(B) a statement that all of the requirements in subsection (e) of this section were met prior to the start of the program;

(C) a statement that the applicant understands that the application fee submitted in the permit process is nonrefundable;

(D) a statement that the applicant understands that materials submitted in the application process are not returnable;

(E) a statement that the applicant understands that it is a misdemeanor to falsify any information submitted to DADS; and

(F) the applicant's signature that has been dated and notarized.

(3) The applicant must submit a certified copy or a photocopy that has been notarized as a true and exact copy of an unaltered original of the applicant's high school graduation diploma or transcript or an equivalent GED diploma or higher degree unless the applicant is applying under subsection (f) of this section.

(4) DADS sends a notice listing the additional materials required to an applicant who does not complete the application. An application not completed within 30 calendar days after the date of the notice will be void.

(5) DADS sends notice of application acceptance, disapproval, or deficiency in accordance with subsection (q) of this section.

(j) Examination. DADS gives a written examination to each applicant at a site DADS determines.

(1) No final examination may be given to an applicant until the applicant has met the requirements of subsections (e) and (i) of this section, and if applicable, subsections (f), (g), or (h) of this section.

(2) An applicant with a disability, including an applicant with dyslexia as defined in Texas Education Code §51.970 (relating to Instructional Material for Blind and Visually Impaired Students and Students with Dyslexia), may request a reasonable accommodation for the examination under the Americans with Disabilities Act.

(3) [~~(2)~~] The applicant must be tested on the subjects taught in the training program curricula and clinical experience. The examination covers an applicant's knowledge of accurate and safe drug therapy to an agency's clients.

(4) [~~(3)~~] A training program must notify DADS at least four weeks prior to its requested examination date.

(5) [~~(4)~~] DADS determines the passing grade on the examination.

(6) [~~(5)~~] DADS notifies in writing an applicant who fails the examination.

(A) DADS may give an applicant under subsection (e) of this section one subsequent examination, without additional payment of a fee, upon the applicant's written request to DADS.

(B) A subsequent examination must be completed by the date given on the failure notification. DADS determines the site of the examination.

(C) Another examination will not be permitted if the student fails the subsequent examination unless the student enrolls and successfully completes another training program.

(7) [~~(6)~~] An applicant who is unable to attend the applicant's scheduled examination due to unforeseen circumstances may be given an examination at another time without payment of an additional fee upon the applicant's written request to DADS. The examination must be completed within 45 calendar days from the date of the originally scheduled examination. DADS determines the site for the rescheduled examination.

(8) [~~(7)~~] An applicant whose application for a permit will be disapproved under subsection (k) of this section is ineligible to take the examination.

(k) Determination of eligibility. DADS approves or disapproves all applications. DADS sends notices of application approval,

disapproval, or deficiency in accordance with subsection (q) of this section.

(1) DADS denies an application for a permit if the person has:

(A) not met the requirements of subsections (e)-(i) of this section, if applicable;

(B) failed to pass the examination prescribed by DADS as set out in subsection (j) of this section;

(C) failed to or refused to properly complete or submit any application form, endorsement, or fee, or deliberately presented false information on any form or document required by DADS;

(D) violated or conspired to violate the Health and Safety Code, Chapter 142, Subchapter B, or any provision of this chapter; or

(E) been convicted of a felony or misdemeanor if the crime directly relates to the duties and responsibilities of a permit holder as set out in subsection (r) of this section.

(2) If, after review, DADS determines that the application should not be approved, DADS gives the applicant written notice of the reason for the proposed decision and of the opportunity for a formal hearing in accordance with subsection (r) of this section.

(l) Permit renewal. Home health medication aides must comply with the following permit renewal requirements.

(1) When issued, a permit is valid for one year.

(2) A permit holder must renew the permit annually.

(3) The renewal date of a permit is the last day of the current permit.

(4) Each permit holder is responsible for renewing the permit before the expiration date. Failure to receive notification from DADS before the expiration date of the permit does not excuse the permit holder's failure to file for timely renewal.

(5) A permit holder must complete a seven clock-hour continuing education program approved by DADS prior to expiration of the permit in order to renew the permit. Continuing education hours are not required for the first renewal. After a permit is renewed for the first time, the permit holder must earn approved continuing education hours to have the permit renewed again.

(6) DADS denies renewal of the permit of a permit holder who is in violation of the Health and Safety Code, Chapter 142, Subchapter B, or this chapter at the time of application for renewal.

(7) Home health medication aide permit renewal procedures are as follows.

(A) At least 30 calendar days before the expiration date of a permit, DADS sends to the permit holder at the address in DADS [~~DADS'~~] records notice of the expiration date of the permit and the amount of the renewal fee due and a renewal form that the permit holder must complete and return with the required renewal fee.

(B) The renewal form must include the preferred mailing address of the permit holder and information on certain misdemeanor and felony convictions. It must be signed by the permit holder.

(C) DADS issues a renewal permit to a permit holder who has met all requirements for renewal.

(D) DADS does not renew a permit if the permit holder does not complete the required seven-hour continuing education requirement. Successful completion is determined by the student's instructor. An individual who does not meet the continuing education requirement must complete a new program, application, and examination in accordance with the requirements of this section.

(E) DADS does not renew a permit if renewal is prohibited by the Texas Education Code, §57.491, concerning defaults on guaranteed student loans.

(F) If a permit holder fails to timely renew his or her permit because the permit holder is or was on active duty with the armed forces of the United States of America serving outside the State of Texas, the permit holder may renew the permit pursuant to this subparagraph.

(i) Renewal of the permit may be requested by the permit holder, the permit holder's spouse, or an individual having power of attorney from the permit holder. The renewal form must include a current address and telephone number for the individual requesting the renewal.

(ii) Renewal may be requested before or after the expiration of the permit.

(iii) A copy of the official orders or other official military documentation showing that the permit holder is or was on active military duty serving outside the State of Texas must be filed with DADS along with the renewal form.

(iv) A copy of the power of attorney from the permit holder must be filed with DADS along with the renewal form if the individual having the power of attorney executes any of the documents required in this subparagraph.

(v) A permit holder renewing under this subparagraph must pay the applicable renewal fee.

(vi) A permit holder is not authorized to act as a home health medication aide after the expiration of the permit unless and until the permit holder actually renews the permit.

(vii) A permit holder renewing under this subparagraph is not required to submit any continuing education hours.

(8) A person whose permit has expired for not more than two years may renew the permit by submitting to DADS:

(A) the permit renewal form;

(B) all accrued renewal fees;

(C) proof of having earned, during the expired period, seven hours in an approved continuing education program for each year or part of a year that the permit has been expired; and

(D) proof of having earned, prior to expiration of the permit, seven hours in an approved continuing education program as required in paragraph (5) of this subsection.

(9) A permit that is not renewed during the two years after expiration may not be renewed.

(10) Notices of permit renewal approval, disapproval, or deficiency must be in accordance with subsection (q) of this section (relating to Processing Procedures).

(m) Changes.

(1) A permit holder must notify DADS within 30 calendar days after changing his or her address or name.

(2) DADS replaces a lost, damaged, or destroyed permit upon receipt of a completed duplicate permit request form and permit replacement fee.

(n) Fees.

(1) The schedule of fees is:

(A) combined permit application and examination fee--$25;

(B) renewal fee--$15; and

(C) permit replacement fee--$5.00.

(2) All fees are nonrefundable.

(3) An applicant or permit holder must pay the required fee by cashier's check or money order made payable to the Department of Aging and Disability Services. All fees are nonrefundable, except as provided by Government Code, Chapter 2005.

(o) Training program requirements.

(1) An educational institution accredited by the Texas Workforce Commission or Texas Higher Education Coordinating Board that desires to offer a training program must file an application for approval on a DADS form. Programs sponsored by state agencies for the training and preparation of its own employees are exempt from the accreditation requirement. An approved institution may offer the training program and a continuing education program.

(A) All signatures on DADS forms and supporting documentation must be originals.

(B) The application includes:

(i) the anticipated dates of the program;

(ii) the location(s) of the classroom course(s);

(iii) the name of the coordinator of the program;

(iv) a list of instructors and any other person responsible for the conduct of the program. The list must include addresses and telephone numbers for each instructor; and

(v) an outline of the program content and curriculum if the curriculum covers more than DADS [~~DADS'~~] established curricula.

(C) DADS may conduct an inspection of the classroom site.

(D) DADS sends notice of approval or proposed disapproval of the application to the program within 30 calendar days of the receipt of a complete application. If the application is proposed to be disapproved due to noncompliance with the requirements of the Health and Safety Code, Chapter 142, Subchapter B, or of this chapter, the reasons for disapproval are given in the notice.

(E) An applicant may request a hearing on a proposed disapproval in writing within ten calendar days of receipt of the notice of the proposed disapproval. The hearing must be in accordance with subsection (r) of this section and the Administrative Procedure Act, Texas Government Code, Chapter 2001. If no request is made, the applicant is deemed to have waived the opportunity for a hearing, and the proposed action may be taken.

(2) The program includes, but is not limited to, the following instruction and training:

(A) procedures for preparation and administration of medications;

(B) responsibility, control, accountability, storage, and safeguarding of medications;

(C) use of reference material;

(D) documentation of medications in the client's clinical records, including PRN medications;

(E) minimum licensing standards for agencies covering pharmaceutical service, nursing service, and clinical records;

(F) federal and state certification standards for participation under the Social Security Act, Title XVIII (Medicare), pertaining to pharmaceutical service, nursing service, and clinical records;

(G) lines of authority in the agency, including agency personnel who are immediate supervisors;

(H) responsibilities and liabilities associated with the administration and safeguarding of medications;

(I) allowable and prohibited practices of permit holders in the administration of medication;

(J) drug reactions and side effects of medications commonly administered to home health clients;

(K) instruction on universal precautions; and

(L) the provisions of this chapter.

(3) The program consists of 140 hours in the following order: 100 hours of classroom instruction and training, 20 hours of return skills demonstration laboratory, ten hours of clinical experience including clinical observation and skills demonstration under the supervision of a RN in an agency, and ten more hours in the return skills demonstration laboratory. A classroom or laboratory hour is 50 clock-minutes of actual classroom or laboratory time.

(A) Class time will not exceed four hours in a 24-hour period.

(B) The completion date of the program must be a minimum of 60 calendar days and a maximum of 180 calendar days from the starting date of the program.

(C) Each program must follow the curricula established by DADS.

(4) At least seven calendar days prior to the commencement of each program, the coordinator must notify DADS in writing of the starting date, the ending date, the daily hours of the program, and the projected number of students.

(5) A change in any information presented by the program in an approved application including, but not limited to, location, instructorship, and content must be approved by DADS prior to the program's effective date of the change.

(6) The program instructors of the classroom hours must be an RN and registered pharmacist.

(A) The nurse instructor must have a minimum of two years of full-time experience in caring for the elderly, chronically ill, or pediatric clients or been employed full time for a minimum of two years as an RN with a home and community support services agency. An instructor in a school of nursing may request a waiver of the experience requirement.

(B) The pharmacist instructor must have a minimum of one year of experience and be currently employed as a practicing pharmacist.

(7) The coordinator must provide clearly defined and written policies regarding each student's clinical experience to the student, the administrator, and the supervising nurse [~~director of nursing~~] of the agency used for the clinical experience.

(A) The clinical experience must be counted only when the student is observing or involved in functions involving medication administration and under the direct, contact supervision of an RN.

(B) The coordinator is responsible for final evaluation of the student's clinical experience.

(8) Upon successful completion of the program, each program issues to each student a certificate of completion, including the program's name, the student's name, the date of completion, and the signature of the program coordinator.

(9) Within 15 calendar days after completion of the course, each program must inform DADS on the DADS class roster form of the satisfactory completion for each student.

(p) Continuing education. The continuing education training program is as follows.

(1) The program must consist of at least seven clock hours of classroom instruction.

(2) The instructor must meet the requirements in subsection (o)(6) of this section.

(3) Each program must follow the curricula established by DADS.

(4) Within 15 days after completion of the course, each program must inform DADS on the DADS class roster form of the name of each permit holder who has completed the course.

(q) Processing procedures. DADS complies with the following procedures in processing applications of home health medication aide permits and renewal of permits.

(1) The following periods of time apply from the date of receipt of an application until the date of issuance of a written notice that the application is complete and accepted for filing or that the application is deficient and additional specific information is required. A written notice stating that the application has been approved may be sent in lieu of the notice of acceptance of a complete application. The time periods are:

(A) letter of acceptance of an application for a home health medication aide permit--14 working days; and

(B) letter of application or renewal deficiency--14 working days.

(2) The following periods of time shall apply from the receipt of the last item necessary to complete the application until the date of issuance of written notice approving or denying the application. The time periods for denial include notification of proposed decision and of the opportunity, if required, to show compliance with the law and of the opportunity for a formal hearing. An application is not considered complete until the required documentation and fee have been submitted by the applicant. The time periods are as follows:

(A) the issuance of an initial permit--90 calendar days;

(B) the letter of denial for a permit--90 calendar days; and

(C) the issuance of a renewal permit--20 calendar days.

(3) In the event an application is not processed in the time period stated in paragraphs (1) and (2) of this subsection, the applicant has the right to request reimbursement of all fees paid in that particular application process. Request for reimbursement is made to the director of the Home Health Medication Aide Permit Program. If the director of the Home Health Medication Aide Permit Program does not agree that the time period has been violated or finds that good cause existed for exceeding the time period, the request will be denied.

(4) Good cause for exceeding the time period exists if the number of applications for initial home health medication aide permits and renewal permits exceeds by 15% or more the number of applications processed in the same calendar quarter of the preceding year; another public or private entity relied upon by DADS in the application process caused the delay; or any other condition exists giving DADS good cause for exceeding the time period.

(5) If a request for reimbursement under paragraph (3) of this subsection is denied by the director of the Home Health Medication Aide Permit Program, the applicant may appeal to the commissioner of DADS for a timely resolution of any dispute arising from a violation of the time periods. The applicant must give written notice to the commissioner at the address of DADS that he or she requests full reimbursement of all fees paid because his or her application was not processed within the applicable time period. The director of the Home Health Medication Aide Permit Program must submit a written report of the facts related to the processing of the application and of any good cause for exceeding the applicable time period. The commissioner provides written notice of the commissioner's decision to the applicant and the director of the Home Health Medication Aide Permit Program. An appeal is decided in the applicant's favor if the applicable time period was exceeded and good cause was not established. If the appeal is decided in favor of the applicant, full reimbursement of all fees paid in that particular application process are made.

(r) Denial, suspension, or revocation.

(1) DADS may deny, suspend, emergency suspend, or revoke a permit or program approval if the permit holder or program fails to comply with any provision of the Health and Safety Code, Chapter 142, Subchapter B, or this chapter.

(2) DADS may also take action under paragraph (1) of this subsection for fraud, misrepresentation, or concealment of material fact on any documents required to be submitted to DADS or required to be maintained or complied by the permit holder or program pursuant to this chapter.

(3) DADS may suspend or revoke an existing permit or program approval or disqualify a person from receiving a permit or program approval because of a person's conviction of a felony or misdemeanor if the crime directly relates to the duties and responsibilities of a home health medication aide or training program. In determining whether a conviction directly relates, DADS considers the elements set forth in §97.601 of this title (relating to Enforcement Actions). [~~License Denial, Suspension or Revocation.~~]

(4) If DADS proposes to deny, suspend, or revoke a home health medication aide permit or to rescind a home health medication aide program approval, DADS notifies the permit holder or home health medication aide program by certified mail, return receipt requested, of the reasons for the proposed action and offers the permit holder or home health medication aide program an opportunity for a hearing.

(A) The permit holder or home health medication aide program must request a hearing within 15 calendar days of receipt of the notice. Receipt of notice is presumed to occur on the tenth calendar day after the notice is mailed to the last address known to DADS unless another date is reflected on a United States Postal Service return receipt.

(B) The request must be in writing and submitted to the Department of Aging and Disability Services, Medication Aide [~~Permit~~] Program, Mail Code E-416 [~~Y-979~~], P.O. Box 149030, Austin, Texas 78714-9030.

(C) If the permit holder or home health medication aide program does not request a hearing, in writing, within 15 calendar days of receipt of the notice, the permit holder or home health medication aide program is deemed to have waived the opportunity for a hearing and the proposed action is taken.

(5) DADS may suspend a permit to be effective immediately when the health and safety of persons are threatened. DADS notifies the permit holder of the emergency action by certified mail, return receipt requested, or personal delivery of the notice and of the effective date of the suspension and the opportunity for the permit holder to request a hearing.

(6) All hearings are conducted pursuant to Texas Government Code, Chapter 2001, and the formal hearing procedures at 1 TAC §§357.481-357.490.

(7) If the permit holder or program fails to appear or be represented at the scheduled hearing, the permit holder or program has waived the right to a hearing and the proposed action is taken.

(8) If DADS suspends a home health medication aide permit, the suspension remains in effect until DADS determines that the reason for suspension no longer exists, revokes the permit, or determines not to renew the permit. DADS investigates prior to making a determination.

(A) During the time of suspension, the suspended permit holder must return his or her permit to DADS.

(B) If a suspension overlaps a renewal date, the suspended permit holder may comply with the renewal procedures in this chapter; however, DADS does not renew the permit until DADS determines that the reason for suspension no longer exists.

(9) If DADS revokes or does not renew a permit, a person may reapply for a permit by complying with the requirements and procedures in this chapter at the time of reapplication.

(A) DADS may refuse to issue a permit if the reason for revocation or nonrenewal continues to exist.

(B) When a permit is revoked or not renewed, a permit holder must immediately return the license or permit to DADS.

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

Filed with the Office of the Secretary of State on September 26, 2011.

TRD-201103996
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Proposed date of adoption: December 1, 2011
For further information, please call: (512) 438-3734

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PART 15. TEXAS VETERANS COMMISSION

CHAPTER 460. FUND FOR VETERANS' ASSISTANCE PROGRAM

SUBCHAPTER A. GENERAL PROVISIONS REGARDING THE FUND FOR VETERANS' ASSISTANCE PROGRAM

40 TAC §§460.1, 460.2, 460.5, 460.8 - 460.10, 460.12, 460.16

The Texas Veterans Commission (commission) proposes amendments to Chapter 460, Subchapter A, §460.1, Purpose; §460.2, Definitions; §460.5, Performance Measures; §460.8, Grant Objectives; §460.9, Administrative Costs; and §460.10, Limitations on Grant Funds; and new §460.12, Grant Amendments; and new §460.16, Housing4TexasHeroes.

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF SECTIONS

PART III. IMPACT STATEMENTS

PART IV. COORDINATION ACTIVITIES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The proposed amendments and new sections are necessary to comply with the requirements of House Bill (HB) 1, 82nd Legislature, Regular Session (2011). HB 1 transferred funds from the state Housing Trust Fund to the commission for the purpose of administering, operating, and expending funds for Housing4TexasHeroes (H4TH) to assist Texas veterans and their families in obtaining, maintaining, or improving housing. The amendments and new sections also further define the purpose and objectives of the Fund for Veterans' Assistance (FVA) Program, and clarify the administration of the FVA as a reimbursement grant program.

It is the mission of the Texas Veterans Commission to provide superior service through the Agency programs of claims assistance, employment services, education and grants that will significantly improve the quality of life of Texas veterans and their families. These rules meet this mission by providing procedures and guidance for the Agency's authority to distribute grants to organizations also dedicated to improving the quality of life of Texas veterans and their families. By creating a comprehensive set of rules that ensure that the distribution of grant funds is done in a uniform manner with sufficient oversight, the Agency maintains its mission of superior service.

PART II. EXPLANATION OF SECTIONS

SUBCHAPTER A. GENERAL PROVISIONS REGARDING THE FUND FOR VETERANS' ASSISTANCE PROGRAM

§460.1. Purpose.

Deletes obsolete language and adds the term, "reimbursement" to more accurately describe the purpose of the Fund for Veterans' Assistance Program.

§460.2. Definitions.

Corrects the reference to, "§458.2 of this title relating to Fund for Veterans' Assistance Advisory Committee" which is currently proposed for repeal. Adds a new definition for "Reimbursement Grant" to define how grant funds are distributed to Grantees.

§460.5. Performance Measures.

Adds language to clarify that stated performance measures must be met in order to qualify for reimbursement of grant funds.

§460.8. Grant Objectives.

Deletes obsolete language, and adds the term, "reimbursement" to clarify that grant funds are awarded on a reimbursement basis.

§460.9. Administrative Costs.

Clarifies language for which administrative costs can be budgeted.

§460.10. Limitations on Grant Funds.

Adds language to allow grant funds that are awarded under the Housing4TexasHeroes program to be used for capital expenditures and acquisition of construction facilities.

§460.12. Grant Amendments.

This is a new section that sets out the parameters for Grantees to request amendments to existing Grant Agreements.

§460.16. Housing4TexasHeroes.

This is a new section that establishes the purpose and administration of the Housing4TexasHeroes program.

PART III. IMPACT STATEMENTS

Irma Rodriguez, Chief Financial Officer, Texas Veterans Commission, has determined that for each year of the first five years the amendments and new sections will be in effect, the following statements will apply:

There will be no increase in expenditures or revenue for state government and no fiscal impact for local government as a result of enforcing or administering the amendments and new sections.

There are no anticipated economic costs to persons required to comply with the amendments and new sections.

An Economic Impact Statement and Regulatory Flexibility Analysis is not required because the amendments and new sections will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Shawn Deabay, Director, Veterans Employment Services, Texas Veterans Commission, has determined that there is no significant negative impact upon employment conditions in the state as a result of the amendments and new sections.

Bill Wilson, Director, Fund for Veterans' Assistance, Texas Veterans Commission, has determined that for each year of the first five years the amendments and new sections are in effect, the public benefit anticipated as a result of enforcing the rules will be increased accountability and successful performance of the Fund for Veterans' Assistance resulting in meeting the needs of more Texas veterans and their families.

PART IV. COORDINATION ACTIVITIES

Comments on the proposed amendments and new sections may be submitted to Texas Veterans Commission, Attn: General Counsel, P.O. Box 12277, Austin, Texas 78711; faxed to (512) 463-3288; or emailed to *karen.fastenau@tvc.state.tx.us.* For comments submitted electronically, please include "H4TH Rules" in the subject line. The commission must receive comments postmarked no later than 30 days from the date this proposal is published in the *Texas Register.*

The amendments and new sections are proposed under Texas Government Code §434.010, which authorizes the commission to establish rules that it considers necessary for the effective administration of the Agency, and Texas Government Code §434.017, which authorizes the commission to establish rules governing the award of grants by the commission.

No other statutes, articles or codes are affected by these proposed amendments and new sections.

§460.1. Purpose.

The Texas Veterans Commission is authorized to use funds appropriated to the Fund for Veterans' Assistance to administer the fund[~~, enhance or improve veterans' assistance programs, including veterans' representation and counseling~~] and make reimbursement grants to address the needs of both veterans and their families.

§460.2. Definitions.

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

(1) Advisory Committee--The committee formed under §452.2(c) [~~§458.2~~] of this title (relating to Fund for Veterans' Assistance Advisory Committee).

(2) - (9) (No change.)

(10) Reimbursement Grant--The Texas Veterans Commission Fund for Veterans' Assistance awards grants on a cost reimbursement basis. Under the cost reimbursement method of funding, a Grantee is required to finance its operations, beyond any authorized initial costs or payments, with its own working capital with Grant payments made to reimburse the Grantee for actual cash disbursements supported by adequate documentation.

(11) [~~(10)~~] Units of Local Government--A county, municipality, special district, school district, junior college district, a local workforce development board created under §2308.253, Texas Government Code, or other legally constituted political subdivision of the state.

§460.5. Performance Measures.

In order to qualify for reimbursement, Grantees must provide periodic program performance reports on the following:

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

§460.8. Grant Objectives.

It is the objective of the Fund for Veterans' Assistance to provide reimbursement grants to meet the needs of veterans and their families. Such needs include, but are not limited to, the following:

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

(7) legal services, excluding criminal defense; and

(8) development of professional services networks.[~~; and~~]

[~~(9) enhancement or improvement of veterans' assistance programs, including veterans' representation and counseling.~~]

§460.9. Administrative Costs.

(a) (No change.)

(b) Administrative costs must be budgeted by line-item in the grant application, unless:

(1) the applicant has a cost allocation plan [~~current Indirect Cost Rate Plan~~] approved by a federal agency; or

(2) the applicant's [~~applicant has an approved administrative~~] cost allocation plan has an indirect cost rate approved by a federal agency[~~, as determined by the Agency~~].

(c) An applicant that has a current cost allocation plan with an indirect cost [~~Indirect Cost Rate Plan~~] approved by a federal agency [~~or an Agency-approved administrative cost allocation plan~~] may budget up to the amount of allowable administrative costs or the approved indirect cost rate, whichever is lower.

§460.10. Limitations on Grant Funds.

Grant funds cannot be used for the following:

(1) capital expenditures, including capital purchases or capital leases, except for grant funds awarded under the Housing4TexasHeroes program;

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

(4) acquisition or construction of facilities, except for grant funds awarded under the Housing4TexasHeroes program;

(5) - (10) (No change.)

§460.12. Grant Amendments.

(a) A Grantee may request an amendment to their current Grant Agreement.

(b) Grant amendments shall meet all the conditions established by the Commission to be considered by the appropriate approval authority.

(c) Decisions made by the appropriate approval authority are final and non-appealable.

§460.16. Housing4TexasHeroes.

(a) The Housing4TexasHeroes (H4TH) program provides reimbursement grants to organizations to assist Texas veterans and their families in obtaining, maintaining, or improving housing.

(b) H4TH grantees shall comply with the rules set forth in this chapter governing the Fund for Veterans' Assistance and the requirements set forth in §434.017 and Chapter 2306, Texas Government Code.

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

Filed with the Office of the Secretary of State on September 22, 2011.

TRD-201103963
H. Karen Fastenau
General Counsel
Texas Veterans Commission
Earliest possible date of adoption: November 6, 2011
For further information, please call: (512) 463-1981

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 354. MEDICAID HEALTH SERVICES

The Texas Health and Human Service Commission (HHSC) adopts new §354.1042, concerning home health supplies provided by a pharmacy, and new §354.1877, concerning quantity limitations; and the repeal of Subchapter W concerning pharmacy limitations, which consists of §354.3047, concerning quantity limitations, and §354.3092, concerning review and evaluation. The new rules and repeals are adopted without changes to the proposed text as published in the April 15, 2011, issue of the *Texas Register* (36 TexReg 2303) and will not be republished.

Background and Justification

House Bill (H.B.) 1487, 81st Legislature, Regular Session, 2009, allows diabetic supplies to be prescribed for Medicaid clients using a method similar to that allowed under Medicare, i.e., valid prescription. Prior to the enactment of H.B. 1487, diabetic supplies (other than insulin syringes and needles) required a home health order form instead of a prescription.

Additionally, effective January 2012, new Health Insurance Portability and Accountability Act (HIPAA) transaction requirements explicitly allow pharmacies to bill for non-drug items using the HIPAA National Council for Prescription Drug Programs (NCPDP) transaction.

Currently, with the exception of insulin syringes and needles that are already reimbursable under the Medicaid Vendor Drug Program (VDP), durable medical equipment (DME) and home health providers are the only providers that may receive Medicaid reimbursement for home health supplies that are a benefit of Texas Medicaid. Pharmacies enrolled with the VDP may currently enroll as a DME provider, which requires Medicare DME certification.

The new rules allow pharmacies enrolled in the VDP to provide a limited set of basic home health supplies commonly found in pharmacies without requiring enrollment as a DME provider. The limited set of basic supplies includes aerosol holding chambers, blood glucose meters, blood glucose reagent strips, diabetic lancet devices, diabetic lancets, hypertonic saline solution, oral bowel evacuants, oral electrolyte solution, and orally administered iron salts (ferrous sulfate, ferrous gluconate) in addition to insulin syringes and needles, which are currently reimbursable under VDP. Pharmacies will not be allowed to provide the full scope of benefits provided by DME and home health providers. Because of the low cost of the supplies that will be provided by pharmacies for reimbursement, prior authorization will not be required. The limited set of home health supplies will continue to be available from DME and home health providers. The reimbursement amounts and limitations will be the same regardless of the provider type.

Additionally, the rules eliminate duplicative information and move rule information to a more appropriate subchapter.

Comments

The 30-day comment period ended May 15, 2011. During this period, HHSC did not receive comments regarding the proposed rule changes.

SUBCHAPTER A. PURCHASED HEALTH SERVICES

DIVISION 3. MEDICAID HOME HEALTH SERVICES

1 TAC §354.1042

The new rule is adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Government Code §531.099, which requires HHSC to modify rules for ordering diabetic supplies under the Medicaid program to provide for a system that is comparable to ordering diabetic supplies under the Medicare program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 21, 2011.

TRD-201103922
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Effective date: May 1, 2012
Proposal publication date: April 15, 2011
For further information, please call: (512) 424-6900

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SUBCHAPTER F. PHARMACY SERVICES

DIVISION 4. LIMITATIONS

1 TAC §354.1877

The new rule is adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Government Code §531.099, which requires HHSC to modify rules for ordering diabetic supplies under the Medicaid program to provide for a system that is comparable to ordering diabetic supplies under the Medicare program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 21, 2011.

TRD-201103921
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Effective date: May 1, 2012
Proposal publication date: April 15, 2011
For further information, please call: (512) 424-6900

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SUBCHAPTER W. PHARMACY LIMITATIONS

1 TAC §354.3047, §354.3092

The repeals are adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Government Code §531.099, which requires HHSC to modify rules for ordering diabetic supplies under the Medicaid program to provide for a system that is comparable to ordering diabetic supplies under the Medicare program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 21, 2011.

TRD-201103920
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Effective date: May 1, 2012
Proposal publication date: April 15, 2011
For further information, please call: (512) 424-6900

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TITLE 4. AGRICULTURE

PART 2. TEXAS ANIMAL HEALTH COMMISSION

CHAPTER 33. FEES

4 TAC §33.1, §33.3

The Texas Animal Health Commission (Commission) adopts new Chapter 33, §33.1 and §33.3, concerning Fees, without changes to the proposed text as published in the August 12, 2011, issue of the *Texas Register* (36 TexReg 5059). The sections will not be republished.

The new chapter is for the purpose of adding a foreign cattle inspection fee.

The Commission has been protecting Texas' livestock and poultry since 1893. The Commission has legislative authority to make and enforce regulations and assess fees to prevent, control, and eradicate specific infectious animal diseases or pests which endanger livestock, exotic livestock, and poultry. The Commission is also the lead agency in Texas for animal disaster issues, including disease, natural, or manmade situations.

There were several legislative bills introduced during this last legislative session which all contained specific fee authorization language for the Commission. House Bill 1992 was passed and enacted into law. The intent of this legislation is to provide the Commission with the full and necessary authority to assess any appropriate and equitable fees for the different types of services or actions provided to the various agricultural animal industries. This legislation was necessary as a result of the current Legislative Budget Board recommendation to fundamentally change the agency funding structure from primarily General Revenue sourced funding to a partial fee-for-services funding model. The change will require the Commission to generate new revenue streams through fees for up to approximately 50% of future budgets to maintain all essential services.

The Commission's activities are focused not only on protecting the animal industries of Texas from disease threats, but also supporting consumer confidence that Texas' animals and products are safe, wholesome, and disease free. A disease free Texas livestock population also allows for enhanced marketability and less restrictive movement requirements, from both an interstate and international perspective. The Commission's previous authority to assess fees was primarily with inspection processes. The bill does expressly grant additional rulemaking authority to the agency for assessing fees.

The intent of the foreign cattle inspection fee program is to ensure that these animals entering Texas meet Commission entry requirements and do not pose a disease risk to Texas cattle. These animals may be inspected by Commission personnel for disease risk to ensure compliance with our entry requirements and any associated record keeping requirements. As that is a service provided by the Commission and in support of the protecting the state's cattle industry, the Commission is proposing to promulgate a fee to support the services provided by the Commission.

No comments were received regarding adoption of the rules.

STATUTORY AUTHORITY

The new chapter is adopted under the following statutory authority as found in Chapter 161 of the Texas Agriculture Code. Under §161.060, "[t]he commission may charge a fee, as provided by commission rule, for an inspection made by the commission". During the 82nd Texas Legislative Session, House Bill 1992 was passed which provides the Commission with broader based fee assessment authority. HB 1992 amends §161.060 which will al-

low the Commission to set and collect a fee for most services provided, including: 1) inspecting animals or facilities; 2) obtaining samples from animals for disease diagnostic test; 3) testing animals for disease; 4) disease prevention, control/eradication and treatment efforts; 5) services related to the transport of livestock; 6) control and eradication of ticks and other pests; and 7) any other service for which the Commission may incur a cost.

The Commission is also vested by statute, §161.041(a), with the requirement to protect all livestock, domestic animals, and domestic fowl from disease. The Commission is authorized, by §161.041(b), to act to eradicate or control any disease or agent of transmission for any disease that affects livestock. If the Commission determines that a disease listed in §161.041 of this code or an agent of transmission of one of those diseases exists in a place in this state among livestock, or that livestock are exposed to one of those diseases or an agent of transmission of one of those diseases, the Commission shall establish a quarantine on the affected animals or on the affected place. That is found in §161.061.

As a control measure, the Commission by rule may regulate the movement of animals. The Commission may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international commerce. The Commission may require, under §161.054, testing, vaccination, or another epidemiologically sound procedure before or after animals are moved. That authority is found in §161.048. A person is presumed to control the animal if the person is the owner or lessee of the pen, pasture, or other place in which the animal is located and has control of that place; or exercises care or control over the animal. That is under §161.002.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 21, 2011.

TRD-201103904
Gene Snelson
General Counsel
Texas Animal Health Commission
Effective date: October 11, 2011
Proposal publication date: August 12, 2011
For further information, please call: (512) 719-0724

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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 51. HOUSING TRUST FUND RULE

10 TAC §§51.1 - 51.16

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC Chapter 51, §§51.1 - 51.16, concerning the Housing Trust Fund Rule, without changes to the proposal as published in the July 15, 2011, issue of the *Texas Register* (36 TexReg 4521) and will not be republished.

This repeal is adopted in order to consolidate and simplify the existing rules for the Housing Trust Fund.

A public hearing to receive input on the proposed repeal was held on July 29, 2011 and public comments were accepted through August 5, 2011.

No comments were received concerning the proposed repeal.

The Board approved the final order adopting this repeal on September 15, 2011.

The repeal is adopted pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 26, 2011.

TRD-201104001
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: October 16, 2011
Proposal publication date: July 15, 2011
For further information, please call: (512) 475-3916

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10 TAC §§51.1 - 51.11

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 51, §§51.1 - 51.11 concerning the Housing Trust Fund Rule. Section 51.2 and §§51.4 - 51.10 are adopted with changes to the proposed text as published in the July 15, 2011, issue of the *Texas Register* (36 TexReg 4522). Sections 51.1, 51.3 and 51.11 are adopted without change and will not be republished.

The new sections ensure compliance with all statutory requirements, removes any redundant or unnecessary references to other federal or state statutes, and includes recommendations for necessary policy and administrative changes to further enhance and streamline operations.

In accordance with the 2012 Housing Trust Fund Biennial Plan (approved by the Board on July 28, 2011) the reservation system may be utilized for loans or grants as well as programs that may not require reservations on behalf of individual households. Accordingly, staff recommended non-substantive technical corrections to §51.8 to better capture the use of the reservation system and related processes. In addition, staff made minor consistency corrections to defined terms in §51.2 and §§51.4 - 51.10.

The Department accepted comments on the proposed rules in writing and by email and a public hearing to receive input on the proposed rules was held on July 29, 2011 and public comments were accepted through August 5, 2011.

No public comments or input were received.

The Board approved the final order adopting the new sections on September 15, 2011.

The new sections are adopted pursuant to the authority of Chapter 2306 of the Texas Government Code, which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

§51.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings unless the context or the Notice of Funding Availability (NOFA) indicate otherwise. Lack of capitalization of a term or word in this chapter does not indicate that the term is undefined. Other definitions may be found in Chapter 2306 of the Texas Government Code.

(1) Activity--A form of assistance by which HTF funds are used to provide incentives to develop and support affordable housing and homeownership through acquisition, new construction, reconstruction, and rehabilitation of residential housing.

(2) Administrative Deficiencies--The absence of information or a document from the application as required by these rules and program manuals.

(3) Administrator--A unit of government, nonprofit entity or other party who has an executed written agreement or contract with the Department committing the Department to provide funds upon the completion of certain actions called for in the agreement or contract.

(4) Amortized--A loan in which the principal as well as the interest, if applicable, is payable monthly or in some other periodic installment over the term of the loan.

(5) Applicant--A person who has submitted an application for Department funds or any other form of assistance.

(6) Application--A request for funds submitted to the Department in a form prescribed by the Department, including any exhibits or other supporting material.

(7) Application Acceptance Period--The period of time that applications may be submitted to the Department as more fully described in the applicable NOFA.

(8) Articles of Incorporation--A document that sets forth the basic terms of a corporation's existence and is the official recognition of the corporation's existence. The documents must evidence that they have been filed with the Office of the Secretary of State.

(9) Bylaws--A rule or administrative provision adopted by a corporation for its internal governance. Bylaws are enacted apart from the articles of incorporation. Bylaws and amendments to bylaws must be formally adopted in the manner prescribed by the organization's articles or current bylaws by either the organization's board of directors or the organization's members, whoever has the authority to adopt and amend bylaws.

(10) Chapter 2306--Chapter 2306 of the Texas Government Code.

(11) Combined Loan to Value (CLTV)--Value of all liens against the property and/or loans, including forgivable loans.

(12) Committed--Funds approved by the Department to provide assistance to an individual or family.

(13) Competitive Application Cycle--A defined deadline in which all applications must be submitted in accordance with the NOFA.

(14) Contract--The executed written agreement between the Department and an administrator performing an activity related to a program that outlines performance requirements and responsibilities assigned by the document.

(15) Contract Period--The length of time between the contract's effective date (starting date) through its ending date.

(16) Deobligation--The cancellation of funds involving some or all of a financial obligation between the Department and an administrator.

(17) Department--The Texas Department of Housing and Community Affairs.

(18) Development--A Project in which an applicant, administrator, or development owner has or will have an ownership interest and that has a construction component, either in the form of new construction or rehabilitation of multi-unit or single family residential housing.

(19) Development Owner--Any person, general partner, or affiliate of a person who owns or proposes a development or expects to acquire control of a development under a purchase contract and is the person responsible for performing under the contract with the Department.

(20) Development Site--The area, or if scattered site, areas for which the development is proposed to be located.

(21) Domestic Farm Laborer--Individuals (and the family) who receive a substantial portion of their income from the production or handling of agricultural or aquacultural products.

(22) Draw--Funds requested by the administrator, approved by the Department and subsequently disbursed to the administrator.

(23) Effective Date--The date on which the Department's Governing Board approved action or when all applicable parties have signed a contract or agreement.

(24) First time Homebuyer--A First-Time Homebuyer is:

(A) An individual who has had no ownership in a principal residence in Texas during the three (3) year period ending on the date of purchase of the property.

(B) A single parent who has only owned with a former spouse while married.

(C) An individual who is a displaced homemaker and has only owned with a spouse.

(D) An individual who has only owned a principal residence not permanently affixed to a permanent foundation in accordance with applicable regulations.

(E) An individual who has only owned a property that was not in compliance with State, local building codes and which cannot be brought into compliance for less than the cost of constructing a permanent structure.

(25) Forgivable Loan--Financial assistance in the form of money that, in an executed agreement, is not required to be repaid.

(26) General Partner--A person, or persons, who is identified as the general partner of the partnership that is the development owner and that has general liability for the partnership. In addition, unless the context shall clearly indicate the contrary, if the development owner in question is a limited liability company, the term "General Partner" shall also mean the managing member or other party with management responsibility for the limited liability company.

(27) Grant--Financial assistance that is awarded in the form of money for a specific purpose and that is not required to be repaid. A grant includes a forgivable loan.

(28) Household--One or more persons occupying a housing unit. May also be referred to as a "Family."

(29) Housing Trust Fund (HTF)--The fund created under Chapter 2306 of the Texas Government Code and governed by this title.

(30) HUD--United States Department of Housing and Urban Development.

(31) Income and Rent Limits--Limits in place for maximum allowable incomes and rents for specific programs administered by the Department, as provided by the Department.

(32) Individuals and families of Low-Income--Individuals and families individuals or families whose annual incomes do not exceed 80 percent of the greater of state or local median income as provided by the Department.

(33) Individuals and families of Very Low-Income--Individuals or families whose annual incomes do not exceed 60 percent of the greater of state or local median income as provided by the Department.

(34) Individuals and families of Extremely Low Income--Individuals or families whose annual incomes do not exceed 30 percent of the greater of state or local median income as provided by the Department.

(35) Lien--A claim against a property that provides security for repayment of a debt or obligation of the property owner.

(36) Loan--Financial assistance in the form of money that is required to be repaid in accordance with terms and interest rates provided in the executed agreement.

(37) Loan Assumption--An HTF loan may be assumable if the Department determines that all program requirements in effect at the time of the assumption are met.

(38) Loan to Value (LTV)--The amount of the outstanding mortgage loan divided by the property's appraised value. The LTV for an HTF loan cannot exceed 100 percent.

(39) Land Use Restriction Agreement (LURA)--An agreement between the Department and a person related to a specific property or properties which is filed with the responsible recording authority.

(40) Manufactured Housing Unit (MHU)--A structure transportable in one or more sections which, in traveling mode, is 8 body-feet or more in width or 40 body-feet or more in length, or when erected on site, is 320 square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required facilities, and includes the plumbing, heating, air-conditioning, and electrical systems contained therein. MHUs must comply with §19(1) of the Texas Manufactured Housing Standards Act.

(41) Multifamily Structure--A property designed and built to support the habitation of more than one person or one household may include an attached or semi-detached unit.

(42) New Construction--A project in which the main purpose of funds is to create additional dwelling units and is not a rehabilitation or reconstruction.

(43) NOFA--Notice of Funding Availability.

(44) Nonprofit Organization--An organization, institution or agency that:

(A) is organized under state or local laws;

(B) has no part of its net earnings benefiting any member, founder, contributor, or individual; and

(C) is a tax exempt §501(c) organization. A pending application for §501(c) status cannot be used to comply with the tax status requirement.

(45) Open Reservation Cycle--A defined period during which an administrator may submit applications according to a published NOFA and which will be reviewed on a first come-first serve basis until all funds available are committed, or until the NOFA is closed. Applications will be reviewed in accordance with NOFA and manual for the applicable HTF program.

(46) Parity Lien--A lien position whereby two or more lenders share a security interest of equal priority in collateral.

(47) Person--Any individual, partnership, corporation, association, local unit of government, community action agency, or public or private organization of any character.

(48) Persons with Disabilities--An individual who has a disability that is a physical or mental impairment that substantially limits one or more major life activities.

(49) Principal Residence--The primary housing unit that an individual or family inhabits.

(50) Program Manual--A set of guidelines designed to be an implementation tool for the administrator that has executed an agreement and allows the administrator to search for terms, statutes, regulations, forms and attachments. The program manual may be developed by the Department and amended or supplemented from time-to-time.

(51) Property/Properties--The real estate and all improvements thereon which are the subject of the HTF funds whether currently existing or proposed to be built thereon in connection with the funds.

(52) Public Housing Authority (PHA)--A housing authority established under Chapter 392 of the Texas Local Government Code.

(53) Received Date--The date an application is verified to be received by the Department.

(54) Reconstruction--The rebuilding of an existing structure on the same lot where housing exists at the time of application. HTF funds may also be used to build a new foundation or repair an existing foundation.

(55) Rehabilitation--Includes the alteration, improvement or modification of an existing structure. It may also include moving an existing structure to a foundation constructed with HTF funds.

(56) Reservation--An amount of funds set-aside for each individual applicant registered into the Department's HTF registration website.

(57) Resolution--Formal action by a corporate board of directors or other corporate body authorizing a particular act, transaction, or appointment. Resolutions must be in writing and state the specific action that was approved and adopted, the date the action was approved and adopted, and the signature of person or persons authorized to sign resolutions. Resolutions must be approved and adopted in accordance with the corporate bylaws.

(58) Senior Lien--A lien that takes priority over the Department's lien and any subsequent liens.

(59) Setup--The submission of required information into the reservation system in order to reserve funds for activities specified in the applicable NOFA.

(60) Single family structure--A property designed and built to support the habitation of one person or one household. This includes an attached or detached unit, including structures such as a single-family detached unit, condominium unit, and/or a single unit in a duplex or triplex.

(61) TAC--Texas Administrative Code.

(62) Title Commitment--A document from a title company showing the status of a property's ownership and pledging to issue a title insurance policy when the requirements shown therein are met.

§51.4. Use of Funds.

(a) Use of Additional or Deobligated Funds. In the event the Department receives additional funds, such as loan repayments, donations and interest earnings, the Department will redistribute the funds in accordance with the HTF Plan in effect at the time the additional funds become available.

(b) Reprogramming of Funds. If funding for a program is undersubscribed or funds not utilized, within a timeframe as determined by the Department, remaining funds may be reprogrammed at the discretion of the Department consistent with the HTF Plan in effect at the time.

(c) Deobligation of Funds. The Department may deobligate all or a portion of the awarded or committed amount if such amount is not expended in a timely manner in accordance with the NOFA and contract or Reservation agreement.

(d) The Department may terminate an agreement in whole or in part if the administrator does not achieve performance benchmarks as outlined in agreement, NOFA, contract or Reservation agreement.

(e) Amendments. The Department may authorize, execute, and deliver modifications and/or amendments to any program written agreement provided that:

(1) Time extensions. The Department may collectively provide up to one six (6) month extension to the end date of any agreement. Any additional time extension granted by the Department shall include a statement by the Department relating to unusual, non-foreseeable or extenuating circumstances. If the extension is longer than six (6) months and the Department determines that a statement related to unusual, non-foreseeable, or extenuating circumstances cannot be issued, it will be presented to the Governing Board for approval, approval with modifications, or denial of the requested extension; and

(2) In the case of all other modifications or amendments, such modification or amendment does not, in the estimation of the Department, significantly decrease the benefits to be received by the Department.

§51.5. Prohibited Activities.

(a) Conflict of Interest.

(1) Conflict Prohibited. No person described in paragraph (2) of this subsection who exercises, has the power or ability to exercise, or has exercised any functions or responsibilities with respect to HTF activities under Chapter 2306 of the Texas Government Code, or who is in a position to participate in a decision making process or gain inside information with regard to such activities, may obtain a personal or financial interest or benefit from a HTF assisted activity, or have any interest, directly or indirectly, legally or beneficially, in any HTF contract, subcontract or agreement or the proceeds hereunder, either for themselves or those with whom they have family or business ties, during their tenure and for one year thereafter.

(2) Persons covered. The conflict of interest provisions of paragraph (1) of this subsection apply to any person ("covered persons") who is an employee, agent, consultant, officer, trustee, director, member of a governing board or other oversight body, elected official or appointed official of the administrator, or any person acting in any such capacity or role, however designated.

(3) No employee, officer or agent of the administrator shall participate in selection, or in the award or administration of a agreement supported by HTF funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when the following persons have a financial or other interest in a firm under consideration to be selected for award or certified to administer funds:

(A) covered person;

(B) any member of his or her immediate family;

(C) his or her partner;

(D) an organization which employs, or is about to employ, anyone listed in subparagraphs (A) - (C) of this paragraph; or

(E) an organization controlled by any such person.

(4) The covered persons of the administrator will neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to sub-agreements. Administrators may set minimum rules where the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by state or local law or regulations, such standards or conduct will provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the officers, employees, or agents of the administrator, or by contractors or their agents. The awarding agency may in regulation provide additional prohibitions relative to real, apparent, or potential conflicts of interest.

(b) The following activities are prohibited in relation to the origination of a HTF loan, but may be charged as an allowable cost by a third (3rd) party lender for the origination of all other loans originated in connection with an HTF loan:

(1) Payment of delinquent property taxes or related fees or charges on properties to be assisted with HTF funds;

(2) Loan origination fees;

(3) Application fee;

(4) Discount fees;

(5) Underwriter fee;

(6) Loan processing fees; and

(7) Other fees not approved by the Department.

(c) Persons receiving or benefiting from HTF funds, as determined by the Department, may not be currently in delinquency or in default with child support and/or government loans.

(d) Unless otherwise provided in the NOFA, persons receiving or benefiting from HTF funds that are provided as a loan, as determined by the Department, may not have any outstanding judgments and/or liens on the property.

§51.6. Administrator Eligibility and Requirements.

(a) The following organizations or entities are eligible to participate in HTF programs:

(1) Any eligible entity listed in §2306.202 of the Texas Government Code; or

(2) Other eligible entities approved by the Department, such as, but not limited to colleges, universities, institutions of higher education and other public agencies.

(b) Ineligible Administrators. The following violations may cause a Participant, and any applications they have submitted, to be ineligible to participate in programs or receive funding:

(1) Administrators that have failed to make timely payment on fee commitments or on debt instruments held by the Department and for which the Department has initiated formal collection actions; and

(2) Administrator that have been debarred by HUD or the Department.

(c) Current or previous noncompliance. Each administrator will be reviewed for its compliance history by the Department. Administrators found to be in material noncompliance, or otherwise violating the compliance rules of the Department, will be terminated and/or not recommended for future funding.

(d) Administrator must enter into an agreement with the Department in order to be eligible as more fully described in the NOFA.

(e) Determination of annual income. The method used to determine annual income will be provided in the NOFA or program manual.

(f) Procurement. Administrators must comply with all applicable state, and local laws, regulations, and ordinances for making procurements with HTF funds.

(g) Administrators may not retain any program income generated through the operation of a HTF program or activity.

(h) Records retention. Administrator shall be required to maintain records pertinent to an assisted household's files for a period of at least three (3) years as required by the Department or, if applicable, Chapter 60, Subchapter A of this title (relating to Compliance Monitoring).

(i) Other requirements may be specified in the NOFA or other release of funds (such a Request for Qualifications (RFQ) or Request for Proposals (RFP)).

§51.7. General Application Procedures and Requirements.

(a) The Department will state within a NOFA, Request for Qualifications (RFQ), Request for Proposals (RFP) or other documentation for the release of funding the submission and eligibility guidelines. Applicants to the Department must verify and ensure the accuracy, sufficiency and receipt of all submissions to the Department.

(b) Application Deadline. All applications must be received during business hours (8:00 a.m. to 5:00 p.m. Central Time) on any business day. Completion and submission of the application includes the entire application and any other supplemental forms which may be required by the Department.

(c) The Department reserves the right to reduce the amount requested in an application based on activity or Project feasibility, underwriting analysis, or availability of funds.

(d) The Department may decline to fund any application if the proposed activities do not, in the Department's sole determination, represent a prudent use of the Department's funds. The Department is not obligated to proceed with any action pertaining to any applications which are received, and may decide it is in the Department's best interest to refrain from pursuing any selection process. The Department reserves the right to negotiate individual elements of any application.

§51.8. Criteria for Reservation System Funding.

(a) This section applies to reservation system programs as further outlined in the applicable NOFA. The reservation system is the online system utilized by administrators to reserve or draw funds, and track status of funding activities. The NOFA will establish and define the terms and conditions for the submission of reservations. The NOFA will also indicate the approximate amount of available funds.

(b) An administrator must have been approved by the Department and must have executed an agreement to be eligible to submit Reservations on behalf of households or the administrator. A reservation containing false information and/or all documents required are not received within ten (10) business days after the reservation has been entered into the system may be cancelled. The Department staff will review and process all Reservations received. If the Department receives more than one reservation on the same day and funding is insufficient, the Reservations will be processed in the order submitted to the reservation system for approval by the Department. The administrator will be notified via the reservation system or otherwise in writing of the Department's determination.

(c) Reservations of funds are available to the administrator on first-come, first-served basis. In all cases the administrator must register each household or funding activity as outlined in the NOFA. The administrator may enter additional Reservations after a loan or activity has closed or funding has otherwise been committed.

(d) Unless otherwise provided in the NOFA, reservations received by the Department in response to a NOFA will be handled in the following manner:

(1) The Department will accept Reservations until all funds under the NOFA have been committed or the availability of funds expires. The Department may limit the eligibility of Reservations in the NOFA.

(2) Each reservation will be assigned a received date in the reservation system based on the date and time the reservation was entered into the HTF reservation system. Each will be reviewed in accordance with the NOFA.

(3) Reservations and/or applications submitted on behalf of a household must comply with all applicable HTF requirements or regulations established in these rules. Reservations and/or applications submitted on behalf of a household that do not comply with such requirements will be disqualified. The administrator will be notified via the reservation system or otherwise in writing of any cancelled and/or disqualified Reservations and/or applications submitted on behalf of an applicant.

(4) Administrative Deficiencies. If a reservation contains deficiencies which, in the determination of the Department staff, require clarification or correction of information submitted at the time of the Reservation, the Department staff may request clarification or correction of such administrative deficiencies. The Department staff may request clarification or correction in a deficiency notice in the form of an email, facsimile or a telephone call to the administrator advising that such a request has been transmitted. An administrator may not change or supplement a reservation in any manner after submission, except in response to a direct request from the Department.

(5) Prior to approval, the Department may decline to fund any reservation entered into the reservation system if the proposed housing activities do not, in the Department's sole determination, represent a prudent use of the Department's funds. The Department is not obligated to proceed with any action pertaining to any reservation which are entered, and may decide it is in the Department's best interest to refrain from committing the funds. If the Department has approved the applicant, but the administrator and/or household has not complied with all the program rules and guidelines, the Department may suspend funding until the administrator and/or household has satisfied all requirements of HTF.

(e) Unless otherwise provided in the NOFA, a reservation of funds may be subject to cancellation if all required documents are not submitted to the Department within ten (10) business days of the date the registration was entered into the reservation system and/or if the performance benchmarks outlined in these HTF rules are not adhered to. Submission of a reservation on behalf of a household or administrator does not guarantee the availability or commitment of funding.

(f) Maximum Pending Setups. Unless otherwise provided in the NOFA, at any one time, the administrator may have up to ten (10) unapproved setups awaiting approval ("pending") in the reservation system. If the administrator has the maximum ten setups pending, new setups will only be reviewed by the Department once an existing unapproved setup becomes a reservation (if approved) or is cancelled.

(g) Modification of Reservation. Unless otherwise provided in the NOFA, after a reservation has been secured and the household or activity has been approved, the administrator must notify the Department of any changes to the setup, such as a cancellation, change in the sales price, or change in the loan or grant amount. The administrator will not be permitted to change, exchange, replace or switch households, if applicable, once the reservation has been approved; unless construction has commenced and one of the following events has occurred: death, illness, divorce, loss of income, nonperformance by the household or for other acceptable reasons, as approved by the Department, where the household is unable to perform.

(h) Unless otherwise provided in the NOFA, once a reservation has been approved, the Department may grant one forty-five (45) day extension of required benchmarks due to extenuating circumstances that were beyond the administrator's control. If the administrator cannot meet the required benchmarks after the forty-five (45) day extension, the reservation will be cancelled. If funds are available, the administrator must resubmit the reservation along with an updated household application to ensure the household still meets all guidelines and requirements for the NOFA.

§51.9. Loan, Lien and Mortgage Requirements.

(a) The requirements in this section shall apply to HTF loans unless otherwise provided in the NOFA or waived by the Department.

(b) Lien position requirements:

(1) A loan made by the Department shall be secured by a first (1st) lien on the real property if the Department's loan is the largest amortized, repayable loan secured by the real property; or

(2) The Department may accept a parity lien position if the original principal amount of the leveraged loan is equal to or greater than the Department's loan; or

(3) The Department may accept a subordinate lien position if the original principal amount of the leveraged loan is at least $1,000 or greater than the Department's loan. However liens related to other subsidized funds provided in the form of grants and non-amortizing loans, such as deferred payment or forgivable loans, must be subordinate to the Department's loan.

(c) Deobligated Funds. The Department will apply §1.19 of this title (relating to Deobligated Funds).

(d) Encumbrances.

(1) Real property taxes assessed on the housing unit must be current and/or the household must be participating in an approved payment plan with the taxing authority.

(2) The property must not be encumbered with tax liens or child support liens.

(3) The Department may require the owner to be current on any existing mortgage loans or home equity loans.

(e) Affordability periods.

(1) In the event that the housing unit ceases to be the principal residence, the forgiveness of the loan or grant agreement will cease.

(2) If a housing unit transfers by devise, descent or operation of law upon the death of the assisted homeowner, the loan may be forgiven at the discretion of the Department.

§51.10. Property Guidelines and Related Issues.

(a) The requirements in this section shall apply unless otherwise provided in the NOFA.

(b) If the administrator is utilizing HTF funds to construct the home they must conform to §2306.514 of the Texas Government Code.

(c) All work performed that utilizes HTF funds must meet HUD Housing Quality Standards (HQS), at a minimum, as well as other property standards required in the NOFA.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 26, 2011.

TRD-201104002
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: October 16, 2011
Proposal publication date: July 15, 2011
For further information, please call: (512) 475-3916

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CHAPTER 80. MANUFACTURED HOUSING

The Manufactured Housing Division of the Texas Department of Housing and Community Affairs (the "Department") adopts amendments to 10 Texas Administrative Code Chapter 80, §§80.3, 80.4, 80.21, 80.31 - 80.34, 80.38, 80.40, 80.80, and 80.90 - 80.93 relating to the regulation of the manufactured housing program. The rules are adopted without changes to the proposed text as published in the August 5, 2011, issue of the *Texas Register* (36 TexReg 4879) and will not be republished.

The rules are revised to comply with House Bill 1510 (82nd Legislature, 2011 Regular Session) that amends the Manufactured Housing Standards Act; to remove references to §80.100, Subchapter I; and for clarification purposes.

The rules are effective thirty (30) days following the date of publication in the *Texas Register* of notice that the rules are adopted.

There were no comments received during the comment period and no requests were received for a public hearing to take comments on the rules.

The rules as proposed on August 5, 2011, are adopted as final rules.

The following is a restatement of the rules' factual basis:

Section 80.3(k)(4): To remove the reference to §80.100, Subchapter I relating to forms because the subchapter is repealed

since there is no statutory requirement for the forms to be part of the rules.

Section 80.4: To correct the cite reference from §1201.205(e) to §1201.251(e).

Section 80.21(e)(3): To remove the reference to §80.100, Subchapter I relating to forms because the subchapter is repealed since there is no statutory requirement for the forms to be part of the rules.

Section 80.21(e)(4): To remove the reference to §80.100, Subchapter I relating to forms because the subchapter is adopted for repeal since there is no statutory requirement for the forms to be part of the rules.

Section 80.31(c): To remove the reference to §80.100, Subchapter I relating to forms because the subchapter is repealed since there is no statutory requirement for the forms to be part of the rules.

Section 80.32(g): To remove the reference to §80.100, Subchapter I relating to forms because the subchapter is repealed since there is no statutory requirement for the forms to be part of the rules.

Section 80.32(p): To remove the subsection because it is in conflict with §1201.151(a) of the Standards Act.

Section 80.32(p) - (v): The subsections are re-lettered because of the adoption to remove subsection (p).

Section 80.32(s): To remove the reference to §80.100, Subchapter I relating to forms because the subchapter is repealed since there is no statutory requirement for the forms to be part of the rules.

Section 80.33(k)(3): To remove the reference to §80.100, Subchapter I relating to forms because the subchapter is repealed since there is no statutory requirement for the forms to be part of the rules.

Section 80.34(a): To remove the reference to §80.100, Subchapter I relating to forms because the subchapter is repealed since there is no statutory requirement for the forms to be part of the rules.

Section 80.38(a): To remove the reference to §80.100, Subchapter I relating to forms because the subchapter is repealed since there is no statutory requirement for the forms to be part of the rules.

Section 80.38(b)(2): To remove the reference to §80.100, Subchapter I relating to forms because the subchapter is repealed since there is no statutory requirement for the forms to be part of the rules.

Section 80.40(a): To remove the reference to §80.100, Subchapter I relating to forms because the subchapter is repealed since there is no statutory requirement for the forms to be part of the rules.

Section 80.80(a): To remove the reference to §80.100, Subchapter I relating to forms because the subchapter is repealed since there is no statutory requirement for the forms to be part of the rules.

Section 80.90(f)(1)(A) and (C): To comply with amendments to the Manufactured Housing Standards Act in HB 1510 (82nd Legislature, 2011 Regular Session).

Section 80.91(b) and (c): To remove subsection (b) to comply with amendments to the Manufactured Housing Standards Act in HB 1510 (82nd Legislature, 2011 Regular Session) and re-letter subsection (c) to (b).

Section 80.92(a): To remove the reference to §80.100, Subchapter I relating to forms because the subchapter is repealed since there is no statutory requirement for the forms to be part of the rules.

Section 80.93(a): To remove the reference to §80.100, Subchapter I relating to forms because the subchapter is repealed since there is no statutory requirement for the forms to be part of the rules.

Section 80.93(c): To add new subsection to comply with amendments to the Manufactured Housing Standards Act in HB 1510 (82nd Legislature, 2011 Regular Session).

Section 80.93(d): To re-letter the current subsection (c) to (d).

Section 80.93(e): To re-letter the current subsection (d) to (e) and to remove the reference to §80.100, Subchapter I relating to forms because the subchapter is repealed since there is no statutory requirement for the forms to be part of the rules.

SUBCHAPTER A. CODES, STANDARDS, TERMS, FEES AND ADMINISTRATION

10 TAC §80.3, §80.4

The amendments are adopted under §1201.052 of the Texas Occupations Code, which provides the Director with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and §1201.053 of the Texas Occupations Code, which authorizes the board to adopt rules as necessary and the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statutes, codes, or articles are affected by adoption of the amended rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 23, 2011.

TRD-201103973
Joe A. Garcia
Executive Director, Manufactured Housing Division
Texas Department of Housing and Community Affairs
Effective date: November 6, 2011
Proposal publication date: August 5, 2011
For further information, please call: (512) 475-2206

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SUBCHAPTER B. INSTALLATION STANDARDS AND DEVICE APPROVALS

10 TAC §80.21

The amendments are adopted under §1201.052 of the Texas Occupations Code, which provides the Director with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and §1201.053 of the Texas

Occupations Code, which authorizes the board to adopt rules as necessary and the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statutes, codes, or articles are affected by adoption of the amended rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 23, 2011.

TRD-201103974
Joe A. Garcia
Executive Director, Manufactured Housing Division
Texas Department of Housing and Community Affairs
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Proposal publication date: August 5, 2011
For further information, please call: (512) 475-2206

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SUBCHAPTER C. LICENSEES' RESPONSIBILITIES AND REQUIREMENTS

10 TAC §§80.31 - 80.34, 80.38

The amendments are adopted under §1201.052 of the Texas Occupations Code, which provides the Director with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and §1201.053 of the Texas Occupations Code, which authorizes the board to adopt rules as necessary and the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statutes, codes, or articles are affected by adoption of the amended rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 23, 2011.

TRD-201103975
Joe A. Garcia
Executive Director, Manufactured Housing Division
Texas Department of Housing and Community Affairs
Effective date: November 6, 2011
Proposal publication date: August 5, 2011
For further information, please call: (512) 475-2206

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SUBCHAPTER E. LICENSING

10 TAC §80.40

The amendments are adopted under §1201.052 of the Texas Occupations Code, which provides the Director with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and §1201.053 of the Texas Occupations Code, which authorizes the board to adopt rules as necessary and the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statutes, codes, or articles are affected by adoption of the amended rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 23, 2011.

TRD-201103976
Joe A. Garcia
Executive Director, Manufactured Housing Division
Texas Department of Housing and Community Affairs
Effective date: November 6, 2011
Proposal publication date: August 5, 2011
For further information, please call: (512) 475-2206

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SUBCHAPTER G. MANUFACTURERS HOMEOWNERS' RECOVERY TRUST FUND

10 TAC §80.80

The amendments are adopted under §1201.052 of the Texas Occupations Code, which provides the Director with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and §1201.053 of the Texas Occupations Code, which authorizes the board to adopt rules as necessary and the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statutes, codes, or articles are affected by adoption of the amended rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 23, 2011.

TRD-201103977
Joe A. Garcia
Executive Director, Manufactured Housing Division
Texas Department of Housing and Community Affairs
Effective date: November 6, 2011
Proposal publication date: August 5, 2011
For further information, please call: (512) 475-2206

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SUBCHAPTER H. STATEMENTS OF OWNERSHIP AND LOCATION

10 TAC §§80.90 - 80.93

The amendments are adopted under §1201.052 of the Texas Occupations Code, which provides the Director with authority to amend, add, and repeal rules governing the Manufactured

Housing Division of the Department and §1201.053 of the Texas Occupations Code, which authorizes the board to adopt rules as necessary and the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statutes, codes, or articles are affected by adoption of the amended rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 23, 2011.

TRD-201103978
Joe A. Garcia
Executive Director, Manufactured Housing Division
Texas Department of Housing and Community Affairs
Effective date: November 6, 2011
Proposal publication date: August 5, 2011
For further information, please call: (512) 475-2206

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SUBCHAPTER I. FORMS

10 TAC §80.100

The Manufactured Housing Division of the Texas Department of Housing and Community Affairs (Department) adopts the repeal of 10 TAC Chapter 80, §80.100, relating to forms. The repeal is adopted without changes to the proposal as published in the August 5, 2011, issue of the *Texas Register* (36 TexReg 4884) and will not be republished.

The forms are not required by statute to be part of the rules. It will be more efficient and quicker to implement new and revised forms without going through the rulemaking process.

The repeal is effective thirty (30) days following the date of publication in the *Texas Register* of notice that the repeal is adopted.

There were no comments received during the comment period and no requests were received for a public hearing to take comments on the rule.

The repeal is adopted under §1201.052 of the Texas Occupations Code, which provides the Director with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and §1201.053 of the Texas Occupations Code, which authorizes the board to adopt rules as necessary and the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statutes, codes, or articles are affected by adoption of the repealed rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 23, 2011.

TRD-201103979
Joe A. Garcia
Executive Director, Manufactured Housing Division
Texas Department of Housing and Community Affairs
Effective date: November 6, 2011
Proposal publication date: August 5, 2011
For further information, please call: (512) 475-2206

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER D. RECORDS, REPORTS, AND OTHER REQUIRED INFORMATION

16 TAC §25.74

The Public Utility Commission of Texas (commission) adopts an amendment to §25.74, relating to Report on Change in Control, Sale of Property, Purchase of Stock, or Loan, without changes to the proposed text as published in the July 22, 2011, issue of the *Texas Register* (36 TexReg 4622).

Pursuant to House Bill 1753 of the 82nd Legislature, Regular Session in 2011 (HB 1753), the amendment increases from $100,000 to $10 million the total amount of consideration exchanged in a sale, acquisition, or lease of an operating unit or system above which a public utility is required to report the transaction to the commission. Project Number 39473 is assigned to this proceeding.

The commission received no comments on the proposed amendment.

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supp. 2010) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, HB 1753 §1, which amends PURA §14.101(a), effective September 1, 2011, to increase the threshold above which public utilities must report to the commission.

Cross Reference to Statutes: Public Utility Regulatory Act §14.001 and HB 1753 §1 (which amends PURA §14.101(a)).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 21, 2011.

TRD-201103926
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Effective date: October 11, 2011
Proposal publication date: July 22, 2011
For further information, please call: (512) 936-7223

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SUBCHAPTER J. COSTS, RATES AND TARIFFS

DIVISION 1. RETAIL RATES

16 TAC §25.243

The Public Utility Commission of Texas (commission) adopts new §25.243, relating to Distribution Cost Recovery Factor (DCRF), with changes to the proposed text as published in the July 22, 2011, issue of the *Texas Register* (36 TexReg 4623). The rule provides for the adjustment of an electric utility's rates for changes in certain distribution costs, pursuant to Senate Bill 1693 of the 82nd Legislature, Regular Session in 2011 (SB 1693). Project Number 39465 is assigned to this proceeding.

The commission received written initial and/or reply comments on the proposed rule from AEP Texas Central Company, AEP Texas North Company, Southwestern Electric Power Company, CenterPoint Energy Houston Electric LLC, El Paso Electric Company, Entergy Texas, Inc., Oncor Electric Delivery Company, Texas-New Mexico Power Company, and Sharyland Utilities LP (collectively, Electric Utilities); City of El Paso (CEP); City of Houston (COH); the Coalition of Regulatory Entities (CORE), which includes numerous cities; Office of Public Utility Counsel (OPC); the Retail Electric Provider Coalition, consisting of the Alliance for Retail Markets, CPL Retail LP, Reliant Energy Retail Service LLC, Direct Energy LP, Direct Energy Business LLC, Gateway Energy Services Corporation, Texas Energy Association of Marketers, TXU Energy Retail Company LLC, and WTU Retail LP (collectively, REP Coalition); Southwestern Public Service Company (SPS); State of Texas' agencies and institutions of higher education (State Agencies); the Steering Committee of Cities Served by Oncor (Oncor Cities); Texas Industrial Energy Consumers (TIEC); Wal-mart Stores Texas LLC and Sam's East Inc. (collectively, Walmart); and State Representative Sylvester Turner (District 139).

Public Hearing

On August 15, 2011, at the request of Oncor Cities, State Agencies, and TIEC, commission staff conducted a public hearing in this proceeding. Parties' statements at the public hearing were generally similar with their filed written comments, but where different are noted below.

General Comments

Electric Utilities indicated general support for the proposal and a belief that, for the most part, the proposal effectively implements SB 1693. Electric Utilities emphasized the benefits of the rules and procedures adopted by the commission for the recovery of transmission costs, specifically noting the support for and timely recovery of transmission investment, and argued that properly crafted rules for recovery of distribution investment should produce similar benefits.

REP Coalition stated that the proposed rule reasonably limits DCRF updates to once per calendar year, ensures system-wide application of an approved DCRF, and requires a minimum 45-day notice period for an approved DCRF before it becomes effective. REP Coalition emphasized the important role that each of these requirements plays in REP Coalition's preparation for and implementation of an electric utility's DCRF.

COH stated that it understands the overall purpose and potential benefits to ratepayers, utilities, and regulators of implementing an automatic cost adjustment mechanism such as the periodic rate adjustment provided in Public Utility Regulatory Act (PURA) §36.210, and noted that any commission rule to implement such a mechanism must be properly designed and executed, requiring an ongoing collaborative process between the utility and the regulators. In addition, COH alleged that the proposed rule exceeds the PURA §36.210 grant of authority to the commission, shifts the overall risk to the ratepayers, and frustrates the statutory safeguards the Texas legislature (Legislature) chose to enact.

State Agencies argued that the proposed rule does not achieve the statutory goals of SB 1693 because the proposed rule (1) proposes a formula that reallocates distribution costs in a manner that changes the allocation from the prior base rate case, by failing to properly account for load growth revenues; (2) undercuts discovery rights of public participants; (3) truncates substantive staff review of the applications; (4) improperly delegates approval or disapproval of costs to a "presiding officer" other than the commission or the State Office of Administrative Hearings; and, (5) does not include a clear mechanism for disallowing, from inception, requests from utilities who are over-earning.

CORE recognized that the establishment of a DCRF is pursuant to the commission's new statutory authority to approve periodic rate adjustments relating to changes in an electric utility's distribution invested capital. However, CORE contended that the provisions of the proposed rule do not comply with the requirements of SB 1693, exceed the authority granted to the commission in SB 1693, and violate PURA §§32.002, 33.001, 36.108, and 36.111.

OPC contended that the purpose of the DCRF adjustment is to provide an abbreviated ratemaking process for an electric utility to petition the commission for an adjustment of its non-fuel rates to incorporate changes in only the utility's distribution invested capital since its most recent general base rate case, and that PURA §36.210 does not authorize and was never intended to serve as a mechanism for the electric utilities to be granted what OPC calls "lost revenues." OPC stated that PURA §36.210 requires that an electric utility's petition for a DCRF be processed in accordance with an expedited procedure, and suggested that the best way to expedite and simplify the DCRF procedure is to state as clearly and specifically as possible in the rule what is eligible for inclusion in a DCRF adjustment and what an electric utility must include in its application and prove to obtain a DCRF adjustment.

Oncor Cities stated that the proposed rule accurately reflects the requirements of PURA §36.210 in most respects, but in several significant ways departs from the framework set forth by the new statute. Oncor Cities noted that proponents of the streamlined distribution ratemaking concept have analogized it to the interim transmission cost of service (TCOS) or the transmission cost recovery factor (TCRF) mechanisms. Oncor Cities argued, however, that the statutory authority giving rise to those devices is not analogous to PURA §36.210. Comparing and contrasting the two statutes, Oncor Cities pointed out that PURA §35.004, the interim TCOS mechanism, states simply that "the commission may approve wholesale rates that may be periodically adjusted to ensure timely recovery of transmission investment," whereas PURA §36.210 contains a great deal of detail regarding the new distribution cost recovery mechanism rather than a broad-brush grant of authority that assumes that the commission will provide all relevant details of the new recovery mechanism via a rule. Oncor Cities argued that the additional detail that PURA

§36.210 puts into the DCRF mechanism reflects the legislative understanding that distribution charges have a far greater bill impact compared to the charges that are established in the interim TCOS process. Oncor Cities explained that distribution charges are not socialized across the Electric Reliability Council of Texas (ERCOT) region and remain in the footprint of the utility; therefore, distribution charges have a larger impact on the bills of any particular customer compared to transmission charges.

Oncor Cities also commented that the proposed rule is very favorable to the utilities, providing advantages such as limitations on discovery, short timelines for approval, and limitations on the scope of review before the relevant costs begin to be recovered.

Commission Response

Section 2 of SB 1693 requires the commission to adopt rules as necessary to implement new PURA §36.210 not later than September 25, 2011--120 days after SB 1693 was enacted and took effect. New §25.243, adopted herein, meets this requirement. The commission addresses in the discussion below specific issues raised in the parties' general comments.

Comments on Specific Sections of the Proposed Rule

Section 25.243(b): Definitions

As discussed below concerning *Proposed 25.243(b)(2): Distribution Invested Capital,* the commission has added a definition of net distribution invested capital and included it as §25.243(b)(4) of the adopted rule. In addition, as discussed below concerning *§25.243(c)(1): Application for DCRF or DCRF Update--General Requirements,* the commission has defined "DCRF proceeding" and included it as §25.243(b)(2) of the adopted rule.

Section 25.243(b)(1): Capitalized O&M Expenses

Representative Turner commented on an amendment to SB 1693 that he sponsored. Representative Turner commented that his amendment prohibiting capitalized operations and maintenance (O&M) expenses (and indirect corporate costs) from being recovered through the periodic rate adjustment mechanism was an important safeguard for Texas ratepayers. Representative Turner also stated that he is concerned that the proposed rule substantially weakens this protection and does not reflect his intent, which included no exceptions to the prohibition. Representative Turner observed that the proposed definition of capitalized O&M provides leeway for utilities to recover expenses that were never intended to be subject to the new mechanism. Representative Turner expressed concern that the definition is too narrow and that utilities may attempt to broaden the scope of SB 1693 by accounting for their O&M expenditures in a different manner.

Oncor Cities also commented on Representative Turner's amendment. Oncor Cities stated that the amendment represented a concern by legislators that electric utilities could attempt to expand the scope of costs that can be flowed through the DCRF by classifying expenses as capital items or by including executive pay increases or bonuses, office supplies, and the like as overhead costs for new capital projects. Oncor Cities further commented that SB 1693 was represented to legislators as a cost recovery mechanism that would be strictly limited to the cost of constructing and installing new distribution facilities. Oncor Cities stressed that given the importance of this amendment in protecting ratepayers from abuse of the DCRF mechanism, the definition of capitalized O&M expenses should be strengthened. Oncor Cities also noted that the exclusion of costs eligible for DCRF recovery does not preclude the utility from requesting recovery of the costs in a subsequent full base rate case.

Oncor Cities agreed that capitalized O&M expenses should be excluded from recovery through the DCRF but commented that the proposed rule's definition may not be broad enough to limit efforts by utilities to circumvent the intent of the law. Oncor Cities contended that the definition should preclude any attempt by utilities to recover an expense through the DCRF even if the utility has not labeled the cost as a regulatory asset or liability. Oncor Cities expressed concern that a utility should not be permitted to circumvent this definition by capitalizing an estimated (rather than incurred) expense. Oncor Cities also proposed language that would exclude amortization of a regulatory asset or liability. Electric Utilities disagreed that utilities could potentially attempt to circumvent the intent of the DCRF rule by attempting to recover expenses that have not been labeled as a regulatory asset or liability, but agreed conceptually with Oncor Cities' proposed modifications to the definition and supported the addition of the phrases "or estimated" and "or amortized" as suggested by Oncor Cities.

Oncor Cities also proposed language that would exclude the costs of activities normally recorded in O&M accounts (Federal Energy Regulatory Commission (FERC) Accounts 500-935). Electric Utilities argued that Oncor Cities' proposed language is superfluous given the fact that the phrase "incurred or estimated expenses" is inclusive of expenses recorded in FERC Accounts 500-935 and thus should not be included in the definition.

Oncor Cities further opined that one reason the statute addresses O&M expense is that utilities may attempt to blur the line between repair and maintenance costs and investment in new distribution facilities through accounting interpretations that treat items such as inspection and testing of distribution facilities, cleaning and repairing distribution equipment, replacing transformers and voltage regulators, and tree trimming as part of its construction program rather than as O&M expense. Oncor Cities expressed concern that the commission would have difficulty differentiating the costs from general distribution construction and identifying the issue in a DCRF proceeding.

Electric Utilities replied that it is not entirely clear what expenses Oncor Cities refer to, because Oncor Cities combine replacement of transformers, which can be a capital-related project if the replacement was due to load growth, with true O&M activities such as inspection and testing of distribution facilities. Electric Utilities noted that if Oncor Cities' proposal is intended to exclude costs like engineering and design labor and construction labor from invested capital, then Electric Utilities disagree. Electric Utilities argued that accounting rules require them to add the cost associated with the labor required to install a distribution pole to the actual cost of the pole when that work order is closed and the total amount is recorded in FERC Account 364 (poles, towers and fixtures). Electric Utilities pointed out that that practice is consistent across the industry and has been recognized by the commission in rates since its inception.

Commission Response

To address Representative Turner's and Oncor Cities' concern about an electric utility changing the way that it accounts for O&M expenditures in order to increase recovery through its DCRF, the commission has added subsection (d)(3), which provides that the electric utility must clearly identify any costs included as distribution invested capital because of a change in account-

ing rules or practices since the test year in the electric utility's most recent comprehensive base-rate proceeding. The commission shall exclude such costs if the electric utility does not prove that the costs are appropriate for recovery through the DCRF. In addition, the commission has changed the definition of capitalized O&M expenses to refer generally to "expenses" rather than "incurred expenses" and included a reference to amortized expenses in order to avoid unintentionally narrowing the definition, and thereby unintentionally broadening cost recovery through the DCRF.

Proposed §25.243(b)(2): Distribution Invested Capital

Comments Regarding the Inclusion of Specific FERC Accounts

CORE, COH, and Oncor Cities proposed that the definition of "distribution invested capital" be modified to exclude Account 391, relating to office furniture and equipment from the list of Federal Energy Regulatory Commission (FERC) Uniform System of Accounts on which the definition is based. CORE argued that distribution invested capital should only include items directly related to the provision of electric service using distribution facilities and that office furniture and equipment are not distribution facilities and should not be treated as invested capital that the utility may recover through the DCRF. Oncor Cities commented that Account 391 is a general plant account for office furniture and equipment that may include costs that fall within the ambit of indirect corporate costs, which are specifically excluded from DCRF recovery. Oncor Cities also noted that the FERC chart of accounts lists costs recordable in Account 391, and none of the costs is related to communications equipment. Oncor Cities argued that Account 391 includes indirect corporate costs, and does not include either distribution plant or distribution-related communications plant, so this account should not be included in the definition of distribution invested capital.

Electric Utilities replied that these parties suggested that FERC Account 391 should be excluded from the list of FERC accounts that are included in the definition of distribution invested capital merely because that account is labeled office furniture and equipment. Electric Utilities further replied that Oncor Cities also suggested that FERC Accounts 352 and 353 (discussed below) should be excluded from the definition because they are designated as transmission plant accounts. Electric Utilities claimed that these suggestions incorrectly assume that the listing of a FERC account in the definition necessarily means that the entirety of amounts recorded in that account is recoverable under a DCRF. Electric Utilities pointed out that Account 391--Office Furniture and Equipment does include general office furniture such as desks, chairs, etc., but is also used by a number of electric utilities to book computer-related equipment, including servers. According to Electric Utilities, Unique Property Unit Numbers, also a FERC requirement, are used to further categorize specific plant items that fall under the general header of office furniture and equipment such that specific types of property can be readily identified within the broader category. Electric Utilities contended that the use of Property Unit Numbers is necessary because all possible plant items that exist today do not neatly fit into one of the FERC broader categories. Electric Utilities pointed out that it can be argued that the FERC system of accounts was created before the advent of computers, which is the reason no specific FERC account references computer hardware, or software for that matter. Electric Utilities argued that this omission does not lessen the fact that computer hardware is a reality of our time and is in fact plant that is recoverable through the rate base in base-rate case proceedings, and to the extent that it is distribution-related, should be recoverable through the DCRF.

Electric Utilities proposed that to ensure that they do not include costs for plant that are not directly related to the provision of distribution service, a query of these Property Unit Numbers will produce the amount of plant associated with computer-related equipment that has been booked to FERC Account 391 or any other FERC account that an electric utility may use to book such assets. Electric Utilities noted that in this manner, visibility can readily be provided, thereby ensuring that utilities do not seek to recover items that are precluded from recovery under the DCRF. Electric Utilities reiterated that because computer hardware that is directly used in the provision of distribution service is booked to this account by multiple electric utilities, FERC Account 391 must remain in the list of accounts that define distribution invested capital to ensure that this invested capital is capable of being recovered.

Commission Response

To fall within the rule's definition of distribution invested capital, invested capital must be: (1) categorized as distribution plant, distribution-related intangible plant, or distribution-related communication equipment and networks; and (2) properly recorded in FERC Accounts 303, 352, 353, 360 through 374, 391, or 397. Certain types of invested capital that directly relate to the distribution system are properly booked to FERC Account 391. However, invested capital that is not directly related to the distribution system but is booked to FERC Account 391 does not fall within the definition of distribution invested capital. Exclusion of this account could preclude invested capital that directly relates to the distribution system from recovery through the DCRF, a result that would be contrary to PURA §36.210. The commission therefore declines to exclude all invested capital in FERC Account 391 from the definition of distribution invested capital.

Oncor Cities commented that in addition to excluding Account 391, the definition of distribution invested capital should not include FERC Accounts 352 or 353 because the law limits recoverable costs to distribution investment and these accounts are designated by the FERC Chart of Accounts as transmission plant accounts. Oncor Cities argued that PURA §36.210(a) references the FERC uniform system of accounts as a basis for defining distribution plant and that PURA §36.210(f)(3) specifically prohibits the inclusion of costs recoverable through a transmission cost recovery factor. Oncor Cities expressed concern that inclusion of Accounts 352 and 353 could result in the double recovery of costs that are currently recovered through TCOS rules.

Electric Utilities replied that Oncor Cities' argument reflects a narrow view of FERC accounting principles and noted that while FERC Accounts 352 and 353 appear to be solely transmission-related and thus ineligible for inclusion in a DCRF filing, that is not the case. According to Electric Utilities, Accounts 352 and 353 include structures and improvements and station equipment related to substations, which can be classified as either transmission substations or distribution substations, depending on the primary function of the substation. Electric Utilities explained that for substations classified as transmission substations, the primary function is a transmission switching station; however, distribution transformers and equipment can also be present in these stations to provide distribution-level service as a secondary function. Electric Utilities further noted that in stations with this configuration, the transformers that transform power from transmission voltage (at or above 60 kilovolt (kV)) to distribution voltage (below 60 kV) as well as the associated facilities on the low side

of the transformer are booked to FERC Accounts 352 and 353, but are functionalized to distribution since they support the provision of distribution service. Electric Utilities commented that the portions of the facilities in these stations that are operated at or above 60 kV are functionalized to transmission.

Electric Utilities emphasized that in the TCOS filings, the entirety of FERC Accounts 352 and 353 is not included for this very reason and that only the portions of the accounts functionalized to transmission are included in the TCOS filing, thus ensuring that no distribution-related plant is recovered through the TCOS process. Electric Utilities pointed out that in this same manner, only the portions of Accounts 352 and 353 that are functionalized to distribution would be recoverable under a DCRF, not the entirety of Accounts 352 and 353. Electric Utilities commented that PURA §36.210(f)(3) requires the exclusion of any transmission costs from the DCRF, so that the chance that the same costs are double-recovered through the TCOS and DCRF are eliminated.

Electric Utilities noted that inclusion of these FERC accounts, or any other FERC account, in the definition of distribution invested capital will not permit Electric Utilities to seek recovery of all costs included in these accounts through the DCRF process. Electric Utilities replied that the proposed rule clearly articulates that only the portions of these accounts that are categorized as distribution plant, distribution-related intangible plant, and distribution-related communication equipment and networks are recoverable through a DCRF. Electric Utilities assured that to the extent that costs related to transmission service, desks, chairs, or any other items not directly related to the provision of distribution service are found in these accounts, they will be excluded from Electric Utilities' DCRF applications.

Commission Response

As with FERC Account 391, discussed above, certain types of invested capital that directly relate to the distribution system are properly booked to FERC Accounts 352 and 353. In addition, §25.192(c)(1)(B) (relating to Transmission Service Rates) requires the exclusion of distribution facilities in FERC Accounts 352 and 353 in the calculation of wholesale transmission rates, thereby addressing Oncor Cities' concern about double recovery. Therefore, the commission declines to exclude all invested capital in these accounts from the definition of distribution invested capital.

Other Issues Related to Plant Accounts and Invested Capital

COH was concerned that the rule fails to specifically require the utility to include all plant accounts in the DCRF proceeding, as this could result in the utility exercising the option to include only those accounts that increase while excluding any that may have decreased since the last rate change. OPC and Oncor Cities agreed, and OPC commented that utilities should not be allowed to game the system by including only increases in distribution invested capital in a DCRF application while omitting decreased distribution invested capital costs. OPC recommended that this requirement be added to the General Instructions for the DCRF rate filing package. COH also proposed that the DCRF rule require the utility to reflect known and measurable changes, just as it does in a base rate case.

Commission Response

The commission has added a provision to the definition of distribution invested capital to preclude the gaming possibility identified by COH. The commission declines to require or permit adjustments for known and measurable changes to distribution invested capital. Under §25.231(c)(2)(F) (relating to Cost of Service), determining whether and how to make a known and measurable adjustment to invested capital in a comprehensive base-rate proceeding can involve a number of considerations. Considering adjustments for known and measurable changes to distribution invested capital would add significant complexity to a DCRF proceeding, which would undermine PURA §36.210(a)(1)'s requirement that the proceeding be expedited. In addition, such adjustments are likely to be relatively small. The commission also notes that, although COH's comments on the proposed rule generally expressed concern about excessive recovery through a DCRF, its proposal to allow known and measurable adjustments would likely increase DCRF cost recovery in most cases, because an electric utility's net distribution invested capital generally increases over time due to factors such as load growth and inflations, as well as possibly smart grid investments. As discussed below concerning proposed subsection (b)(3), the commission has changed subsection (b)(2) to expressly address compliance with PURA §36.058.

COH proposed that the DCRF rule contain appropriate language in §25.243(b)(2) that clearly limits allowable cost recovery to new invested capital. COH argued that the rule must clearly prohibit any attempt at correcting prior accounting errors through the DCRF filing, because such accounting changes are not associated with completion of new capital projects. The concern expressed by COH is the possibility that such inclusion could result in an artificial increase in revenue requirement because of the correction of errors that transpired many years ago. Oncor Cities concurred with the recommendation of COH related to expressly limiting allowable cost recovery to new invested capital.

Electric Utilities disagreed and urged the commission to reject the proposed change, arguing that in its comments, COH seems to suggest that accounting corrections are improper rather than recognize the fact that true accounting errors can and do sometimes happen. Electric Utilities pointed out that COH also appears to not recognize that accounting errors can go both ways, and the correction of an accounting error may work in the customers' interest by reducing the amount of the request. Electric Utilities further replied that if an error has been discovered, it is incumbent on the utility to make corrections to the official books and records of the company at the point when the error is discovered. Electric Utilities pointed out that since the DCRF process is heavily dependent on the official books and records of the company, COH's proposal would require electric utilities to either knowingly carry forward erroneous balances in FERC accounts, which would be a violation of accounting standards, or maintain two separate instances of records, one that would represent the official books and records and the other that carries forward the incorrect balance. Electric Utilities urged that either option is fraught with problems and has the potential to complicate both the DCRF filings as well as the proper maintenance of the company's financial records and for these reasons, COH's suggestion should be rejected.

Commission Response

The commission is persuaded by the Electric Utilities' comments. No change is warranted.

Comments related to Accumulated Deferred Federal Income Taxes (ADFIT)

Oncor Cities, CEP, COH, CORE, TIEC, and OPC commented that the definition of distribution invested capital should be modified to recognize the deduction of ADFIT. Oncor Cities argued

that the proper recognition of revenue requirements associated with changes in distribution plant investment should take into account distribution-related ADFIT because ADFIT represents ratepayer-supplied funds for taxes not yet required to be remitted to the U.S. Treasury. Oncor Cities reasoned that ADFIT reduces the distribution rate base in order to recognize the benefits that the company receives from the differences between tax depreciation and depreciation for ratemaking purposes and that fairness requires that ratepayers receive the benefits of ADFIT in rates.

COH and CORE contended that while PURA §36.053 limits distribution-related invested capital to original cost less depreciation or net plant, the commission, by rule and practice, has established the definition to include other components of rate base. COH noted that §25.231(a), relating to Components of Cost of Service, identifies allowable expenses and return on invested capital as the two components of cost of service employed for ratemaking purposes and that the commission, by rule and practice, has always allowed utilities to earn a return on invested capital not limited to the original cost less depreciation, but inclusive of all components of rate base. CEP claimed that the term invested capital is a term of art, and is a carryover from the usage in the original 1975 version of PURA that expressed rate base and the return on rate base in terms of invested capital and the adjusted value of invested capital. CEP argued that since the earliest days of the commission, ADFIT has been included in the calculation of invested capital (or original cost rate base) and that the offset is required by the normalization provisions of the Internal Revenue Code.

COH claimed that consistent application of the definition of invested capital as employed by the commission would require recognition of changes in ADFIT and that the change in ADFIT each year is predominantly tied to the change in plant in service. COH argued that to recognize changes in plant only as net plant, without the corresponding rate base components, is inconsistent with existing rules and current commission practice and presents contradictory definitions of invested capital as it applies to rates charged to customers.

OPC commented that including ADFIT in the DCRF formula is warranted because the DCRF calculation in the proposed rule includes consideration of changes in the utility's current federal income taxes and other taxes associated with the changes in invested capital. OPC contended that disregarding changes in the utility's current ADFIT balance while including changes in the utility's current federal income taxes, to which the ADFIT balance is closely related, in the DCRF formula is unduly preferential to the utilities, and appears arbitrary and capricious. OPC maintained that changes in the utility's current ADFIT balance associated with changes in invested capital must be included in the calculation of the DCRF rates if federal income taxes and other associated taxes are included in the DCRF calculation.

OPC contended that the ADFIT must be considered in DCRF adjustments so that a utility will not be enabled by DCRF adjustments to receive a greater rate of return than authorized in the utility's most recent base rate case. OPC maintained that not deducting ADFIT from the invested capital included in a DCRF adjustment would result in the utility realizing a greater rate of return than authorized, which contravenes PURA §36.210, because the utility would be receiving additional return on the cost-free ADFIT capital. OPC pointed out that nothing requires a utility to apply for a DCRF adjustment on an annual basis. Consequently, even though a utility is limited to four DCRF adjustments between base-rate proceedings, under the proposed DCRF formula, invested capital can be included in a utility's DCRF rates for several years without any recognition of substantial ADFIT associated with the invested capital until new base rates are later determined in a base rate case. OPC argued that not accounting for ADFIT associated with invested capital included in rates through the DCRF is totally inconsistent with traditional ratemaking principles, which were not changed by PURA §36.210 and still prevail, and will consequently result in not only a greater rate of return for the utility than authorized in the most recent base rate case, but also rates that are unreasonable and unfair to consumers.

COH commented that the proposed rule would allow the utility to recover both increased depreciation expense and increased income tax expense, but does not reflect the impact these changes have on ADFIT. COH pointed out that in CenterPoint's last base rate filing (Docket Number 38339), ADFIT reduced the distribution rate base by 20% and, other than net plant, was the most significant item in the distribution rate base. COH argued that the accumulated provision for depreciation and ADFIT are the two most significant rate-base offsets and it is only through recognition of these offsets that the DCRF could result in a rate decrease as PURA §36.210(a) contemplates. COH maintained that to exclude ADFIT in the context of the DCRF rule not only exceeds the intended scope of PURA §36.210, but also conflicts with the plain language of PURA §36.210(a) that clearly contemplates an upward or downward adjustment of rates. COH argued that unless the DCRF rule includes offsets to rate base that could exceed plant increases in a given year, no potential rate decrease is possible. CORE concurred with this observation.

Oncor Cities and TIEC contended that the inclusion of new distribution plant in rate base should produce additions to the ADFIT balance over time. Oncor Cities maintained that assuming a utility will use multiple DCRF updates in between full rate cases, the ADFIT balance may increase over time and should be used to partially offset the higher revenue requirements associated with the new plant investment. Oncor Cities and TIEC also proposed exclusion of the impact of Financial Accounting Standards Board Interpretation No. 48 (FIN 48) on ADFIT, which they maintained is consistent with the commission's most recent decisions with respect to FIN 48, and avoids litigation of the FIN 48 issue in the DCRF/DCRF update proceeding.

OPC, CEP, and COH pointed out that the ADFIT issue is exacerbated by the bonus depreciation arising from the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Public Law 111-312 (2010), which created a 100% deduction for capital investment placed in service after September 8, 2010 and before December 31, 2011, and a 50% deduction through December 31, 2012. COH and OPC also claimed that federal legislation establishing bonus depreciation typically has a significant impact on the level of ADFIT since bonus depreciation results in additional income tax savings to utilities. COH contended that this savings is typically passed through to the ratepayers through ADFIT, and therefore the exclusion of ADFIT serves to further detach the rule from existing law. COH maintained that because of the state of the economy, a bonus depreciation extension beyond 2012 is anticipated.

COH commented that the overall purpose of SB 1693 and the implementing rule is to provide for timely cost recovery. COH contended that inclusion of ADFIT does not slow down or interfere with a timely cost recovery process. COH and CORE claimed that it has been suggested that the exclusion of ADFIT would provide additional encouragement to utilities to invest in new in-

frastructure, but that that is not the intent or purpose of the bill. OPC claimed that like the issue of prudence, the calculation of a utility's ADFIT balance is rarely challenged in electric utility rate cases, is not an issue that typically involves extensive discovery or litigation, and its inclusion in the formula would not complicate DCRF adjustment cases or conflict with the DCRF mechanism's purpose of providing an expedited procedure. COH stressed that ADFIT is an indispensable component in the quantification of invested capital and argued that the DCRF process was never intended to afford a utility an unwarranted level of return while eliminating regulatory lag for infrastructure expenditures. COH emphasized that failure to consistently recognize ADFIT in the DCRF rate-setting process inappropriately enriches a utility beyond the special rate treatment being afforded to it through the DCRF process. COH commented that ADFIT associated with the precise plant recognized in a DCRF request must also be simultaneously recognized.

Electric Utilities replied that they strongly support the exclusion of ADFIT for several reasons. Electric Utilities stressed that the interim TCOS process does not take into account any changes in ADFIT, and SB 1693 was adopted to clearly authorize the commission to implement a rate adjustment for distribution investment that is very similar to the interim TCOS adjustment applicable to transmission investment. Electric Utilities commented that the basics of the DCRF adjustment formula, unless otherwise addressed by the statute, should be the same as the interim TCOS formula. Electric Utilities noted that whether to include ADFIT in the DCRF calculation was also considered in the earlier DCRF rulemaking, Project Number 38298, with Oncor Cities proposing it be included. Electric Utilities observed that while the commission ultimately did not act on that proposed rule, waiting instead for the Legislature to have an opportunity to address the topic of distribution cost recovery and provide guidance, staff's proposed rule did not include ADFIT. Electric Utilities submitted that staff's proposed resolution of this issue in Project Number 38298 was correct and should be adopted here.

Electric Utilities acknowledged that while the city groups are correct that new capital additions may produce additional ADFIT, including those amounts resulting from the application of bonus depreciation (which is due to expire at the end of 2012), what those entities ignore is that payment of taxes reduces ADFIT. Electric Utilities commented that ADFIT is no different than any other rate base component--it changes over time. Electric Utilities argued that if the DCRF proceeding is not to morph into a general rate case, then the items that are adjusted must be kept to a minimum. Electric Utilities pointed out that although ADFIT changes over time, so do regulatory assets (insurance reserve, pensions), cash working capital, plant held for future use, and other components of rate base. Electric Utilities urged that those items are all properly excluded from the DCRF formula, and ADFIT is likewise properly excluded from the DCRF formula.

Electric Utilities commented that the arguments of CEP and COH that the language in PURA §36.210(a) requires the inclusion of ADFIT because it is a component of invested capital fail, because PURA §36.053 explicitly refers only to "the original cost, less depreciation, of property used by and useful to the utility in providing service" and does not specifically refer to ADFIT. Electric Utilities urged that if ADFIT is adjusted simply because it is a component of invested capital, then all of the other components of invested capital would also have to be included, and that is a far cry from both the limited, expedited nature of the proceeding envisioned by SB 1693, and from the interim TCOS process upon which SB 1693 is modeled. Electric Utilities submitted that the language in PURA §36.210 referring to invested capital as described in PURA §36.053 reinforces the concept that ADFIT is not to be included in calculating the DCRF adjustment.

Electric Utilities further replied that ADFIT is not kept on a FERC account basis, but rather is maintained at the FERC function level, and these functional amounts are then "allocated" to the individual FERC accounts. Electric Utilities noted that since some accounts that contain distribution-related investment also contain transmission-related investment, further allocation at the account level would be necessary. Electric Utilities pointed out that including ADFIT changes in the DCRF formula would require an updated ADFIT allocation study and that having to prepare, and then possibly litigate, such an allocation study is contrary to the limited, expedited nature of the DCRF proceeding.

Electric Utilities disagreed with COH's argument that because SB 1693 envisions not only a positive but a negative DCRF adjustment, then ADFIT has to be included or there could never be a negative DCRF adjustment. Electric Utilities argued that a utility whose distribution-related depreciation expense exceeds its distribution investments could, if it chose, request a negative DCRF. Electric Utilities noted that because inclusion of ADFIT is not necessary in order for a utility to request a downward DCRF adjustment, COH's argument that ADFIT must be included thus fails. In sum, Electric Utilities replied that the proposed adjustment formula, consistent with the interim TCOS formula, properly excludes ADFIT.

Commission Response

The commission concludes that changes in distribution-related ADFIT should be included in the definition of net distribution invested capital, which the commission has included in the adopted rule as subsection (b)(4). PURA §36.210(a) provides that a DCRF is to be "based on changes in the parts of the utility's (distribution) invested capital, as described in Section 36.053...." PURA §36.053 describes "original cost, less depreciation, of property used by and useful to the utility in providing service." Thus, PURA §36.210(a) defines distribution invested capital narrowly, to include only original cost less depreciation, which is also referred to as distribution plant less accumulated depreciation or net distribution plant. In comparison, as indicated by §25.231(c)(2), the commission's long-standing practice has been to define invested capital to include additional items, including working capital, ADFIT, unamortized investment tax credits to the extent allowed by the Internal Revenue Code, insurance reserves, contributions in aid of construction, and customer deposits and other sources of cost-free capital. Some of these other types of invested capital serve to increase invested capital, while others serve to decrease invested capital.

Under PURA §36.210, changes in net distribution plant are the trigger for a DCRF. However, once triggered, the DCRF is not limited to recovery of net distribution plant. PURA §36.210(a) provides that a DCRF is to be *based* on changes in distribution invested capital; it does not require that the cost component of the DCRF be limited solely to distribution invested capital. Instead, it gives the commission discretion to determine which types of costs to include in the DCRF, with the limitation in PURA §36.210(e) that the DCRF not include indirect corporate costs or capitalized O&M expenses. If the DCRF were limited to recovery of net distribution plant, an electric utility would be limited solely to the recovery of depreciation expense through the DCRF; depreciation expense constitutes the recovery of distribution plant. In that case, the electric utility would be prohibited from recovering through the DCRF return on net distribution plant and taxes

directly related to distribution plant. The proposed rule included return and plant-related taxes, and the inclusion of these items substantially increases the DCRF and thereby greatly benefits an electric utility that implements a DCRF. Changes in ADFIT are largely driven by changes in plant investment, depreciation expense, and federal income taxes, all of which are to be updated in a DCRF application.

The commission first adopted the interim TCOS "factor" (ITF) in 1999, and it is the first type of plant-related cost recovery factor adopted by the commission. For an electric utility that is eligible for a DCRF pursuant to PURA §36.210, distribution plant is typically around double the level of its transmission plant. This means that inclusion of ADFIT in the calculation of the DCRF will have a much greater impact on the electric utility's resulting revenues than would inclusion of ADFIT in the calculation of an ITF. Thus, the ITF rule's exclusion of ADFIT is distinguishable from the adopted DCRF rule's inclusion of ADFIT. More recently, in 2007, the commission adopted a rule for a transmission cost recovery factor for certain non-ERCOT utilities (non-ERCOT TCRF). The non-ERCOT TCRF rule requires inclusion of ADFIT. *See* §25.239(e) (relating to Transmission Cost Recovery Factor for Certain Electric Utilities) (definition of "Revreqt").

Concerning Project Number 38298, where the commission considered adopting a DCRF before the enactment of PURA §36.210, only one commenter raised the issue of inclusion of ADFIT in the calculation of the DCRF: "(Oncor) Cities stated that the rule does not explicitly require the utility to update the accumulated deferred federal income tax (ADFIT) balance, which is necessary to arrive at an appropriate update to invested capital. Cities stated that if a utility fails to make the appropriate changes to ADFIT, the rule provides no remedy for the commission or intervenors. Cities also commented that the rule should take into account consolidated tax savings, changes in depreciation rates, and a reduction in the return on invested capital to reflect the sharp decrease in regulatory risk affecting the utility's required cost of capital." *Rulemaking Related to Cost Recovery by Electric Utilities of Distribution Costs,* Project Number 38298, staff's recommended Order Adopting §25.243 for Consideration at the December 16, 2010 Open Meeting at 78. Staff's recommended response stated: "(T)he commission agrees with Oncor that inclusion in the DCRF of issues such as ADFIT, depreciation rates, and rate of return would undermine the DCRF mechanism's purpose, which is to allow for updates to rate base to reflect increases in distribution investment without the electric utility having to file a base-rate proceeding." *Id.* at 82-83. Thus, in the prior DCRF rulemaking, ADFIT was only briefly raised along with various other issues. In contrast, in the current rulemaking, there were extensive, persuasive comments filed that advocated inclusion of ADFIT in the calculation of the DCRF. The commission concludes that ADFIT can be included in the calculation of the DCRF without unduly broadening the scope of a DCRF proceeding.

Finally, the commission concurs with Oncor Cities and TIEC that the effects of FIN 48 should be excluded from the DCRF mechanism, consistent with commission precedent. *Application of Oncor Electric Delivery Company for Authority to Change Rates,* Docket Number 35717, Order on Rehearing at 18, finding of fact 60.

Proposed §25.243(b)(3): Indirect Corporate Costs

Representative Turner commented on an amendment to SB 1693 that he sponsored. Representative Turner commented that his amendment prohibiting indirect corporate costs (and capitalized O&M expenses) from being recovered through the periodic rate adjustment mechanism was an important safeguard for Texas ratepayers. Representative Turner also stated that he is concerned that the proposed rule substantially weakens this protection and does not reflect his intent, which included no exceptions to the prohibition. Representative Turner observed that the proposed rule permits a wide variety of allocated, indirect costs that go well beyond the "wires-and-poles" focus of the legislation.

COH, Oncor Cities, State Agencies, CORE, and OPC all commented that the proposed rule inappropriately appears to create an exception to the prohibition against inclusion of indirect corporate costs by allowing costs recorded as "construction overhead in accordance with FERC guidelines." These parties all pointed out that PURA §36.210(e) specifically prohibits inclusion of any indirect corporate costs, without limitation or exception. Oncor Cities cited officers' salaries, executive compensation, office supplies and furniture for the corporate headquarters, and Board of Directors' expenses as examples of administrative and general expenses that should be excluded from recovery through the DCRF. Oncor Cities contended that the reference to the FERC guidelines provides a significant, additional means for utilities to circumvent the statutory exclusion of indirect corporate costs, and the FERC guidelines with respect to construction overhead provide considerable discretion to the utility. In support of this contention, Oncor Cities pointed to FERC Chart of Accounts Instruction 3(A)(12), which permits capitalized general administration expenses like pay and expenses of the general officers and general and administrative expenses within the components of construction if they are "reasonably applicable" to the utility's construction program and further spread an "equitable proportion of such costs" to each construction project. Oncor Cities expressed concern that applying an exception based on the FERC guidelines will result in the inclusion of indirect corporate costs in contradiction of the law.

Oncor Cities maintained that the Legislature intended to allow only the direct costs of new distribution investment, and not to pass through general corporate administrative costs outside of a general rate case. Oncor Cities expressed concerns regarding administrative and general (A&G) costs associated with the parent company's service company that may be allocated to transmission-distribution construction because affiliate transaction standards are applicable to these expenses issues which require greater scrutiny than is likely to be available in an expedited proceeding.

Oncor Cities commented that indirect corporate costs, by their nature, are fixed costs that will be incurred regardless of the incremental distribution invested capital and that if the new distribution capital investment had not been undertaken, the indirect corporate costs assigned to the distribution plant construction would be reallocated to the utility's other functions or construction activities. Oncor Cities pointed out that the assignment of indirect corporate costs to new distribution investment may reduce the costs allocated to other functions; however, only the increased amount assigned to distribution investment will be recovered from customers between rate cases. State Agencies made a related argument that the statutory language was intended to preclude double recovery of general corporate costs of a central service entity that were already included in base rates.

COH observed that the prohibition in the enabling statute represents an important consumer protection that should not be diluted or rendered impotent and urged that where the Legislature

has supplied specific words, they should be reflected without exception in the final rule. COH pointed out that exclusion of indirect corporate costs does not deny the utility the right to recover these costs during any base rate proceeding, and does not prejudice the utility. COH argued that this protection was enacted by the Legislature to restrict a utility from utilizing a flexible interpretation of accounting rules to maximize accelerated cost recovery beyond that intended by the Legislature. COH further asserted that the Legislature recognized that certain rate issue components (such as pension and legal expenses) are subject to variable interpretation and have only an indirect impact on capital additions for ratemaking purposes and should be litigated individually in a comprehensive rate proceeding rather than within a DCRF proceeding. COH commented that only those direct costs associated with new invested capital are properly included in DCRF adjustments.

Oncor Cities urged the commission to reject the proposed rule's exception to the definition of indirect corporate costs, but to the extent that the exception for construction overhead costs is included in the definition of indirect corporate costs, argued that the exception should be strictly limited to administrative costs that are directly incurred in constructing the distribution project and exclude salaries of officers with general responsibility for construction activities and allocations of general costs across construction projects.

COH urged the commission to delete the definition of "indirect corporate costs" and pointed out that the Legislature was undoubtedly aware of the varying corporate structures utilized by utilities subject to the new law. COH argued that with this knowledge, the Legislature still opted for the all-encompassing language and that this language should be respected. OPC argued that the phrase "costs recorded as construction overhead in accordance with FERC guidelines" is unduly vague and fails to put the reader on notice as to what is contemplated by "FERC guidelines" in the definition. OPC claimed that FERC has many regulations and advisory statements that arguably could be relevant to this definition. OPC commented that the definition of "indirect corporate costs" in the proposed rule does not provide adequate clarity or specificity as to what this term means. OPC contended that the lack of clarity will undoubtedly result in uncertainty, disagreement, and unnecessary additional litigation in the DCRF proceedings. OPC also claimed that the proposed definition contains no explanation or specific reference for the descriptor "corporate support costs." OPC recommended that the commission revise the definition of "indirect corporate costs" to provide greatly needed clarity and certainty and provided suggested wording.

COH agreed with OPC's comments that the proposed rule is unduly vague, but noted that it cannot support OPC's suggested language. COH commented that Generally Accepted Accounting Principles (GAAP) are open to varying interpretations of what should be included in capital expenditures as utilities themselves have recognized, and OPC's suggested changes would not adequately remedy the ambiguity. Electric Utilities commented that OPC's proposed definition is reasonable with some minor modification for additional clarity, and that both the State Agencies and the Oncor Cities ignore the statutory language that excludes only indirect corporate cost, not all corporate costs. Electric Utilities argued that because the Legislature excluded only indirect corporate costs, it necessarily intended that direct corporate costs be allowed. Electric Utilities commented that the FERC Uniform System of Accounts prescribes how costs are to be recorded for costs associated with the construction of electric plant and that such instructions specifically direct that overhead costs be included in the capitalization of constructed plant.

Electric Utilities observed that the legislative history indicates that the expenses that were intended to be excluded were not what the Oncor Cities and the State Agencies suggest be excluded--a broad swath of corporate support costs that are properly allocable and assignable--but rather the only costs that should be excluded are those that would be excluded anyway from distribution investments in a rate proceeding. Electric Utilities argued that there is no evidence that the Legislature intended by this term in SB 1693 to exclude any cost that the utility would otherwise be allowed to recover as distribution invested capital in a comprehensive base-rate proceeding. Electric Utilities further argued that it is only those costs not directly related to the planning, design, or construction of distribution facilities--things such as "corporate aircraft and artwork"--that were intended to be excluded by this term.

Electric Utilities further commented that the definitions offered by these parties would draw an unnecessary and inequitable distinction between those companies that use a shared service company or parent in their operations and those that have everything in-house. In response to State Agencies' suggestion that there is a concern that there will be double-recovery of costs, Electric Utilities stated that regardless of whether the person working on a distribution project is in-house or in a separate affiliated company, or in a totally independent third party, that person's time is being capitalized on projects rather than expensed and that there is no danger of double recovery. Electric Utilities stated that Oncor Cities' concern about affiliate transactions does not justify the significant exclusions from distribution invested capital for those companies that happened to be structured with a separate service company. Electric Utilities noted that more importantly, PURA resolves any concern about affiliate transactions in a process like this by providing that the affiliate issues may be addressed when the rates are finally reconciled.

Commission Response

PURA §36.210(a) allows recovery of the parts of a utility's invested capital that are "categorized as distribution plant, distribution-related intangible plant, and distribution-related communication equipment and networks in accordance with commission rules adopted after consideration of the uniform system of accounts prescribed by the Federal Energy Regulatory Commission." Thus, this provision starts with the FERC uniform system of accounts (USOA) as the benchmark and gives the commission the discretion to deviate from that benchmark. However, the commission's discretion is circumscribed by PURA §36.210(a), which prohibits inclusion of indirect corporate costs (and capitalized O&M expenses). The comments focused on what constitutes an "indirect" cost, but did not address what constitutes a "corporate cost" or "corporate support cost," neither of which have a generally understood definition. After reviewing PURA §36.210, the commission concludes that the purpose of this section's exclusion of indirect corporate costs is to circumscribe the commission's discretion in expanding the definition of distribution invested capital beyond the well-established standards in the FERC USOA. As a result, PURA §36.210 prohibits the commission from categorizing as distribution invested capital corporate aircraft and artwork or other invested capital that arguably is indirectly necessary to provide distribution service.

The interpretation of indirect corporate costs advocated by the consumer commenters would require a utility to dramatically alter its accounting practices used to identify capital costs, even

though these accounting practices comply with the FERC USOA and have been followed by electric utilities for decades without challenge by consumer groups.

The proposed rule's definition of "indirect corporate costs" confused rather than clarified the issue of what costs are properly includable as distribution invested capital. The definition of distribution invested capital in the adopted rule excludes indirect corporate costs without the need to define that term. Therefore, the adopted rule does not contain a definition of indirect corporate costs.

Concerning distribution invested capital that includes payments to affiliates, the commission has changed subsections (b)(2), (e)(1), (e)(5), and (f) to expressly address compliance with PURA §36.058.

Proposed §25.243(b)(4): Weather-normalized

Electric Utilities submitted that weather normalization should be based on the weather-normalization model, including the number of years of data, used to design base rates in the electric utility's last comprehensive base-rate proceeding. Electric Utilities noted that the weather adjustments in the current earnings monitoring reports (EMR) are based on the same number of years as was used in the utility's last comprehensive base-rate proceeding, and that for consistency purposes and in order to avoid confusion, the number of years used to define the "normal" period in the DCRF and EMR processes should be the same number of years used in the last comprehensive base-rate proceeding. Electric Utilities argued that it should only be in those cases where the commission has decided the electric utility's last comprehensive base-rate proceeding in such a manner that it cannot be determined what time period was used that the 10-year period should be used as the default.

Electric Utilities asserted that the inconsistent use of weather data can result in an anomalous growth factor determination and provided an illustration of this point. Electric Utilities proposed that if the rule requires the use of the most recent ten years, it should also clarify how that should be accommodated with regard to historical billing determinants used in the formula. Electric Utilities commented that the only readily apparent way to adjust for this problem would be to require the utility to restate the billing determinants from the utility's last comprehensive base-rate proceeding by recalculating weather normalization using ten years of data. Electric Utilities pointed out that this could foster disputes that would not occur if consistent weather data were used. Electric Utilities commented that the typical practice has been to use calendar years for purposes of weather normalization, and that this should be clarified in the rule.

REP Coalition commented that Electric Utilities correctly pointed out that the lack of consistency in the weather normalization methodology between the utility's last comprehensive base-rate proceeding and a DCRF application could lead to erroneous changes in billing determinants. REP Coalition agreed with Electric Utilities' recommendation to change proposed subsection (b)(4) to ensure consistency between the weather normalization methodology used for determining historical billing determinants and current billing determinants.

OPC commented that the challenge in requiring a specific normalization period for all utilities at this time is that, for some utilities, a different normalization period was used when normalizing the billing determinants used to set base rates. OPC concurred with Electric Utilities' proposed definition of weather-normalized, which would synchronize the duration of the normalization periods used in the base rate and DCRF proceedings when possible and use a 10-year period as a default when not possible. As a result, according to OPC, for some utilities the change in billing determinants computed for purposes of a DCRF would capture load growth without any additional "noise." OPC further reasoned that in the case of a utility for which the 10-year default period must be used, Electric Utilities' definition would encourage parties in the utility's next base rate case to either stipulate to a weather normalization methodology or obtain an order specifying the methodology. OPC proposed that the long-term result is that for all utilities, the normalization period for the billing determinants used to set base rates and those used to set the DCRF can be synchronized.

Oncor Cities agreed with the proposed rule's requirement regarding the determination of normal weather. Oncor Cities opposed Electric Utilities' proposed change, which would allow the use of varying normal weather periods with accompanying divergent accuracies in forecasting the average weather in the future. Oncor Cities noted that the commission has previously adopted the most recent ten years of data to determine normal weather for purposes of developing demand growth rates in energy efficiency filings and that maintaining consistency with the normal weather standard adopted for the energy programs efficiency is reasonable and promotes a uniform approach to normalizing weather.

Oncor Cities commented that there is no inherent advantage in maintaining the same weather normalization period from the utility's previous rate case and that the only purpose of weather normalization is to develop an accurate description of future billing determinants assuming average weather conditions. Oncor Cities expressed concern that weather normalization based on a historical period of excessive length will unjustly enrich the utilities. Oncor Cities pointed out that in some cases, previous weather normalizations were based on 20-30 year periods and, given climate trends of hotter weather, a shorter historical period will be less likely to over-compensate the utility. Oncor Cities commented that contrary to Electric Utilities' arguments, there is no reason to re-adjust the previous rate case billing determinants for the same ten-year normal weather. Oncor Cities urged that the weather-normalized billing determinants for future DCRF charges should be the most reasonable estimate of average weather, regardless of the normal weather periods used in previous normalization models.

Oncor Cities commented that a systematic warming trend is evident in recent years and that data from recent weather normalization results in Texas demonstrates that the most recent ten years is warmer than the prior 10 and 20 year periods. Oncor Cities argued that the warming trend is consistent with the predominant scientific acceptance of climate change and that even if the recent warming trend is due to long-term cyclical conditions rather than global warming, use of the shorter 10-year period is prudent.

Commission Response

The commission disagrees that weather normalization should be based on the weather-normalization model used to design base rates in the electric utility's last comprehensive base-rate proceeding. Both the Electric Utilities and OPC allude to statistical differences that could occur from the use of weather normalization periods that differ between the base-rate and DCRF proceedings. However, requiring the use of the same duration would still result in the use of different time periods, because the DCRF period will use weather data from years after the base-rate

proceeding, regardless of the duration of the data. The use of larger sample sizes in the development of inferential statistics is generally more representative than smaller sizes, but only when statistical data points are randomly distributed. As Oncor Cities point out, weather data are not randomly distributed by year. There can be weather trends, and the commission concludes that the use of ten years of data is a reasonable means of capturing such trends.

The commission agrees with the Electric Utilities that the term "calendar" should be inserted in the language of the rule to be consistent with the historical practice of using calendar years for the purposes of weather normalization.

Section 25.243(c)(1): Application for DCRF or DCRF Update--General Requirements

City Jurisdiction

CORE, COH, CEP and Oncor Cities commented that the proposed rule includes provisions that pose significant jurisdictional issues. These parties stated that the Legislature expressly took care not to infringe upon the exclusive original jurisdiction of municipalities beyond permitting a periodic rate adjustment mechanism to be implemented by the commission. Oncor Cities commented that the maintenance of municipal jurisdiction was a central component of the negotiated process that led to the passage of SB 1693. Oncor Cities stated that they and other stakeholders worked diligently to arrive at legislation that accommodated parties' critical concerns such as the jurisdiction granted to them by PURA, and legislators responded by providing assurance that municipal jurisdiction would not be curtailed by SB 1693. CORE, COH, CEP, and Oncor Cities argued that express provisions in the proposed new rule would limit the original jurisdiction of the municipalities and must be deleted from the proposed rule so that, at a minimum, the rule does not violate PURA and is consistent with the intent of SB 1693.

CEP commented that the fourth through seventh sentences of this subsection should be removed in the final rule. According to CEP, these sentences address directly, and would interfere with, the original jurisdiction of municipalities. CEP and COH stated that the provisions of SB 1963 address directly the preservation of original jurisdiction of the municipalities, and PURA §36.210(f) provides that "Nothing in this section is intended to... limit the jurisdiction of a municipality over the rates, operations and services of an electric utility as provided by Section 33.001...." CEP stated that the provisions that speak to the timing of a municipal action, and the results of a municipal decision, and direction to the utility regardless of the municipal decision, would interfere with and impinge on the municipality's original jurisdiction in direct contravention of the above-cited section of SB 1963. CEP noted that, specifically, the fourth sentence requiring simultaneous filing with all regulatory authorities would infringe on that jurisdiction, and would discourage the utility from working with its municipalities. CEP similarly noted that the fifth through seventh sentences also would encroach on municipal jurisdiction by directing how and when the municipality must act, and the actions of the utility after the rule-imposed determination of municipal action, and thus the impact of the proposed rule would constitute direct interference with the original jurisdiction of municipalities, which would violate the plain language of SB 1963. CEP commented that the commission should delete those four sentences upon final adoption of the rule. CORE supported CEP's recommendations.

COH commented that subsection (c)(1) of the proposed rule would require a municipality's governing body with original jurisdiction to make a final decision on the DCRF application within 60 days after the application is filed. COH submitted that the 60 day restriction for final action by a municipality would effectively impair municipal regulation and would not provide the necessary opportunity for proper review, discovery, analysis, potential negotiations and final action. COH remarked that a municipality must have time for discovery and analysis of responses to discovery, development of potential issues, and review of potential issues by the city council in order to adequately exercise its original jurisdiction. COH maintained that inherent in the meaningful exercise of a city's local jurisdiction is the ability to render a final, non-appealable decision, and that as proposed, subsection (c)(1) requires an electric utility to appeal a local ruling on its DCRF application, without regard to the outcome of the city's ruling. COH stated that as a practical matter, this provision effectively prevents the settlement of a DCRF application at the local level and guarantees the addition of a city as a party to the commission's DCRF proceeding, even if the city grants the application. COH stated that this undeniably contradicts §36.210(f), because it limits a city's jurisdiction to grant the very application that §36.210 authorizes.

In order to allow a municipality adequate opportunity for retention of experts, review of a DCRF filing, discovery, negotiations, and final action, COH recommended a minimum of 90 days for local action. COH further commented that experience has shown in similar filings that the option to extend the local timeline for negotiations can result in ultimate resolution of the filing at the local level, as PURA §36.210 clearly contemplates. COH recommended that the proposed rule include a local option to extend the 90-day local timeline by agreement for negotiations in progress and that changes to the proposed rule explicitly allow negotiated settlement at the local level.

CORE commented that the general requirements for the filing of an application for a DCRF filing would provide an unworkable time frame for the processing of the application that would also infringe upon the rights of municipalities exercising exclusive original jurisdiction, in violation of PURA §§32.002(2), 33.001(a), and 36.210. CORE further commented that the limited time for a municipality to exercise its exclusive original jurisdiction over a DCRF filing is not authorized by SB 1693 and would directly violate PURA §36.108(a)(1), which guarantees local regulatory authorities up to 125 days to exercise their exclusive original jurisdiction over rate change requests. Oncor Cities and COH agreed.

CORE stated that proposed §25.243(c)(1) would require the utility to simultaneously file applications with all regulatory authorities with original jurisdiction *(i.e.,* both the local regulatory authorities and the commission), and would require a municipality to issue a final decision on the requested rate within 60 days or else the rate change would be deemed denied and appealable to the commission. As a result, the proposed rule would effectively eliminate any meaningful exercise of jurisdiction by the municipality, requiring the municipality to almost immediately deny an application for a DCRF filing. CORE noted that because subsection (c)(1) also requires all appeals of final decisions from local regulatory authorities to be consolidated with applications before the commission, and requires system-wide rates, the DCRF applicable to areas within the municipality (over which the municipality has exclusive jurisdiction) would be conformed to the commission's final order for rates affecting areas in which it has original jurisdiction, thereby reducing a municipality's original ju-

risdiction to a meaningless exercise. CORE submitted that a better balance must be struck between an expedited schedule and municipalities' rights under PURA. CORE specifically remarked that additional days must be added to the timeline for processing a DCRF filing to allow a municipality to meaningfully, yet expeditiously, exercise its exclusive original jurisdiction. Further, CORE noted, the rules must not dictate a certain number of days a municipality has to exercise its original jurisdiction, in direct violation of PURA §36.108.

CORE stated that, moreover, the proposed deadline violates the express provisions of PURA §36.108(1)(a), in which, when read with §36.102, the local regulatory authority is guaranteed at least 125 days of exclusive original jurisdiction over rate-change requests within its municipal boundaries. CORE argued that potential arguments that PURA §36.108 is not applicable to DCRF filings because it is located in Subchapter C of PURA Chapter 36, while future §36.210 is located in Subchapter E of PURA Chapter 36, lack merit. CORE argued that Subchapter C of PURA pertains to "General Procedures for Rate Changes Proposed by a Utility," and a DCRF filing clearly meets the definition of a "rate change proposed by a utility." Further, nothing in Subchapter C, or specifically in §36.108(1)(a), limits the applicability of the 90-day suspension period to rate changes implemented under Subchapter C, and nothing in §36.102(a) limits the requirement for a utility to file a statement of intent with a local regulatory at least 35 days prior to the 90 days rate suspension period being triggered. CORE also argued that nothing in Subchapter E, or specifically in §36.210, exempts the suspension period authorized by §36.108 from applying to rate changes made through a DCRF filing. CORE stated that SB 1693 does not specify a time frame for a municipality to exercise its exclusive original jurisdiction over an application for a DCRF filing; rather, SB 1693 expressly states that it is not the Legislature's intent to limit a municipality's right to exercise its exclusive original jurisdiction in authorizing the commission to implement a periodic rate adjustment mechanism.

Similarly, Oncor Cities stated that PURA §36.210 makes clear that nothing within it abrogates the original, exclusive jurisdiction of cities over utility rates within their boundaries, and proposed subsection (c)(1) imposes a limit on the jurisdiction of cities that is found nowhere within the statute. Oncor Cities argued that proposed subsection (c)(1) contradicts this exclusive, original municipal jurisdiction by purporting to establish a new timeline by which cities must exercise jurisdiction. Oncor Cities commented that PURA §36.102 and §36.108 together permit cities to take action on a utility's rate change application up until the effective date of the rate change, subject to the ability of a city to suspend the effective date of the rate change by 90 days, and this arrangement is jurisdictional, not capable of being modified by administrative rule. By imposing a shorter deadline for city action than that established by statute, the proposed rule would have the effect of denying the full exercise of exclusive, original jurisdiction permitted cities by PURA, jurisdiction explicitly reaffirmed and protected by PURA §36.210.

State Agencies commented that nothing in PURA §36.210 mandates a 60-day *maximum* period of time for the city to review and act upon a utility's DCRF application, or supports a default denial after that point, and that the 60-day floor in PURA §36.210(a)(1)(C) had been converted by this rule into a ceiling for city action. State Agencies argued that, while the Legislature provided for an expedited proceeding, that standard could be met by allowing more than 60 days for the municipal regulatory authority to act on the DCRF request.

REP Coalition commented that by itself the issue of whether the local regulatory authority has 60 days to review a DCRF application, or as much time as the city groups maintain is necessary, does not intrude on REP Coalition's core issues of adequate notice of new rates, system-wide rates, and effective date. REP Coalition stated that system-wide rates and at least 45-days' advance notice of any DCRF change can be accomplished regardless of whether the cities are provided 60 days to act or 120 days to act; additionally, the imposition of an effective date of September 1--which is consistent with the statutory requirement in PURA §36.210(b)(2) that a utility shall implement, to the extent possible, all nonfuel rates to be adjusted in a 12-month period that are charged by the utility to retail electric providers--can be accomplished regardless of the time frame allocated to the cities. REP Coalition noted, however, that some of the parties who propose elimination of or changes to the time by which a local regulatory authority is required to act on a DCRF application fail to demonstrate how system-wide rates could be approved 46 days before September 1 under their proposed timelines. REP Coalition expressed the belief that there is more than one viable timeline, including the timeline included in the proposed rule. REP Coalition commented that it takes no position on the Oncor Cities' timeline issue so long as the timeline in the final rule does not affect the system-wide rates, the 45-day notice period, or the target effective date of September 1.

REP Coalition commented that system-wide rates are essential to REP billing systems and retail product design and without system-wide application of an electric utility's DCRF, the costs of billing retail electric service will increase, because both transmission and distribution utilities (TDUs) and REPs would have to extensively test billing systems to ensure that customers across various local jurisdictions are being charged the appropriate DCRF rate. REP Coalition also stated that system-wide utility rates are essential to reduce the complexity of the shopping experience for retail electricity customers.

Electric Utilities commented that the Legislature had given the commission explicit authority under PURA §36.210(a)(1) and (g) to adopt rules accelerating the time periods that would otherwise be applicable in rate cases. Electric Utilities stated that PURA §36.210(a)(1) requires that a DCRF application be approved or denied in accordance with an "expedited procedure," and PURA §36.210(g) directs the commission to adopt rules providing for filing requirements "consistent with the expedited procedure." Electric Utilities stated that the term "expedited" means "to accelerate the process or progress of," and that the Legislature has given the commission explicit authority to adopt rules accelerating the time periods that would otherwise be applicable in rate cases.

Electric Utilities contended that the city groups' insistence on a 125-day time period to review a DCRF application leads to an absurd result, because PURA §36.210(b)(2) mandates that retail electric providers be given at least 45 days' notice of the rates approved under a DCRF application. Electric Utilities submitted that if municipalities were given 125 days to review a DCRF application before the commission obtained jurisdiction over the appeal, the commission would have only 15 days to consider the application and issue an order even under the 185-day time limit for full-blown base-rate cases. Shortening the 185-day limit by 15 days, which can hardly be said to be expedited at all, would give the commission no time whatsoever to review the DCRF application. Electric Utilities replied that this is obviously an illogical and absurd result, particularly because the statute requires the DCRF rate to be applied on a system-wide basis. Because

the Legislature is never presumed to have intended a foolish or absurd result, the city groups' statutory interpretation is wrong. Electric Utilities continued that it is possible to harmonize PURA §36.210(a)(1) and PURA §36.108 in a manner that does not lead to an absurd result, because PURA §36.108(a)(1) provides that a municipality may suspend a rate change "for not longer than 90 days" after the date on which the rate change would otherwise be effective. Thus, while 90 days is the maximum amount of time a municipality can suspend a rate change beyond the date it would otherwise be effective, the commission has the implied power to shorten that time period when necessary to implement other parts of PURA, and that in this instance, it is necessary for the commission to shorten the time period set forth in PURA §36.108(a)(1) to implement the "expedited procedure" mandated by PURA §36.210(a)(1). Electric Utilities commented that on the other hand, if provisions of PURA §36.210(a)(1) and PURA §36.108 are deemed to be in irreconcilable conflict and therefore cannot be harmonized, PURA §36.210 prevails because it was enacted more recently than PURA §36.108 and because it is specific to DCRF applications, whereas PURA §36.108 applies to rate cases generally. Electric Utilities replied that COH implicitly concedes that the 125-day period is not jurisdictional by proposing that municipalities be given 90 days, rather than 125 days, to act on a utility's DCRF application.

Electric Utilities also contended that the city groups' argument is inconsistent with the legislative history of PURA §36.210, given that the very purpose of the statute, as expressed in bill analyses for the Senate and House, is to encourage original jurisdiction municipalities "to modernize and bring efficiencies to their electric utility rate regulation processes through the use of periodic rate adjustments." Electric Utilities commented that requiring utilities to submit to the 125-day period used for comprehensive base-rate cases would create no efficiencies in municipalities' electric utility rate regulation process and therefore would run afoul of the intent of the statute. Electric Utilities stated that the city groups' argued that the proposed 60-day limit is inconsistent with PURA because the Legislature expressly provided in PURA §36.210(f)(2) that nothing in the legislation is intended to "affect the limitation on the commission's jurisdiction under Section 32.002," and because §36.210(f)(4) states that nothing in PURA §36.210 is intended to "limit the jurisdiction of a municipality over rates, operations and services of an electric utility as provided" by PURA §33.001. Electric Utilities argued, however, that the city groups have omitted key language in both statutes, because PURA §32.002 provides that the subtitle of PURA addressing electric utilities does not authorize the commission to affect the jurisdiction of a municipality exercising original jurisdiction "(e)xcept as otherwise provided by this title." Similarly, PURA §33.001 grants a municipality original jurisdiction over the rates, operations, and services of electric utility "subject to the limitations imposed by this title." Thus, PURA §32.002 and §33.001 both contemplate that a municipality's jurisdiction can be limited by the commission pursuant to other portions of PURA. Electric Utilities stated that the proposed 60-day time period in subsection (c)(1) should be adopted.

Commission Response

CORE and Oncor Cities argued that PURA Chapter 36, Subchapter C applies to a DCRF application. CORE argued that Subchapter C applies to a rate change proposed by a utility, and a DCRF application is a rate change proposed by a utility; therefore, a DCRF application is subject to Subchapter C. The commission disagrees. Although a DCRF application pursuant to PURA §36.210 is not expressly exempted from PURA Chapter 36, Subchapter C, the Legislature impliedly intended such an exclusion. PURA §36.210 is in Subchapter E, not Subchapter C. The lower numbered cost recovery sections in Subchapter E expressly exempt the sections from Subchapter C, while the higher numbered ones do not expressly address the issue. *Compare* PURA §36.202(d) and §36.203(f) to PURA §§36.204-36.209.

The PURA provision that authorizes the interim TCOS factor is located outside of Subchapter C. *See* PURA §35.004(d). Even though that provision is not expressly exempted from Subchapter C, the commission's rule that implements the provision does not subject applications pursuant to that rule to Subchapter C. The original ITF rule was adopted by the commission in 1999 and since then the commission has approved numerous applications pursuant to that rule, without any challenge that Subchapter C applies. *See Rulemaking Proceeding to Amend SUBST. R. §25.192(g),* Project Number 37519, Order Adopting Amendment to §25.192 as Approved at the July 30, 2010 Open Meeting (comments filed by CORE and Oncor Cities did not challenge commission authority to adopt an expedited procedural schedule for an ITF application).

Similar to ITF applications, ERCOT TCRF applications, which are also authorized under PURA §35.004(d), are not processed in compliance with Subchapter C. In addition, the commission adopted the non-ERCOT TCRF rule in 2007 without including provisions applying Subchapter C to that rule. *See Rulemaking Relating to Transmission Cost-Recovery Factor for Non-ERCOT Utilities,* Project Number 33253, Order Adopting New §25.239 as Approved at the December 7, 2007, Open Meeting at 30 (AXM and CARD, which are participating as part of CORE in the current rulemaking, stated that PURA §36.209 does not limit the time the commission has to conduct a non-ERCOT TCRF proceeding).

Although the ITP, ERCOT TCRF, and non-ERCOT TCRF PURA sections do not give cities jurisdiction over an application filed pursuant to one of those sections, such an application is nevertheless a rate change proposed by a utility. Therefore, under CORE's reasoning, an application under any of these sections should be subject to Subchapter C, just like a base-rate application over which the commission has original jurisdiction is subject to Subchapter C.

The commission concludes that a DCRF application is impliedly not subject to Subchapter C. Subsection (a)(1) of PURA §36.210 requires that a DCRF be approved or denied in accordance with an expedited procedure that extends for not less than 60 days. Subsection (a)(5) requires that a DCRF be applied by an electric utility on a system-wide basis. Subsection (b) requires that an electric utility provide notice to retail electric providers (REPs) of the approved DCRF not later than the 45th day before the date the DCRF takes effect. Subsection (g) requires that the commission adopt rules necessary to implement the section. In addition, subsection (g) requires that the commission's rules provide for a procedure by which a DCRF tariff or rate schedule is to be reviewed and approved, and provide for filing requirements consistent with the expedited procedure described in subsection (a)(1). In summary, the commission is required to adopt a DCRF rule that imposes filing requirements, mandates an expedited procedure, specifies the manner in which a DCRF is reviewed and approved, ensures that REPs receive at least 45 days' notice of the approved DCRF, and ensures that the DCRF is applied on a system-wide basis. These statutory requirements cannot be met without the commission establishing parameters for a city's consideration of a DCRF.

If a DCRF application were subject to Subchapter C, an electric utility applying for a DCRF would have to file its application at least 35 days before its proposed effective date, pursuant to PURA §36.102(a). Pursuant to PURA §36.108(a)(1), a city could suspend the proposed effective date for 90 days, meaning that the city would have 125 days to act on the application. The utility would have to appeal the city's final decision to the commission in order to ensure that the DCRF is applied on a system-wide basis. A DCRF is a rate and applying it on a system-wide basis means that the same DCRF must apply to all parts of the utility's system. As explained by the REP Coalition, requiring that a DCRF be implemented on a system-wide basis is essential to promotion of a competitive retail electric market in Texas, consistent with PURA §39.001(a) and (b).

If the commission had no authority to establish parameters for the city's DCRF proceeding, then PURA §33.051 and §33.053(b) would presumably apply, and the utility would have 30 days to appeal the city's final decision on the application. Adding that time to a 125-day review period by the city means that appeal of the city's final decision to the commission could occur 155 days after the utility filed its DCRF application. Assuming that the commission made its final decision on the appeal 14 days after the appeal was made and assuming that on the day following the commission's final decision the utility provided 45 days' notice to the REPs of the approved DCRF, the DCRF would take effect 215 days after the DCRF application filed--30 days more than can be used for a base-rate proceeding (except in the unusual case where the effective date in a base-rate proceeding is extended pursuant to PURA §36.108(a)(b)). Without establishing parameters for the city's DCRF review timeline, the commission could not comply with PURA §36.210's requirement that the commission adopt a DCRF rule that mandates an expedited procedure.

A commission DCRF rule that establishes parameters for cities' DCRF review timeline does not violate subsection (f)(2) and (4) of PURA §36.210. Subsection (f)(2) states that nothing in PURA §36.210 is intended to affect the limitation on the commission's jurisdiction under PURA §32.002. That section provides that the commission is not authorized to affect a city's jurisdiction, *except as otherwise provided by PURA.* Subsection (f)(4) of PURA §36.210 states that nothing in PURA §36.210 is intended to limit the jurisdiction of a city over the rates, operations, and services of an electric utility as provided by PURA §33.001. That section provides that a city has exclusive original jurisdiction in the city *subject to the limitations imposed by PURA.* Both PURA §32.002 and §33.001 are expressly subject to limitations in other parts of PURA, including PURA §36.210. Reading those two sections in conjunction with PURA §36.210, the commission concludes that it has the authority to affect a city's jurisdiction to the extent necessary to fulfill its obligations under PURA §36.210. Establishing parameters for a city's DCRF review timeline is necessary to comply with PURA §36.210's requirement that the commission adopt a DCRF rule that mandates an expedited procedure of at least 60 days. Subsection (c)(1) of the rule gives a city 60 days to review a DCRF application--a meaningful and reasonable period of time given that DCRF proceedings are expedited.

Coordination of City Proceedings with Commission Proceeding

CORE commented that the provision in the proposed rule that states that denial of an application for a DCRF filing by a local regulatory authority shall automatically be suspended is not logical and, more important, is contrary to PURA §36.111. CORE stated that if the effective date of the proposed rates is not until the 46th day *after* a final order is issued by the commission, the suspension of a local regulatory authority's denial does not serve a purpose. Moreover, under PURA §36.111, rates established by a regulatory authority must be observed until changed on appeal, prohibiting the suspension of the local regulatory authority's decision. State Agencies commented that the "deemed" denial, after expiration of a 60-day time period for a municipal authority to act, is not supported by the statute. Electric Utilities stated that to ensure that the commission would not be delayed by waiting for the appeals from municipal actions, the rule should provide for automatic appeals upon expiration of the 60-day time-period for municipal review. REP Coalition supported Electric Utilities' proposed change to subsection (c)(1) to make automatic the appeal of a municipality's governing body's decision on a DCRF application, noting that an automatic appeal would reduce the potential for unnecessary delay in processing a DCRF application.

Commission Response

As explained above, PURA Chapter 36, Subchapter C, including PURA §36.111, does not apply to a DCRF proceeding. Also as explained above, a DCRF must be applied on a system-wide basis, and automatic suspension of the city's final decision is necessary to ensure a system-wide DCRF. Likewise, deeming a DCRF application denied if the city does not make a final decision within 60 days is necessary for an expedited DCRF procedure. The commission agrees with Electric Utilities and REP Coalition that the rule should make an electric utility's appeal automatic; doing so avoids the cost of actually appealing the city action or inaction and ensures that the appeal is made. Because an appeal is necessary to ensure a system-wide DCRF, making the appeal automatic helps ensure a system-wide DCRF. The commission has made corresponding changes to subsection (c)(1). Because the commission has made an appeal automatic, it has added a change to subsection (c)(1) to make automatic the consolidation of an appeal with the electric utility's DCRF proceeding before the commission. As a result, the commission has deleted proposed subsection (e)(6)(C), which addressed consolidation of appeals. In addition, the commission has changed subsection (c)(1) to clarify that the automatic suspension of the governing body's interim and final decisions occur at the times they took effect, in order to ensure a system-wide DCRF.

Reduction in the Timeline

Electric Utilities commented that PURA §36.210 requires that the timeline for processing a DCRF request be "processed in accordance with an expedited procedure," and the statute further mandates that the commission adopt rules that provide for filing requirements and discovery consistent with the expedited procedure. Electric Utilities stated that while the commission's proposal to provide for a 145-day timeline is more expedited than the 185-day period for a comprehensive base-rate proceeding, a DCRF request could be processed faster than 145 days while maintaining the integrity of the process. Electric Utilities proposed a 125-day timeline instead.

Electric Utilities remarked that because the statute and rule require 45 days' notice to customers of a change in distribution costs, the proposed rule necessarily provides 100 days for the commission to review the filing, and that would be 40 days longer than the 60-day period allowed for the commission to review a transmission service provider's request to change its transmission cost of service. Electric Utilities commented that they do not believe that it should take any longer to review and approve

a DCRF application than it does to review and approve an application to change the transmission cost of service, but in the spirit of compromise Electric Utilities proposed to split the difference between the 60-day period for a transmission cost of service application and the 100-day period proposed in the draft rule. That compromise would allow the commission 80 days to review and approve a DCRF.

Electric Utilities noted that the commission may hear complaints that an 80-day period is unworkable because municipalities have 60 days under the proposed rule to consider the DCRF application and that the 80-day period would leave only 20 days for the commission to consider and approve the application after the municipalities act on the utility's application. Electric Utilities stated, however, that because of the statutory directive that DCRF rates be instituted on a system-wide basis, the commission would necessarily have to consider each utility's DCRF application, regardless of how the individual municipalities rule on the application; therefore, the commission's internal review process would not need to wait for action by municipalities on the DCRF requests. Electric Utilities provided alternative language that reflected their recommended 125-day review period.

State Agencies opposed the suggestion that the time limits proposed to review the DCRF request should be shortened further, stating that they did not see what harm would be remedied by the exclusion of 20 additional days from the rules proposal. Additionally, State Agencies replied that no utility would be driven to financial ruin, no bond rating would be lowered, and no distribution capital would suffer by allowing at least the 145 days for an adjustment proceeding. CEP, CORE, Oncor Cities, and OPC also urged the commission to reject the changes to the timeline proposed by Electric Utilities, because the proposal would overlook key aspects of municipal jurisdiction over utility rates and misinterpret PURA §36.210. CEP commented that automatic appeals should be rejected by the commission.

Commission Response

The commission declines to adopt Electric Utilities' request to shorten the commission's time to review a TDU's DCRF application from 100 days to 80 days. The commission disagrees with Electric Utilities' comment that it should not take any longer to review a DCRF application than it does to review an interim TCOS factor (ITF) application. A DCRF proceeding will require more resources than an ITP proceeding. A key difference between DCRF and ITP proceedings is that in a DCRF proceeding, the commission must determine whether the electric utility is earning more than its authorized rate of return using weather-normalized data. Although the commission intends to avoid turning this determination into a comprehensive cost-of-service review, the determination will require significant resources.

In addition, for a TDU, compressing the timeline 20 days would have little benefit. In order to reduce the number of times in a year that a REP is required to implement TDU rate changes, it is important that TDUs implement DCRFs on September 1, pursuant to subsection (e)(6)(D) of the DCRF rule. September 1 is a day on which ERCOT TCRF updates are made pursuant to §25.193(b)(1) (relating to Distribution Service Provider Cost Recovery Factor (TCRF)). Under subsection (c)(2) of the DCRF rule, a TDU can file a DCRF application as late as April 8. Moving this date by 20 days, in either direction, would not change the effective date for the DCRF. In addition, delaying the date by 20 days to April 28 would not affect the data used in the DCRF application--data as of December 31 of the prior year. Although delaying the application deadline to April 28 would give a TDU more time to prepare its application, the commission concludes that it is better to keep these 20 days available for review of the DCRF application.

Number of DCRF Filings per Year

REP Coalition commented that consistent with PURA §36.210(d), proposed subsection (c)(1) includes a provision that limits DCRF updates to once per calendar year. REP Coalition commented that they strongly support this provision in the proposed rule, stating that limiting the number of DCRF updates to once per calendar year would permit electric utilities to timely recover their additional distribution-related capital costs pursuant to PURA §36.210, while also placing a reasonable restriction on the number of price changes that retail customers would experience each year as a result of changes in distribution-related capital costs. REP Coalition commented that restricting the number of DCRF adjustments to once per calendar year means that a REP would adjust its retail prices no more than once a year to reflect any change in a TDU's DCRF, and REP Coalition commented that this approach to implementing PURA §36.210 falls within the parameters of existing commission policy. REP Coalition stated that limiting the number of DCRF adjustments to once per calendar year would lighten the administrative burden of implementing new and revised TDU rates and moderate the administrative costs that all parties participating in commission DCRF proceedings would bear.

Commission Response

The commission agrees with the REP Coalition that this provision should remain in the rule.

Pending Proceeding

Electric Utilities commented that the last two sentences of §25.243(c)(1) would not allow for a DCRF filing while a base-rate proceeding for the utility is pending. Electric Utilities also commented that a DCRF filing application would be dismissed if the utility or commission initiates a base-rate proceeding during the pendency of a DCRF filing. Electric Utilities submitted that some accommodation should be given in instances when a base-rate proceeding has been extended beyond the statutory time frame. Additionally, Electric Utilities commented that if a DCRF proceeding is well along in the process when a base-rate proceeding is initiated, the DCRF proceeding and work should not be dismissed and discarded. Electric Utilities pointed out that no similar prohibition exists for transmission cost adjustments. Electric Utilities also commented that four rate changes between base-rate proceedings should mean between final orders that change rates, and Electric Utilities recommended amending subsection (c)(1) to state that an electric utility shall not apply for a DCRF filing within 185 days after an electric utility has initiated a base-rate proceeding. Electric Utilities further commented that an electric utility's application for a DCRF filing should be dismissed if the electric utility or commission initiates a base-rate proceeding within 60 days after the electric utility has initiated a DCRF filing proceeding.

CEP, CORE, Oncor Cities, State Agencies, and TIEC disagreed with Electric Utilities. CEP replied that the proposed rule would be a reasonable resolution of the issue of overlapping proceedings and that the commission should reject Electric Utilities' proposal. State Agencies replied that Electric Utilities had not supported with legislative history their contention that a base-rate case and annual adjustment can proceed simultaneously. CORE and Oncor Cities also urged the commission to

reject Electric Utilities' requested modification to the proposed rule for allowance of concurrent base-rate and DCRF filings. Oncor Cities commented that there were no sound policy reasons for allowing utilities to pursue simultaneous rate relief via the base-rate and DCRF processes. TIEC commented that the implementation of a DCRF while a base-rate proceeding is pending would be excessive and unnecessary, and should be rejected. TIEC also stated that updating rates four times without a base-rate proceeding would be a more than generous reduction to regulatory lag and utilities would not also need the ability to implement a DCRF in the middle of a rate proceeding; further, a DCRF proceeding would not need to be completed once a utility filed a base rate case even if the DCRF proceeding was far along in the process. TIEC replied that there would be no need to change rates in quick succession, and therefore §25.243(c)(1) should be adopted as proposed.

Commission Response

PURA §36.210(d) states that an electric utility may adjust its rates under the section "not more than once per year and not more than four times *between* comprehensive base rate proceedings." Because the phrase "between comprehensive base rate proceedings" is vague, the commission has discretion in the manner in which it implements the phrase, with the end points of the discretionary range being that a comprehensive base-rate proceeding cannot be pending during a DCRF proceeding (as in the proposed rule) or only one DCRF proceeding can be completed between the final orders of successive comprehensive base-rate proceedings.

Allowing an electric utility to apply for a DCRF while a comprehensive base-rate proceeding is pending would be problematic, because the rate-class allocation factors in the pending comprehensive base-rate proceeding would not yet be determined by the commission. Using the rate-class allocation factors from the immediately preceding comprehensive base-rate proceeding could result in the DCRF being calculated using allocation factors that would be outdated by the time the DCRF went into effect.

Although subsection (e)(6)(D) of the DCRF rule contemplates that the presiding officer will approve the DCRF application within approximately 145 days after it is filed, it remains to be seen how often, if at all, the presiding officer will deviate from this timeline. An electric utility should not have to delay a comprehensive base-rate application, or withdraw a DCRF application, because completion of its DCRF takes longer than 145 days. In addition, the problem of outdated rate-class allocation factors would not be an issue in this scenario, because the DCRF would be terminated or set to zero once the new base rates became effective. The commission has changed subsection (c)(1) accordingly.

Wholesale Service over Distribution Facilities

Electric Utilities commented that at least one utility, Oncor, has a separate wholesale transmission tariff rate schedule for the provision of wholesale service over distribution facilities through an interconnection at distribution-level voltage. Electric Utilities stated that to the extent that additional distribution investment would be properly allocated to these customer classes, the rule should be clarified to remove any ambiguity regarding the applicability of a DCRF to wholesale customer classes that utilize distribution facilities. OPC agreed, and Electric Utilities provided language reflecting its recommendation.

Commission Response

The commission agrees with OPC and Electric Utilities that PURA §36.210 does not limit a DCRF to retail distribution service. The commission reflected this conclusion in proposed subsection (a), which provides that the section applies to electric utilities that provide wholesale or retail distribution service. To reinforce this conclusion, the commission has changed subsection (c)(1) of the rule to address this issue.

Terminology

State Agencies argued that the proposed rule should not depart from statutory language referring to a DCRF rather than a "periodic rate adjustment." Stage Agencies additionally stated that in relabeling the periodic rate adjustment mechanism a "DCRF," the proposed rule would create a new, and undefined, term: "DCRF update." State Agencies commented that both the statute and the proposed rule formula contained in §25.243(d)(1) use the previous base rate case as the baseline, and "DCRF update" would imply that a new baseline would be used. State Agencies asked that the references to "DCRF" and "DCRF update" be stricken and the statutory term, period rate adjustment, be used.

Commission Response

Use of the term "DCRF" is helpful to distinguish the periodic rate adjustment in this rule from periodic rate adjustments in other rules, such as the "Interim Update of Transmission rates" in §25.192(h)(1) (referred to in this order as interim TCOS factor or ITF), the "Distribution Service Provider Transmission Cost Recovery Factor" in §25.193 (referred to in this order as ERCOT TCRF), the "Transmission Cost Recovery Factor for Certain Electric Utilities" in §25.239 (referred to in this order as non-ERCOT TCRF), and the "energy efficiency cost recovery factor" or "EECRF" in §25.181(f). For ease of reference, the commission has defined and used throughout the adopted rule a "DCRF proceeding" to mean a proceeding conducted pursuant to this section in which creation or amendment of a DCRF is considered on application of an electric utility to the commission pursuant to subsection (c)(1). This change eliminates the need to refer to a DCRF update. In addition, for readability, the commission has split paragraph (1) of subsection (c) into subparagraphs.

Statutory Requirement

Walmart commented that as proposed the rules could be interpreted to mean that approval of a DCRF is a matter of right upon the filing of an application, or perhaps as somehow eliminating other provisions of PURA, and these interpretations would be inconsistent with the applicable statutes and the proposed rules should be clarified to avoid any such misinterpretation. Walmart noted, for example, that PURA §36.003(a) mandates that electric utility rates be "just and reasonable," and PURA §36.006 places on utilities the burden of proving that a proposed rate change is just and reasonable. Walmart commented that these requirements would not be eliminated by SB 1693, but rather SB 1693's possible allowance of a DCRF would appear to supplement these types of long-standing statutory requirements.

Walmart stated that SB 1693 also clearly allows the commission to deny an application for a DCRF. Reasons for denial would not be expressly limited to reasons enumerated in SB 1693;--conceivably, there could be other reasons for denying a DCRF application. Walmart suggested the following addition to §25.243(c)(1): "Any such application shall be evaluated consistently with all applicable statutory provisions."

Commission Response

In the DCRF rule and the DCRF form being considered in Project Number 39466, the commission has delineated to the extent feasible the requirements an electric utility must meet to obtain approval of a DCRF. Nevertheless, the commission agrees with Walmart that a DCRF must meet all applicable PURA requirements. The commission has changed adopted subsections (b)(3), (e)(1), (e)(5), and (f)(7) to make this requirement explicit.

Proposed §25.243(c)(2): Application for DCRF or DCRF Update--Requirements Applicable to TDUs

REP Coalition and Electric Utilities commented that in proposed subsection (c)(2), the word "update" should be added after the second use of the term DCRF in the second sentence.

Consistent with their recommended timeline of 125 days, Electric Utilities suggested that the application filing dates should allow for the filing for a DCRF filing only during the period April 21 through April 28.

Commission Response

As discussed above concerning *§25.243(c)(1): Application for DCRF or DCRF Update--General Requirements,* the commission has defined and used throughout the adopted rule a "DCRF proceeding, " which eliminate the need to refer to a DCRF update. As discussed above in *§25.243(c)(1): Application for DCRF or DCRF Update--General Requirements,* the commission declines to change the DCRF application filing period for a TDU.

Proposed §25.243(c)(3): Application for DCRF or DCRF Update--Requirements Applicable to Other Electric Utilities

CEP commented that the filing deadlines established for TDUs would effectively require a TDU to file the application at the same time every year. CEP stated that the provisions of this paragraph applicable to other electric utilities, however, would allow the utility a greater time period between filings in which to make filings, so that the time between general rate reviews, if no other intervening action occurs, could be considerably longer for utilities in areas not subject to customer choice. CEP commented that this paragraph should be revised to narrow the period for subsequent filings.

Electric Utilities replied that this change would be unnecessary, and if made, would put greater restrictions on the non-ERCOT utilities. Electric Utilities stated that the time period for ERCOT utilities was set to accommodate concerns by retail electric providers about having to accommodate randomly timed rate changes throughout the year, and there is no reason to believe that the time period between comprehensive base-rate proceedings would be any different for ERCOT and non-ERCOT utilities. Electric Utilities stated that for both, the electric utility would be limited to one DCRF rate adjustment per year, and no more than four rate adjustments between comprehensive base-rate proceedings. The only difference would be that ERCOT utilities would be given a narrow window in which to file each year, if they chose to do so, and the non-ERCOT utilities would not. Electric Utilities stated that the time period between comprehensive base-rate proceedings in both situations would depend on whether the electric utility chose to file for a DCRF rate change in a particular year, and whether or not the electric utility would be restricted to a particular filing window in each year would not make the time period between comprehensive base-rate proceedings any shorter or longer.

Commission Response

The commission agrees with Electric Utilities.

Section 25.243(d)(1): Calculation of DCRF Formula--DCRF Formula

Allocation of Costs and Revenues in the DCRF Formula

TIEC commented that while the DCRF formula in the proposed rule appropriately calculates the utility's incremental distribution costs and updates the billing determinants, it completely ignores the requirement in SB 1693 to allocate costs "consistent with the "manner" in which they were allocated in the last rate proceeding. In other words, the DCRF rates should reflect what the results would be if the allocation methodology from the last case were re-applied based on updated information. TIEC submitted that the proposed formula freezes the percentage of the total distribution costs allocated to each class at the level assigned in the last base rate case, and as a result, the formula disproportionately raises rates for classes with less load growth and imposes lower costs on classes with more growth. TIEC argued that the statutory provision does not require each class to continue paying the same percentage of the total distribution costs, irrespective of relative changes in class size or demand, and that changing rates to include new investments and new billing determinants without also updating class allocations is not "consistent with the manner in which" costs are allocated in a rate case.

TIEC proposed an alternative formula that it believes complies with the requirements of SB 1693. TIEC argued that its formula follows cost-causation principles by allocating a greater share of the incremental costs to a class that is growing and causing more of the incremental distribution costs to be incurred, and those costs will be spread among a greater number of customers in that class. TIEC also noted that under its formula, once the updated revenue requirements are divided by the new billing determinants for each class, all customers end up paying the same per-unit DCRF rate, regardless of which class they are in. TIEC argued that this is the correct result--the utility recovers the same total amount as it would under the formula in the proposed rule, but the costs are distributed equitably among the classes based on cost-causation and changes in demand, and consistent with the "manner" in which costs were allocated in the last rate case.

State Agencies similarly opined that the proposed formula will not achieve, as the statute requires, an allocation between the rate classes that is "consistent with the manner in which costs were allocated...in the electric utility's most recent base rate statement of intent proceeding...." State Agencies argued that the Legislature plainly intended the previous base-rate case to serve as the model for allocation of the incremental distribution capital costs recovered through the DCRF, after crediting additional revenues recovered through base rates against the total amount of costs sought. State Agencies commented that nothing in the statute provides that load growth revenues should be broken down into discrete rate classes in calculating the necessity and amount of the periodic adjustment. State Agencies further commented that under the proposed formula, the system distribution cost increase is allocated using an allocation factor from the last base-rate case, but the system revenues recovered from base rates are assigned to each class based on the actual revenue change for that particular class. State Agencies expressed its belief that the legislative objective of accounting for load growth is realized by taking the total incremental qualifying distribution costs, offsetting them with the load growth revenues attributed to distribution investments, and then allocating any resulting net system distribution increases to rate classes. State Agencies argued that the proposed formula

would result in an allocation of the net system distribution cost increase that is not consistent with the manner that the distribution capital costs were allocated in the utility's last base-rate case, because the formula calculation imposes greater rate increases for the classes with lower (or no) load growth. State Agencies commented that it is not the Legislature's intention to impose such a disparate rate impact on any class and that classes with lower load growth should not be responsible for more of the increase than the customers taking services from the classes experiencing more load growth and for whom the additional distribution capital expenses have been arguably incurred. State Agencies stated that its proposed formula would allocate the system distribution capital cost increase and the system revenue change based on the same allocation factor and result in an allocation of the net distribution cost increase that is consistent with that in the last base rate case. State Agencies claimed that its proposed formula would be an allocation among different classes that more nearly meets the objectives of PURA §36.210(a)(2) and (3) and will not result in greatly disparate rates.

OPC commented that the enabling legislation contains two co-equal requirements that must be met in implementing a DCRF adjustment: (1) recover invested capital consistent with the allocation among classes used in the most recent general base rate case; and (2) account for changes in load and customer growth that have occurred since the most recent general base rate case. OPC commented that while some parties (TIEC and State Agencies) have advocated that the DCRF formula should be changed so that the effects of changes in the number of utility customers, energy consumption, and demand on revenues being recovered through base rates are used to change the cost allocation that the commission approved in the utility's most recent base rate case, these advocates seek to change the DCRF formula in order to take advantage of anticipated customer and load growth in the residential class and apply it to subsidize their rate classes. OPC stated that the position of these parties inappropriately mixes the rate design requirement of PURA §36.210(a)(2)--an update of revenues based upon changes in billing determinants, which are normally used on a class-by-class basis for rate design under well-established ratemaking principles--with the cost allocation requirement in PURA §36.210(a)(3). OPC pointed out that cost allocation is based on numerous underlying weighted factors in an involved cost of service study as part of a general base-rate case, and that any modification of the allocation factors determined in the most recent base-rate case, as sought by these parties, would require a complete re-computation of the utility's class cost of service study in order to achieve a fair and accurate result.

OPC additionally commented that in addition to being inconsistent with traditional ratemaking principles, such a proposed change to the DCRF formula would result in a failure to adhere to the requirement in PURA §36.210(a)(3) that the invested capital costs to be recovered through the DCRF are to be allocated to each rate class consistent with the manner in which invested capital costs were allocated in the utility's most recent base rate case, and that injecting into cost allocation a consideration of changes in revenues generated by the different rate classes as a result of changes in their respective billing determinants is completely inconsistent with the manner in which costs are allocated in base-rate cases, and therefore contrary to PURA §36.210(a)(3). OPC argued that the commission should reject this attempt to force residential customers to subsidize other rate classes and to pay more than their allocated share of costs as determined by the commission, often based upon a settlement agreement, in the utility's most recent base-rate case.

State Agencies commented that OPC argues that other parties seek to use the residential class load-growth revenues as a subsidy to other classes, but that it is in fact the proposed commission formula that results in a subsidy to the residential class by potentially shifting most of the distribution capital costs into classes that did not cause them. State Agencies commented that OPC argues that PURA §36.210(a)(2) and (3) establish co-equal considerations that the proposed rules must implement, but State Agencies opined that the Legislature intended the DCRF rate design process to follow the sequence that ordinarily is used in base-rate cases, with the preceding base-rate case as the template. State Agencies commented that like any other rate design process, rules to implement the DCRF rates should involve the three steps of: determining the total qualifying costs that can be recovered through the DCRF, allocating the recoverable qualifying costs among customer classes, and designing the DCRF rate for each class by dividing each class's allocated cost by the appropriate determinant. State Agencies argued that its proposed formula follows this sequence, and that the normal design process does not typically involve crediting the load growth for one class entirely against the rates that would otherwise apply to that class. State Agencies opined that its proposed formula complies with PURA §36.210(a)(3) and does not, as OPC charges, modify the allocation factors determined in the most recent base rate case.

TIEC commented that it agrees with the State Agencies' conclusion that the proposed formula violates the requirements of PURA §36.210(a)(3), and that the DCRF formula in the proposed rule arbitrarily and inequitably keeps additional revenues from load growth within the classes. TIEC commented that this means that customers in classes with greater growth will pay lower per-unit DCRF rates, and customers in classes with less load growth receive a disproportionate rate increase. TIEC stated that to avoid this result, the State Agencies' formula offsets the total incremental distribution investment with the total distribution-related revenues from load growth on a utility-wide basis, rather than doing this on a class-by-class basis, and this is the correct approach. TIEC stated, however, that the State Agencies' formula then applies the percentage allocation factors from the last rate case to the incremental revenue requirement to determine the revenue increase for each class, and then calculates the DCRF by dividing this class revenue increase by the class's updated billing determinants. TIEC argued that the State Agencies' formula still results in disparate rate increases for customers in different classes, because it applies outdated allocation factors to the incremental revenue requirement. TIEC submitted that allocation factors are directly related to class billing determinants, and that it is improper ratemaking to recognize that a class's billing determinants have changed, but then to refuse to update the allocation factors to reflect this change. TIEC argued that under its approach, the utility recovers the same overall amount, but customers pay the same amount for the same unit of usage regardless of which class they are in. TIEC argued that by adjusting the per-unit rates rather than the total pot of dollars assigned to each class, its formula naturally tracks changes in class compositions and results in a proper cost allocation. TIEC submitted that while the State Agencies' formula is an improvement upon the formula in the rule, it still does not fully comply with SB 1693, and TIEC's formula should be adopted instead.

OPC disagreed with TIEC and State Agencies regarding the way the DCRF formula should operate and argued that a step-by-step

review of the formula readily demonstrates that the allocation of costs among classes in the proposed rule is consistent with the allocation requirement in PURA §36.210(a)(3). OPC argued that the rule's proposed formula tallies incremental cost and allocates it according to the class allocation factors established in the last base rate proceeding, and that TIEC's and State Agencies' contention that the formula does not allocate costs in a manner consistent with the last base-rate proceeding, and therefore runs afoul of the statute, is baseless.

OPC further commented that both TIEC and State Agencies propose amendments to the formula in an attempt to remedy the perceived misallocation of costs, but their arguments confuse the relationship between cost allocation, revenue collected through base rates, revenue collected through a DCRF, and rates. OPC stated that this confusion results in proposed formulas by TIEC and State Agencies that create cross-subsidization among the rate classes, notably subsidizations of the rate classes they represent, and that at their core, the formulas socialize the economic benefit of load growth. OPC observed that the amount of revenue to be collected from each class is determined in a base-rate proceeding, and given the customer count, energy consumption, and energy demand of a particular class, rates are designed to collect this class revenue requirement exactly. OPC pointed out, however, that base rates are not a revenue guarantee, because future years deviate from the test year used to establish rates, and along with fluctuations in billing determinants, the revenue actually collected by the utility from each class will differ from the revenue requirement used to set base rates. OPC noted that the growth of billing determinants over time, and the resultant increase in utility revenue, is generally referred to as "load growth," and that load growth is an issue in the computation of the DCRF because the statute requires the DCRF rate to account for changes in the number of a utility's customers, energy consumption, and energy demand on the amount of revenue the utility recovers. OPC expressed its support for the basic approach in the formula in the proposed rule that makes this adjustment by subtracting the revenue impact of class load growth from the incremental costs to be recovered from each class; the resulting revenue requirement determines the class's DCRF, ensuring that one class is not subsidizing another class by virtue of the changes being recognized through the DCRF.

OPC further stated that State Agencies' formula generally follows the formula in the proposed rule but takes a different approach to the load growth adjustment: instead of calculating the adjustment on a class-by-class basis, State Agencies would take the entire incremental cost to be recovered through a DCRF, reduce it by the entire system revenue impact of load growth, and allocate the net amount among rate classes by the allocation factors approved in the last base-rate proceeding to determine the DCRF for each class. OPC stated that this approach is inequitable because it gives each class the economic benefit of the system's load growth and not the benefit of its own load growth, because classes with load growth above the system average would donate the economic value of their "extra" load growth to classes with load growth below the system average. OPC commented that for these donating classes, the DCRF is set too high--the combination of the revenue collected through base rates and the revenue to be collected through the DCRF is higher than the class's revenue requirement. Likewise, the classes receiving the donation will pay less through base rates and the DCRF than the revenue requirement assigned to them.

Regarding TIEC's proposed formula, OPC commented that the formula modifies the load-growth adjustment mechanism in the proposed rule, and that just as with the formula proposed by State Agencies, TIEC's formula would result in improper cross-subsidization among rate classes. OPC noted TIEC comments that "the DCRF rates should reflect what the results would be if the allocation methodology from the last case were reapplied based on updated information." But OPC stated that updates to information are controlled by PURA §36.210--a DCRF is to account for changes in specific categories of utility costs and to account for changes in the amount of revenue recovered through base rates. Thus, outside of the updates to billing determinants, the only other update a DCRF should include is the change in costs related to distribution investment that occur subsequent to a rate case. OPC opined that no section of the statute directs the commission to revisit a base-rate case and re-investigate the costs subsumed in base rates and how classes' relative cost responsibility varies with relative changes in class sizes. Yet this is exactly what TIEC's proposal would have the commission do.

OPC commented that the numerical example TIEC provided in its comments presumes that a class with an increased customer count has caused more of the incremental distribution costs than the other class that has shrunk. Furthermore, OPC stated that TIEC's example presumes that cost-causation principles should allocate a greater share of the incremental costs to the growing class. OPC commented that these presumptions are problematic, because while it may or may not be true that a growing class is responsible for a larger percentage of incremental distribution investment than a shrinking class, the degree to which this may be true is not readily apparent, would be a subject of litigation, and is properly explored only in a full base-rate proceeding. OPC stated that, additionally, the presumptions fail to consider that growth in a customer class is also responsible for growth in the revenue that the class brings to the utility through base rates, and the growth in revenue may partially, completely, or more than completely offset the incremental costs potentially associated with the class's growth. OPC stated that it is this fact that underlies the statutory requirement for a DCRF to include changes in revenue due to load growth, and the formula in the proposed rule develops DCRF rates that match TIEC's criterion that the DCRF rates should apply the allocation methodology from the base-rate case to information updated as part of the DCRF proceeding. OPC commented that incremental costs, which are the only updates to cost information that are permissible, are allocated among classes using the allocation methodology from the last rate case; however, TIEC modifies the load growth adjustment in a way that makes an end-run around the statute, effectively using the DCRF as a vehicle for "updating" the allocation of costs subsumed in base rates by adjusting the overall revenue (base rate plus DCRF) collected from each class. OPC commented that, similar to the State Agencies' formula, TIEC's formula socializes the revenue impact of load growth by first computing the total DCRF revenue requirement (incremental costs less increased revenue resulting from load growth) before parsing the revenue requirement into the various class revenue requirements, and as a result TIEC's formula would create cross-subsidization. OPC commented that TIEC's formula goes even further astray in that it does not rely on the allocation factors from the base-rate case whatsoever, but parses the overall DCRF revenue requirement into class requirements by a new allocation mechanism. OPC commented that it recommends that the DCRF formula presented in the proposed rule, subject to OPC's suggested modifications, be adopted. OPC stated that this formula adheres to the statute by allocating incremental distribution-related costs by means of the allocation methodology utilized in the last base-rate case, and because this methodology

is established and matters of allocation are typically contentious, utilization of the methodology limits litigation of allocation issues and supports the abbreviated schedule for a DCRF proceeding as envisioned by the statute.

Oncor Cities commented that although TIEC and State Agencies suggest different modifications to the formula, both recommendations have the effect of indirectly changing the previously adopted allocation of distribution plant costs, resulting in an allocation that is contrary to the requirement of PURA §36.210(a)(3), and the formula set out in the proposed rule is more consistent with that provision. Oncor Cities stated that TIEC focuses on the words "consistent with the manner" from §36.210(a)(3), in order to argue that the numeric allocations adopted in the last base-rate case should be ignored in the DCRF formula. Oncor Cities further commented that the TIEC formula completely deletes any reference to the class allocation approved in the previous base-rate case. Oncor Cities observed that the commission has previously addressed a similar issue with respect to stranded cost allocation, where the statute pertaining to class allocation for stranded costs recovery has a similar reference to the allocation adopted in the utility's previous base-rate case. Oncor Cities observed that, similar to its arguments here, TIEC has previously proposed to modify stranded costs recovery allocations to reflect the change in size of each class since the utility's last base-rate case, but that the commission determined that the law's allocation requirement should be implemented by applying the specific numeric class allocations adopted in the previous base-rate case instead of TIEC's proposed interpretation. Oncor Cities further commented that the commission's interpretation and use of the historic numeric allocators from the previous rate case have been affirmed by the Supreme Court as reasonable. Oncor Cities stated that even assuming acceptance of TIEC's argument that §36.210(a)(3) should be based on the previous rate case's "manner" of class allocation rather than the historic allocation from that rate case, TIEC's formula does not replicate the manner or method of allocating costs in the previous base-rate proceeding. Oncor Cities argued that TIEC's formula makes no reference to the methodology for allocating distribution investment in the utility's base rate case, but that instead, TIEC proposes to apply percentage increases to the classes' revenue growth. Oncor Cities averred that an accurate attempt to apply the previous "manner" of cost allocation to current load data would be as complicated as replicating the class cost of service study, and the composite allocation of distribution investment is dependent on numerous allocation factors applied to specific plant accounts, as well as indirect allocations computed by the cost allocation model. Oncor Cities argued that, for this reason, the use of fixed class allocations from the prior rate case is a more feasible procedure for the application of §36.210(a)(3).

Oncor Cities additionally commented that TIEC's proposal also glosses over the fact that "billing determinants" are not the same as the data used to allocate costs to classes, and that TIEC's proposed formula skips the allocation step and proceeds directly to billing determinants that are developed for rate design. Oncor Cities noted, however, that billed demands and kilowatt-hours at the meter are not the same as load data that form the basis for class allocation, and for this reason, the hypothetical examples in TIEC's comments are not an accurate portrayal of class allocation methods. Oncor Cities commented that it would not be typical for class demand allocation methods to result in equal kilowatt-hour charges among classes, as implied in TIEC's examples in its comments. Oncor Cities stated that the relationship between kilowatt hours and classes' demands--the underlying data for the allocation factors--will depend on the class load factor for the period.

Oncor Cities contended that State Agencies' proposal is an improvement over TIEC's formula to the extent that State Agencies' formula retains the previous rate case class allocation factors as a multiplier, but that deduction of total revenue growth from incremental distribution investment indirectly changes the class allocation, which is inconsistent with §36.210(a)(3). Oncor Cities pointed out that for ratemaking purposes, the revenues paid by a class are directly assigned to that class, but the effect of State Agencies' proposal is to allocate total revenue growth among the classes, rather than credit each class with the revenues it paid. As a result, revenue growth paid by one class may offset the amount of costs allocated to another class. Oncor Cities stated that this result is the virtual definition of "cross-subsidy." As set out in the proposed rule, revenue growth generated by a class is used to offset the incremental distribution costs allocable *to that class.* For those reasons, Oncor Cities urged the commission to maintain the allocation approach set forth in the proposed rule.

COH commented that several participants recommended revisions to the class allocations in the DCRF formula, and that as proposed, the formula provides revenue credits for customer classes with load growth as compared to class usage levels in the utility's prior rate case. COH commented that if a customer class grows more, relative to other classes, then it would properly receive a larger revenue credit and, therefore, be allocated a smaller percent of the increase in distribution class costs. COH observed that parties representing customer classes that do not expect to grow much obviously do not favor this approach and seek to obtain a portion of this growing class's revenue credit. COH stated that it does not support proposals by TIEC and State Agencies to allocate the revenue credits on an average system basis and considers the proposals to be self-serving and unsupported.

Electric Utilities agreed with OPC's assertions regarding TIEC's and State Agencies' proposals to co-mingle rate design and cost allocation requirements to their advantage by the use of alternative formulas. Electric Utilities stated that the commission should flatly reject the proposed changes. Electric Utilities commented that PURA §36.210(a)(3) clearly requires that the DCRF formula "be consistent with the manner in which *costs for invested capital* described in this subsection were allocated to each rate class, as approved by the commission," in the electric utility's most recent comprehensive base-rate case. Instead of using allocation factors based on the amount of invested capital, as the statute clearly requires, the approach suggested by TIEC and State Agencies first nets the overall change in revenues against the increase in expenses related to the distribution invested capital and then allocates the net increase to the classes based on their relative share of the overall revenues. Electric Utilities stated that, in essence, these alternative approaches calculate a new allocation factor to take advantage of revenue increases in one or more classes and spread it across all classes to subsidize those classes for which growth in revenue is not as significant or perhaps even declines, and that in doing so, the formulas proposed by TIEC and State Agencies unfairly penalize a class whose growth is enough to cover the new investment allocated to its class. Electric Utilities stated that nothing in the statute requires that the average DCRF increase (or decrease) be applied virtually equally to all rate classes, but that rather, each class should stand on its own. Electric Utilities stated that TIEC's and State Agencies' approaches to calculating a new revenue-based allocation factor is in direct conflict with the requirement in the

statute, which clearly specifies the use of the capital-based allocation factors approved in the utility's last rate case, and for this reason, as well as those cited by OPC, Electric Utilities urged the commission to reject TIEC's and State Agencies' alternative formulas.

Commission Response

For the calculation of the DCRF, commenters recommended three different types of allocation formulas, including the formula in the proposed rule. The proposed rule's formula credits to each class the actual distribution-related revenue collected from that particular class and then allocates to each class the system distribution cost increase on the basis of cost allocation factors from the utility's base-rate proceeding. The formula then determines the DCRF for each class by taking the difference between the class's credited incremental revenues and allocated costs and dividing it by the class's new billing determinants.

In contrast, TIEC's proposed formula assigns both load-growth revenues and incremental costs on the basis of current billing determinants. TIEC argues that allocation factors are directly related to class billing determinants, and while the commission acknowledges that this assumption generally reflects the relationship between load growth and incremental capital investment as typically determined in a comprehensive base-rate proceeding, to make this assumption in an expedited DCRF proceeding is problematic. As noted by several parties, cost allocation, when litigated in a comprehensive base-rate proceeding, is based on numerous underlying factors and analyses of how classes' relative cost responsibility varies with load data and relative changes in class sizes, and any modification of the allocation factors determined in the most recent comprehensive base-rate proceeding would require a complete re-computation of the utility's class cost-of-service study to achieve an accurate result. It is not appropriate, in the context of a DCRF proceeding, to assume that there is a 100% correlation between updated billing determinants and the load data used in the cost-of-service study to allocate costs to classes in the last comprehensive base-rate proceeding. The commission thus rejects TIEC's proposal to use updated billing determinants as the basis for allocating both load-growth revenues and incremental capital-related costs.

The third approach, as advocated by State Agencies, has certain elements of both the proposed rule's formula and TIEC's recommended formula. It credits load-growth revenues on a utility-wide basis, as does TIEC's proposal, but it allocates incremental costs to each rate class using allocation factors from the utility's base-rate proceeding, as does the formula in the proposed rule.

The commission agrees with TIEC and State Agencies that, for the allocation of load-growth revenues, the DCRF formula should first offset the total incremental distribution capital costs with the total load-growth-related distribution revenues on a utility-wide basis, rather than on a class-by-class basis. Although some parties claim that this results in class cross-subsidization, subsidies can be ascertained only if specific cost-allocation information is ascertained, and because PURA §36.210 does not contemplate cost allocation adjustments, the extent--or even the presence--of subsidization cannot be determined absent a comprehensive cost-of-service study. Moreover, as noted by State Agencies, nothing in PURA §36.210 provides that load-growth revenues should be allocated to discrete rate classes when calculating the DCRF, and applying system revenues across all classes minimizes the possibility of widely disparate DCRF rates across classes.

The commission concludes that, after offsetting system load-growth revenues against system incremental capital costs, the appropriate basis for allocating the remaining costs is to use the rate-class cost-allocation factors from the utility's base-rate proceeding, rather than cost allocations based on updated billing determinants as recommended by TIEC. This part of the adopted DCRF formula reflects the language in PURA §36.210(a)(3) that the DCRF must "be consistent with the manner in which costs... were allocated to each rate class" in the base-rate proceeding. It is also consistent with the manner in which the proposed rule's formula allocated incremental costs.

Given the constraints of an expedited timeline for a DCRF proceeding, the commission concludes that the formula advocated by State Agencies is a reasonable balance between TIEC's recommended formula and the proposed rule's formula. Therefore, the commission finds that for the calculation of the DCRF, load growth should be "take(n) into account" by taking the total incremental qualifying distribution costs, offsetting them with the load growth revenues attributed to distribution investments, and then allocating any resulting net system distribution cost increases to rate classes on the basis of the allocation factors from the base-rate proceeding.

PURA §36.210(a)(3) requires that a DCRF must "be consistent with the manner in which costs for invested capital described by this subsection were allocated to each rate class, as approved by the commission, in an electric utility's *most recent base rate statement of intent proceeding*...." (Emphasis added.) A statement of intent is filed when an electric utility initiates a base-rate proceeding, pursuant to PURA Chapter 36, Subchapter C. However, no statement of intent is filed when the commission initiates a base-rate proceeding, pursuant to PURA Chapter 36, Subchapter D. Taken literally, PURA §36.210(a)(3) would require use of the cost allocation from the utility's most recent base-rate statement of intent proceeding, even if the commission had initiated a comprehensive base-rate proceeding since that proceeding. The commission does not interpret this provision literally, because to do so would lead to an absurd result, where the DCRF would be calculated using outdated rate-class allocation factors. Consistent with the proposed rule and without objection by any commenters, the adopted rule uses the rate-class allocation factors from the last comprehensive base-rate proceeding, regardless of whether that proceeding was initiated by the utility or the commission.

Inclusion of Formula in Rule

Stage Agencies and COH commented that it is inadvisable to put a complex formula into the rule, because the commission will lose the flexibility to adapt certain elements of the formula if they are demonstrated not to achieve the results prescribed by the statute. Stage Agencies commented that inclusion of such a formula into a rule can have unintended consequences, and recommended that the proposed formula be replaced with language requiring that the DCRF be filed "on a form and in the manner prescribed by the commission."

Electric Utilities disagreed, stating that the purpose of a rule is to prevent repeated litigation in contested proceedings, and this is especially important in what is designed to be an expedited proceeding of limited scope. Electric Utilities stated that while the formula appears complex, it is conceptually quite simple and no future "tweaks" should be necessary. Electric Utilities contended that this is particularly true since it is being modeled on the interim TCOS formula, which has been successfully utilized for a number of years. Electric Utilities stated that in order to prevent

having to repeatedly litigate in the first several DCRF cases exactly how the adjustment should be calculated, the commission should set out the formula in the rule and avoid such unnecessary litigation. Electric Utilities stated that in light of the many comments suggesting a variety of changes to the formula--from whether ADFIT is included, to how revenues are accounted for, to how to properly allocate costs--failure to decide these issues now will ensure that numerous DCRF cases are litigated until all of the issues have been raised and considered by the commission, and even then, some parties will likely choose to re-litigate certain issues in the hope of the commission reversing its decision. Electric Utilities submitted that making final decisions in this rulemaking, and eliminating the repeated litigation of those issues, will be much more cost-effective for all of the entities involved.

OPC commented that, as evidenced by the sundry positions taken by participants in this rulemaking with respect to the form of the formula, the computation of a DCRF is itself a contentious issue, and any certainty the final rule can provide with respect to the computation of a DCRF reduces the potential for litigation and the costs associated with an initial DCRF filing application. OPC commented that a reduction in the potential for litigation also supports the abbreviated schedule for a DCRF filing, and OPC stated its belief that it is possible to craft a formula in the current rulemaking that adheres to the statute. OPC pointed out that if the commission determines at some future date that changes to the formula are needed, it is not prevented from opening another rulemaking to revise the formula.

Commission Response

The commission agrees with Electric Utilities and OPC that inclusion of a formula in the rule provides clarity and minimizes controversial issues in DCRF proceedings, which is consistent PURA §36.210's requirement that a DCRF proceeding have an expedited procedure. As explained by Electric Utilities, the DCRF formula is conceptually simple and should not produce unintended results. In addition, a DCRF is calculated in a manner similar to interim TCOS rates, and interim TCOS rates have been calculated without controversy as to the formula for many years.

Definitions

COH stated that it had no major issues with the proposed formula, but expressed its belief that the definition of the variable ALLOCclass should be clarified by using the word "approved" when referring to items from a utility's last comprehensive base-rate proceeding. CORE expressed agreement with COH's comments in this regard.

Electric Utilities and OPC commented that the definitions of the formulaic terms DEPRc and DEPRrc should be modified to reflect the fact that depreciation expense is calculated on the amount of gross investment as opposed to net investment.

Commission Response

The commission agrees with the recommendations of COH, Electric Utilities, and OPC and has modified the rule accordingly.

Distribution-Related Other Revenues

Oncor Cities commented that the DCRF formula should be modified to include changes in distribution-related other revenues (FERC Account No. 450-456). Oncor Cities stated that other revenues are used to reduce the base-rate revenue requirement allocated to customers, and include those received for activities such as telecommunications pole rentals, connect/disconnect fees, pole attachments, rental of land, etc. Oncor Cities commented that during the development of cost of service, distribution-related portions of the revenue are identified and deducted from distribution revenue requirements, and a more accurate reflection of revenue requirement associated with distribution-invested capital would include the change in distribution-related other revenues in the interval since the utility's most recent base rate case. Oncor Cities proposed a modification to the DCRF formula to address this issue.

Electric Utilities disagreed with Oncor Cities' recommendation for several reasons. Electric Utilities argued that Oncor Cities' suggestion goes beyond the statute, which clearly requires that the DCRF take into account changes in base revenue associated only with changes in customer count, energy consumption, and energy demand. Neither in PURA §36.210(a)(2) or anywhere else in the statute does it mention the requirement to adjust for other revenues associated with activities such as pole rentals, connect/disconnect fees, etc. Electric Utilities additionally argued that the majority of these other revenues are derived from O&M-related services such as connect/disconnect, meter re-reads, etc., which are intended to recover the cost of the provision of these O&M services, and thus, using revenues that are designed to recover the cost of these services to offset an increase in expense related to capital investment would result in a misapplication of these revenues. Electric Utilities also argued that adjustments to other revenues are not included in the interim TCOS process from which the DCRF rule is closely patterned; these revenues are fixed in the interim TCOS and are appropriately only adjusted in full rate cases. Electric Utilities argued that for these reasons, the commission should reject Oncor Cities' attempt to add an adjustment for other revenues to the DCRF formula.

Commission Response

Distribution-related other revenues include revenues from O&M services. In addition, they are not expressly addressed in PURA §36.210. The commission declines to include them in the DCRF formula, but in a future rulemaking may consider requiring that distribution plant-related other revenues be included in the DCRF formula.

Lost Revenues

OPC commented that the DCRF formula in subsection (b)(1) of the proposed rule must be amended to eliminate the use of the DCRF as a means to grant utilities what OPC characterizes as "lost revenues." OPC stated that the portion of the formula that relates to changes in billing determinants for each rate class since the most recent base-rate case will produce a negative amount for a particular rate class if the billing determinants of the class have decreased since the most recent base rate case, and that such a decrease could be due to a variety of reasons, including general economic conditions as well as successful energy efficiency programs. OPC submitted that if this portion of the formula results in a negative amount, it will inappropriately require the rate class to make up for revenues not being collected by the utility from the class due to the decline in the class's billing determinants since the most recent base rate case, and will raise the rate charged to the class for a reason beyond the scope and purpose of PURA §36.210. OPC stated that PURA §36.210 is intended to only allow the utility to recover the revenue related to changes in distribution investment, not purported inadequate revenues from existing base rates, and that if a utility believes that current base rates are inadequate, the utility needs to initi-

ate a base-rate case. OPC commented that in order to eliminate this inappropriate and unauthorized recovery, the DCRF formula must be appropriately modified, and OPC provided changes consistent with this point.

Oncor Cities commented that if OPC's proposed change were adopted, customer classes with load loss would be protected from any DCRF impact due to the loss of revenue within the class.

State Agencies disagreed with the "lost revenues" adjustment, stating that OPC's suggested changes would merely amend a proposed rule that State Agencies contend is flawed.

Electric Utilities commented that any DCRF adjustment will be prospective in nature, so there is no ability to recover any historical "lost revenues" due to reduced demand or energy consumption. Electric Utilities stated that, with respect to the proposed DCRF formula, it does take into account the impact of both positive and negative changes in demand and energy consumption on the revenues related to the items being adjusted (depreciation, return on distribution-related invested capital, FIT, and other taxes). Electric Utilities commented that the proposed formula does so *because that is what SB 1693 requires.* Electric Utilities stressed that the statutory language does not in any way limit the impact on revenues to *positive* effects, or the impact caused by *increased* consumption or demand; rather, the language of the statute clearly requires *all* weather-normalized effects on the amount of revenues recovered through the utility's base rates related to the items being adjusted (depreciation, return on distribution-related invested capital, FIT and other taxes) to be taken into account in setting the DCRF. Electric Utilities contended that the proposed rule simply implements the statutory requirements.

Commission Response

Because the commission has changed the DCRF formula consistent with its prior discussion, the issue of "lost revenues" is moot.

Accounting for All Revenues

OPC commented that the DCRF formula must account for all growth in the utility's revenues being recovered through base rates to comply with PURA §36.210(a)(2). OPC argued that it is clear from the statutory language that the updating of the impact on revenue being recovered in base rates because of changes in the number of customers, energy consumption, and demand is not restricted to only the revenues derived from the utility's distribution invested capital, and there is no such limitation in the statute, expressed or implied. OPC opined that the plain language of subsection (a)(2) requires the commission to account for all growth in the utility's revenues being recovered through base rates when making a DCRF adjustment, but that the DCRF formula in the proposed rule incorrectly restricts the updating of revenues to only the portion of the utility's revenues related to distribution invested capital. OPC provided changes to the formula to make the DCRF formula consistent with its interpretation of §36.210(a)(2). CEP expressed agreement with OPC's suggested alterations to the formula.

Electric Utilities disagreed that the statute requires that the adjustment to revenues in subsection (a)(2) must apply to all distribution-related revenues. Electric Utilities argued that OPC improperly attempts to read subsection (a)(2) in isolation, ignoring the language in (a)(1) that the tariff is to be adjusted up or down based on changes in the utility's distribution-related invested capital (as described in PURA §36.053), after consideration of the Uniform System of Accounts. Electric Utilities stated that there is no indication that the provisions in (a)(2) were designed to extend beyond the change in revenues related to distribution-related invested capital (including depreciation, return, and tax accounts) and pick up *all* distribution-related revenue changes, including those pertaining to O&M expenses such as salaries, pensions, gasoline prices, etc. Electric Utilities argued that those additional O&M-related revenues related to growth in usage are necessary to meet the utility's increased O&M-related costs related to that increased usage, and the concept behind the paragraph at issue is that if changes in consumption have increased the revenues related to distribution-related capital investment, then those increased capital-related revenues should be used to offset the amount of the rate increase arising from the new plant that has been constructed and placed in service. Electric Utilities stated that (a)(2) does not explicitly exclude transmission revenues from its scope, but no party would argue that increased transmission revenues would also be used as an offset to increased distribution-related capital investment. Electric Utilities submitted that no such exclusion is necessary because the entire scope of SB 1693 and PURA §36.210 is limited to distribution-related capital investment. Electric Utilities contended that OPC's attempt to expand one paragraph of the section beyond the scope of the section itself is improper and should be rejected.

Commission Response

Taken literally, PURA §36.210(a)(2) would require that all of an electric utility's revenues resulting from load growth be taken into account in calculating the DCRF, including generation-related revenues, transmission-related revenues, and distribution-O&M-related revenues. PURA §36.210(a) provides that the DCRF is to be based on changes in the electric utility's distribution invested capital. In light of this requirement, PURA §36.210(a)(2) can reasonably be interpreted as limited to revenues related to distribution invested capital.

Rate Moderation

Oncor Cities recommended that the commission consider adding a provision that allows the presiding judge, upon a showing of good cause, to apply rate moderation constraints to the class allocation in order to avoid excessive cost increases for particular classes. Oncor Cities noted that the commission has historically used rate moderation constraints to avoid excessive class impacts, and based upon the commission's inherent authority to ensure just and reasonable rates, the rule should permit the exercise of discretion as necessary to prevent unreasonable results for particular classes. Oncor Cities submitted that this would resolve any concerns that the DCRF's formula could result in extreme class impacts by allowing the commission to exercise discretion to modify class results if those situations arise.

Commission Response

Permitting rate moderation adjustments is unnecessary, because the DCRF will make up only a small part of a customer's bill and the DCRF formula is consistent with the principle of cost causation. In addition, allowing rate moderation adjustments, which are fact-specific, would potentially add significant complexity to a DCRF proceeding. The small benefit of permitting a rate moderation adjustment is outweighed by the complexity that it would introduce into a DCRF proceeding.

Absence of Formula Inputs

State Agencies commented that much of the data essential to the proposed formula will not exist when there has been a black box settlement of the previous rate case. Stage Agencies stated that the proposed formula requires various cost data that are to be derived from the utility's last base-rate case, but that much of the required data may not be available because of the wide use of black box settlements. State Agencies commented that many of these black box settlements did not have commission-approved, class-specific cost amounts that can be ascertained for items such as federal income taxes, other taxes, depreciation, and return on invested capital for each class needed to perform the calculations for the formula. Stage Agencies commented that the proposed rule fails to propose a mechanism for dealing with such black box rate case settlements.

OPC expressed similar concerns and recommended that the commission add a provision to the DCRF rule that requires the utility, before applying for its first DCRF, to apply for and obtain a commission determination of the unknown DCRF formula inputs for the utility. OPC stated that the only other alternative would be a new base-rate case for the utility. OPC commented that the proceeding for determination of the unknown DCRF formula inputs must be a contested case proceeding because it will be a part of the DCRF ratemaking process.

SPS commented in response that it plans to file and conclude a base-rate proceeding before considering filing for a DCRF. SPS stated that even if some of the utilities would be unable to take advantage of the proposed rule until after completing a base rate case, it is still advantageous to adopt the rule.

Electric Utilities agreed with SPS that the commission should reject OPC's suggestion that contested-case proceedings should be required to establish DCRF formula inputs for each settled rate case as contrary to the statute and fundamentally inconsistent with its purpose. Electric Utilities stated that while OPC lists five utilities for which it believes at least some of the necessary inputs for the DCRF formula are not available, Electric Utilities do not share OPC's or the State Agencies' concerns because the statute grants the commission discretion on how the incremental distribution investment and the related costs are to be determined. Electric Utilities stated that, with regard to the allocation of costs for the DCRF, all that the statute requires is that it be determined "consistent with the manner in which costs for invested capital...were allocated to each rate class, as approved by the commission," in the utility's most recent comprehensive base-rate case. Because each settlement and the current circumstances faced by each utility are unique, Electric Utilities addressed the concerns separately for each utility as follows:

Texas-New Mexico Power Company (TNMP) submitted that all of the inputs can be determined from the settlement documents and supporting workpapers from its last comprehensive base-rate proceeding. TNMP filed separate reply comments on this issue that explains its position in detail.

Entergy Texas, Inc. (ETI) submitted that, while not conceding any merit to OPC's claim, the issue can be resolved by scaling the utility's last filed base-rate revenue requirement to the settlement-level revenue requirement. The first step would be to apply any items actually stated in the settlement *(e.g.,* rate of return on equity) to the utility's last filed cost of service study to derive a "base" revenue requirement starting point. The next step would be to compare that base revenue requirement to the settlement revenue requirement for any rate class. The resulting difference, stated as a percentage, would be applied to discrete items in the base revenue requirement to derive the proxy for that item based on the settlement level revenue requirement.

El Paso Electric Company (EPE) stated its belief that, because of the recent completion of one combined-cycle generating unit and the construction of a new combustion turbine, which have not been included in base rates, it does not anticipate it will request a DCRF before filing a comprehensive base-rate proceeding. EPE stated that, consequently, when it requests a DCRF, the required inputs for the DCRF formula will be available. EPE stated that, in the unlikely event EPE does seek a DCRF prior to another comprehensive base-rate proceeding, it submits that, like ETI, while not conceding any merit to OPC's claim, the issue can be resolved by scaling the utility's last filed base-rate revenue requirement to the settlement-level revenue requirement.

Southwestern Electric Power Company (SWEPCO) stated that it plans on filing and concluding a comprehensive base-rate proceeding prior to the time it would consider filing for a DCRF. Consequently, when SWEPCO request a DCRF, the required inputs for the DCRF formula will be available.

Electric Utilities expressed the position that, after considering these individual replies, the commission can reject the concerns of OPC and State Agencies and adopt the proposed rule, but that in any event, the commission should reject OPC's suggestion that utilities with settled rate cases must litigate a contested case to determine allegedly missing DCRF formula factors before seeking a DCRF. Electric Utilities stated that nothing in the statute contemplates a rule that would effectively penalize utilities that have achieved a negotiated resolution of their most recent rate case. Electric Utilities stated that, in sum, the proposed rule requires no modification to address a supposed gap between the DCRF formula and the data available from utilities who settled their most recent base-rate cases. Electric Utilities commented that the data need only be reasonably derived from the settlement and consistent with the cost allocation approved in the settlement. Electric Utilities submitted that these data are available and can be elicited and appropriately reviewed in DCRF proceedings.

TNMP commented separately on OPC's and State Agencies' suggestion that the proposed DCRF formula requires data that will not be available for utilities that have resolved their last comprehensive base-rate proceeding by a "black box settlement." TNMP stated that all the DCRF formula components that refer to the utility's "last comprehensive base-rate proceeding" can be directly identified in, or readily derived from, the settlement stipulation approved by the commission in TNMP's most recent base-rate case, Docket Number 38480, and that no change to the formula is warranted. TNMP argued that, in all events, OPC's suggestion that utilities who have settled their most recent comprehensive base-rate case should be required to conduct contested-case proceedings to establish DCRF formula inputs, as a prerequisite to applying for a DCRF, must be rejected as contrary to the statute and fundamentally inconsistent with its purpose.

TNMP asserted that, in its most recent comprehensive base-rate case, all the formula inputs, if not found directly in the utility's approved settlement documents, can be determined "consistent with the manner in which costs for invested capital...were allocated to each rate class, as approved by the commission." TNMP stated that is what the statute requires, and the proposed rule requires no more, and that all these DCRF factors are specifically set out in the commission-approved settlement resolving TNMP's case, with the class-specific amounts to be used in the DCRF formula readily available.

TNMP stated that nothing in the statute authorizes a rule that would limit use of DCRFs to utilities with contested-case orders or with settlements that specifically set out each of these values. Rather, the statute requires, and the rule allows for, determination of class-specific amounts "consistent with" the class allocations applied in the most recent comprehensive base-rate case, whether it was resolved by settlement or order. TNMP stated that, in its recent case, the settlement Stipulation included agreement "on the allocation of the base rate increase as reflected in the schedule attached hereto and incorporated by reference in Appendix B." The Stipulation continued that "Exhibit B is provided for the limited purpose of defining the agreed class allocations and the total dollars allocated to each class." TNMP commented that the commission's Final Order approving the settlement recognized that the parties had agreed that the base-rate increase would be "allocated and implemented through the customer class allocations shown on Exhibit B to the stipulation." Exhibit B to the Stipulation spreads the agreed Texas retail cost of service across the several rate classes. TNMP asserted that all the necessary calculations for determining the formula's inputs are shown in TNMP workpapers, and these workpapers are straightforward, subject to independent replication, and available and subject to review in a DCRF proceeding, and these calculations include class-specific allocations for all the categories required under the DCRF formula. TNMP provided copies of schedules from its last rate case affirming these points.

TNMP commented that OPC's suggestion that utilities who have settled their most recent rate case should be required to litigate a contested case to determine allegedly missing DCRF formula factors, before they can seek a DCRF, is an outlier proposal that would stand on its head a statute designed to streamline ratemaking. TNMP commented that nothing in the statute contemplates or authorizes a rule that would limit the DCRF in this fashion, which would effectively penalize utilities that have achieved a negotiated resolution of their most recent rate case. Such a rule would be extraordinarily bad policy--discouraging the settlement of comprehensive base-rate cases--and it would run contrary to the statute, which makes no mention of the new species of contested cases proposed by OPC and requires only that the adjustment be consistent with the cost allocation approved in the utility's most recent rate case. TNMP stated that the proposed rule does not require use of data that is unavailable to utilities who have settled their most recent rate case, at least as long as the rule comes with a clear directive from the commission that it be interpreted and applied reasonably, as outlined above.

Commission Response

The commission disagrees with OPC that, before an electric utility with a settled comprehensive base-rate proceeding applies for a DCRF, a contested-case proceeding should be required to establish DCRF formula inputs. Such a requirement would be inconsistent with PURA §36.210(a)(1)'s requirement that a DCRF be approved or denied in accordance with an expedited procedure. The commission has added a provision to subsection (d)(1) that states that, if an input to the DCRF formula from the last comprehensive base-rate proceeding is not separately identified in that proceeding, it shall be derived from information from that proceeding.

Section 25.243(d)(2): Return on Invested Capital

Electric Utilities contended that the rule's requirement that 10% be used as an alternative to a utility's commission-approved return on equity (ROE) that is over three years old and greater than 10% should also apply to commission-approved equity costs that are less than 10%. Electric Utilities further suggested that rather than 10%, the alternative ROE should be determined as an average of the last three ROEs approved by the commission.

CEP, COH, State Agencies, CORE, Oncor Cities, OPC, and TIEC all disagreed with Electric Utilities. CEP stated that the commission should reject Electric Utilities' suggested change to 10% rate of return because it makes the alternative more arbitrary. The suggested change does not consider the scope of operations, size, or capital structure of the companies whose rates of return it would have as proxies for the filing company, nor does it consider the timing of the comparable companies' rate cases, if the companies are subject to any special circumstances, whether they have a decoupling mechanism, and other factors. CEP also commented that the return on invested capital provisions of the proposed rule rely excessively on prior decisions of the commission and on reports that the commission requires to be filed by an electric utility. In CEP's case, this could have resulted in a cost of debt that was almost three years old. CEP stated that the rule should require references to a more-current, embedded cost of debt and capital structure.

COH asserted that the proposed rule's provisions for determining return on invested capital should be retained without change because a utility is required by its fiduciary duty to apply for an increase in rates whenever it is not being fully compensated for its cost of service. Further, a utility's not filing a rate case for three years in most cases would be a reliable indication that the utility has determined its ROE is equal to or lower than the lower of 10% or the last ROE approved for it by the commission. COH commented that this approach is especially appropriate in regard to the DCRF rule, because the rule will promote timely recovery of costs, a factor which would lower ROE.

COH also disagreed with Electric Utilities that the 10% ROE is arbitrary and unlikely to represent an appropriate ROE over time, because 10% is supported by the commission's recently allowed ROEs. The commission authorized CenterPoint and TNMP ROEs of 10% and 10.13% respectively in their most recent rate cases. COH commented that the 10% allowance for ROE is also supported by the 9.80% average ROE for electric-delivery service allowed by state commissions during the first half of this year. COH further pointed out that the difference between this last 9.80% average and 10.24%, which is the allowed average ROE for *all* electric utilities during the same period, is 44 basis points. Subtracting 44 basis points from 10.40%, the average ROE allowed for *all* electric utilities from 2005 through June 2011, results in a ROE of 9.96% for *electric-delivery* companies. COH contended that future economic activity and capital costs are generally expected to be comparable to or lower than those prior to 2005, which would make the 10% ROE unlikely to be too low an approximation of the cost of common equity capital for electric distribution service in the future.

State Agencies contended that the averaging approach proposed by Electric Utilities would not be appropriate because it would rely on approved ROEs that could be older than five years. State Agencies expressed the belief that the Legislature implied five years would be an acceptable interval between rate cases before information would need to be updated in a base-rate case. State Agencies recommended that any utility seeking its initial DCRF must have had its ROE in a base-rate case determined by the commission within a certain period of time before making that request in order that the process of updating avoid the "moving target" aspect of adjustment requests

filed more than three years after the prior rate decision. In the case of the proposed rule, State Agencies recommended the five-year time period it believes is supported by statute.

CORE disagreed with Electric Utilities that averaging the last three ROEs approved by the commission in base-rate proceedings would result in an appropriate determination of a utility's ROE for calculating a DCRF, because the number of separate tariffs a utility may file to increase various rates between base-rate cases makes it questionable how often utilities will file base-rate cases. CORE also advised that the ROEs approved by the commission are inappropriate for the proposed rule because they are utility-specific, and averaging three of them does not sufficiently mitigate the utility-specific aspect to make the average accurate for the rule's purpose.

Oncor Cities maintained that ratepayers should be given the benefit of a previously authorized rate of return that is below the rule's alternative rate of return because a utility's authorized rate of return is specific to that utility and may recognize more favorable risk factors appropriate for that utility. Oncor Cities further held that Electric Utilities' proposed change may create a loophole whereby utilities could recover additional distribution costs at a higher rate of return than the rate of return used to determine excess earnings in the earnings monitoring report. Oncor Cities stated that Electric Utilities' proposal to use the average cost of equity adopted by the commission in the previous three electric-utility base-rate cases is susceptible to misuse and should be denied in favor of provisions of the proposed rule. Oncor Cities opined that misuse of Electric Utilities' proposal may occur because one of the three previous comprehensive base-rate cases were associated with utilities that were not comparable to the utility filing the DCRF application or because the cases were settled without an explicit ROE or with terms limiting their applicability as precedent. Excluding settled cases could result in inappropriately old rate case decisions being part of the average. Oncor Cities also stated that, if the three utilities used to develop an average rate of return are themselves subject to the alternative return, there would be illogical results and that the required rates of return of electric utilities should be recognized as lower after the rule goes into effect because all current authorized rates of return incorporate investors' assumptions that an electric utility in Texas cannot obtain rate recovery for new distribution investment until a final order is entered in the utility's next full base-rate case.

TIEC supported the comments by Oncor Cities, noting that the reduction to utilities' risk actually occurs at the time they are able to implement a DCRF, which is prior to the time their reduced risk would be considered in a base-rate proceeding. Given this dynamic, TIEC expressed its support for Oncor Cities' proposal to impose a presumed 25 basis point reduction to the utilities' rates of return and Oncor Cities' proposed changes to §25.243(d)(2).

Walmart cited other jurisdictions that have made specific ROE adjustments to recognize the effects of implementation of revenue assurance mechanisms: Maryland Public Service Commission reduced Potomac Edison's ROE by 50 basis points; Montana Public Service Commission reduced NorthWestern Energy's ROE by 25 basis points; and the Public Utility Commission of Oregon reduced Portland General Electric ROE by 10 basis points.

Walmart also cited several state commissions that have accounted for revenue assurance mechanisms in setting the utility's ROE but did not provide a specific adjustment in their orders. Walmart commented that the rule's methodology for setting the rate of return for an electric utility whose rate of return was approved more than three years before the DCRF application should be required for all DCRF applications. Walmart contended that this would recognize the revenue assurance and risk reduction provided by implementation of the DCRF.

OPC stated its belief that the alternative method in the proposed rule clearly recognizes that rates of return have decreased over recent history, is a more reasoned approach than that suggested by Electric Utilities, and is a good compromise among the various parties' positions. OPC commented that a proceeding to establish rate of return may be necessary if a utility has no authorized rate of return. CEP opined that OPC's recommendation has merit because, although proposed rule is a reasonable compromise in circumstances in which no rate-case finding has occurred for some period of time, it is often true that there has been no recent rate-case decision upon which to establish the rate of return. CEP also commented that earnings reports do not always reflect a company's current capital structure and cost of debt.

Electric Utilities maintained that the State Agencies' concern about possible uncertainty about the information needed to ascertain the rate of return under Electric Utilities' alternative return proposal is misplaced because the information is readily available and can be easily applied. Electric Utilities advised that the State Agencies' recommendation that the commission require utilities seeking their initial DCRF to have had their ROEs determined in a comprehensive base-rate case should be rejected if the State Agencies mean a litigated outcome, as it is in the interest of the commission, the parties, and ratepayers for parties to settle cases when possible. Electric Utilities also contended that a comprehensive base-rate case, litigated or settled, is not necessary for a utility to qualify for a DCRF because the alternative rate of return in the rule ensures that utilities cannot continue to use rates of return that may have grown stale with the passage of time.

Electric Utilities stated that Walmart does not provide adequate support for its recommendation that the commission adopt the alternative proposal in the rule for all DCRF applications, regardless of how recently the commission approved the utility's rate of return. Electric Utilities submitted that Walmart had not adequately demonstrated that the circumstances of the decisions it cites in other jurisdictions that have reduced a utility's ROR for the effects of "revenue assurance programs" are comparable to the circumstances in which the proposed rule is to be applied. Electric Utilities also commented that Walmart provided no reason to believe that the alternative rate of return proposed in the rule is a better proxy for a utility's required return than a recent rate of return awarded by the commission.

Commission Response

The commission declines Electric Utilities' recommendation to use an average of the last three ROEs approved by the commission. CEP, CORE, and Oncor Cities all correctly pointed out that the averaging method favored by Electric Utilities has no provision for ensuring comparability between the utility whose ROE is being determined and the utilities used in the averaging. In addition, the commission declines Electric Utilities' proposal to use the alternative rate of return even when it is higher than an electric utility's rate of return that was approved in its last comprehensive base-rate proceeding. This proposal would risk allowing the utility to over-earn. In contrast, if the alternative rate of return is lower than the utility could demonstrate, it has the

right to initiate a comprehensive base-rate proceeding in which its rate of return would be re-determined.

The commission disagrees with CEP's request to use more current, embedded cost of debt and capital structure. Using the capital structure approved by the commission in the electric utility's last comprehensive base-rate proceeding is appropriate, because the commission determined that the capital structure was reasonable, and the utility's capital structure is unlikely to change much over time. An electric utility's cost of debt is rarely an issue, so using its cost of debt as reported in the electric utility's most recent earnings monitoring report is appropriate.

For the reasons discussed below concerning subsection (g), the commission declines the suggestions of Walmart, Oncor Cities, and TIEC to impose a specific ROE adjustment to recognize the effects of implementation of a DCRF.

Section 25.243(e)(1): Procedures for DCRF or DCRF Update Proceeding--Filing Requirements

CORE commented that in addition to a sworn statement by an employee of an electric utility filing an application for a DCRF filing, the electric utility should be required to provide supporting documentation with its initial filing. CORE requested that the electric utility be required to also file schedules and supporting workpapers in their native, electronic, and searchable format sufficient to support the electric utility's application, as well as its more recent earnings monitoring report, updated to within 90 days of the filing to allow parties to more quickly and efficiently review an application and to demonstrate that the electric utility's application should be denied pursuant to subsection (e)(4).

Commission Response

Subsection (e)(1) lists the requirements in PURA §36.110 for a DCRF application and requires use of the commission-prescribed application form. The commission is developing the DCRF application form in Project Number 39466, and will address in that project issues concerning what information must be included in a DCRF application. As discussed above concerning subsection (b)(3), the commission has changed subsection (e)(1) to require that the sworn statement included with a DCRF application expressly state that the costs included in the DCRF comply with PURA §36.058. The commission has also required that the statement expressly state that the costs comply with PURA §36.053 and, as discussed below concerning subsection (e)(5), expressly state that the costs are prudent, reasonable, and necessary. As discussed below concerning subsection (e)(4), the commission has also added to subsection (e)(1) a requirement that an electric utility include in its application an earnings monitoring report for the immediately preceding calendar year prepared in accordance with §25.37(b) of this title.

Section 25.243(e)(2): Notice and Intervention Deadline

CORE submitted that the proposed rule's requirement for an electric utility to provide notice of an application for a DCRF filing to all parties in its last comprehensive base-rate proceeding, and if applicable, last DCRF update or DCRF update proceeding, by the day after it files its application, is not sufficient, both in manner of service and the identified recipients. CORE stated that the rule should specify that notice must be mailed to all parties in the electric utility's last base-rate proceeding or DCRF proceeding to ensure parties can know how notice will be provided and the commission can determine when service was completed; additionally, the rule should also require notice of the proceeding before the commission, including the docket number for the new proceeding, to be mailed to all municipalities in the electric utility's service territory at least two weeks (14 days) prior to the electric utility's DCRF filing. CORE stated that early provision of notice to all municipalities within the electric utility's service area, similar to early notice provided to municipalities in a general major rate case, will notify municipalities exercising original jurisdiction of the docket in which the application before the commission was filed and will allow all municipalities to take the necessary steps to timely intervene in the proceeding.

Electric Utilities replied that CORE's requests that notice be provided by mail and that the municipal authorities be provided 14 days' advance notice of the filing should be rejected. Electric Utilities pointed to CORE's comment concerning the need that notice be given by mail "to ensure parties can know how notice will be provided and the commission can determine when service was completed," and replied that it is not clear why it is necessary for parties to know how they will receive notice. Likewise, Electric Utilities commented that they routinely provide proof of notice and are unaware of any particular controversy regarding establishing the timing of when notice was served. Electric Utilities noted that given that these proceedings are intended to be expedited, rather that restricting notice to a centuries-old method that requires the use of paper, the rule should provide flexibility and allow notice of the filing to be given by email, which is widely used for conducting business. Electric Utilities noted that in some places, the commission rules already recognize this--for instance, the rule for revision of a fuel factor pursuant to a formula requires that a copy of the filing be served by email. Electric Utilities commented that CORE's suggestion that municipalities by notified 14 days in advance of a filing so that the municipalities can "take the necessary steps to timely intervene in the proceeding," is unnecessary and adds an unnecessary additional burden to a DCRF filing. Electric Utilities stated that the circumstances that call for the advance notice in a general rate proceeding do not exist with a DCRF filing, given that in a general rate proceeding, once the advance notice is given, the municipality has 30 days to elect to receive a copy of the statement of intent, and the utility is required to provide the statement of intent to only those municipalities that request one. Because the statement of intent in a general rate proceeding is typically a very large filing comprising several file boxes, the advance notice/municipal election process avoids the wasteful process of providing boxes of information to municipalities that do not want them. Electric Utilities noted that the DCRF filing will be much more abbreviated, so it is unnecessary to go through this additional step. Electric Utilities stated that providing notice by the day after the filing, as required by the proposed rule, should be more than adequate to allow the municipality to take the necessary steps to intervene in the PUC's proceeding.

Commission Response

The commission declines to make any changes. The rule should permit reasonable methods of notice that are more efficient than first-class mail. In addition, requiring advance notice to cities would place an unnecessary burden on an electric utility. If a city was a party in the electric utility's last comprehensive base-rate proceeding or DCRF proceeding, it will receive notice at the same time as the other parties in those proceedings. If a city exercises original jurisdiction over the utility's rates, the utility will file its DCRF application with the city at the same time that it files with the commission.

Section 25.243(e)(4): Denial Due to Earnings

COH recommended, and OPC and CORE agreed, that the rule should clearly indicate that the commission correction to the rate of return is to the earned rate of return rather than the allowed rate of return. To that end, COH provided amended rule language consistent with its recommendation.

TIEC, CORE, COH, OPC, and Oncor Cities indicated support for an improved earnings monitoring report (EMR) and process, and up-to-date reports to support DCRF updates. TIEC stated that it does not believe that the currently instituted EMRs provide an adequate tool for assessing a utility's current revenues. TIEC therefore recommended, and CORE agreed, that the commission make clear that a substantially revised and enhanced earnings monitoring process is needed. TIEC suggested that the reduced frequency of base-rate cases and the cost recovery contemplated in this rule will make the earnings monitoring process more critical to ensuring that utilities are not over-recovering. CORE suggested that the rule must contain all necessary provisions to ensure that an up-to-date EMR is available to assess whether the electric utility is earning more than its authorized rate of return at the time that it files its DCRF filing. To that end, CORE recommended that the rule specify that commission consideration of an electric utility's DCRF filing is contingent upon the filing of an updated EMR within 90 days of the DCRF filing. CORE provided redlined rule language consistent with its recommendation, which TIEC supported. Oncor Cities argued, and CORE agreed, that the usefulness of the EMR as a guide to whether the utility is overearning is significantly impaired unless the report is filed in conjunction with the DCRF application. Oncor Cities recommended rule language that requires utilities to file their EMRs in conjunction with their April DCRF application to the extent they do not already have an EMR on file for the year ending December 31 prior to the April DCRF filing. TIEC indicated support for both the CORE and Oncor Cities' approaches. OPC indicated support for Oncor Cities' approach.

Electric Utilities recommended, and OPC agreed, that the proposed rule make clear that the EMR shall not be litigated in the DCRF proceeding. Electric Utilities argued that litigation of the EMRs would transform DCRF proceedings into comprehensive base-rate proceedings and would prevent the commission from processing an application in an efficient manner as required by statute. Electric Utilities explained further that combining the review of the EMR with the review of the DCRF creates the potential for abuse, considerable uncertainty, and cost to consumers. Electric Utilities proposed language consistent with these points.

CEP, Oncor Cities, COH, TIEC, and CORE recommended that the commission reject Electric Utilities' proposal to revise language relating to the EMR to reflect that the EMR is not subject to review in a DCRF proceeding. CEP argued that the report must be subject to some review because the report may reflect issues that are not considered in the ratemaking process *(e.g.,* expenses which may be disallowed for ratemaking purposes, or non-recurring expenses or charges). Oncor Cities pointed to PURA §36.210(g)(4), which requires the "denial of the electric utility's filing if the electric utility is earning more than the utility's authorized rate of return on investment...at the time the periodic rate adjustment request is filed." Oncor Cities noted that Electric Utilities propose to bar any review of their EMRs in their DCRF cases without explaining how the resulting process will ensure that utilities are not over-earning "at the time the periodic rate adjustment request is filed" in accordance with the statute. Oncor Cities reiterated that parties must be able to review Electric Utilities' EMRs and to propose adjustments as necessary. Oncor Cities believed that the proposed rule already includes constraints that are intended to restrain litigation in a DCRF filing, including discovery limitations and a short timeline for approval, and that such limitations will not significantly burden a DCRF filing. COH stated that the Legislature recognized the importance of the EMR as a tool in the DCRF process, and clearly indicated that the utility's DCRF application must be rejected if the utility is over-earning as measured by a valid EMR. CORE disagreed with the recommendation by Electric Utilities to preclude review of a utility's EMR in a DCRF filing because it would restrict the commission's ability to ensure that a utility is not earning more than its authorized rate of return at the time of filing a DCRF, consistent with PURA §36.210(g)(3) and (4). TIEC argued that because the EMRs will be used to determine whether a utility can implement a DCRF, parties must be given an opportunity to vet utilities' EMRs and to ask discovery regarding the assumptions that go into those reports.

OPC disagreed with CEP, Oncor Cities, COH, and CORE that an evaluation of the EMR should be included in a DCRF case.

Electric Utilities disagreed with several parties that urged the commission to address issues related to the EMR that will be used to determine whether a utility is over-earning. Electric Utilities stated their belief that the commission is currently planning to revise the language of §25.73, the rule that governs EMRs; therefore, Electric Utilities argued that the commission should defer consideration of any changes to the EMR filing requirements in this proceeding and address those issues in the EMR rulemaking. Electric Utilities opined that revising the EMR requirements on a piecemeal basis in different rulemaking projects may lead to inconsistent requirements and unintended consequences. OPC agreed with Electric Utilities that suggested improvements to the EMR process should be handled outside this DCRF rulemaking proceeding in a comprehensive review of the EMR requirements under §25.73(b).

State Agencies argued that restricting the commission from reviewing an EMR where it may be appropriate is ill-advised because the commission has the duty to review a previously approved DCRF not just for prudence and reasonableness of the underlying costs, but to refund any amounts that were "improperly recovered" through the DCRF. State Agencies believed that such commission oversight would not equate to re-litigation of the EMR.

State Agencies, CORE, and OPC concluded that an electric utility that intends to seek a DCRF should not be entitled to a waiver of the requirement to file an EMR because the EMR is critical to the assessment of a utility's qualification for a DCRF.

COH suggested rule language that expressly extends to a municipality the authority to deny a DCRF application due to overearnings.

Commission Response

PURA §36.210(g)(4) requires that the commission deny a DCRF application if the electric utility is earning more than its authorized rate of return at the time the application is filed. Thus, determining whether the utility is over-earning is a key issue with respect to a DCRF. Therefore, parties in the DCRF proceeding should be allowed to participate in that determination.

PURA §36.210(g)(3) contemplates that the commission will use an EMR to make this determination. As a result, the commission has added to subsection (e)(1) a requirement that an electric utility include in its DCRF application an EMR for the immediately

preceding calendar year prepared in accordance with §25.37(b) of this title.

The commission agrees with COH, OPC, and CORE that the rule should clearly indicate that the commission's correction of the rate of return in the EMR is to the earned rate of return rather than the allowed rate of return, and changes the rule accordingly.

The commission agrees with TIEC, CORE, COH, OPC, and Oncor Cities that the EMR form and process should be updated. The commission has opened Project Number 39040 for this purpose.

The commission declines COH's recommendation to expressly extend to a city the authority to deny a DCRF application due to over-earnings. PURA §33.004(b) states that a city may exercise the same regulatory power under the same standards and rules as the commission.

Section 25.243(e)(5): Scope of Proceeding

Electric Utilities, COH, and TIEC commented on the scope of the DCRF proceeding and voiced concern over the language in the proposed rule that allows the prudence of a particular cost to be examined in a DCRF proceeding "for good cause." Electric Utilities submitted that in order to ensure a timely and efficient process, the rule should not allow parties to expand the scope of a DCRF proceeding by litigating the reasonableness of the investment in the DCRF proceeding. They argued that reconciliation of the distribution investment should mirror the TCOS process and take place in the utility's next comprehensive base-rate proceeding, stating that the portion of the proposed rule that would allow the presiding office to transform a DCRF proceeding into a prudence review creates the potential for abuse, considerable uncertainty, and cost to consumers. In addition, Electric Utilities contended that opening the DCRF proceeding up to a review of prudence would necessarily mean that electric utilities would be required to develop testimony on the prudence issues raised, which would necessarily lengthen the DCRF process and jeopardize the expedited timeline. COH agreed that the good cause exception makes the scope of the proceeding uncertain and could result in additional complexity that is beyond the scope of limited proceedings to address. Both Electric Utilities and COH proposed that the portion of the proposed §25.243(e)(5) after the word "update" be deleted.

TIEC commented that given the abbreviated time frame and discovery procedures contemplated for the DCRF, it supported reserving prudence review until the utility's next base-rate proceeding. TIEC stated concern that subsection (e)(5) opens the door to allowing utilities to seek prudence review of a particular cost under the truncated DCRF procedures and bypass the more rigorous review that would occur in a rate proceeding. TIEC recommended that subsection (e)(5) be clarified to allow prudence review for a particular cost only upon request by a *non-utility* party to the proceeding. Additionally, TIEC stated that if the presiding officer allows prudence review for good cause, the discovery limitations in subsection (e)(6)(B) should no longer apply given the expanded issues.

Electric Utilities commented that TIEC's proposal to modify this section to allow the scope to be expanded only upon the request of a non-utility is an unworkable proposal and should be rejected. Electric Utilities argued that an electric utility needs to know before the filing whether it will be expected to present evidence and testimony to support the prudence, reasonableness, and necessity of its costs. If the electric utility will be at risk in each case of the scope being expanded, necessarily the electric utility will have to make it a routine practice to address, prudence, reasonableness, and necessity in every filing, and this will increase the costs, diminish the efficiency of the process, and ultimately result in greater costs to the customers.

OPC agreed that litigating whether requested additions to distribution invested capital are prudent, reasonable, and necessary in a DCRF case complicates the case and could interfere with the processing of the DCRF application within the time period contemplated in the proposed rule. OPC recommended that the commission remove consideration of whether requested additions to distribution invested capital are prudent, reasonable, and necessary from the scope of the DCRF case and reserve these issues to the utility's forthcoming base-rate case. OPC contended, however, if the commission should decide to allow litigation of these issues in a DCRF case, then the commission should revise subsection (e)(5) of the rule to allow these issue to be litigated in a DCRF case only if a non-utility party in the case requests that the issues be litigated in the DCRF case and shows good-cause for doing so, as TIEC recommended. OPC further argued that if the prudence issues are litigated in a DCRF case, OPC urges the commission to remove the discovery limitations in subsection §25.243(e)(6)(B), at least in regard to the particular DCRF case due to the expansion of the issues to be litigated. CORE agreed with Electric Utilities and COH and recommended that no "good cause" exception be included in the rule in order to provide certainty as to the scope of the proceeding. However at a minimum, CORE stated that TIEC's proposed revisions should be accepted.

Commission Response

The commission has retained the good-cause exception for a reconciliation in a DCRF proceeding. The commission expects to use this provision rarely, if ever. However, there could be a circumstance, for example, where the commission is sufficiently concerned about an electric utility's actions related to distribution invested capital that it feels the need to review those actions before allowing recovery of the invested capital. Under the rule, such a review is allowed only if the presiding officer finds that good cause exists to do so. In such a case, the utility would be given time to prepare direct testimony addressing the issue and good cause would exist to allow additional discovery and extend the timeline for the proceeding. The commission has also changed subsection (e)(1) to require that the sworn statement included with a DCRF application expressly state that the costs included in the DCRF are prudent, reasonable, and necessary.

Section 25.243(e)(6)(B): Discovery

Electric Utilities supported the commission's streamlining the DCRF process by placing parameters on discovery, because the proposed parameters are consistent with PURA §36.210(g)(2), regarding the adoption of rules that expedite procedure; they are commensurate with limiting the scope of the process; and, they prevent unnecessary expense and burden on the commission of processing a DCRF rate change. Electric Utilities contended that by specifically requiring the commission to adopt a rule providing for "discovery consistent with the expedited procedure," it is clear that the Legislature intends the commission to adopt some type of limitation on discovery. Electric Utilities maintained that the limit of 20 requests for information should apply to all questions, including objectionable requests, and it should also be made clear that if an objection to a request for information is sustained that does not mean the party can make an additional request.

CEP advised that Electric Utilities' restrictions for the proposed rule are too stringent and that the rule's provision that questions for which an objection is filed should not be counted should remain. CEP stated that the number of discovery questions per party including subparts needs to be expanded substantially. CEP pointed out that parties may seek limitations on discovery from the presiding officer and advised that depositions should be permitted as they are in other cases.

OPC, CORE, and State Agencies contended that the rule should specify that a discovery request to which an objection is filed or a motion to compel because the utility's answer is non-responsive is filed does not count against a party's request limit. Oncor Cities maintained that, if these requests for information (RFIs) count against whatever RFI limit the commission may adopt, Electric Utilities will have every incentive to object as widely and often as possible in the hope that some of the objections have merit. Oncor Cities submitted that such an incentive is inconsistent with an expedited procedure, and recommended that the commission reject Electric Utilities' recommendation on this point.

Oncor Cities stated that a limitation of 50 RFIs and requests for admission would be more meaningful than 20, which the proposed rule would allow. A limitation of 20 would encourage insufficient or ambiguous answers, which would be safe from full follow-up discovery. Oncor Cities additionally stated that requests for more discovery would likely be opposed, which would consume limited time for evaluating the utility's application and that limiting RFIs and requests for admission to 20 could render the discovery process futile, which would be inconsistent with the specific provision for discovery in a DCRF/DCRF update proceeding made by PURA §36.210(g)(2). COH made similar comments.

State Agencies contended that the proposed rule imposes limits on the number and form of RFIs that are unnecessary and premature. State Agencies commented that if the rule is to depart from existing discovery practice, it should address discovery abuse by utilities as well as by other parties. State Agencies agreed that commission staff should not be limited in any further information it seeks from the electric utility, and proposed a separate section of the rule be added to emphasize this. State Agencies recommended that failure of the electric utility to make full disclosure of requested information should be grounds for denying the DCRF request in whole or in part.

State Agencies maintained that there is no indication that other states that have interim rate recovery mechanisms in place have found it necessary to so restrictively limit discovery by rule. State Agencies recommended that the commission consider that limiting the number and structure of discovery requests undercuts the statutory directive to foster public participation and that there are already rules in place should discovery become abusive or duplicative. State Agencies also advocated the elimination of voluminous rooms and remote availability of information because PURA §36.210 proceedings are expedited and current technology for production of requested information can make its acquisition faster.

CORE disagreed with the proposed rule's limitation of the number of discovery requests because it is still unknown what information an electric utility will provide with its initial filing. CORE also recommended that the commission keep in mind that the absence of a prudence review already reduces the need for discovery, any discovery limitation that is imposed should not preclude the inclusion of subparts or multiple questions, and there should be no limitation of requests for production because they would only be necessary if the electric utility does not properly document its requested rate change.

OPC maintained that expediting the DCRF cases by limiting the principal form of discovery for intervenors is not consistent with the Legislature's intent in Senate Bill 1693, and the amount of discovery that can be conducted is already indirectly limited by the time limitation of an expedited proceeding. OPC did not consider commission staff's argument citing limitations placed on interrogatories in the federal rules as similar to those of this proposed rule as appropriate because the principal method of discovery under the federal rules is depositions and, in cases before the commission, requests for information and admissions are the principal forms of discovery for intervening parties, which have limited budgets. OPC also commented that technical conferences are useful but are inadequate substitutions for requests for information and admission because submitting information acquired through technical conferences as evidence is cumbersome.

Walmart maintained that the proposed discovery limits severely limit the ability of parties other than staff to contribute to the development of a robust and transparent examination and complete record.

Electric Utilities disagreed with State Agencies that it is bad public policy to impose numerical restrictions on discovery questions, because the State of Texas has had discovery limitations in civil suits in place for years. Electric Utilities responded to various commenters' objections to the proposed rule's policy about question subparts by noting that Texas rules of civil procedure specifically state that "(e)ach discrete subpart of an interrogatory is considered a separate interrogatory." Similarly, Electric Utilities responded to various commenters' objections to limitations on depositions by noting that limitations on depositions are also found in the Rules of Civil Procedure. Electric Utilities considered the following other factors to be significant in determining whether the rule unnecessarily limits discovery: DCRF revenues would be subject to refund in a subsequent reconciliation proceeding, the proposed rule explicitly allows a single technical conference, staff would not be subject to any discovery limitations, and other parties' could request additional discovery upon a showing of good cause. Electric Utilities provided a chart that supports the proposed discovery limitations being reasonable by showing that after the first few interim TCOS filings, a process similar to the DCRF filings, the number of intervenors and the number of discovery questions fell to zero.

Electric Utilities also opposed State Agencies' suggestion that the rule provide that voluminous discovery responses be provided on CD or DVD and suggested that the commission not impose additional discovery burdens on utilities in what is designed to be an expedited proceeding.

Commission Response

PURA §36.210(g)(2) requires that the commission adopt a DCRF rule that addresses "discovery consistent with the expedited procedure" required by PURA §36.210(a)(1). This provision contemplates that the DCRF rule will impose discovery limits. The discovery limits in the proposed rule are appropriate because the form for a DCRF application will require that the electric utility include extensive information as part of its application; the scope of a DCRF proceeding is narrow; and the costs recovered through the DCRF will be reconciled in the utility's next comprehensive base-rate proceeding.

The proposed rule provides that an RFI for which an objection is filed does not count towards a party's RFI limit. This provision provides appropriate incentives. Because of the expedited timeline for a DCRF proceeding, a utility could significantly impair an intervener's ability to conduct appropriate discovery by aggressively objecting to RFIs. Even if the objections were overruled, the RFI responses would be significantly delayed. Not counting objected-to RFIs towards the RFI limits provides a utility an incentive not to object to RFIs if it is unlikely to prevail on those objections. In addition, an intervener has an incentive not to ask irrelevant RFIs, because those RFIs would count toward the party's RFI limit if the utility does not object to them. In addition, the rule does not limit the number of RFIs from commission staff. Because there is no RFI limit on staff, the commission has changed the rule so that the numbering restrictions do not apply to staff.

With respect to Oncor Cities' concern about insufficient or ambiguous RFI responses, a party propounding RFIs should take care in the drafting of the RFIs to be clear what it is asking for. In addition, the commission expects the parties to work diligently and in good faith to resolve discovery issues. *See* §22.144(d). If necessary, the propounding party can file a motion to compel a sufficient response. The commission declines State Agencies' request that for DCRF proceedings the commission change the manner in which RFI responses are provided; the commission's existing procedural rules adequately address this issue.

Section 25.243(e)(6)(C): Consolidation of Appeals

As discussed above concerning subsection (c)(1), the commission has addressed consolidation of appeals in subsection (c)(1) of the adopted rule. Therefore, the commission has deleted proposed subsection (e)(6)(C).

Section 25.243(e)(6)(D): System-wide Rates and Effective Date of DCRF Filing

COH and CORE took issue with the term "system-wide rates." COH commented that the proposed subsection (e)(6)(D) contains terms that are inconsistent with the subsection heading reading "system-wide rates," while the text of the subsection requires the presiding officer to approve a DCRF on a "system-wide basis." COH argued that because PURA §36.210(a)(5) requires the utility to implement a DCRF on a "system-wide basis," the reference to "system-wide rates" should be stricken, as it is without basis in the enabling legislation. COH stated that "system-wide rates" and "system-wide basis" are not interchangeable and if the commission equates the two phrases, the result would be a direct conflict with a municipality's original jurisdiction over rates within its city limits. COH contended that if the commission were to impose a "system-wide rates" rule, it would effectively render the municipality powerless to set a DCRF within its own city limits, and the only valid DCRF would be beyond the city's jurisdiction to adopt. COH argued that a municipality may not be required to cede its original jurisdiction in conflict with PURA §33.002, and the plain purpose of PURA §36.210 may be accomplished by adopting a rule that allows the municipality to set, and the utility to implement, a DCRF on a "system-wide basis" to the fullest extent of its jurisdiction to do so, and that preserves the ability of the utility and municipality to settle a DCRF on mutually agreeable terms on a "system-wide basis" within the city limits.

CORE agreed, stating that proposed subsection (e)(6)(D) states that the presiding officer shall approve the DCRF "on a system-wide basis," and, further, the rule requires the electric utility to appeal the local regulatory authority's final "decision," regardless of whether the local regulatory authority approved or denied the application. Thus, irrespective of a municipality's final decision in regard to a DCRF filing, the municipality's decision will be appealed to the commission, consolidated with the applications already before the commission, and conformed to those applications over which the commission has original jurisdiction. CORE argued that just as the expedited timeframe for processing the DCRF filings erodes a municipality's right to exclusive original jurisdiction, the rule's required system-wide rates would render null and void any decision by a municipality, including approval or settlement, different from the commission's order in applications already before the commission as the regulatory authority with original jurisdiction. CORE stated that PURA §36.210 does not require system-wide rates, contending that it only requires the use of system-wide data to be used in determining rates, similar to the existing process in base-rate proceedings. CORE stated that system-wide "rates" are not mentioned, much less required by the bill, and therefore the proposed rule would limit a municipality's exclusive original jurisdiction over the rates of an electric utility in its city limits on the commission's own initiative and would be contrary to limits placed on the commission's jurisdiction by §32.002 and §33.001 and new PURA §36.210.

REP Coalition disagreed that the proposed rule's system-wide rate requirement will eliminate the jurisdiction of the local regulatory authority and that this is not required or authorized by PURA §36.210(a)(5). REP Coalition argued that PURA §36.210 requires that the DCRF be applied by an electric utility on a system-wide basis, and the system-wide rate obligation, as implemented in the proposed rule, does not impinge on the jurisdiction of the local regulatory because such obligation does not prevent the local regulatory authority from continuing to review and act upon rate filings made with them. REP Coalition contended that, instead, the proposed rule simply requires the utility to appeal to the commission any DCRF decision made by a municipality with original jurisdiction, and only through the appeal process outlined in the proposed rule can the utility meet its statutory obligation under PURA §36.210(a)(5) to implement the DCRF as a system-wide rate. REP Coalition stated that because the commission has original jurisdiction over rates that apply in areas outside the city limits of a municipality with original jurisdiction and also has jurisdiction to address appeals of decisions of a municipality's governing body, only the commission can approve a system-wide rate. REP Coalition submitted that by appealing a municipality's governing body's decision to the commission, as required by subsection (c)(1) of the proposed rule, the utility has the opportunity to meet the statutory obligation to apply the DCRF on a system-wide basis. REP Coalition asserted that if this system-wide rate obligation is not met, then the rate cannot go into effect because the terms required by PURA §36.210 for a DCRF would not be met.

REP Coalition additionally commented that system-wide utility rates are essential to enable REP Coalition to maintain consistent pricing plans across a utility's service area and reduce the complexity of the shopping experience for retail electricity customers. If utility rates that apply inside a municipality's city limits were to vary from those rates that apply outside the city limits, there would be a heavy administrative burden on REP Coalition to maintain many additional pricing plans, complicating price disclosure to potential customers. REP Coalition stated that the arguments put forth by CORE and COH to assert that system-wide rates are not required or authorized by SB 1693 are strained and incorrect interpretations of PURA §36.210(a)(5),

and that CORE revealed the weakness of its argument by suggesting that the phrase "periodic rate adjustment to be applied on a system-wide basis" is somehow the same as "system-wide data must be applied on a system-wide basis." REP Coalition argued that CORE's suggested interpretation completely ignores the term "periodic rate adjustment" in PURA §36.210(a)(5), and that a plain reading of PURA §36.210(a)(5) requires the utility to apply the "rate adjustment" (i.e., the new or updated DCRF rate) on a system-wide basis (i.e., across the utility's service area). REP Coalition contended that it is the rate--and not some other data as suggested by CORE--that must be applied system-wide. REP Coalition commented that COH's interpretation is no more convincing than the interpretation put forward by CORE. REP Coalition contended that because any DCRF must be applied system-wide to qualify for approval under PURA §36.210, the DCRF must be a system-wide rate. Although COH claimed that there is a difference between "system-wide" rates and "rates on a system-wide basis," arguing that "system-wide basis" should be interpreted as "system-wide rates, to the fullest extent of its jurisdiction to do so," REP Coalition stated that COH has added to the statute the words, "to the fullest extent of its jurisdiction to do so," but these words are not present in the statute and change the specific meaning of the provision. REP Coalition stated that where the Legislature wanted to provide the commission discretion, it knew exactly how to do so; for example, SB 1693 requires the commission to combine surcharges "to the extent possible." REP Coalition stated that with regard to implementing "rates on a system-wide basis," there are no such qualifying words, and thus the commission must assure that the DCRF is applied by the utility on a system-wide basis to give effect to the unambiguous language in the statute.

REP Coalition further commented that it is important to note that during the recent decade, in utility service areas where retail competition has been introduced, system-wide rates have been the norm, rather than the exception, and the reason for this outcome is partly because the commission's policies recognize that system-wide rates foster competition better than rates set on a patchwork basis throughout a utility's service area. REP Coalition commented that the system-wide rates are essential to REP billing systems and retail product design, and without system-wide application of an electric utility's DCRF, the costs of billing retail electric service will increase as both TDUs and REPs would have to extensively test billing systems to ensure that customers across various local jurisdictions are being charged the appropriate DCRF rate. REP Coalition submitted that 46 days is a sufficient period for REP Coalition to modify their contract documents and billing systems to incorporate and implement an adjustment in a TDU's DCRF, and the 46 days of "rate certainty" are critical for allowing a REP to time its retail price change with the effective date of a TDU's DCRF adjustment.

Electric Utilities commented that PURA §36.210(a)(5) states that a DCRF must "be applied by an electric utility on a system-wide basis," and consistent with that statutory language, proposed subsection (e)(6)(D) requires the presiding officer to approve DCRF rates "on a system-wide basis." Electric Utilities commented that they and REP Coalition support this provision of the rule because it is consistent with the statute and because it promotes uniformity of rates throughout a utility's service area. Electric Utilities contended that, on the other hand, CORE and COH assert the plainly mistaken argument that PURA §36.210(a)(5) does not require system-wide rates and say that subsection (e)(6)(D) must be revised to eliminate the requirement of system-wide rates. Electric Utilities commented that the simple answer to that argument is that the statute requires a DCRF to be applied on a "system-wide basis," and the only logical way to apply a DCRF on a "system-wide basis" is by setting system-wide rates. Electric Utilities disagreed with CORE's contention that the commission can comply with the statutory mandate to apply a DCRF on a system-wide basis by using "system-wide data" to determine the utility's requested rate changes, rather than by implementing a system-wide rate. Electric Utilities commented that under the actual language of PURA §36.201(a)(5), the DCRF rate itself must be applied on a system-wide basis, and because of the statutory directive that DCRF rates be instituted on a system-wide basis, the commission will necessarily have to consider each utility's DCRF application, regardless of how the individual municipalities rule on the application. Therefore, the commission's own internal review process need not wait for action by municipalities on the DCRF requests, and to ensure that the commission is not delayed by waiting for the appeals form municipal actions, the rule should provide for automatic appeals upon expiration of the 60-day time-period for municipal review. Electric Utilities commented that city groups also argued that the rule nullifies their original jurisdiction because the requirement of system-wide rates renders municipal decisions meaningless, but that that too is wrong, as nothing in the rule prohibits municipalities from engaging in discovery and holding hearings, if they choose to do so.

Commission Response

PURA §36.210(a)(5) requires that a DCRF "be applied by an electric utility on a system-wide basis." As indicated in subsection (d)(1) of the rule, a DCRF consists of rates that apply to the rate classes. Therefore, applying the DCRF on a system-wide basis means that a single DCRF for each rate class is applied on a system-wide basis. As explained by the REP Coalition, requiring that a DCRF be implemented on a system-wide basis is essential to promotion of a competitive retail electric market in Texas, consistent with PURA §39.001(a) and (b). This issue and the broader issue of city jurisdiction are discussed in detail above, concerning subsection (c)(1).

September 1 Effective Date

REP Coalition stated their support for the target effective date of September 1 for approved DCRF adjustments, because it will permit REPs to combine those rate changes with approved TCRF adjustments, which also take effect on September 1 under the commission rules and is therefore consistent with PURA §36.210(b)(1), which requires the simultaneous implementation of changes in an electric utility's non-fuel rates in a 12-month period, to the extent possible. By reducing the frequency of TDU rate changes and/or grouping those rate changes when possible, the number of times a year a retail customer may experience a price change due to a change in a TDU rate will decrease. Those actions will also reduce the administrative costs borne by REPs, which will lower the level of costs to be recovered from customers and consequently decrease the retail prices charged to those customers.

Commission Response

The commission has retained the September 1 effective date in the rule.

Simultaneous Implementation of Rates

REP Coalition argued the proposed rule does not comprehensively address the objective of simultaneous implementation of

all TDU rates in a 12-month period. Rather, it facilitates the simultaneous implementation of only two of those rates, that is, the TCRF and the DCRF. The REP Coalition urged the commission to take every opportunity to give effect to PURA §36.210(b)(1) by combining nonfuel surcharges in a more comprehensive manner, consistent with the statute.

OPC commented that while the statute requires an electric utility in the ERCOT region to simultaneously implement non-fuel rate adjustments within a 12-month period to the extent possible, the proposed rule is concerned with just one of these rate adjustments (the DCRF). The proposed rule would require the presiding officer to set the effective date of a TDU's DCRF as September 1 unless good cause exists for a later date. OPC commented that this target effective date matches the effective date of a TCRF adjustment; thus, the proposed rule does not increase the number of non-fuel rate changes implemented on discrete dates and does not contravene the statutory requirements of simultaneous implementation. OPC commented that the current rulemaking is not the proper forum to address a comprehensive approach to the synchronization of non-fuel rates if indeed that is required by the statute as addressed in REP Coalition's comments. OPC commented that at issue presently is the implementation of an additional rate mechanism; adjustments to the implementation of other, existing rate mechanisms should be handled in separate rulemakings. To address adjustments to other rate mechanisms in this rulemaking will add complexity and potentially delay implementation of the DCRF. Additionally, parties affected by modifications to other rate mechanisms may not be participants in the current rulemaking and would be disadvantaged were the scope of the current rulemaking expanded to include modification of the other rate mechanisms by which they are affected. OPC replied that it believes that it is inappropriate to inject the issue of combining non-fuel surcharges other than the DCRF into this rulemaking.

Commission Response

The commission agrees with OPC that the scope of this rulemaking does not include consideration of simultaneous effective dates for all TDU rate changes.

Automatic Appeal

Electric Utilities and REP Coalition recommended that the appeal of a municipality's governing body's decision on a DCRF application be automatic pursuant to the rule. An automatic appeal reduces the potential for unnecessary delay in processing a DCRF application.

Oncor Cities stated that municipal jurisdiction over the rates of a utility charged within the municipal boundary is a creature of the statute that cannot be abrogated by an administrative rule. Oncor Cities submitted that Electric Utilities' notion that the commission should deem an appeal to have occurred on the 60th day after filing, regardless of the action the city took, is inconsistent with that jurisdiction. Oncor Cities stated that Electric Utilities' "deemed appeal" approach is inconsistent with this ability, inasmuch as a city that has suspended a rate change has taken no action that can be appealed. Oncor Cities stated that a city that has suspended a requested rate change retains jurisdiction until the city has made a final decision, upon which only a utility can appeal to the commission pursuant to PURA §33.051, as that section clearly speaks to a party's ability to appeal a city's "decision" to the commission, while PURA §36.108(a)(1) establishes the ability of a city to suspend the effective date *pending a decision.* Oncor Cities stated that if a city has suspended the rate change pursuant to PURA §36.108(a)(1), the "deemed appeal" that Electric Utilities urge simply cannot occur--there is nothing that can be appealed. Even if the city has not suspended the rate change request, Electric Utilities' proposed approach still presents problems, because if the city has simply not taken action yet, that city still retains jurisdiction. Under PURA §36.102 and §36.108, Oncor Cities have until the effective date of the application to take final action. Oncor Cities urged the commission to reject Electric Utilities' proposal that city action be deemed appealed on the 60th day after a DCRF application is submitted.

Commission Response

As explained above concerning subsection (c)(1), PURA Chapter 36, Subchapter C (including PURA §36.108) and PURA §33.051 do not apply to a DCRF proceeding. Also as explained above concerning subsection (c)(1), a DCRF must be applied on a system-wide basis, and automatic suspension of the city's final decision is necessary to ensure a system-wide DCRF. Likewise, deeming a DCRF application denied if the city does not make a final decision within 60 days is necessary for an expedited DCRF procedure. The commission agrees with Electric Utilities and REP Coalition that the rule should make an electric utility's appeal automatic; doing so avoids the cost of actually appealing the city action or inaction and ensures that the appeal is made. Because an appeal is necessary to ensure a system-wide DCRF, making the appeal automatic helps ensure a system-wide DCRF. The commission has made corresponding changes to subsection (c)(1).

Delegation of Decisions to Presiding Officer

State Agencies commented that the rule improperly delegates final decisions to a "presiding officer" other than the commission. State Agencies argued that in contrast to the procedure followed for transmission cost recovery factor decisions under §25.193 and §25.239, the proposed rule improperly delegates the commission's statutory responsibility to approve or disapprove the adjustment. State Agencies submitted that the preamble to the proposed rule does not separately describe the intended role of any "presiding officer," which is not the commission in the adjustment process, and to the extent that this subsection of the rule intends for the presiding officer to be any entity other than the commission for purposes of approving the adjustment, this is an improper delegation of authority expressly delegated to the commission by the Legislature. State Agencies contended that the Legislature made clear that "the commission" (or other regulatory authority) would be the body to approve any rate adjustment request in the statute's opening paragraph (a), but the proposed rule make no provision whatsoever for any commission ruling on the DCRF application and appears to empower only a "presiding officer" to make the final decision and set effective dates for utility rates. State Agencies further commented that the commission is without authority to delegate rate approval responsibility either to SOAH or to an in-house staff attorney because Texas Government Code §2003.049 states that the PUC can delegate its hearing function solely to the State Office of Administrative Hearings and, additionally, even where proper delegation is made to the SOAH utility division to hear a contested case, its proposal for decision is simply a recommendation to the sole final decision maker--the commission. State Agencies further contended that there is no statute authorizing the commission to deflect to a staff hearings officer the final decision on DCRFs. State Agencies stated §22.2(34) and §22.202 cannot be employed to authorize delegation of ratemaking decisions that violate both the Government Code and PURA.

OPC commented that it concurred with the State Agencies' comment that the term "presiding officer" in this particular subsection should be changed to "the commission," because under the current legal setting, only the commission can exercise the functions addressed in this subsection.

Electric Utilities commented that they do not interpret subsection (e)(6)(D) as a delegation of authority by the commission to the presiding officer to decide a DCRF proceeding without commission input. Electric Utilities stated that if a DCRF application is contested, the commission will presumably decide it based on the evidence and briefing, as it does in other contested cases.

Commission Response

The DCRF rule uses the term "presiding officer" in the manner defined by §22.2(34): "The commission, any commissioner, or any hearing examiner or administrative law judge presiding over a proceeding or any portion thereof." Subsection (e)(6)(E) of the DCRF rule provides that a DCRF proceeding is eligible for disposition pursuant to §22.35(b)(1). Section 22.35(b)(1), read in conjunction with subsection (a)(2) of that section, provides that a commission administrative law judge may approve an application if it is not adverse to any party other than commission staff. Subsection (e)(6)(E) of the DCRF rule is similar to §25.192(h)(4)(C), which addresses interim TCOS applications. Commission administrative law judges routinely approve interim TCOS applications, as well as ERCOT TCRF applications filed pursuant to §25.193, because these applications are usually not adverse to any party. Allowing commission administrative law judges to approve such applications does not prejudice any party and is an efficient use of state resources. Only one non-ERCOT TCRF application, in Docket Number 37135, has been filed under §25.239, and the Commissioners approved the application in that docket. Unlike for interim TCOS factors and ERCOT TCRFs, §25.239 requires a determination that transmission infrastructure improvement costs are reasonable and necessary before they are recovered through a non-ERCOT TCRF, as required by PURA §36.209(b).

Section 25.243(e)(6)(E): Review of Application

Oncor Cities noted that the proposed rule is silent on the ability of parties to obtain a hearing on a utility's DCRF filing, and on the ability of parties to file either testimony or a recommendation to the commission on the utility's application. Oncor Cities stated their belief that PURA §36.210(g)(2) provides that parties may conduct discovery on a utility's application for a DCRF filing, but Oncor Cities noted that discovery without the opportunity to file a recommended disposition of the utility's application for a DCRF filing and the opportunity to request a hearing renders PURA §36.210(g)(2) a nullity. Oncor Cities opined that the Legislature could not have intended that parties would be permitted to conduct discovery but then be afforded no opportunity to use that discovery.

Oncor Cities noted that APA §2001.0051(1) and (2) state that parties to a contested case are entitled to a hearing, and are entitled to present and respond to evidence and argument on each issue involved in the case. Oncor Cities concluded that including express provisions for disposition and hearing adds clarity to the rule and ensures that DCRF proceedings are conducted in accordance with the law, and that such provisions would not obstruct the DCRF process. Oncor Cities proposed new language in proposed subsection (e)(6)(E) to address this concern.

Commission Response

Subsection (e)(6)(E) properly leaves to the presiding officer the responsibility to establish a procedural schedule based on the circumstances in a particular DCRF proceeding.

Section 25.243(e)(6)(F): Notice of Approved Rates

Electric Utilities recognized the potential difficulty associated with providing notice of approval of a rate change on "the day after" approval, given, for example, that such notice could occur on a Friday. Electric Utilities recommended that the commission change the phrase "day after" to "working day after." In addition, Electric Utilities recommended that the commission change the provision to allow service by email.

Commission Response

The commission agrees with Electric Utilities' recommendation that the rule should provide for notice by email, and to change the phrase "day after" to "working day after." The notice would be provided to REPs, and REP Coalition did not object to service by email. As discussed above concerning subsection (e)(2), the DCRF rule should permit reasonable methods of notice that are more efficient than first-class mail. In addition, having the default deadline for notice of the approved rates be the working day following the presiding officer's final decision is reasonable. The rule expressly allows the presiding officer to order a different deadline.

Section 25.243(f): DCRF Reconciliation

Carrying Charges on Refunds

Electric Utilities commented that the appropriate carrying charge for any over-recovered amounts should be the commission-approved interest rate for over-charges pursuant to §25.28(c). Electric Utilities stated that requiring the carrying charge to be equal to a utility's authorized rate of return means the utility would be paying a return on a return; and, just as in the case of any other over-charge, such as refunds for over-billing or bonded rates, the carrying charge should be consistent with the commission's rule for such refunds, which specifies a rate that is different than the utility's cost of capital.

OPC commented that Electric Utilities' argument that requiring the carrying charge on refunds of improper DCRF collections to be at the utility's cost of capital would mean utilities would be paying a return on a return ignores the fact that the return an electric utility recovers under a DCRF adjustment is a principal amount of the recovery, just like the distribution investment costs recovered under the DCRF. OPC maintained that, in addition to being the correct carrying charge, the cost of capital used as the carrying charge prevents the utility from using the DCRF process as a means of arbitrage and it would not cause economic harm to the utility.

OPC also maintained that it is clear that Electric Utilities believe the model represented by §25.192(h) (relating to interim TCOS), which uses the utility's cost of capital as the carrying charge, is an effective rule and worthy of emulation in the development of a similar DCRF rule, as indicated in the following comment by Electric Utilities: "...the rules and procedures that the commission adopted for the recovery of transmission costs have helped support transmission investment in this state and allowed for timely and efficient changing of rates to reflect additional investment. Properly crafted, the rules for recovery of distribution investment should work in the same manner. The commission's proposal is a very good effort at achieving the same success that has been experienced with the regulation of transmission rates."

CEP, COH, TIEC, Oncor Cities, and CORE advised the commission to reject Electric Utilities' proposed change of the interest rate to be earned on pending refunds that are subject to the proposed rule from the utility's cost of capital to the over-collection refund rate for the same reasons the commission rejected a similar request in Project Number 37519 relating to §25.192(c). COH commented that the carrying cost for utility refunds must be consistent with the context and latitude associated with the proposed DCRF process and serve as a deterrent to overreaching by the utility. CORE and Oncor Cities stated that using the higher updated rate of return would better hold utilities accountable for accurately and responsibly filing applications for a DCRF proceeding. Oncor Cities additionally contended that the interest rate on over- or under-billings is more relevant to refunds covering relatively short time periods. Oncor Cities noted that the time period between DCRF updates and the utility's next base-rate case could be quite long--perhaps 4-10 years, or even more. Section 25.263(h)(4), pertaining to the interest rate recoveries associated with the final fuel reconciliation, utilizes the over- or under-billing interest rate if the time period between the fuel reconciliation and stranded cost true up is one year or less, but requires the use of the weighted cost of capital if the time interval is more than one year.

Commission Response

The commission concurs with OPC's argument that for any over-recovery refund amounts that include a return component paid by customers, that return is part of the overpayment, and refunding only those return dollars would not provide interest to, and appropriately compensate customers for, their loss of the use of the overpaid funds.

The commission agrees with CEP, COH, TIEC, Oncor Cities, CORE, and OPC that the method of determining carrying charges that is used in §25.192(h) should be used for interest earned on pending refunds in the DCRF rule for the same reasons as those cited in Project Number 37519, which amended §25.192(h), the interim TCOS rule.

As was argued by intervener groups in Project Number 37519, use of the interest rate established under §25.28 would create an arbitrage opportunity for electric utilities, because this rate is lower than the electric utilities' rates of return. In Project Number 37519, TIEC noted that if an over-recovery is refunded with an interest rate that is lower than the transmission service provider's (TSP's) authorized rate of return, the TSP will be overcompensated and theoretically have an incentive to include excessive amounts in its TCOS updates, given that the interest rate at which any over-recoveries would be refunded would be lower than the rate of return the TSP can earn on those amounts. For interest calculations on refunds from over-recoveries resulting from DCRFs, the commission therefore rejects the use of the over- and under-billing rate specified in §25.28 and retains the language of the published rule.

Improperly Recovered Revenues

TIEC suggested modifications that TIEC contended will bring the rule's language into conformance with statutory language intended to provide a refund to customers for "any amount improperly recovered" through the DCRF. TIEC observed that this includes amounts that were added to rates in relation to a proper investment but were over-recovered due to load growth or other factors. CORE supported TIEC's proposed revision. In addition, CORE stated that subsection (f) of the DCRF rule should not permit a reconciliation to consider whether a utility's investments were prudent, reasonable, or necessary unless the reconciliation occurs in a base-rate proceeding. Otherwise, contrary to the intended scope of the rule, the prudence of an investment would be considered using a truncated schedule inadequate for such review. State Agencies contended that the commission should retain the right to review, during the next base-rate case, whether costs recovered through a DCRF were improperly recovered, not just whether the investments are prudent, reasonable, and necessary.

OPC concurred with TIEC in its observation and comments that PURA §36.210(f)(6)(B) requires the commission in a DCRF reconciliation to consider whether "any amount" was "improperly recovered" through the DCRF and to refund the improper amounts with appropriate carrying charges. TIEC commented that PURA §36.210(f)(6)(A) does not limit the scope of a DCRF reconciliation to a consideration of only whether the costs included in a DCRF were prudent, reasonable, and necessary; rather, §36.210(f)(6)(A) states that the commission is not prevented from "reviewing" the investment costs in a DCRF and considering these issues. TIEC argued that in a DCRF reconciliation, which is anticipated to be a part of the utility's next base-rate case, the commission is required to consider all amounts recovered through a DCRF since the utility's previous base-rate case.

Electric Utilities submitted that the proposed rule properly defines the scope of reconciliation and that TIEC's argument that the scope should include additional amounts recovered due to load growth as well as State Agencies' argument that legislative language requires the scope to include any amount improperly recovered should be rejected.

Electric Utilities noted that the language in the statute requiring the refund of "any amount improperly recovered through the periodic rate adjustments," when considered in context, clearly is a reference to whether the costs were prudent, reasonable, and necessary. Electric Utilities cited subsection (f) of SB 1693 and maintained that the proximity of the language providing for a refund to the language concerning a review of whether they were "prudent, reasonable, and necessary" clearly suggests that the basis of the refund relates to whether the investments were prudent, reasonable or necessary.

Electric Utilities also contended that additional revenues that may result from load growth after a DCRF is set and in place are simply revenues collected under an approved rate and, absent a finding that some portion of the investment was imprudent, unreasonable, or unnecessary, should not be refunded.

Commission Response

PURA §36.210(f)(6)(B) requires that "any amount improperly recovered" through the DCRF be refunded. The word "improperly" is vague. As a result, the Legislature gave the commission discretion in applying PURA §36.210(f)(6)(B). A non-ERCOT TCRF is trued-up to avoid over-recovery of costs due to load growth. *See* §25.239(f). This true-up is required by PURA §36.209(b), which provides that the commission may not allow an electric utility to over-recover costs through a non-ERCOT TCRF. An ERCOT TCRF is also trued-up to avoid over-recovery of costs due to load growth. *See* §25.193(b)(2)(B)(iii). This true-up is appropriate, because costs that are recovered through an ERCOT TCRF are a pass-through of transmission service charges from other utilities. See *Rulemaking Proceeding to Amend P.U.C. SUBST. R. 25.193, Relating to Distribution Service Provider Transmission Cost Recovery Factor (TCRF),*

Project Number 37909, Order Adopting Amendment to §25.193 as Approved at the September 29, 2010 Open Meeting at 7.

Transmission costs recovered through an interim TCOS factor (ITF) are not trued-up for load growth. *See* §25.192(h). Costs recovered through an ITF are related to the transmission invested capital of the utility using the ITF. As with base-rate costs, which are predominantly related to a utility's own invested capital, the lack of a true-up for load growth, or load declines, is part of the utility's overall operating risk profile. A DCRF will recover costs related to a utility's own invested capital, and it is appropriate not to true-up the DCRF for changes in load.

The proper scope of a reconciliation is to review the invested capital that was included in the DCRF. PURA §36.210(f)(6)(A) contemplates that the commission will determine whether the invested capital costs were prudent, reasonable, and necessary. In addition, PURA §36.210(f)(a) uses PURA §36.053 to define invested capital. Among other things, that section requires that a cost be used by and useful to the utility in providing service in order to be considered invested capital for ratemaking purposes. PURA §36.058 requires that certain standards be met for payments by a utility to an affiliate in order for those payments to be included as invested capital for ratemaking standards. In adopted subsection (f), the commission has expressly included all of these PURA requirements within the scope of a DCRF reconciliation.

Reconciliation Based on Scope of Proceeding

Electric Utilities recommended a revision to subsection (f) removing the language in the first sentence that accommodates the idea of a review of the reasonableness of the investment taking place in a DCRF proceeding.

Commission Response

For the reasons discussed above concerning subsection (e)(5), the commission declines to make this change.

Section 25.243(g): DCRF's effect on Electric Utility's Financial Risk and Rate of Return

Electric Utilities advised that this provision should be stricken because it was not part of SB 1693, nor required under PURA §36.052, and the commission has many other factors to consider in determining ROE. Electric Utilities stated that this provision inappropriately elevates the importance of a DCRF.

OPC disagreed with Electric Utilities' contention that the financial risk provision not being included in the language of PURA §36.210 indicates that the Legislature intended for it not to be explicitly evaluated. OPC asserted that a reasonable person might conclude that adjustments to reflect reduction in risk, because they are not specifically excluded in the statute, could be considered within the DCRF evaluation.

COH commented that implementation of the DCRF will allow utilities greater assurance of timely and full collection of their distribution service costs, and as a result, may reasonably be expected to lower the risk associated with such service. The commission, therefore, should expressly consider the effect of the DCRF on the utility's financial risk and rate of return.

TIEC commented that it is well-accepted that allowing utilities to implement rate increases between base-rate proceedings reduces their regulatory lag and financial risk, and this should be explicitly acknowledged in the rule. TIEC noted that the revised TCOS rule adopted in Project No. 37519 included similar language acknowledging that utilities' rates of return should be reduced to reflect their reduced risk resulting from automatic recovery mechanisms in the next base-rate proceeding, and that this language was also included in the staff's Proposal for Adoption in Project Number 39298, *Rulemaking Related to Recovery by Electric Utilities of Distribution Costs.* TIEC therefore supported the inclusion of this provision.

Oncor Cities maintained that Electric Utilities do not and cannot dispute that the DCRF reduces the risk of regulatory lag for electric utilities in Texas. Oncor Cities, State Agencies, and CORE recommended that the commission apply a presumptive 25 basis point adjustment for reduced risk to the rates of return applied to new capital investment recovered through the DCRF and added that this could be reduced or eliminated upon a showing of good cause and would not change the rate of return applied to embedded investment in the utility's last rate order. State Agencies held that Electric Utilities want to have this issue both ways: they seek to reduce investor risk through piecemeal, direct-rate recovery without a full-blown rate case, then argue that the approved return should not be reduced to reflect lowered rate risk of regulatory lag. CORE urged the commission to strengthen this subsection of the rule by expressly requiring the commission to consider the effect of the DCRF on the utility's financial risk and rate of return.

OPC agreed with Oncor Cities and CORE that a DCRF reduces a utility's financial and investment risk and, therefore, its use warrants a review of the rate of return used in the DCRF calculation. OPC added that adoption of a standard adjustment may expedite processing of DCRF proceedings; however, OPC held that the method for determining the rate of return as described in §25.243(d)(2) is a reasonable compromise position when evaluated in conjunction with the earnings monitoring report.

Walmart advised that staff's efforts to recognize that the DCRF reduces regulatory lag in the recovery of distribution costs would appropriately reduce the associated risk of recovery of those costs. As such, Walmart proposed no change to proposed subsection (g).

Electric Utilities stated that Oncor Cities acknowledge that nothing in PURA §36.210 requires explicit recognition of the effects of the DCRF on financial risk and that it is unfair to single out one factor that may ameliorate risk, such as the DCRF, without also accounting for factors that increase risk for Texas utilities, such as consolidated tax savings adjustments. Electric Utilities also disagreed that the commission should have made consideration of the DCRF mandatory, rather than permissive, when setting a utility's rate of return. Electric Utilities further disagreed with Oncor Cities that the commission should specify a 25-basis point reduction to account for the DCRF, and stated that Oncor Cities have presented no evidence to suggest that 25 basis points is the correct measure of diminished risk.

Commission Response

PURA §36.052 requires that the commission consider "applicable factors" in setting an electric utility's rate of return. A DCRF may be an applicable factor to expressly consider when setting an electric utility's rate of return. Therefore, subsection (g) is appropriate. However, requiring a specific basis-point reduction because of the DCRF would be inappropriate, because the effects of a DCRF on electric utilities' financial risk will vary from utility to utility. Thus, the effects of a DCRF are best considered on a case-by-case basis.

With respect to the general impact of a DCRF on an electric utility's financial condition, the commission observes that the op-

portunity for a DCRF application as often as once every calendar year clearly provides for reduced regulatory lag, which eliminates at least some degree of uncertainty with respect to the timing of an electric utility's recovery of investment. A reduction in regulatory lag during a period when an electric utility is increasing its investments positively impacts the electric utility's financial condition.

Section 25.243(i): Expiration

COH commented that while the proposed rule would expire on January 1, 2017 when its enabling legislation expires, the proposed rule contemplates that "any DCRF in effect at that time shall remain in effect until the utility's next comprehensive base rate proceeding." COH commented that, for example, a rate adjustment put into effect in 2016 could conceivably stay in place for many years beyond the expiration of the enabling statute and rule, clearly exceeding the legislative grant of authority. COH commented that it believes that the proposed indefinite time frame would be inappropriate, because it represents an attempt to circumvent the statutory sunset date. COH suggested that DCRF interim adjustments remain in effect only until January 1, 2017. CORE agreed with COH.

Electric Utilities disagreed, stating that the commission would have authority to provide for a DCRF adjustment even absent SB 1693. Electric Utilities expressed the belief that SB 1693 clarifies that the commission has the authority to adopt DCRFs for certain non-fuel items related to distribution costs and that nothing in the statute would prohibit or require municipalities or the commission to approve an electric utility tariff that periodically adjusts a non-fuel rate outside a general rate case or prohibits them from doing so.

Commission Response

PURA §36.210 does not require that a DCRF expire on the expiration of that section. After PURA §36.210 expires, a DCRF should remain in effect until the electric utility's next comprehensive base-rate proceeding, similar to the way that the DCRF will operate when PURA §36.210 is in effect. In that way, the utility's base rates can be adjusted at the same time that the DCRF is terminated or set to zero. In addition, PURA §36.210(h) expressly contemplates that the Legislature may extend or remove the expiration date for PURA §36.210.

General Issue: Inaccurate Preamble

State Agencies commented that the preamble to the published rule was inaccurate because it failed to comply with the disclosures required by Texas Government Code §2001.024(a)(4). State Agencies stated that the Legislature requires state agencies to make detailed disclosures about the impact of proposed rules, and an integral part of that disclosure is the "fiscal note," which must alert state and local governments of any fiscal consequences. State Agencies commented that the preamble to proposed §25.243 merely recited that "there will be no fiscal implications for state or local government as a result of enforcing or administering the section," and State Agencies submitted that adequate notice is essential for fairness as well as meaningful opportunity to comment on a proposed rule. State Agencies commented that while the commission was not required to come up with dollar amounts of impact, it is simply untrue that there would be "no" fiscal consequences that result from administration or enforcement of the rule by any party, as the local governments that act as regulatory authorities would be required to add yet another proceeding to consider rates, and have paper work expense to duplicate and distribute the DCRF forms to its governing boards and attorneys. State Agencies submitted that adapting to the more frequent periodic increases in the rates charged by regulated utilities for service to state agencies and institutions would be certain to have a fiscal impact.

Electric Utilities disagreed with State Agencies because under the proposed rule, local regulatory authorities need do absolutely nothing in response to a DCRF filing, because if they do nothing, the application would be deemed denied 60 days after filing. Electric Utilities asserted that the proposed rule would in no way require any municipality to expend any resources.

Commission Response

The preamble to the proposed rule properly states that there will be no fiscal implications for state or local government as a result of enforcing or administering the DCRF rule. The commission will use existing resources to administer and enforce the DCRF rule. The commission expects that cities exercising original jurisdiction will do so as well. Furthermore, a city may choose to take no action on a DCRF application, and under subsection (c)(1), the DCRF application will be automatically appealed to the commission and consolidated with the DCRF proceeding before the commission.

The predominant costs and benefits of the rule are the result of implementing PURA §36.210. State and local governments' electricity costs will be affected by the rule in a manner similar to other electricity customers. PURA §36.210(h) delineates a study and report on DCRFs that the commission is required to undertake for the Legislature. Performing the costs analysis suggested by State Agencies would be an inefficient use of state resources.

Proposed New Subsection: Burden of Proof

CORE believed that the rule should expressly state that in a DCRF proceeding the electric utility bears the burden of proving that its requested relief complies with PURA §36.210 and §25.243, including that the electric utility is not earning more than its authorized rate of return, on a weather-normalized basis, at the time the application is filed.

Commission Response

Addressing the burden of proof in a DCRF proceeding is unnecessary, because it is well established that, pursuant to PURA §36.006, an electric utility has the burden of proof in a rate change proceeding, such as a DCRF proceeding. The interim TCOS, ERCOT TCRF, and non-ERCOT TCRF rules do not expressly address burden of proof.

Proposed New Subsection: Municipal rate case expenses

CORE proposed new subsection (e)(6)(H), Municipal Rate Case Expenses. CORE commented that under PURA §33.023, municipalities were entitled to receive reimbursement for the reasonable costs of participating in or conducting a ratemaking proceeding, and that in passing SB 1693, the Legislature not only acknowledged the applicability of PURA §33.023 to DCRFs, but also expressly stated its intent not to limit the ability of a municipality to obtain reimbursement under PURA §33.023. CORE stated that the proposed DCRF rule did not include a provision that acknowledges a municipality's right to reimbursement for reasonable expenses relating to participating in a DCRF filing, nor did the proposed rule include a provision that prescribes the method for the municipality to request reimbursement and the electric utility to actually reimburse the municipality its reasonable costs associated with participating in the DCRF filing.

CORE submitted that the new rule must address how municipalities would be reimbursed for their reasonable expenses associated with participating in a DCRF filing to ensure that the municipality would be reimbursed for such expenses in the DCRF filing, consistent with PURA §33.023 and PURA §36.210. CORE requested that the commission add subsection (e)(6)(H) specifying that a municipality's reasonable rate-case expenses be reimbursed to the municipality within 30 days after the municipality submits its request for reimbursement. CORE commented that the rule should also specify that a municipality should file its rate case expenses within one week of the conclusion of a hearing on the merits or within one week after the deadline by which a hearing must be requested has passed. CORE stated that the rule may specify that an electric utility may seek to recover any reimbursed municipality rate case expenses in the utility's next DCRF reconciliation proceeding.

Oncor Cities also commented that PURA §36.210(f)(5) requires that the mechanism adopted pursuant to this section not limit the ability of cities to be reimbursed for their reasonable rate case expenses pursuant to PURA §33.023, but despite this specific reference to reimbursement of municipal rate case expenses in the statute, the proposed rule was silent on the subject. Oncor Cities submitted that greater clarity and certainty would be lent to the DCRF process if the reimbursement of rate-case expenses was addressed in the rule, and this would especially be so given the short timeline for a DCRF filing proceeding, and the corresponding limited ability of parties to litigate additional issues.

Oncor Cities commented that its proposed rule language makes clear that a DCRF proceeding is one in which reasonable municipal rate-case expenses are reimbursable, and also requires that reimbursement occur on a timely basis. Oncor Cities commented that in recent ratemaking proceedings, at least one utility has proposed unreasonable reimbursement schedules, including, for instance, a proposal to reimburse cities on a monthly basis for the life of a proposed 12-year advanced metering system (AMS) surcharge, and Oncor Cities' suggested language would bar such proposals and would therefore reduce costly litigation.

Oncor Cities' proposed language would state that reimbursement of cities' reasonable expenses for a given DCRF proceeding should occur within that proceeding, as any other arrangement would place an unreasonable burden on municipal intervenors. Oncor Cities argued that requiring cities to wait to quantify and receive their rate-case expense reimbursement until a subsequent DCRF update proceeding would put municipal rate-case expense recovery at the whim of the utility, and there is no requirement in the statute or proposed rule that a utility file for a DCRF update every year. Oncor Cities commented that it should not be put in a position of potentially waiting years to have reimbursable rate-case expenses addressed by the commission and paid by the utility.

COH commented that the proposed rule ignored the reality that local rate regulation, interim or comprehensive, would incur costs subject to reimbursement under PURA §33.023 as contemplated by PURA §36.210(f)(5). COH suggested adding language under subsection (e)(3) to address the issue.

Electric Utilities agreed that the DCRF proceeding would be a ratemaking proceeding that would permit municipalities to recover reasonable expenses, but stated that revising the proposed rule to address municipal rate-case expense recovery would be unnecessary and delay adoption of the rule. Electric Utilities commented that PURA §33.023 already provides for municipal expense recovery in ratemaking proceedings, and determinations of the mechanics and timing of any reimbursement to municipalities would be best addressed in light of the evidence in the record of a case as opposed to a detailed reimbursement process in a rule.

Commission Response

The commission concludes that including in the rule a specific provision for recovery of rate-case expenses is not necessary. The commission has addressed reimbursement of city rate-case expenses for many years without addressing that issue in a rule.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this section, the commission has made changes consistent with the discussion above and to clarify its intent.

The new rule is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supp. 2010) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, SB 1693 §1 (to be codified as PURA §36.210), which requires the commission to adopt rules to implement the section; PURA §36.052, which requires the commission to consider applicable factors in establishing a reasonable return on invested capital; PURA §36.053, which addresses invested capital; and PURA §36.058, which addresses an electric utility's payment to an affiliate.

Cross Reference to Statutes: PURA §§14.002, 36.052, 36.053, and 36.058; and SB 1693 §1 (to be codified as PURA §36.210).

§25.243. Distribution Cost Recovery Factor (DCRF).

(a) Purpose and application. This section implements Public Utility Regulatory Act (PURA) §36.210. This section applies to electric utilities, including transmission and distribution utilities (TDUs), that provide wholesale or retail distribution service.

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

(1) Capitalized operations and maintenance expenses--Expenses that have been deferred or amortized as a regulatory asset or liability.

(2) DCRF proceeding--A proceeding conducted pursuant to this section in which creation or amendment of a DCRF is considered on application of an electric utility to the commission pursuant to subsection (c)(1) of this section.

(3) Distribution invested capital--The parts of the electric utility's invested capital, as described in PURA §36.053, that are categorized as distribution plant, distribution-related intangible plant, and distribution-related communication equipment and networks properly recorded in Federal Energy Regulatory Commission (FERC) Uniform System of Accounts 303, 352, 353, 360 through 374, 391, and 397. Distribution invested capital includes only costs: for plant that has been placed into service; that comply with PURA, including §36.053 and §36.058; and that are prudent, reasonable, and necessary. Distribution invested capital does not include: generation-related costs; transmission-related costs, including costs recovered through rates set pursuant to §25.192 of this title (relating to Transmission Service Rates), §25.193 of this title (relating to Distribution Service Provider Transmission Cost Recovery Factors (TCRF)), or §25.239 of this title (relating to Transmission Cost Recovery Factor for Certain Electric Utilities); indirect corporate costs; capitalized operations and maintenance expenses; and distribution invested capital recovered through a separate rate, including a surcharge, tracker, rider, or other mechanism. In a

DCRF proceeding, an electric utility may elect not to seek recovery of certain distribution invested capital, but may not exclude all of the distribution invested capital in one of the accounts identified above unless the electric utility can prove that the distribution invested capital in the account reduced by the related accumulated depreciation is greater than the distribution invested capital in the account reduced by the related accumulated depreciation used in setting rates in the electric utility's last comprehensive base-rate proceeding.

(4) Net distribution invested capital--Distribution invested capital less accumulated depreciation and adjusted for any changes in distribution-related accumulated deferred federal income taxes and excluding any impact associated with Financial Accounting Standards Board Interpretation No. 48 (FIN 48).

(5) Weather-normalized--Adjusted for normal weather using weather data for the most recent ten calendar years.

(c) Application for a DCRF.

(1) General requirements.

(A) Filing of application. An electric utility may apply for inclusion of a DCRF in its tariffs for wholesale and retail distribution service. To implement a DCRF, an electric utility shall file the application for the DCRF simultaneously with all regulatory authorities having original jurisdiction over the electric utility's distribution service area.

(B) Municipal proceedings. A municipality's governing body with original jurisdiction over an application for a DCRF shall make a final decision on the application within 60 days after the application was filed. If the governing body does not make a final decision within 60 days after the application was filed, the application is deemed denied by the governing body. On the 60th day after the application is filed, the electric utility is deemed to appeal the governing body's final decision to the commission, regardless of whether the governing body approves or denies the application, and the appeal is deemed at that time to be consolidated with the electric utility's DCRF proceeding before the commission. In addition, the governing body's interim and final decisions are deemed automatically suspended at the times they took effect.

(C) Frequency of DCRF proceedings. An electric utility may have no more than one DCRF (including a DCRF amendment) become effective each calendar year pursuant to an application filed pursuant to this paragraph. An electric utility may change its rates pursuant to a DCRF no more than four times between comprehensive base-rate proceedings. An electric utility shall not apply for a DCRF while a comprehensive base-rate proceeding for the electric utility is pending. In addition, the presiding officer shall dismiss an electric utility's application for a DCRF if the electric utility or commission initiates a comprehensive base-rate proceeding within 145 days after the electric utility filed the application for a DCRF.

(2) Requirements applicable to TDUs. A TDU may file an application for a DCRF only during the period April 1 through April 8. A TDU shall not file an application for a DCRF after April 8 of a year even if April 8 is not a working day, as defined by §22.2(44) of this title (relating to Definitions).

(3) Requirements applicable to other electric utilities. An electric utility that does not offer customer choice may file an application for a DCRF at any time other than in April and May.

(d) Calculation of DCRF.

(1) DCRF formula. The DCRF for each rate class shall be calculated using the following formula:
Figure: 16 TAC §25.243(d)(1)

(2) Return on invested capital. The electric utility's rate of return is the rate of return approved by the commission in the electric utility's last comprehensive base-rate proceeding if the final order (which may be an order on rehearing) approving the rate of return was filed less than three years before the application for a DCRF was filed. If the final order approving the rate of return was filed three years or more before the application for a DCRF was filed, the rate of return is the lesser of the rate of return in the final order or the alternative rate of return calculated as follows: The alternative rate of return shall be calculated using a 10% cost of equity, the capital structure approved by the commission in the electric utility's last comprehensive base-rate proceeding, and the cost of debt as reported in the electric utility's most recent Earnings Monitoring Report filed pursuant to §25.73 of this title (relating to Financial and Operating Reports).

(3) Determination of Distribution Invested Capital. The electric utility must clearly identify any costs included as distribution invested capital because of a change in accounting rules or practices since the test year in the electric utility's most recent comprehensive base-rate proceeding. The commission shall exclude such costs if the electric utility does not prove that the costs are appropriate for recovery through the DCRF.

(e) Procedures for DCRF proceeding.

(1) Filing requirements. To file an application for a DCRF, an electric utility shall use the commission-prescribed form and include a sworn statement from an appropriate employee of the electric utility that the application complies with the electric utility's tariff and this section, including that the distribution invested capital in the application includes only costs: for plant that has been placed into service; that comply with PURA, including §36.053 and §36.058; and that are prudent, reasonable, and necessary. In addition, the sworn statement shall state that the application is true and correct to the best of the employee's knowledge, information, and belief. Furthermore, the electric utility shall include in its application an earnings monitoring report for the immediately preceding calendar year prepared in accordance with §25.73(b) of this title.

(2) Notice and intervention deadline. By the day after it files its application, the electric utility shall provide notice of its application, using a reasonable method of notice, to all parties in the electric utility's last comprehensive base-rate proceeding and, if applicable, last DCRF proceeding, and shall include in the notice the docket number for the new proceeding. The intervention deadline is 30 days from the date service of notice is completed.

(3) Parties. The Office of Public Utility Counsel and affected parties may participate as parties in a DCRF proceeding.

(4) Denial due to earnings. The commission shall deny an electric utility's application for a DCRF if the earnings monitoring report included in the electric utility's application shows that the electric utility is earning more than its authorized rate of return using weather-normalized data. In making this determination, the commission shall correct the calculation of the earned rate of return in the earnings monitoring report to the extent that the calculation does not comply with §25.73(b) of this title and any form adopted to implement that subsection.

(5) Scope of proceeding. The issues of whether distribution invested capital included in an application for a DCRF or DCRF adjustment complies with PURA, including §36.053 and §36.058, and is prudent, reasonable, and necessary shall not be addressed in a DCRF proceeding unless the presiding officer finds that good cause exists to address these issues.

(6) Commission processing of application.

(A) Sufficiency of application. A motion to find an application materially deficient shall be filed no later than 30 days after service of notice is completed. The motion shall be served on the electric utility by hand delivery, facsimile transmission, or overnight courier delivery, or by e-mail if agreed to by the electric utility or ordered by the presiding officer. The motion shall specify the nature of the deficiency and the relevant portions of the application, and cite the particular requirement with which the application is alleged not to comply. The electric utility's response to a motion to find an application materially deficient shall be filed no later than five working days after such motion is received. If within ten working days after the deadline for filing a motion to find an application materially deficient, the presiding officer has not issued a written order concluding that material deficiencies exist in the application, the application is deemed sufficient.

(B) Discovery. Each party, other than commission staff, may serve no more than 20 requests for information and requests for admissions of fact pursuant to §22.144 of this title (relating to Requests for Information and Requests for Admission of Facts), except where the presiding officer finds good cause for a party to serve additional requests. Except for a request by commission staff, a request shall not include subparts or multiple questions, and requests shall be sequentially numbered, regardless of whether the requests are served at the same time or on different parties. A response to a request shall be served no later than ten working days after receipt of the discovery request. An objection to a request shall be filed no later than five working days from receipt of the request. A request for which an objection is filed does not count towards a party's request limit. A party may request a technical conference by the intervention deadline, and shall identify the topics that it wants to discuss. An electric utility shall hold the technical conference in Austin, Texas five working days after the intervention deadline, unless the electric utility and the parties who requested the technical conference agree to a different date. The technical conference shall be held at the location designated by the electric utility, unless the commission staff designates a location. The electric utility shall have appropriate persons attend the technical conference to answer questions. A party may take a deposition only if authorized by the presiding officer.

(C) System-wide rates and effective date of DCRF. The presiding officer shall approve the DCRF for an electric utility on a system-wide basis and set the effective date of the DCRF for a TDU as September 1 unless good cause exists for a later date. The presiding officer shall make a final decision on a DCRF application made by a TDU at least 46 days before the effective date of the approved rates, even if this requirement results in an effective date after September 1. For an electric utility that does not offer customer choice, the presiding officer shall set the effective date of the DCRF to be 145 days after the application was filed unless good cause exists for a later date.

(D) Review of application. A DCRF proceeding is eligible for disposition pursuant to §22.35(b)(1) of this title (relating to Informal Disposition).

(E) Notice of approved rates. Unless otherwise ordered, a TDU shall serve notice of the approved rates and the effective date of the approved rates by the working day after the presiding officer's final decision, to retail electric providers that are authorized by the registration agent to provide service in the TDU's distribution service area. Notice under this subparagraph of this paragraph may be served by email.

(f) DCRF reconciliation. The commission shall reconcile investments recovered through a DCRF in the electric utility's next comprehensive base-rate proceeding to the extent such reconciliation did not already occur in a DCRF proceeding pursuant to subsection (e)(5) of this section. The reconciliation shall be limited to the issues of the extent to which the investments complied with PURA, including §36.053 and §36.058, and this section and were prudent, reasonable, and necessary. To the extent that the commission determines that the investments did not comply with PURA and this section or were not prudent, reasonable, and necessary, the electric utility shall refund all revenues related to the investments that it improperly recovered through rates, and shall also pay its customers carrying charges on these revenues. The carrying charges shall be determined as follows: For the time period beginning with the date on which over-recovery is determined to have begun to the effective date of the new base rates, carrying costs shall be calculated using the same rate of return that was applied to the investments in the DCRF proceedings that resulted in the over-recovery. For the time period beginning with the effective date of the new base rates, carrying costs shall be calculated using the electric utility's rate of return authorized in the comprehensive base-rate proceeding.

(g) DCRF's effect on electric utility's financial risk and rate of return. In setting the rate of return for an electric utility with a DCRF, the commission may expressly consider the effect of the DCRF on the electric utility's financial risk and rate of return.

(h) Reports. An electric utility with a DCRF shall file reports that will permit the commission to monitor its DCRF revenues, in accordance with any filing requirements and schedules prescribed by the commission pursuant to §25.73 of this title or this section.

(i) Expiration. This section expires upon the expiration of PURA §36.210. Any DCRF in effect at that time shall remain in effect until the electric utility's next comprehensive base-rate proceeding.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 23, 2011.

TRD-201103980
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Effective date: October 13, 2011
Proposal publication date: July 22, 2011
For further information, please call: (512) 936-7223

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TITLE 22. EXAMINING BOARDS

PART 11. TEXAS BOARD OF NURSING

CHAPTER 223. FEES

22 TAC §223.1

Introduction. The Texas Board of Nursing (Board) adopts an amendment to §223.1 (relating to Fees) without changes to the proposed text published in the August 19, 2011, issue of the *Texas Register* (36 TexReg 5180) and will not be republished.

Reasoned Justification. The amendment is adopted under the authority of the Occupations Code §301.151 and §301.155 and is necessary to implement the requirements of House Bill (HB) 1, enacted by the 82nd Legislature, Regular Session, effective September 1, 2011, which establishes the Board's budget for the 2012-2013 biennium.

In its budget request for the 2012-2013 biennium, the Board requested eleven new full time employees, $300,000 litigation costs, and restoration of the 5% budget reduction that was required by the Legislature for all state agencies during the 2010-2011 biennium. The Legislature approved the appropriation of these monies, subject to a contingency rider that requires the Board to assess or increase fees in an amount sufficient to generate an additional $2,419,030 during the 2012-13 biennium. In order to meet this requirement, the Board has determined that it is necessary to increase its renewal fees. However, the Board has decided that it will only increase the renewal fees for registered nurses at this time. The renewal fees for vocational nurses will not be affected by this rule amendment. This decision was based upon a review of the annual base salaries of registered and vocational nurses. Based upon its review, the Board determined that the annual base salary of a vocational nurse is 2/3 that of the annual base salary of a registered nurse. The decision to increase the renewal fees of registered nurses is intended to maintain parity between registered nurses and vocational nurses based upon the respective earning capacity of each level of licensure. The Board's current renewal fee for a professional nursing license is $65 each biennium. The adopted amendment increases the renewal fee for a professional nursing license by $8, resulting in a new renewal fee of $73 each biennium. This $8 increase moves the Board closer to achieving complete parity in the renewal fee for vocational nursing licenses, which is currently set at $55, and the newly adopted $73 renewal fee for professional nursing licenses.

Pursuant to the adopted amendment, registered nurses will incur an $8 fee increase for the renewal of their licenses each biennium. The adopted amendment will also have a peripheral effect on the reactivation of a delinquent or inactive professional nursing license. Currently, the Board's rules require a separate fee for the reactivation of a delinquent or inactive professional nursing license. Although the adopted amendment does not alter the amount of the reactivation fee *per se,* the total reactivation fee will increase by $8 as a result of the adopted amendment. For example, currently, the Board's rules require a fee of $60 for the reactivation of a professional nursing license that has been delinquent for less than 90 days, in addition to the current renewal fee. The adopted amendment does not alter the $60 reactivation fee. However, the adopted amendment increases the current renewal fee by $8. As a result, a fee of $133 will be required for the reactivation of the license under the adopted amendment, instead of a reactivation fee of $125 under the former rule. The adopted amendment will have the same effect on the reactivation of a professional nursing license that has been delinquent for 90 or more days. Currently, the Board's rules require a fee of $120 for the reactivation of a professional nursing license that has been delinquent for 90 days or more, in addition to the current renewal fee. Again, while the adopted amendment does not alter the $120 reactivation fee, it increases the current renewal fee by $8. As a result, a fee of $193 will be required for the reactivation of the license under the adopted amendment, instead of a reactivation fee of $185 under the former rule. The same is true for the reactivation of an inactive professional nursing license. Under the Board's current rules, a fee of $10 is required for the reactivation of a professional nursing license that has been in inactive status for less than four years, in addition to the current renewal fee. While the adopted amendment does not alter the $10 reactivation fee, it increases the current renewal fee by $8. Thus, a fee of $83 will be required for the reactivation of the license under the adopted amendment, instead of a reactivation fee of $75 under the former rule. Finally, under the Board's current rules, a fee of $20 is required for the reactivation of a professional nursing license that has been in inactive status for four or more years, in addition to the current renewal fee. While the adopted amendment does not alter the $20 reactivation fee, it increases the current renewal fee by $8. Thus, a fee of $93 will be required for the reactivation of the license under the adopted amendment, instead of $85 under the former rule.

The Board recognizes that the adopted amendment will increase the licensure costs for registered nurses. However, in most cases, the fee increase will only affect the renewal of a professional nursing license once every two years, and individuals may avoid additional reactivation fees by timely renewing their professional nursing licenses. Further, the increase in licensure costs was discussed with various stakeholder groups and legislative offices prior to the passage of HB 1, and there was consensus among these groups for the fee increase. Overall, the Board anticipates that the nominal $8 fee increase in the renewal fee for a professional nursing license, coupled with the Board's normal revenue growth, will be sufficient to meet the requirements of HB 1. The adopted amendment is necessary to generate the additional funds to meet the requirements of HB 1.

How the Sections Will Function. Adopted §223.1(a)(3)(A) states that the Board has established reasonable and necessary fees for the administration of its functions and that the fee for the renewal of a professional nursing license is $73 each biennium.

Summary of Comments and Agency Response. The Board did not receive any comments on the proposal.

Statutory Authority. The amendment is adopted under the Occupations Code §301.151 and §301.155.

Section 301.151 authorizes the Board to adopt and enforce rules consistent with Chapter 301 and necessary to: (i) perform its duties and conduct proceedings before the Board; (ii) regulate the practice of professional nursing and vocational nursing; (iii) establish standards of professional conduct for license holders Chapter 301; and (iv) determine whether an act constitutes the practice of professional nursing or vocational nursing.

Section 301.155(a) provides that the Board by rule shall establish fees in amounts reasonable and necessary to cover the costs of administering the Occupations Code Chapter 301. Further, §301.155(a) provides that the Board may not set a fee that existed on September 1, 1993, in an amount less than the amount of that fee on that date.

Section 301.155(b) provides that the Board may adopt a fee in an amount necessary for a periodic newsletter to produce and disseminate to license holders the information required under the Occupations Code §301.158.

Section 301.155(c) states that the Board shall assess a surcharge of not less than $3 or more than $5 for a registered nurse and a surcharge of not less than $2 or more than $3 for a vocational nurse to the fee established by the Board under §301.155(a) for a license holder to renew a license under Chapter 301. The Board may use nine cents of the registered nurse surcharge and six cents of the vocational nurse surcharge to cover the administrative costs of collecting and depositing the surcharge. The Board quarterly shall transmit the remainder of each surcharge to the Department of State Health Services to be used only to implement the nursing resource section under the Health and Safety Code §105.002. The Board is not required to collect the surcharge if the Board determines the funds collected

are not appropriated for the purpose of funding the nursing resource section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 21, 2011.

TRD-201103924
Jena Abel
Assistant General Counsel
Texas Board of Nursing
Effective date: October 11, 2011
Proposal publication date: August 19, 2011
For further information, please call: (512) 305-6822

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PART 16. TEXAS BOARD OF PHYSICAL THERAPY EXAMINERS

CHAPTER 329. LICENSING PROCEDURE

22 TAC §329.2

The Texas Board of Physical Therapy Examiners adopts an amendment to §329.2, concerning License by Examination, without changes to the proposed text as published in the April 1, 2011, issue of the *Texas Register* (36 TexReg 2080). The amendment corrects a typographical error made when the rule was last amended.

The amendment moves the decimal point in the listing of continuing competence units required as additional education.

No comments were received regarding the proposed changes.

The amendment is adopted under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 19, 2011.

TRD-201103866
John P. Maline
Executive Director
Texas Board of Physical Therapy Examiners
Effective date: October 9, 2011
Proposal publication date: April 1, 2011
For further information, please call: (512) 305-6900

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CHAPTER 347. REGISTRATION OF PHYSICAL THERAPY FACILITIES

22 TAC §347.9

The Texas Board of Physical Therapy Examiners adopts an amendment to §347.9, concerning Renewal of Registration, without changes to the proposed text as published in the April 1, 2011, issue of the *Texas Register* (36 TexReg 2080). The amendment incorporates procedure into rule regarding the use of the facility registration renewal transaction receipt.

The amendment clarifies that a facility for which the renewal process is completed online prior to the expiration of the registration may use the printed transaction receipt in lieu of the certificate for the period of time specified on the receipt.

No comments were received regarding the proposed changes.

The amendment is adopted under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 19, 2011.

TRD-201103865
John P. Maline
Executive Director
Texas Board of Physical Therapy Examiners
Effective date: October 9, 2011
Proposal publication date: April 1, 2011
For further information, please call: (512) 305-6900

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PART 22. TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY

CHAPTER 501. RULES OF PROFESSIONAL CONDUCT

SUBCHAPTER E. RESPONSIBILITIES TO THE BOARD/PROFESSION

22 TAC §501.94

The Texas State Board of Public Accountancy adopts an amendment to §501.94, concerning Mandatory Continuing Professional Education, without changes to the proposed text as published in the July 29, 2011, issue of the *Texas Register* (36 TexReg 4773) and will not be republished.

The amendment will revise the current language to state that a license may be revoked after a licensee has failed to accrue the required CPE after three consecutive years, replace terms with acronyms and correct a rule reference.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Public Accountancy Act (Act), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 22, 2011.

TRD-201103937
J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Effective date: October 12, 2011
Proposal publication date: July 29, 2011
For further information, please call: (512) 305-7842

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TITLE 34. PUBLIC FINANCE

PART 5. TEXAS COUNTY AND DISTRICT RETIREMENT SYSTEM

CHAPTER 103. CALCULATIONS OR TYPES OF BENEFITS

34 TAC §103.4

The Texas County and District Retirement System adopts an amendment to §103.4, concerning the calculation of average compensation for purposes of determining prior service credit. The amendment is adopted without changes to the proposed text as published in the August 12, 2011, issue of the *Texas Register* (36 TexReg 5074).

The adopted amendment deletes the requirement that average prior service compensation must be calculated using only the actual compensation paid the member during the 36-month period immediately preceding the month the subdivision began participating in the System. The rule allows the subdivision to adopt any reasonable method for calculating average prior service compensation that is fair, equitable and consistently applied, so long as the total prior service credit awarded the member under the method used by the subdivision is not less than the prior service credit the member would be awarded if actual prior service compensation were used. Limiting the calculation to that compensation only received in such 36-month period can unfairly deny any prior service credit to an otherwise eligible member whose entire prior service was performed 3 years before the subdivision joined the System. Furthermore, compensation records for the 36-month period may be missing and difficult to retrieve or reconstruct.

No comments were received regarding the adoption of the amendment.

The amendment is adopted under the Government Code, §843.104, which authorizes the board of trustees of the Texas County and District Retirement System to adopt rules for defining and computing average prior service compensation.

The Government Code, §843.104 is affected by the adopted amendment.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 20, 2011.

TRD-201103877
Tom Harrison
General Counsel
Texas County and District Retirement System
Effective date: October 10, 2011
Proposal publication date: August 12, 2011
For further information, please call: (512) 637-3355

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34 TAC §103.9

The Texas County and District Retirement System adopts an amendment to §103.9, concerning the administration of partial lump sum distributions on service retirements. The amendment is adopted without changes to the proposed text as published in the August 12, 2011, issue of the *Texas Register* (36 TexReg 5075).

The adopted amendment follows the expanded rollover opportunities under federal law, conforms certain definitions in the rule with certain definitions in the TCDRS Act, eliminates the rigid allocation of basis rules for distributions from multiple accounts in keeping with the greater latitude afforded members with respect to separate elections specific to each of the member's accounts, and allows the member greater flexibility for dividing benefits in the case of divorce. The eligibility and procedure for electing a partial lump sum distribution at service retirement is essentially unchanged.

No comments were received regarding the adoption of the amendment.

The amendment is adopted under the Government Code, §845.102, which authorizes the board of trustees of the Texas County and District Retirement System to adopt rules that are necessary or desirable for efficient administration of the system.

The Government Code, §844.009 is affected by the adopted amendment.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 20, 2011.

TRD-201103878
Tom Harrison
General Counsel
Texas County and District Retirement System
Effective date: October 10, 2011
Proposal publication date: August 12, 2011
For further information, please call: (512) 637-3355

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CHAPTER 105. CREDITABLE SERVICE

34 TAC §105.41

The Texas County and District Retirement System adopts new §105.41, concerning the application of the Heroes Earnings Assistance and Relief Act of 2008 (HEART Act). The new rule is

adopted with changes to the text as published in the August 12, 2011, issue of the *Texas Register* (36 TexReg 5077).

The HEART Act mandates that the survivors of a member who dies after December 31, 2006, while performing military service under USERRA, are entitled to any additional benefits (other than benefit accruals relating to the period of qualified military service but including ancillary life benefits and survivor benefits) that would have been provided under the employer's plan had the member resumed employment and then terminated employment on account of death. Adoption of the new rule allows the System to comply with federal law by recognizing qualified military service under the USERRA, as credited service for purposes of determining eligibility for the survivor's annuity, and any optional group term life insurance. In addition, the HEART Act includes a provision that allows plans to grant benefit accruals to members who become disabled while performing such qualified military service. The provision is permissive and is not adopted by the System. However, in accordance with the 26 CFR §1.401(a)(4)-11(d)(3) relating to rules imputing credited service for military service and periods of disability, the new rule expands creditable service to include (for vesting purposes but not for benefit accrual purposes) qualified military service of a member who becomes disabled while performing military service under the USERRA, but does not thereafter return to employment with the employer. The new rule treats members who die or who become disabled while performing qualified military service similarly.

No comments were received regarding the adoption of the new rule.

The new rule is adopted under the Government Code, §843.502 which authorizes the board of trustees of the Texas County and District Retirement System to adopt rules to cause the System to comply with the provisions of the USERRA.

The Government Code §843.502 is affected by the adopted new rule.

§105.41. Credited Service and Survivor Benefits Under the Heroes Earnings Assistance and Relief Tax Act of 2008 (HEART Act).

(a) In accordance with §401(a)(37) of the Internal Revenue Code (§104(a) of the HEART Act), the survivors of a member who dies after December 31, 2006, while performing qualified military service under the USERRA, are entitled to any additional benefits (other than benefit accruals relating to the period of qualified military service) that would have been provided under the employer's plan had the member resumed employment and then terminated employment on account of death.

(b) A deceased member described above will receive credited service for the period of the deceased member's qualified military service for purposes of determining eligibility for a Survivor Annuity in accordance with §844.407 of the Act (but such period of qualified military service will not increase the deceased member's accrued benefit used to determine the amount of any survivor annuity for which the deceased member's survivors may or may not be eligible).

(c) A deceased member described above will be included in the coverage of any Member Optional Group Term Life Program elected by the employer under §842.004 of the Act, with the death benefit based on the annualized regular rate of pay or regular salary paid the member in accordance with §844.503(c) of the Act during the most recent pay period of active employment prior to the commencement of qualified military service.

(d) The System does not adopt the permissive provisions of §104(b) of the HEART Act, as added by §414(u)(9) of the Internal Revenue Code relating to benefit accruals. However, pursuant to the authority granted the Board by §845.102 of the Act, and in conformance with 26 CFR §1.401(a)(4)-11(d)(3) relating to rules for imputing military service and periods of disability as credited service, any member who, after December 31, 2006, becomes disabled (based on the criteria set forth in subparagraphs (A) and (B) of §844.303(b)(2) of the Act) while performing the member's qualified military service under the USERRA, is entitled to credited service in the retirement system for the period of qualified military service under the USERRA. However, such period of qualified military service will not increase the disabled member's accrued benefit used to determine the amount of any service, disability or survivor annuity for which the member or the member's survivors may or may not become eligible. The disabled member will be included in the coverage of any Member Optional Group Term Life program elected by the employer under §842.004 of the Act and not terminated and will, subject to §844.502 of the Act, be eligible to receive extended coverage during the two years following the onset of disability, provided that sufficient evidence of the member's continuous disability and its date of onset is submitted to the retirement system on application for a death benefit based on the disabled member's compensation described in subsection (c) of this section.

(e) In accordance with §414(u)(12) of the Internal Revenue Code (§105(b) of the HEART Act), and effective as of January 1, 2009, amounts received by a member as a "differential wage payment" (within the meaning of the Internal Revenue Code) for any period that such member is not performing services for the employer by reason of qualified military service will be treated as "compensation" for purposes of benefit accruals under the Act and will be treated as compensation for purposes of the Internal Revenue Code to the extent so required.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 20, 2011.

TRD-201103879
Tom Harrison
General Counsel
Texas County and District Retirement System
Effective date: October 10, 2011
Proposal publication date: August 12, 2011
For further information, please call: (512) 637-3355

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CHAPTER 107. MISCELLANEOUS RULES

34 TAC §107.8

The Texas County and District Retirement System adopts an amendment to §107.8, concerning the electronic transfer of payments to the System by participating subdivisions. The amendment is adopted without changes to the proposed text as published in the August 12, 2011, issue of the *Texas Register* (36 TexReg 5078).

The adopted amendment expands the number of permissible alternatives that subdivisions may use to electronically transfer payments to the System. The System can now accommodate transfers by ACH credit and by wire. Previously, the System had required that electronic transfers be made only by ACH Debit

because of concerns involving FDIC insurance coverage and collateralization. These concerns have been resolved. Subdivisions may now make payments to the System by ACH Debit, ACH Credit, Wire, or check.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Government Code, §845.102, which authorizes the board of trustees of the Texas County and District Retirement System to adopt rules that are necessary or desirable for efficient administration of the system.

The Government Code, §845.116 is affected by the adopted amendment.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 20, 2011.

TRD-201103880
Tom Harrison
General Counsel
Texas County and District Retirement System
Effective date: October 10, 2011
Proposal publication date: August 12, 2011
For further information, please call: (512) 637-3355

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 11. QUALITY ASSURANCE FEE

40 TAC §§11.2 - 11.4

The Texas Health and Human Services Commission (HHSC), on behalf of the Department of Aging and Disability Services (DADS), adopts amendments to §§11.2 - 11.4, concerning definitions, quality assurance fee determination methodology, and required reports, in Chapter 11, Quality Assurance Fee. The amendment to §11.3 is adopted with changes to the proposed text as published in the May 27, 2011, issue of the *Texas Register* (36 TexReg 3280). The amendments to §11.2 and §11.4 are adopted without changes to the proposed text.

The amendments are adopted to require intermediate care facility for persons with mental retardation (ICF/MR) providers to pay a quality assurance fee (QAF) for all days of paid leave on a monthly basis, rather than at the end of the reconciliation process, and exclude durable medical equipment claims from total revenue calculations.

DADS received written comments from ResCare, Inc./Educare Community Living Corp.; Mosaic; Evergreen Presbyterian Ministries of Texas, Inc.; Avondale House; Special Texas Homes; Community Access, Inc.; Private Providers Association of Texas; and Providers Alliance for Community Services of Texas. A summary of the comments and the responses follows.

Comment: Eight commenters expressed opposition to the half-percent increase in the QAF required by the proposed amendment to §11.3. All comments included statements to the effect that the increase would be a hardship for providers with regard to providing services and retaining staff. The comments cited recent reductions in provider payment rates and the upcoming two-percent rate reduction as additional reasons for opposing the increase in QAF.

Response: The agency agrees with the comments concerning the proposed half percent increase in QAF and will retain the QAF at five and one-half percent of total gross receipts, which has been in effect since January 1, 2008.

Comment: A commenter questioned adherence to the ICF/MR Reimbursement Methodology and expressed concerns regarding payment rate calculations.

Response: Comments pertaining to ICF/MR reimbursement methodology are not germane to the proposed amendments to the rules regarding the QAF.

The amendments are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

§11.3. Quality Assurance Fee Determination Methodology.

(a) Quality assurance fee. Effective January 1, 2008, the quality assurance fee for a facility is five and one-half percent of a facility owner's total gross receipts.

(b) Quality assurance fee review. Every twelve months or on a schedule determined by DADS, DADS will review each facility owner's quality assurance fee payments from all of the owner's facilities combined. A facility owner's liability for the quality assurance fee may be adjusted following this review to ensure that the quality assurance fee equals five and one half percent of total gross receipts from all facilities.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 21, 2011.

TRD-201103928
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: October 11, 2011
Proposal publication date: May 27, 2011
For further information, please call: (512) 438-3734

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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Agency Rule Review Plan

Texas Higher Education Coordinating Board

Title 19, Part 1

TRD-201104005
Filed: September 26, 2011

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Proposed Rule Reviews

Texas Education Agency

Title 19, Part 2

The State Board of Education (SBOE) proposes the review of 19 TAC Chapter 33, Statement of Investment Objectives, Policies, and Guidelines of the Texas Permanent School Fund, pursuant to the Texas Government Code, §2001.039.

As required by the Texas Government Code, §2001.039, the SBOE will accept comments as to whether the reasons for adopting 19 TAC Chapter 33 continue to exist. The comment period begins with the publication of this notice and must last a minimum of 30 days.

Comments or questions regarding this rule review may be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701-1494, (512) 475-1497. Comments may also be submitted electronically to rules@tea.state.tx.us or faxed to (512) 463-0028.

TRD-201104037
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Filed: September 28, 2011

♦ ♦ ♦

The State Board of Education (SBOE) proposes the review of 19 TAC Chapter 157, Hearings and Appeals, pursuant to the Texas Government Code, §2001.039. The rules being reviewed by the SBOE in 19 TAC Chapter 157 are organized under the following subchapters: Subchapter A, General Provisions for Hearings Before the State Board of Education; and Subchapter D, Independent Hearing Examiners.

As required by the Texas Government Code, §2001.039, the SBOE will accept comments as to whether the reasons for adopting 19 TAC Chapter 157, Subchapters A and D, continue to exist. The comment period begins with the publication of this notice and must last a minimum of 30 days.

Comments or questions regarding this rule review may be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701-1494, (512) 475-1497. Comments may also be submitted electronically to rules@tea.state.tx.us or faxed to (512) 463-0028.

TRD-201104038
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Filed: September 28, 2011

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The Texas Education Agency (TEA) proposes the review of 19 TAC Chapter 157, Hearings and Appeals, pursuant to the Texas Government Code, §2001.039. The rules being reviewed by the TEA in 19 TAC Chapter 157 are organized under the following subchapters: Subchapter AA, General Provisions for Hearings Before the Commissioner of Education; Subchapter BB, Specific Appeals to the Commissioner; Subchapter CC, Hearings of Appeals Arising Under Federal Law and Regulations; Subchapter DD, Hearings Conducted by Independent Hearing Examiners; and Subchapter EE, Review by State Office of Administrative Hearings: Certain Accreditation Sanctions.

As required by the Texas Government Code, §2001.039, the TEA will accept comments as to whether the reasons for adopting 19 TAC Chapter 157, Subchapters AA-EE, continue to exist.

The public comment period on the review of 19 TAC Chapter 157, Subchapters AA-EE, begins October 7, 2011, and ends November 7, 2011. Comments or questions regarding this rule review may be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701-1494, (512) 475-1497. Comments may also be submitted electronically to rules@tea.state.tx.us or faxed to (512) 463-0028.

TRD-201104039
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Filed: September 28, 2011

♦ ♦ ♦

The Texas Education Agency (TEA) proposes the review of 19 TAC Chapter 176, Driver Training Schools, pursuant to the Texas Government Code, §2001.039. The rules being reviewed by the TEA in 19 TAC Chapter 176 are organized under the following subchapters: Subchapter AA, Commissioner's Rules on Minimum Standards for Operation of Licensed Texas Driver Education Schools; Subchapter BB,

Commissioner's Rules on Minimum Standards for Operation of Licensed Texas Driving Safety Schools and Course Providers; Subchapter CC, Commissioner's Rules on Minimum Standards for Operation of Texas Drug and Alcohol Driving Awareness Programs; and Subchapter DD, Commissioner's Rules on Hearings Held Under the Texas Education Code, Chapter 1001.

As required by the Texas Government Code, §2001.039, the TEA will accept comments as to whether the reasons for adopting 19 TAC Chapter 176, Subchapters AA-DD, continue to exist.

The public comment period on the review of 19 TAC Chapter 176, Subchapters AA-DD, begins October 7, 2011, and ends November 7, 2011. Comments or questions regarding this rule review may be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701-1494, (512) 475-1497. Comments may also be submitted electronically to rules@tea.state.tx.us or faxed to (512) 463-0028.

TRD-201104040
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Filed: September 28, 2011

♦ ♦ ♦

Texas Medical Board

Title 22, Part 9

The Texas Medical Board proposes to review Chapter 173, Physician Profiles, §§173.1 - 173.5 and 173.7, pursuant to the Texas Government Code, §2001.039.

Elsewhere in this issue of the *Texas Register,* the Texas Medical Board contemporaneously proposes amendments to §173.1 and §173.3.

Comments on the proposed review may be submitted to Jennifer Kaufman, P.O. Box 2018, Austin, Texas 78768-2018 or e-mail comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

TRD-201104003
Mari Robinson, J.D.
Executive Director
Texas Medical Board
Filed: September 26, 2011

♦ ♦ ♦

The Texas Medical Board proposes to review Chapter 175, Fees and Penalties, §§175.1 - 175.3 and 175.5, pursuant to the Texas Government Code, §2001.039.

Elsewhere in this issue of the *Texas Register,* the Texas Medical Board contemporaneously proposes amendments to §§175.1, 175.2 and 175.5.

Comments on the proposed review may be submitted to Jennifer Kaufman, P.O. Box 2018, Austin, Texas 78768-2018 or e-mail comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

TRD-201104004
Mari Robinson, J.D.
Executive Director
Texas Medical Board
Filed: September 26, 2011

♦ ♦ ♦

Adopted Rule Reviews

Texas Department of Insurance, Division of Workers' Compensation

Title 28, Part 2

The Texas Department of Insurance (Department), Division of Workers' Compensation (Division) has completed its review required by the Texas Government Code §2001.039 of the following chapter of the Texas Administrative Code, Title 28, Part 2: Chapter 112, Scope of Liability for Compensation. The reviewed sections in this chapter are subsequently referred to collectively in this Notice of Adopted Review as "the sections."

The notice of proposed rule review was published in the July 29, 2011, issue of the *Texas Register* (36 TexReg 4815). As provided in this notice, the Division reviewed and considered the sections for readoption, revision, or repeal.

The Division considered whether the reasons for adoption of the sections continue to exist. The Division received no written comments regarding the review of the sections.

The Division has determined that the reasons for adopting the sections continue to exist and the sections are retained in their present form. Any revisions in the future will be accomplished in accordance with the Administrative Procedure Act.

This concludes and completes the Division's review of Chapter 112; the chapter will be reviewed again in the future in accordance with Government Code §2001.039.

TRD-201104041
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Filed: September 28, 2011

♦ ♦ ♦

The Texas Department of Insurance (Department), Division of Workers' Compensation (Division) has completed its review required by the Texas Government Code §2001.039 of the following chapter of the Texas Administrative Code, Title 28, Part 2: Chapter 120, Compensation Procedure--Employers. The reviewed sections in this chapter are subsequently referred to collectively in this Notice of Adopted Review as "the sections."

The notice of proposed rule review was published in the July 29, 2011, issue of the *Texas Register* (36 TexReg 4815). As provided in this notice, the Division reviewed and considered the sections for readoption, revision, or repeal.

The Division considered whether the reasons for adoption of the sections continue to exist. The Division received no written comments regarding the review of the sections.

The Division has determined that the reasons for adopting the sections continue to exist and the sections are retained in their present form. Any revisions in the future will be accomplished in accordance with the Administrative Procedure Act.

This concludes and completes the Division's review of Chapter 120; the chapter will be reviewed again in the future in accordance with Government Code §2001.039.

TRD-201104042

Dirk Johnson

General Counsel

Texas Department of Insurance, Division of Workers' Compensation

Filed: September 28, 2011

♦ ♦ ♦

The Texas Department of Insurance (Department), Division of Workers' Compensation (Division) has completed its review required by the Texas Government Code §2001.039 of the following chapter of the Texas Administrative Code, Title 28, Part 2: Chapter 122, Compensation Procedure--Claimants. The reviewed sections in this chapter are subsequently referred to collectively in this Notice of Adopted Review as "the sections."

The notice of proposed rule review was published in the July 29, 2011, issue of the *Texas Register* (36 TexReg 4816). As provided in this notice, the Division reviewed and considered the sections for readoption, revision, or repeal.

The Division considered whether the reasons for adoption of the sections continue to exist. The Division received no written comments regarding the review of the sections.

The Division has determined that the reasons for adopting the sections continue to exist and the sections are retained in their present form. Any revisions in the future will be accomplished in accordance with the Administrative Procedure Act.

This concludes and completes the Division's review of Chapter 122; the chapter will be reviewed again in the future in accordance with Government Code §2001.039.

TRD-201104043

Dirk Johnson

General Counsel

Texas Department of Insurance, Division of Workers' Compensation

Filed: September 28, 2011

♦ ♦ ♦

The Texas Department of Insurance (Department), Division of Workers' Compensation (Division) has completed its review required by the Texas Government Code §2001.039 of the following chapter of the Texas Administrative Code, Title 28, Part 2: Chapter 124, Carriers: Required Notices and Mode of Payment. The reviewed sections in this chapter are subsequently referred to collectively in this Notice of Adopted Review as "the sections."

The notice of proposed rule review was published in the July 29, 2011, issue of the *Texas Register* (36 TexReg 4816). As provided in this notice, the Division reviewed and considered the sections for readoption, revision, or repeal.

The Division considered whether the reasons for adoption of the sections continue to exist. The Division received no written comments regarding the review of the sections.

The Division has determined that the reasons for adopting the sections continue to exist and the sections are retained in their present form. Any revisions in the future will be accomplished in accordance with the Administrative Procedure Act.

This concludes and completes the Division's review of Chapter 124; the chapter will be reviewed again in the future in accordance with Government Code §2001.039.

TRD-201104044

Dirk Johnson

General Counsel

Texas Department of Insurance, Division of Workers' Compensation

Filed: September 28, 2011

♦ ♦ ♦

TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 16 TAC §25.243(d)(1)

$$[((DIC_C - DIC_{RC}) * ROR_{AT}) + (DEPR_C - DEPR_{RC}) + (FIT_C - FIT_{RC}) + (OT_C - OT_{RC}) - \sum(DISTREV_{RC\text{-}CLASS} * \%GROWTH_{CLASS})] * ALLOC_{CLASS} / BD_{C\text{-}CLASS}$$

Where:

DIC_C = Current Net Distribution Invested Capital.

DIC_{RC} = Net Distribution Invested Capital from the last comprehensive base-rate proceeding.

ROR_{AT} = After-Tax Rate of Return as defined in paragraph (2) of this subsection.

$DEPR_C$ = Current Depreciation Expense, as related to Current Gross Distribution Invested Capital, calculated using the currently approved depreciation rates.

$DEPR_{RC}$ = Depreciation Expense, as related to Gross Distribution Invested Capital, from the last comprehensive base-rate proceeding.

FIT_C = Current Federal Income Tax, as related to Current Net Distribution Invested Capital, including the change in federal income taxes related to the change in return on rate base and synchronization of interest associated with the change in rate base resulting from additions to and retirements of distribution plant as used to compute Net Distribution Invested Capital.

FIT_{RC} = Federal Income Tax, as related to Net Distribution Invested Capital from the last comprehensive base-rate proceeding.

OT_C = Current Other Taxes (taxes other than income taxes and taxes associated with the return on rate base), as related to Current Net Distribution Invested Capital, calculated using current tax rates and the methodology from the last comprehensive base-rate proceeding, and not including municipal franchise fees.

OT_{RC} = Other Taxes, as related to Net Distribution Invested Capital from the last comprehensive base-rate proceeding, and not including municipal franchise fees.

$DISTREV_{RC\text{-}CLASS}$ (Distribution Revenues by rate class based on Net Distribution Invested Capital from the last comprehensive base-rate proceeding) = $(DIC_{RC\text{-}CLASS} * ROR_{AT}) + DEPR_{RC\text{-}CLASS} + FIT_{RC\text{-}CLASS} + OT_{RC\text{-}CLASS}$.

$\%GROWTH_{CLASS}$ (Growth in Billing Determinants by Class) = $(BD_{C\text{-}CLASS} - BD_{RC\text{-}CLASS}) / BD_{RC\text{-}CLASS}$

$DIC_{RC\text{-}CLASS}$ = Net Distribution Invested Capital allocated to the rate class from the last comprehensive base-rate proceeding.

$DEPR_{RC\text{-}CLASS}$ = Depreciation Expense, as related to Gross Distribution Invested Capital, allocated to the rate class in the last comprehensive base-rate proceeding.

$FIT_{RC\text{-}CLASS}$ = Federal Income Tax, as related to Net Distribution Invested Capital, allocated to the rate class in the last comprehensive base-rate proceeding.

$OT_{RC\text{-}CLASS}$ = Other Taxes, as related to Net Distribution Invested Capital, allocated to the rate class in the last comprehensive base-rate proceeding, and not including municipal franchise fees.

$ALLOC_{CLASS}$ = Rate Class Allocation Factor approved in the last comprehensive base-rate proceeding, calculated as: total net distribution plant allocated to rate class, divided by total net distribution plant. For situations in which data from the last comprehensive base-rate proceeding are not available to perform the described calculation, the Rate Class Allocation Factor shall be calculated as the total distribution revenue requirement allocated to the rate class

(less any identifiable amounts explicitly unrelated to Distribution Invested Capital) divided by the total distribution revenue requirement (less any identifiable amounts explicitly unrelated to Distribution Invested Capital) for all classes as approved by the commission in the electric utility's last comprehensive base-rate case.

$BD_{C\text{-}CLASS}$ = Rate Class Billing Determinants (weather-normalized and adjusted to reflect the number of customers at the end of the period) for the 12 months ending on the date used for purposes of determining the Current Net Distribution Invested Capital. For customer classes billed primarily on the basis of kilowatt-hour billing determinants, the DCRF shall be calculated using kilowatt-hour billing determinants. For customer classes billed primarily on the basis of demand billing determinants, the DCRF shall be calculated using demand billing determinants.

$BD_{RC\text{-}CLASS}$ = Rate Class Billing Determinants used to set rates in the last comprehensive base-rate proceeding.

If an input to the DCRF formula from the last comprehensive base-rate proceeding is not separately identified in that proceeding, it shall be derived from information from that proceeding

Figure: 16 TAC §82.120(b)

BARBER INSTRUCTOR - 750 HOUR CURRICULUM			
(1)	instruction in theory, consisting of:		175 hours
	(A)	lesson planning	15 hours
	(B)	personality and professional conduct	15 hours
	(C)	development of a barber course	15 hours
	(D)	student learning principles	10 hours
	(E)	principles of teaching	35 hours
	(F)	basic teaching methods	35 hours
	(G)	teaching aids	10 hours
	(H)	Testing	10 hours
	(I)	Self evaluation	10 hours
	(J)	teaching adults	10 hours
	(K)	classroom problems	5 hours
	(L)	classroom management	5 hours
(2)	instruction in practical work, consisting of:		575 hours
	(A)	assisting with students	350 hours
	(B)	theory class (assisting teacher, observing, teaching)	150 hours
	(C)	learning office procedures and state laws	50 hours
	(D)	grading test papers (assisting teacher, observing, grading)	25 hours

Figure: 16 TAC §82.120(c)

BARBER INSTRUCTOR - 750 HOUR CURRICULUM			
(1)	instruction in theory, consisting of:		175 hours
	(A)	lesson planning	15 hours
	(B)	personality and professional conduct	15 hours
	(C)	development of a barber course	15 hours
	(D)	student learning principles	10 hours
	(E)	principles of teaching	35 hours
	(F)	basic teaching methods	35 hours
	(G)	teaching aids	10 hours
	(H)	Testing	10 hours
	(I)	Self evaluation	10 hours
	(J)	teaching adults	10 hours
	(K)	classroom problems	5 hours
	(L)	classroom management	5 hours
(2)	instruction in practical work, consisting of		575 hours
	(A)	assisting with students	350 hours
	(B)	theory class (assisting teacher, observing, teaching)	150 hours
	(C)	learning office procedures and state laws	50 hours
	(D)	grading test papers (assisting teacher, observing, grading)	25 hours

Figure: 16 TAC §82.120(d)

PRIVATE AND PUBLIC POST-SECONDARY BARBER SCHOOL CLASS A BARBER CURRICULUM				
(1)	theory, consisting of:			180 hours
	(A)	anatomy, physiology, and histology, consisting of the study of:		50 hours
		(i)	Hair	
		(ii)	Skin	
		(iii)	Muscles	
		(iv)	Nerves	
		(v)	Cells	
		(vi)	circulatory system	
		(vii)	Digestion	
		(viii)	Bones	
	(B)	Texas barber law and rules		35 hours
	(C)	bacteriology, sterilization, and sanitation		30 hours
	(D)	disorders of the skin, scalp, and hair		10 hours
	(E)	Salesmanship		5 hours
	(F)	barbershop management		5 hours
	(G)	chemistry		5 hours
	(H)	Shaving		5 hours
	(I)	scalp, hair treatments and skin		5 hours
	(J)	Sanitary professional techniques		4 hours
	(K)	professional ethics		4 hours
	(L)	Scientific fundamentals of barbering		4 hours
	(M)	cosmetic preparations		3 hours
	(N)	shampooing and rinsing		2 hours
	(O)	cutting and processing curly and over-curly hair		2 hours
	(P)	haircutting, male and female		2 hours
	(Q)	theory of massage of scalp, face and neck		2 hours
	(R)	hygiene and good grooming		1 hour
	(S)	barber implements		1 hour
	(T)	honing and stropping		1 hour
	(U)	mustaches and beards		1 hour
	(V)	facial treatments		1 hour
	(W)	electricity and light therapy		1 hour

	(X)	history of barbering		1 hour
(2)	instruction in practical work, consisting of the study of:			1320 hours
	(A)	dressing the hair, consisting of:		800 hours
		(i)	men's haircutting	
		(ii)	children's haircutting	
		(iii)	women's haircutting	
		(iv)	Cutting and processing curly and over-curly hair	
		(v)	razor cutting	
	(B)	Shaving		80 hours
	(C)	Styling		55 hours
	(D)	shampooing and rinsing		40 hours
	(E)	bleaching and dyeing of the hair		30 hours
	(F)	waving hair		28 hours
	(G)	Straightening		25 hours
	(H)	Cleansing		25 hours
	(I)	professional ethics		22 hours
	(J)	barbershop management		22 hours
	(K)	hair weaving and hairpieces		17 hours
	(L)	Processing		15 hours
	(M)	Clipping		15 hours
	(N)	beards and mustaches		15 hours
	(O)	Shaping		15 hours
	(P)	Dressing		15 hours
	(Q)	Curling		15 hours
	(R)	first aid and safety precautions		11 hours
	(S)	scientific fundamentals of barbering		10 hours
	(T)	barber implements		10 hours
	(U)	haircutting or the process of cutting, tapering, trimming, processing, and molding and scalp, hair treatments, and tonics		10 hours
	(V)	Massage and facial treatments		10 hours
	(W)	Arranging		10 hours
	(X)	Beautifying		10 hours
	(Y)	Singeing		7 hours
	(Z)	Manicuring		8 hours

Figure: 16 TAC §82.120(e)

COSMETOLOGY OPERATOR TO CLASS A BARBER CURRICULUM			
(1)	Instruction in theory, consisting of:		25 hours
	(A)	History of Barbering	1 hour
	(B)	Barber Laws and Rules Review	1 hour
	(C)	Implements, Honing, and Stropping	5 hours
	(D)	Shaving	5 hours
	(E)	Men's Haircutting and tapering	5 hours
	(F)	Beard and Mustache Trimming and Design	1 hour
	(G)	Hair color Review	1 hour
	(H)	Permanent Waving and Relaxing Review	1 hour
	(I)	Manicuring and Nail Care Review	1 hour
	(J)	Facial Treatments and Skin Care Review	1 hour
	(K)	Anatomy and Physiology Review	1 hour
	(L)	Blow-dry Styling Review	1 hour
	(M)	Shampooing and Conditioning Review	1 hour
(2)	Instruction in practical work, consisting of:		275 hours
	(A)	Men's Haircutting and tapering	165 hours
	(B)	Shaving, Mustache and Beard Trimming	85 hours
	(C)	Hair coloring	5 hours
	(D)	Permanent Waving and Relaxing	5 hours
	(E)	Facial Treatments	5 hours
	(F)	Shampooing and Conditioning and Blow-dry Styling	5 hours
	(G)	Manicuring	5 hours

Figure: 16 TAC §82.120(f)

PUBLIC SECONDARY CLASS A BARBER CURRICULUM FOR HIGH SCHOOL STUDENTS				
(1)	Theory, consisting of the study of:			
	(A)	anatomy, physiology, and histology, consisting of the study of:		50 hours
		(i)	Hair	
		(ii)	Skin	
		(iii)	Muscles	
		(iv)	Nerves	
		(v)	Cells	
		(vi)	Circulatory system	
		(vii)	Digestion	
		(viii)	Bones	
	(B)	Texas barber law and rules		25 hours
	(C)	bacteriology, sterilization, and sanitation		30 hours
	(D)	disorders of the skin, scalp, and hair		5 hours
	(E)	salesmanship		1 hour
	(F)	barbershop management		1 hour
	(G)	chemistry		1 hour
	(H)	Shaving		1 hour
	(I)	scalp, hair treatments and skin		1 hour
	(J)	sanitary professional techniques		1 hour
	(K)	professional ethics		1 hour
	(L)	scientific fundamentals of barbering		1 hour
	(M)	cosmetic preparations		1 hour
	(N)	shampooing and rinsing		1 hour
	(O)	cutting and processing curly and over-curly hair		1 hour
	(P)	haircutting, male and female		1 hour
	(Q)	theory of scalp, face and neck message		1 hour
	(R)	hygiene and good grooming		1 hour
	(S)	barber implements		1 hour
	(T)	honing and stropping		1 hour
	(U)	mustaches and beards		1 hour
	(V)	facial treatments		1 hour
	(W)	electricity and light therapy		1 hour

	(X)	history of barbering		1 hour
(2)	instruction in practical work, consisting of the study of:			
	(A)	dressing the hair, consisting of:		500 hours
		(i)	men's haircutting	
		(ii)	children's haircutting	
		(iii)	women's haircutting	
		(iv)	cutting and processing curly and over-curly hair	
		(v)	razor cutting	
	(B)	shaving		80 hours
	(C)	styling		50 hours
	(D)	shampooing and rinsing		30 hours
	(E)	Hair bleaching and dyeing		20 hours
	(F)	waving hair		25 hours
	(G)	straightening		25 hours
	(H)	cleansing		20 hours
	(I)	professional ethics		20 hours
	(J)	Hair weaving and hairpieces		5 hours
	(K)	processing		5 hours
	(L)	Clipping		5 hours
	(M)	beards and mustaches		6 hours
	(N)	shaping		5 hours
	(O)	dressing		5 hours
	(P)	curling		5 hours
	(Q)	first aid and safety precautions		5 hours
	(R)	scientific fundamentals of barbering		5 hours
	(S)	barber implements		5 hours
	(T)	haircutting or the process of cutting, tapering, trimming, processing, and molding and scalp, hair treatments, and tonics		10 hours
	(U)	massage and facial treatments		10 hours
	(V)	arranging		10 hours
	(W)	beautifying		10 hours
	(X)	singeing		1 hours
	(Y)	manicuring		8 hours

Figure: 16 TAC §82.120(g)

MANICURIST CURRICULUM			
(1)	instruction in theory, consisting of:		45 hours
	(A)	bacteriology, sterilization, and sanitation	16 hours
	(B)	manicuring, equipment, and procedures	4 hours
	(C)	the nail and disorders	4 hours
	(D)	Texas barber law and rules	4 hours
	(E)	anatomy and physiology	4 hours
	(F)	skin	4 hours
	(G)	professional ethics	3 hours
	(H)	hygiene and good grooming	3 hours
	(I)	advanced nail techniques	3 hours
(2)	instruction in practical work, consisting of:		555 hours
	(A)	shaping nails	96 hours
	(B)	applying polish	74 hours
	(C)	trimming cuticle and buffing nails	59 hours
	(D)	hand and arm massage	57 hours
	(E)	removal of polish	57 hours
	(F)	application of artificial and gel nails	44 hours
	(G)	applying cuticle remover and loosening	40 hours
	(H)	preparation of manicure table	40 hours
	(I)	softening cuticle	37 hours
	(J)	Bleaching under free edge	18 hours
	(K)	cleaning under free edge	18 hours
	(L)	applying cuticle oil or cream	15 hours

Figure: 16 TAC §82.120(h)

BARBER TECHNICIAN/MANICURIST CURRICULUM		
THEORY		
A	Bacteriology, sterilization, and sanitation hygiene (M/T)	37 hours
B	Manicuring, equipment, and procedures (M)	4 hours
C	The nail and disorders (M)	4 hours
D	Texas barber law and rules (M/T)	8 hours
E	Anatomy and physiology (M)	4 hours
F	Skin (M)	4 hours
G	Professional ethics (M/T)	7 hours
H	Advanced nail techniques (M)	3 hours
I	Common disorders of the skin; facial treatments (T)	4 hours
J	Shampooing, equipment, and procedures (T)	4 hours
K	Cosmetic applications and massage (T)	3 hours
L	Good grooming; preparing patron and making appointments (T)	3 hours
M	Theory of massage, and structure of head, neck, and face (T)	2 hours
N	Rinsing, types and procedures (T)	2 hours
O	Scalp and hair treatments (T)	2 hours
PRACTICAL		
A	Shaping nails (M)	96 hours
B	Applying polish (M)	74 hours
C	Trimming cuticle and buffing nails (M)	59 hours
D	Hand and arm massage (M)	57 hours
E	Removal of polish (M)	57 hours
F	Application of artificial and gel nails (M)	44 hours
G	Applying cuticle remover and loosening	40 hours
H	Preparation of manicure table (M)	40 hours
I	Softening cuticle (M)	37 hours
J	Bleaching under free edge (M)	18 hours
K	Cleaning under free edge (M)	18 hours
L	Applying cuticle oil or cream (M)	15 hours
M	Application of shampoo and shampooing (T)	45 hours
N	Application of rinses and removal (T)	35 hours
O	Makeup application (T)	33 hours
P	Facial manipulations (T)	20 hours
Q	Application of conditioner and rinsing (T)	20 hours
R	Scalp manipulations (T)	20 hours

S	Brushing and drying (T)	18 hours
T	Sanitation and sterilization (T)	15 hours
U	Draping and scalp examination (T)	11 hours
V	Application and removal of creams (T)	10 hours
W	Application and removal of packs (T)	8 hours
X	Set-up for facial (T)	8 hours
Y	Preparation of work area for shampooing (T)	7 hours
Z	Patron protection (T)	5 hours

Figure: 16 TAC §82.120(i)

BARBER TECHNICIAN/HAIR WEAVING CURRICULUM		
THEORY		
A	Hygiene, bacteriology, sterilization, and sanitation (T/H)	28 hours
B	Common disorders of the skin; facial treatments and theory of massage (T)	4 hours
C	Shampooing, equipment, and procedures (T/H)	4 hours
D	Texas barber law and rules (T/H)	4 hours
E	Cosmetic applications and massage	3 hours
F	Professional ethics (T)	3 hours
G	Good grooming; preparing patron and making appointments (T/H)	5 hours
H	Anatomy and physiology-scalp: theory of head, neck, and face. Bones, major muscles, major nerves and functions, skin structures, appendages, conditions and lesions, structure, ,hair regularities, hair and scalp diseases (T/H)	30 hours
I	Composition of hair or fiber used (H)	2 hours
J	Rinsing, types and procedures (T/H)	2 hours
K	Chemistry of compounds, and mixtures, composition and uses of cosmetics in hair weaving and facial treatments (T/H)	2 hours
L	Scalp and hair treatments (T/H)	2 hours
PRACTICAL		
A	Definitions, importance, sanitary rules and laws, sterilization methods of unused hair and fiber droppings Basic hair weaving, repair on hair weaving, removal of weft, sizing and finishing.	150 hours
B	Professional practices: vocabulary, ethics, salon procedures, hygiene, grooming, professional attitudes, salesmanship, public relations including purpose, effect, equipment, implements, supplies, and preparation (T/H)	40 hours
C	Application of shampoo and shampooing (T/H)	45 hours
D	Application of rinses and removal (T)	35 hours
E	Makeup application (T)	33 hours
F	Facial manipulations (T)	20 hours
G	Application of conditioner and rinsing (T/H)	20 hours
H	Shampooing client, weft and extensions (H)	50 hours
I	Scalp manipulations (T/H)	20 hours
J	Brushing and drying (T/H)	18 hours
K	Draping and scalp examination (T/H)	11 hours
L	Application and removal of creams (T)	10 hours

M	Application and removal of packs (T)	8 hours
N	Set-up for facial (T)	8 hours
O	Preparation of work area for shampooing (T/H)	7 hours
P	Safety measures: client protection (T/H)	28 hours
Q	Chemistry in hair weaving Elements, compounds, and mixtures, composition and uses of cosmetics in hair weaving (H)	8 hours

Figure: 16 TAC §82.120(j)

BARBER TECHNICIAN CURRICULUM			
(1)	instruction in theory, consisting of:		45 hours
	(A)	hygiene, bacteriology, sterilization, and sanitation	18 hours
	(B)	common disorders of the skin; facial treatments	4 hours
	(C)	shampooing, equipment, and procedures	4 hours
	(D)	Texas barber law and rules	4 hours
	(E)	cosmetic applications and massage	3 hours
	(F)	professional ethics	3 hours
	(G)	good grooming; preparing patron and making appointments	3 hours
	(H)	theory of massage, and structure of head, neck, and face	2 hours
	(I)	rinsing, types and procedures	2 hours
	(J)	scalp and hair treatments	2 hours
(2)	instruction in practical work, consisting of:		255 hours
	(A)	application of shampoo and shampooing	45 hours
	(B)	application of rinses and removal	35 hours
	(C)	makeup application	33 hours
	(D)	facial manipulations	20 hours
	(E)	application of conditioner and rinsing	20 hours
	(F)	scalp manipulations	20 hours
	(G)	brushing and drying	18 hours
	(H)	sanitation and sterilization	15 hours
	(I)	draping and scalp examination	11 hours
	(J)	application and removal of creams	10 hours
	(K)	application and removal of packs	8 hours
	(L)	set-up for facial	8 hours
	(M)	preparation of work area for shampooing	7 hours
	(N)	patron protection	5 hours

Figure: 16 TAC §82.120(k)

BARBER TECHNICIAN CURRICULUM			
(1)	instruction in theory, consisting of:		45 hours
	(A)	hygiene, bacteriology, sterilization, and sanitation	18 hours
	(B)	common disorders of the skin; facial treatments	4 hours
	(C)	shampooing, equipment, and procedures	4 hours
	(D)	Texas barber law and rules	4 hours
	(E)	cosmetic applications and massage	3 hours
	(F)	professional ethics	3 hours
	(G)	good grooming; preparing patron and making appointments	3 hours
	(H)	theory of massage, and structure of head, neck, and face	2 hours
	(I)	rinsing, types and procedures	2 hours
	(J)	scalp and hair treatments	2 hours
(2)	instruction in practical work, consisting of:		255 hours
	(A)	application of shampoo and shampooing	45 hours
	(B)	application of rinses and removal	35 hours
	(C)	makeup application	33 hours
	(D)	facial manipulations	20 hours
	(E)	application of conditioner and rinsing	20 hours
	(F)	scalp manipulations	20 hours
	(G)	brushing and drying	18 hours
	(H)	sanitation and sterilization	15 hours
	(I)	draping and scalp examination	11 hours
	(J)	application and removal of creams	10 hours
	(K)	application and removal of packs	8 hours
	(L)	set-up for facial	8 hours
	(M)	preparation of work area for shampooing	7 hours
	(N)	patron protection	5 hours

Figure: 16 TAC §82.120(l)

HAIR WEAVING CURRICULUM	
(1) Hair weaving:	150 hours
Basic hair weaving, repair on hair weaving, removal of weft, sizing and finishing	
(2) Shampooing client, weft and extensions:	50 hours
Basic shampooing, basic conditioners, semi-permanent and weakly rinses, basic hair drying, draping	
(3) Professional practices:	40 hours
Hair weaving as a profession, vocabulary, ethics, salon procedures, hygiene, grooming, professional attitudes, salesmanship, public relations, hair weaving/braiding skills, including purpose, effect, equipment, implements, supplies, and preparation	
(4) Anatomy and physiology-scalp:	30 hours
Major bones and functions, major muscles and functions, major nerves and functions, skin structures, functions, appendages, conditions and lesions, hair or fiber used, structure, composition, hair regularities, hair and scalp diseases	
(5) Chemistry in hair weaving:	10 hours
Elements, compounds, and mixtures, composition and uses of cosmetics in hair weaving	
(6) Sanitation and safety measures:	10 hours
Definitions, importance, sanitary rules and laws, sterilization methods of unused hair and fiber droppings	
(7) Safety measures: client protection	10 hours

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Department of Aging and Disability Services

Public Hearing Regarding Proposed Amendments and New Sections to 40 TAC Part 1, Concerning Cost Containment Initiatives

The Department of Aging and Disability Services (DADS) will hold a public hearing on October 18, 2011, at 8:30 a.m. in the Public Hearing Room of the John H. Winters Building, 701 W. 51st Street, Austin, Texas. At the hearing, DADS will receive public comment regarding proposed amendments and new sections to Chapter 9, Subchapter D, governing the Home and Community-Based Services (HCS) Program; Chapter 45, governing the Community Living Assistance and Support Services (CLASS) Program; Chapter 48, Subchapter J, governing the Community Based Alternatives (CBA) Program; and the Medically Dependent Children Program (MDCP). The proposed amendments and new sections are published elsewhere in this issue of the *Texas Register.* The hearing is being held to comply with the requirements of Texas Government Code, §2001.029(b), in the event a request is made in accordance with that subsection.

Persons with disabilities who will need auxiliary aids or services at the hearing are asked to call the Center for Consumer and External Affairs at (512) 438-4563, at least three days before the date of the hearing so appropriate arrangements can be made.

TRD-201104027
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Filed: September 27, 2011

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Office of the Attorney General

Notice of Settlement of a Texas Water Code Enforcement Action

Notice is hereby given by the State of Texas of the following proposed resolution of an environmental enforcement lawsuit under the Texas Water Code. Before the State may settle a judicial enforcement action, pursuant to the Texas Water Code, the State shall permit the public to comment in writing on the proposed judgment. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreed judgment if the comments disclose facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Code.

Case Title and Court: Settlement Agreement in *State of Texas v. Arturo Rodriguez, Sr., Amelia Rodriguez, 1220 Enterprises, Ltd., and 1220 Enterprises GP, L.L.C.;* Cause No. 2011-CI-01145; in the 150th Judicial District, Bexar County District Court.

Background: The suit seeks recovery of clean-up costs expended by the Texas Commission on Environmental Quality in response to a release of used oil from an auto service facility in San Antonio, Texas.

Nature of the Settlement: The partial settlement awards the State $10,915.02 for costs expended in response to the spill and $3,000.00 in attorney's fees.

For a complete description of the proposed settlement, the complete proposed Agreed Judgment should be reviewed. Requests for copies of the judgment and written comments on the proposed settlement should be directed to Mark Steinbach, Assistant Attorney General, Office of the Texas Attorney General, P.O. Box 12548, Austin, Texas 78711-2548, (512) 463-2012, facsimile (512) 320-0911. Written comments must be received within 30 days of publication of this notice to be considered.

For information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.

TRD-201104048
Jay Dyer
Deputy Attorney General
Office of the Attorney General
Filed: September 28, 2011

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Comptroller of Public Accounts

Certification of the Average Taxable Price of Gas and Oil - July 2011

The Comptroller of Public Accounts, administering agency for the collection of the Crude Oil Production Tax, has determined that the average taxable price of crude oil for reporting period July 2011, as required by Tax Code, §202.058, is $79.94 per barrel for the three-month period beginning on April 1, 2011, and ending June 30, 2011. Therefore, pursuant to Tax Code, §202.058, crude oil produced during the month of July 2011, from a qualified Low-Producing Oil Lease, is not eligible for exemption from the crude oil production tax imposed by Tax Code, Chapter 202.

The Comptroller of Public Accounts, administering agency for the collection of the Natural Gas Production Tax, has determined that the average taxable price of gas for reporting period July 2011, as required by Tax Code, §201.059, is $3.34 per mcf for the three-month period beginning on April 1, 2011, and ending June 30, 2011. Therefore, pursuant to Tax Code, §201.059, gas produced during the month of July 2011, from a qualified Low-Producing Well, is eligible for 25% credit on the natural gas production tax imposed by Tax Code, Chapter 201.

The Comptroller of Public Accounts, administering agency for the collection of the Franchise Tax, has determined, as required by Tax Code, §171.1011(s), that the average closing price of West Texas Intermediate crude oil for the month of July 2011, is $97.34 per barrel. Therefore, pursuant to Tax Code, §171.1011(r), a taxable entity shall not exclude total revenue received from oil produced during the month of July 2011, from a qualified low-producing oil well.

The Comptroller of Public Accounts, administering agency for the collection of the Franchise Tax, has determined, as required by Tax Code, §171.1011(s), that the average closing price of gas for the month of July 2011, is $4.35 per MMBtu. Therefore, pursuant to Tax Code,

§171.1011(r), a taxable entity shall exclude total revenue received from gas produced during the month of July 2011, from a qualified low-producing gas well.

Inquiries should be directed to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528.

TRD-201104016
Ashley Harden
General Counsel
Comptroller of Public Accounts
Filed: September 27, 2011

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Certification of the Average Taxable Price of Gas and Oil - August 2011

The Comptroller of Public Accounts, administering agency for the collection of the Crude Oil Production Tax, has determined that the average taxable price of crude oil for reporting period August 2011, as required by Tax Code, §202.058, is $76.52 per barrel for the three-month period beginning on May 1, 2011, and ending July 31, 2011. Therefore, pursuant to Tax Code, §202.058, crude oil produced during the month of August 2011, from a qualified Low-Producing Oil Lease, is not eligible for exemption from the crude oil production tax imposed by Tax Code, Chapter 202.

The Comptroller of Public Accounts, administering agency for the collection of the Natural Gas Production Tax, has determined that the average taxable price of gas for reporting period August 2011, as required by Tax Code, §201.059, is $3.35 per mcf for the three-month period beginning on May 1, 2011, and ending July 31, 2011. Therefore, pursuant to Tax Code, §201.059, gas produced during the month of August 2011, from a qualified Low-Producing Well, is eligible for 25% credit on the natural gas production tax imposed by Tax Code, Chapter 201.

The Comptroller of Public Accounts, administering agency for the collection of the Franchise Tax, has determined, as required by Tax Code, §171.1011(s), that the average closing price of West Texas Intermediate crude oil for the month of August 2011, is $86.34 per barrel. Therefore, pursuant to Tax Code, §171.1011(r), a taxable entity shall not exclude total revenue received from oil produced during the month of August 2011, from a qualified low-producing oil well.

The Comptroller of Public Accounts, administering agency for the collection of the Franchise Tax, has determined, as required by Tax Code, §171.1011(s), that the average closing price of gas for the month of August 2011, is $3.98 per MMBtu. Therefore, pursuant to Tax Code, §171.1011(r), a taxable entity shall exclude total revenue received from gas produced during the month of August 2011, from a qualified low-producing gas well.

Inquiries should be directed to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528.

TRD-201104025
Ashley Harden
General Counsel
Comptroller of Public Accounts
Filed: September 27, 2011

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.005, and 303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 10/03/11 - 10/09/11 is 18% for Consumer[1]/Agricultural/Commercial[2] credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 10/03/11 - 10/09/11 is 18% for Commercial over $250,000.

[1] Credit for personal, family or household use.

[2] Credit for business, commercial, investment or other similar purpose.

TRD-201104029
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: September 27, 2011

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East Texas Council of Governments

Request for Proposals

The East Texas Council of Governments is issuing this Request for Proposals for experienced general contractors to provide renovation services for its facility located at 3800 Stone Road, Kilgore, Texas 75662.

Deadline to submit a proposal is 5:00 p.m. (CST) on October 17, 2011.

Proposal packets are available at www.etcog.org or by email at savannah.pacobit@etcog.org.

TRD-201104028
Savannah Pacobit
Housing Manager
East Texas Council of Governments
Filed: September 27, 2011

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Texas Education Agency

Request for Applications Concerning the Texas Literacy Initiative Grant

Eligible Applicants. The Texas Education Agency (TEA) is requesting applications under Request for Applications (RFA) #701-11-110 from public independent school districts and open-enrollment charter schools in Texas. To be eligible for the Texas Literacy Initiative (TLI) grant, the local educational agency (LEA) must serve students in Kindergarten-Grade 12. The LEA must have at least one Kindergarten-Grade 5 campus, at least one middle school campus, or at least one high school campus that meets the eligibility criteria defined for the LEA. An LEA that lacks an eligible campus (i.e., an LEA without an eligible Kindergarten-Grade 5, middle school, or high school campus) must agree to partner with other eligible LEA(s); all LEAs will be required to partner with early childhood education (ECE) providers with a demonstrated record of effectiveness in improving the early literacy development of children from age zero through Kindergarten entry to form a Literacy Line. All age and grade levels from age zero through Grade 12 must be represented in the Literacy Line. A list of eligible LEAs will be posted along with the RFA on the TEA Grant Opportunities website at http://burleson.tea.state.tx.us/GrantOpportunities/forms/GrantProgramSearch.aspx.

All applicants must have a student population whose passing rate is below 90 percent on the English language arts/reading portion of the

2011 Texas Assessment of Knowledge and Skills (TAKS) for Grades 3-11. For districts and charter districts evaluated under standard procedures in the state accountability system, this information can be found in the TEA 2011 District Accountability Data Tables that were posted online in late July 2011 (which may be generated online by following the District Data Table link at http://ritter.tea.state.tx.us/perfreport/account/2011/index.html). For charter districts evaluated under alternative education accountability procedures in the state accountability system, this information, labeled TAKS Met 2011 Standard - Sum of All Grades Tested (Standard Accountability Indicator), can be found in the 2011 Academic Excellence Indicator System district reports that will be posted online in mid-November 2011 (which may be generated online by following the District Report link at http://ritter.tea.state.tx.us/perfreport/aeis/index.html).

In addition, LEAs must have student populations that meet at least two of the following three criteria in order to be eligible for grant funding: (1) at least 59 percent are economically disadvantaged, with "economically disadvantaged" defined as qualifying for free or reduced-price lunch based on Texas Department of Agriculture data for the 2010-2011 school year; (2) at least 16.9 percent have limited English proficiency, according to 2011 Public Education Information Management System (PEIMS) data; (3) at least 9.0 percent receive special education services, according to 2011 PEIMS data. Five priority points may be awarded to LEAs that meet all three criteria. When proposing participating campuses, applicants should give priority to those campuses whose student populations reflect similar demographics to LEA eligibility criteria, as detailed in the RFA.

Description. The purpose of the TLI is to improve school readiness and success in the areas of language and literacy for disadvantaged students in targeted school districts, including their associated ECE providers, who will use the model of Literacy Lines to implement the Texas State Literacy Plan (TSLP). A Literacy Line is a vertical collaborative among feeder-pattern campuses within an LEA or among partnering eligible LEAs (including prekindergarten, elementary, middle, and high schools) and their associated ECE providers. Literacy Lines will provide instructional and programming alignment for language, preliteracy, and literacy development and ease the transition for children across their entire learning careers. Grant recipients will be required to form a fully articulated Literacy Line that includes all levels: age zero to school entry, elementary, middle, and high school(s). Details on Literacy Line formation and function are given in the RFA.

The goals of the grant program are to (1) increase the oral language and preliteracy skills of participating preschool children; (2) improve the performance of participating Kindergarten-Grade 2 students on early reading assessments; (3) increase the percentage of participating students who meet or exceed proficiency on the state English language arts assessments in Grades 3-12; (4) increase the use of data and data analysis to inform all decisionmaking in participating districts, campuses, classrooms, and early learning settings; and (5) increase the implementation of effective literacy instruction through Literacy Lines.

Dates of Project. The TLI grant will be implemented beginning in the 2011-2012 school year. It is anticipated that the grant will be for a total of five years, contingent on funding availability, annual reapplication, and full implementation of grant requirements. Applicants should plan for a starting date of no earlier than March 8, 2012, and an ending date for first-year funding of no later than September 30, 2012. Pre-award costs are allowed beginning January 2, 2012.

Project Amount. Approximately $63,175,000 is available in federal funds for the TLI grant. Funding will be provided for approximately 20 to 30 grantees. Each grantee will receive a grant amount for the 2011-2012 project period that is based upon the number of students and children served by the project. This project is funded 100 percent from Fiscal Year 2010 Consolidated Appropriations Act (Public Law 111-117) under the Title I demonstration authority (Elementary and Secondary Education Act [ESEA] Part E, Section 1502).

Selection Criteria. Applications will be selected based on the ability of each applicant to carry out all requirements contained in the RFA. Reviewers will evaluate applications based on the overall quality and validity of the proposed grant programs and the extent to which the applications address the primary objectives and intent of the project. Applications must address each requirement as specified in the RFA to be considered for funding. TEA reserves the right to select from the highest-ranking applications those that address all requirements in the RFA.

Applicants' Conference. An applicants' conference will be held by webinar on Wednesday, October 19, 2011, at 1:00 p.m. To reserve a webinar seat, visit https://meeting.austin.utexas.edu/srclta/. The system requirements for PC-based attendees are Windows 2000, XP Home, XP Pro, 2003 Server, or Vista. The requirements for Macintosh-based attendees are Mac OS X 10.4 (Tiger) or later. Each person attending will be required to sign a register setting out the representative's name and the name, address, and telephone number of the applicant organization.

Questions relevant to the RFA may be emailed to Kathy Stewart at kathy.stewart@tea.state.tx.us or faxed to (512) 475-3667 by 5:00 p.m. Central Time on Tuesday, October 18, 2011. These questions, along with other information, will be addressed in the webinar. The webinar will be open to all potential applicants and will provide general and clarifying information about the program and RFA.

TEA is not obligated to approve an application, provide funds, or endorse any application submitted in response to this RFA. This RFA does not commit TEA to pay any costs before an application is approved. The issuance of this RFA does not obligate TEA to award a grant or pay any costs incurred in preparing a response.

Requesting the Application. RFAs are no longer available in print. The announcement letter and complete RFA will be posted on the TEA website at http://burleson.tea.state.tx.us/GrantOpportunities/forms for viewing and downloading. In the "Select Search Options" box, select the name of the RFA (2011-2012 Texas Literacy Initiative) from the drop-down list. Scroll down to the "Application and Support Information" section to view all documents that pertain to this RFA.

Further Information. For clarifying information about the RFA, contact Iris Adams, Division of Grants Administration, Texas Education Agency, (512) 463-8525. In order to assure that no prospective applicant may obtain a competitive advantage because of acquisition of information unknown to other prospective applicants, any and all questions must be submitted in writing to the TEA contact persons identified in Part 2: Program Guidelines of the RFA. All questions and the written answers thereto will be posted on the TEA website in the format of Frequently Asked Questions (FAQs) at http://burleson.tea.state.tx.us/GrantOpportunities/forms. In the "Select Search Options" box, select the name of the RFA (2011-2012 Texas Literacy Initiative) from the drop-down list. Scroll down to the "Application and Support Information" section to view all documents that pertain to this RFA.

Deadline for Receipt of Applications. Applications must be received in the TEA Document Control Center by 5:00 p.m. (Central Time), Thursday, November 17, 2011, to be eligible to be considered for funding.

TRD-201104036

Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Filed: September 28, 2011

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. TWC, §7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. TWC, §7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is November 7, 2011. TWC, §7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-2545 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be received by 5:00 p.m. on November 7, 2011. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, TWC, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing.**

(1) COMPANY: 2SAM, INCORPORATED dba Hyridge Grocery; DOCKET NUMBER: 2011-0983-PST-E; IDENTIFIER: RN101495299; LOCATION: Austin, Travis County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks; PENALTY: $2,886; ENFORCEMENT COORDINATOR: Rajesh Acharya, (512) 239-0577; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(2) COMPANY: 610 ENTERPRISES INCORPORATED dba 610 Valero; DOCKET NUMBER: 2011-0838-PST-E; IDENTIFIER: RN102649449; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor underground storage tanks for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $5,100; ENFORCEMENT COORDINATOR: Philip Aldridge, (512) 239-0855; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(3) COMPANY: Ahmad Masood dba Fannett Drive In; DOCKET NUMBER: 2011-0895-PST-E; IDENTIFIER: RN101750834; LOCATION: Beaumont, Jefferson County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(5)(A)(iii), by failing to ensure that a valid, current TCEQ delivery certificate is posted at the station and visible at all times; 30 TAC §334.8(c)(5)(C), by failing to ensure that a legible tag, label, or marking with the tank number is permanently applied upon or affixed to either the top of the fill tube or to a nonremovable point in the immediate area of the fill tube for each regulated underground storage tank (UST) according to the UST registration and self-certification form; 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for all USTs involved in the retail sale of petroleum substances used as motor fuel; 30 TAC §334.50(b)(2) and TWC, §26.3475(a), by failing to provide release detection for the piping associated with the USTs; 30 TAC §334.50(b)(2)(A)(i)(III) and TWC, §26.3475(a), by failing to test the line leak detectors at least once per year for performance and operational reliability; 30 TAC §115.246(3) and Texas Health and Safety Code (THSC), §382.085(b), by failing to maintain Stage II records at the station and making them immediately available for review upon request by agency personnel; and 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment at least once every 12 months; PENALTY: $9,677; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5825; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(4) COMPANY: Bogga Enterprises LLC dba A M Food Mart; DOCKET NUMBER: 2011-1109-PST-E; IDENTIFIER: RN101381705; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor underground storage tanks for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $2,675; ENFORCEMENT COORDINATOR: Marcia Alonso, (512) 239-2616; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(5) COMPANY: Brownsville Navigation District; DOCKET NUMBER: 2011-0889-MWD-E; IDENTIFIER: RN102078094; LOCATION: Brownsville, Cameron County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1) and (17), §319.7(d) and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0014355001, Monitoring and Reporting Requirements Number 1, by failing to timely submit the discharge monitoring reports for the monitoring periods ending September 30, 2010, October 31, 2010, November 30, 2010, and January 31, 2011, by the 20th day of the following month; and 30 TAC §305.125(1) and (17) and TPDES Permit Number WQ0014355001, Sludge Provisions, by failing to submit the annual sludge report for the monitoring period ending July 31, 2010; PENALTY: $1,512; ENFORCEMENT COORDINATOR: Jennifer Graves, (956) 430-6023; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(6) COMPANY: City of Newton; DOCKET NUMBER: 2011-0584-MWD-E; IDENTIFIER: RN101607570; LOCATION: Newton County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: TWC, §26.121(a), 30 TAC §305.125(1) and TPDES Permit Number WQ0014748001, Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent

limits; PENALTY: $5,520; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(7) COMPANY: City of Port Aransas; DOCKET NUMBER: 2011-0512-MLM-E; IDENTIFIER: RN102503646; LOCATION: Port Aransas, Nueces County; TYPE OF FACILITY: used oil and unauthorized solid waste citizens' collection station; RULE VIOLATED: 30 TAC §328.25(a) and THSC, §371.105, by failing to demonstrate concurrence with the transfer of used oil filters from the transporter to the registered storage facility or processor using properly completed bills of lading; 30 TAC §334.127(a)(1), by failing to register with the agency an aboveground storage tank in existence on or after September 1, 1989; 30 TAC §§330, 330.9, and 330.11, by failing to obtain a permit, registration, or other authorization prior to conducting storage, processing, or disposal of municipal solid waste (MSW) at the facility; 30 TAC §330.954, by failing to obtain a development permit prior to commencing physical construction of an enclosed structure over a closed MSW landfill; 30 TAC §328.58(a), by failing to complete the information pertaining to generator name, address, telephone number, and registration number on scrap tire manifests; 30 TAC §328.58(d), by failing to obtain the completed manifests from the transporter within 60 days after the scrap tires or tire pieces were transported off-site; and 30 TAC §328.58(e), by failing to notify the TCEQ of the transporter's failure to return manifests within three months of transporting tires off-site; PENALTY: $13,925; ENFORCEMENT COORDINATOR: Brianna Carlson, (361) 825-3420; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(8) COMPANY: City of Schertz; DOCKET NUMBER: 2011-0847-MWD-E; IDENTIFIER: RN104800289; LOCATION: Schertz, Bexar County; TYPE OF FACILITY: domestic wastewater treatment; RULE VIOLATED: TWC, §26.121(a), 30 TAC §305.125(1), and TPDES Permit Number WQ0014667001, Interim I Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limits; PENALTY: $1,150; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(9) COMPANY: CROSS STREET SERVICE, INCORPORATED; DOCKET NUMBER: 2011-0733-PST-E; IDENTIFIER: RN102488020; LOCATION: Fort Worth, Tarrant County; TYPE OF FACILITY: fleet refueling; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks (USTs) for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); and 30 TAC §334.10(b), by failing to maintain UST records and making them immediately available for inspection upon request by agency personnel; PENALTY: $3,150; ENFORCEMENT COORDINATOR: Clinton Sims, (512) 239-6933; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(10) COMPANY: Crosswinds I Partnership, Ltd.; DOCKET NUMBER: 2011-0797-EAQ-E; IDENTIFIER: RN105601850; LOCATION: San Antonio, Bexar County; TYPE OF FACILITY: commercial construction site with a sewage collection system; RULE VIOLATED: 30 TAC §213.4(j)(4) and Sewer Collection System (SCS) Plan Number 13-08080503, Standard Conditions Number 2, by failing to obtain approval of a modification of a SCS plan prior to beginning a regulated activity over the Edwards Aquifer Recharge Zone; PENALTY: $5,000; ENFORCEMENT COORDINATOR: Lanae Foard, (512) 239-2554; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(11) COMPANY: Enbridge G&P L.P. (East Texas); DOCKET NUMBER: 2011-0782-AIR-E; IDENTIFIER: RN100222819 (Aker Plant) and RN104898978 (Marquez Plant); LOCATION: Freestone County and Robertson County; TYPE OF FACILITY: natural gas treatment plants; RULE VIOLATED: 30 TAC §116.615(2) and §122.143(4), General Operating Permit (GOP) Number O978, Oil and Gas GOP Number 514, Site-wide Requirements (b)(7)(B), Standard Permit Registration Number 81650, Maximum Allowable Emission Rates Table (MAERT), and THSC, §382.085(b), by failing to prevent unauthorized emissions during an emissions event (Incident Number 146648) which occurred on August 15, 2010 and lasted for one hour and 20 minutes at the Aker Plant; 30 TAC §101.201(a)(1) and THSC, §382.085(b), by failing to submit the initial notification for Incident Number 146648 within 24 hours after the discovery of the event at the Aker Plant; 30 TAC §116.615(2) and §122.143(4), GOP Number O978, Oil and Gas GOP Number 514, Site-wide Requirements (b)(7)(B), Standard Permit Registration Number 81650, MAERT, and THSC, §382.085(b), by failing to prevent unauthorized emissions during an emissions event (Incident Number 144040) which occurred on August 25, 2010 and lasted for three hours at the Aker Plant; 30 TAC §116.615(2) and §122.143(4), GOP Number O978, Oil and Gas GOP Number 514, Site-wide Requirements (b)(7)(B), Standard Permit Registration Number 81650, MAERT, and THSC, §382.085(b), by failing to prevent unauthorized emissions during an emissions event (Incident Number 150294) which occurred on February 3, 2011 and lasted 14 hours and 41 minutes at the Aker Plant; 30 TAC §101.201(a)(1) and THSC, §382.085(b), by failing to submit the initial notification for Incident Number 150294 within 24 hours after the discovery of the event at the Aker Plant; and 30 TAC §122.143(4), §106.512(2)(C)(iii) and GOP Number O2885, Oil and Gas GOP Number 514, Terms and Conditions (b)(7)(D)(xlvi), and THSC, §382.085(b), by failing to conduct initial and biennial testing for nitrogen oxide and carbon monoxide emissions at the Marquez Plant; PENALTY: $30,672; ENFORCEMENT COORDINATOR: Allison Fischer, (512) 239-2574; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(12) COMPANY: EOG Resources, Incorporated; DOCKET NUMBER: 2011-0866-AIR-E; IDENTIFIER: RN106115686; LOCATION: Fowlertown, La Salle County; TYPE OF FACILITY: oil and gas production; RULE VIOLATED: 30 TAC §116.110(a) and THSC, §382.085(b) and §382.0518(a), by failing to obtain authorization to construct and operate a source of air emissions; PENALTY: $1,500; ENFORCEMENT COORDINATOR: Todd Huddleson, (512) 239-2541; REGIONAL OFFICE: 707 East Calton Road, Suite 304, Laredo, Texas 78041-3887, (956) 791-6611.

(13) COMPANY: FGH INSULATION COMPANY; DOCKET NUMBER: 2011-0904-PST-E; IDENTIFIER: RN101436707; LOCATION: Houston, Harris County; TYPE OF FACILITY: fleet refueling; RULE VIOLATED: 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to renew a previously issued underground storage tank (UST) delivery certificate by submitting a properly completed UST registration and self-certification form at least 30 days before the expiration date; and 30 TAC §334.8(c)(5)(A)(i) and TWC, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the UST; PENALTY: $2,361; ENFORCEMENT COORDINATOR: Keith Frank, (512) 239-1203; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(14) COMPANY: FIRESTONE POLYMERS, LLC; DOCKET NUMBER: 2011-1258-IWD-E; IDENTIFIER: RN100224468; LOCATION: Orange, Orange County; TYPE OF FACILITY: polybutadiene and butadiene/styrene copolymer manufacturing plant with an associated wastewater treatment facility; RULE VIOLATED: TWC, §26.121(a)(1), 30 TAC §305.125(1), and TPDES Permit Number WQ0000454000, Effluent Limitations and Monitoring Requirements

Number 1, for Outfall Number 001, by failing to comply with permitted effluent limits; PENALTY: $7,900; ENFORCEMENT COORDINATOR: Lanae Foard, (512) 239-2554; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(15) COMPANY: GOVA ENTERPRISES INCORPORATED dba Stella Link Valero; DOCKET NUMBER: 2011-0818-PST-E; IDENTIFIER: RN102346871; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(2) and TWC, §26.3475(a), by failing to provide a method of release detection for the piping associated with the underground storage tank; PENALTY: $4,979; ENFORCEMENT COORDINATOR: Todd Huddleson, (512) 239-2541; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(16) COMPANY: Izzet Yildirim dba Charles Conoco; DOCKET NUMBER: 2011-1012-PST-E; IDENTIFIER: RN101828689; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor underground storage tanks for releases at a frequency of at least once per month (not to exceed 35 days between each monitoring); PENALTY: $2,600; ENFORCEMENT COORDINATOR: Danielle Porras, (713) 767-3682; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(17) COMPANY: Minaldi, Beverly; DOCKET NUMBER: 2011-1576-WOC-E; IDENTIFIER: RN103317483; LOCATION: Nederland, Sabine County; TYPE OF FACILITY: individual; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: $210; ENFORCEMENT COORDINATOR: Heather Podlipny, (512) 239-2603; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(18) COMPANY: MSBK, LLC dba Exxon Deli; DOCKET NUMBER: 2011-0732-PST-E; IDENTIFIER: RN102252566; LOCATION: Orange, Orange County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment at least once every 12 months or upon major system replacement or modification, whichever occurs first; 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); and 30 TAC §334.49(c)(2)(C) and (4)(C) and TWC, §26.3475(d), by failing to inspect the impressed current cathodic protection system at least once every 60 days to ensure that the rectifier and other system components are operating properly and by failing to have the cathodic protection system inspected and tested for operability and adequacy of protection at a frequency of at least once every three years; PENALTY: $8,448; ENFORCEMENT COORDINATOR: Rajesh Acharya, (512) 239-0577; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(19) COMPANY: NEW MART CORPORATION dba Murphy Food Corner; DOCKET NUMBER: 2011-1139-PST-E; IDENTIFIER: RN101892206; LOCATION: Stafford, Fort Bend County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment at least once every 12 months; and 30 TAC §115.242(3) and THSC, §382.085(b), by failing to maintain the Stage II vapor recovery system in proper operating condition, as specified by the manufacturer and/or any applicable California Air Resources Board Executive Order, and free of defects that would impair the effectiveness of the system; PENALTY: $3,155; ENFORCEMENT COORDINATOR: Danielle Porras, (713) 767-3682; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(20) COMPANY: Owen, Ivar V.; DOCKET NUMBER: 2011-1600-WOC-E; IDENTIFIER: RN105837843; LOCATION: Granger, Williamson County; TYPE OF FACILITY: individual; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: $210; ENFORCEMENT COORDINATOR: Heather Podlipny, (512) 239-2603; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(21) COMPANY: Pecan Pipeline Company; DOCKET NUMBER: 2011-0870-AIR-E; IDENTIFIER: RN105589311; LOCATION: Montague, Montague County; TYPE OF FACILITY: compressor station; RULE VIOLATED: 30 TAC §101.201(a)(1)(B) and THSC, §382.085(b), by failing to submit an initial notification not later than 24 hours after the discovery of an emissions event that began on August 4, 2010; and 30 TAC §106.4(c) and §106.6(b) and (c), THSC, §382.085(b), and Permit By Rule Registration Number 85698, by failing to properly maintain a control device and by failing to prevent unauthorized emissions during an event that began on August 4, 2010 (Incident Number 151818); PENALTY: $15,860; ENFORCEMENT COORDINATOR: Miriam Hall, (512) 239-1044; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(22) COMPANY: Regal Energy Operating, L.L.C.; DOCKET NUMBER: 2011-1378-WR-E; IDENTIFIER: RN105937684; LOCATION: Greenwood, Wise County; TYPE OF FACILITY: drilling site; RULE VIOLATED: TWC, §11.121, and 30 TAC §297.11, by failing to obtain authorization prior to diverting, storing, impounding, taking, or using state water; PENALTY: $850; ENFORCEMENT COORDINATOR: Jeremy Escobar, (361) 825-3422; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(23) COMPANY: Spring Branch Independent School District; DOCKET NUMBER: 2011-1187-PST-E; IDENTIFIER: RN100572189; LOCATION: Houston, Harris County; TYPE OF FACILITY: fleet refueling; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor underground storage tanks for releases at a frequency of at least once per month (not to exceed 35 days between each monitoring); PENALTY: $1,925; ENFORCEMENT COORDINATOR: Kimberly Morales, (713) 422-8938; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(24) COMPANY: Vishnu Priya, LLC dba Bruton Road Mobil; DOCKET NUMBER: 2011-0894-PST-E; IDENTIFIER: RN100533066; LOCATION: Mesquite, Dallas County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $2,550; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5825; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(25) COMPANY: WILLIAMS CONCRETE PRODUCTS, INCORPORATED; DOCKET NUMBER: 2011-0629-IWD-E; IDENTIFIER: RN100741156; LOCATION: Dallas, Dallas County; TYPE OF FACILITY: concrete block and brick manufacturing plant; RULE VIOLATED: 30 TAC §305.125(1) and (17), §319.7(d), and TCEQ General Permit Number TXG110699, Part IV, Number 7.f, by failing to timely submit monitoring results at the intervals specified in the permit; PENALTY: $1,260; ENFORCEMENT COORDINATOR: Steve Villatoro, (512) 239-4930; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-201104026
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: September 27, 2011

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Notice of Water Quality Applications

The following notices were issued on September 16, 2011 through September 23, 2011.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

INFORMATION SECTION

NESTLE WATERS NORTH AMERICA INC which operates Wood County Bottling Plant, a facility that manufactures, stores, bottles, and distributes spring water and drinking water products, has applied for a renewal of Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0004812000, which authorizes the discharge of process wash water, utility wastewater, reverse osmosis reject water, cooling tower blowdown, boiler blowdown, and line and filler lubrication at a daily average flow not to exceed 150,000 gallons per day via Outfall 001. The facility is located at 3265 Farm-to-Market Road 2869, in the City of Hawkins, Wood County, Texas 75765.

CITY OF GRANDVIEW has applied for a renewal of TPDES Permit No. WQ0010180001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 300,000 gallons per day. The facility is located on the north side of County Road 102, approximately 1.5 miles southeast of the City of Grandview in Johnson County, Texas 76050.

CITY OF GEORGETOWN has applied for a new permit, proposed TPDES Permit No. WQ0010489007, to authorize the discharge of treated domestic wastewater at an annual average flow not to exceed 3,000,000 gallons per day. The facility will be located approximately 10,000 feet west of Texas Highway 195 and 17,000 feet north of Farm-to-Market Road 2338 (Williams Drive) in northwest Williamson County, Texas 78633.

CITY OF KRUM has applied for a major amendment to TPDES Permit No. WQ0010729001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 137,000 gallons per day to a daily average flow not to exceed 700,000 gallons per day. The facility is located on the east side of North Hickory Creek, approximately 0.6 miles southwest of the intersection of Farm-to-Market Road 156 and Farm-to-Market Road 1173 in Denton County, Texas 76249.

GUADALUPE-BLANCO RIVER AUTHORITY has applied for a renewal of TPDES Permit No. WQ0011496001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 260,000 gallons per day. The facility is located at 350 Parkview Drive, approximately 0.2 mile west of Farm-to-Market Road 306 and 3.5 miles southeast of the intersection of Farm-to-Market Road 306 and Farm-to-Market Road 484 in Comal County, Texas 78133.

AZTEC COVE PROPERTY OWNERS ASSOCIATION INC has applied for a renewal of TPDES Permit No. WQ0011831001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 7,500 gallons per day. The facility is located approximately seven miles east of the City of Trinity on the north side of Farm-to-Market Road 356, approximately 2,000 feet west of the bridge over the White Rock Creek Arm of Lake Livingston in Trinity County, Texas 75862.

ALDINE INDEPENDENT SCHOOL DISTRICT has applied for a renewal of TPDES Permit No. WQ0012070002, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 60,000 gallons per day. The facility is located in the northeast corner of T.S. Grantham M.S. Campus at 13800 Chrisman Road, approximately 1,350 feet east of Chrisman Road and approximately 1,900 feet north of the intersection of Aldine Mail Road and Chrisman Road in Harris County, Texas 77039.

CYPRESS HILL MUNICIPAL UTILITY DISTRICT NO 1 has applied to the Texas Commission on Environmental Quality (TCEQ) for a renewal of TPDES Permit No. WQ0012327001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 800,000 gallons per day. The facility is located 400 feet west of Cypress Rosehill Road and 0.75 mile north of the intersection of Cypress Rosehill Road and U.S. Highway 290 in Harris County, Texas 77429.

WALL INDEPENDENT SCHOOL DISTRICT has applied for a major amendment to TCEQ Permit No. WQ0013421001 to authorize a change in the disposal location. The current permit authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 18,000 gallons per day via surface irrigation of 3.5 acres of non-public access agricultural land, which will remain the same. This permit will not authorize a discharge of pollutants into water in the State. The wastewater treatment facility and disposal site are located on the south side of the Wall Independent School District campus, approximately 0.5 mile south of the intersection of Loop 570 and Hawk Avenue, in the community of Wall in Tom Green County, Texas 76957.

MARINE QUEST-HIDDEN COVE LP has applied for a renewal of TPDES Permit No. WQ0013785001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 16,000 gallons per day. The facility is located at 20400 Hackberry Creek Park Road, approximately 1.75 miles south of Farm-to-Market Road 720 and approximately 3.0 miles west of Farm-to-Market Road 423 in Denton County, Texas 75034.

MAGNOLIA INDEPENDENT SCHOOL DISTRICT has applied for a renewal of TPDES Permit No. WQ0014124001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 20,000 gallons per day. The facility is located at 28747 Hardin Store Road, Magnolia in Montgomery County, Texas 77354.

HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO 412 has applied for a renewal of TPDES Permit No. WQ0014527001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 640,000 gallons per day. The facility is located approximately 1.8 miles southeast of the intersection of Will Clayton Parkway and Timber Forest Drive in Harris County, Texas 77044.

FORT BEND MUNICIPAL UTILITY DISTRICT NO 169 and City of Fulshear has applied for a major amendment to TPDES Permit No. WQ0014745001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 500,000 gallons per day to an annual average flow not to exceed 1,000,000 gallons per day. The facility is located at 5720 1/2 Cross Creek Bend lane, approximately 1.4 miles east and 0.2 mile north of the intersection of Farm-to-Market Road 359 and First Street in Fort Bend County, Texas 77441.

QUADVEST LP has applied for a new permit, proposed TPDES Permit No. WQ0015006001, to authorize the discharge of treated domes-

tic wastewater at a daily average flow not to exceed 225,000 gallons per day. The facility will be located 2,000 feet northeast of the intersection of Farm-to-Market Road 1488 and Carriage Hills Boulevard in Montgomery County, Texas 77384.

RPM WATER SUPPLY CORPORATION has applied for a new permit, proposed TPDES Permit No. WQ0015007001, to authorize the discharge of treated filter and lime contact chamber backwash effluent from a water treatment plant at a daily average flow not to exceed 10,000 gallons per day. The facility will be located at 960 VZ County Road 4818 in Van Zandt County, Texas 75758.

If you need more information about these permit applications or the permitting process, please call the TCEQ Public Education Program, Toll Free, at (800) 687-4040. General information about the TCEQ can be found at our website at www.TCEQ.state.tx.us. Si desea información en español, puede llamar al (800) 687-4040.

TRD-201104045
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: September 28, 2011

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Texas Ethics Commission

List of Late Filers

Listed below are the names of filers from the Texas Ethics Commission who did not file reports, or failed to pay penalty fines for late reports in reference to the listed filing deadline. If you have any questions, you may contact Robbie Douglas at (512) 463-5800.

Deadline: 8-Day Pre-Election Report due October 25, 2010 for Candidates and Officeholders

Casetra Lee McKinney, 4522 Sylvanfield Dr. #405, Houston, Texas 77014

Deadline: Semiannual Report due July 15, 2011 for Committees

Michelle A. Najar, 1239 S. Pine St., Grapevine, Texas 76051

R.E. Price, 2531 M.L.K. Jr. Blvd., Dallas, Texas

George R. Burridge, P.O. Box 870656, Mesquite, Texas 75187

Deadline: Monthly Report due August 5, 2011 for Committees

Aaron N. Slater, 2120 4th St., Rosenberg, Texas 77471-5124

Deadline: Lobby Activities Report due January 10, 2011

Carlos A. Truan, Jr., 10900 Research Blvd., Ste 160-C, Austin, Texas 78759

Deadline: Lobby Activities Report due April 11, 2011

Hank Clements, III, 5907 Hillcrest, Unit E, Dallas, Texas 75205

Deadline: Personal Financial Statement due May 2, 2011

Robert Elliott Jones, 4626 Jarvis St., Corpus Christi, Texas 78412

Norberto Salinas, Sr., 2000 Brazos Ct., Mission, Texas 78572

Jon E. Sloan, 1802 Shadowbrook Cir., Round Rock, Texas 78681

TRD-201103925
David Reisman
Executive Director
Texas Ethics Commission
Filed: September 21, 2011

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General Land Office

Notice and Opportunity to Comment on the FY 2009/FY 2010 Texas Coastal Impact Assistance Plan Amendment

Pursuant to §1356a(c)(1)(B) of the Energy Policy Act of 2005, the Governor of Texas must solicit local input and provide for public participation in the development of the FY 2009/FY 2010 Texas Coastal Impact Assistance Plan amendment. Notice is thereby given that the Texas General Land Office, on behalf of the Office of the Governor, is soliciting public comment regarding the Plan amendment. All comments must be submitted by November 7, 2011. A copy of the Plan and comment submission directions may be found at http://www.glo.texas.gov/what-we-do/caring-for-the-coast/grants-funding/ciap/index.html.

For more information on this matter, contact Melissa Porter, Coastal Resources Division, Texas General Land Office, (512) 475-1393.

TRD-201104049
Larry L. Laine
Chief Clerk, Deputy Land Commissioner
General Land Office
Filed: September 28, 2011

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Texas Health and Human Services Commission

Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on October 27, 2011, at 9:00 a.m. to receive public comment on proposed rates for Hospice routine home, continuous home, inpatient respite, and general inpatient care. The Medicaid Hospice program is operated by the Texas Department of Aging and Disability Services (DADS). The hearing will be held in compliance with Human Resources Code §32.0282 and Texas Administrative Code (TAC), Title 1, §355.105(g), which require public notice and hearings on proposed Medicaid reimbursements. The public hearing will be held in the Lone Star Conference Room of the Health and Human Services Commission, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. Persons requiring Americans with Disability Act (ADA) accommodation or auxiliary aids or services should contact Esther Brown by calling (512) 491-1445, at least 72 hours prior to the hearing so appropriate arrangements can be made.

Briefing Package. A briefing package describing the proposed payment rates will be available at http://www.hhsc.state.tx.us/rad/rate-packets.shtml on October 13, 2011. Interested parties may also obtain a copy of the briefing package prior to the hearing by contacting Esther Brown by telephone at (512) 491-1445; by fax at (512) 491-1998; or by e-mail at Esther.Brown@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Esther Brown, Health and Human Services Commission, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Esther Brown at (512) 491-1998; or by e-mail to Esther.Brown@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand-delivered to Esther Brown, HHSC, Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

TRD-201103964
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: September 22, 2011

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Public Notice

The Texas Health and Human Services Commission announces its intent to submit transmittal number 11-055 to the Texas State Plan for Medical Assistance under Title XIX of the Social Security Act.

The proposed amendment establishes the Recovery Audit Contractor (RAC) Program. HHSC delayed the implementation of the RAC Program pending legislative authority to establish the program. House Bill 1720, 82nd Legislature, Regular Session, 2011, granted authority to implement the Medicaid RAC Program.

Under Section 1902(a)(42)(B)(i) of the Social Security Act, states and territories are required to establish a program to contract with one or more Medicaid RACs for the purpose of identifying underpayments and overpayments and recouping overpayments under the state plan and under any waiver of the state plan with respect to all services for which payment is made to any entity under such plan or waiver. States must establish these programs in a manner consistent with state law, and generally in the same manner as the Secretary contracts with contingency fee contractors for the Medicare RAC program. The requested effective date for the proposed amendment is October 1, 2011. The proposed amendment is not expected to have a fiscal impact on the state or federal budgets.

To obtain copies of the proposed amendment, interested parties may contact Deborah Keyser by mail at HHSC, P.O. Box 13247, Mail Code H-390, Austin, Texas 78711; by telephone at (512) 491-1865; by facsimile at (512) 491-1957; or by e-mail at deborah.keyser@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Department of Aging and Disability Services.

TRD-201103929
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: September 22, 2011

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Texas Department of Insurance

Company Licensing

Application to change the name of OLD RELIANCE INSURANCE COMPANY to AMERICAN LIFE & SECURITY CORP., a foreign life, accident and/or health company. The home office is in Phoenix, Arizona.

Application for admission to the State of Texas by WRM AMERICA INDEMNITY COMPANY, INC., a foreign fire and/or casualty company. The home office is in Uniondale, New York.

Any objections must be filed with the Texas Department of Insurance, within 20 calendar days from the date of the *Texas Register* publication, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, MC 305-2C, Austin, Texas 78701.

TRD-201104047
Sara Waitt
Acting General Counsel and Chief Clerk
Texas Department of Insurance
Filed: September 28, 2011

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Third Party Administrator Applications

The following third party administrator application has been filed with the Texas Department of Insurance and is under consideration.

Application of TRISTAR BENEFIT ADMINISTRATORS, INC. (doing business as AMERICAN ADMINISTRATORS), a foreign third party administrator. The home office is LONG BEACH, CALIFORNIA.

Any objections must be filed within 20 days after this notice is published in the *Texas Register,* addressed to the attention of David Moskowitz, 333 Guadalupe, MC 305-2E, Austin, Texas 78701.

TRD-201104046
Sara Waitt
Acting General Counsel and Chief Clerk
Texas Department of Insurance
Filed: September 28, 2011

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Texas Department of Licensing and Regulation

Vacancies on Advisory Board on Cosmetology

The Texas Department of Licensing and Regulation (Department) announces two vacancies on the Advisory Board on Cosmetology (Board) established by Texas Occupations Code, Chapter 1602. The pertinent rules may be found in 16 Texas Administrative Code §83.65. The purpose of the Advisory Board on Cosmetology is to advise the Texas Commission of Licensing and Regulation (Commission) and the Department on: education and curricula for applicants; the content of examinations; proposed rules and standards on technical issues related to cosmetology; and other issues affecting cosmetology.

The Board is composed of seven members appointed by the presiding officer of the Commission, with the Commission's approval. The Board consists of one member who holds a license for a beauty shop that is part of a chain of beauty shops; one member who holds a license for a beauty shop that is not part of a chain of beauty shops; one member who holds a private beauty culture school license; two members who each hold an operator license; one member who represents a licensed public secondary or post secondary beauty culture school; and one public member. Members serve staggered six-year terms, with the terms of one or two members expiring on the same date each odd-numbered year. This announcement is for the vacancies of a member who holds a license for a beauty shop that is not part of a chain of beauty shops and a member who represents a licensed public secondary or post secondary beauty culture school.

Interested persons should download an application from the Department website at: www.license.state.tx.us. Applicants can also request an application from the Texas Department of Licensing and Regulation by telephone (800) 803-9202, fax (512) 475-2874 or email advisory.boards@license.state.tx.us. Applicants may be asked to appear for an interview; however, any required travel for an interview would be at the applicant's expense.

TRD-201103972

William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Filed: September 23, 2011

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Texas Lottery Commission

Instant Game Number 1373 "Season's Greetings"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1373 is "SEASON'S GREETINGS." The play style is "key number match with doubler."

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1373 shall be $10.00 per ticket.

1.2 Definitions in Instant Game No. 1373.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, WIN SYMBOL, SNOWMAN SYMBOL, $10.00, $20.00, $50.00, $100, $200, $500, $1,000, $5,000 and $250,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO.1373 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWFV
26	TWSX
27	TWSV
28	TWET
29	TWNI
30	TRTY
31	TRON
32	TRTO
33	TRTH
34	TRFR
35	TRFV
36	TRSX
37	TRSV
38	TRET
39	TRNI
40	FRTY
WIN SYMBOL	WIN
SNOWMAN SYMBOL	DBLR
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUND

$200	TWO HUND
$500	FIV HUND
$1,000	ONE THOU
$5,000	FIV THOU
$250,000	250 THOU

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00, $100 or $500.

H. High-Tier Prize - A prize of $1,000, $5,000 or $250,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1373), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 050 within each pack. The format will be: 1373-0000001-001.

K. Pack - A pack of "SEASON'S GREETINGS" Instant Game tickets contains 050 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). Ticket back 050 will be exposed on one side of the pack and ticket 001 on the other side.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "SEASON'S GREETINGS" Instant Game No. 1373 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule, §401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "SEASON'S GREETINGS" Instant Game is determined once the latex on the ticket is scratched off to expose 65 (sixty-five) play symbols. If a player matches any of YOUR NUMBERS play symbols to any of the WINNING NUMBERS play symbols, the player wins the PRIZE for that number. If a player reveals a "WIN" play symbol, the player wins the PRIZE for that symbol. If a player reveals a "SNOWMAN" play symbol, the player wins DOUBLE the PRIZE for that symbol. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 65 (sixty-five) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 65 (sixty-five) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 65 (sixty-five) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 65 (sixty-five) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award

of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.

B. The "SNOWMAN" (doubler) play symbol will only appear on winning tickets as dictated by the prize structure.

C. The "WIN" (auto win) play symbol will never appear more than once on a ticket.

D. No five or more duplicate non-winning prize symbols on a ticket.

E. No duplicate WINNING NUMBERS play symbols on a ticket.

F. No duplicate non-winning YOUR NUMBERS play symbols on a ticket.

G. Non-winning prize symbols will never be the same as the winning prize symbol(s).

H. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS play symbol (i.e., 10 and $10).

I. The top prize symbol will appear on every ticket unless otherwise restricted.

2.3 Procedure for Claiming Prizes.

A. To claim a "SEASON'S GREETINGS" Instant Game prize of $10.00, $20.00, $50.00, $100 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $50.00, $100 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Sections 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "SEASON'S GREETINGS" Instant Game prize of $1,000, $5,000 or $250,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "SEASON'S GREETINGS" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The Texas Lottery is not responsible for tickets lost in the mail. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct:

1. a sufficient amount from the winnings of a prize winner who has been finally determined to be:

a. delinquent in the payment of a tax or other money to a state agency and that delinquency is reported to the Comptroller under Texas Government Code, §403.055;

b. in default on a loan made under Chapter 52, Education Code; or

c. in default on a loan guaranteed under Chapter 57, Education Code; and

2. delinquent child support payments from the winnings of a prize winner in the amount of the delinquency as determined by a court or a Title IV-D agency under Chapter 231, Family Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "SEASON'S GREETINGS" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of $600 or more from the "SEASON'S GREETINGS" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code, §466.408. Any rights to a prize that is not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game

ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 4,080,000 tickets in the Instant Game No. 1373. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1373 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$10	571,200	7.14
$20	489,600	8.33
$50	122,400	33.33
$100	30,600	133.33
$500	4,590	888.89
$1,000	272	15,000.00
$5,000	16	255,000.00
$250,000	5	816,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.35. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1373 without advance notice, at which point no further tickets in that game may be sold. The determination of the closing date and reasons for closing the game will be made in accordance with the instant ticket game closing procedures and the Instant Game Rules. See 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1373, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201104033
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: September 28, 2011

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Instant Game Number 1375 "Merry Crossword"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1375 is "MERRY CROSSWORD." The play style is "crossword."

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1375 shall be $3.00 per ticket.

1.2 Definitions in Instant Game No. 1375.

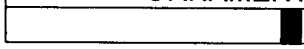
A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, ORNAMENT SYMBOL and blackened square.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1375 - 1.2D

PLAY SYMBOL	CAPTION
A	
B	
C	
D	
E	
F	
G	
H	
I	
J	
K	
L	
M	
N	
O	
P	
Q	
R	
S	
T	
U	
V	
W	
X	
Y	
Z	
ORNAMENT SYMBOL	
	

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $3.00, $5.00, $10.00, $15.00 or $20.00.

G. Mid-Tier Prize - A prize of $30.00, 50.00, $60.00, $100 or $150.

H. High-Tier Prize - A prize of $1,000, $3,000 or $30,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1375), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 125 within each pack. The format will be: 1375-0000001-001.

K. Pack - A pack of "MERRY CROSSWORD" Instant Game tickets contains 125 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of ticket 001 and back of 125 while the other fold will show the back of ticket 001 and front of 125.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "MERRY CROSSWORD" Instant Game No. 1375 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule, §401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "MERRY CROSSWORD" Instant Game is determined once the latex on the ticket is scratched off to expose 166 (one hundred sixty-six) possible play symbols. The player must scratch off the YOUR 18 LETTERS and the two BONUS letters to form words in the MERRY CROSSWORD puzzle and the player wins the amount

shown in the PRIZE LEGEND. There will be only one prize per ticket. The player must scratch each of the 3 ORNAMENT symbols in the MERRY CROSSWORD puzzle. Each ORNAMENT symbol is a Free Match and counts as a matched letter. Letters combined to form a complete "word" must be revealed in an unbroken horizontal (left to right) sequence or vertical (top to bottom) sequence of letters within the MERRY CROSSWORD puzzle. In the MERRY CROSSWORD puzzle, every lettered square within an unbroken horizontal or vertical sequence must be matched with the YOUR 18 LETTERS, BONUS letters or contain an ORNAMENT symbol to be considered a complete "word." If a player reveals 3 or more completed words in the MERRY CROSSWORD puzzle, the player wins the prize indicated in the PRIZE LEGEND. If a player wins in the MERRY CROSSWORD puzzle and any one of the completely uncovered words has an ORNAMENT symbol within the word, the player wins TRIPLE the prize indicated in the PRIZE LEGEND for that same winning play. Words within a word are not eligible for a prize. For example: Winning Words: SPY, STONE, LET; Non-Winning Words: TON or ONE. A complete "word" must contain at least three letters. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 166 (one hundred sixty-six) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 166 (one hundred sixty-six) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 166 (one hundred sixty-six) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 166 (one hundred sixty-six) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.

B. Each grid will contain exactly the same amount of letters.

C. Each grid will contain exactly the same amount of words.

D. No duplicate words on a ticket.

E. All words used will be from the TEXAS APPROVED WORD LIST CASHWORD/CROSSWORD v.1.0.

F. All words will contain a minimum of 3 letters.

G. All words will contain a maximum of 9 letters.

H. The CALLER AREA is defined as the combined area of YOUR 18 LETTERS area and the BONUS area.

I. No duplicate play symbols in the CALLER AREA.

J. At least one of the BONUS letters will open one letter in the crossword grid.

K. There will be a minimum of 3 vowels (A, E, I, O and U) in the CALLER AREA.

L. A minimum of 15 play symbols in the CALLER AREA will match at least one letter in the crossword grid.

M. The presence or absence of any letter or combination of letters in the CALLER AREA will not be indicative of a winning or non-winning ticket.

N. No consonant play symbol will appear more than 9 times in the crossword grid and no vowel will appear more than 14 times in the crossword grid.

O. On winning tickets, at least 1 play symbol in the BONUS area will match at least one letter in a completed word.

P. All non-winning grids will have exactly two (2) completed words on all tickets, neither of which will contain an Ornament symbol.

Q. All non-winning grids will have no completed word containing an "ornament" symbol.

R. None of the three (3) Ornaments symbols in the Puzzle will appear in grid positions that are used for more than one (1) word.

S. Two (2) or more of the three (3) Ornament symbols will not appear in the same word.

T. There will be exactly three (3) Ornament symbols per grid.

U. The Ornament will never appear in the Caller's Area.

V. The three (3) Ornament symbols will appear in words containing four (4), five (5), and six (6) letters, respectively.

W. There will never be more than one (1) word containing an Ornament symbol completely revealed.

X. There will be no more than ten (10) completed words per Grid.

Y. The Ornament symbol will only win in accordance with the prize structure.

Z. Any word in the puzzle grid on a ticket containing the Ornament symbol will not be found on the rejected word listing by either removing the Ornament symbol and comparing the compressed letters to form a word or treating the Ornament as a wild card character that would be any letter from A through Z to form a word.

2.3 Procedure for Claiming Prizes.

A. To claim a "MERRY CROSSWORD" Instant Game prize of $3.00, $5.00, $10.00, $15.00, $20.00, $30.00, $50.00, $60.00, $100 or $150, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $30.00, $50.00, $60.00, $100 or $150 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Sections 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "MERRY CROSSWORD" Instant Game prize of $1,000, $3,000 or $30,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "MERRY CROSSWORD" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The Texas Lottery is not responsible for tickets lost in the mail. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct:

1. a sufficient amount from the winnings of a prize winner who has been finally determined to be:

a. delinquent in the payment of a tax or other money to a state agency and that delinquency is reported to the Comptroller under Texas Government Code, §403.055;

b. in default on a loan made under Chapter 52, Education Code; or

c. in default on a loan guaranteed under Chapter 57, Education Code; and

2. delinquent child support payments from the winnings of a prize winner in the amount of the delinquency as determined by a court or a Title IV-D agency under Chapter 231, Family Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "MERRY CROSSWORD" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of $600 or more from the "MERRY CROSSWORD" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code, §466.408. Any rights to a prize that is not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game

ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 5,040,000 tickets in the Instant Game No. 1375. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1375 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$3	604,800	8.33
$5	645,120	7.81
$10	161,280	31.25
$15	40,320	125.00
$20	20,160	250.00
$30	12,600	400.00
$50	5,880	857.14
$60	5,838	863.31
$100	2,730	1,846.15
$150	3,150	1,600.00
$1,000	126	40,000.00
$3,000	42	120,000.00
$30,000	10	504,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.36. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1375 without advance notice, at which point no further tickets in that game may be sold. The determination of the closing date and reasons for closing the game will be made in accordance with the instant ticket game closing procedures and the Instant Game Rules. See 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1375, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201104034

Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: September 28, 2011

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North Central Texas Council of Governments

Notice Announcing Call for Projects

The North Central Texas Council of Governments (NCTCOG) is issuing a competitive call for projects to award Federal Transit Administration Job Access/Reverse Commute (49 U.S.C. §5316) and New Freedom (49 U.S.C. §5317) Program funds. Approximately $5.3 million in Job Access/Reverse Commute and $2.9 million in New Freedom funding is available for award to eligible projects in the Dallas-Fort Worth Metropolitan Area. The Job Access/Reverse Commute Program provides funding for projects designed to transport low-income individuals to and from employment and employment-related activities or to transport residents of urban, rural and suburban areas to suburban employment opportunities. The New Freedom Program supports new services

and facility improvements that address transportation needs of individuals with disabilities that go beyond those required by the Americans with Disabilities Act. Private non-profit organizations, State or local governmental authorities, and operators of public transportation services, including private operators of public transportation services are encouraged to submit projects for consideration. Detailed information on the call for projects can be obtained online at www.nctcog.org/jarc or by contacting Jamie Keshav at jkeshav@nctcog.org or (817) 608-2377.

Due Date. Project submittals are due at the NCTCOG offices no later than 5:00 p.m., Central Daylight Time, on Friday, November 18, 2011. No late submittals will be accepted.

TRD-201104031
R. Michael Eastland
Executive Director
North Central Texas Council of Governments
Filed: September 27, 2011

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Public Utility Commission of Texas

Announcement of Application for State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on September 20, 2011, for a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Sendero Networks, LLC for State-Issued Certificate of Franchise Authority, Project Number 39783.

The requested CFA service area consists of Floresville, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) (800) 735-2989. All inquiries should reference Project Number 39783.

TRD-201103970
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 23, 2011

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Notice of Application for Amendments to Service Provider Certificates of Operating Authority

On September 12, 2011, Cavalier Telephone, PAETEC Communications, Inc., McLeodUSA Telecommunications Services, LLC d/b/a PAETEC Business Services, and US LEC Communications Services, LLC d/b/a PAETEC Business Services filed applications to amend their Service Provider Certificates of Operating Authority Nos. 60118, 60263, 60078, and 60325, respectively.

The Application: Application of Cavalier Telephone, PAETEC Communications, Inc., and PAETEC Business Services for Amendments to Service Provider Certificates of Operating Authority, Docket Number 39753.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at (888) 782-8477 no later than October 14, 2011. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll-free at (800) 735-2989. All comments should reference Docket Number 39753.

TRD-201103969
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 23, 2011

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Notice of Application to Amend Certificated Service Area Boundaries

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application filed on September 20, 2011, for an amendment to certificated service area boundaries within Cameron County, Texas.

Docket Style and Number: Application of the Brownsville Public Utilities Board (BPUB) to Amend a Certificate of Convenience and Necessity for Service Area Boundaries within Cameron County. Docket Number 39785.

The Application: The application encompasses an area of land which is singly certificated to American Electric Power Company (AEP), formerly known as Central Power & Light (CP&L), and is within the corporate limits of the City of Brownsville. BPUB received a letter request from Daniel Flores, Bishop of Brownsville, Catholic Diocese of Brownsville, requesting BPUB to provide electric utility service to a 16.54 acre tract of land. The estimated cost to BPUB to provide service to this proposed area is $18,139.56. The area is presently not developed and distribution facilities will not need to be constructed in order to provide service. If the application is granted the area would be dually certificated for electric service.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas no later than October 17, 2011, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) (800) 735-2989. All comments should reference Docket Number 39785.

TRD-201103971
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 23, 2011

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Notice of Application to Amend Certificated Service Area Boundaries

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application filed on September 23, 2011, for an amendment to certificated service area boundaries within Cameron County, Texas.

Docket Style and Number: Application of the Brownsville Public Utilities Board (BPUB) to Amend a Certificate of Convenience and Necessity for Service Area Boundaries within Cameron County. Docket Number 39794.

The Application: The application encompasses an area of land which is singly certificated to American Electric Power Company (AEP), formerly known as Central Power & Light (CP&L), and is within the cor-

porate limits of the City of Brownsville. BPUB received a letter request from Mr. Charles Cabler, City Manager for the City of Brownsville, requesting BPUB to provide electric utility service to a 35.787-acre tract of land. The estimated cost to BPUB to provide service to this proposed area is $36,132.80. The area is presently not developed and distribution facilities will not need to be constructed in order to provide service. If the application is granted the area would be dually certificated for electric service.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas no later than October 17, 2011, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) (800) 735-2989. All comments should reference Docket Number 39794.

TRD-201104014
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 27, 2011

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Notice of Application to Amend Certificated Service Area Boundaries

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application filed on September 23, 2011, for an amendment to certificated service area boundaries within Cameron County, Texas.

Docket Style and Number: Application of the Brownsville Public Utilities Board (BPUB) to Amend a Certificate of Convenience and Necessity for Service Area Boundaries within Cameron County. Docket Number 39795.

The Application: The application encompasses an area of land which is singly certificated to American Electric Power Company (AEP), formerly known as Central Power & Light (CP&L), and is within the corporate limits of the City of Brownsville. BPUB received a letter request from Judge Carlos Cascos, Cameron County Judge, requesting BPUB to provide electric utility service to a 9.242-acre tract of land. The estimated cost to BPUB to provide service to this proposed area is $2,700. The area is presently not developed and distribution facilities will not need to be constructed in order to provide service. If the application is granted the area would be dually certificated for electric service.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas no later than October 17, 2011, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) (800) 735-2989. All comments should reference Docket Number 39795.

TRD-201104015
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 27, 2011

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Request for Proposals to Provide Technical Consulting Services

This is a re-advertisement of 473-11-00313 - Request for Proposals to Provide Technical Consulting Services.

NOTE: No changes were made to specifications and this re-advertisement is solely to extend due date.

RESPONDENT'S: Previous submissions to this RFP solicitation will be returned to allow equal opportunity. Please consider resubmission to this advertisement.

The Public Utility Commission of Texas (PUCT or Commission) is issuing a Request for Proposals (RFP) for a person or entity to provide consulting services related to proceedings before the Federal Energy Regulatory Commission (FERC) and the PUCT concerning the membership of Entergy Texas, Inc. (ETI) in a regional transmission organization. The contractor will provide evaluation services and may, at the PUCT's election, provide contested case services as described below.

Evaluation Services

Under the direction of a PUCT staff attorney, the contractor will evaluate the costs and benefits of ETI joining a regional transmission organization, as specified below:

- Analyze and evaluate the cost-benefit studies performed by Charles River Associates related to membership of Entergy Operating Companies (OpCos) in the Southwest Power Pool (SPP) or the Midwest Independent Transmission System Operator (MISO). This will include evaluation of the additional cost and benefits of joining SPP or MISO identified by Entergy, and evaluation of the allocation of costs and benefits to the OpCos performed by Entergy.

- Analyze and evaluate the impact of SPP or MISO membership on ETI and its customers, including the impact of their respective market designs, transmission cost allocation methods, governance, and membership agreements.

- Analyze and evaluate the costs and benefits to ETI of continued participation in the Entergy System Agreement (ESA) if the OpCos in the Entergy System join SPP or MISO. Also review and evaluate proposed changes to the ESA.

- Develop findings and recommendations with regard to the costs and benefits to ETI and its customers of the Entergy OpCos joining SPP or MISO.

Hearing Services

At the PUCT's election, the contractor will work with PUCT staff and attorneys in connection with FERC and PUCT proceedings related to the topics in the evaluation services scope of work. The contractor's duties may include, but are not limited to:

- propounding and responding to discovery requests;

- reviewing and providing critical analysis of testimony submitted by other parties;

- preparing and presenting testimony at a hearing in FERC or PUCT proceedings;

- attending hearings in FERC or PUCT proceedings;

- assisting PUCT counsel in cross-examining expert witnesses;

- assisting PUCT staff during hearings as directed; and

- assisting PUCT counsel in preparing post-hearing briefing.

RFP documentation may be obtained by contacting:

Purchaser

Public Utility Commission of Texas

P.O. Box 13326

Austin, Texas 78711-3326

(512) 936-7069

purchasing@puc.state.tx.us

RFP documentation is also located on the PUCT website at http://www.puc.state.tx.us/agency/about/procurement/Default.aspx.

Deadline for proposal submission is 3:00 p.m. CDT on October 28, 2011.

TRD-201104035
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 28, 2011

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Texas Department of Transportation

Public Notice - Aviation

Pursuant to Transportation Code, §21.111, and Title 43, Texas Administrative Code §30.209, the Texas Department of Transportation conducts public hearings to receive comments from interested parties concerning proposed approval of various aviation projects.

For information regarding actions and times for aviation public hearings, please go to the following website:

http://www.txdot.gov/public_involvement/hearings_meetings.

Or visit www.txdot.gov, click on Public Involvement and click on Hearings and Meetings.

Or contact Texas Department of Transportation, Aviation Division, 150 East Riverside, Austin, Texas 78704, (512) 416-4501 or 1-800-68-PILOT.

TRD-201104000
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: September 26, 2011

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Texas Water Development Board

Request for Applications for Flood Protection Planning

The Texas Water Development Board (Board) requests, pursuant to 31 Texas Administrative Code (TAC) §355.3, the submission of applications leading to the possible award of contracts to develop flood protection plans for areas in Texas from political subdivisions with the legal authority to plan for and abate flooding and which participate in the National Flood Insurance Program. Flood protection planning applications may be submitted by eligible political subdivisions from any area of the State for consideration and evaluation. In addition, applicants must supply a map of the geographical planning area to be studied.

Description of Planning Purpose and Objectives

The purpose of the flood protection planning grant program is for the State to assist local governments to develop flood protection plans for entire major or minor watersheds (as opposed to local drainage areas) that provide protection from flooding through structural and non-structural measures as described in 31 TAC §355.2. Planning for flood protection will include studies and analyses to determine and describe problems resulting from or relating to flooding and the views and needs of the affected public relating to flooding problems. Potential solutions to flooding problems will be identified, and the benefits and costs of these solutions will be estimated. From the planning analysis, feasible solutions to flooding problems will be recommended. The flood protection planning study should also include an assessment of the environmental and cultural resources of the planning area as necessary to evaluate the flood control alternatives being considered. Solutions for localized drainage problems are not eligible for grant funding.

Description of Funding Consideration

Up to $1,000,000 has been initially authorized for Fiscal Year 2012 assistance for flood protection planning from the Board's Research and Planning Fund. Up to fifty percent funding may be provided to individual applicants, with up to seventy-five percent funding available to areas identified in 31 TAC §355.10(a) as economically disadvantaged. In the event that acceptable applications are not submitted, the Board retains the right to not award contract funds.

Deadline, Review Criteria, and Contact Person for Additional Information

Six double-sided copies on recycled paper and one digital copy (CD) of a complete flood protection planning grant application including the required attachments must be filed with the Board prior to 3:00 p.m., January 11, 2012. Applications can be directed either in person to Mr. David Carter, Texas Water Development Board, Stephen F. Austin Building, 1700 North Congress Avenue, Austin, Texas or by mail to Mr. David Carter, Texas Water Development Board, P.O. Box 13231-Capitol Station, Austin, Texas 78711-3231.

Applications will be evaluated according to 31 TAC §355.5. All potential applicants can contact the Board to obtain these rules and an application instruction sheet. Requests for information, the Board's rules and instruction sheet covering the research and planning fund may be directed to Mr. Gilbert Ward at the preceding mailing address, or by email at gilbert.ward@twdb.state.tx.us or by calling (512) 463-6418. This information can also be found on the Internet at the following address: http://www.twdb.state.tx.us.

TRD-201103962
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Filed: September 22, 2011

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Request for Applications for Regional Water and Wastewater Facility Planning

The Texas Water Development Board (Board) requests, pursuant to 31 Texas Administrative Code (TAC) Chapter 355, Subchapter A, as amended, the submission of planning grant applications leading to the possible award of contracts for regional facility planning. This planning will evaluate and determine the most feasible alternatives to meet water supply and/or wastewater facility needs, estimate the costs associated with implementing feasible water supply and/or wastewater facility alternatives, and identify institutional arrangements to provide water supply and/or wastewater services for areas in Texas. In order to receive a grant, the applicant must have the authority to plan, implement, and operate regional water supply and/or wastewater facilities.

Planning grant applications may be submitted by eligible political subdivisions from any area of the state. To be eligible for funding, at least two political subdivisions must participate in the proposed study and more than one service area must be evaluated for feasibility of regional facilities. In addition, applicants must supply a map of the geographical planning area to be studied.

Description of Planning Purpose and Objectives

Note: studies related to the development of regional water supply plans, the evaluation of water supply alternatives, and drought response plans, as described in Texas Water Code, §16.053, are not eligible for funding under this Request for Applications. The purpose of this program is for the state to assist local governments to prepare plans that document water supply and/or wastewater service facility needs, identify feasible regional alternatives to meet water supply and/or wastewater facility needs, and present estimates of costs associated with providing regional water supply facilities and distribution lines and/or regional wastewater treatment plants and collection systems. The study should, at a minimum, include the following steps:

Develop Problem Statement;

Inventory Existing Conditions and Forecast Future Conditions and Needs;

Formulate Planning Alternatives;

Evaluate and Compare Each Planning Alternative; and

Select Best Planning Alternative.

A water conservation plan and a drought management plan must be developed to ensure that existing and future sources are used efficiently and as a basis for confirming demand projections of future need. The Board's population and water demand projections will be considered in preparing projections. Discrete phases to implement regional water supply and/or wastewater facilities to meet projected needs will be identified. Environmental, social, and cultural factors for possible solutions identified in the plan should be evaluated. Cost estimates will be made for each respective implementation phase to determine the capital, operation, and maintenance requirements for a 30-year planning period. Separate cost estimates will be made for each regional water supply and/or wastewater system component, including the water conservation program.

Description of Funding Consideration

An amount not to exceed $500,000 has been initially authorized for Fiscal Year 2012 assistance for regional facility planning from the Board's Research and Planning Fund. Up to 50 percent funding may be provided to individual applicants, with up to 75 percent funding available to areas identified in 31 TAC §355.10(a) as economically disadvantaged. In the event that acceptable applications are not submitted, the Board retains the right not to award contract funds.

Deadline, Review Criteria, and Contact Person for Additional Information

Six double-sided copies on recycled paper and one digital copy (CD) of a complete regional facility planning grant application including the required attachments must be filed with the Board prior to 12:00 p.m., Wednesday, December 21, 2011. Applications can be directed either in person to Mr. David Carter, Texas Water Development Board, Stephen F. Austin Building, 1700 North Congress Avenue, Austin, Texas or by mail to Mr. David Carter, Texas Water Development Board, P.O. Box 13231 Austin, Texas 78711-3231.

Applications will be evaluated according to 31 TAC §355.5. All potential applicants can contact the Board to obtain these rules and an application instruction sheet. Requests for information may be directed to David Meesey at the preceding mailing address, by e-mail at david.meesey@twdb.state.tx.us or by calling (512) 936-0852. More information can be found on the Internet at the following address: http://www.twdb.state.tx.us.

TRD-201103961
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Filed: September 22, 2011

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How to Use the Texas Register

Information Available: The 14 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 public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

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

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

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

Review of Agency Rules - notices of state agency rules review.

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 36 (2011) is cited as follows: 36 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 "36 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 36 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.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online at: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the internet. For website information, call the Texas Register at (512) 463-5561.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the 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***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic 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 complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac.

The following companies also provide complete copies of the TAC: Lexis-Nexis (800-356-6548), and West Publishing Company (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 ***Index of Rules***. The *Index of Rules* is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register***. If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with the ***Texas Register*** page number and a notation indicating the type of filing (emergency, proposed, withdrawn, or adopted) as shown in the following example.

TITLE 1. ADMINISTRATION
Part 4. Office of the Secretary of State
Chapter 91. Texas Register
40 TAC §3.704.....950 *(P)*